

Freedom to Read Foundation

REPORT TO COUNCIL

2007 Annual Conference — Washington, D.C.

As President of the Freedom to Read Foundation, I am pleased to report on the Foundation's activities since the 2007 Midwinter Meeting:

YOUTH AND THE FIRST AMENDMENT

This spring, the trustees of the Freedom to Read Foundation were glad to have two different opportunities to advocate directly on behalf of the right of young persons to exercise their First Amendment freedoms.

The first of these opportunities came in February when FTRF joined with the Student Press Law Center, Feminists for Free Expression, the First Amendment Project, and the Thomas Jefferson Center for the Protection of Free Expression to file an *amicus* brief in the case of Morse v. Frederick. This case, better known as the “Bong Hits 4 Jesus” lawsuit, was filed by Joseph Frederick and his parents after Frederick was suspended from his high school for displaying a banner during the Olympic Torch relay that read “Bong Hits 4 Jesus.” Frederick was not on school property and was not participating in a school activity at the time he raised the sign (although the school district argued it was a school-sanctioned event by virtue of the fact that the students were let out of school and accompanied by teachers).

While the circumstances of this case may amuse us, the stakes were very high. We are seeing more and more school administrators claim the right to regulate student speech—not only speech that takes place on campus, but speech that is unconnected with the student's attendance at or participation in school activities. This lawsuit was the first major case to consider student free speech rights in many years, and we were hopeful the Supreme Court would vindicate the right of young people to voice their ideas in the wider world, without fear of official retribution.

The Supreme Court heard oral arguments on March 19, and handed down a decision yesterday, June 25. The majority of the Court decided against Frederick, overturning the decision of the Ninth Circuit Court of Appeals. In writing the majority opinion, Chief Justice John Roberts considered the content of the banner, claiming that it “promoted illegal drug use and that “failing to act would send a powerful message to the students in [Principal Deborah Morse's] charge.” In a dissent, Justice John Paul Stevens said the majority was “inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs.”

Our second opportunity to defend students' right to read freely came in ACLU of Florida v. Miami Dade School Board, when FTRF filed an *amicus curiae* brief urging the Eleventh Circuit Court of Appeals to uphold a district court's order requiring the school board to return the book *Vamos a Cuba* to school library shelves. The school board voted to remove *Vamos a Cuba* and its English language edition, *A Visit to Cuba*, from all Miami-Dade school libraries last summer after a group of parents objected to the book's portrayal of Cuban society as offensive to the Miami-Dade Cuban community. Subsequently, the district court ruled that the removal was unconstitutionally motivated and entered a preliminary injunction ordering the school district to immediately reinstate the entire *Visit to . . .* series on library shelves. After the Miami-Dade School Board appealed the decision to the Eleventh Circuit Court of Appeals, FTRF joined with the American Booksellers Foundation for Free Expression (ABFFE), the Association of Booksellers for Children, REFORMA, Peacefire, and the National Coalition Against Censorship to file its *amicus* brief supporting young peoples' First Amendment right to access and read books like *Vamos a Cuba* in the school library. On June 6, the Eleventh Circuit heard oral arguments, and we await the court's opinion.

THE FREEDOM TO READ FREELY

Of course, the Foundation remains committed to vindicating everyone's right to read and speak freely. I am very pleased to report to you that once again, a federal district court has struck down the Child Online Protection Act (COPA), a law that regulated and criminalized many kinds of Internet speech otherwise protected by the First Amendment. Following a four-week trial on the issues in Gonzales v. American Civil Liberties Union, Judge Lowell Reed of the U.S. District Court in Philadelphia permanently enjoined enforcement of COPA on March 22, ruling the law facially violates both the First and Fifth Amendments of the Bill of Rights. In so doing, Judge Lowell concluded the regulations imposed by COPA on Constitutionally protected materials deemed "harmful to minors" were overly restrictive, given that parents can use Internet filtering software to block content in their homes. In overturning COPA, Judge Reed took pains to reiterate his view that "perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection."

We hope Judge Reed's opinion will stand as the final word in this litigation, which has been ongoing since 1998 and has been before the Supreme Court twice. FTRF has participated as an *amicus* in all phases of the litigation and is committed to continuing its participation if the government appeals Judge Reed's decision.

It is important to note that the court's endorsement of Internet filters as a useful tool for parents to use in the home is not an endorsement of the use of mandatory filtering in other contexts, especially the public library. As Justice Kennedy noted in his opinion in the United States v. ALA lawsuit challenging the Children's Internet Protection Act (CIPA), adult users retain the right to request access to the Internet free of any restrictions imposed by filtering software. We continue to watch with interest the lawsuit filed in Washington State, Sarah Bradburn et al. v. North Central Regional Library District, which challenges a library's restrictive use of Internet filters and its policy of refusing to honor adults' requests to temporarily disable the filter for research and reading.

Just as FTRF participates in challenges to federal laws like COPA that criminalize Internet content deemed “harmful to minors,” FTRF also participates in challenges to state laws that similarly criminalize Internet content. The most pressing lawsuit, The King’s English v. Shurtleff, challenges a Utah statute that extends the state’s “harmful to minors” provisions to the Internet and requires Internet service providers to block access to websites placed on a registry maintained by the state’s Attorney General, who is empowered to declare a website “harmful to minors” without judicial review.

For much of this past year, the Utah legislature attempted to amend the law to address the concerns raised by FTRF and its partners, but the amendment adopted by the legislature did not offer sufficient protection for free expression on the Internet. Consequently, the plaintiffs, who include FTRF, ABFFE, the Association of American Publishers (AAP), the Comic Book Legal Defense Fund, the ACLU of Utah, and several Utah bookstores, Internet service providers (ISPs), and residents, filed an amended complaint on April 30. The state has asked the court to dismiss the complaint, and the parties are now briefing that motion.

FTRF also is participating as an *amicus* in Gorran v. Adkins Nutritionals, Inc., a consumer protection lawsuit that seeks to strip First Amendment protection from the claims made in the book. FTRF has joined with AAP and ABFFE to file an *amicus* brief supporting the right of persons like the late Dr. Adkins to promulgate their ideas without fear that they will be penalized for their speech. The case is pending before the Second Circuit Court of Appeals; we are waiting for the court to set a date for oral arguments.

The Eighth Circuit Court of Appeals heard oral arguments in Entertainment Software Association et al. v. Hatch, a lawsuit challenging 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 and requires retailers to post signs warning minors about the prohibition. After the District Court of Minnesota ruled the law unconstitutional in July 2006, FTRF joined with ABFFE, AAP, the International Periodical Distributors Association, the Motion Picture Association of America, Inc., Publishers Marketing Association, and Recording Industry Association of America to file an *amicus* brief urging the Eighth Circuit Court of Appeals to uphold the district court’s decision. We are now waiting for the court’s decision.

PROTECTING PRIVACY AND ANONYMITY

Since 2001, the Freedom to Read Foundation’s most urgent concerns have been the lawsuits challenging the FBI’s use of its expanded powers under the USA PATRIOT Act. In the last year, however, we have watched with dismay as these suits have concluded without vindicating our right to be free from government surveillance in the library and on the Internet.

We remain committed, however, to participating in lawsuits aimed at establishing a broader right to privacy in what we read and view, as well as the right to read anonymously. For this reason, FTRF has joined as an *amicus curiae* in New Jersey v. Reid, a criminal action filed against Shirley Reid after she was accused of unlawfully accessing her employer’s computer. The New Jersey Court of Appeals upheld the trial judge’s decision to suppress information obtained by the police from Comcast Corporation, Reid’s ISP, which allowed the police to identify and arrest

her. The court of appeals ruled that the New Jersey state constitution confers a privacy interest in a person's ISP account information, such that a police officer must obtain a valid subpoena in order to obtain that information from an ISP. The state has appealed the court's decision to the New Jersey Supreme Court, and FTRF will join with the New Jersey Library Association, the ACLU of New Jersey, the Electronic Frontier Foundation (EFF), and Privacy Rights Clearinghouse to file a brief in support of Internet users' privacy rights.

A similar action, Forensic Advisors, Inc. v. Matrixx Initiatives, Inc., has ended without a final determination. As you may recall, this lawsuit sought to quash a subpoena served on a financial advice newsletter. The subpoena, if upheld, would have required publisher Timothy Mulligan to turn over the names of the newsletter's subscribers. Early this year, Matrixx dismissed the underlying lawsuit and withdrew its subpoena, rendering moot Mulligan's challenge.

Finally, our sole remaining challenge to the USA PATRIOT Act, John Doe and ACLU v. Gonzales, et al., remains pending before Judge Marrero of the Southern District of New York. In the original lawsuit, Judge Marrero ruled that the statute authorizing National Security Letters (NSLs), which permits the FBI to compel the production of information without judicial review, is unconstitutional. After the Second Circuit Court of Appeals remanded the case to the district court and the ACLU filed an amended complaint, the FBI withdrew the NSL but sustained the gag order that accompanied the NSL. Rather than abandon his claims, the plaintiff has chosen to contest the regime of silence surrounding the use of NSLs by continuing the constitutional challenge to the gag order. John Doe's motion for summary judgment remains pending.

RELIGION AND THE PUBLIC LIBRARY

The issue of religion continues to bedevil libraries across the country. A library board in Colorado found itself defending its open display case policy after a library user objected to a conservative religious group's display about homosexuality; other libraries continue to grapple with religious groups' use of meeting rooms, or the use of labels to identify books with particular religious content. Libraries regularly call FTRF and ALA to obtain guidance on these issues.

For this reason, the FTRF Board was pleased to meet this week with Dan Mach, who previously served as one of FTRF's legal counsel and is now with the ACLU's Program on Freedom of Religion and Belief. Dan reviewed the current status of the law governing religion in public forums, and discussed particular cases in light of the Supreme Court's decisions in this area. Of particular interest was his review of Faith Center Church Evangelistic Ministries v. Glover, the lawsuit filed by a local religious group after the Contra Costa County (CA) Public Library refused to let it use the library's meeting rooms for a religious service. Although the district court ruled the group was likely to succeed on its First Amendment claims, the Ninth Circuit Court of Appeals reversed the district court's finding, upholding the library's policy as a reasonable restriction in light of the library's intended use of its space.

As a result of the Ninth Circuit's decision, libraries across the country were left with questions about their meeting room policies and other policies addressing behavior. It appears these questions may be answered soon, as the plaintiffs have filed a petition asking the Supreme Court

to review the Ninth Circuit's decision. While FTRF is not currently a participant in this lawsuit, it will continue to monitor this case due to its importance to the library community.

FREEDOM OF INFORMATION ACT REQUEST

A year ago, FTRF and ALA filed a Freedom of Information Act (FOIA) request on behalf of the organizations and over 50 members with the FBI. The request sought any records of criminal investigations or surveillance of the organizations and their members related to, or caused by, their opposition to the USA PATRIOT Act.

In February, the FBI informed our legal counsel, Theresa Chmara, that it did not have any records responsive to our request. After reviewing the circumstances surrounding the request, Theresa recommended that neither ALA nor FTRF pursue an appeal, as she believed that insufficient evidence existed to support an appeal of the FBI's determination. Keith Michael Fiels and Judith Krug accepted her recommendation, based both upon her expertise and a desire not to expend funds on legal actions where there appears to be little possibility of success.

Individuals still concerned about potential surveillance by the FBI or other federal agencies can still file their own personal requests for records with the FBI and the Department of Justice and ask that any responsive records be sent directly to them. ALA's Office for Intellectual Freedom will be happy to assist anyone who desires to file his or her own FOIA request.

FTRF PROGRAM AT ANNUAL CONFERENCE

It was my distinct pleasure to provide an introduction for Theresa Chmara at our Sunday afternoon program addressing recent litigation affecting libraries and library users. As is her custom, Theresa provided ALA members with a thorough and thoughtful update and gave us much practical information about how the outcome of these lawsuits affects the day-to-day operation of libraries. The program was recorded, and soon will be posted at www.ftrf.org. We at the Foundation are very lucky to have Theresa's wise counsel and guidance as we pursue our mission of defending the freedom to read, and we are grateful for all her hard work on our behalf.

STATE LEGISLATION

We continue to see state legislation limiting the freedom to read introduced in the states. In many instances, as in Illinois, concerted efforts by librarian and library users defeated state legislation tying library funding to the use of Internet filtering software. But in other states, like Virginia, state legislatures have adopted mini-CIPAs which require public libraries to install filters or lose state funding.

Our concern over the USA PATRIOT Act has born fruit in some states, such as Connecticut and Oregon, which have revised their state library statutes to extend further privacy rights to library users. In Illinois, where conservative organizations mounted an attack on the library confidentiality statute, librarians worked hard to halt or limit the changes sought by local police

officers. Unfortunately, despite these efforts, local police in Illinois now can demand that libraries identify library users without presenting any court order.

2007 ROLL OF HONOR RECIPIENT LUCILLE C. THOMAS

It is my honor to report that on Saturday evening during the Opening General Session, we presented the 2007 FTRF Roll of Honor to Lucille C. Thomas, immediate past president of the Brooklyn (NY) Public Library's Board of Trustees and former assistant director of the New York City Department of Education, Office of Library, Media & Telecommunication. Lucille has been a stalwart member of the Foundation during her many years of service to libraries and library users, standing fast behind the idea that libraries should be proactive in reaching out to underserved populations and committed to the principle that, when a person uses a library, his or her ability to learn should not be restricted by censorship. The FTRF Board of Trustees is privileged to add Lucille to the Freedom to Read Foundation Roll of Honor.

END NOTES

This is my last report to you as the Freedom to Read Foundation president; my second two-year term concludes with this meeting. It has been a very distinct honor and privilege to participate in the work of the Foundation, and I will, of course, actively continue to support its work.

At its organizing meeting for 2008 last Thursday, the FTRF Board of Directors elected Judith Platt as president. Judith is the Director, Freedom to Read and Communications/Public Affairs at the Association of American Publishers. Judith shares our passion for the Foundation's work as ably demonstrated by her service as a Foundation Trustee for many years.

I am pleased to report that our new organizational membership category is developing "legs." Trustee James G. Neal, Columbia University, reported to the Board that 24 member libraries of the Association of Research Libraries have become members, most at the \$1,000 level this year—and Jim promises many more to follow. We urge all of you to ask your home institutions to do likewise. As ALA's First Amendment legal defense arm, the challenges are many and the stakes are high.

And finally, I invite all of you personally to join me in the Foundation's efforts to defend First Amendment rights by becoming a member of FTRF. You can do so by sending a check to Freedom to Read Foundation, 50 E. Huron Street, Chicago, IL 60611.

You can also 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