

**Freedom to Read Foundation**  
**REPORT TO COUNCIL**  
**2018 Annual Conference — New Orleans, Louisiana**

As president of the Freedom to Read Foundation, it is my privilege to report on the foundation's activities since the 2018 Midwinter Meeting:

**CURRENT LITIGATION**

Since I last reported to you, two of FTRF's litigation efforts were decided by the courts in a manner favorable to the parties FTRF supported in each case. Customarily, we would enthusiastically celebrate these results. But in both cases, while the courts reached the correct result, they did not address or decide the issues and concerns raised by our legal briefs.

On Monday, June 13, 2018, the Supreme Court handed down its opinion in *Lozman v. the City of Riviera Beach*. Last fall, FTRF agreed to participate as *amicus curiae* in the case, signing a brief in support of Fane Lozman, the plaintiff. Lozman, an outspoken critic of the City of Riviera Beach, was handcuffed and incarcerated after a member of the city council ordered his arrest when he attempted to speak during the city council's public comment period. Lozman subsequently filed a lawsuit against the City of Riviera Beach, claiming that the arrest violated his First Amendment rights because it was ordered in retaliation for his criticism of the city government and because Lozman had successfully sued the city in the past. On appeal, the Eleventh Circuit held that Lozman's lawsuit was barred as a matter of law because the jury trying Lozman found that police had probable cause to arrest the petitioner for disturbing a lawful assembly, thereby defeating his First Amendment retaliatory arrest claim.

The *amicus* brief signed by FTRF urged the Supreme Court to alter this standard. In it, we asked the Court to establish a balancing test for reporters and others pursuing claims of retaliatory arrest. The brief argues that probable cause for arrest should be a factor to be considered in a First Amendment retaliatory arrest claim, rather than a complete bar to bringing the claim. Our objection to the rule arose from our concern about the chilling effect the threat of retaliatory arrest might have on journalists and photojournalists. The brief points out that permitting a claim of probable cause to function as a bar to a First Amendment retaliatory arrest claim encourages police to use arrests to clear journalists from newsworthy events and scenes in which they might not want the press to document police activity.

Unfortunately, the Supreme Court's decision in *Lozman* did not address this important issue. Instead, the court held that, based on the unique facts of case, the presence of probable cause for arrest did not bar Lozman's First Amendment retaliation claim. In his own legal filing, Lozman alleged that his arrest was part of an official municipal policy to retaliate against him for being a persistent vocal critic of the city council, and the court adopted his argument. The court's opinion explicitly refused to decide the legal issues raised by FTRF's brief. Nonetheless, Lozman prevailed on his First Amendment claims, and we congratulate him on his victory.

The second case to conclude in our favor was *Gravano and Lohan v. Take Two Interactive Software*, a consolidated lawsuit filed by plaintiffs Karen Gravano and Lindsey Lohan. Both women sued a video game maker in New York, claiming that the video game maker violated their rights of publicity by using their likenesses in the video game *Grand Theft Auto*. Both plaintiffs argued that New York's right of publicity statute, which bars the nonconsensual use of a person's name, portrait, picture, or voice for the purpose of trade or advertising, should be expanded to allow a lawsuit for damages whenever any story for sale includes the use of a person's "image," "persona," or "likeness," even if the work does not use the person's name, portrait, picture, or voice.

FTRF agreed to join an *amicus curiae* brief that urged the court to not expand the reading of the New York statute to prohibit use of an "image," "likeness" or "persona" in fiction. Expansion of the law could allow legal challenges to other fictional works such as unauthorized biographies, nonfiction works that mention real persons or events such as Truman Capote's *In Cold Blood*, or fictional characters based on real people like the depiction of Martin Luther King, featured in the graphic novel trilogy *MARCH*. Expansion of the law might also give rise to legal actions against newspapers, photographs, artworks, and other goods and works that depict people, simply because they are sold, rather than given away for free. We argued that the statute does not permit such legal actions and its expansion could unconstitutionally restrict freedom of expression and violate the First Amendment.

On appeal, New York's Court of Appeals dismissed both plaintiffs' cases, effectively rejecting their request to expand the reach of New York's right of publicity statute. The court, however, did not address or consider the arguments we raised in defense of the freedom to publish. Instead, the court held that the video game avatars the plaintiffs complained of were generic characters that were simply not recognizable as the plaintiffs.

While neither the Supreme Court nor the New York Court of Appeals resolved these lawsuits on the grounds we recommended in our briefs, it is important to remember that neither court ruled in a fashion that impairs the First Amendment rights we sought to preserve. By arguing our cause, we helped to ensure that the courts avoided a result that would endanger First Amendment rights in each case.

Finally, I can report on the conclusion of one lawsuit that we can applaud without reservation. At our last meeting, we celebrated the hard-won legal victory in *Gonzalez v. Douglas*, the lawsuit filed by the students of the Tucson Unified School District after the state required the district to close its Mexican-American Studies program. The students challenged the state's enforcement of the Arizona statute prohibiting Arizona's public and charter schools from using class materials or books that "encourage the overthrow of the government," "promote resentment toward a race or class of people," are "designed primarily for pupils of a particular ethnic group," and "advocate ethnic solidarity instead of the treatment of pupils as individuals."

As you may recall, the district court permanently enjoined the superintendent's enforcement of the statute on the grounds that the statute violated the students' First Amendment and equal protection rights. But the court's decision was subject to appeal, and we waited to hear if the state of Arizona would challenge the trial court's judgment in a higher court.

I am glad to report that this litigation is now definitively concluded. On May 30, 2018, the parties in *Gonzalez v. Douglas* filed a Notice of Settlement with the court stating that the parties had settled the

remaining issues in the case. The court's ruling — that there are constitutional limits on a school board's power to censor curriculum materials — stands as good precedent.

## NEW LITIGATION

FTRF recently agreed to serve as *amicus curiae* in a lawsuit that raises important free speech and liability issues for publicly funded libraries that use social media to engage with their community. The lawsuit, ***Robinson v. Hunt County, Texas***, was filed by Deanna Robinson, a resident of Hunt County, Texas, after she was banned from posting on the Facebook page maintained by the Hunt County Sheriff's Office. She was banned from commenting on the page after she posted comments critical of the county sheriff that the sheriff deemed verbally abusive. But other posters who used strong language comparable to the language Robinson used did not have their posts removed or their posting rights taken away if they expressed support for the sheriff.

Robinson filed a lawsuit against the Sheriff's Office, arguing that the ban violated her First Amendment rights. She asked the court to compel the Sheriff's Office to restore her posts to the Facebook page, restore her ability to engage in activity on the page, and further bar the sheriff from removing any posts addressing matters of public concern. But the district court ruled in favor of the Sheriff's Office, holding that because Facebook's Terms of Service allowed Facebook to remove verbally abusive posts, the sheriff's office was required to remove those posts or face deactivation of its Facebook page, regardless of the Sheriff's Office's obligations under the First Amendment.

FTRF has agreed to join an *amicus curiae* brief in support of Deanna Robinson. The brief, written by the Brechner Center for Freedom of Information, was also joined by the Marion B. Brechner First Amendment Project, the National Coalition Against Censorship, and the DKT Liberty Project. The brief argues that the Facebook page maintained by the Hunt County Sheriff's Office in fact operated as a designated public forum, in which citizens were invited to discuss the policies and practices of an agency of local government. As a designated public forum for discussion, the Sheriff's Office is prohibited from enforcing any prior restraints on speech or enforcing viewpoint-based preferences as to whose speech may be heard. Consequently, the Sheriff's Office's exclusion of Deanna Robinson from the Hunt County Sheriff's Office Facebook page and the censorship of her Facebook posts is a type of viewpoint discrimination that violates Robinson's First Amendment rights.

The case is an important one. Not only is there a need to defend the right to express one's opinion on a government agency's social media account, but there is also a need to establish sufficient legal precedent so that publicly funded libraries can understand their legal responsibilities when they choose to open a social media account to engage with the public. Our brief has been filed with the court and we await a result.

## DEVELOPING ISSUES

Members of the Foundation's Developing Issues Committee reported on several important issues that raise significant constitutional or privacy issues for libraries and society at large. These include:

- how the growing use of machine-driven decision-making and artificial intelligence (often described as MACHine Driven Communications or MADCOM) to generate propaganda and fake news online threatens democracy;
- how the use of "big data" and predictive analytics is eroding personal privacy;

- the requirements of the European Union's General Data Protection Regulation;
- colleges' and universities' efforts to preserve free speech and academic freedom on campus, and the campaign by the Goldwater Institute to pass legislation in each state that intends to correct left-leaning bias on U.S. campuses and prevent the disruption of conservative speakers;
- updates on efforts to preserve net neutrality; and
- updates on the removal and loss of online government information.

## **THE JUDITH F. KRUG MEMORIAL FUND**

Established by the family, friends, and colleagues of Judith F. Krug, the Judith F. Krug Memorial Fund supports projects and programs that carry on Judith's mission to educate both librarians and the public about the First Amendment and the importance of defending the right to read and speak freely.

### **Banned Books Week Grants**

On June 13, FTRF announced the recipients of the 2018 Krug Fund Banned Books Week grants, which provide financial support and guidance to libraries, schools, and community organizations planning Banned Books Week celebrations. The seven grantees for 2018 are:

- Handley Regional Library, Winchester, VA
- Independence Public Library, Independence, KS
- James F. Byrnes High School, Duncan, SC
- Moreno Valley High School Book Club, Moreno Valley, CA
- Suffolk Public Library, Suffolk, VA
- Winston-Salem State University, Winston-Salem, NC

The grantees have planned creative and engaging events to observe Banned Books Week and celebrate the freedom to read. The events include an "Edible Banned Books Festival," featuring extravagant cakes decorated to represent a particular banned book; a community-wide street festival celebrating the freedom to read; a banned book cartmobile; and programs examining book challenges in South Carolina and books banned in North Carolina's libraries and prisons. As is customary, the grantees' photos, videos, and written reports will be featured on the foundation's website. To learn more about the grantees and their events, visit [ftrf.org/Krug\\_BBW](http://ftrf.org/Krug_BBW).

### **LIS and Professional Education**

On April 25, the Krug Fund co-sponsored a timely and well-received continuing education webinar with the Intellectual Freedom Committee, "**Fake News or Free Speech: Is There a Right to be Misinformed?**" The webinar examined the nature of fake news and propaganda in an age of social media and explored whether "fake news" can be legally suppressed under the First Amendment. The webinar panel featured Emily Knox and Nicole Cook from the University of Illinois School of Information Sciences; Joyce Valenza of Rutgers University's School of Information and Communication; and Mary Minow, a Berkman Klein Fellow at Harvard University. The archived webinar is freely available online: [ala.org/advocacy/intfreedom/webinar/fakenews](http://ala.org/advocacy/intfreedom/webinar/fakenews).

This spring, the Krug Fund successfully launched its collaboration with the San Jose State University School of Information through its support of Professor Wrenn-Estes' course on intellectual freedom and youth. With the help of FTRF Educational Consultant Joyce Hagen-McIntosh, FTRF identified

guest lecturers for the class and provided additional consultation and assistance to professor Wrenn-Estes as she conducted the class. We look forward to providing similar support to SJSU's fall semester intellectual freedom seminar taught by Carrie Gardner.

Our inaugural collaboration with the University of Illinois' School of Information Science will also continue this fall. Professor Emily Knox will once again teach her course "Intellectual Freedom and Censorship" with the support of the Krug Fund. We thank the University of Illinois and San Jose State University for partnering with FTRF to assure that high-quality intellectual freedom curricula and training remains available to LIS students preparing for their professional careers.

As always, I want to recognize and thank our educational consultant Joyce Hagen-McIntosh. Her efforts on behalf of the Krug Fund's education initiative are vital to maintaining our ongoing programs in support of intellectual freedom education.

## **2018 ROLL OF HONOR AWARD RECIPIENTS J. DOUGLAS ARCHER AND BARBARA M. JONES**

At each Annual Conference, I have the privilege of announcing the recipients of the Freedom to Read Foundation Roll of Honor Award. It gives me particular pleasure to announce this year's winners of the 2018 FTRF Roll of Honor award: J. Douglas "Doug" Archer and Barbara M. Jones.

Doug Archer is a peace studies, global affairs and political science librarian at the University of Notre Dame's Hesburgh Libraries. During the past four decades he has served on or chaired most of the Intellectual Freedom Round Table's committees. More recently, he served on the Intellectual Freedom Committee, three terms as its chair. Archer was also an active member of the Indiana Library Federation's (ILF) Intellectual Freedom Committee for fifteen years and its chair for eight.

During that time, he led working groups through the revision and drafting of many *Library Bill of Rights* interpretations. These include "Religion in American Libraries," "Politics in American Libraries" and "Internet Filtering." Doug has also served as liaison to and member of the FTRF Board of Directors. He has written and presented extensively on First Amendment issues and is now completing a term as ALA councilor-at-large. He is also an actively ordained minister in the Church of the Brethren.

The freedom to read has been Barbara Jones' professional focus for 45 years. She has served on the foundation's Board of Trustees, was a member of the ALA Intellectual Freedom Committee from 1990-1994, and she rejoined the committee in 2001-2003. She served as chair of the Intellectual Freedom Round Table twice and also served on the state intellectual freedom committees in Iowa and Minnesota.

Barbara Jones' long history as an intellectual freedom advocate includes her tenure as the director of the ALA Office for Intellectual Freedom and the Freedom to Read Foundation from 2009 through 2015. She has written extensively about intellectual freedom and has travelled the world teaching and advocating for intellectual freedom on behalf of IFLA and FAIFE, its intellectual freedom committee. Her efforts earned the recognition of the University of Illinois Graduate School of Library and Information Science, which presented her with the 2008 Robert B. Downs Intellectual Freedom Award. This is Barbara's second appearance on the Freedom to Read Foundation Roll of Honor; she was first recognized in 1999 during the foundation's 30th anniversary gala. We are celebrating her

achievements a second time for her ongoing commitment to intellectual freedom advocacy and especially for her ready willingness to leave her retirement to lead FTRF following the death of Judith Krug.

The Board of Trustees is especially gratified to recognize the work of these two stalwart intellectual freedom advocates who have given so much to the profession.

The FTRF Roll of Honor was established in 1987 to recognize and honor individuals who have contributed substantially to the foundation through adherence to its principles and/or substantial monetary support. For more information about the Roll of Honor and other FTRF grants, awards, and scholarships, visit [ftrf.org](http://ftrf.org).

## **2018 CONABLE CONFERENCE SCHOLARSHIP**

It is also my privilege and pleasure to introduce you to Dovi Mae Patino, the 2018 recipient of the Gordon M. Conable Conference Scholarship. Dovi is a first-year, first-generation MLIS student at the University of Washington's Information School. As a Filipina-American, she aspires to be a public librarian committed to ensuring equitable access to information and resources in underrepresented communities. She also places tremendous value in professional development and mentorship opportunities, which are not always accessible to people of color.

The selection committee was particularly impressed with Dovi's commitment to intellectual freedom and diversity, noting that her graduate school and work experience demonstrate her strong commitment to the FTRF's mission of intellectual freedom and information access and to ALA's core values of equity, diversity, and inclusion.

The Conable Scholarship honors the memory of Gordon Conable, a past president of the Freedom to Read Foundation, an ALA Councilor, and a tireless champion of intellectual freedom. The Conable Scholarship provides financial assistance to a new librarian or library student who shows a particular interest in intellectual freedom and wishes to attend the ALA Annual Conference. Mentoring was an important undertaking for Gordon, and the board is pleased to be able to honor his memory in this way. If you would like to donate to the Conable Scholarship, please visit [ftrf.org](http://ftrf.org).

## **A VISION FOR THE FUTURE**

From time to time during my tenure as the president of the Freedom to Read Foundation, I have reported on the Board of Trustees' ongoing effort to develop and adopt a new strategic plan for FTRF. Our goal was to identify strategies that would allow FTRF to enlarge its role as a national leader in the defense of the freedom to read, speak, and publish, and also strengthen and sustain its educational initiatives. The importance of our work was driven home by the realization that 2019 marks the 50<sup>th</sup> anniversary of the foundation's founding.

I am gratified to report that during this conference we finalized and adopted a plan to carry forward the foundation's work for the next five years. We have adopted a new mission statement that describes our goals for the future and approved a long-range plan that identifies seven key strategies to meet those goals. It is our plan to grow public awareness of our work, fully engage with our members, build up our legal capacity and staff capacity, and develop effective partnerships with other free expression groups and educational institutions. We also plan to revitalize our efforts to defend free speech and

free expression in libraries and work to recruit a diverse and enthusiastic membership. We plan to kick off this initiative with a 50<sup>th</sup> anniversary event that will celebrate our past successes and launch our long-range strategic plan.

## **FTRF MEMBERSHIP**

Your ongoing support of the foundation is vital to our successful implement of our strategy. I invite you to join FTRF and work with us as we establish a sound foundation for the defense of the freedom to read.

Membership in the Freedom to Read Foundation provides necessary and vital support for the foundation's defense of First Amendment freedoms in libraries and throughout the world. I encourage all ALA Councilors and all ALA members to join me in becoming a personal member of the Freedom to Read Foundation. I also ask that you invite your institution or organization to join FTRF as an organizational member. Please send a check (\$50+ for personal members, \$100+ for organizations, and \$35 for new professionals and \$10+ for students) to:

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

Alternatively, you can join or renew your membership by calling (800) 545-2433, ext. 4226, or online at [ftrf.org](http://ftrf.org).

Respectfully submitted,

Martin Garnar  
President, Freedom to Read Foundation