To Be Argued By:
Daniel J. Kornstein
Time Requested: Fifteen Minutes

Court of Appeals of the State of New York

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RACHEL EHRENFELD,

Plaintiff-Appellant,

-against-

KHALID SALIM A BIN MAHFOUZ,

Defendant-Respondent.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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USCA Docket Number 06-2228-cv

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Defendant-Appellee.	:	

BRIEF FOR PLAINTIFF-APPELLANT

This is a "perfect storm" of an appeal. It combines international terrorism, free speech, the Internet, and something called "libel tourism." Fused into one appeal, these various elements come to this Court from federal court filtered through a certified question of long-arm jurisdiction. The specific question to be decided concerns the scope of CPLR 302(a)(1),[1] and these larger issues bear on that decision.

Law responds to new developments, what Holmes famously called "the felt necessities of the time." O. W. Holmes, The Common Law 5 (Little Brown 1963) (1881). A new development in our time is libel tourism. This appeal asks the Court to help mitigate the pernicious effects of libel tourism by finding personal jurisdiction over a foreign serial libel tourist who has obtained a libel judgment in England against a New York author.

[1] CPLR 302(a)(1) states: "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent: (1) transacts any business within the State. . . ."

Threatened enforcement of that judgment has had a chilling effect in New York on that author and others.

The certified question gives the Court an opportunity to protect the rights of plaintiff and other New York residents to write about -- and all New Yorkers to read about -- urgent public issues such as the financing of international terrorism. A finding of personal jurisdiction over this defendant will enable New York authors and publishers to obtain effective relief from foreign libel judgments designed to target and restrict their speech in New York.

What Is Libel Tourism?

A recent, mounting, and insidious trend, libel tourism occurs when a person, usually prominent and wealthy, sues for libel in a country that lacks the protections afforded by the First Amendment.[2] Such suits smack of forum-shopping because the authors, the publishers, and the publications at issue have little, if any, connection to the country where the litigation is commenced. See, e.g., Rodney A. Smolla, The Law of Defamation § 1.9 (2d ed. 2004); Note, "England's Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech," 74 Fordham L. Rev. 3073, 3074, 3135 (2006). With the advent of the Internet and Internet

[2] Libel tourism has also been described as "the cynical and aggressive use of claimant-friendly libel laws in foreign jurisdictions without legitimate connection to the challenged publication." Brief of Amici Curiae to Second Circuit at 1.

commerce, including websites such as Amazon.com, it has become easier for foreign plaintiffs to allege that a publication written and distributed primarily in the United States was also "sold" or "published" in a foreign jurisdiction, even when the author and publisher took no actions to market or distribute the publication there.

England is a favorite destination, the "perfect locale" for libel tourists, Note, "England's Chilling Forecast," 74 Fordham L. Rev. at 3075, because English libel law provides substantially less protection for speech than does U.S. law. See, e.g., id. at 3077-92; Smolla, The Law of Defamation at § 1.9; Telnikoff v. Matusevitch, 347 Md. 561, 598, 702 A.2d 230, 248 (1997). "London is the libel capital of the Western world and attracts endless foreign claimants. They are often seen as overseas 'forum shoppers' convinced that English common law offers the best hope of burnishing their reputations." "Be Reasonable: British Courts Should Beware the Dangers of Libel Tourism," The Times (London), May 19, 2005, at 19. See also David Hooper, Representation Under Fire: Winners and Losers in the Libel Business 428 (2000) ("London has become known to many foreign 'forum-shoppers' as a Town named Sue -- a place where you can launder your reputation on the basis of a few sales in the UK of some overseas publication.").

Some of the wealthiest people have recognized libel tourism as an effective public relations weapon to quell unwanted international criticism. Saudis, like defendant, have taken

particular advantage of this situation. "In a growing phenomenon that lawyers have dubbed 'libel tourism,' the Saudis are seeking to invoke Britain's plaintiff-friendly libel laws to silence critics in the United States and in the international community." Mark Hosenball & Michael Isikoff, "Libel Tourism: Anxious Over Allegations of Terrorist Ties, Rich Saudis Are Trying to Silence Their Critics in Court," Newsweek, Oct. 22, 2003, http://msnbc.msn.com/id/3339584/. See also Sarah Lyall, "Are Saudis Using British Libel Law to Deter Critics?" N.Y. Times, May 22, 2004, at B7.

This Appeal

Libel tourism led to this appeal. Plaintiff Dr. Rachel Ehrenfeld, a New York resident, wrote a book called Funding Evil: How Terrorism Is Financed -- and How to Stop It, which was published only in the United States. She seeks a judgment from federal court here in New York declaring an English libel default judgment against her totaling $221,000 unenforceable under the United States Constitution and New York law. A 33-35, 54.[3] Defendant -- Khalid Salim A Bin Mahfouz -- sued Dr. Ehrenfeld for libel in England based on constitutionally protected statements in her book discussing his alleged financial support of terrorist organizations. He is not a citizen of England. He is a citizen of Saudi Arabia, and one of the wealthiest men in the world. A

[3] "A" refers to the Appendix filed by appellant with this Court.

38.

Mahfouz won his UK libel judgment only by default. Dr. Ehrenfeld did not appear. She could not afford to defend herself in the English courts and was unwilling, as a matter of principle, to submit the libel issues to a legal system less protective of free speech than ours, when her book had nothing to do with England. A 54.

Although Mahfouz has a UK judgment for monetary damages and injunctive relief, he has intentionally not enforced it. But he has reserved the right to do so, thereby leaving a sharp Sword of Damocles hanging ominously over Dr. Ehrenfeld in New York.

Dr. Ehrenfeld's suit, which seeks to remove Mahfouz's dangling threat, involves an issue of personal jurisdiction over Mahfouz. By simply postponing judgment enforcement indefinitely, Mahfouz wants to choose if and when he will submit to personal jurisdiction. This is really an affirmative assertion of power on Mahfouz's part -- his power to hush critics with the fear of impending enforcement of a foreign judgment. If the Court does not find jurisdiction, Mahfouz will have that sole power for as long as he wants. Mahfouz could then wait for years to enforce the UK judgment -- with full knowledge that the mere existence of the judgment and the continued threat of enforcement are enough to chill Dr. Ehrenfeld's speech, to discourage publishers from publishing her writings, and to deter other New York journalists from writing about him.

The United States Court of Appeals for the Second Circuit

has asked this Court to decide whether, as Dr. Ehrenfeld asserts, the courts of this State have jurisdiction over Mahfouz by virtue of CPLR 302(a)(1) in light of his contacts with New York.

Defendant's New York Contacts

Mahfouz's UK case was part of a purposeful scheme to intimidate Dr. Ehrenfeld and others in New York and to chill Dr. Ehrenfeld's and others' freedom of speech in New York on matters of vital public interest. Mahfouz, who has sued or threatened to sue for libel dozens of times in the UK, has waged a systematic campaign intended to suppress critics (in New York and elsewhere) and to discourage investigation of any role he may have had in the funding of terrorism that led to the 9/11 attacks. A 58, 61. The scheme includes Mahfouz's use of his website, accessible in New York, to announce to the world his "successes" in his UK libel cases, including the one against Dr. Ehrenfeld. A 58, 61. Mahfouz continues to monitor Dr. Ehrenfeld's activities in New York. A 59.

In connection with his UK case, Mahfouz has communicated with and served litigation papers on Dr. Ehrenfeld in New York. On one occasion, in March 2005, Mahfouz sent an agent to Dr. Ehrenfeld's home in New York who told her menacingly: "You had better respond. Sheikh bin Mahfouz is a very important person, and you ought to take very good care of yourself." A 56. On five occasions, Mahfouz's agents have mailed letters and documents relating to the UK case to Dr. Ehrenfeld's home in New

York. A 56-58. On five occasions, Mahfouz's agents have intrusively sent e-mails relating to the UK case that Dr. Ehrenfeld read at her home computer in New York. A 56-58.

The UK judgment and Mahfouz's communications and actions have had and were designed to have an impact and effect in New York. The UK judgment seeks to require Dr. Ehrenfeld to take certain steps (apologize, issue a retraction, cease making certain statements) in New York. A 76, 85-86. Mahfouz's attorneys have written to Dr. Ehrenfeld in New York demanding that she destroy all copies of her book in New York, prevent "leakage" of her book into England, and make a payment to an agreed-upon charity. A 70, 72. And Mahfouz refuses to say he will not try to enforce the UK monetary judgment in New York, the only jurisdiction in which Dr. Ehrenfeld has any assets, thereby creating a lingering, continuing threat and chilling effect in New York.

Mahfouz is no stranger to New York. He has had past and will have future contacts with New York. During the 1990s, he was a major figure in the Bank Credit and Commerce International ("BCCI") banking scandal, paying a massive fine to resolve a New York indictment. A 59. Until August 2004 -- seven months after he first demanded that Dr. Ehrenfeld destroy all copies of her book and issue a public apology, and two months after the initial filings in his UK libel action against Dr. Ehrenfeld -- Mahfouz owned two condominiums in New York City. A 71, 94-97. He is a defendant in several civil cases in New York arising out of 9/11.

And he is almost certainly paying his U.S. attorneys in dollars requiring a Clearing House Payments System transfer and settlement on the books of the Federal Reserve Bank of New York. Moreover, since Dr. Ehrenfeld's assets are only in New York, enforcement of the UK judgment for money damages can take place only in New York.

Why Personal Jurisdiction Exists

The circumstances of this case, including Mahfouz's many New York contacts, make personal jurisdiction over him appropriate. Any other result would give Mahfouz and other libel tourists a powerful new tool to chill the protected speech of New York citizens on crucial issues like international terrorism. The facts satisfy the jurisdictional requirements of our long-arm statute, CPLR 302(a)(1). The defendant "transacts business" in New York because the "totality" of his New York contacts are sufficient, purposeful, materially affect events and people in New York, and make it foreseeable and fair for such a defendant to answer for his actions in New York.

This conclusion is buttressed by Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (en banc), cert. denied, 126 S.Ct. 2332 (2006). In that important recent case, similar but lesser contacts than Mahfouz's supported jurisdiction under California's long-arm statute. Even if not technically binding, Yahoo! is persuasive and illuminating precedent.

Once the "transacting business" hurdle is cleared, the remaining statutory issue is readily satisfied. Dr. Ehrenfeld's lawsuit "arises from" the activities that constitute Mahfouz's transacting of business in New York. It grows out of and is based on those very activities.

The exercise of personal jurisdiction in this case only requires a holding based on the facts of this case. Such a holding would be narrow, drawn from existing precedent, fair, sensitive to fundamental rights, and without any untoward consequences. According to that limited holding, a non-New Yorker subjects himself or herself to personal jurisdiction in New York in a declaratory judgment action challenging the enforceability of a foreign libel judgment even before New York enforcement proceedings have started when the following three factors are met:

1. The non-New Yorker has obtained a foreign libel judgment against a New York resident;

2. That foreign libel judgment is based on a publication published exclusively in the U.S. by a New York resident, and

3. That judgment awards money damages or injunctive relief requiring any actions to be taken in New York.

Statement of Jurisdiction

On June 8, 2007, the United States Court of Appeals for the Second Circuit certified a question to this Court. 489 F.3d 542 (2d Cir. 2007). On June 28, 2007, this Court accepted the

certification. 2007 WL 1834831 (N.Y.), 2007 N.Y. Slip Op. 05586.

Question Certified

Does CPLR 302(a)(1) confer personal jurisdiction over the defendant? The certified question may be deemed expanded to cover any further pertinent question of New York law involved in this appeal that the Court of Appeals chooses to answer.

Statement of Facts

Behind this appeal are the efforts of a Saudi Arabian banker, linked numerous times by responsible sources to the financing of terrorist organizations, and a man with past, present and future ties to New York, to use litigation in a foreign country overly friendly to libel plaintiffs in order to intimidate and shut down his critics in New York. The facts relevant to this appeal are simple and straightforward. Most of them come from the complaint. Because no jurisdictional discovery has occurred, the facts alleged by the plaintiff must be assumed, under both federal and state rules, to be true and all supplemental affidavits read in her favor. Arrington v. N.Y. Times Co., 55 N.Y.2d 433, 442, 449 N.Y.S.2d 941, 945 (1982); In re Magnetic Audiotape Antitrust Litig., 334 F.3d 204, 206 (2d Cir. 2003).

Dr. Ehrenfeld's Book

Dr. Ehrenfeld (she is a Ph.D.) is an American citizen and New York resident. A 12, 53, 65. She is a recognized "terrorism

expert"[4] and the author of Funding Evil, a book about the financing of global terrorism published exclusively in the United States in 2003 by Chicago-based Bonus Books. A 52, 65.

A "meticulous" and "respected" scholar,[5] Dr. Ehrenfeld spent years researching Funding Evil, and her "solid" conclusions in it came from many credible and responsible sources, including the CIA, the Department of Defense, reports from Congressional hearings, the Wall Street Journal, The Washington Post, The London Times, The Financial Times, Newsweek and The Economist, to name a few. A 65. Based on such sources, Dr. Ehrenfeld identified defendant as a financial supporter of various terrorist organizations, including Al Qaeda. A 17-22.

Mahfouz: Wealthy Saudi Libel Tourist with Deep Ties to New York

Mahfouz is a hugely wealthy Saudi financier with longstanding ties to New York. He was indicted in New York for his role in the scandals involving BCCI, which have been called the biggest fraud in banking history. A 59. In 1992, Mahfouz paid fines totalling $225 million in connection with the BCCI matter. Id. Until August 2004, Mahfouz owned two condominium apartments in Manhattan. A 94-96.

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[4] David Brooks, "Rumsfeld's Blinkers," N.Y. Times, Mar. 16, 2006, at A27 (referring to Dr. Ehrenfeld as a "terrorism expert").

[5] In his Foreward to Funding Evil, former CIA Director R. James Woolsey called the book "meticulous" and "solid." Woolsey also described Dr. Ehrenfeld as a "respected scholar." Quoted in Thomas Lipscomb, "Another First Amendment Landmark Case," Editors & Publishers, Mar. 22, 2005.

Mahfouz is also a serial libel tourist. In a systematic effort to eliminate criticism of him, he has filed or threatened to file numerous libel actions in England to prevent authors from discussing his alleged links to terrorist organizations. A 12, 60-63. After Funding Evil was published, Mahfouz the professional libel plaintiff added Dr. Ehrenfeld to his list of targets.

Mahfouz's Scheme to Silence Dr. Ehrenfeld in New York

In early 2004, Mahfouz launched a scheme, consisting of New York activities, purposefully designed to silence Dr. Ehrenfeld in New York.

Mahfouz's Initial Demands: The first step in Mahfouz's scheme was to send, through his English attorneys, a letter to Dr. Ehrenfeld in New York via e-mail on January 23, 2004. A 66-70. (When that letter was sent, Mahfouz still owned the two apartments in Manhattan. A 94-96.) In that letter, Mahfouz objected to certain passages in Funding Evil and demanded that Dr. Ehrenfeld: (a) undertake before the High Court in London "not to repeat the same (or similar) offending allegations"; (b) withdraw from circulation and destroy and/or deliver up all unsold copies of Funding Evil; (c) publicly apologize to Mahfouz; (d) make a donation to an agreed-upon charity; and (e) pay legal costs. A 70. Because Dr. Ehrenfeld lives and works in New York, Mahfouz necessarily intended that his demands would affect Dr. Ehrenfeld's behavior in New York. She would, for example, have

to destroy unsold copies of Funding Evil from New York, make any charitable donation from New York, and make any public apology from New York.

The UK Suit: When Dr. Ehrenfeld refused to bow to Mahfouz's demands, he took his scheme to damage her a step further and sued her and her publisher, Bonus Books, in England for libel. A 53-54. (When he first filed his claim against Dr. Ehrenfeld in the UK in June 2004, Mahfouz still owned two apartments in Manhattan.) The reason Mahfouz chose to sue Dr. Ehrenfeld in England, where Funding Evil was never published or marketed, and where Dr. Ehrenfeld neither lives nor works, is simple. He wanted to obtain an easy judgment against her there that he could then use to inhibit her New York-based investigation and writing on his alleged links to international terrorism. A 22-26, 98-101.

The press in England is familiar with this tactic and the reasons for it. "The case of Khalid bin Mahfouz," commented the London Times, "is merely the latest in which wealthy litigants from foreign countries have sought -- and in this case won -- legal recompense for damage to their reputation in London, chiefly because the odds here are stacked uniquely in their favor." "Be Reasonable: British Courts should Beware the Dangers of Libel Tourism," The Times (London), May 19, 2005, at 19.

The alleged UK jurisdictional basis for Mahfouz's suit was, to put it gently, weak. Only 23 copies of Funding Evil entered

England through on-line sales, and one chapter had been made accessible on the Internet. A 40-54. Nowhere in his filings with the English court did Mahfouz, a citizen of Saudi Arabia, disclose a residence address in England. A 12, 38.

Libel tourists such as Mahfouz sue American authors in England because English law provides significantly less protection for speech than does U.S. law. A 22-26. American law is "totally different from English defamation law in virtually every significant respect," and those "differences are rooted in historic and fundamental public policy differences concerning freedom of the press and speech." Telnikoff v. Matusevitch, 347 Md. 598, 702 A.2d at 248. When Mahfouz obtained his UK judgment, English libel law, unlike American libel law: (1) presumed defamatory statements to be false, placing the burden of proof on the defendant, (2) deemed defamation a strict liability tort for which liability is imposed despite the defendant's good faith belief in the truth of the statement and the absence of any negligence or malice; and (3) offered no special protection for defamation actions arising from critiques of public figures or public officials. Rodney A. Smolla, The Law of Defamation, at § 1.9.[6]

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[6] The House of Lords' October 2006 decision in Jameel v. Wall Street Journal Europe SPRL, 2006 UKHL 44, [2007] 1 AC 359 (HL) does not change the analysis. That decision does not address the many differences between UK and American libel law, and it has no impact on Dr. Ehrenfeld's need for or entitlement to relief because Mahfouz obtained his UK default judgment nearly two years before the Jameel decision. See A 164-65 (Ltr. dated Oct. 30, 2006, from Daniel Kornstein to Julius Crockwell, Deputy

As a result of these profound differences, a number of American courts have refused to enforce UK libel judgments. See, e.g., Telnikoff v. Matusevitch, 347 Md. at 573, 702 A.2d at 236 (English libel judgment unenforceable as "contrary" and "repugnant to the public policy" of Maryland and the United States); Matusevitch v. Telnikoff, 877 F. Supp. 1 (D.D.C. 1995) (same), aff'd, 159 F.3d 636 (D.C. Cir. 1998); Abdullah v. Sheridan Square Press, Inc., No. 93 Civ. 2515 (LLS), 1994 WL 419847, at *1 (S.D.N.Y. May 4, 1994) (English libel law "antithetical to the First Amendment"); Ellis v. Time, Inc., 1997 WL 863267, at *13 (D.D.C. Nov. 18, 1997) (barring application of English libel law because it would have chilled protected speech and violated First Amendment); Bachchan v. India Abroad Publications Inc., 154 Misc. 2d 228, 235, 585 N.Y.S.2d 661, 665 (Sup. Ct. N.Y. Co. 1992) (English libel law "antithetical to the protections afforded the press by the U.S. Constitution").

Reserving Rights to Enforce The UK Judgment: Mahfouz, as planned and unopposed, easily won a judgment against Dr. Ehrenfeld. Dr. Ehrenfeld did not appear in the UK case because she disagreed in principle with Mahfouz's tactic of forcing her to defend a libel suit in a country with which she has no contacts, where she never published or marketed her book, and whose free speech protections fall far short of those of the First Amendment. A 54. She also did not have the financial

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Clerk of the U.S. Court of Appeals for the Second Circuit).

resources to defend the action and was daunted by the procedural and substantive burdens placed on a libel defendant under UK law. A 54.

Because Dr. Ehrenfeld refused to agree to Mahfouz's blatant forum-shopping, the English court granted a default judgment against her on December 7, 2004. A 7-8. On May 3, 2005, the English court awarded Mahfouz and his sons damages of £30,000 and an interim payment of £30,000 toward costs, which Mahfouz's English lawyers claim to have been at least £81,261 as of February 2005 (equivalent in total to approximately $221,000 at the current exchange rate, plus mounting post-judgment interest). A 33-36, 54. Mahfouz has not yet attempted to enforce his monetary judgment in New York, but has indicated he may do so in the future. In a November 16, 2006 letter to the United States Court of Appeals for the Second Circuit, Mahfouz's attorneys categorically refused to renounce his right to enforce the judgment in New York. A 168.

Most significantly, the English court also granted Mahfouz an expression-chilling injunction that operates against Dr. Ehrenfeld and seeks to affect her conduct in New York. That injunction restrains her from "publishing, or causing or authorizing the further publication" of the disputed statements about Mahfouz in Funding Evil or any similar statements anywhere within the English court's jurisdiction. A 8, 35. The English court further ordered Dr. Ehrenfeld to issue a correction and an apology to Mahfouz. A 34-35.

Mahfouz's Service of Papers and Communications in New York: In waging his censorship campaign against Dr. Ehrenfeld, Mahfouz communicated with and served litigation papers on her in New York on numerous occasions.

On four separate instances -- October 22, 2004, December 30, 2004, March 3, 2005 and May 19, 2005 -- Mahfouz employed private agents to go to Dr. Ehrenfeld's Manhattan apartment to deliver, in person, packages containing documents relating to the UK action. A 55. The March 3, 2005 encounter greatly disturbed Dr. Ehrenfeld because Mahfouz's agent frightened her with the following thinly-veiled verbal threat: "You had better respond, Sheikh bin Mahfouz is a very important person, and you ought to take very good care of yourself." A 56. Such a menacing remark from an agent of a fantasticly wealthy man repeatedly accused of funding terrorists carries a distinct, portentous message, much as a brushback pitch does in baseball.

Mahfouz also repeatedly communicated with Dr. Ehrenfeld in New York by mail and e-mail:

- On September 22, 2004, Mahfouz's attorneys sent Dr. Ehrenfeld a letter and a package to her home in New York containing a bundle of documents concerning the UK action. A 57, 71.
- On December 9, 2004, Mahfouz's attorneys sent Dr. Ehrenfeld a letter to her home in New York stating that Mahfouz had obtained a default judgment and injunctive relief against her in the UK. In the letter, Mahfouz's attorneys threatened Dr. Ehrenfeld with contempt of court if she failed to ensure that every measure was taken to prevent Funding Evil from "leaking" into the UK. A 57, 72.

- On April 26, 2005, Mahfouz's attorneys sent an e-mail to Dr. Ehrenfeld that she read on her home computer in New York concerning Mahfouz's claim for damages and attaching additional purported evidence that would be submitted against her in the UK action. A 57, 77.

- On April 27, 2005, Mahfouz's attorneys sent two e-mails to Dr. Ehrenfeld, which she read on her home computer in New York, one of which enclosed a witness statement in the UK action, and the other which concerned the date of the UK court's assessment of damages against her. A 57, 78-80.

- On May 2, 2005, Dr. Ehrenfeld received a package via courier at her home in New York from Mahfouz's attorneys that contained additional documents regarding Mahfouz's alleged damages. A 58.

- On May 9, 2005, Mahfouz's attorneys sent an e-mail to Dr. Ehrenfeld, which she read on her home computer, attaching the UK court's May 3, 2005 order awarding damages against her. The same day, Dr. Ehrenfeld also received the same communication via courier at her home in New York. A 58, 83.

Chilling Effect of Mahfouz's Scheme: Mahfouz's scheme has, as he intended, created a severe chilling effect on Dr. Ehrenfeld and others in New York. In addition to obtaining his UK judgment against Dr. Ehrenfeld, Mahfouz has made clear that he is monitoring her conduct in New York. He has a website, (www.binmahfouz.info/en_index.html), which can be accessed by New York residents and the rest of the world, and on which he has posted information about Dr. Ehrenfeld, her writing, and the UK action. A 58-59, 69. Mahfouz's attorneys have also shown in their filings in the UK action that they too are closely scrutinizing Dr. Ehrenfeld's work in New York. A 88-93.

As a result of Mahfouz's UK judgment and his constant monitoring of Dr. Ehrenfeld, she finds herself increasingly

concerned about the need to conform her writing to the standards of English law, and she has withheld from publication much of what her research has revealed, for fear that her writings, particularly on the Internet, might "leak" into the UK and thereby prompt another baseless libel suit. A 61-62. After Mahfouz posted news of his UK judgment against Dr. Ehrenfeld on his website, at least two publications that used to publish Dr. Ehrenfeld's work regularly have declined to publish her articles and have been evasive about the reasons for their refusal. A 61.

Mahfouz's actions, moreover, have also stifled other authors, publishers and their audiences, as explained in the brief of amici to the Second Circuit. The "chilling effect" of Mahfouz's outstanding judgment "will not be limited to Dr. Ehrenfeld." Brief of Amici Curiae to Second Circuit at 17. It will "continue to have a powerful effect . . . on the media in general." Id. at 14. It "sends an unmistakable message to others writers and publishers that scrutinizing the activity of [Mahfouz], and others of similar wealth and combativeness, is a perilous legal, professional and financial course." Id. at 1. It has the unacceptable result of "effectively chilling all speech that might be critical of him." Id. at 17.

As a consequence of Mahfouz's campaign of intimidation and the climate of fear it has created, some articles and books about the funding of terrorism have not seen, and will never see, the

light of day. A 61-63, ¶ 25.[7] "U.S. publishers might have to stop contentious books being sold on the Internet in case they reach the 'claimant-friendly' English court." "Be Reasonable," The Times (London), May 19, 2005, at 19. This chilling effect severely hurts the general public, which is deprived of crucial information on some of the most important and urgent issues of our time.

Procedural History

To correct this situation, Dr. Ehrenfeld sued Mahfouz in the United States District Court for the Southern District of New York. She seeks a declaratory judgment that under the law of the United States and the State of New York: (1) Mahfouz could not prevail on a claim of libel against her arising from Funding Evil, and (2) the default judgment obtained by Mahfouz in the

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[7] See also "Rules, Brittania! The Growing, Chilling Reach of Commonwealth Libel Laws," Authors Guild Bulletin 17 (Fall 2006); Samuel A. Abady & Harvey Silverglate, "'Libel Tourism' and The War on Terror," The Boston Globe, Nov. 7, 2006, available at http://www.boston-com/ae/media/articles/2006/11/07/libel-tourism_and_the_war_on_terror; Note, "England's Chilling Forecast," 74 Fordham L. Rev. 3073, 3136; Ron Chepesiuk, "Libel Tourism Chills Investigative Journalism," Global Journalist, 2d Qtr. 2004, at 14, available at http://www.globaljournalist.org/magazine/2004-2/libel-tourism.html; Duncan Currie, "The Libel Tourist Strikes Again," The Weekly Standard, Aug. 20, 2007, available at http://www.weeklystandard.com/content/Public/Articles/000/000/013/987ankei.asp; Andrew C. McCarthy, "Protect the American Media . . . Whether They Deserve It or Not," Human Events, Aug. 14, 2007, available at http://www.humanevents.com/article.php?id=21907; Note, "Legislating the Tower of Babel: International Restrictions on Internet Content and the Marketplace of Ideas," 56 Fed. Comm. L.J. 417, 422 (2004); Sarah Lyall, "Are Saudis Using British Libel Law to Deter Critics?" N.Y. Times, May 22, 2004, at B7.

English action is unenforceable in the United States.

Dr. Ehrenfeld sued in order to relieve the chilling effect caused by Mahfouz's UK judgment, which he has not yet attempted but still threatens to enforce in New York. While Dr. Ehrenfeld's declaratory judgment action would have no effect on the enforceability of Mahfouz's judgment in the UK, it would at least clarify, definitively, whether she can resume her work in New York under the protections of federal and state free speech law, or whether she must instead conform her work in New York to the unconstitutional standards of English libel law.

Mahfouz moved to dismiss Dr. Ehrenfeld's complaint for lack of subject matter jurisdiction and for lack of personal jurisdiction. The federal district court granted the motion to dismiss on personal jurisdiction grounds but declined to address the issue of subject matter jurisdiction.

Dr. Ehrenfeld appealed the dismissal to the United States Court of Appeals for the Second Circuit. At oral argument on November 8, 2006, the Second Circuit asked Mahfouz's attorneys to state in writing whether he would commit not to seek enforcement of his UK judgment against Dr. Ehrenfeld in the United States. In response, Mahfouz's lawyers wrote that Mahfouz would not "waive any of the rights obtained by the English litigation, including whatever rights he may have to seek enforcement of the damage award in a U.S. court." A 168.

On June 8, 2007, the federal appeals court issued its decision. 489 F.3d 542. Although the Second Circuit affirmed

the district court as to CPLR 302(a)(3) and jurisdictional discovery, it declined to dismiss the suit for lack of prudential ripeness, finding that "this case presents a clear and concrete issue for resolution by a court." 489 F.3d at 547. Inasmuch as "New York courts have not addressed whether personal jurisdiction should attach" under CPLR 302(a)(1) on the facts presented, the Second Circuit certified that issue to this Court, adding that it "may be deemed expanded to cover any further pertinent question of New York law involved in this appeal that the Court of Appeals chooses to answer." Id. at 551.

In certifying, the Second Circuit pointed out that the issue is "significant, implicates important public policy for the State of New York, and is likely to be repeated." Id. at 549. The question is "important to authors, publishers and those, like Mahfouz, who are the subject of books and articles." Id. And the issue "may implicate the First Amendment rights of many New Yorkers." Id.

The Second Circuit reserved for itself any decision on whether assertion of jurisdiction would violate constitutional due process. Id. at 547.

This Court accepted certification on June 28, 2007.

The Statute

CPLR 302(a)(1) creates a two-part test for long-arm jurisdiction. According to CPLR 302(a)(1), "As to a cause of action arising from any of the acts enumerated in this section, a

court may exercise personal jurisdiction over any non-domiciliary . . . who in person or though an agent: (1) transacts any business within the state . . . ." This statutory text means that, first, the non-domiciliary defendant must "transact business" in New York. And then, second, the plaintiff's cause of action must be one "arising from" such transaction of business.

This case passes both parts of the 302(a)(1) test.

Argument

I

SINCE MAHFOUZ'S NEW YORK CONTACTS, INCLUDING A CHILLING EFFECT, ARE SUFFICIENT, PURPOSEFUL, AFFECT PEOPLE AND EVENTS IN NEW YORK, AND MAKE IT FORSEEABLE THAT HE WOULD BE SUED THERE, MAHFOUZ "TRANSACTS BUSINESS" IN NEW YORK

Mahfouz meets the first prong of 302(a)(1) because he "transacts business" in New York. The "transacting business" test under 302(a)(1) is not mechanical or wooden. There is no one simple bright-line rule, no magic formula, no talismanic incantation. The test embodies, rather, a supple, somewhat elastic approach, a pragmatic judgment based on all the circumstances, varying in its application depending on the particular facts of a case and capable of adapting to new fact patterns.

Consistent with the legislative intent and this practical interpretive spirit, 302(a)(1) is liberal[8] and flexible,[9] looks

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[8] Kramer v. Vogl, 17 N.Y.2d 27, 32, 267 N.Y.S.2d 900, 904 (1966); Lynch v. Austin, 96 A.D.2d 196, 197-98, 469 N.Y.S.2d 228,

to the "totality" of a defendant's New York contacts,[10] is not limited to "commercial" activity only,[11] and is calculated to adjust to changes in technology.[12] Although the courts should rely upon "the quantity and composite quality of the various related activities,"[13] even a "single transaction" is enough to trigger jurisdiction under 302(a)(1).[14]

229-30 (3d Dep't 1983).

[9] "It has long been observed that technological advances affecting the nature of commerce require the doctrine of personal jurisdiction to adapt and evolve along with those advances". Citigroup Inc. v. City Holding Co., 97 F. Supp. 2d 549, 565 (S.D.N.Y. 2000).

[10] Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 457 n.5, 261 N.Y.S.2d 8, 18 n.5, cert. denied, 328 U.S. 905 (1965).

[11] The statute's "jurisprudential gloss and its legislative history suggest that its 'transacts business' clause is not restricted to commercial activity." Padilla v. Rumsfeld, 352 F.3d 695, 709 n.19 (2d Cir. 2003), rev'd on other grounds, 542 U.S. 426 (2004). In our case, the Second Circuit, citing Padilla, stated that, "Courts interpreting CPLR 302(a)(1) have held that non-commercial activity may qualify as the 'transaction of business.'" 489 F.3d at 548.

[12] Deutsche Bank Secs., Inc. v. Montana Bd. of Investments, 7 N.Y.3d 65, 71, 818 N.Y.S.2d 164, 167, cert. denied, 127 S.Ct. 832 (2006); Opticare Acquisition Corp. v. Castillo, 25 A.D.3d 238, 245, 806 N.Y.S.2d 84, 90 (2d Dep't 2005); see also Hanson v. Denckla, 357 U.S. 235, 250 (1958) ("As technological progress has increased the flow of commerce between states, the need for jurisdiction over nonresidents has undergone a similar increase").

[13] George Reiner and Co. v. Schwartz, 41 N.Y.2d 648, 651, 394 N.Y.S.2d 844, 846 (1977).

[14] "[P]roof of one transaction in New York is sufficient to invoke jurisdiction, even through the defendant never enters New York." Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 467, 527 N.Y.S.2d 195, 198 (1988).

Cases interpreting 302(a)(1) have established four general lines of inquiry to aid in determining if a defendant has "transacted business" in New York. One is whether the defendant's activities in New York are "sufficient." Under another, courts look to see if those New York activities were "purposeful" rather than "random or fortuitous." A third inquiry turns on whether the defendant's activities "materially affect events in New York." Finally, the law considers whether the defendant could reasonably expect to defend himself in New York.

Applying each and all of these approaches to this case demonstrates that Mahfouz "transacts business" in New York within the meaning of 302(a)(1). He satisfies every one of the criteria.

A. Sufficient New York Contacts

A hallmark of New York long-arm jurisprudence (as under the Due Process Clause of the U.S. Constitution) has always been the requirement of sufficient minimum contacts with the forum state. This has been so from the beginning and continues today. See Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 450-52, 261 N.Y.S.2d 8, 13-14 (1965); Deutsche Bank Secs., Inc. v. Montana Bd. of Investments, 7 N.Y.3d 65, 71, 818 N.Y.S.2d 164, 167 (2006).

This requirement is more than met by the long list of Mahfouz's New York contacts. The nature and extent of those contacts -- among them a foreign litigation scheme to inhibit

crucial free speech in New York, threatened enforcement of a foreign judgment in New York, a foreign judgment requiring action in New York by a New York citizen and resident, service of litigation papers and numerous communications in New York -- suffice for this inquiry.

B. Purposeful New York Contacts

The nature of Mahfouz's New York contacts on their face demonstrates their "purposefulness," a key marker under 302(a)(1). Almost 40 years ago, this Court held that jurisdiction extends to "nonresidents who have engaged in some purposeful activity (here) . . . in connection with the matter in suit." Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 16, 308 N.Y.S.2d 337, 339 (1970), quoting Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d at 457, 261 N.Y.S.2d at 18. And before that, the Court ruled that the "overriding criterion" in applying 302(a)(1) is whether the defendant "purposefully avails" himself of "the privilege of conducting activities within" New York. McKee Elec. Co. v. Rauland-Borg Corp., 20 N.Y.2d 377, 382, 283 N.Y.S.2d 34, 37-38 (1967).

Mahfouz's New York acts were purposeful, intentional and calculated. His scheme and campaign to discourage criticism of him by Dr. Ehrenfeld and others in New York was no accident. His service of papers and various communications to Dr. Ehrenfeld in New York was by design. Obtaining a foreign judgment requiring

Dr. Ehrenfeld to take significant actions in New York was exactly what he wanted.

Mahfouz's continuing threat to enforce the judgment in New York is compelling evidence of his purposeful intent. Were vindication of his reputation his true goal, the English court's judgment would have fully satisfied that goal. "The principal purpose of a libel suit is the restoration of a falsely damaged reputation." Pierre N. Leval, "The No-Money, No-Fault Libel Suit: Keeping Sullivan In Its Proper Place," 101 Harv. L. Rev. 1287, 1288 (1988). Mahfouz's refusal to refrain forever from enforcing the judgment in New York pulls off any mask hiding his intent. Such refusal reveals that the chilling of Dr. Ehrenfeld's speech in New York is precisely what he intends.

PDK Labs, Inc. v. Friedlander, 103 F.3d 1105 (2d Cir. 1997), sheds some light on the nature of "purposefulness" under the statute. In that case, the Second Circuit acknowledged that a single "cease and desist" letter sent to a New York resident, alone and without more, in an attempt to settle legal claims will not be sufficient to invoke jurisdiction. But the court found that "persistent, vexing" communications going beyond merely trying to settle legal claims were enough. Id. at 1109. PDK Labs covers Mahfouz's "persistent, vexing" communications to Dr. Ehrenfeld. In both cases, a defendant's continuing legal threats to a New York resident were tactical components in a larger strategy aimed at the forum.

Mahfouz's New York acts were not "random, fortuitous or

attenuated contacts" over which Mahfouz had no control. They were knowingly and intentionally targeted directly into New York, and they were persistent. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76 (1985) (internal questions omitted). Mahfouz took many actions against Dr. Ehrenfeld in New York, and did so for the express purpose of inhibiting Dr. Ehrenfeld's speech (and that of others) and forcing her to undertake several actions in New York.

Mahfouz demanded, both through his January 23, 2004 "cease and desist" letter and the UK injunction, that Dr. Ehrenfeld take all of these affirmative steps:

1. Withdrawal and Destruction of Books. Mahfouz demanded that Dr. Ehrenfeld take "immediate action" to withdraw Funding Evil from circulation and either destroy or deliver to him all unsold copies of the book. A 76.

2. Preventing Leakage into UK. After the UK court issued an interim order enjoining Dr. Ehrenfeld from "publishing, or causing or authorizing the further publication of" the disputed statements about Mahfouz "within the jurisdiction of this court," A 8, Mahfouz's counsel wrote to Dr. Ehrenfeld in New York to tell her she had a duty to take all necessary steps to prevent copies of Funding Evil from "leak[ing]" into the UK through "US online retail websites." A 72.

3. Future Statements. The UK court's injunction, which was continued in the May 3, 2005 final order, also prohibits Dr. Ehrenfeld from publishing or causing the publication of "any

similar defamatory words of or concerning" Mahfouz. A 8, 35. Although the injunction is limited to publication within the jurisdiction of the UK court, according to the interpretation advanced by Mahfouz's own counsel, Dr. Ehrenfeld must also take steps in New York to prevent her future work, including what she puts on the Internet, from leaking into the UK.

4. Apology and Correction. The UK court further ordered Dr. Ehrenfeld to participate in a complicated procedure leading to publication of a "suitable correction and apology" or summary of judgment. A 34-35. In a letter to Dr. Ehrenfeld in New York, Mahfouz demanded a "letter of apology." A 70. His November 16, 2006 letter to the Second Circuit again seeks a "correction and apology."

Because Mahfouz was fully aware that Dr. Ehrenfeld lives and works in New York, he knew that if Dr. Ehrenfeld were to comply with his demands and the UK injunction she personally would have to take action in New York. For example, even if her letter of apology and correction were ultimately only published in the UK, Dr. Ehrenfeld would have to prepare and issue the letter in New York. Similarly, to prevent further publication of her book in the UK, Mahfouz's counsel demanded that Dr. Ehrenfeld contact "U.S. online retail sites" to limit the availability of her work. A 72. Mahfouz's attorney also complained to the UK court that Funding Evil "is available for purchase in this jurisdiction and the Claimants' solicitors have purchased and received copies of the Book from Amazon.com and BarnesandNoble.com." A 89.

Restricting the availability of Dr. Ehrenfeld's book on U.S. based Internet sites would necessarily require conduct by Dr. Ehrenfeld in New York.

The UK injunction may require Dr. Ehrenfeld to do even more in New York than contact U.S. based on-line retailers. If, as Mahfouz's attorneys assert, she must prevent leakage of the book into England, she may -- in New York -- have to contact U.S. book distributors and ensure that they do not sell copies of Funding Evil to English bookshops. She may -- in New York -- have to contact U.S. bookshops and libraries and ask them to tell customers and borrowers not to bring copies of Funding Evil into England. She may also -- in New York -- have to ensure the destruction of the unsold copies of Funding Evil so as to minimize the possibility that any copies "leak" into England. She may -- in New York -- have to contact the U.S. Postal Service and private courier services to prevent leakage.

In applying the highly fact-specific test for personal jurisdiction, the Court should not ignore Mahfouz's intent. Rather than the number or nature of Mahfouz's contacts alone, the "composite quality of the various related activities," George Reiner and Co. v. Schwartz, 41 N.Y. 2d 648, 651, 394 N.Y.S.2d 844, 846 (1977), especially his intent to restrict speech in New York, provides a firm basis for personal jurisdiction. The Court should treat each New York contact by Mahfouz in connection with the UK judgment for exactly what it is -- a direct threat aimed at Dr. Ehrenfeld and other New York writers who may dare to

follow her example.

C. New York Events and Residents Affected

Another important consideration is whether Mahfouz "materially affected events in New York." Opticare Acquisition Corp. v. Castillo, 25 A.D.2d 238, 245, 806 N.Y.S.2d 84, 90 (2d Dep't 2005) (interpreting Parke-Bernet) (emphasis in original). This includes harming New Yorkers. New York courts exercise long-arm jurisdiction under 302(a)(1) in part because "New York is under a powerful duty to protect its domiciliaries from harm." In re Sayeh R., 91 N.Y.2d 306, 313, 670 N.Y.S.2d 377, 380 (1997). In short, to paraphrase what Justice Jackson said in another context, if it is New York that "feels the pinch," it does not matter where the defendant "applies the squeeze." United States v. Women's Sportswear Mfrs. Assn., 336 U.S. 460, 464 (1949) (local operations affecting interstate commerce).

Mahfouz qualifies here too. He may have applied the squeeze in England but New York felt the pinch. His activities affected events and local commerce in New York and harmed New Yorkers by creating a significant chilling effect. The chilling effect caused by Mahfouz and felt by Dr. Ehrenfeld and others in New York is enough by itself to confer long-arm jurisdiction over Mahfouz.

As this Court has recognized time and again, "the courts since Sullivan have been vigilant about the potential 'chilling effect' the threat of defamation actions can have on public

debate." 600 West 115th Street Corp. v. Van Gutfeld, 80 N.Y.2d 130, 137, 589 N.Y.S.2d 825, 828 (1992), cert. denied, 508 U.S. 910 (1993). Mahfouz's litigation campaign is exactly what the Court was referring to. "In recent years, there has been a rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out" on matters on public concern. Id. at 138 n.1, 589 N.Y.S.2d at 828 n.1. After all, "First Amendment values suffer because would-be communicators, fearing lawsuits, may be reluctant to risk expressing themselves." Id. at 138, 589 N.Y.S.2d at 828.

From this perspective, Mahfouz's UK action was an international SLAPP suit, a strategic lawsuit against public participation by investigative reporters looking into his possible ties to terrorism. Such lawsuits, this Court stated, "are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future." Id. at 138 n.1, 589 N.Y.S.2d at 828 n.1. See also N.Y. Civ. Rights Law §§ 70-a, 76-a (statute enacted in 1992 broadening protection of citizens facing litigation arising from public petition and participation). Precisely so here.

That is why all those whom Mahfouz threatens or sues -- except Dr. Ehrenfeld -- settle. For "[t]he threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of

the lawsuit itself." Karaduman v. Newsday, Inc., 51 N.Y.2d 531, 545, 435 N.Y.S.2d 556, 563 (1980), quoting Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967). The threat is even worse when, as here, the jurisdiction involved is known for being hostile to libel defendants and for making the losing party pay the winner's attorneys fees. "The chilling effect of an outstanding, unenforced foreign judgment at odds with the First Amendment can be just as powerful -- its impact on personal liberty, and the public dissemination of ideas and information just as great" as actual enforcement of such a judgment. Brief of Amici Curiae to Second Circuit at 13.

Thus, none of Mahfouz's UK libel suits against terrorism allegations have (to the best of our knowledge) ever been tried through to verdict in an adversary proceeding where a libel defendant has been allowed to put in proof of the allegations and to confront and cross-examine Mahfouz in open court. Instead, Mahfouz's victims, fearing the high cost of litigation and the strong plaintiff-bias of UK libel law, cave in to his threats and settle by paying money and issuing so-called retractions and apologies. Mahfouz then trumpets these results on his website as "victories" to frighten and intimidate others, especially in America (and New York in particular), who might dare to speak truth to power (and wealth). Coerced retractions and apologies made under such pressure are, of course, as worthless and as unreliable as confessions made under torture, but that has not

stopped Mahfouz from disingenuously citing them as "proof" that the statements about his funding terrorism are false.

In such circumstances, courts should fashion remedies "to ensure that fear of liability will not chill important free speech and free press rights and cause self-censorship." Mahoney v. Adirondack Publishing Co., 71 N.Y.2d 31, 38, 523 N.Y.S.2d 480, 483 (1987). The appropriate remedy starts here, with a finding of long-arm jurisdiction over Mahfouz. Personal jurisdiction is the threshold issue. Without it, no remedy is possible. To find a remedy for this problem, the courts must begin with finding jurisdiction.

Only then can Dr. Ehrenfeld, other writers/scholars, and their publishers protect themselves "from crippling libel suits, brought to punish those who exercise free speech and to deter others, by chilling the atmosphere, from expressing disagreement in public forums." Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 384, 397 N.Y.S.2d 943, 953, cert. denied, 434 U.S. 969 (1977). Such jurisdiction in the face of libel tourism is the only way to guarantee that investigative journalists like Dr. Ehrenfeld will be able to fulfill their duty "to inform the reading public on matters of concern and interest." Id.

D. New York Jurisdiction Foreseeable

One factor mentioned by the Court in its most recent application of 302(a)(1) is whether a non-domiciliary "should reasonably expect to defend its actions" in New York. Deutsche

Bank, 7 N.Y.3d at 71, 818 N.Y.S.2d at 167. This factor is not new, see Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 466, 527 N.Y.S.2d 195, 198 (1988) (same), and also points to jurisdiction over Mahfouz.

Mahfouz should reasonably have expected to be haled into a court in New York as a result of his actions in New York and affecting New Yorkers. Mahfouz could reasonably foresee that Dr. Ehrenfeld -- who lives and works in New York and has no ties to the UK -- would seek relief in her home forum from the chilling effect caused by the UK judgment and Mahfouz's onerous demands. By reaching across the seas "on his own initiative," Mahfouz, "in a very real sense projected himself into" the New York publishing arena, signaling to all investigative journalists seeking to uncover and share the truth about the financing of terrorism that they do so only at a grave risk. Cf. Padilla v. Rumsfeld, 352 F.3d 695, 709 & n.19 (2d Cir. 2003), rev'd on other grounds, 542 U.S. 426 (2004) (jurisdictional acts in New York were deprivation of constitutional rights).

Forseeability of being sued in New York emerges from other basic facts as well. Dr. Ehrenfeld has no assets in the UK, lives only in New York, and only has assets here. Mahfouz had no reason to expect otherwise. To enforce his money judgment, then, he would have to do so only in New York. There is no other place to enforce it. That future New York contact is crucial. His continued refusal to agree not to enforce the judgment in New York creates a severe chilling effect here in New York. That

chill operates on Dr. Ehrenfeld as well as on publishers and other writers. See Brief of Amici to the Second Circuit.

The mere threat of enforcement in New York is enough to confer jurisdiction over Mahfouz. In In re Sayeh R., 91 N.Y.2d at 318, 670 N.Y.S.2d at 383, the Court held that respondent's "acts in New York threatening [her] children with successful enforcement [of a Florida custody order] brings respondent within the reach of New York's long-arm statute."

* * *

The "totality" of Mahfouz's New York contacts therefore subjects him to personal jurisdiction under 302(a)(1).

II

SINCE THE YAHOO! DECISION PROVIDES PERSUASIVE AUTHORITY BASED ON EVEN LESS COMPELLING FACTS, IT SUPPORTS THE EXERCISE OF JURISDICTION HERE

Fortifying this conclusion -- that long-arm jurisdiction exists over Mahfouz -- is the 2006 en banc decision of the Ninth Circuit in Yahoo!, 433 F.3d 1199, which the Second Circuit described as "a case involving facts similar to those here." 489 F.3d at 546. In Yahoo!, the Ninth Circuit found personal jurisdiction. Even though Yahoo! depended on the long-arm statute of another state (California), the similarity of its facts to ours and the analysis used by the en banc panel make it useful and appropriate to consider here.

A. The Yahoo! Case

The Ninth Circuit en banc panel in Yahoo! found that the

defendants, French entities seeking to invoke French statutes that bar the sale of Nazi paraphernalia, subjected themselves to the jurisdiction of California courts by: (1) sending a cease-and-desist letter into California to Yahoo!, a global Internet Service Provider whose e-commerce sites were viewable in France; (2) serving Yahoo! in California with process to initiate a French lawsuit; and (3) refusing to agree that it would not enforce orders from the French court requiring Yahoo! to take steps in California to remove information from its servers. Id. at 1208-09.

The Ninth Circuit was especially struck by the "impact and potential impact" of the threat of enforcement on the plaintiff under the "effects" test of Calder v. Jones, 465 U.S. 783 (1984), reasoning that "the very existence of those orders may be thought to cast a shadow on the legality of Yahoo!'s current policy." Id. at 1211. The district court had also stated that "the ongoing possibility of . . . enforcement in the United States chill[ed] Yahoo!'s First Amendment rights." 169 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001), rev'd on other grounds, 433 F.3d 1199 (9th Cir. 2006).

B. Our Jurisdictional Case Is Stronger

Our case has several of the same elements as did Yahoo! -- the cease-and-desist letter, the in-state service of process, and the unenforced, but lingering, looming foreign judgment -- and more, making the case for personal jurisdiction stronger still.

First, the number and substance of Mahfouz's purposeful contacts with New York far exceed those by the French company in Yahoo! Mahfouz had two apartments in New York when he began his campaign to silence Dr. Ehrenfeld, whom Mahfouz knew to be a resident of New York. Yahoo! was served with process by the U.S. Marshal's Service, while Mahfouz employed private agents -- one of whom made what could reasonably be interpreted as a verbal shot across the bow -- to serve Dr. Ehrenfeld. Mahfouz's retention of private agents to serve process shows more of an intent to thrust himself into the New York forum than had the Yahoo! defendants. And the Yahoo! defendants appear to have sent only a single letter to California, Yahoo!, 433 F.3d at 1208, an act that pales in comparison with Mahfouz's numerous substantial acts in New York.

Second, the Yahoo! case, which arose out of a website targeting French consumers, was much more tied to the foreign jurisdiction than Mahfouz's campaign, which has always had its locus in New York. The shadow which the French judgment cast over Yahoo! affected its business policies concerning the services it provided directly to Internet users in France, as distinct from other services it offered globally. By contrast, Dr. Ehrenfeld is not a global company with regionalized business approaches. She works only in New York, and her books only incidentally reached a handful of international buyers due to the nature of the Internet marketplace made viable by companies such as Yahoo!

Moreover, while Yahoo! displayed French advertisements to Internet users whom it identified as French, Dr. Ehrenfeld did not engage in any marketing in the United Kingdom. Id. at 1126. Her business practices -- i.e., her research and writing -- are affected by Mahfouz's campaign against her, but it is only the business that she performs in New York that is affected, and it is this business that deserves the full protection of the New York and United States Constitutions. In short, because of Yahoo!'s voluntary connection to France, the French suit against it was not targeted at Yahoo!'s activities in California to the degree that the UK litigation is directed at Dr. Ehrenfeld's conduct in New York.

Finally, the Yahoo! defendants had more of a connection to the foreign jurisdiction -- they were actually French citizens -- than Mahfouz has with respect to England, a forum he particularly sought out solely for strategic purposes. The Yahoo! defendants did not seek to limit Yahoo!'s e-commerce sites in jurisdictions other than France. Mahfouz's campaign, by contrast, was aimed at New York and was merely incidental to England to the extent of its advantageous legal regime. Neither party is a citizen of England, and no acts can be carried out in New York that both comply with the UK judgment and afford Dr. Ehrenfeld all the protections to which she is entitled in New York as she continues to pursue her livelihood here. From the first letter sent to New York demanding that Dr. Ehrenfeld destroy all her books in New York, Mahfouz's campaign always was an intentional effort to

suppress Dr. Ehrenfeld's New York speech. And by doing so, Mahfouz purposefully availed himself of the jurisdiction of the New York courts.

C. Yahoo! Not Distinguishable on Due Process Grounds

Yahoo! is a persuasive, cogent, and compelling precedent. Even if not technically binding or controlling on the Court, it is illuminating and instructive and should guide and inform decision in this case. The Ninth Circuit's analysis of facts closely analogous to ours provides precedential support for the exercise of jurisdiction here. Yahoo! should not be distinguished, ignored or brushed aside in our case on the ground that the California long-arm statute in Yahoo! is coextensive with constitutional due process. This supposed distinction simply does not exist and, in any event, should not dissuade the Court from considering the logic of Yahoo!.

True, it has sometimes been said that CPLR 302 "does not confer jurisdiction in every case where it is constitutionally permissible." Kreutter, 71 N.Y.2d at 471, 527 N.Y.S.2d at 201. See also Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust, Ltd., 62 N.Y.2d 65, 71, 476 N.Y.S.2d 64, 66-67 (1984); Talbot v. Johnson Newspaper Corp., 71 N.Y.2d 827, 829-30, 527 N.Y.S.2d 729, 731 (1988); Best Van Lines, Inc. v. Walker, 490 F.3d 239, 248 (2d Cir. 2007) ("some distance remains between the jurisdiction permitted by the Due Process Clause and that granted by New York's long-arm statute."). But those occasional statements,

analyzed carefully and in context, do not apply here.

Most of the statements of this Court and others regarding a gap between New York long-arm jurisdiction and constitutional due process limits do not address the specific subdivision at issue here, 302(a)(1). In Kreutter, for example, immediately after discussing the gap, the Court cited CPLR 302(a)(2) and (3) as examples. 71 N.Y.2d at 471, 527 N.Y.S.2d at 201. For this reason, the Court in Banco Ambrosiano was correct when it stated, "Importantly, in setting forth certain categories of bases for long-arm jurisdiction, CPLR 302 does not go as far as is constitutionally permissible." 62 N.Y.2d at 71, 476 N.Y.S.2d at 66-67 (emphasis added). But that does not mean all subdivisions of 302 fall within that description. The text of the statute itself expressly specifies certain categories -- defamation cases 302(a)(2) and (3), and possibly matrimonial cases, 302(b) -- where jurisdiction is not coterminous with due process. See Best Van Lines, 490 F.3d at 245 n.8. It has never been suggested that 302(a)(1) is one of those categories.

The one decision of this Court that even refers to the "gap" in relation to 302(a)(1), Talbot, 71 N.Y.2d 827, 527 N.Y.S.2d 729, simply held that plaintiffs failed to meet the nexus requirements of 302(a)(1), because the cause of action on which they were suing did not arise out of their transaction of business in New York. The Court's general reference to the gap between New York's long-arm statute and constitutional due process limits was dicta. Indeed, 17 years later, this Court

described Talbot as a case merely standing for the proposition that "jurisdiction is not justified where the relationship between the claim and transaction is too attenuated." Johnson v. Ward, 4 N.Y.3d 516, 520, 797 N.Y.S.2d 33, 35 (2005). The true extent of 302(a)(1) -- that it is practically if not actually coterminous with constitutional due process -- can be gleaned from those decisions of this Court analyzing its genesis, purpose and requirements.

The "transacting business" standard of 302(a)(1) was originally conceived of and has always been treated as coextensive with due process. The Legislature passed CPLR 302(a)(1) as a direct response to the invitation from U.S. Supreme Court decisions like International Shoe Co. v. Washington, 326 U.S. 310 (1945), and McGee v. International Life Ins. Co., 355 U.S. 220 (1957), regarding the constitutional due process criteria for long-arm jurisdiction. See Kreutter, 71 N.Y.2d at 466-67, 527 N.Y.S.2d at 198-99. The "purposeful availment" definition for "transacting business" has been adopted by this Court from Supreme Court cases analyzing the constitutional limitations on a state's power to assert personal jurisdiction over a non-domiciliary. Id. In defining and interpreting 302(a)(1), this Court has quoted from and relied heavily on U.S. Supreme Court constitutional analysis. Id.; Parke-Bernet, 26 N.Y.2d 13, 308 N.Y.S.2d 337; Longines-Wittnauer, 15 N.Y.2d 443, 261 N.Y.S.2d 8. The Court's most recent ruling on 302(a)(1) discussed that provision and due process requirements

seemingly simultaneously. Deutsche Bank, 7 N.Y.3d at 71-72, 818 N.Y.S.2d at 166-167.

Considering this history, the Second Circuit recently stated that, "It may be that the meaning of 'transact[ing] business' for the purposes of section 302(a)(1) overlaps significantly with constitutional 'minimum contacts' doctrine." Best Van Lines, supra, 490 F.2d at 247.

In view of this analysis, Yahoo! should not be overlooked simply because it involved a long-arm statute that went to the limits of constitutional due process. Yahoo! is a helpful guidepost for decision in this case.

III

SINCE DR. EHRENFELD'S CLAIM STEMS DIRECTLY FROM MAHFOUZ'S INTIMIDATION OF HER IN NEW YORK, IT "ARISES FROM" MAHFOUZ'S TRANSACTION OF BUSINESS IN NEW YORK

Having met the "transacting business" test, Dr. Ehrenfeld next must satisfy 302(a)(1)'s other requirement: that her cause of action "arise from" those acts of Mahfouz. But that is an easy and simple task here. To pass the "arise from" test, Dr. Ehrenfeld need only show "the existence of some articulable nexus between the business transacted and the cause of action sued upon," McGowan v. Smith, 52 N.Y.2d 268, 272, 437 N.Y.S.2d 643, 645 (1981), or a "substantial relationship between the transaction and the claim asserted." Kreutter, 71 N.Y.3d at 467, 527 N.Y.S.2d at 198-99; see also Johnson v. Ward, 4 N.Y.2d 516, 797 N.Y.S.3d 33.

In this case a clear, close and substantial relationship exists between, on the one hand, Mahfouz's campaign to censor and suppress Dr. Ehrenfeld's free speech, and, on the other hand, Dr. Ehrenfeld's request for a declaration that the First Amendment protects her from further interference by Mahfouz. From the first letter sent by Mahfouz's attorneys in January 2004, through the later letters, e-mails, visits by agents, both before and after the entry of the UK Judgment, Mahfouz's intent and message have been the same. He has sought to coerce Dr. Ehrenfeld to retract her speech and to issue an apology. This New York lawsuit stems directly from Mahfouz's conduct in New York.

IV

SINCE THE EXERCISE OF JURISDICTION HERE IS FAIR AND GROUNDED IN PRECEDENT AND PUBLIC POLICY, THE COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE

It is appropriate for any court but especially for this Court, at the top of our State's judicial hierarchy, to consider the practical consequences and effects of its decisions. Here, all such considerations point in favor of jurisdiction. The facts of this case fall within 302(a)(1) as it is already understood.

A. An Appropriately Narrow Holding

Finding personal jurisdiction over Mahfouz here, and reducing the harmful effects of libel tourism, requires only a limited, narrow holding based on the facts presented. That

holding, under existing 302(a)(1) precedent, would be, given the facts of this case, that personal jurisdiction exists when a New Yorker sues a non-New Yorker for a declaratory judgment challenging the enforceability of a foreign libel judgment even if no steps have yet been taken to enforce the judgment in New York and the following three factors are present:

1. A non-New Yorker obtains a foreign libel judgment;

2. That libel judgment is based on a publication published exclusively in the United States by a New York resident;

3. The judgment awards monetary damages or imposes injunctive relief requiring any actions to be taken in New York.

That limited holding is merely a finding of personal jurisdiction on the facts of a given case. It is not the first step on a slippery slope leading to jurisdiction in other cases with other facts that might make jurisdiction inappropriate. To find jurisdiction here is not to find it elsewhere.

B. No New Jurisdictional Test

Our proposed result is not an effort to extend the scope of 302(a)(1). When the conditions set forth above are met, as they are here, the defendant's actions in obtaining the foreign judgment and threatening enforcement qualify as transacting business under existing principles for interpreting the New York long-arm statute. This result does not expand that statute. Rather, it applies the statute flexibly, as the Legislature intended and the Court has interpreted, to the new phenomenon of

libel tourism, where the libel plaintiff's conduct is aimed entirely at the New York forum. The precise facts and circumstances may not have been addressed yet by a New York court, but the applicable principles are long established -- old wine in a new bottle.

C. No Interference With Foreign Libel Cases

The proposed narrow jurisdictional holding would not interfere with libel suits in other countries. It would not involve dragging foreign libel plaintiffs into New York courts and subjecting them to monetary damages. Nor would it permit New York courts to enjoin ongoing foreign libel litigations. It would not, for example, require Mahfouz to do anything except respond to the complaint in court here asking that his UK libel judgment be declared unenforceable in New York. It would, instead, simply permit New York authors and publishers to obtain judicial declarations as to whether they could be subject to liability in New York for foreign libel judgments based on legal principles repugnant to the fundamental public policies of New York and the U.S. Constitution.

D. No Jurisdiction in Non-Defamation Cases

Nor would this holding vest New York courts with expansive jurisdiction over all foreign litigants with foreign judgments against New York residents. Thus, the possibility raised by the Second Circuit that "the case may lead to personal jurisdiction over many defendants who successfully pursue a suit abroad

against a New York citizen," 489 F.3d at 549-50, poses no real concern and will not occur -- unless the courts make it come to pass. This case has special facts. The proposed result, in view of the facts of this case, applies only to defamation cases and to authors whose work has been published exclusively in the U.S.

As a consequence, therefore, a holding of personal jurisdiction in this case would not benefit, say, a hypothetical U.S. company that buys widgets in Taiwan and finds itself on the wrong end of a Taiwanese money judgment. This is so both because that hypothetical dispute was commercial in nature, and because that hypothetical company, unlike Dr. Ehrenfeld, chose to transact business outside of the United States. In most commercial cases, moreover, the foreign plaintiff will, unlike Mahfouz, have every incentive to enforce the foreign judgment in the U.S. as soon as possible.

E. Legislative Intent to Foster Free Speech

The result sought by Dr. Ehrenfeld comports with and furthers the Legislature's intent in the long-arm statute itself to promote and protect free speech. The Legislature explicitly carved out defamation claims from 302(a)(2) and (3), which provide for jurisdiction over a defendant who has committed a tortious act within or without the state. The reason the Legislature wrote the "defamation exception" into 302(a)(2) and (3) was to "avoid unnecessary inhibitions on freedom of speech or the press." Best Van Lines, 490 F.3d at 245, quoting Legros v.

Irving, 38 A.D.2d 53, 55, 327 N.Y.S.2d 371, 373 (1st Dep't 1971). In particular, the Legislature "did not wish New York to force newspapers published in other states to defend themselves in states where they had no substantial interests, as the New York Times was forced to do in Alabama" in N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). Id.

The defamation carve-outs in sections 302(a)(2) and (3) prevent New York plaintiffs from doing what Mahfouz did to Dr. Ehrenfeld. That is, they prevent New York plaintiffs from filing defamation lawsuits in New York if the defendants' only connections to New York are the allegedly defamatory statements. In so doing, the defamation carve-outs enhance the free speech of non-New York writers and publishers: they can write or publish in their home jurisdictions without fear of being haled into a New York court.

In view of 302's explicit and careful protection of the speech of non-New York writers and publishers, it is only equitable, logical, symmetrical, and consistent with public policy that 302(a)(1) permit a New York court to exercise personal jurisdiction in a declaratory judgment action over a defendant like Mahfouz, who has purposefully designed and implemented a scheme to suppress the speech of a New York resident. To hold otherwise would undermine the Legislature's explicit intent to protect free speech, as well as afford greater protection to the speech of non-New Yorkers than to the speech of New Yorkers. Neither of these results would make sense. The

long-arm statute should further the Legislature's intent and protect the free speech rights of New Yorkers.

* * *

The narrow holding proposed by Dr. Ehrenfeld on the facts of her case would allow the Court to interpret 302(a)(1) so as to avoid conflict with the compelling state interests in promoting free speech, defending its citizens from harm, and protecting New York's high status and enviable reputation in the publishing world. Denial of jurisdiction would undermine longstanding state policies. In particular, denial of jurisdiction would jeopardize and diminish the heightened protection this Court has assigned to freedom of expression as a matter of New York State constitutional law. See, e.g., Immuno, A.G. v. Moor-Jankowski, 77 N.Y.2d 235, 566 N.Y.S.2d 906, cert. denied, 500 U.S. 954 (1991). The Court should reject Mahfouz's crabbed interpretation of New York's long-arm statute and its resulting restrictions on the free speech rights of New Yorkers. See Hernandez v. New York City Health & Hospitals Corp., 78 N.Y.2d 687, 693-94, 578 N.Y.S.2d 510, 513-14 (1991) (refusing to require "mechanical application" of CPLR provision, which would cause "unnecessarily harsh result" due to unique facts of case, and instead, interpreting statute to "strike[] the appropriate balance among competing policy considerations").

In this case, the appropriate balance is to be struck in favor of free speech, which means in favor of jurisdiction:

> Individuals who are defamed may be left without compensation. But excessive self-censorship by publishing houses would be a more dangerous evil. Protection and encouragement of writing and publishing, however controversial, is of prime importance to the enjoyment of first amendment freedoms. Any risk that full and vigorous exposition and expression of opinion on matters of public interest may be stifled must be given great weight. In areas of doubt and conflicting considerations, it is thought better to err on the side of free speech.

Rinaldi, 42 N.Y.2d at 384, 397 N.Y.S.2d at 953, quoting Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977), cert. denied, 434 U.S. 834 (1977).

Conclusion

The Court should answer the certified question in the affirmative. CPLR 302(a)(1) does confer personal jurisdiction over the defendant. He "transacts business" in New York within the meaning of the long-arm statute, a conclusion supported by the similar Yahoo! case. The case "arises from" the defendant's New York activities and their New York effects. A finding of jurisdiction is called for by all relevant policy considerations without in any way interfering with other interests.

Censorship. Mahfouz's systematic course of aggressive litigation is really a form of intellectual terrorism, an extreme type of literary censorship. Suppressing a book because you disagree with its contents is always a challenge to freedom of speech. He has used a foreign lawsuit to successfully chill the speech of New York authors and publishers on pressing matters of

public concern. He claims he should be able to silence Dr. Ehrenfeld's speech in New York through the new tool of libel tourism, yet not be subject to personal jurisdiction in New York. This "heads-I-win-tails-you-lose" position is unacceptable.

What Is At Stake. At stake on this appeal are core values. The Court's answer to the certified question will affect whether New York journalists, investigative reporters, independent authors and publishers can continue to function with the full protection of freedom of speech. That answer may determine whether New Yorkers and all Americans will continue to benefit from a fearless, freedom-loving, robust New York publishing and media center known throughout the world for uncovering and commenting on key facts, which might otherwise never come to light, about pressing issues such as the funding of international terrorism. This is not a case about a celebrity gossip column or an ill-advised comment in an interview.

Negative Answer: Negative Results. A negative answer by the Court would have baleful consequences. It would inspire other libel tourists to impede writers and publishers from doing their job properly and aggressively, and to thwart their search for the truth behind issues of the highest and most urgent public interest. It would transform libel tourism from a troubling new phenomenon into a dangerous and pernicious regime of extraterritorial censorship. It would be ironic if this case gave foreign libel plaintiffs a blueprint for evading the free speech protection of this country and State under the guise of

state jurisdictional statutes designed to protect due process and discourage forum-shopping in defamation cases.

Compounding this problem of forum-shopping is the continuing expansion of the Internet and the increasing willingness of foreign courts to exercise jurisdiction over American authors based on nominal online book sales or the availability of the disputed statements on websites accessible to foreign readers. See Kurt Wimmer, "International Liability for Internet Content: Publish Locally, Defend Globally," in A. Thierer & W. Crews (eds.), Who Rules the Net? Internet Governance and Jurisdiction at 239-47 (2003); Brian P. Werley, "Aussie Rules: Universal Jurisdiction Over Internet Defamation," 18 Temp. Int'l Comp. L.J. 199, 226 (2004). Thus, a negative answer will permit foreign plaintiffs like Mahfouz to target American writers in the foreign forum with the libel laws most hostile to free speech. England is by no means the only destination for libel tourists. "Singapore has been called a 'libel paradise,' and New Zealand, Kyrgyzstan, and Australia are also noted for being friendly to plaintiffs. So many options for the libel tourist only heightens the problem, as well as the demand for an American solution." Note, "England's Chilling Forecast," 74 Fordham L. Rev. at 3076.

Affirmative Answer; Positive Results. An affirmative answer, in sharp contrast, is not only correct under the law, but would implement and enhance a number of important public policies. It would protect a New York citizen from a campaign directly targeting her livelihood. It would promote the public

interest, free speech and an understanding of how international terrorism is funded. It would enable intrepid, tenacious, energetic New York writers to ferret out essential and controversial facts without fear of expensive, time-consuming lawsuits and huge judgments in foreign countries whose defamation laws are "repugnant" and "antithetical" to ours. The free speech of New Yorkers in New York should -- one of their most fundamental rights -- not be held hostage to the libel laws of other nations.

For the reasons given, this Court should rule that personal jurisdiction exists over the defendant under CPLR 302(a)(1). This case should be the last stop on Mahfouz's libel tour.

Dated: New York, N.Y.
August 24, 2007

Respectfully submitted,

KORNSTEIN VEISZ WEXLER
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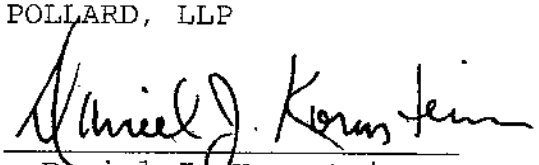
By: 
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