

**Court of Appeals of the State of New York**

**RACHEL EHRENFELD,**

*Plaintiff-Appellant,*

– against –

**KHALID SALIM A BIN MAHFOUZ,**

*Defendant-Respondent.*

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**BRIEF OF *AMICI CURIAE***

**ADVANCE PUBLICATIONS, INC., AMAZON.COM, INC., AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATION OF AMERICAN PUBLISHERS, INC., AUTHORS GUILD, INC., EUROPEAN PUBLISHERS COUNCIL, FORBES INC., GANNETT, CO., INC., MEDIA INSTITUTE, NEWSPAPER ASSOCIATION OF AMERICA, ONLINE NEWS ASSOCIATION, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND WORLD PRESS FREEDOM COMMITTEE**

**IN SUPPORT OF PLAINTIFF-APPELLANT**

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## **LISTING OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES**

Pursuant to 22 NYCRR § 500.1(c), *amici curiae* state as

follows:

Association of American Publishers, Inc., American Society of Newspaper Editors, Authors Guild, Inc., European Publishers Council, Media Institute, Newspaper Association of America, Online News Association, Radio-Television News Directors Association, Reporters Committee for Freedom of the Press, and World Press Freedom Committee each states that it is a not-for-profit organization, and does not have any public parents, subsidiaries or affiliates.

Advance Publications, Inc. states that it is a privately-held corporation and does not have any public parents, subsidiaries or affiliates.

Amazon.com, Inc. states that it is a publicly held corporation and does not have any public parents, subsidiaries or affiliates.

Forbes Inc. states that it is a privately held corporation and does not have any public parents, subsidiaries or affiliates.

Gannett Co., Inc. states that it is a publicly held corporation and does not have any public parents, subsidiaries or affiliates.

## INTEREST OF THE *AMICI CURIAE*

*Amici* are uniquely suited to assist the Court in the resolution of the question presented in this appeal, which cuts to the heart of 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. *See generally* Heather Maly, *Publish at Your Own Risk Or Don’t Publish at All: Forum Shopping Trends in Libel Litigation Leave the First Amendment Un-Guaranteed*, 14 J.L. & POL’Y 883 (2006). Increasingly, wealthy litigants implicated by hard-hitting investigative reporting have elected to file suit in countries with plaintiff-friendly libel laws to attack the credibility of American authors and journalists, many of whom reside and work in New York. Libel tourism also sends an unmistakable message to other writers and publishers that investigative journalism and reporting on critical issues such as the financing of terrorism will expose journalists to legal, professional and financial perils.

This appeal also illustrates a pernicious problem faced by the targets of libel tourism: The same litigants who file suit in plaintiff-friendly countries often do not take any actions to enforce their foreign judgments in American courts. By not taking action, but, at the same time, refusing to disclaim the right to enforce the judgment in the future, a foreign plaintiff

can chill free expression while depriving the author or publisher of an opportunity to challenge the foreign judgment in an American court on constitutional and public policy grounds. Therefore, it is essential that this Court interpret New York's long-arm statute in a way that affords New York authors and publishers the right to challenge these foreign judgments – the mere existence of which has such a direct impact on First Amendment-protected activities within the State – in New York courts. Interpreting the statute in such a manner will be consistent with the traditions of this Court as a protector of free speech and the tradition of vigorous expression of ideas in New York:

This State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas. . . .

The expansive language of our State constitutional guarantee, its formulation and adoption prior to the Supreme Court's application of the First Amendment to the States \* \* \* the recognition in very early New York history of a constitutionally guaranteed liberty of the press \* \* \* and the consistent tradition in this State of providing the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events' \* \* \* all call for particular vigilance by the courts of this State in safeguarding the free press against undue interference.

*Immuno, A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 249, 566 N.Y.S.2d 906, 913 (1991) (citations omitted; omissions replaced by asterisks in original).

*Amici* are the United States' largest newspaper publisher; a publisher of daily newspapers in over 25 cities, weekly business journals in over 40 cities, and some of the nation's leading magazines; associations representing the United States publishing, newspaper and broadcast journalism industries and European publishers; one of the Internet's foremost online retailers; the publisher of America's leading business publication; an association representing Internet journalists; and organizations in the United States and Europe that assist journalists and publishers and advocate for freedom of expression in virtually every country on the globe. Twelve of the *amici* appeared before the United States Court of Appeals for the Second Circuit in the appeal leading to this certified question. See *Ehrenfeld v. Mahfouz*, 489 F.3d 542, 544 (2d Cir. 2007).

**Advance Publications, Inc.** ("Advance Publications") publishes daily newspapers in over 25 cities and weekly business journals in over 40 cities throughout the United States, including *The Syracuse Post-Standard*, the *Staten Island Advance*, *The Business Review of Albany* and *Buffalo Business First*. Advance Publications also owns Condé Nast Publications, which publishes over 25 magazines with nationwide circulation, including *The New Yorker*, *Vanity Fair*, *Vogue*, and *Wired*. In addition, Advance Publications owns many Internet sites that are related to

its print publications, as well as interests in cable systems serving over 2.3 million subscribers.

**Amazon.com, Inc.** (“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 at great prices. Amazon.com and other sellers using Amazon.com’s internet retail platform offer millions of unique new, refurbished and used items in categories such as books, magazines, music, DVDs, beauty, health and personal care, jewelry and watches, gourmet food, sports and outdoors, apparel and accessories, electronics and office, toys and baby, and home and garden. Amazon.com operates seven branded retail websites: [www.amazon.com](http://www.amazon.com), [www.amazon.co.uk](http://www.amazon.co.uk), [www.amazon.de](http://www.amazon.de), [www.amazon.fr](http://www.amazon.fr), [www.amazon.co.jp](http://www.amazon.co.jp), [www.amazon.ca](http://www.amazon.ca) and [www.joyo.com](http://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.

**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. AAP 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 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.

**Forbes Inc.** is a privately held publishing and new media company. Its flagship publication is *Forbes*, oldest of the nation's major business magazines, which celebrated its 90th anniversary in 2007 and remains the leading American business publication. *Forbes*, *Forbes Asia*, *ForbesLife*, and the company's eight local-language editions together reach

a worldwide audience of over five million readers. In an industry increasingly dominated by public conglomerates, Forbes Inc. continues to be one of the largest and most successful family businesses of its kind. In recent years the company has expanded to include Forbes.com, Forbes Conference Group, Forbes Custom Media.

**Gannett Co., Inc.** (“Gannett”) is a leading international news and information company, and the country’s largest newspaper publisher. It publishes 85 daily newspapers with a total daily circulation of 7.2 million, including USA TODAY, and nearly 1,000 non-daily publications. Gannett also operates 23 television stations in the United States. In the United Kingdom, Gannett publishes 17 paid-for daily newspapers and almost 300 non-daily publications. Gannett’s internet sites, including USA TODAY.com, received 23.2 million unique visitors in January 2007.

**The Media Institute** (“Institute”) is an independent, nonprofit research foundation in Arlington, Virginia, specializing in issues of communications policy and freedom of speech. The Institute advocates and promotes three principles: First Amendment freedoms for all media; the development of a dynamic communications industry based on competition rather than regulation; and excellence in journalism. The Institute has participated in United States federal regulatory proceedings and in select

cases before federal courts of appeal and the Supreme Court of the United States. The Institute also conducts research projects and conferences, and sponsors publications relating to the First Amendment and other communications policy issues.

**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 United States 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 United States-based organization of online journalists. ONA’s members include reporters, news writers, editors, producers, designers, photographers and others who produce news for distribution over the Internet and through other digital media, as well as 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.

**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.

**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**

### **THE COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE**

#### **A. The Facts Presented in This Appeal Powerfully Illustrate the Danger Libel Tourism Poses to Free Expression in New York**

Rachel Ehrenfield, a United States citizen, resident of New York, and the director of the New York-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 United States

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. A12-15.<sup>1</sup>

Mr. Bin Mahfouz has alleged that the statements concerning him in *Funding Evil* are false and defamatory. In October 2004, he brought a libel action against Dr. Ehrenfeld. He filed suit in England, and not in the New York, where Dr. Ehrenfeld works and lives, or anywhere else in the United States, where the book was for sale. A12, A16-22, A53-54.

Mr. Bin Mahfouz and his agents had substantial contacts with New York in connection with the English defamation action. On four separate occasions, his agents came to Dr. Ehrenfeld's home to deliver papers related to the English court action to her. A55. On eight separate occasions, Mr. Bin Mahfouz's attorneys sent letters, emails and packages to Dr. Ehrenfeld's home in New York or to her email address, where she read the emails from her computer located in New York. A56-58. These contacts included a letter sent by Mr. Bin Mahfouz's attorneys to Dr. Ehrenfeld in New York demanding that she take certain steps, including the destruction of copies of her book in New York and the taking of steps to

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<sup>1</sup> Citations to documents in the record are to the Appendix filed by Plaintiff-Appellant (A\_\_).

prevent leakage of the book into the United Kingdom. A56-57. *See also Ehrenfeld*, 489 F.3d at 548-49.

It is clear that Mr. Bin Mahfouz, a Saudi national, filed suit in England to avoid application of United States libel law and the protections that the First Amendment provides to libel defendants. The differences between the two countries' libel laws are significant, with English law favoring plaintiffs in a number of critical respects and not affording defendants the constitutional protections that American authors, journalists and news organizations take for granted. For example:

English law does not distinguish between private persons and those who are public figures or are involved in matters of public concern. None are required to prove falsity of the libel or fault on the part of the defendant. No plaintiff is required to prove that a media defendant intentionally or negligently disregarded proper journalistic standards in order to prevail.

The defendant has the burden of proving not only truth but also of establishing entitlement to the qualified privilege for newspaper publications and broadcasters . . . .

*Bachchan v. India Abroad Publ'ns Inc.*, 154 Misc.2d 228, 231-32, 585 N.Y.S.2d 661, 663 (Sup. Ct. N.Y. County 1992) (declining to enforce an English defamation judgment because it would be repugnant to public policy to enforce a defamation judgment imposed without First Amendment protections). Under English law, "a libel defendant would be held liable for statements the defendant honestly believed to be true and published without

any negligence. In contrast, the law in the United States requires the plaintiff to prove that the statements were false and looks to the defendant's state of mind and intentions." *Matusevitch v. Telnikoff*, 877 F. Supp. 1, 4 (D.D.C. 1995) (holding that recognition and enforcement of the foreign libel judgment would deprive plaintiff of his constitutional rights), *aff'd*, 159 F.3d 636 (D.C. Cir. 1998).

Dr. Ehrenfeld did not appear in the English action, and Mr. Bin Mahfouz obtained a default judgment against her. A7. 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,<sup>2</sup> against Dr. Ehrenfeld, an injunction against Dr. Ehrenfeld "publishing, or causing or authori[z]ing the further publication" of the disputed statements in *Funding Evil* in the United Kingdom, and a "declaration of falsity" in which the court determined (without the benefit of the views of Dr. Ehrenfeld, her publisher or any other witnesses) that the challenged statements in *Funding Evil* are false and defamatory. A7-8, A33-36.

This default judgment might never be executed against Dr. Ehrenfeld. In their post-argument letter to the Second Circuit, Mr. Bin

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<sup>2</sup> See [http://www.binmahfouz.info/news\\_20050503.html](http://www.binmahfouz.info/news_20050503.html) (last accessed Oct. 1, 2007).

Mahfouz's attorneys stated that their client "has never threatened to file and has no plan to file an action in the United States seeking enforcement of any aspect of the English libel judgment." A167-68. But they also stated that Mr. Bin Mahfouz expressly refused to waive his right to seek enforcement of the English judgment at some point in the future, "including whatever rights he may have to seek enforcement of the damages award in a U.S. court." A168. And the Second Circuit opinion noted that "[t]here has been no suggestion that the order will be changed or that Ehrenfeld has instituted a policy under which she will be in compliance with the order." *Ehrenfeld*, 489 F.3d at 547.

The value of the default judgment to Mr. Bin Mahfouz's campaign against Dr. Ehrenfeld and other journalists who have also linked him to the funding of terrorism is obvious, even if – indeed especially if – he takes no further actions to enforce it. The English judgment, as well as the English court's "declaration of falsity" and its injunction against publication, has chilled and will continue to chill Dr. Ehrenfeld's exercise of her free speech rights. It likely will compromise her ability to find publishers in the future. 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 an outstanding judgment. In fact,

some already have: after Mr. Bin Mahfouz posted his account of the English judgment on his website, two publications that regularly featured Dr. Ehrenfeld's work rejected an article she wrote about a Saudi-owned company and have declined to provide Dr. Ehrenfeld with reasons for their decisions. A61.

By subjecting Dr. Ehrenfeld to liability based on the content of *Funding Evil*, the English judgment deters her from making any future statements about Mr. Bin Mahfouz, or any other of her research subjects, that might be alleged to be defamatory under English law. The outstanding English default judgment – particularly because it includes a “declaration of falsity” – harms Dr. Ehrenfeld's reputation as an American author and researcher. Further, unless Dr. Ehrenfeld is afforded an opportunity to challenge the English judgment, she is exposed to the ongoing risk of domestic enforcement proceedings and is potentially compromised in her ability to borrow funds and acquire property. Thus, Dr. Ehrenfeld has already begun to tailor her writing to more restrictive English libel standards in order to avoid future suits like Mr. Bin Mahfouz's English action. A61-62.

Dr. Ehrenfeld is not the only one being chilled by the English default judgment. Increasingly, publishers are being subject, based on *de*

*minimis* availability of their works abroad, particularly through the internet, to the jurisdiction of foreign courts that apply laws that do not comport with the constitutions and public policies of New York or the United States. As a result, media organizations have begun to curtail speech that would be protected in their home country out of legitimate concern that they will be subject to judicial actions in countries with fewer protections for free expression. *See, e.g.,* Michael Geist, *Global Internet Jurisdiction: The ABA/ICC Survey* (April 2004) (reporting that more than half of media companies surveyed had adjusted their business operations to account for Internet jurisdiction risk, most commonly by reducing business activity in “high risk jurisdictions”); Bryan P. Werley, *Aussie Rules: Univeral Jurisdiction Over Internet Jurisdiction*, 18 TEMP. INT’L & COMP. L.J. 199, 226 (2004) (publishers are forced “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”).

Mr. Bin Mahfouz alone 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* A26. This phenomenon is especially troubling where, as here, the challenged publication occurred solely in the United States, where the First Amendment requires libel plaintiffs to meet a much more

demanding burden of proof. *See Bachchan*, 154 Misc.2d at 231-32, 585 N.Y.S.2d at 663; *Matusевич*, 877 F. Supp. at 4.

This broad chilling effect not only jeopardizes the individual rights of members of the media, but also stunts the crucial free flow of information and ideas to the people of New York and the American public on matters of public concern. Mr. Bin Mahfouz's English judgment provides compelling evidence of the ease with which the subjects of critical investigative journalism are able to punish American authors by using the courts of another country to avoid the protections of the First Amendment, while also evading American judicial review of those foreign judgments.

**B. The Court of Appeals Should Adopt the Limited Holding Advocated by Dr. Ehrenfeld**

Dr. Ehrenfeld has asked this Court to adopt a limited holding whereby a non-New York domiciliary would be subjected to personal jurisdiction in New York in a declaratory judgment action challenging the enforcement of a foreign libel judgment brought before New York enforcement proceedings have been commenced if all three of the following factors are present:

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.

Brief on Behalf of Plaintiff-Appellant at 9, 45. This limited holding would prevent a party from engaging in the dual abuses of libel tourism and then thwarting New York judicial review of the foreign judgment by not taking action to enforce the judgment in New York. At the same time, this limited holding would not open the courts of New York to declaratory judgment actions and other lawsuits with no significant nexus to this State.

Such a limited holding would be entirely consistent with the precedents of this Court and the other courts of this State interpreting CPLR § 302(a)(1). “Courts interpreting N.Y. C.P.L.R. § 302(a)(1) have held that non-commercial activity may qualify as the ‘transaction of business.’”

*Ehrenfeld*, 489 F.3d at 548 (citing *Padilla v. Rumsfeld*, 352 F.3d 695, 709 & n.19 (2d Cir. 2003), *rev'd on other grounds*, 542 U.S. 426 (2004)).

CPLR § 302(a)(1) is a “‘single act statute’ and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant’s activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted.” *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467, 527 N.Y.S.2d 195, 198-99 (1988) (citations omitted); *see also Deutsche Bank Secs., Inc. v. Montana Bd. of Invs.*, 7 N.Y.3d 65, 71, 818

N.Y.S.2d 164, 166-67 (2006) (same). And while the Second Circuit has noted that a single pre-suit “case and desist” letter is not sufficient to confer personal jurisdiction, that court has held that a “persistent campaign” of telephone calls and letters *was* sufficient. *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1109 (2d Cir. 1997) (holding that CPLR § 302(a)(1) conferred personal jurisdiction in an action seeking a judgment that the defendant lacked standing to bring claims against the plaintiff). Here, Dr. Ehrenfeld has alleged that Mr. Bin Mahfouz and his agents engaged in such a “persistent campaign” for the express purpose of chilling Dr. Ehrenfeld’s exercise of her constitutional right to publish on a matter of grave public importance. A55-59.

The proposed limited holding also is consistent with this Court’s precedents holding that personal jurisdiction over a non-New York domiciliary is proper if he engages in “some act by which [he] purposefully avails [himself] of the privilege of conducting activities within [this] State, thus invoking the benefits and protections of its laws.” *McKee Elec. Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 382, 283 N.Y.S.2d 34, 37-38 (1967) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The United States Supreme Court has described “purposeful availment” as “contacts [which] proximately result from actions by the defendant *himself* that create a

‘substantial connection’ with the forum state.” *Burger King Co. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220 223 (1957)) (emphasis in original). The Supreme Court further stated that “where the defendant . . . has created ‘continuing obligations’ between himself and the residents of the forum . . . he manifestly has availed himself of the privilege of conducting business there.” *Id.* at 475-76 (quoting *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 648 (1950)). A party who has filed a libel suit in a foreign jurisdiction requiring acts in New York to comply with that judgment undoubtedly has created this “substantial connection” and “continuing obligations.”

Dr. Ehrenfeld’s proposed holding also is consistent with this Court’s precedents that have focused on whether it was foreseeable that a foreign party would be subject to the jurisdiction of the New York courts. *See Deutsche Bank Secs.*, 7 N.Y.3d at 71, 818 N.Y.S.2d at 167 (holding that there was personal jurisdiction over the Montana Board of Elections because it “should reasonably have expected to defend its actions in New York”). A foreign defamation plaintiff who sues a New York resident and obtains a judgment requiring actions to be taken in New York to satisfy that judgment “should reasonably . . . expect[.]” to become a defendant in a New York action seeking a declaration that the foreign judgment is unenforceable. *Cf.*

*In re Sayeh R.*, 91 N.Y.2d 306, 318, 670 N.Y.S.2d 377, 383 (1997) (holding that “acts in New York threatening the children with successful enforcement of her right to custody over them in Florida[] brings respondent within the reach of New York’s long-arm statute”).

The proposed holding also satisfies the requirement that the cause of action “arises from” the transaction of business by the non-New York domiciliary. This requirement can be satisfied by a showing 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). Here, there is a clear and intended nexus between the foreign defamation judgment, the steps that must be taken in New York to satisfy that judgment and the New York declaratory judgment action.

The limited holding urged by Dr. Ehrenfeld also would be consistent with the policy behind the Legislature’s decision to exclude defamation actions from CPLR §§ 302(a)(2) and (3), separate bases for long-arm jurisdiction over non-New York domiciliaries in tort actions. The Legislature “intended to avoid unnecessary inhibitions on freedom of speech or the press. . . . It 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 *Times v.*

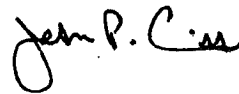
*Sullivan]*.” *Legros v. Irving*, 38 A.D.2d 53, 55, 327 N.Y.S.2d 371, 373 (1st Dep’t 1971); *see also Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 245 (2d Cir. 2007) (citing *Legros*). This Court should interpret § 302(a)(1) in a manner that ensures that New York plaintiffs similarly are not forced to litigate in foreign jurisdictions “where they ha[ve] no substantial interests,” *Legros*, 38 A.D.2d at 55, 327 N.Y.S.2d at 373, because they cannot later seek review of that foreign judgment in a New York court.

### CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court answer the certified question in the affirmative, and adopt the limited holding requested by Dr. Ehrenfeld.

Dated: New York, New York  
October 4, 2007

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