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13 Ehrenfeld v. Mahfouz

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CHIEF JUDGE KAYE: Good afternoon, Mr. Kornstein.

MR. KORNSTEIN: Thank you, Your Honor. May I reserve three minutes for rebuttal?

CHIEF JUDGE KAYE: Absolutely.

MR. KORNSTEIN: May it please the Court, this case is about whether foreigners can limit the free speech of New Yorkers without themselves being subject to jurisdiction here.

CHIEF JUDGE KAYE: I thought it was about the CPLR.

MR. KORNSTEIN: Part of the CPLR deals with that, Your Honor, section 302(a)(1), long-arm jurisdiction, is the precise question that is presented to the court. It's a question of whether what happened here constituted transacting business in New York for the purpose of that statute.

What we have is a scheme. The free speech was limited by a scheme consisting in part of a foreign libel lawsuit against a New Yorker, who wrote a book about the funding of international terrorism, a book that was published only in America.

1 CHIEF JUDGE KAYE: See, the difficulty I'm  
2 having, Mr. Kornstein, is that you seem to be  
3 arguing for an "effects" construction of the long-  
4 arm jurisdiction. I think we're kind of stuck  
5 with the CPLR, which addresses transacting any  
6 business. How - don't we have to focus on the  
7 transaction of business, rather than the effect  
8 on your client?

9 MR. KORNSTEIN: In this case, they blend  
10 together, but let me take first the transaction  
11 of business. In the United Kingdom  
12 proceeding, Mr. Mahfouz, admitted, in his  
13 papers, at pages 41-42 and page 44 of our  
14 appendix - his statements to the court, and  
15 on behalf of him by his lawyer, where he  
16 says he's bringing the action because of  
17 financial reasons, because of business reasons.

18 He was having trouble, he alleged, as a  
19 result of the book being published, with getting  
20 certain financing, so that there is a business  
21 aspect there in terms of the concession. That's  
22 number one.

23 Number two: Mr. Mahfouz has made a  
24 cottage industry of suing people for libel. He  
25 has either brought or made claims dozens of times -

1 I believe the number by now is over 30 - against people and publishers  
2 who he says, are doing these things to him.

3           So he now has his own little business  
4 of suing people. Most of us who practice law,  
5 and those on the bench, know that if somebody has  
6 one libel suit in a lifetime, it was probably  
7 more than enough. But if someone is making over  
8 30 libel claims, it's a very unusual situation.

9           JUDGE GRAFFEO: Haven't we said, though, that  
10 that transaction of business has to occur in New  
11 York State?

12           MR. KORNSTEIN: And that's where we come  
13 to I think the issue that the Chief Judge  
14 was referring to. When you do something outside  
15 of New York, and that action itself is an action  
16 that is occurring in New York at the same  
17 time - that is, by obtaining the judgment - we  
18 say improperly, but by obtaining a United Kingdom  
19 libel judgment that, ever since the Sullivan  
20 case, we know has a chilling impact.

21           It inhibits freedom of speech, and this  
22 Court has been one of the leaders in this country  
23 in terms of protecting those interests -  
24 that, to try to separate out the action of

25

1 obtaining the judgment from the effect of the  
2 chill, it becomes metaphysical and they blend  
3 together.

4 JUDGE GRAFFEO: So we have to do a special rule  
5 for cases that affect the - have First Amendment  
6 rights involved?

7 MR. KORNSTEIN: I don't know that it's a  
8 -

9 JUDGE GRAFFEO: Carve out a special CPLR rule  
10 for those First Amendment cases?

11 MR. KORNSTEIN: Well, first of all, I  
12 think, Your Honor, that the legislature already  
13 carves out a special rule for First Amendment  
14 cases in Rule 302. There are two defamation  
15 carve-outs in 302(a)(2) and 302(a)(3), which were  
16 designed to protect freedom of speech.

17 CHIEF JUDGE KAYE: What about 302(a)(1)?

18 MR. KORNSTEIN: 302(a)(1) still  
19 embodies the same protection for freedom of  
20 speech, and, I remember, in some of the  
21 cases in the 1960s, early 1970s, Justice Douglas  
22 used to talk about "speech brigaded with  
23 action," that you could not separate out speech  
24 from action.

25 Here, we have a similar thing. We

1 have an action - the filing of the lawsuit, the  
2 obtaining of the judgment - that, at the same  
3 time, the getting of the judgment and the threat  
4 of enforcement, which continues, and actually  
5 aggravates the chilling effect, is an action. To  
6 try to separate that out from an effect is to try  
7 to parse something that can't be parsed.

8 CHIEF JUDGE KAYE: Mr. Kornstein, speaking  
9 for myself, you make a very attractive argument,  
10 but I'm just trying to fit what you're telling me  
11 into the language of CPLR 302(a)(1), which is what we  
12 are obliged to do.

13 MR. KORNSTEIN: That statute -

14 CHIEF JUDGE KAYE: And I would like to hear  
15 you articulate a theory of how the  
16 defendant transacts any business within New  
17 York State.

18 MR. KORNSTEIN: Because that statute,  
19 is a somewhat general statute, and has been  
20 applied flexibly, liberally - liberally, and  
21 pragmatically to many different kinds of  
22 circumstances, it should be applied here to  
23 confer jurisdiction because the person he  
24 sued only has assets in New York.

25 And it is part of a scheme. It's not

1 simply one libel suit. It's part of a  
2 scheme to inhibit speech and writing about his  
3 activities in New York, as well as elsewhere in  
4 America, and that is the transacting of business  
5 in New York. That -

6 CHIEF JUDGE KAYE: Has there been any attempt  
7 to enforce this foreign judgment in New  
8 York?

9 MR. KORNSTEIN: Not yet, but they  
10 have refused to disavow any attempt to  
11 enforce it, so that the - the Damocles sword is  
12 ever present, and, in fact, our position is that  
13 the, so far, non-enforcement of it  
14 aggravates the chill, because it continues longer  
15 the limbo status for Ms. Ehrenfeld and other -

16 JUDGE CIPARICK: Well, their position is  
17 that it may be a premature suit that you've  
18 brought.

19 MR. KORNSTEIN: We - rather than  
20 premature, we think that every day that goes by  
21 creates a worse situation, and it - it's not Ms.  
22 Ehrenfeld alone. As the Court knows from the  
23 Amicus Brief, there are many other writer  
24 organizations and publisher organizations that  
25 feel the threat or chill. There are books and

1 articles that are not being published about  
2 terrorism because of this kind of a situation.

3           The pendency of the judgment, which  
4 could be enforced at any time, the refusal of Mr.  
5 Mahfouz to say that he will not enforce it, says  
6 something, too. If the concern was simply  
7 vindication of his reputation in England, he  
8 would have been satisfied by what happened there.

9           But by keeping the enforcement threat  
10 available - and that threat doesn't have to be by  
11 him saying, "I will enforce this next  
12 week." It can simply be the existence of the  
13 judgment.

14           JUDGE CIPARICK: Is it enforceable? Or hasn't  
15 this - this type of action been found to  
16 be against our public policy?

17           MR. KORNSTEIN: It has, by about six  
18 courts, Your Honor. None on an appellate  
19 level in this state. There - in other words,  
20 there are only a handful of courts that have  
21 ruled on it; we think it would be unenforceable,  
22 but we don't know until it happens. No one knows,  
23 and, in fact, Mr. Mahfouz's brief, kind  
24 of takes both sides of that issue.

25           On the one hand, they say that, "Well,

1 it's unlikely it will be enforced"; on the other  
2 hand, it says, "The procedures in England are  
3 fine and acceptable, and there would be no  
4 problem." And, in any event, he says, "I'm not  
5 going to give up my right to enforce it sometime  
6 in the future."

7 CHIEF JUDGE KAYE: I just want to be  
8 sure, Mr. Kornstein. I - I think I know the  
9 answer is we're only under 302(a)(1), because,  
10 clearly, what you say about conduct outside  
11 having effect within the state could be a basis  
12 for jurisdiction if there were some tort.  
13 There is no - nothing before us of that nature.

14 MR. KORNSTEIN: On the contrary, Your  
15 Honor, we think that, despite what this -

16 CHIEF JUDGE KAYE: So that is before us too?

17 MR. KORNSTEIN: Well, let me phrase it  
18 this way. The Second Circuit, in its  
19 decision, had said that there was no  
20 tort argument, under 302 (a)(3). However, in  
21 certifying the question to this Court, it said  
22 that this Court could consider any issue of New  
23 York law that it thought relevant to resolving  
24 the dispute.

25 And we think this kind of a situation

1 may be a hybrid. It may be like an anti-SLAPP  
2 suit. It may be a situation that doesn't fit into  
3 any of the ordinary categories.

4           That's why we have something called  
5 prima facie tort, that, in fact, this may be  
6 something that is akin to a tort, may be a tort,  
7 and that we think the Court has the  
8 discretion, has the - the right to, in answering  
9 the certified question from the Court of Appeals,  
10 to say that it could, might, will, can fall under  
11 the tort section, so that the effects analysis  
12 would be very acceptable and standard.

13           What I think happens frequently, in  
14 - in law, is that we - we become, dominated  
15 by a tyranny of words and labels.

16           CHIEF JUDGE KAYE: Hardening of categories?

17           MR. KORNSTEIN: Yes. And here we  
18 have, because of developing technology, because  
19 of new ideas about how to approach things,  
20 because of the Internet, because of the way  
21 things are marketed, changes being made. And,  
22 the law is pressed to adapt to it.

23           I think this is a perfect illustration of how that  
24 has to happen. The chill here is huge; the subject matter is

1 one of the most urgent that we can imagine in  
2 public life today; the risk of not allowing  
3 this kind of jurisdiction to occur, and then to  
4 have it determined on the merits.

5 This is not something that we're  
6 talking about on the merits yet. This is just  
7 whether we get to first base to find out whether  
8 the judgment is or is not enforceable in this  
9 country, in this state. That's what's critical.

10 Our adversaries talk about the  
11 dangers and the floodgates and the risks of  
12 going forward if you allow jurisdiction here, but  
13 really, the risk is the other way. The floodgates  
14 argument doubles back and the - the fear  
15 is, if the Court says that there is no  
16 jurisdiction, then this would be - I - I see a  
17 yellow light -- that decision would be a green light to  
18 everybody who is in a similar position to Mr.  
19 Mahfouz who wants to bring these kinds of cases  
20 overseas, whether it's in the United Kingdom  
21 or other countries that don't quite -

22 CHIEF JUDGE KAYE: Isn't this argument better  
23 addressed to the legislature?

24 MR. KORNSTEIN: Not - not -  
25

1 as it arises in this case. The idea of applying a  
2 statute cast in general terms to particular  
3 circumstances is a central judicial function, a  
4 typical judicial function.

5 We're not asking the Court to extend  
6 the statute; we're not asking it to amend the  
7 statute. We're asking it to apply the statute to  
8 a situation that has arisen, that, when statutes  
9 are written, they're written in the past,  
10 particularly this kind of a statute.

11 Just earlier this year,  
12 in the - the Deutsche Bank case, the Court noted  
13 that changes in technology and electronics  
14 make application of this statute in an  
15 appropriate way. That's what we're asking for. We  
16 ask the Court to answer the certified question in  
17 the affirmative and to find jurisdiction.

18 CHIEF JUDGE: Thank you, Mr. Kornstein.  
19 Mr. Finn?

20 MR. FINN: Thank you, Your Honor.  
21 May it please the Court, I am Timothy Finn,  
22 counsel for Khalid bin Mahfouz, who's the  
23 defendant in this action.

24 Your Honor is correct that the  
25 only issue that's before the Court today is the

1 302(a)(1) transacting business provision. The - the  
2 Second Circuit considered an argument under  
3 302(a)(3), a tort argument, an argument that - that  
4 the conduct of Mr. bin Mahfouz was tortious and  
5 should be subject to (a)(3), and decided that, since  
6 a tort wasn't pled, that provision  
7 couldn't be used, and expressly declined  
8 certification, declined a request to  
9 certify that issue to this Court.

10 JUDGE GRAFFEO: Your client certainly had the  
11 resources to initiate this lawsuit in New York. I  
12 presume there were legal reasons why they wanted  
13 to bring the action in England. But it has quite  
14 an effect here on this New York resident.

15 MR. FINN: Well, the reason the action  
16 was brought in England is because that's where my  
17 client has relevant contacts. He had  
18 residences there; he's had a couple residences  
19 there for a long time, and he has a long

20 CHIEF JUDGE KAYE: Oh, does he reside there? I -  
21 I understood that was in the past.

22 MR. FINN: Pardon me?

23 CHIEF JUDGE KAYE: Does he reside in England?

24 MR. FINN: He does not reside in  
25

1 England. His home is in Saudi Arabia, but he  
2 still maintains two residences, in - in  
3 England. And he has a long history of business  
4 transactions in England as well, and important  
5 reputational interest to protect in England. And  
6 that's why the suit was brought there.

7 CHIEF JUDGE KAYE: And no business transactions  
8 in New York?

9 MR. FINN: No, he has no business in New  
10 York. No business or - or property at this -

11 JUDGE CIPARICK: He had apartments in New York  
12 at one time, right?

13 MR. FINN: Pardon me?

14 JUDGE CIPARICK: But no longer? He had two  
15 apartments in New York at one time?

16 MR. FINN: He - he did have a couple of  
17 apartments, which were sold before this  
18 action was commenced.

19 JUDGE GRAFFEO: So why shouldn't we consider the  
20 chilling effect that this plaintiff suffers as a  
21 result of this judgment? Why is that not a  
22 transaction of business?

23 MR. FINN: Well, first of all,  
24 we've - we've disputed that there is any chilling  
25 effect here. This judgment has

1 not, chilled her speech, but rather has - has  
2 incited it and amplified it. She's - it's given  
3 her a platform, really, to repeat the defamation  
4 of our client and to, republish a new edition  
5 of her book, which, has been marketed as,  
6 The book the Saudis don't want you to read.

7 She hasn't alleged that  
8 she has refrained from making any  
9 defamatory statements with respect to our client,  
10 Mr. bin Mahfouz, as a result of this lawsuit.

11 Now, she - she contends that the  
12 that the outstanding judgment has some kind  
13 of chilling effect on her, but the record  
14 really provides no evidence of that. There's no  
15 objective -

16 CHIEF JUDGE KAYE: Well, that clearly was the  
17 purpose of it, was it not? Of - of bringing suit  
18 in England, securing a judgment, and  
19 then not enforcing it, but simply holding it over  
20 the head of the -

21 MR. FINN: Well, as - as we say, we  
22 don't think that the failure to enforce it has  
23 had any chilling effect at all.

24 CHIEF JUDGE KAYE: Oh, but I asked that was  
25 clearly the purpose of it, as the other 30 times,

1 is it not?

2 MR. FINN: Uh, no. The failure to  
3 enforce it is not to - to chill her. We, we  
4 really have no interest in proceeding -

5 JUDGE CIPARICK: But she can't - she's not  
6 selling books in England, that's for sure.

7 MR. FINN: Pardon me?

8 JUDGE CIPARICK: She's - she can't sell her  
9 book overseas.

10 MR. FINN: Correct. Correct. The  
11 injunction prevents her from selling her book  
12 overseas, but doesn't affect her speech in the  
13 United States.

14 JUDGE PIGOTT: Your judgment in England -  
15 you want - I mean as far as England is  
16 concerned, this is - this is a libelous book?

17 MR. FINN: Correct.

18 JUDGE PIGOTT: But your client is satisfied  
19 to let the book be sold in the United States,  
20 where the defendant lives?

21 MR. FINN: My client is concerned  
22 with his business, or his reputation, in England.

23 JUDGE PIGOTT: But not in the United States?

24 MR. FINN: That's - that's  
25 - it's his - his concerns are centered in

1 England. The - obviously, the English  
2 judgment helps his reputation in the United  
3 States, to the extent that people are  
4 aware of it. They're aware that the book has  
5 been found to be false and defamatory by an  
6 English court.

7 CHIEF JUDGE KAYE: I thought he wasn't concerned  
8 about his reputation in the United States.

9 MR. FINN: Well, not - not concerned  
10 enough to - to bring an action in the United  
11 States.

12 CHIEF JUDGE KAYE: That's odd, then, isn't it?

13 MR. FINN: Not necessarily. I mean,  
14 he's been - he's been vindicated in England.  
15 which is, as I say, a location in which  
16 he has had a lot of, contacts that are  
17 important to him, and where he has important  
18 reputational interest.

19 JUDGE GRAFFEO: If he did enforce the English  
20 judgment in a New York court, would that fall  
21 under (a)(1) transaction of business?

22 MR. FINN: No, I don't think so. I don't  
23 - I don't think enforcement -

24 JUDGE GRAFFEO: I know that - I know that's not  
25 what's in front of us, but -

1 MR. FINN: I don't think enforcement of  
2 a libel judgment is the transaction of business  
3 within New York. Uh, I don't think a lawsuit is -  
4 is the same thing as a business transaction, and  
5 -

6 CHIEF JUDGE KAYE: But if he tried to enforce  
7 the judgment here, he clearly would be subject to  
8 jurisdiction, wouldn't he?

9 MR. FINN: Yeah, if he comes here,  
10 obviously he'd be subject to jurisdiction if  
11 he - if he brang an action to enforce the  
12 judgment against Dr. Ehrenfeld here. She  
13 could, at that time, raise her objections to  
14 the jurisdiction of the English court and to  
15 the - the - the English substantive  
16 standards.

17 It is our position that - that  
18 that's the appropriate course, here, that she  
19 should - she should wait to see if there is any  
20 enforcement action. And, as I say, we - her  
21 problem really is that we don't have an incentive  
22 to bring an enforcement action.

23 It really doesn't make any economic  
24 sense for us. It would cost more than you could -  
25 you can recover, and it doesn't make any

1 reputational sense either, because it would  
2 simply provide Dr. Ehrenfeld an additional  
3 platform from which to continue to repeat  
4 her wrong claims about - about my client.

5 JUDGE CIPARICK: He served her here, and  
6 sent correspondence to her here, in  
7 relation to the English action, correct?

8 MR. FINN: Yes.

9 JUDGE CIPARICK: And you feel that's not  
10 sufficient. What about the posting of his - his  
11 website?

12 MR. FINN: Uh -

13 JUDGE CIPARICK: I mean, that's accessible here  
14 in New York.

15 MR. FINN: Right. The - the website  
16 could be viewed from New York. There is case  
17 law on the jurisdictional effects of websites, to  
18 the effect that a passive website  
19 which simply provides information is not the  
20 transaction of business in New York.

21 You could - there are a couple of  
22 federal cases indicating that a website  
23 that offered products and - and made  
24 sales engaged in transactions, could give  
25 rise to jurisdiction, but not a passive

1 website, which is - which is like an  
2 advertisement that somebody sees in New York.

3 CHIEF JUDGE KAYE: Mr. Finn, if you - if your  
4 client brought suit to enforce the judgment here,  
5 you would also run the risk that you would find  
6 the judgment not enforceable.

7 MR. FINN: Correct.

8 CHIEF JUDGE KAYE: Isn't that correct?

9 MR. FINN: Correct. I mean, we  
10 agree that all the existing case law  
11 indicates that an English judgment is not  
12 enforceable in the United States, for public  
13 policy reasons, and to our knowledge,  
14 there's never been an English judgment enforced  
15 in the United States.

16 We haven't been able to find  
17 any reported opinions, and - and neither has  
18 has the plaintiff -

19 CHIEF JUDGE KAYE: Isn't there something  
20 discomfiting and anomalous here, to allow this  
21 kind of sword of Damocles, as Mr. Kornstein calls  
22 it, to hang over the head of someone here,  
23 that you know would not be enforceable here?

24 MR. FINN: Well, he - he complains that,  
25 you know, we've failed to voluntarily give up

1 any possibility of ever enforcing this cause  
2 of action. But, again,

3 CHIEF JUDGE KAYE: You seem to be  
4 acknowledging that.

5 MR. FINN: Well, we - we - the Second  
6 Circuit actually asked us, the Second  
7 Circuit was a little - little puzzled at this  
8 case, and - and said, "Well, will you  
9 agree to waive your right to ever enforce this -  
10 this claim?"

11 And, we sent in a letter that's -  
12 that's part of the record here in which we said  
13 that, you know, we'd be happy to do it, in  
14 the context of a settlement in which Dr.  
15 Ehrenfeld agrees to set the record straight.

16 CHIEF JUDGE KAYE: But you acknowledge that  
17 the judgment wouldn't be enforceable here. It  
18 would be against public policy. You said that a  
19 moment ago.

20 MR. FINN: I - I - it would  
21 certainly be an uphill battle. Now, our other  
22 problem with simply, unilaterally giving it  
23 up is that - that Dr. Ehrenfeld has really very  
24 vigorously publicized this dispute and this  
25 case, and we're concerned that if we simply give

1 it up that this will be publicized as some  
2 kind of vindication of - of her position and of  
3 her journalism. And it would be another  
4 opportunity to cause reputational damage to our  
5 client.

6 As - as the Court, I think,  
7 appreciates, the plaintiff here is  
8 relying on a - a lawsuit, not a business  
9 transaction, that occurred in London, not New  
10 York, that is alleged to support, Mr. bin  
11 Mahfouz's business interests in London and not  
12 New York. This - this doesn't, this  
13 doesn't really provide any basis, any - any hook  
14 into 302(a)(1) at all.

15 CHIEF JUDGE KAYE: How long before the  
16 institution of the lawsuit did he give up his -  
17 did he have two residences here? How long -

18 MR. FINN: He's - he still has the  
19 - you're talking about the - the condominium  
20 apartments? It was not very long before the  
21 lawsuits that those were sold.

22 CHIEF JUDGE KAYE: I bet he regrets that.

23 MR. FINN: [LAUGHS]

24 CHIEF JUDGE KAYE: [LAUGHS]

25 MR. FINN: Perhaps. The - the

1 plaintiff's argument here really relies on  
2 the notion that Mr. bin Mahfouz can somehow  
3 project himself into New York, within the terms  
4 of this Court's decisions in - in Parke-Bernet,  
5 and, more recently, the Deutsche Bank case. But  
6 those cases involve parties who communicated into  
7 New York over the phone, or through the Internet,  
8 and, through those communications, created an  
9 agreement from which the claim arose.

10 The Court found, in those cases,  
11 that the parties had projected themselves into  
12 New York for the purpose of conducting a business  
13 transaction, but we don't have any of that  
14 here. Mr. bin Mahfouz conducted a litigation in  
15 England designed to protect his - his interests  
16 and reputation in England, which has affected Dr.  
17 Ehrenfeld as a defendant in New York.

18 JUDGE CIPARICK: So none of the emails that  
19 he sent to her can be counted as - as transacting  
20 business?

21 MR. FINN: No. There - there's a  
22 fair amount of case law, and I - I - if you look  
23 at - at our brief, I think, at, - it's at  
24 footnote 25 at - at page 41, there's a number of  
25 cases which discuss the sending of

1 communications into the jurisdiction.

2 And these cases uniformly find that,  
3 you can't base (a)(1) jurisdiction simply on  
4 such communications. They don't constitute the  
5 transaction of business; they're not - they're  
6 not deemed even purposeful activity in New York.  
7 It's not the kind of act by which a defendant  
8 purposefully avails itself of the privilege of  
9 conducting activities within the state.

10 JUDGE CIPARICK: And what about the actions of  
11 the process server, the alleged actions of the  
12 process server?

13 MR. FINN: Right. I would  
14 suggest that the Court should look, also, at the  
15 affidavit that was submitted by the process  
16 server. The process server submitted an affidavit  
17 in which he explained that he had a very  
18 different view of what happened.

19 But in addition, he makes clear  
20 that he didn't even have any instructions  
21 from the lawyers. The lawyers never talked to  
22 him. So he's not an agent of Mr. bin Mahfouz  
23 in any respect. And - and even - even if  
24 those actions occurred, it isn't the transaction  
25 of business.

1 CHIEF JUDGE KAYE: Mr. Finn, you - you  
2 acknowledge that this is not the only time  
3 this has happened, the only - this is - I - I  
4 heard the figure 30 times, that your client  
5 secured judgments in London?

6 MR. FINN: Not - not judgments, but I  
7 think what plaintiff is counting is the number of  
8 times in which, a newspaper or a publication  
9 has made a retraction in response to a  
10 letter sent by counsel for Mr. bin Mahfouz.

11 So, yeah, it's - it's - these - these  
12 kinds of claims are - are exceedingly defamatory,  
13 and they get spread very quickly, and it has been  
14 a major effort to try to - to address them, to  
15 try to bring it to the attention of  
16 those who've published them and, in every  
17 instance really but this one, a  
18 retraction was ultimately given.

19 CHIEF JUDGE KAYE: Thank you, Mr. Finn.  
20 Mr. Kornstein?

21 MR KORNSTEIN: Very quickly, going  
22 back to those two apartments, while they were  
23 sold shortly before we brought our lawsuit, they  
24 weren't sold until after Mr. Bin Mahfouz  
25 sued Ms. Ehrenfeld in the U.K. One might

1 speculate as to the timing of the sale; they were  
2 for investment purposes here, and, of course, by  
3 selling them after he sued her in England, he  
4 could say now they didn't exist at the time that  
5 we sued. So -

6 JUDGE GRAFFEO: How do - how do you distinguish  
7 the Yahoo! case?

8 MR KORNSTEIN: Your Honor, we - one of  
9 the most memorable and colorful phrases in my  
10 adversary's brief was when he said that  
11 because the Yahoo! case relied on a  
12 California statute, it was like comparing New  
13 York apples and California oranges.

14 This is a New York apple. This is a  
15 California orange. They are not identical. They  
16 are not congruent. But they are similar. They are  
17 spheres of approximately the same size. They are  
18 both edible fruits. My point is that, while they  
19 may not be the same for every purpose, they can  
20 be compared. They can be compared. So that while  
21 we have a -

22 JUDGE GRAFFEO: The cease-and-desist letter was  
23 insufficient in Yahoo! correct?

24 MR KORNSTEIN: By itself, what - what  
25 the Yahoo! en banc decision said that the

1 combination of the cease-and-desist letter plus  
2 the service of process by a marshal plus the  
3 refusal of the plaintiff in France,  
4 the French, the defendant in the case, in  
5 California - to withdraw the judgment.

6 In other words, allowing or - the  
7 possibility to enforce the judgment, involving or  
8 requiring action in California, taking items off  
9 the Web, did suffice for jurisdiction. The Court,  
10 the en banc decision did find personal  
11 jurisdiction on facts that are less strong than  
12 our facts, less compelling. Here we have -

13 JUDGE CIPARICK: Isn't that because  
14 the California long-arm statute is broader than -  
15 than our statute?

16 MR KORNSTEIN: That's not clear,  
17 Your Honor. The - the statute in California,  
18 of course, is not the very same wording.

19 JUDGE GRAFFEO: It - it encompasses due process  
20 concerns.

21 MR KORNSTEIN: Yes. California has due  
22 process. My suggestion is that 302(a)(1) either does  
23 the same thing or comes absolutely very close,  
24 and that this Court has never said that 302(a)(1)  
25 does not go to the length of due process. The

1 decisions in this Court have focused on the other  
2 provisions in 302, which are, by the legislature,  
3 made separate, separate categories.

4 And certainly, the distinct - the,  
5 discussion in Deutsche Bank, which relies -  
6 and several of the cases rely on the Supreme  
7 Court decisions - come as close as one can  
8 imagine that there is a very significant  
9 overlap between the New York statute and  
10 constitutional due process. So that's not a  
11 significant distinction, I think.

12 The - the one that they talk about  
13 is that the purposeful availment  
14 language is one that we would say is closer to  
15 ours, because the one that the Court relied on in  
16 Yahoo! was an effects one, and they analyzed it  
17 under Calder vs. Jones, the Supreme Court  
18 opinion, there.

19 But Calder vs. Jones is a case that, on  
20 its facts, is very helpful because, again,  
21 the Court said there was jurisdiction over  
22 defendants because all of their activities were  
23 focused on people in California. So we think the  
24 Yahoo! case is the closest case anybody has  
25 found, on the facts, to the precise issue we

1 have. And yes, the statutes are not identical -

2 CHIEF JUDGE KAYE: What's your best precedent?

3 MR. KORNSTEIN: The best precedent is  
4 Yahoo! combined with the flexible approach  
5 that this Court has always used, coupled with,  
6 the attitude toward the first amendment  
7 issues, particularly the way the Court phrased it  
8 in the Immuno case, that New York State is a  
9 cultural center for the nation, and that there is  
10 a strong tradition in this state, in this Court,  
11 to broadly protect those freedoms that are the  
12 matrix of all other freedoms, as Judge Cardozo so  
13 well put it many years ago.

14 But one of the things, Judge  
15 Ciparick when you were going over the website  
16 issues, and the other activities here, let's not  
17 forget that they were talking about pulping  
18 books. The demand letter in January of 2004  
19 demanded the destruction of all copies of the  
20 books. And, in fact, that's what the judgment  
21 calls for; that's what they're trying to do.

22 We're talking about destruction of  
23 books, the equivalent of book-burning, and we  
24 know that in the other case, the Cambridge  
25 University press case that has been getting

1 publicity, that's what happened. Books were  
2 pulped, and letters and errata slips from every  
3 library had to be put in, because of this scheme.  
4 That's what we cannot let happen. That's what we  
5 ask the Court not to let happen.

6 CHIEF JUDGE KAYE: Thank you, Mr. Kornstein.

7 MR. PIGGOTT: Leave the  
8 exhibits, Mr. Kornstein. I'm kidding.

9 MR KORNSTEIN: My lunch.

10 [END OF TAPE]

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