Appeal No. 01-17424

UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

YAHOO!, INC., a Delaware corporation

Plaintiff-Appellee,

v.

LA LIGUE CONTRE LE RACISME ET L'ANTISEMITISME, a French association, and L'UNION DES ESTUDIANTS JUIFS DE FRANCE, a French association,

Defendants-Appellants.

Appeal from the U.S. District Court for the Northern District of California,
San Jose Division
Case No. C 00-21275- JF-RS
The Honorable Jeremy Fogel

BRIEF OF AMICI CURIAE CENTER FOR DEMOCRACY AND TECHNOLOGY, AMERICAN CIVIL LIBERTIES UNION, ET AL. IN SUPPORT OF APPELLEE YAHOO! INC.

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INTERESTS OF AMICI

This brief amici curiae, urging affirmance, is submitted on behalf of various public interest organizations and other associations that engage in online speech and share a deep commitment to ensuring that the Internet achieves its full promise as a revolutionary medium of communication. Amici submit this brief pursuant to the consent of all parties.

Center for Democracy and Technology ("CDT") is a non-profit public interest and Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy, and individual liberty.

American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the Constitutional principles of liberty and equality. American Civil Liberties Union of Northern California is its regional affiliate. The ACLU has been at the forefront in numerous state and federal cases involving freedom of expression on the Internet.

American Booksellers Foundation For Free Expression ("ABFFE") is a not-for-profit organization dedicated to educating members of the book industry and the public about the dangers of censorship and protecting the free expression of ideas. ABFFE members' right to learn about, acquire, and

distribute First Amendment protected books and other materials will be seriously abridged if they must worry about the application of the laws of every country in the world to their U.S.-centered Internet communications.

Computer Professionals for Social Responsibility ("CPSR") is a public interest alliance of information technology professionals and others concerned about the impact of computer technology on society (www.cpsr.org). With over 1,200 members and 23 chapters worldwide, CPSR has played an active role on a variety of public policy issues related to the Internet, including First Amendment matters.

Digital Freedom Network ("DFN") is a New Jersey-based non-profit organization promoting international human rights through the use of Internet technology, including through its Web site at www.DFN.org. It fears that foreign court decisions will stifle human rights organizations, forcing them to comply with the speech restrictions of the world's most repressive countries.

The DKT Liberty Project is a not-for-profit organization that advocates vigilance over government regulation of all kinds, especially restrictions of individual civil liberties, such as the right to free speech. Such restrictions threaten the reservation of power to the citizenry that underlies our constitutional system. This case presents the possibility that

not only our own, but other governments may, attempt to restrict these liberties.

The Electronic Frontier Foundation ("EFF") is a nation-wide, non-profit, civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges industry and government to support free expression, privacy, and openness in the information society and maintains one of the most-linked-to Web sites (www.eff.org) in the world. EFF believes that free speech is a fundamental human right; that free expression is vital to society.

Feminists for Free Expression ("FFE") is a national, not-for-profit organization of diverse women and men sharing a commitment both to gender equality and to preserving the individual's right and responsibility to read, view, or produce expressive materials free from government intervention. FFE believes that the goal of equality is inextricably linked to the values enshrined in our Constitution's free speech clause.

The First Amendment Project is a nonprofit, public interest law firm and advocacy organization dedicated to protecting and promoting freedom of information, expression, and petition. It provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

The Freedom to Read Foundation ("FTRF") is a non-profit membership organization established by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; and to set legal precedent for the freedom to read on behalf of all citizens.

Human Rights in China ("HRIC") is an international non-governmental organization headquartered in New York City that monitors and advocates the implementation of international human rights standards in the People's Republic of China. HRIC posted on its own site a pro-democracy webpage that had been shutdown by Chinese authorities; it also distributes a quarterly journal (China Rights Forum), available online, to thousands of readers worldwide.

Human Rights Watch is a non-profit organization that investigates and reports on violations of fundamental human rights in over 70 countries worldwide. It is the largest international human rights organization based in the United States. Since its inception, it has taken special interest in issues pertaining to freedom of expression.

The Media Institute is an independent, nonprofit research foundation in Washington, D.C., specializing in issues of communications policy. The Institute advocates and promotes three principles: First Amendment

freedoms for both new and traditional media; the maintenance and development of a dynamic communications industry based on competition rather than regulation; and excellence in journalism.

National Coalition Against Censorship ("NCAC"), founded in 1974, is an alliance of 51 national nonprofit organizations, including religious, educational, professional, artistic, labor and civil rights groups, united in the conviction that freedom of thought, inquiry and expression are indispensable to a healthy democracy. The positions advocated by NCAC in this brief do not necessarily reflect the positions of each of its participating organizations.

People For the American Way Foundation is a nonpartisan citizens' organization established to promote constitutional liberties, and has litigated to protect Internet freedoms. With over 500,000 members and supporters nationwide, it works to ensure that the First Amendment provides the foundation for an open and tolerant society and a critical tool for countering hate, discrimination and division.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news editors and reporters dedicated to defending the First Amendment and freedom of information interests of the print and broadcast media since 1970.

The Society of Professional Journalists ("SPJ") is the nation's largest, most broad-based journalism organization. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

VIP Reference (also known as "Dacankao") is the leading Chinese pro-democracy electronic newsletter (www.bigNEWS.org). Based in Washington D.C., it is read by countless online recipients in mainland China and elsewhere. VIP Reference is concerned that if foreign countries are allowed to extend their legal power to the United States, the governments of various repressive nations (especially mainland China) will use these powers to suppress online free speech and persecute dissidents.

PRELIMINARY STATEMENT

Freedom of expression has a long and cherished history in this nation. Words and ideas, even those that challenge our most treasured values, enjoy a measure of protection under our Constitution that is almost unheard of elsewhere. The French judgment that prompted this appeal places our tradition of free expression in jeopardy. It represents a direct attempt by a foreign nation to apply its law extraterritorially to restrict the freedom of expression of U.S.-based online speakers who are protected by the First Amendment. It does so because the Plaintiff, Yahoo! Inc. ("Yahoo!"), has chosen the Internet as its means of communication.

The French court's order is but one example of the sort of judgment that this and other American courts can expect to see with increasing frequency as Internet use expands throughout the world. It is a predictable consequence of the global character of the Internet and the conflicts that inevitably will arise concerning speech protected by the U.S. Constitution but forbidden by repressive laws elsewhere. The court below recognized that enforcement of the French Order would be inconsistent with basic First Amendment principles and refused to permit the seeds of foreign censorship to be planted on U.S. soil. *Yahoo!, Inc. v. La Ligue Contre Le Racisme et*

L'Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001). This Court should affirm that judgment.

Appellants correctly – albeit unwittingly – identify the central issue as whether "worldwide jurisdiction" should extend to any "conduct that has the potential of offending local sensibilities," which is the principal effect of the French Order. Opening Brief for Appellants at 19. Astonishingly, however, they do not challenge the district court's conclusion that the First Amendment prohibits enforcement of that judgment, and their brief mentions the words "First Amendment" only once. Appellants' only disagreement focuses on the lower court's rulings on jurisdiction and justiciability. But above all else, this is a First Amendment case and the United States Constitution provides the essential backdrop against which Appellants' arguments must be considered. First Amendment principles inevitably inform any consideration of Appellants' arguments.

Quite obviously, the United States may not say what the laws of another nation may be. It is one thing, however, for a foreign nation to use its authority to silence or regulate speakers within its borders. It is quite another for an American court to become complicit in such censorship. To open the door to foreign restrictions on U.S. speakers even the slightest crack would allow numerous restrictions on speech that would never be

permitted if initiated in this country and would undermine First Amendment protections for Internet speech. This door must be kept closed, and closed tightly, both by refusing to enforce such judgments and by affirming declaratory rulings, like the one below, to preclude their *in terrorem* effects.[1]/

ARGUMENT

I. ENFORCEMENT OF THE FRENCH COURT ORDER IN THE UNITED STATES WOULD FUNDAMENTALLY CHANGE THE NATURE OF THE INTERNET AS A MEDIUM OF FREE EXPRESSION

A. American Courts Have Recognized the Importance of the Internet as a Unique New Medium of Communication

In the six short years between 1996 and the present, U.S. courts have been presented with a number of significant cases involving attempts to restrict information available on the Internet and World Wide Web. This growing body of law required courts to devote significant attention to the nature of the Internet as a medium of communication and to assess its

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[1]/ Amici do not contend that foreign judicial resolution of issues that are subject to international treaties and conventions, such as disputes over the infringement of intellectual property rights arising out of the Internet, would be unenforceable in United States courts where such enforcement is consistent with the Constitution. Such disputes raise substantially different issues than those raised by the case at bar and this brief does not address those issues.

importance to the American system of free expression. The courts have been emphatic that the Internet is entitled to the highest level of protection and that attempts to censor its content or silence its speakers are to be viewed with extreme disfavor. [2]/

These judicial assessments of the Internet as a vital medium of communication, and the courts' conclusions about its protected constitutional status are predicated on "the unique factors that affect communication in the new and technology-laden medium of the Web." *Reno II*, 31 F. Supp. 2d 473, 495 (E.D. Pa. 1999). The Internet is a source of information as "'diverse as human thought.'" *Reno I*, 521 U.S. at 851, 852 (quoting district court, 929 F. Supp. 824, 842 (E.D. Pa. 1996)). It has been

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[2]/ *See, e.g., Ashcroft v. Free Speech Coalition*, ___ U.S. ___, 2002 WL 552476 (2002), *Reno v. ACLU*, 521 U.S. 844 (1997), *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000) (Table), *aff'g*, 55 F. Supp. 2d 737 (E.D. Mich. 1999) (preliminary injunction); *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000) ("*Reno II*"), *cert. granted*, 532 U.S. 1037 (2001); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *American Booksellers Foundation for Free Expression v. Dean*, No. 1:01-C-46 (D. Vt. April 18, 2002); *ACLU v. Napolitano*, Civ. 00-505 TUC ACM (D. Ariz. Feb. 21, 2002); *PSINet, Inc. v. Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001) (permanent injunction); *Cyberspace Communications, Inc. v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001) (permanent injunction); *PSINet, Inc. v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000) (preliminary injunction); *American Libraries Ass'n. v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), *aff'd*, 521 U.S. 1113 (1997).

characterized as "the most participatory form of mass speech yet developed." *Reno I*, 929 F. Supp. at 824 (Dalzell, J.). In "the medium of cyberspace . . . anyone can build a soap box out of web pages and speak her mind in the virtual village green to an audience larger and more diverse than any of the Framers could have imagined." *ACLU v. Reno II*, 31 F. Supp. 2d at 476. The Internet "may well be the premier technological innovation of the present age." Pataki, 969 F. Supp. at 161.

A key characteristic that is relevant here is the global nature of the medium. The Internet makes information available "'not just in Philadelphia, but also in Provo and Prague.'" *Reno I*, 521 U.S. at 854 (quoting 929 F. Supp. at 844). Cyberspace is located in no particular geographical location and has no centralized control point and is available to anyone, anywhere in the world with access. *Id.* at 851. It is "ambient – nowhere in particular and everywhere at once." *Reno II*, 217 F.3d at 169 (quoting Doe v. Roe, 955 P.2d 951, 956 (Ariz. 1998)). This characteristic makes geography "a virtually meaningless construct on the Internet." Pataki, 969 F. Supp. at 169.

Yahoo! epitomizes the type of worldwide communication made possible on the Internet. Although its services are in English and are hosted entirely on servers located in the U.S., its home website at

http://www.yahoo.com is accessible globally, as are all Internet sites. It is this characteristic of Internet communication – that the Yahoo! U.S. site can be reached by French citizens – that is the basis of the legal dispute in this case.

B. Other Nations Have Adopted a Very Different Approach to Freedom of Expression on the Internet

Recognizing the essential character of the Internet as a global medium, American courts overwhelmingly have rejected attempts to censor it. This is not true elsewhere. Other nations have imposed controls on the Internet intended to silence disfavored expression originating within their borders and to keep out disfavored expression originating abroad. At least 59 different countries limit freedom of expression online. [3]/

When nations restrict their own citizens' access to news, information, or ideas from abroad, the impact of their repressive policies remains localized. However, when nations seek to control content on the Internet by applying their domestic laws extraterritorially to speech originating in the United States, the broader threat to freedom of expression is palpable, as the following examples illustrate:

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[3] / Reporters Sans Frontieres, ENEMIES OF THE INTERNET 5 (2001) ("ENEMIES OF THE INTERNET"); *see also* Douglas Sussman, CENSOR DOT GOV: THE INTERNET AND PRESS FREEDOM 2 (2000) http://www.freedomhouse.org/pfs2000/sussman.html.

China. The Peoples' Republic of China severely restricts communication via the Internet, including all forms of dissent and the free reporting of news. The so-called "Measures for Managing Internet Information Services," prohibit private websites from publishing "news" without prior approval from Communist officials. [4]/ Another set of laws, known as the "The Seven No's," bars the publication of materials that negate "the guiding role of Marxism, Leninism, Mao Zedong and Deng Xiaoping's theories, [g]oes against the guiding principles, official line or policies of the Communist Party," or "violates party propaganda discipline." Also banned is "content that guides people in the wrong direction, is vulgar or low." [5]/

Disturbingly, Chinese officials are trying to stop online protest messages available on overseas websites, particularly those located in the

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[4]/ *See* Managing Internet Information-Release Services, P.R.C. Ministry of Information Industry Regulation, Nov. 7, 2000; *see also China Issues Regulations on Managing Internet Information-Release Services*, CHINA ONLINE, Nov. 13, 2000. The Chinese government has since issued additional rules barring press coverage of certain subjects, such as Taiwan and Tibet. *Beijing Reins in Media with New Rules,* STRAITS TIMES, Feb. 25, 2002 <http://www.asiamedia.ucla.edu/Weekly2002/02.26.2002/China.htm>. Other restrictions target various disfavored groups, such as the Falun Gong spiritual movement. See *China Passes Internet Security Law*, CHINA ONLINE, Dec. 29, 2000.

[5]/ See You Don't Say: China Forbids Publication of Seven Types of Content, CHINA ONLINE, Aug. 13, 2001.

United States, from which so much pro-democracy speech emanates. [6]/ Such restrictions pose a particular threat to groups like Amici VIP Reference and Human Rights in China, who have been directly affected by these laws. [7]/ If U.S. courts begin enforcing foreign speech standards like the French law that gave rise to the judgment against Yahoo!, Chinese authorities are likely to follow a similar course in the hope of silencing other pro-democracy speech originating in the United States. Indeed, Beijing has already imposed regulations that force United States companies doing business in China to censor their websites. [8]/

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[6]/ See Sussman, supra, at 2-3.

[7]/ VIP Reference is the leading Chinese pro-democracy electronic newsletter. Based in Washington D.C., it is read by countless individuals in mainland China. *See* Complete Archives of Dacankao Daily News (visited Mar. 23, 2001) <http://www.bignews.org>. Similarly, Chinese government agents shut down Xinwenming, a China-based pro-democracy website. *Xinwenming* (last visited Feb. 27, 2001) <http://www.hrichina.org/Xinwenming/index.htm>. More recently, Chinese agents shut down a number of computer bulletin boards, including Tianya Zongheng, which previously posted vigorous discussions of various political events. See *Authorities Close Down Web Sites for Opposition Publications*, CHINA NEWS DIGEST, Sept. 3, 2001 <http://www.cnd.org/Global/01/09/03/010903-0.html>.

[8] / See, e.g. Joanne Lee-Young & Sharon Walsh, *Beijing Backs Down on School Explosion Story*, THE INDUSTRY STANDARD, Mar. 16, 2001 at <http://www.thestandard.com/article/display/0,1151,22915,00.html>; *Beijing Accused of School Blast Cover-up,* BBC NEWS, Mar. 9, 2001, available at <http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1210000/1210522.stm>; HUMAN RIGHTS WATCH, CHINA

Singapore. The Singapore Broadcasting Authority ("SBA") maintains strict control over free speech activities of that country's Internet users. It regulates access to Internet content by licensing both domestic websites and ISPs and requires service providers to block access to web pages that, in the Government's view, undermine public security, national defense, racial and religious harmony, and public morals.[9]/ In July 2001, the government of Singapore imposed new restrictions on political content, which led at least one organization, Sintercom, to shutdown its online activities. [10]/

Saudi Arabia. Saudi Arabia bans publishing or accessing online expression that would be protected in this country. "Anything contrary to the state or its system;" "[n]ews damaging to the Saudi Arabian armed forces;" "[a]nything damaging to the dignity of heads of states;" "[a]ny false information ascribed to state officials;" and "[s]ubversive ideas;" are all

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HUMAN RIGHTS UPDATE 4 (2002), available at <http://hrw.org/backgrounder/asia/china_update.htm> .

[9] / U.S. Dept. Of State, Country Reports On Human Rights Practices 2001 (2002).

[10] / *Id.*; see also *Singapore Net Law Dismays Opposition*, BBC NEWS, Aug. 14, 2001, available at <http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1490000/1490425.stm>; John Aglionby, *Singapore Plans Purge of Net Politics*," THE GUARDIAN, July 27, 2001, available at <http://www.guardianunlimited.co.uk/internetnews/story/0,7369,528129,00.html>.

prohibited. [11]/ All 30 of the country's ISPs are linked to a set of central servers configured to block access to "sensitive" sites that might violate "the social, cultural, political, media, economic, and religious values of the Kingdom." [12]/ Several key overseas websites have received special scrutiny and blocking, including the Movement for Islamic Reform in Arabia – a group based in England. Saudi Arabian authorities have also issued a *fatwa* against Pokémon, claiming that the popular children's games and cards possess the minds of children while promoting gambling and Zionism. [13]/

Syria. Syria bans much expression on the Internet, including statements that endanger "national unity" or divulge "state secrets" – categories that include pro-Israeli speech. [14]/ Syrian citizens can be jailed

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[11]/ Saudi Internet Regulations, Saudi Arabia Council of Ministers Resolution (Feb. 12, 2001) <http://www.al-bab.com/media/docs/saudi.htm>; *see also Losing the Saudi Cyberwar,* THE GUARDIAN, Feb. 26, 2001 <http://www.guardianunlimited.co.uk/elsewhere/journalist/story/0,7792,443261,00.html>.

[12] / Human Rights Watch World Report 1999: FREEDOM OF EXPRESSION ON THE INTERNET, <http://www.hrw.org/hrw/worldreport99/special/internet.html>.

[13] / *See Adieu Pikachu*, ABCNEWS.COM, March 26, 2001 <http://more.abcnews.go.com/sections/world/dailynews/pokemon010326.html>.

[14] / *See* Syria Const., art. XXXXII; ENEMIES OF THE INTERNET, *supra*, at 101.

for sending e-mail overseas without government authorization. [15]/ The only Internet service provider in Syria is government-run, and it conducts intensive surveillance of communications and heavily blocks unauthorized content. [16]/

The foregoing examples of censorship are particularly stark. But even democratic states sometimes restrict more expression than is acceptable under the First Amendment:

Australia. Under Amendments to the Broadcasting Services Act, Australian-based content hosts are required to deny access to sites lacking content ratings or that are X-rated. Additionally, the scheme is designed to deny Australian minors access to any "R-rated" websites. [17]/ The list of subjects considered "unsuitable" for minors includes suicide, crime, corruption, marital problems, emotional trauma, drug and alcohol dependency, death and serious illness, racism, and religious issues. [18]/

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[15]/ *Id*.

[16] / ENEMIES OF THE INTERNET, *supra*, at 101-102.

[17] / Broadcasting Services Act, 1992 (amended 1999), part 15, § 216B, sched. 5, part 3, div. 1 (Austl.).

[18] / *See*, *e.g*., Guidelines for the Classification of Films and Videotapes, Austl. Office of Film and Literature Classification Regulation, Sept. 18, 2000.

Italy. Italy restricts both online and offline speech in various ways. The Italian constitution contains broad language that forbids "[p]rinted publications, performances, and all other exhibits offensive to public morality." [19]/ This heightened ability to regulate speech gains added significance in light of a court decision asserting authority to shut down foreign websites that can viewed in Italy. [20]/ The court noted that "the use of the Internet embodies one of the cases of aggravation described in Article 595 of the penal code," and that in this case "the sender deserves to be meted a more severe form of punishment." [21]/ The court's decision may well have been influenced by the fact that the speech at issue contained not only statements about a private party, but also "extremely negative defamatory opinions" about "the work of the Italian judicial authorities." [22]/

Sweden Swedish laws ban several types of Internet speech, including "illegal description of violence" and "racial agitation." [23]/ These strictures

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[19] / Italian Const. art. XXI, § 6.

[20] / *In the Matter of Moshe D.,* Italy. Cass., closed session, Nov. 17-Dec. 27, 2000, Judgment No. 4741.

[21] / *Id*.

[22] / *Id*.

[23]/ Lag (1998:112) om ansvar för elektroniska anslagstavlor [Act (1998:112) on Responsibility for Electronic Bulletin Boards], Art. V, § 1

require the proprietors of "electronic bulletin boards" to remove or make inaccessible such content. [24]/ In March 2002, a Swedish court applied these rules to the website of the country's biggest newspaper, *Aftonbladet,* and fined the website's editor for anonymous statements posted to the newspaper's online comment forum.[25]/

Just as the Internet has globalized speech, it carries the potential to universalize the reach of speech-restrictive laws. Thus, the question presented here has significance not just for Yahoo! It is an issue of moment to all U.S.-based Internet speakers who depend upon the First Amendment for protection.

C. Recognizing the French Court Judgment Would Undermine Domestic Protection for Internet Communication

Granting recognition to the French court's judgment would have practical and legal ramifications that extend far beyond one nation's law or a single court order. The conclusion that the French Order may be enforced in

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(1998) (Swed.), available at <http://dsv.su.se/jpalme/society/swedish-bbs-act.html>.

[24]/ *Id.*

[25]/ See Drew Cullen, *It's Bloody Hard to Run a Forum (in Sweden)*, THE REGISTER (UK), March 8, 2002 <http://www.theregister.co.uk/content/6/24352.html>.

the United States would establish an international regime in which any nation would be able to enforce its legal and cultural "local community standards" on speakers in all other nations. In such a regime, Internet Service Providers and content providers would have no practical choice but to restrict their speech to the lowest common denominator in order to avoid potentially crushing liability.

The impact of such a lowest common denominator approach is measured not by counting the number of nations that already have sought to apply their laws beyond their borders (although that number is growing, as noted above). Rather, it is determined by assessing the practical effects on website operators. They will face a daunting task to the extent they must take measures to disable access to any information that may be illegal in foreign countries.

In the international arena, inconsistent regulation of Internet content acts like a "customs dut[y]." *Pataki*, 969 F. Supp. at 174. A White House report on electronic commerce called for a minimum of government regulation internationally and warned that content regulation "could cripple the growth and diversity of the Internet." It described content regulations as non-tariff trade barriers. White House, A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE 18 (July 1997). Similarly, the U.S. Department of

Commerce has found that "[f]ull realization of the economic promise of information technology depends on the development of the same safeguards and predictable legal environment that individuals and businesses have come to expect in the offline world. U.S. Dep't of Commerce, DIGITAL ECONOMY 2000, at 22 (Dec. 2000).

The French court reasoned that requiring Yahoo! "to extend its ban to symbols of Nazism" would satisfy "an ethical and moral imperative shared by all democratic societies," and that restrictions on Yahoo!'s United States operations are necessary to enforce a "simple public morality." (ER:138) Whether or not all nations share a belief in the evils of Nazism – a point not in dispute here – the critical issue in this case is that all nations do not agree that there is "an ethical and moral imperative" to censor disfavored speech. More importantly, enforcing matters of "public morality" is not so simple as the French Order assumes. The legal principle upon which the French Order is based is not confined to Nazism or to other issues in which values presumably are "shared." Its reasoning would permit enforcement of any nation's limitations on Internet speech, regardless of the extent to which such restrictions undermine human rights.

Amici believe that freedom of expression is a fundamental human right and disagree strongly with policies that deny individuals the right to

voice their own dissent or to hear a competing point of view. While some nations have made these policy choices, they may not be permitted to export them, thus undermining freedom of expression in the rest of the world. Yet that is the inevitable result if foreign judgments restricting free speech are applied extraterritorially.

Here, for example, the French Order would have a dramatic impact if enforceable in this country. Yahoo! would be forced to alter the architecture of its U.S. servers to block the offending material. And if French law can be enforced here, Yahoo! could likewise be required to block access to information that "sabotages national unity" in China, undermines "religious harmony and public morals" in Singapore, offends "the social, cultural, political, media, economic, and religious values" of Saudi Arabia, fosters "pro-Israeli speech" in Syria, facilitates viewing unrated or inappropriately rated websites in Australia, or makes available information "offensive to public morality" in Italy – just to name a few examples. Under such a regime, U.S. courts would become vehicles for enforcing foreign speech restrictions on U.S. speakers. Such a rule is fundamentally inconsistent with the First Amendment and with U.S. public policy.

II. ENFORCEMENT OF THE FRENCH JUDGMENT WOULD BE REPUGNANT TO PUBLIC POLICY

Judgments of foreign courts are not entitled to automatic recognition or enforcement in American courts. *Wilson v. Marchington*, 127 F.3d 805, 808 (9th Cir. 1997). Whether the forum court will honor a foreign judgment is determined by principles of comity. *Id.* at 808. Among these is the rule that a court need not enforce a foreign judgment if to do so will offend the public policy of the forum state. *Ackermann v. Levine*, 788 F.2d 830, 837 (2d Cir. 1986); *Laker Airways Ltd v. Sabena, Belgian World Airlines*, 731 F.2d 909, 929, 931, 937, 943 (D.C. Cir. 1984); *Yuen v. U.S. Stock Transfer Co.*, 966 F. Supp. 944, 948 (C.D. Cal. 1997); *see Hilton v. Guyot*, 159 U.S. 113 (1895) (outlining fundamental principles of comity); Cal. Civ. Proc. Code § 1713.4(b)(3) (court need not recognize foreign money judgment based on cause of action repugnant to public policy of state).

A classic example of a judgment that will not be enforced on public policy grounds is a judgment that unconstitutionally impairs individual rights of personal liberty. *Ackermann v. Levine*, 788 F.2d at 841; *see Hilton v. Guyot*, 159 U.S. at 164, 193; *Somportex Ltd v. Philadelphia Chewing Gum Corp*., 453 F.2d 435, 443 (3d Cir. 1971). This includes a judgment based on laws or procedures that do not comport with fundamental First Amendment principles or their state constitutional counterparts. *See, e.g.*,

Matusevitch v. Telnikoff, 877 F. Supp. 1 (D.D.C. 1995), *aff'd on other grounds*, 159 F.3d 636 (D.C. Cir. (1998) (Table); *Bachchan v. India Abroad Publ'ns. Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992). Similarly, judgments cannot be enforced if they violate an explicit public policy expressed by Congress. Here, enforcement of the French Order would violate public policy as expressed in both statutory and constitutional law.

A. Enforcement of the French Judgment Would Violate the First Amendment

The French Order requiring Yahoo! to block access to portions of its website based on its assessment of the "simple morality" of its mandate conflicts with the basic premises of the First Amendment. Our constitutional jurisprudence is based on the understanding that:

> Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis and Holmes, J.J., concurring). *See also United States v. Playboy Entertainment Group*, *Inc*., 529 U.S. 803, 826 (2000) ("The history of the law of free expression is one

of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly."). The conflict with First Amendment policy is especially pronounced with respect to Internet censorship since, as noted above, U.S. courts have decisively invalidated restrictions on Internet speech. *See supra* note 2.

Here, to the extent that French law prohibits the mere viewing of Nazi memorabilia, including such plainly expressive items as books, *see Board of Educ., Island Trees Union Free Sch. Dist. v. Pico,* 457 U.S. 853 (1982), or flags, *see Spence v. Washington*, 418 U.S. 405, 410 (1974), it flies in the face of fundamental principles of free expression. The French law discriminates on the basis of viewpoint by prohibiting expression that presumably evidences approval of the former Nazi regime while nevertheless permitting speech critical of that era. Such viewpoint discrimination is presumptively invalid under the First Amendment. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-829 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

Additionally, by affirmatively ordering Yahoo! to take all necessary measures to ". . . make impossible any access via yahoo.com to the auction service for Nazi merchandise as well as to any other site or service that may

be construed as constituting an apology for Nazism or contesting the reality of Nazi crimes[,]" the French court has imposed a prior restraint on speech, which is also presumptively unconstitutional. *Alexander v. United States*, 509 U.S. 544, 550 (1993); *Wilson v. Superior Court*, 13 Cal. 3d 652, 659, 532 P.2d 116, 120 (1975).

Moreover, this conflict is not limited to the French order *per se*. As noted above, the legal regimes governing Internet speech of many nations are fundamentally at odds with First Amendment jurisprudence. They restrict websites precisely because "the Internet represents a brave new world of free speech," *Blumenthal v. Drudge*, 992 F. Supp. 44, 48 n.7 (D.D.C. 1998), which is the direct opposite of our legal presumptions. Adopting a rule that would apply such rules to U.S. websites simply because the Internet makes them available without regard to international borders would be fundamentally at odds with First Amendment policy.

In a number of cases, U.S. courts have refused to enforce libel judgments based on foreign law because of the First Amendment limits on American libel law imposed by the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). For example, in *Telnikoff v. Matusevitch*, 702 A.2d 230, 238-239 (Md. 1997), the court denied enforcement of a foreign judgment as contrary to public policy embodied in the First

Amendment, even though the allegedly defamatory statements were published only in the LONDON DAILY TELEGRAPH. *See also Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d at 665 (protections of free speech "would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the U.S. Constitution"). Similarly, in *Ellis v. Time, Inc.*, 1997 WL 863267, 26 Media L. Rptr. 1225 (D.D.C. 1997), the court held that applying English law to allegedly defamatory publications in England would violate the Constitution. *Id.,* at *13, 26 Media L. Rptr. at 1234; *see also DeRoburt v. Gannett Co.,* 83 F.R.D. 574, 580 (D. Haw. 1979) (public policy requires application of First Amendment to libel cases brought in U.S.).

In this case, the conflict with the First Amendment transcends mere questions of "public policy;" enforcement of the French Order is directly prohibited by the First Amendment. Ordinarily, the question of whether to deny enforcement to a foreign judgment on public policy grounds is a matter of discretion. *See, e.g.,* Restatement (Third) of the Foreign Relations Law of the United States § 422 (1987); Cal. Civ. Proc. Code § 1713.4(b). The rule is different, however, where enforcement will violate the First Amendment. In such cases, enforcement is constitutionally forbidden. *Matusevitch v.*

Telnikoff, 877 F. Supp. at 4; *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S. 2d at 662; *Ellis v. Time, Inc.*, 1997 W. 863267, at *13, 26 Media L. Rptr. at 1234 (D.D.C. 1997).

B. Enforcement of the French Judgment Would be Repugnant to the Public Policy of the State of California

The conflict between French law and constitutional guarantees of free expression is even more pronounced under article I, section 2(a) of the California Constitution, which has long been held to be broader and more protective than the First Amendment. *Dailey v. Superior Court*, 112 Cal. 94, 97-98, 44 P. 458, 459-460 (1896); *accord*, *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 491, 12 P.3d 720, 735 (2000) (and cases cited therein); *Wilson v. Superior Court*, 13 Cal. 3d at 658, 532 P.2d at 720. Its language not only prohibits censorship, but affirmatively establishes a right to speak out and publish "on all subjects." *See Gerawan*, 24 Cal. 4th at 492, 12 P.2d at 735 (quoting Cal. Const. art. I, § 2a).

Enforcement of the French judgment would, at a minimum, require the validation of a prior restraint that would plainly violate both the federal and state constitutions if issued by a California court. It would also impose a monetary judgment representing the fines ordered by the French court for Yahoo!'s failure to implement that restraint. Such a judgment is completely

at odds with California's strong public policy protecting the expression of all points of view.

C. Enforcement of the French Judgment Would be Repugnant to the Public Policy of the United States as Expressed by Congress

It is the statutory policy of the United States that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Section 230 of the Communications Act establishes the clear policy that the public interest is best served by "promot[ing] the continued development of the Internet and other interactive computer services," 47 U.S.C. § 230(b)(1), and by "preserv[ing] the vibrant and competitive free market" for these services, "unfettered by Federal or State regulation." *Id*. § 230(b)(2). Accordingly, Congress has created "a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Just as with the cases cited above regarding Internet censorship, U.S. courts have applied this statutory immunity broadly. [26]/

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[26]/ *Zeran,* 129 F.3d 327; *accord Ben Ezra, Weinstein, & Co. v. America Online, Inc.*, 206 F.3d 980, 984-85 (10th Cir. 2000).

Such immunity from liability for third-party content is not the international norm. In *Godfrey v. Demon Internet, Ltd*., 3 ILR (P&F) 98 (Q.B. 1999), for example, an English court held that an ISP could be held responsible for defamatory postings by a third party to the extent it made newsgroups containing the postings available. The court rejected the U.S. policy embodied in Section 230, noting that "[t]he impact of the First Amendment has resulted in a substantial divergence of approach between American and English defamation law." *Id*.

The French Yahoo! Order does not simply create an "incentive" for self-censorship; it absolutely requires it. Giving effect to the French judgment – and, by extension, to all of the judgments from around the world that will undoubtedly follow in its wake – will strip the Internet of its hallmark characteristic as a "forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *See* 47 U.S.C. § 230(a)(3). It will eviscerate the protection for this "extraordinary advance in the availability of educational and information resources to our citizens" *id.* § 230(a)(1), that Congress so clearly intended to provide. Because that result must inevitably frustrate "Congress' desire to promote unfettered speech on the Internet," *Zeran* 129 F.3d at 334, the French judgment cannot be enforced.

III. A REFUSAL TO CONSIDER THE MERITS OF THIS ACTION WILL IMPERMISSIBLY CHILL PROTECTED SPEECH

A refusal to adjudicate the enforceability of the French court's judgment will, in and of itself, undermine important First Amendment values. The danger of leaving the question unresolved is, of course, the danger of self-censorship, "a harm that can be realized even without an actual prosecution." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988). "The sword of Damocles causes harm because it hangs, not necessarily because it drops." *PSINet Inc. v. Chapman*, 167 F. Supp. 2d 878, 888 (W.D. Va. 2001). Allowing LICRA to bide its time as to whether or when it will seek to enforce its judgment puts Yahoo! "between the Scylla of intentionally flouting [the French court's order] and the Charybidis of foregoing what [it] believes to be constitutionally protected activity . . . ." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974). In the end, "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). Accordingly, this Court has recognized that the chilling effect of leaving the constitutional question unresolved makes a case justiciable. *LSO, Ltd. v. Stroh*, 205 F.3d 1146,1155 (9th Cir. 2000); *Bland v. Fessler*; 88 F.3d 729, 736-37 & n.11 (9th Cir. 1996); *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1057-58 (9th Cir. 1995).

Yahoo!'s actions here may be a good case in point. Because Yahoo! continues to allow the auction of Nazi stamps and coins and to allow access to significant amounts of speech that may fall within the terms of the French court's order, *see Yahoo!,* 169 F. Supp. 2d at 1185 nn. 3 &4; Appellee's Answering Brief at 14-15, Appellants may yet seek to enforce the Order in this country. Nevertheless, Yahoo! significantly changed its auction policy in the wake of the French order, and now prohibits the auctioning of items that glorify or are associated with groups known for their hateful or violent positions such as the Nazis. *See Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d at 1185. Although Appellants denigrate Yahoo!'s change in policy as "nothing more than a public relations decision," Appellants' Br. at 34, this action eliminated much of the material from the service that gave rise to the French litigation.

The power of its outstanding judgment to influence Yahoo!'s exercise of its First Amendment rights has not been lost on Appellants. They profess to be "satisfied" with Yahoo!'s "compliance" yet refuse to take the definitive steps necessary to remove the threat to Yahoo!'s First Amendment freedoms created by the ambiguity of a draconian judgment whose enforcement in the U.S. continues to be a threat. LICRA may not have it both ways. Yahoo! is entitled to have its claim adjudicated.

CONCLUSION

This is a pivotal time in the development of the Internet. Not only is the technology evolving before our eyes, but the law surrounding this new medium is developing as well. In the United States, courts have been uniform in supporting the Internet as a preserve for free expression, and in striking down restrictions on speech. This case, however, presents this Court with a situation that could undermine the protections of U.S. law and handicap the further development of the Internet. This Court should make clear that efforts to import censorship to the United States through the vehicle of this new medium are repugnant to U.S. law. Respect for the laws of other nations does not require enforcement of judgments in U.S. courts that would undermine longstanding legal and constitutional protections.

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Accordingly, Amici respectfully urge this Court to affirm the decision below.

Dated: May 6, 2002

Respectfully submitted,

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