

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RACHEL EHRENFELD,	:	
	:	
Plaintiff,	:	No. 04-CV-9641 (RCC)
	:	
- against -	:	ECF Case
	:	
KHALID SALIM BIN MAHFOUZ,	:	
	:	
Defendant.	:	

**MEMORANDUM OF LAW OF *AMICI CURIAE*
AMAZON.COM, AMERICAN SOCIETY OF NEWSPAPER EDITORS,
ARTICLE 19, ASSOCIATION OF ALTERNATIVE NEWSWEEKLIES,
ASSOCIATION OF AMERICAN PUBLISHERS, INC., AUTHORS GUILD, INC.,
ELECTRONIC FRONTIER FOUNDATION, EUROPEAN PUBLISHERS
COUNCIL, JOHN FAIRFAX HOLDINGS, LTD., NEWSPAPER ASSOCIATION
OF AMERICA, ONLINE NEWS ASSOCIATION, NYP HOLDINGS, INC.,
RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, REPORTERS
COMMITTEE FOR FREEDOM OF THE PRESS, TIMES NEWSPAPERS
LIMITED, AND WORLD PRESS FREEDOM COMMITTEE
IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS**

R. Bruce Rich (RBR-0313)
Jonathan Bloom (JB-7966)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8775
*Counsel for Association of American
Publishers, Inc.*

Kay Murray (KM-1113)
General Counsel
THE AUTHORS GUILD, INC.
31 East 28th Street
New York, New York 10016
(212) 563-5904
Counsel for Amici Curiae

Lucy A. DalGLISH
Gregg P. Leslie
Grant D. Penrod
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1101 Wilson Boulevard, Suite 1100
Arlington, Virginia 22209

Additional counsel noted on
signature block

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INTEREST OF THE AMICI

The First Amendment guards the credibility of journalists and authors of nonfiction, shielding writers from groundless attacks on their credibility and professionalism. In recent years, however, authors and publishers have faced the growing and dangerous threat of “libel tourism” – the cynical and aggressive use of claimant-friendly libel laws in foreign jurisdictions with no legitimate connection to the challenged publication. When a wealthy litigant successfully cherry-picks a strategically chosen foreign forum with plaintiff-friendly libel laws to cleanse his reputation by attacking the credibility of an American investigative author and her work, the damage to that author is direct and immediate. Such an action also sends an unmistakable message to other writers and publishers that scrutinizing the activities of that litigant, and others of similar wealth and combativeness, is a perilous legal, professional and financial course. American authors must have a means to affirmatively counter such attacks and relieve themselves of the stigma and the financial threat posed by such judgments.

The need for remedies in U.S. courts against such judgments is particularly urgent today, when our national security depends, in part, on the efforts, courage and credibility of journalists investigating the causes, participants and funding of international terrorism. Rarely in the history of the United States have the principles underlying our First Amendment – the need for vigorous, open debate and a free flow of information on matters of vital public interest such as the funding of terrorism – been more important. Libel actions brought in foreign jurisdictions against U.S. authors and publishers pose a substantial threat to the vigorous exercise of the constitutional right to report on such matters – a threat that is magnified by the increasing availability of U.S. publications around the world via the Internet.

Amici are American, British and Australian newspaper publishers; associations representing the U.S. publishing, newspaper and broadcast journalism industries and European publishers; one of the Internet's foremost online retailers, associations representing Internet journalists and advocating freedom of expression on the Internet; and organizations in the U.S. and Europe that assist journalists and publishers and advocate for freedom of expression in virtually every country on the globe. They are uniquely suited to assist the Court in the resolution of these issues:

- **Amazon.com** is one of the world's largest and best known online retailers. Amazon.com, a Fortune 500 company based in Seattle, opened on the World Wide Web in July 1995. Amazon.com seeks to be the Earth's most customer-centric company, where customers can find and discover anything they might want to buy online, and endeavors to offer its customers the lowest possible prices. Amazon.com and other sellers offer millions of unique new, refurbished and used items in categories such as beauty, health and personal care, jewelry and watches, gourmet food, sports and outdoors, apparel and accessories, books, music, DVDs, electronics and office, toys and baby, and home and garden. Amazon.com operates seven websites: www.amazon.com, www.amazon.co.uk, www.amazon.de, www.amazon.fr, www.amazon.co.jp, www.amazon.ca and www.joyo.com.
- **The American Society of Newspaper Editors** is a nonprofit organization founded in 1922. It has a nationwide membership of approximately 800 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being added in Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.
- **ARTICLE 19** is an international human rights NGO focusing on the right to freedom of expression. It works to promote, protect and develop freedom of expression, including access to information and the means of communication and does this through advocacy, standard-setting, campaigns, research, litigation and the building of partnerships. ARTICLE 19 engages global, regional and State institutions, as well as the private sector, in critical dialogue and holds them accountable for the implementation of international standards.
- **The Association of Alternative Newsweeklies** ("AAN") is the not-for-profit trade association for 122 alternative newspapers in North America,

including weekly papers such as The Village Voice and Washington City Paper. AAN publications provide an editorial alternative to the mainstream press by reporting on news and culture from a different perspective and by presenting that coverage within a wider range of stylistic freedom. AAN members have a total weekly circulation of more than 7 million and a reach of 17 million readers.

- **The Association of American Publishers, Inc. (“AAP”)**, is the national trade association of the U.S. book publishing industry. AAP’s members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field; educational materials for the elementary, secondary, postsecondary and professional markets; computer software; and electronic products and services. The Association represents an industry whose very existence depends upon freedom of expression and a free press.
- **The Authors Guild, Inc.**, founded in 1912, is the nation's oldest and largest organization of published, professional authors of all genres. Its more than 8,000 members include journalists, historians, biographers, novelists, poets and other authors of fiction and nonfiction. Members include winners of Pulitzer and Nobel Prizes, PEN/Faulkner and National Book Awards, Caldecott and Newbery Medals, MacArthur and Guggenheim Fellowships and numerous other accolades and awards in the worlds of literature and entertainment. The Authors Guild works to promote authors’ rights and interests in various areas of law and business. As such, the Guild advocates for the protection of writers’ First Amendment rights in freedom of expression and anti-censorship initiatives. Since the early 1990s, the Authors Guild has employed a staff of attorneys to advise authors on the scope of their free speech and intellectual property rights. In the last seven years, the Authors Guild Legal Department has addressed more than 7,000 separate matters for its members, many of which involved First Amendment issues. The Authors Guild views this case as bearing directly on the ability of authors to carry on their business of writing as a livelihood.
- **The Electronic Frontier Foundation (“EFF”)** is a non-profit, civil liberties organization working to protect rights in the digital world. Founded in 1990, EFF has more than 12,000 members. EFF actively encourages and challenges industry and government to support free expression, privacy and openness in the information society. EFF’s website (<http://www.eff.org>) receives more than 1.5 million hits per day – more than 45 million hits per month – and is one of the most linked-to websites in the world. EFF estimates that its website receives approximately 3.15 million unique visitors every month. In addition, EFF

generates a weekly e-mail newsletter that has more than 52,000 subscribers worldwide.

- **The European Publishers Council** (“EPC”) is a high level group of chairmen and chief executives of 29 leading European media corporations whose interests span newspaper, magazine and online database publishing as well as interests in private broadcasting. The EPC was founded in January 1991 with the express purpose of reviewing the impact of proposed European legislation on the press, and then expressing an agreed opinion to the initiators of the legislation, politicians and opinion-formers.
- **John Fairfax Holdings Limited** (“Fairfax”) is Australia’s largest newspaper publishing group. Its mastheads include *The Sydney Morning Herald*, *The Age*, *The Australian Financial Review*, *BRW* and *The Sun-Herald* in Australia and *The Dominion Post* and *The Press* in New Zealand. In addition, Fairfax publishes regional and community newspapers, financial and consumer magazines, and provides online, interactive and e-commerce services through f2 Network, its wholly owned Internet subsidiary. f2 Network is visited by more than 3 million unique users monthly in two principal areas: news and classifieds. On an average day, f2 Network has visitors from 187 different countries.
- **The Newspaper Association of America** (“NAA”) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada, of which more than 1,500 have news websites. NAA members account for 87 percent of the U.S. daily newspaper circulation and a wide range of non-daily newspapers. One of NAA’s key strategic priorities is to advance newspapers’ First Amendment interests, including the ability to gather and report the news.
- **The Online News Association** (“ONA”) is the premier U.S.-based organization of people who make their living gathering and/or producing news for digital presentation. ONA’s professional members include reporters, news writers, editors, producers, designers, photographers and others who produce news for distribution over the Internet and through other digital media. ONA’s membership also includes academics and others interested in the development of online journalism. In partnership with the Annenberg School for Communication at the University of Southern California, ONA administers the prestigious Online Journalism Awards. ONA is dedicated to advancing the interests of online journalists and the public, generally, by encouraging editorial integrity, editorial independence, journalistic excellence, freedom of expression and freedom of access.
- **NYP Holdings, Inc.** (“NYP”) is an indirect, wholly-owned subsidiary of The News Corporation Limited, a South Australian Corporation. NYP publishes the *New York Post*, which is the longest continuously published

daily newspaper in the United States, founded in 1801 by Alexander Hamilton. It is currently the seventh largest newspaper in the country. The *New York Post* is printed in New York, Florida and California and is distributed through newsstands and retailers primarily in the New York Metropolitan area, as well as Southern and Western Florida, Southern California and Las Vegas. The *New York Post* is also distributed via mail to subscribers in most of the fifty states and many foreign countries. The Internet edition of the *New York Post* is accessible at www.nypost.com.

- **The Radio-Television News Directors Association** (“RTNDA”), based in Washington, D.C., is the world’s largest and only professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news executives, as well as educators and students, in radio, television, cable, the Internet and other electronic media in more than 30 countries. Founded as a grassroots organization in 1946, RTNDA’s purpose was to set standards of news gathering and reporting. Although news techniques and technologies have changed since the early years of its founding, RTNDA’s commitment to encouraging excellence in the electronic journalism industry, preserving journalists’ ability to gather the news and upholding First Amendment freedoms remains the same.
- **The Reporters Committee for Freedom of the Press** is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information litigation in state, federal and international courts since 1970.
- **Times Newspapers Limited**, a part of News Corporation, publishes *The Times of London*, a respected and authoritative national daily newspaper that was founded in 1785, and *The Sunday Times*. The Internet edition of *The Times*, Times Online, has a combined monthly traffic of more than 21 million page impressions and 1.9 million unique users.
- **The World Press Freedom Committee** (“WPFC”) is an international coordination organization that includes 45 journalistic groups – print and broadcast, labor and management, journalists, editors, publishers and owners on six continents – united in the defense and promotion of press freedom. Its goal is to strengthen and secure a global environment in which the news media can be free and independent. To this end, it works to reduce the ways and occasions in which governments, intergovernmental organizations or others try to legitimize restrictions on the press. Serving as a watchdog for free news media, the WPFC emphasizes its roles of monitoring press freedom issues and of coordinating of responses to press freedom threats or restrictions.

ARGUMENT

Plaintiff Rachel Ehrenfeld, a U.S. citizen and the director of the U.S.-based American Center for Democracy, wrote *Funding Evil: How Terrorism is Financed and How to Stop It*. The book was published in 2003 by Bonus Books, a U.S. publisher, solely in the United States. The book alleges that defendant Khalid Salim a Bin Mahfouz, a subject of Saudi Arabia, financially supported Al Qaeda in the years preceding the September 11, 2001, terrorist attacks on New York and Washington, D.C.

Mr. Bin Mahfouz alleges that Dr. Ehrenfeld's statements concerning him in *Funding Evil* are false and defamatory. In order to vindicate his reputation, he brought a libel action against Dr. Ehrenfeld. He did not, however, bring it in the United States, where Dr. Ehrenfeld works and lives and where *Funding Evil* was published. Instead, he sued Dr. Ehrenfeld in England. Why did Mr. Bin Mahfouz choose to sue in England? It was surely not because jurisdiction properly lay there – only 23 copies of the books seem to have been purchased by English citizens from Internet sites. Nor was it because he is an English citizen – he is not. Rather, it was to avoid the application of U. S. libel law and the protections that the First Amendment provides to libel defendants.

By avoiding the First Amendment, and thereby not having to prove falsity or actual malice, Mr. Bin Mahfouz was able to obtain “substantial damages,” as he has described it on his website,¹ against Dr. Ehrenfeld, an injunction against the publication of *Funding Evil* in the United Kingdom, and even an extraordinary “declaration of falsity” in which the court determined (without the benefit of the views of Dr. Ehrenfeld, Bonus Books or any other witnesses) that *Funding Evil* is false and defamatory. This

¹ See http://www.binmahfouz.info/news_20050503.html (last accessed June 9, 2005).

default judgment might never be executed against Dr. Ehrenfeld, particularly given Mr. Bin Mahfouz's apparent efforts to avoid the jurisdiction of U.S. courts.² But its value to Mr. Bin Mahfouz's campaign against Dr. Ehrenfeld and other journalists who have also linked him to the funding of terrorism is obvious. Predictably, a summary of the case, which tellingly does not include the salient facts that the court's ruling was a default judgment and that Dr. Ehrenfeld did not appear to defend herself, already is trumpeted on Mr. Bin Mahfouz's website.³

This English default judgment, as well as the English court's "declaration of falsity" and its injunction against publication, will have "a chilling effect on [Dr. Ehrenfeld's] ability to attract publishers interested in publishing her books."⁴ Publishers, who carry insurance policies imposing obligations to review the liability risks of works they consider for publication, may well shy away from an author subject to such a judgment. The menacing message that reportedly was delivered to Dr. Ehrenfeld when she was served with papers for the English action – "you had better respond, Sheikh bin Mahfouz is a very important person, and you ought to take very good care of yourself" –

² See Def. Mem. at 15-18. Mr. Bin Mahfouz also is a named defendant in 11 suits pending before this Court arising from the terrorist attacks on September 11, 2001. See Compl. at 16-17.

³ See http://www.binmahfouz.info/news_20050503.html (last accessed June 9, 2005):

On 3 May 2005, Mr Justice Eady in the High Court in London awarded Sheikh Khalid bin Mahfouz, Abdulrahman bin Mahfouz and Sultan bin Mahfouz substantial damages in their libel action against Rachel Ehrenfeld and Bonus Books. The Judge also made a declaration that the allegations contained in a book, "Funding Evil", written by Rachel Ehrenfeld and published by Bonus Books were false and highly defamatory of the Claimants. The Judge ordered the Defendants to pay the Claimants' costs of the action and publish a correction and apology. The full Judgment of Mr Justice Eady will be made available shortly.

⁴ Compl. at 18. The Court must, of course, take the allegations of the complaint as true for purposes of the motion to dismiss.

reinforces the extent to which the current impact of the English judgment on Dr. Ehrenfeld is direct and palpable.⁵

But the chilling effect of this tactic will not be limited to Dr. Ehrenfeld. Increasingly, publishers are being subjected, based on *de minimis* availability of their works abroad, to the jurisdiction of foreign courts that apply laws that do not comport with the U.S. Constitution or U.S. public policy, at the behest of libel tourists such as Mr. Bin Mahfouz. These judgments cause concrete and specific harm to U.S. publishers. Those with assets abroad are particularly vulnerable. But even smaller publishers, newspapers and online media outlets operating entirely in the United States seeking funding for their expressive activities are likely to be handicapped in their day-to-day business activities when subjected to potentially crippling foreign judgments. Individual investigative journalists and authors will be even more chilled.

This Court has an essential role in ensuring the application of the U.S. Constitution to works published in the United States. It can effectuate this watershed principle by declaring that the English default judgment obtained by Mr. Bin Mahfouz is unenforceable in the United States. Litigation against U.S. publications and authors in foreign countries constitutes a clear threat to the ability of the U.S. press to vigorously investigate and publish news and information about the most crucial issues before the U.S. public – including, as in this case, the funding and sources of terrorism. The English judgment provides compelling evidence of the ease with which the subjects of critical investigative journalism are able to punish U.S. authors by using the courts of another country to avoid the protections of the First Amendment. This Court should provide an

⁵ *Another First Amendment Landmark Case?*, EDITOR & PUBLISHER, Mar. 21, 2005.

essential counterweight for U.S. authors and publishers, who increasingly are under attack by opportunistic litigants in the United Kingdom and elsewhere,.

Internet publication and distribution of newspapers, books and other media has led to litigation in which the courts of Australia, Canada, England, France, Germany, Italy and Zimbabwe, among others, have ignored the laws under which publications have been produced and applied local laws to determine the liability of publishers and authors.⁶ If publishers may be sued in any country in which a handful of citizens have accessed or purchased their works over the Internet, the media will lose the important ability to predict the law that will apply to their publications. This trend, if unrestrained, will lead inexorably to publishers curtailing speech that would be protected in their home country out of legitimate concern that a more restrictive legal system will define their liabilities after publication.⁷ The principle that such judgments would be unenforceable to the extent they do not comport with the laws of the country in which the work was

⁶ See, e.g., *Dow Jones & Co. v. Gutnick* (2002) HCA 56 (Australia); *Bangoura v. The Washington Post*, 235 D.L.R. (4th) 564 (Jan. 27, 2004) (Canada); *Loutchansky v. Times Newspapers, Ltd.*, 2001 E.W.C.A. Civ. 1805, 2002 Q.B. 783 (England); *Association Union des Etudiants Juifs de France v. Yahoo! Inc.*, T.G.I. Paris, Nov. 20, 2000, 6 ILR (P&F) 434 (France); Weisman, *Germany Bans Foreign Websites for Nazi Content*, www.newsfactor.com/perl/story/6063.html (last accessed June 9, 2005) (discussing German *Tobin* case); Corte di Cassazione, closed sez., 27 Dec. 2000, n.4741, V (Italy); Geoffrey Robertson, *Mugabe Versus the Internet*, THE GUARDIAN, June 17, 2002, at www.guardian.co.uk/Archive/Article/0,4273,4435071,00.html (last accessed June 9, 2005) (Zimbabwe). See generally Kurt Wimmer, *International Liability for Internet Content: Publish Locally, Defend Globally*, in A. Thierer & W. Crews (ed.), WHO RULES THE NET? INTERNET GOVERNANCE AND JURISDICTION at 239-247 (2003).

⁷ Indeed, this process already has begun. The International Chamber of Commerce and the American Bar Association reported, in a survey of hundreds of companies in 45 countries, that more than half of all media respondents have adjusted their business operations to account for Internet jurisdiction risk, most commonly by reducing business activity in “high risk jurisdictions.” Michael Geist, *Global Internet Jurisdiction: The ABA/ICC Survey* (April 2004); see also Bryan P. Werley, *Aussie Rules: University Jurisdiction Over Internet Defamation*, 18 TEMP. INT’L & COMP. L.J. 199, 226 (2004) (such a rule “forces [publishers] to choose between catering to the most oppressive, least free journalistic standard, or completely cutting off the stream of information to countries that maintain stringent libel standards”).

published would protect free expression and enable publishers, whether in the United States, Europe or Australia, to retain the full benefit of their countries' laws in an Internet-enabled publication marketplace.

It is well-settled U.S. law that a defamation judgment obtained under English legal standards is unenforceable in the United States.⁸ This principle should be effectuated by this Court without forcing Dr. Ehrenfeld to await the execution of an English default judgment that may never occur. This action is the only means by which Dr. Ehrenfeld can obtain relief from the current, concrete and chilling impact of this judgment. We urge the Court to deny the motion to dismiss and to declare that the English judgment obtained by Mr. Bin Mahfouz is unenforceable under U.S. law.

I. BECAUSE THE DEFAULT JUDGMENT CREATES REAL AND SUBSTANTIAL HARM TO DR. EHRENFELD, THIS CASE PRESENTS AN "ACTUAL CONTROVERSY."

The Declaratory Judgment Act (DJA) provides a means by which a federal court "may declare the rights and other legal relations of any interested party" in the "case of an actual controversy within its jurisdiction." 28 U.S.C. § 2201(a). An "actual controversy" is a "real and substantial controversy admitting of specific relief through a decree of a conclusive character," as opposed to an advisory opinion on a "hypothetical set of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). Although the difference "is necessarily one of degree," the basic question is whether "there is a substantial controversy, between parties having adverse legal interests, of sufficient

⁸ See *Matusевич v. Telnikoff*, 877 F. Supp. 1 (D.D.C. 1995) (English law; answering questions certified from the D.C. Circuit Court of Appeals), 159 F.3d 636 (D.C. Cir. 1998), conforming to judgment of Maryland Court of Appeals, 702 A.2d 230 (Md. 1997); *Abdullah v. Sheridan Square Press*, No. 93 Civ. 2515 (LLS), 1994 WL 419847 (S.D.N.Y. May 4, 1994) (English law); *Bachchan v. India Abroad Publications, Inc.*, 154 Misc. 2d 228 (N.Y. Sup. Ct. 1992) (Indian law); *Desai v. Hersh*, 719 F. Supp. 670 (N.D. Ill. 1989) (Indian law).

immediacy and reality to warrant the issuance of a declaratory judgment.” *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

In this case, the English default judgment entered against Dr. Ehrenfeld creates an immediate and real harm that gives rise to an actual controversy. The order of the English court comprises an injunction, an award of damages and a “declaration of falsity.” *See* Def. Mot. to Dismiss at 3-4. Even though it comes from an overseas court, the default judgment creates immediate and ongoing harm to Dr. Ehrenfeld in the United States. It harms her reputation and career as an American author. It also compromises her constitutional right of free expression, effectively denying her the protections of the First Amendment for her domestic activities. Finally, it subjects her to a risk of financial liability and may have an immediate impact on her ability to borrow funds and acquire property, even in the United States.

A. The English Default Judgment Creates Real and Substantial Harm to Dr. Ehrenfeld that Is Both Immediate and Ongoing.

The English default judgment creates immediate and ongoing harm to Dr. Ehrenfeld in the United States. In securing a default judgment in England, Mr. Bin Mahfouz – without having to prove the falsity of the challenged statements – has acquired a judicial imprimatur for his campaign to discredit Dr. Ehrenfeld and others who reported the same or similar information about him.⁹ He can use the judgment to intimidate Dr. Ehrenfeld and others like her from publishing statements critical of him. Finally, he may seek to enforce the award of damages. For all these reasons, the judgment is harmful to Dr. Ehrenfeld.

⁹ Indeed, Mr. Bin Mahfouz is already using his website to publicize his “victory.” *See* http://www.binmahfouz.info/news_20050503.html, *supra* note 1.

First, the English default judgment serves to chill the expressive activities of Dr. Ehrenfeld and others like her. By declaring her work to be false and defamatory, and holding both her and her publisher liable for defamation, it is likely to compromise her ability to find publishers, which obviously limits her ability to publicize her research. Further, in subjecting Dr. Ehrenfeld to liability based on the content of her publication, the English judgment deters her from making any future statements about Mr. Bin Mahfouz that might be alleged to be defamatory under English law. More broadly, Mr. Bin Mahfouz's pattern of similar action – he has sought to silence his critics by threatening to sue or by actually suing for defamation at least 29 times in the United Kingdom, *see* Compl. ¶¶ 23-24 – effectively chills all speech that might be critical of him. Mr. Bin Mahfouz's behavior is especially troubling where, as here, the expressive activity in question occurred solely in the United States, where the First Amendment requires libel plaintiffs to meet a much more demanding burden of proof.

Second, the English default judgment creates immediate and ongoing harm to Dr. Ehrenfeld's professional reputation. Dr. Ehrenfeld is a Ph.D. and an author; her livelihood depends on her reputation and her journalistic integrity. She has developed an impressive resume as an authority on international terrorism and money laundering, holding professional positions both in academia and with the United States government, and writing for numerous notable publications. *See* Compl. ¶¶ 9-10. Despite this track record, and even though it was rendered in default and without the benefit of her testimony or defense, the English judgment specifically holds Dr. Ehrenfeld's reporting regarding Mr. Bin Mahfouz to be false. This judicial declaration no doubt compromises

her ability to attract publishers and secure employment here in the United States.¹⁰ To any reader of Mr. Bin Mahfouz’s website who does not know the background of the case, it appears to be as authoritative as a judgment obtained after an adversarial proceeding.

Third, the English default judgment creates financial harm. It subjects Dr. Ehrenfeld to an ongoing risk of domestic enforcement proceedings. Although Mr. Bin Mahfouz has not yet sought to enforce the English judgment in this country, there is no indication that he has attempted to withdraw the English judgment. Dr. Ehrenfeld therefore lives with the constant threat that Mr. Bin Mahfouz may initiate domestic enforcement proceedings. Although Dr. Ehrenfeld believes the English judgment to be invalid under U. S. law and unenforceable domestically, this belief does not relieve her of financial risk. Aside from the risk of an unfavorable judgment, she must also consider the unknown and potentially substantial cost of defending herself in a potentially protracted proceeding that could be initiated at any time. The risk of domestic enforcement proceedings could become immediate financial harm were Mr. Bin Mahfouz to seek to enforce the judgment. In the meantime, the risk of enforcement may compromise Dr. Ehrenfeld’s ability to borrow funds and acquire property even within the United States.

B. The Harms Created by the English Default Judgment Give Rise to an “Actual Controversy.”

The existence of an actual controversy depends on “whether the declaratory relief sought relates to a dispute where the alleged liability has already

¹⁰ That Dr. Ehrenfeld has mentioned the controversy in publicizing *Funding Evil*, see Def. Mot. to Dismiss at 5, does not disprove the harmful effect of the English judgment. That notoriety may create a degree of publicity does not necessarily negate its harmful effects. Similarly, even though Dr. Ehrenfeld’s current publisher has stood by her to date, see *id.*, it does not follow that it will do so indefinitely or that the English judgment will not compromise her ability to find other publishers in the future.

accrued or the threatened risk occurred, or rather whether the feared legal consequence remains a mere possibility.” *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 407 (S.D.N.Y. 2002), *aff’d*, 346 F.3d 357 (2d Cir. 2003). In *Dow Jones*, the court found a dispute to be insufficiently real and immediate where the requested declaratory relief was grounded on conjecture as to the outcome of an ongoing English defamation proceeding. *Id.* at 408. In contrast, the court in *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), *rev’d on other grounds*, 379 F.3d 1120 (9th Cir. 2004), *reh’g en banc granted*, 399 F.3d 1010 (9th Cir. 2005), granted the plaintiff’s motion for summary judgment in a similar declaratory judgment action where there were “no relevant appellate proceedings” pending in a French lawsuit stemming from the content of plaintiff’s Internet publications. *See* 169 F. Supp. 2d at 1188. In fact, *Dow Jones* distinguished *Yahoo!* on this ground, stressing its inapplicability to “an incipient lawsuit, or litigation still in its early stages.” *Dow Jones*, 237 F. Supp. 2d at 413.

A second consideration is that “[w]here the plaintiff complains of chills and threats in the protected First Amendment area, a court is more disposed to find that he is presenting a real and not an abstract controversy.” *Reed Enterprises v. Corcoran*, 354 F.2d 519, 523 (D.C. Cir. 1965); *see also Dow Jones*, 237 F. Supp. 2d at 409 (“under some circumstances it is easier to satisfy the threshold of a justiciable controversy when the claim implicates First Amendment rights”). As the *Yahoo!* court recognized, “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury” and hence gives rise to a real and immediate threat within the context of the DJA’s “actual controversy” requirement. 169 F. Supp. 2d at 1190

(quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Thus, the *Yahoo!* court held that an actual controversy existed where a French legal order constrained Yahoo!’s speech in violation of United States constitutional protections. *See id.* at 1189-90.

Applying the standard to this case, it is clear that the harms to Dr. Ehrenfeld arising out of the English judgment give rise to an actual controversy. Because it is final and valid under English law, the default judgment creates a real and immediate harm to Dr. Ehrenfeld. The English action is not an incipient or ongoing proceeding. Instead, it has – as had the French action in *Yahoo!* – been reduced to a final judgment which has already begun to have effects both abroad and in the United States.¹¹ This judgment – and Mr. Bin Mahfouz’s publicizing of it – has undermined Dr. Ehrenfeld’s professional reputation. It has created a risk of financial liability which may compromise her ability to borrow funds. And it has, perhaps most crucially, threatened and chilled her constitutionally protected expressive activity.

In addition to these immediate harms, the ongoing risk of future domestic enforcement also gives rise to an actual controversy. Although the *Yahoo!* court recognized that “the mere possibility . . . that a person may be adversely affected by official acts not yet threatened does not create an ‘actual controversy,’” it concluded that the fact that a foreign penalty was “provisional and would require further legal proceedings in France prior to any enforcement action in the United States does not mean that Yahoo! does not face a present and ongoing threat.” 169 F. Supp. 2d at 1188.

Although it was unclear in *Yahoo!* whether the defendants would try to enforce the

¹¹ That the default judgment resulted from Dr. Ehrenfeld’s own election not to defend herself in a foreign jurisdiction creates another parallel with *Yahoo!*, where the final status of the foreign judgment resulted from the plaintiff’s election not to appeal one foreign order and to withdraw its appeal of another foreign order. *See Yahoo!*, 169 F. Supp. 2d at 1188.

French order in the United States, the court relied on the fact that the defendants had not sought withdrawal of the order in finding the existence of an actual controversy. *See id.* at 1188-89 (citing *Societe de Conditionment en Aluminium v. Hunter Engineering Co.*, 655 F.2d 938, 945 (9th Cir. 1981)). This case presents the same fact pattern: although Mr. Bin Mahfouz has not yet sought to enforce the English judgment domestically, there is no indication that he has attempted to withdraw the English judgment.

Dow Jones is not to the contrary. In *Dow Jones*, the court found Dow Jones' complaint to be "grounded on a string of apprehensions and conjectures" and hence insufficiently real and immediate to present an actual controversy. 237 F. Supp. 2d at 408. This conclusion was based in part on the uncertainty as to whether the defendant would attempt to enforce a favorable judgment in the United States. *See id.* Also central to the decision, however, was uncertainty of the outcome of the English defamation proceedings. At the time of the litigation, it was unclear whether Dow Jones would be held liable in the English courts, let alone "[w]hat specific relief would be granted, whether monetary or injunctive" and whether any ruling "would be sustained on final appeal." *Id.* Also, *Dow Jones* did not involve the spoiling of an author's professional reputation. The litigation in *Dow Jones* concerned the actions of a newspaper that had assets in the United Kingdom being sued by an English company with substantial U.S. operations. *See id.* at 399-401. There was no indication in that case that the defendant would seek – let alone that the English courts would issue – an injunction against publication and a declaration of falsity. *See id.* at 402.

Similarly, the limitations on the *Reed Enterprises* principle recognized by the court in *Dow Jones* are not applicable here. *Dow Jones* relied on *Younger v. Harris*,

401 U.S. 37, 52 (1971), for the proposition that defending a proceeding under a statute regulating speech is an insufficient basis to support federal injunctive relief. *Dow Jones*, 237 F. Supp. 2d at 409. In addition, the court cited *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972), for the proposition that “allegations of a ‘subjective chill’ on the exercise of First Amendment freedoms are insufficient to create an actual controversy absent a concrete claim of specific present ‘objective’ harm or threat of future harm.” *Dow Jones*, 237 F. Supp. 2d at 410. For two independent reasons, neither case is controlling here.

First, in neither *Harris* nor *Tatum* did the plaintiff complain of a specific or coercive government action. The English judgment in this case, in contrast, subjects Dr. Ehrenfeld to specific and coercive harm. In *Tatum*, the Court distinguished the “subjective chill” alleged by the plaintiffs (which allegedly resulted from “the very existence of the Army’s data-gathering system”) from the “regulatory, proscriptive, or compulsory” government actions in other cases which were found to present an “objective harm or a threat of specific future harm” and thus to violate the First Amendment. 408 U.S. at 11-14. In this case, the English order subjects Dr. Ehrenfeld to injunctive and monetary penalties; it constitutes proscriptive and compulsory government action. Hence, the order imposes not a “subjective chill” but rather an “objective harm” within the meaning of *Tatum*.

In *Harris*, where the plaintiffs complained of injury resulting from an ongoing state prosecution, the Court’s holding was motivated by the principle that “[c]ertain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution” do not warrant federal intervention. 401 U.S. at 46. Here, in contrast, the harm to Dr. Ehrenfeld is not merely the prospect of

having to defend against a single prosecution but, rather, the existence of a final and specific judgment which threatens to compromise her First Amendment rights on a permanent, ongoing basis.

Second, the plaintiffs in both *Harris* and *Tatum* were seeking to enjoin government action, whereas Dr. Ehrenfeld requests only declaratory relief. In *Harris*, the plaintiffs had brought “[a] federal lawsuit to stop a prosecution in a state court.” 401 U.S. at 42. Characterizing this type of relief “a serious matter,” the Court observed that “the normal thing to do [in such cases] is not to issue such injunctions.” *Id.* at 42, 45. In *Tatum*, similarly, the plaintiffs were seeking both declaratory and injunctive relief in response to the military data-gathering system. *See* 408 U.S. at 2. Here, Dr. Ehrenfeld requests only a declaration that the English judgment would be invalid and unenforceable in the United States. She is not seeking to enjoin or otherwise interfere with the actions of the U.S. government or any legal tribunal, here or abroad.

C. Granting the Declaratory Relief Requested by Dr. Ehrenfeld Would Present No Issues of International or Interjurisdictional Conflict.

Because the declaratory relief sought by Dr. Ehrenfeld concerns only the validity and enforceability of the English order in the United States, this case presents none of the international and interjurisdictional issues that may have counseled against the finding of an actual controversy in *Dow Jones*. In that case, Dow Jones had requested a declaration that the defendant’s cause of action in the United Kingdom was invalid “not only in the United States but, under the American single publication rule, anywhere else in the world, including the U.K. itself.” 237 F. Supp. 2d at 410 (quotation marks and emphasis omitted). Thus, “under Dow Jones’ hypothesis, the DJA would confer upon an American court a preemptive style of global jurisdiction,” a prospect that the court found

incompatible with the DJA and the United States Constitution, as well as with international law. *Id.* at 411. *Dow Jones* thus provides a clear contrast with *Yahoo!*, where the court relied on the fact that “[n]othing in *Yahoo!*’s suit . . . appear[ed] to be an attempt to relitigate or disturb the French court’s application of French law or its orders with respect to *Yahoo!*’s conduct in France” in granting *Yahoo!* declaratory relief. 169 F. Supp. 2d at 1191.

This distinction was central to the court’s holding in *Dow Jones*. The court found that the “Olympian perspective of federal judicial power” implicit in *Dow Jones*’ extraordinary request for relief distinguished it from *Yahoo!* and *Farrell Lines Inc. v. Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118 (S.D.N.Y. 1997), *aff’d sub nom. Farrell Lines, Inc. v. Ceres Terminals, Inc.*, 161 F.3d 115 (2d Cir. 1998). With respect to *Farrell Lines*, the court stressed that “[t]he *Farrell* court also was not called upon to extend the reach of its authority extraterritorially.” *Dow Jones*, 237 F. Supp. 2d at 415. Likewise, it stressed that the “declaratory relief *Yahoo!* sought was limited to a determination that the French order would not be cognizable under the laws of the United States nor enforceable in this country.” *Id.* at 414. Indeed, the court noted that “*Dow Jones* would have a substantial likelihood to prevail . . . were the remedy *Dow Jones* proposed limited, such as it was in *Yahoo!*,” to a declaration that a foreign order sought to be executed domestically would not be cognizable under American law and would thus be unenforceable in the United States. *Dow Jones*, 237 F. Supp. 2d at 432-33 (emphasis added).

In this case, as in *Yahoo!* and *Farrell Lines*, the plaintiff does not request that this Court extend its reach extraterritorially. The relief Dr. Ehrenfeld requests is

limited to a declaration that the foreign order is not enforceable in the United States and a declaration that Mr. Bin Mahfouz could not prevail on such a libel claim under U.S. law. Even though Mr. Bin Mahfouz has not yet sought to execute the English order in the United States, Dr. Ehrenfeld faces current and sustaining harm here in the United States as a result of the foreign judgment. In light of this harm, as well as the limited declaratory relief requested, this Court should find that an actual controversy exists.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO ISSUE A DECLARATORY JUDGMENT.

Because a declaratory judgment is particularly appropriate in this case, this Court should exercise its discretion to grant Dr. Ehrenfeld's requested relief. District courts possess discretion in determining whether and when to entertain an action under the DJA. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995). A court's decision to exercise its discretion should turn on "considerations of practicality and wise judicial administration." *Id.* at 288. Declaratory relief "should be entertained [where it] 'will serve a useful purpose in clarifying and settling the legal relations in issue'" and eliminate legal uncertainty. *Fort Howard Paper Co. v. William D. Witter, Inc.*, 787 F.2d 784, 790 (2d Cir. 1986) (quoting *Broadview Chem. Corp. v. Loctite Corp.*, 417 F.2d 998, 1001 (2d Cir. 1969)). Particularly in light of the broad chilling effect that the English judgment will have on other authors, journalists and publishers in the United States, the Court should exercise its discretion to issue a declaratory judgment.

A. Issuance of a Declaratory Judgment Would Serve a Useful Purpose in Clarifying the Legal Issues, Settling the Controversy at Hand and Eliminating Legal Uncertainty.

A declaratory judgment would be useful in clarifying the disputed legal issues in this case, and in cases like it in which a U.S. author or publisher is subjected to a

judgment based on the laws of a foreign country in an attempt to discredit the author and chill expression protected by the First Amendment. The legal questions in this case relate only to the enforceability of the English order in the United States and its validity under U.S. law. *See* Compl. ¶¶ 6, 35. Both are questions of U.S. law, which only U.S. courts have the authority to determine. Hence, a declaratory judgment is the only means available to Dr. Ehrenfeld by which the legal uncertainties may be clarified in an authoritative manner. She has no other adequate remedy.

A declaratory judgment issued by this Court also would settle the controversy. In *Dow Jones*, the court feared that a declaratory judgment “would spur more litigation” due to the uncertainty as to whether “British tribunals would honor any judgment by this Court” in which the court sought to exercise its authority extraterritorially. 237 F. Supp. 2d at 437, 438. Here, because the declaratory relief requested concerns only the application of U.S. law applied in the United States, a declaratory judgment would instead *remove* the legal uncertainty that will otherwise plague Dr. Ehrenfeld on an indefinite basis.

Declaratory relief is particularly appropriate where, as here, a timely resolution to the controversy is necessary to safeguard Dr. Ehrenfeld’s constitutional right to free expression. Just as the “irreparable injury” resulting from “[t]he loss of First Amendment freedoms” gives rise to an actual controversy, *Yahoo!*, 169 F. Supp. 2d at 1190, it also provides a compelling reason for this Court to exercise its discretion to issue a declaratory judgment. As discussed above, the ongoing legal controversy in this case effectively chills Dr. Ehrenfeld – and others like her – from making statements that might

be critical of the actions of Mr. Bin Mahfouz or others who could use their resources to obtain foreign judgments against them.

B. The United States Court System Provides the Most Appropriate Forum for Settling Dr. Ehrenfeld's Claims.

It is appropriate for this Court to issue a declaratory judgment because the actions giving rise to the alleged defamation took place primarily within the United States and outside of England. Dr. Ehrenfeld lives and works in the United States. Compl. ¶ 21. *Funding Terror* was published in the United States, and not in England. Compl. ¶ 21. Only 23 copies of the book are known to have been purchased in England. Compl. ¶ 22. Neither Dr. Ehrenfeld nor Mr. Bin Mahfouz reside in the United Kingdom. See Compl. ¶¶ 4-5. Unlike *Dow Jones*, all of the legal issues here relate to the application of U.S. law within the United States.

Despite Mr. Bin Mahfouz's contentions, it is not Dr. Ehrenfeld but rather Mr. Bin Mahfouz who is engaged in strategic forum shopping. In *Dow Jones*, the court declined to grant the requested procedural relief in part because the *plaintiff* had sought a "preemptive procedural strike" in its attempt "to establish venue here and away from another jurisdiction where the action could properly be brought." 237 F. Supp. 2d at 439, 440. In this case, conversely, the quoted language precisely describes *Mr. Bin Mahfouz's* actions in suing Dr. Ehrenfeld in England for actions and publications that took place in the United States. With this preemptive strike, Mr. Bin Mahfouz has sought to exploit the United Kingdom's plaintiff-friendly libel laws and procedures. See Compl. ¶ 22. It bears noting, moreover, that Mr. Bin Mahfouz has engaged in similar actions on an ongoing, serial basis, suing or threatening to sue for defamation in England at least 29 times despite residing in Saudi Arabia. See Compl. ¶ 23.

C. Granting Dr. Ehrenfeld’s Requested Relief Would Not Give Rise to Any Controversial Issues of Interjurisdictional Conflict, Public International Law or International Relations.

Granting Dr. Ehrenfeld’s requested relief would neither interfere with a foreign jurisdiction nor give rise to any controversial issues of constitutional law, public international law or international relations. Courts avoid “unnecessary conflicts” with other jurisdictions to avoid “contradictory judgments” and “protracted proceedings.” *Dow Jones*, 237 F. Supp. at 435-36. Declaratory relief may not be appropriate where it would give rise to “issues of national policy, constitutional law and international affairs that transcend particulars of the matter before the Court.” *Id.* at 433. Granting Dr. Ehrenfeld’s requested relief would raise no such complications.

Because she seeks only a declaration of her legal rights under U.S. law as applied domestically, a judgment in Dr. Ehrenfeld’s favor would not give rise to issues of interjurisdictional conflict. “[C]omity ceases where a foreign judgment’s actual conflict with vital public concerns of the forum state begins to prejudice or undermine domestic interests.” *Dow Jones*, 237 F. Supp. 2d at 446. Here, the vital public concern in favor of free speech militates against recognition of the English judgment and in favor of granting relief. It is the very existence of the overseas default judgment – through which a Saudi resident has sought to use the English court system to silence an American author in her home country in violation of her constitutional rights – that implicates complex issues of national policy, constitutional law and international affairs. By clarifying Dr. Ehrenfeld’s legal rights under American law as applied domestically, a declaratory judgment would serve to resolve, rather than create, these issues.

CONCLUSION

For these reasons, *amici curiae* respectfully request that the Court deny the motion to dismiss and issue the declaratory relief sought by Dr. Ehrenfeld.

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s/ R. Bruce Rich
R. Bruce Rich (RBR-0313)
Jonathan Bloom (JB-7966)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8775
*Counsel for Association of
American Publishers, Inc.*

Lucy A. DalGLISH
Gregg P. Leslie
Grant D. Penrod
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1101 Wilson Boulevard, Suite 1100
Arlington, Virginia 22209

David A. Zapolsky
VP & Associate General Counsel
Litigation & Regulatory
AMAZON.COM, INC.
P.O. Box 81226
Seattle, Washington 98108-1226

Toby Mendel
Law Programme Director
ARTICLE 19
6-8 Amwell Street
London
EC1R 1UQ
England

s/ Kay Murray
Kay Murray (KM-1113)
General Counsel
THE AUTHORS GUILD, INC.
31 East 28th Street
New York, New York 10016
(212) 563-5904
Counsel for Amici Curiae

Jan Constantine (JC-9385)
Executive Vice-President/
Senior Deputy General Counsel
1211 Avenue of the Americas, 4th Floor
New York, New York 10036
*Counsel for NYP Holdings, Inc. and
Times Newspapers Limited*

Kevin M. Goldberg
COHN AND MARKS LLP
1920 N Street, N.W., Suite 300
Washington, D.C. 20036-1622
*Counsel for American Society of
Newspaper Editors and the
World Press Freedom Committee*

Richard Karpel
Executive Director
ASSOCIATION OF ALTERNATIVE
NEWSWEEKLIES
1020 16th St., N.W., Fourth Floor
Washington, D.C. 20036

Lee Tien, Senior Staff Attorney, Privacy,
Free Expression & Freedom of
Information

Kurt Opsahl, Staff Attorney
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, California 94110

Mark Polden
Media Lawyer
JOHN FAIRFAX HOLDINGS LIMITED
Level 24, 201 Sussex Street
Sydney 2000 Australia

Jonathan D. Hart
Dow Lohnes & Albertson PLLC
1200 New Hampshire Ave. NW
Washington, DC 20036-6802
Counsel for Online News Association

Angela Mills Wade
Executive Director
EUROPEAN PUBLISHERS COUNCIL
26 Avenue Livingstone
B-1000 Brussels, Belgium

René P. Milam
Vice President and General Counsel
Legal and Employee Relations
NEWSPAPER ASSOCIATION OF AMERICA
1921 Gallows Road, Suite 600
Vienna, Virginia 22182-3900

Kathleen A. Kirby
WILEY REIN & FIELDING
1776 K Street, NW
Washington, DC 20006
*Counsel for the Radio-Television
News Directors Association*