

Freedom to Read Foundation

REPORT TO COUNCIL

2004 Annual Conference—Orlando, Florida

As President of the Freedom to Read Foundation, I am pleased to report on the Foundation's activities since the 2004 Midwinter Meeting:

THE USA PATRIOT ACT AND LIBRARY PRIVACY AND CONFIDENTIALITY

The Freedom to Read Foundation (FTRF) regards the protection and preservation of library users' privacy and civil liberties as one of its primary missions. In pursuit of this goal, FTRF joined with the American Booksellers Foundation for Free Expression (ABFFE) and other civil liberties organizations as *amici curiae* in **Muslim Community Association of Ann Arbor v. Ashcroft**, a facial legal challenge to Section 215 of the USA PATRIOT Act, which amends the business records provision of the Foreign Intelligence Surveillance Act to permit FBI agents to obtain all types of records, including library records, without a showing of probable cause. The government filed a motion to dismiss the plaintiffs' complaint, and the District Court heard oral arguments on the government's motion in December 2003. We are awaiting a decision in the case.

FTRF also has joined with ABFFE and the American Library Association (ALA) to file an *amicus curiae* brief in **John Doe and ACLU v. Ashcroft**, the ACLU's constitutional challenge to the PATRIOT Act's expansion of the FBI's authority to use National Security Letters to obtain records without judicial review. The ACLU filed the lawsuit in the Southern District of New York in April, but disclosure of the case is limited due to the secrecy provisions of the PATRIOT Act. Much of the case remains under seal, but the judge has ordered all information about the facial challenge to be filed publicly, including FTRF's *amicus* brief.

The Foundation's efforts to address the USA PATRIOT Act also include supporting legislation designed to scale back portions of the Act and opposing new legislation that poses a potential threat to library users' right to be free from unreasonable government surveillance. FTRF signed a letter (Exhibit I) in support of the "Civil Liberties Restoration Act of 2004" (CLRA; S. 2528), introduced in the U.S. Senate by Senator Kennedy (D-MA) on June 16, 2004. Cosponsors include Senators Leahy (D-VT), Durbin (D-IL), Feingold (D-WI), and Corzine (D-NJ). The CLRA is intended to restore the checks and balances that preserve our First Amendment rights and other civil liberties, and to end the abuse of immigrants and others who come as future citizens and visitors to our country.

FTRF also joined with ALA and numerous other organizations in signing a letter (Exhibit II) opposing H.R. 3179, the “Anti-Terrorism Intelligence Tools Improvement Act of 2003,” which would expand the powers granted to law enforcement under the USA PATRIOT Act.

The Foundation continues to inform and encourage its members and all Americans to support the passage of other bills to amend portions of the USA PATRIOT Act. In particular, the Foundation supports Congressman Bernie Sanders (I-VT) in his efforts to pass the Freedom to Read Protection Act and Senators Feingold, Leahy, Craig (R-ID), and Durbin’s work on behalf of the Security and Freedom Enhanced Act (SAFE). A full listing of pending legislation addressing the problems in the USA PATRIOT Act is appended to this report (Exhibit III).

LITIGATION

As part of its mission to preserve First Amendment freedoms in the library and more generally, the Freedom to Read Foundation participates both as plaintiff and *amicus curiae* in lawsuits designed to defend the right to read and to receive information freely. Since the Foundation last reported to Council, it has joined in the following lawsuits:

City of Littleton, Colo., v. Z.J. Gifts: This lawsuit was filed to determine the extent to which prompt judicial review must be assured following a government body’s refusal to issue a license to an adult-oriented business. The plaintiff, Z.J. Gifts, brought a facial challenge to Littleton’s adult-business licensing ordinance when it opened a retail store deemed by the city to be an adult-oriented business. Z.J. Gifts claimed the law was unconstitutional because the licensing scheme, which operates as a prior restraint on protected speech, fails to assure a prompt and final judicial decision following a refusal to issue a license. The Tenth Circuit Court of Appeals ruled in favor of the plaintiff, finding the challenged portions of the law unconstitutional. The defendant city appealed to the U.S. Supreme Court, which granted *certiorari*. FTRF joined with ABFFE and four other organizations to file an *amicus curiae* brief in favor of the plaintiff. On June 7, 2004, the Supreme Court overturned the initial decision, finding the statute constitutional.

Video Software Dealers Association, et al. v. Maleng: The plaintiffs filed this lawsuit to challenge a Washington State law barring the sale or rental to minors of any video game containing depictions of violence directed against law enforcement officers. FTRF joined with fellow members of the Media Coalition to file an *amicus curiae* brief in support of the plaintiffs. U.S. District Court Judge Robert Lasnik issued a preliminary injunction barring enforcement of the law while the case is before the court. Both parties filed cross-motions for summary judgment, and oral arguments on the motions were held on June 24.

FCC petition for reconsideration: FTRF joined in filing a petition with the Federal Communications Commission (FCC), asking the commission to reconsider and reverse its decision to impose penalties on NBC for airing allegedly indecent comments made by the singer Bono during the 2003 Golden Globe awards. The FCC’s decision reversed its original order in the matter, which did not impose penalties on the network after

concluding that Bono's comment, taken in context, was not indecent or obscene. The petition further urges the FCC to set aside new rules imposing more stringent punishment on broadcasters for indecency. The petition and other documents related to this case can be found at <http://www.fcc.gov/eb/broadcast/plead.html>.

The Foundation is also involved in these ongoing lawsuits:

Ashcroft v. American Civil Liberties Union (formerly ACLU v. Reno): This longstanding litigation challenges the Children's Online Protection Act (COPA), a law that proposes restrictions on Internet content deemed "harmful to minors." A U.S. Supreme Court decision reversed a Third Circuit Court of Appeals ruling that struck down the law, and sent the case back to the Third Circuit for further review. After the Third Circuit once again found COPA an unconstitutional abridgment of speech, the government again sought review of the decision by the Supreme Court. FTRF joined with several other First Amendment groups to file an *amicus curiae* brief supporting First Amendment rights. The Supreme Court heard oral arguments on March 2, 2004, and a decision is expected by the end of June 2004.

Center for Democracy and Technology v. Fisher: The Foundation agreed to provide a grant in support of the Center for Democracy and Technology's legal challenge to a Pennsylvania statute that allows a Pennsylvania district attorney or the Attorney General to require Internet service providers—including libraries—to block access to specified Web sites on the Internet. Before the lawsuit was filed, the state's Attorney General issued hundreds of blocking requests, forcing ISPs to bar access to both targeted and other, wholly innocent Web sites without adequate due process protections, raising serious First Amendment concerns. The federal District Court judge issued a temporary restraining order prohibiting enforcement of the law while the case is pending before the court in Philadelphia. Following a hearing, both parties filed briefs with the court and are waiting for a decision.

United States v. Irwin Schiff, et al.: The Foundation filed an *amicus* brief in this lawsuit after the federal government successfully sought a temporary restraining order against Irwin Schiff and his publisher, Freedom Books, forbidding them to publish Mr. Schiff's book, *The Federal Mafia: How Government Illegally Imposes and Unlawfully Collects Income Taxes*. FTRF's brief opposed the court's prior restraint of Mr. Schiff's book. After a federal judge in Las Vegas upheld the restraining order, Mr. Schiff and the ACLU of Nevada appealed the ruling to the Ninth Circuit Court of Appeals. The Ninth Circuit heard oral argument on February 9, and a decision is pending.

FTRF joined in this case to defend the principle that the First Amendment protects even fringe opinion or belief. Criminalizing advocacy that disputes the constitutionality of income taxes, or which advocates the decriminalization of drugs like medical marijuana, comes close to creating "thought crime." FTRF will continue to join with other organizations to fight the court's order forbidding publication of Mr. Schiff's book.

Yahoo!, Inc. v. La Ligue Contra Le Racisme et L'Antisemitisme is an ongoing case involving criminal charges that have been filed against the CEO of Yahoo! and monetary

penalties assessed in French courts against the company for allowing the sale of Internet auction items and the posting of book excerpts on its Web site that violate French law but are fully protected speech under the American First Amendment. La Ligue Contre Le Racisme et L'Antisemitisme and the French Union of Jewish Students initiated legal action against Yahoo! for hosting pages containing auctions for Nazi and racist memorabilia on U.S. servers that could be accessed by French citizens. The two groups won their initial suit and the French trial court imposed fines against Yahoo!, which the groups tried to enforce. Yahoo! filed suit in the United States to obtain a ruling on the validity of the French court's order in light of its users' First Amendment rights. The district court judge ruled that no other nation's law, no matter how valid in that nation, could serve as a basis for quashing free speech in the United States. The Foundation has filed an *amicus* brief in this case which is now under appeal and pending in the Ninth Circuit Court in California.

The issue—which the Foundation Board discussed at length at this meeting—concerns the ability of other countries in which speech is more restricted than it is in the United States to compel American courts to enforce their judgments against American citizens or companies for expressive behavior that is fully protected in this country. The case has significant implications concerning the nature and the legal implications of cross-boundary Internet traffic. It may also set precedents that could have repercussions for intellectual property rights and treaties, particularly for cases in which American entities are trying to exact protections in countries where U.S. copyright may not be recognized. For librarians committed to the rights of free expression at home—and abroad as embodied in Article 19 of the *Universal Declaration of Human Rights*—these are critical questions.

STATE INTERNET CONTENT LAWS

The Freedom to Read Foundation has participated as a plaintiff in several lawsuits challenging state laws that criminalize the distribution of materials deemed “harmful to minors” on the Internet. **Athenaco, Ltd. v. Cox**, challenging the recent amendment to Michigan's “harmful to minors” statute, is the newest lawsuit filed by the Foundation in partnership with other First Amendment organizations. Joining FTRF as plaintiffs are ABFFE, the Association of American Publishers, and several Michigan booksellers. Both parties filed motions for summary judgment, and the court heard oral arguments on May 17, 2004. A decision is pending.

Shipley, Inc. v. Long (formerly Shipley, Inc. v. Huckabee) is a First Amendment challenge to recent amendments made to the Arkansas “harmful to minors” display statute. FTRF and its fellow plaintiffs filed a motion for summary judgment on July 25, 2003, and oral arguments were heard on December 8, 2003. Subsequently, U.S. District Judge G. Thomas Eisele enjoined enforcement of the challenged provision and certified four questions of law to the Arkansas Supreme Court. The parties are waiting for a decision from that court.

FTRF is monitoring **Southeast Booksellers v. McMasters** (formerly Southeast Booksellers Association v. Condon), a lawsuit filed by members of the Media Coalition to overturn an amendment to the South Carolina “harmful to minors” law that sweeps in

visual matter communicated via the Internet. The government filed a motion for summary judgment, which plaintiffs opposed by filing a brief. Subsequently, Judge Patrick M. Duffy announced he would delay ruling on the motion until the Supreme Court issues its decision in Ashcroft v. ACLU, the COPA lawsuit discussed previously.

ABFFE v. Petro (formerly Booksellers, Inc. v. Taft): The Foundation joined with several other plaintiffs to file this lawsuit to challenge **Ohio's** amendment to its "harmful to juveniles" law. After a federal court blocked the law, the government appealed the decision to the Sixth Circuit Court of Appeals. While the lawsuit was pending before that court, the Ohio legislature amended the law in an attempt to moot the litigation. Subsequently, the Sixth Circuit remanded the case to the trial court for further action. The plaintiffs then filed an amended complaint and a motion for summary judgment before the trial judge. The judge then issued an oral ruling finding for the plaintiffs. His written opinion is expected shortly.

PSINet v. Chapman: FTRF and its co-plaintiffs won this case when the Fourth Circuit Court of Appeals upheld the permanent injunction forbidding enforcement of **Virginia's** Internet content law. The government filed a petition asking for rehearing *en banc* and reargument of the case, but the Fourth Circuit rejected the petition on June 24.

ACLU v. Goddard (formerly ACLU v. Napolitano): **Arizona** amended its new "harmful to minors" statute after a federal district court struck down the law and entered a permanent injunction barring its enforcement. Subsequently, the Ninth Circuit Court of Appeals remanded the suit back to the District Court, where the parties exchanged briefs on the effect of the new statute on the lawsuit. The judge has now issued an order awarding summary judgment to FTRF and its co-plaintiffs.

ABFFE v. Dean: The Foundation is pleased to report that this litigation challenging **Vermont's** amended "harmful to minors" statute has successfully concluded with a finding by the Second Circuit Court of Appeals affirming the District Court's decision to issue a permanent injunction forbidding enforcement of the law against Internet speech.

ROLL OF HONOR AWARD

This year's Roll of Honor Award is presented to June Pinnell-Stephens, a great librarian and steadfast champion of free expression and the First Amendment. Pinnell-Stephens is the Collection Services Manager for the Fairbanks-North Star Borough Library in Fairbanks, Alaska. Pinnell-Stephens first joined the FTRF Board of Trustees of the Freedom to Read Foundation in 1994 and since then has served as both President and Treasurer of the Foundation. The citation recognizing her fine work on behalf of intellectual freedom and libraries is attached to this report (Exhibit IV).

FUNDRAISING

In addition to its litigation and work on behalf of free expression and the freedom to read, the Foundation's Board of Trustees continues to develop new methods of fundraising to support FTRF's efforts on behalf of intellectual freedom and the First Amendment. These

efforts are being developed in coordination with the ALA Development Office to ensure that they do not conflict with similar initiatives being undertaken by the Association and its units and that appropriate donors can be most effectively identified and approached.

Respectfully submitted,

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