

Testimony of Timothy C. Fox on House Bill 483 (Rep. David Howard, sponsor) before the State Administration Committee, Montana Legislature, 2011 Session.

March 25, 2011

Mister Chairman and members of the Committee. My name is Tim Fox, and I reside in Montana City. I am an attorney and a partner with the law firm of Gough, Shanahan, Johnson & Waterman in Helena. I am here today on my own behalf in support of House Bill 483.

As you will note from the preamble of the bill, it is in some respects offered by Representative Howard to remedy problems with the constitutionality of Montana's campaign finance laws, particularly as they have been applied to ballot issue advocacy.

Representative Howard has asked that I provide the Committee with some background information about the Canyon Ferry Road Baptist Church case. The case spanned five years and filled several file cabinets full of documents, so please forgive me if I abbreviate the history and hit only the points that might be pertinent to this Bill.

The members of the Committee will recall that Montanans overwhelmingly approved an amendment to the Montana Constitution, often referred to as the "Marriage Amendment," through a ballot initiative in the 2004 general election. In May of 2004, a group opposed to the ballot initiative, sensing that Montana churches might act to support the initiative, mass-produced and sent blind letters, with no return address and using a Montana attorney's facsimile signature, to dozens of churches. The letters erroneously advised the churches that they could not act to support CI-96 without registering and reporting their expenditures with the Commissioner of Political Practices as an incidental political committee, and stated that the churches would jeopardize their non-profit tax-exempt status if they supported CI-96. One of the recipients of these mass-mailed letters was Canyon Ferry Road Baptist Church of East Helena, Montana.

Six days after the threatening letter was sent to Montana churches, Pastor B.G. Stumberg of Canyon Ferry Road Baptist Church told his congregation during a regular Sunday evening worship service about CI-96, and about the efforts to obtain signatures on petitions so that CI-96 could be placed on the November ballot. Pastor Stumberg also mentioned that several copies of the petition were placed in the foyer of the church, and he encouraged the congregation to sign the petitions.

Unbeknownst to Pastor Stumberg, the same group that had sent the letter to Montana churches had sent an employee to monitor the church service that Sunday night. That person reported back to his employer, and his report formed the basis of a campaign finance and practices complaint filed with the Commissioner of Political Practices three days after the Church's Sunday worship service. The following day, May 27, 2004, the anti-CI-96 group had their attorney send another blind, unsolicited letter, again bearing her facsimile signature and no return address, to dozens of Montana churches to advise that a complaint had been filed against Canyon Ferry Road Baptist Church, and to say that this could happen to their church if they got involved in supporting CI-96.

What followed was a five-year ordeal for Pastor Stumberg and the members of his Church. They received violent threats, their Church was vandalized, the media chastised them for speaking out about their convictions, and they were forced to respond to an unfounded and unjustified complaint filed by a man who would never be found, and who could never be questioned about his role in this debacle. Pastor Stumberg refrained from speaking to his congregation about CI-96 after the complaint was filed, and we subsequently learned that many other Montana priests, ministers, and pastors also refrained from speaking about the ballot initiative.

Pastor Stumberg and the Church were compelled to respond to the unfounded accusations, and they eventually filed a Federal Civil Rights lawsuit against Montana's Commissioner of Political Practices. With the able assistance of the Alliance Defense Fund, Pastor Stumberg and the Church eventually prevailed in their Civil Rights lawsuit when the United States Ninth Circuit Court of Appeals ruled that Montana's campaign finance disclosure and reporting requirements were unconstitutional as applied to the *de minimis* activities of the Church in connection with CI-96.

With the Chairman's permission, I will provide a copy of the Ninth Circuit Court's opinion for the Committee's record at the close of my remarks. The Committee should note that the State of Montana paid the Church's legal fees and costs in the amount of \$225,000. This cost to the State was in addition to the estimated hundreds of thousands of dollars that the State spent on state attorney salaries, support staff, litigation costs and other expenses related to pursuing the campaign finance complaint against the Church, and in defending the Federal lawsuit.

Unfortunately, the State of Montana, through its campaign finance laws and rules, was an accomplice to the unconstitutional assault on the free speech and freedom of religion rights of Montana's churches during the 2004 election season. The anti-CI-96 group that attacked the Churches was calculating and deliberate in exploiting Montana's laws. They didn't care what it might cost the State or the churches, and they weren't interested in the eventual outcome. All they wanted to do was to create media sound bites, and to silence people of faith until after the 2004 general election. The resulting cost to Montana, its people, and its churches, and the harm to our Constitutional freedoms, cannot be calculated or overestimated.

In his concurring opinion, Ninth Circuit Judge John T. Noonan observed that the media is free to promote political opinions without registering as a political committee and without disclosing those who contribute financially to their efforts. He stated, "The disparity between the treatment of the media and the treatment of churches is great and gross." Judge Noonan went on to observe that unregulated unregistered churches are as important under the First Amendment as an unregulated and unregistered media. As examples of the churches' role in the democratic life of America, Judge Noonan explained that it was churches who took up the cause to end slavery, and it was Black churches and pastors who led the way during the Civil Rights Movement. He states emphatically in his concurring opinion that it is Freedom of Religion that is the first freedom in our Bill of Rights, and concludes that is on this basis that Canyon Ferry Road Baptist Church should prevail.

Canyon Ferry Road Baptist Church's victory against the State gained national attention among legal scholars, and has been cited with approval in courts across the Nation. With the Chairwoman's permission, I will leave copies of two of the most notable law review articles, one

from the Harvard Law Review, and one from the Notre Dame Law Review, at the close of my remarks.

The Harvard Law Review article analyzes the Ninth Circuit Court's decision in Canyon Ferry, and notes that the campaign finance complaint filed against the Church was motivated less by the public interest in information as it was to harass supporters of CI-96. The author of the Harvard Law Review article concludes that Montana's campaign finance reporting laws are subject to abuse and have a disproportionate adverse effect on minor players in the political discourse. The author recommends that policymakers "raise the floor for disclosure of contributions" This is one of the issues that House Bill 483 seeks to remedy.

The Notre Dame Law Review article also analyzes the Canyon Ferry decision and other recent cases in the context of the Free Exercise Clause of the First Amendment to the United States Constitution. Like Judge Noonan, the author of the Notre Dame Law Review article stresses that, "like an unregulated press, unregulated and politically involved religious institutions are crucial to democracy" The author argues that state laws forcing religious institutions to register as political committees when speaking out about moral issues that coincide with legislation or ballot initiatives do not serve a compelling state interest, and are therefore unconstitutional. Again, House Bill 483 seeks to remedy the constitutional infirmities of Montana's campaign finance laws as those laws have been applied in the past, and will surely be applied in the future, to churches and other groups whose primary purpose is not to influence ballot initiatives or campaigns.

In his 1963 letter written while in a the Birmingham, Alabama jail, Dr. Martin Luther King, Jr., responds to criticism from his fellow clergymen for his non-violent activism against racial injustice. Dr. King wrote:

"There was a time when the church was very powerful--in the time when the early Christians rejoiced at being deemed worthy to suffer for what they believed. In those days the church was not merely a thermometer that recorded the ideas and principles of popular opinion; it was a thermostat that transformed the mores of society." Martin Luther King Jr., (1929 - 1968); Letter from Birmingham Jail, April 1963.

Unfortunately, we cannot turn back the hands of time to remedy the constitutional rights that were violated under color of Montana's campaign finance laws, but the Montana Legislature can act affirmatively to make sure that something similar never happens again. I urge this Committee to protect Montanans' religious and free speech freedoms so that Montana's churches may continue to be the thermostat that transforms the mores of society. I respectfully ask you to vote in favor of House Bill 483.

Thank you for your consideration, and for your attention.