

Freedom to Read Foundation

REPORT TO COUNCIL

2018 Midwinter Meeting — Denver, Colorado

As President of the Freedom to Read Foundation, it is my privilege to report on the foundation's activities since the 2017 Annual Conference:

LITIGATION

Two Legal Victories

I am most pleased to report that the federal district court in Arizona has redressed the most infamous act of classroom censorship in recent history, the State of Arizona's closure of the Tucson Unified School District's Mexican American Studies (MAS) program pursuant to Arizona Revised Statute §15-112. As you may recall, that statute prohibited 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." Relying on that statute, then-State Superintendent of Instruction John Huppenthal declared in June 2011 that the TUSD's MAS program was in violation of §15-112 and ordered the TUSD school board to close the program or pay a penalty amounting to ten percent of TUSD's annual budget. Because of Huppenthal's decree, the board eliminated the Mexican American Studies program, suspending all teaching activities in the MAS program, cancelling the MAS curriculum, and removing the books used in the program from the hands of students and placing them in boxes marked "banned" before putting the books in storage.

For nearly seven years, a group of students have persevered in prosecuting a lawsuit, *Gonzalez v. Douglas (formerly Arce v. Huppenthal)*, that sought to restore the MAS program by overturning the Arizona statute. FTRF has steadfastly supported the students' efforts, taking the lead in writing and filing an *amicus curiae* brief filed before the Ninth Circuit Court of Appeals that argued that the state's enforcement of §15-112 is unconstitutional under the First Amendment because the Supreme Court held in *Board of Education v. Pico* that students have the right to receive information and the government cannot censor material based on political or partisan

motivations, as appeared to be the case based on Huppenthal's public statements. FTRF also took the position that the state violated the First Amendment because curriculum decisions based on political motivations do not constitute a legitimate pedagogical interest.

On appeal, the Ninth Circuit overturned a decision of the district court that dismissed the students' First Amendment claims, holding that the students deserved an opportunity to present evidence at trial that the state's actions constituted unlawful viewpoint discrimination under the First Amendment and violated the students' rights to equal protection under the law.

After a long period of pre-trial proceedings, the new trial finally took place in June and July 2017. On August 22, 2017, the court issued its decision, holding that the statute as enacted violated the First and Fourteenth Amendments of the Constitution and that the actions of the Superintendent in terminating the Tucson Mexican American Studies program also violated the First and Fourteenth Amendments of the Constitution. The district court held that the statute was not enacted or enforced for a legitimate educational purpose but rather for an invidious discriminatory racial purpose and a politically partisan purpose, stating that it was convinced that decisions regarding the MAS program were "motivated by a desire to advance a political agenda by capitalizing on race-based fears." On December 27, 2017, the district court permanently enjoined the Superintendent's enforcement of the statute and awarded the students' legal counsel attorney fees and costs.

We congratulate the students of the Tucson Unified School District on their successful verdict in their favor, and we are very proud of the part FTRF played in securing the students' First Amendment right to study, read, and discuss works addressing their heritage and identity. We want to particularly thank FTRF's general counsel, Theresa Chmara, who led FTRF's legal efforts, and the attorneys of Jenner & Block who participated pro bono in the drafting of FTRF's amicus brief.

I am happy to report a second successful outcome in another of the foundation's lawsuits. ***Animal Legal Defense Fund v. Wasden*** challenged Idaho's "ag-gag" law, one of several laws recently adopted by states seeking to hobble the efforts of environmental and animal rights groups to expose illegal pollution and animal cruelty in agricultural industries. The Idaho law at issue criminalizes "interference with agricultural production," which includes entering an agricultural production facility that is not open to the public and, without the facility owner's express consent, make an audio or video recording of the facility's operations. The law was passed after Mercy for Animals, a Los Angeles-based animal rights group, released a video of workers at an Idaho dairy using a moving tractor to drag a cow on the floor by a chain attached to her neck. The video also showed workers repeatedly beating, kicking, and jumping on cows. An undercover investigator recorded the video.

The lawsuit was filed by a plaintiffs' group that includes animal rights group, environmental groups and the ACLU of Idaho. FTRF joined an *amicus* brief that argued that the law violated the First Amendment by imposing content-based and viewpoint-based restrictions on speech that were not narrowly tailored to address a compelling government interest. The brief also argued that the law restricted access to information that the public has the right to receive and criminalized the dissemination of truthful information about agricultural facilities from

whistleblowers and journalists. Jonathan Bloom, counsel for the Association of American Publishers, and a former FTRF trustee, drafted the brief.

After the federal district court in Idaho ruled that several provisions of the law, including the recording ban, violated the First Amendment and the Equal Protection clause of the Constitution, the state of Idaho appealed that decision to the Ninth Circuit Court of Appeals.

On January 4, 2018, the Ninth Circuit issued its opinion, affirming in part and reversing in part the lower court decision. The Ninth Circuit's ruling upheld the most crucial decisions of the district court: that those portions of the statute that criminalized misrepresentations to enter a production facility and which banned audio and video recordings of the facility's operations were overbroad and targeted protected speech and investigative journalism in violation of the First Amendment. After a review of the law's genesis and application, the appellate court said, "We are left to conclude that Idaho is singling out for suppression one mode of speech—audio and video recordings of agricultural operations—to keep controversy and suspect practices out of the public eye." The court noted that the law suppresses more speech than necessary to further Idaho's stated goals of protecting property and privacy and pointed out "'[t]he remedy for speech that is false is speech that is true'—and not, as Idaho would like, the suppression of that speech."

New Litigation

This fall, the Freedom to Read Foundation agreed to serve as *amicus curiae* in a new lawsuit that asks the New York courts to encroach upon the freedom to create and publish stories in formats both old and new. The lawsuit, ***Gravano and Lohan v. Take Two Interactive Software***, was filed by plaintiffs Karen Gravano and Lindsey Lohan, who claim that the video game maker Take Two Interactive violated their rights of publicity when it used characters that resembled their personas or their likenesses in the video game "Grand Theft Auto." The plaintiffs argue that a New York statute, Civil Rights Law Section 51, 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 a 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 has signed on to an *amicus curiae* brief that argues that the plaintiffs' request to expand the reading of the New York statute to prohibit use of an "image," "likeness" or "persona" in fiction is not permitted by the statute and would unconstitutionally restrict freedom of expression and violate the First Amendment. The amicus brief illustrates the harms that could result if the statute were expanded by describing the limitations an expanded law would impose on works such as unauthorized biographies, nonfiction that includes real persons or events such as Truman Capote's *In Cold Blood*, and fictional characters based on real persons, such as the King in the Broadway play *King Charles III* or the persons depicted in the *MARCH* graphic novel trilogy about the Civil Rights movement. The amicus brief further argues that the statute's prohibition on use of a name, picture, or voice for advertising or for the purpose of trade should not apply simply because material is for sale, or profitable. Otherwise, everyday newspaper articles, photographs, paintings, and other materials would be subject to lawsuit under the expanded law. Joining FTRF on the brief are the American Booksellers Association, the American Society of

Journalists and Authors, the Association of American Publishers, Inc., the Authors' Guild, the College Art Association, the Comic Book Legal Defense Fund, the Dramatists Legal Defense Fund, and the MPA – The Association of Magazine Media. Oral argument in the lawsuit was heard on February 7, 2018.

FTRF has joined with the National Press Photographers' Association and 25 other free speech and media organizations to file an *amicus* brief that urges the Supreme Court to establish a legal standard that will allow reporters and citizens to pursue First Amendment civil rights claims against police and government bodies when they are arrested while exercising their First Amendment rights to speak, observe, and report at public events, demonstrations, and crime scenes. The brief has been filed in support of plaintiff Fane Lozman, an outspoken critic of the city government of Riviera Beach. He filed his lawsuit, ***Lozman v. City of Riviera Beach***, after the state's attorney declined to prosecute Lozman after a Riviera Beach councilmember had police arrest Lozman when Lozman attempted to speak during the City Council's public comment period. Lozman's suit claims that the City violated his First Amendment rights when it had him arrested in retaliation and his criticism of the government and for successfully suing the City in the past. Lozman has persuaded the Supreme Court to review an Eleventh Circuit Court of Appeals decision that held that Lozman's lawsuit was barred as a matter of law because the jury found that police had probable cause to arrest petitioner for disturbing a lawful assembly, thereby defeating his First Amendment retaliatory arrest claim.

The *amicus* brief signed by FTRF asks the Court to establish a balancing test for allowing reporters and others to pursue claims of retaliatory arrest, arguing that probable cause for arrest should be a factor to be considered in a First Amendment retaliatory arrest civil rights claim rather than a complete bar to bringing the claim, as asserted by the Eleventh Circuit Court of Appeals. The brief catalogs the many arrests of journalists and photojournalists attempting to report events at demonstrations, public events, and crime scenes and argues 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 events and scenes in which they might not want documentation of police activity. The Supreme Court will hear oral argument on February 27, 2018.

DEVELOPING ISSUES

The foundation's Developing Issues Committee led a thoughtful discussion during the Board's Midwinter Meeting that highlighted several emerging issues that could prompt litigation to preserve the right to free speech, privacy, and access to information. The trustees and liaisons considered the following issues:

- the FCC vote to repeal net neutrality;
- the rise of hate crimes in libraries and proposals to restrict or censor hate speech;
- a new movement calling for censorship or filtering of research databases, arising from an unsupported belief that the databases allow children to access pornography;
- censorship of reading materials in prisons and prison libraries;
- government surveillance and the actions of the Foreign Intelligence Surveillance Court.

THE JUDITH F. KRUG MEMORIAL FUND

The Judith F. Krug Memorial Fund celebrates the life and memory of FTRF's first executive director, Judith Krug. Established by Judith's family, friends, admirers, and colleagues, the Krug Memorial Fund supports projects and programs that carry on her lifelong mission to educate librarians and the public about the First Amendment and the importance of defending the right to read and speak freely. Its programs include grants that support and underwrite Banned Books Week activities in libraries, schools, and community institutions across the country, as well as an educational initiative dedicated to supporting and improving intellectual freedom education for LIS professionals and students.

Banned Books Week

This year, the Krug Memorial Fund awarded grants to support Banned Books Week observances held by seven different libraries and community organizations. The grantees and a description of their events are listed below:

The **Tolowa Dee-ni' Nation** of Smith River, California held a series of Banned Books Week awareness activities that included a banned book community read-out, a banned and challenged book display, a banned book selfie campaign, a community zine workshop, and a "Blind Date with a Banned Book" program.

Rutgers University Libraries in New Brunswick, New Jersey collaborated with local community members, students, faculty, and staff from the Mason Gross School of the Visual Arts to explore the ideas of intellectual freedom, censorship, and banned books via the creation of original art that explores the theme of banned books and the freedom to read. The artwork will be widely shared with New Brunswick community members.

Carrol County Library in Huntingdon, Tennessee collaborated with local businesses to host a community event for Banned Books Week that featured community members dressed as characters from banned books. Backdrops shaped like large books and decorated to fit the theme of each book provided a stage for each costumed character to perform scenes from the banned or challenged work. These were placed around the town square, and community members were invited to walk from "book to book" and learn why each book was banned and to learn about the importance of the freedom to read.

University of North Florida's **Thomas G. Carpenter Library** in Jacksonville, Florida celebrated Banned Books Week with a month-long effort, "Graphic Novels Under Attack," to raise awareness about the threat of censorship through graphic novel literacy. The campaign invited students, faculty, and staff to attend exhibits and panel discussions and participate in events and activities that included photo ops, pop-up makerspaces, and social media contests.

Alhambra Civic Center Library in Alhambra, California sought to increase awareness of censorship and banned books among its established participants and new library

visitors by incorporating banned books themes across all its programming for different ages and encouraging conversation and further study among its patrons.

Thorntown Public Library in Thorntown, Indiana used its grant to support its participation in Thorntown's Festival of the Turning Leaves. It hosted a Banned Book Story Hour during the festival, sponsored special displays and activities, and constructed a Banned Books Week themed parade float for the festival parade. It also hosted a banned book essay and poster contest with an open house that celebrated and highlighted the winning essays and artworks.

The City Lit Theater Company of Chicago, Illinois staged seven performances of "Books on the Chopping Block" at Chicago area libraries, one for each day of Banned Books Week. The grant helped to underwrite free performances at libraries in underserved neighborhoods in Chicago.

LIS and Professional Education

The Krug Memorial Fund sponsored "**Privacy to Pornography: What Staff Need to Know about Intellectual Freedom**," a continuing education webinar designed for students, new librarians, and non-degreed library staff. Taught by Joyce Hagen-McIntosh, the webinar outlined fundamental intellectual freedom concepts and privacy basics.

We are extremely pleased to report that that the **San Jose State University School of Information** has agreed to collaborate with FTRF through the Krug Memorial Fund to sponsor additional coursework on intellectual freedom and privacy for students in library and information science programs. One course, "Intellectual Freedom and Youth," will be taught by Professor Beth Wrenn-Estes and a second intellectual freedom seminar will be taught by Carrie Gardner and will be available to all LIS students with access to courses in the WISE consortium. The SJSU courses will complement Professor Emily Knox's course on "Intellectual Freedom and Censorship," taught under the auspices the **University of Illinois' School of Information Sciences** with the support of the Krug Fund. We thank the University of Illinois and San Jose State University for partnering with the Freedom to Read Foundation to assure that high-quality intellectual freedom curricula and training remains available for future and current library professionals.

The trustees want to thank Professor Knox and Joyce Hagen-McIntosh, FTRF's educational consultant, for all their hard work toward realizing the goals of FTRF's educational mission.

STRATEGIC PLAN REVIEW

Six months ago, the FTRF Board initiated a review of the foundation's strategic plan, first adopted in 2012. Here in Denver, the trustees and liaisons once again met to continue that work. We anticipate finalizing the plan at the Annual Conference in New Orleans.

The FTRF Board also voted to create a new Communications Committee that will communicate the work and mission of the foundation to its members.

FTRF MEMBERSHIP

Membership in the Freedom to Read Foundation supports the important work of defending our First Amendment freedoms and helps build our organizational capacity so that we can continue to pursue our litigation, education, and public awareness programs. By joining the Freedom to Read Foundation, you amplify your support for intellectual freedom and your advocacy on behalf of free expression and the freedom to read freely. And make sure to encourage your libraries and institutions to become organizational members of FTRF.

Please send a check (\$50+ for personal members, \$100+ for organizations, 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 www.ftrf.org.

Respectfully submitted,

Martin Garnar, President
Freedom to Read Foundation