

Freedom to Read Foundation
REPORT TO COUNCIL

2007 Midwinter Meeting —Seattle, Washington

As President of the Freedom to Read Foundation, I am pleased to report on the Foundation's activities since the 2006 Annual Conference:

You may recall that last year in San Antonio, author Sandra Cisneros generously agreed to appear at a fundraiser for the Freedom to Read Foundation. Her appearance drew an enthusiastic audience and generated much-needed funds and new members for the Foundation. We knew it was a tradition we had to continue.

On Sunday night, January 21, author Chris Crutcher served as the guest of honor at the Foundation's second annual Midwinter Meeting fundraiser. Chris is a remarkable individual who writes with compassion about the lives of young adults. An advocate for the freedom to read, he has stood with and supported teachers and librarians working to keep books—his, as well as others'—on library shelves.

In his time with us, Chris described his experiences as one of the most challenged authors of the past decade, describing the young adults who have come to him to tell him how they have seen their lives in his powerful works of realistic fiction. His stories about a troubled young father and his fond memories of librarian Michael Printz touched us all. Chris then signed books, generously agreeing to stay until he met everyone in the long line of his admirers.

The Freedom to Read Foundation thanks Chris, a member of the Freedom to Read Foundation, for supporting the Foundation's work. We also thank Greenwillow Press, Chris' publisher, who generously donated the books for the event; and thank the Seattle Public Library and its Director, Deborah Jacobs, a Trustee of the Foundation, for donating the space for the event at the extraordinary Main Library. As a result of their generosity, the Foundation now has new members and new funds to sustain its work.

SAFEGUARDING OUR RIGHT TO PRIVACY

Last summer's report described the Freedom to Read Foundation's work in support of the Connecticut librarians who courageously stood up to the FBI by challenging the constitutionality of the National Security Letter (NSL) provision of the USA PATRIOT Act. Ultimately, the government withdrew the NSL served on The Library Connection, resulting in a great victory for

The Library Connection and the library patrons it serves. It is very important to note, however, that by withdrawing the NSL, the government prevented actual review of the NSL statute.

Now, the government has similarly evaded judicial review of the National Security Letter statute by withdrawing the NSL served on the original “John Doe,” the anonymous plaintiff who filed the first lawsuit challenging the constitutionality of the NSL statute in Doe v. Gonzales.

As I reported earlier, the Second Circuit Court of Appeals returned “John Doe’s” lawsuit to Judge Marrero of the Southern District of New York, instructing the judge to reconsider his original opinion that found the use of NSLs unconstitutional in light of the changes to the law following the reauthorization of the USA PATRIOT Act in March 2006. With the assistance of the ACLU and the support of FTRF, “John Doe” refiled his complaint, asking the court to strike down the reauthorized NSL statute on constitutional grounds. Rather than re-litigate the case, the government withdrew the NSL on November 22, 2006. Because the FBI refused to lift the gag order that prevents “John Doe” from disclosing its identity or discussing the NSL, the ACLU continues to challenge the gag order. Briefing is proceeding before the court.

Since the reauthorized PATRIOT Act imposes significant burdens on those who wish to challenge an NSL, it is unlikely we will see an open adjudication of the NSL statute on its own merits in the near future.

Similarly, the lawsuit challenging Section 215 of the USA PATRIOT Act, Muslim Community Association of Ann Arbor v. Gonzales, concluded without any substantive review of the law. After three years of inaction, Judge Denise Page Hood finally ruled the plaintiffs could proceed with their lawsuit, and instructed the plaintiffs to file an amended complaint that addressed the law as reauthorized by Congress in March 2006. On October 27, citing the changes to the USA PATRIOT Act, the ACLU withdrew the lawsuit but vowed to continue monitoring the government’s use of Section 215 for possible civil liberties violations.

We are also involved in a legal battle to preserve the right to read anonymously. Forensic Advisors, Inc. v. Matrixx Initiatives, Inc. seeks to quash a subpoena served on a financial advisor’s newsletter. The plaintiff, Matrixx Initiatives, is demanding the names of the newsletter’s subscribers on the grounds that one or more of the subscribers may be responsible for anonymous Internet posts Matrixx says are defamatory. In September, the Maryland Court of Special Appeals refused to quash the subpoena but held that Timothy Mulligan, the newsletter’s editor and publisher, could assert the news media privilege. Mr. Mulligan, hoping to vindicate both his rights and the rights of his subscribers, petitioned the Maryland Court of Appeals, the highest court in Maryland, and that court has taken up the case. FTRF anticipates joining an *amicus* brief in support of Mr. Mulligan’s effort to protect the privacy of his readers.

Despite these setbacks in the privacy arena, the sea change wrought by the November elections has brought new hope that the deleterious effects on our privacy and our civil liberties resulting from this administration’s use of the USA PATRIOT Act and similar initiatives will be moderated by Congress. Representatives have introduced legislation to assure the right to *habeas corpus*, to regulate and prevent data mining, and to amend and reform the Foreign Intelligence Surveillance Act in order to prevent warrantless wiretapping conducted by the

National Security Agency. It is refreshing to speak about how members of Congress are working to preserve our rights, rather than anticipating future battles against laws that undermine our right to be free from unwarranted government surveillance.

SAFEGUARDING THE RIGHT TO READ FREELY

This fall, the Freedom to Read Foundation joined in three new lawsuits aimed at protecting our rights under the First Amendment:

The first lawsuit, The Local Church v. Harvest House Publishers sought to address the chilling effect of libel litigation on authors and publishers. A religious group called the Local Church filed a libel action against authors John Ankerberg and John Weldon and their publisher, Harvest House, after the Local Church was included in the authors' work, *The Encyclopedia of Cults and New Religions*. The Texas Court of Appeals dismissed the lawsuit after holding that the Local Church's inclusion neither defamed the plaintiff nor provided grounds for a suit, as the determination that a group is a cult depends on an individual's religious beliefs. The Local Church subsequently asked the Texas Supreme Court for review.

FTRF joined the American Association of Publishers (AAP), the American Booksellers Foundation for Free Expression (ABFFE), and the American Association of University Presses (AAUP) to file an *amicus curiae* brief to urge the Texas Supreme Court to uphold the Court of Appeals' decision to dismiss the lawsuit. In December, we were pleased to learn that the Texas Supreme Court denied the Local Church's petition for review, effectively dismissing their lawsuit. The plaintiffs have petitioned for a rehearing, however, and we are waiting for the court's decision on that motion.

The second lawsuit, American Civil Liberties Union of Florida v. Miami-Dade School Board addresses the decision of the Miami-Dade School Board to remove the books *A Visit to Cuba* and *Vamos a Cuba* and all the books in the "A Visit To" series on the grounds the books are educationally unsuitable and offensive to members of Miami's Cuban community. When the district court ruled the removal was unconstitutionally motivated and entered a preliminary injunction ordering the school district to immediately replace the entire series on library shelves, the Miami-Dade School Board appealed the decision to the Eleventh Circuit Court of Appeals. FTRF has joined ABFFE, the Association of Booksellers for Children (ABC), REFORMA, Peacefire, and the National Coalition Against Censorship (NCAC) to file an *amicus* brief urging the Eleventh Circuit to uphold the district court's findings. We are now waiting for the court's decision.

The third lawsuit, Entertainment Software Association et al. v. Hatch, seeks to overturn Minnesota's Restricted Video Games Act, which imposes civil penalties on minors who rent video games rated "AO" or "M" by the Entertainment Software Rating Board (ESRB). The statute also requires retailers to post signs warning minors about the prohibition.

The District Court of Minnesota ruled the law unconstitutional in July 2006. It held that there was no showing that a statute restricting minors' access to violent video games alone would protect children. It also held the statute unconstitutionally delegated the state's authority by

using the ESRB's ratings and unconstitutionally compelled speech by requiring retailers to post signs about the law. When the state appealed to the Eighth Circuit Court of Appeals, the Foundation joined ABFFE, AAP, International Periodical Distributors Association (IPDA), Motion Picture Association of America, Inc. (MPAA), Publishers Marketing Association (PMA), and Recording Industry Association of America (RIAA) to file an *amicus* brief urging the Eighth Circuit Court of Appeals to uphold the district court's decision. We are waiting for the court to schedule oral arguments.

In regard to litigation addressing restrictions on minors' right to access video games, I am pleased to report a successful result in Entertainment Software Association v. Blagojevich. The original lawsuit asked the court to enjoin enforcement of two Illinois statutes limiting the sale and rental of violent and sexually explicit computer and video games to minors. After the federal district court ruled the laws unconstitutional, the Illinois attorney general appealed the decision concerning the Sexually Explicit Video Game Law to the Seventh Circuit Court of Appeals. FTRF filed an *amicus* brief with several of its partners to argue that the law's provisions violate the First Amendment. On November 27, 2006, the Seventh Circuit upheld the lower court's determination that the statute is unconstitutional.

The Foundation is also participating in the following First Amendment actions:

Gonzales v. American Civil Liberties Union (formerly Ashcroft v. ACLU): In June 2004, the Supreme Court issued an opinion upholding the injunction barring enforcement of the Child Online Protection Act (COPA) and returned the lawsuit to the federal district court in Philadelphia for a trial to determine whether COPA's "harmful to minors" restrictions are the least restrictive means of achieving the government's goal of protecting children from seeing sexually explicit materials online, given the ability of parents to purchase and use Internet filtering software. Trial began in October 2006, and the parties presented their evidence regarding the effectiveness of filtering programs for four weeks. We are now waiting for a decision from the court.

Regretfully, the Supreme Court recently upheld a Pennsylvania Department of Corrections policy restricting long-term prisoners' access to newspapers, magazines, and books. In Beard v. Banks, FTRF argued that the prison's policy impermissibly infringed on the First Amendment right of the prisoners to obtain information and the First Amendment right of publishers and writers to freely disseminate their works. By a 6-2 decision issued on June 28, 2006, the Supreme Court held that prison officials had demonstrated adequate support for their policy and that the policy was rationally related to the legitimate penological objectives of prison safety and rehabilitation.

There are two additional lawsuits the Foundation is monitoring due to their importance to the library community. The first, Sarah Bradburn, et al. v. North Central Regional Library District, is the first legal challenge to a library's Internet filtering policies filed since the Supreme Court upheld the Children's Internet Protection Act (CIPA). The complaint, filed by the American Civil Liberties Union of Washington State in November 2006, not only alleges that the library filters Internet content too broadly, but also that the library refuses to unblock its filters when

requested to do so by adult patrons. The library has denied the allegations, and the case is now proceeding before the U.S. District Court in the Eastern District of Washington.

The second lawsuit, Faith Center Church Evangelistic Ministries v. Glover, was filed in July 2004 after a local religious group was barred from using the Contra Costa County (CA) Public Library's meeting room because the group wanted to hold religious services. After the district court ruled the group was likely to succeed on its First Amendment claims and entered a preliminary injunction ordering enjoining the library not to enforce its meeting room policy, the county appealed the decision to the Ninth Circuit Court of Appeals. That court reversed the district court's finding of unconstitutionality on the grounds that the library's policy was reasonable in light of the library's intended use of its public forum. The plaintiffs asked the Court of Appeals for a rehearing on October 3, and their motion is pending before that court.

At this time, FTRF is not a participant in either lawsuit.

SAFEGUARDING INTERNET ACCESS: STATE INTERNET CONTENT LAWS

In the states, the legislatures continue to pass laws criminalizing the publication of Internet content deemed "harmful to minors." The Freedom to Read Foundation actively pursues opportunities to challenge these laws in order to assure the right of individuals to decide for themselves what they read and see on the Internet.

The most pressing lawsuit is filed in Utah, where FTRF is part of a challenge to a Utah statute that extends the state's "harmful to minors" prohibitions to the Internet. In 2005, FTRF joined with ABFFE, AAP, CBLDF, the ACLU of Utah, and several Utah bookstores, Internet providers, and residents to bring the lawsuit, The King's English v. Shurtleff.

On August 25, 2006, the district court enjoined enforcement of the law and gave the state government until November to propose amendments to it that would cure its defects. After examining the state's proposed changes, the plaintiffs concluded the amendments would not cure the law's constitutional defects and sent a letter to the state government demanding that the state comply with outstanding discovery requests. The case is pending before the court.

STATE LEGISLATION

Although we are only a few weeks into the new legislative season, we are seeing several state-level initiatives aimed at restricting the right of library users to access information. Among these is a Virginia bill proposing legislation to implement its own mini-CIPA, requiring libraries to install filters to receive state funding.

State legislatures in three states—Kentucky, Montana, and Missouri—are considering adopting an "Academic Bill of Rights" or "intellectual diversity" provisions that would restrict academic freedom on campus. Utah is considering a new "harmful to minors" statute that would prohibit the distribution of "inappropriate violence" as "harmful to minors." Both New York and Virginia are considering new restrictions on violent video games and video games that contain

racial or religious stereotypes. And South Carolina's legislature is considering a bill that would make it a crime to disseminate profanity to a minor or to use profanity in a public forum.

Finally, Illinois is facing a concerted challenge to the state library confidentiality act, initiated by police officers who believe they should have unfettered access to users' library records, without needing to go to the trouble of obtaining a court order.

FUNDRAISING

I am pleased to report that the Freedom to Read Foundation has new membership brochures reflecting the breadth and depth of its efforts to advance the First Amendment and protect intellectual freedom and privacy in our society. One brochure is for individual members; the second brochure includes information on the Foundation's new "organizational member" category that allows libraries and other institutions to support the FTRF's work at a more substantial level. Increasing organizational membership is a priority this year. Please urge your library, Friends group, business, and other organizations you are affiliated with to join FTRF.

We encourage all our colleagues and friends to become personal members of the Freedom to Read Foundation. Please send a check to:

Freedom to Read Foundation
50 E. Huron Street
Chicago, IL 60611

You also can use a credit card to join the Foundation. Call (800) 545-2433, ext. 4226, or visit us online at www.ftrf.org to use our online donation form.

Respectfully submitted,

John W. Berry
President, Freedom to Read Foundation