BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the	)	**SUMMARY OF FACTS**
Complaint Against	)	**AND**
Gayla Benefield	)	**STATEMENT OF FINDINGS**

Aubyn Curtiss filed a complaint against Gayla Benefield, a candidate for Senate District 41 in the 2002 election. The complaint alleges that Benefield violated Montana Code Annotated § 13-37-131(1) by misrepresenting Curtiss' voting record on House Bill 394, which was introduced during the 2001 Montana Legislature.

SUMMARY OF FACTS

1. In 2002 Gayla Benefield was a candidate for the Senate District 41 seat in the Montana State Senate. Her opponent in the election was Aubyn Curtiss, who won the election.

2. During the 2001 regular session of the Montana Legislature, Curtiss was a member of the House of Representatives.

3. On October 11, 2002, Benefield placed a campaign advertisement in the Western News, a Libby, Montana newspaper. The advertisement, which included a photo of Benefield, urged a vote for Benefield, and included the following message:

> HB 394 would have required government entities to reveal the terms of government awards, grants, loans, tax abatements, etc., used to encourage economic development. Businesses would have been required to pay back tax money if promised jobs and wages were not forthcoming. Aubyn votes NO to government accountability.

4. Curtiss included a photocopy of the advertisement with her complaint. Next to the advertisement Curtiss wrote: "NOT TRUE! House Bill 394 was tabled in the

House Labor and Industry committee of which I was not a member. I did not vote on the bill."

5. During her campaign, Benefield received from the Montana Democratic Party a list of bills that the party believed were important, including bills that Curtiss had voted on. Benefield visited the Montana Legislature's website and reviewed Curtiss' voting record on those bills that were included in the list provided by the Montana Democratic Party. Benefield reviewed the voting record on House Bill 394 and used that information in preparing her October 11 campaign advertisement.

6. House Bill 394 was introduced by Representative Christine Kaufman on January 25, 2001. The title of the bill described it as:

> An act requiring accountability for business subsidies from state and local governments; defining terms; requiring a public purpose for business subsidies; providing criteria for business subsidies; requiring a subsidy agreement along with wage and job goals; providing for public hearings; providing for repayment of a subsidy for failure to meet goals; requiring reports; and providing an effective date.

The bill was referred to the House Committee on Business and Labor. Curtiss was not a member of the committee.

7. A hearing on the bill was held on January 31, 2001. On February 1, 2001, the bill was tabled by the House Committee on Business and Labor. Apparently the bill was taken from the table by the committee some time after February 1, 2001. The committee, after amending the bill, again tabled the bill on February 15, 2001.

8. On February 21, 2001, during a floor session of the House of Representatives, a motion was made to take House Bill 394 from the table in the House Committee on Business and Labor and place it on second reading before the

Committee of the Whole (the full House). The motion failed by a vote of 40 to 57. Curtiss was among the 57 representatives who voted no on the motion.

9. On February 23, 2001, House Bill 394 missed the deadline for transmittal of general bills to the other house of the legislature.

10. Curtiss and Benefield published several additional campaign advertisements after October 11, 2002, addressing the question of whether or not Benefield's October 11 advertisement was accurate. Curtiss placed an ad in the October 24, 2002, edition of the Tobacco Valley News, referencing Benefield's October 11 advertisement. Curtiss' advertisement stated that Curtiss did not vote on House Bill 394. On October 31, 2002, Benefield placed an advertisement in the Tobacco Valley News, referencing both her October 11 advertisement and Curtiss' October 24 advertisement. The October 31 Benefield advertisement stated: "HB 394 was tabled in committee, but a motion was made to bring it before the Committee of the Whole, and my opponent, Aubyn Curtiss, voted along party lines to kill the bill." Benefield placed another advertisement in the November 4, 2002, edition of the Kalispell Daily Interlake. The advertisement referencing the legislative record, reiterated Benefield's claim that Curtiss had voted to kill House Bill 394 on February 21, 2002.

11. Benefield believes that her October 11 campaign advertisement accurately represented that Curtiss voted "no" on House Bill 394 on February 21, 2001, because Curtiss voted against the motion to take the bill from the table in the House committee and bring it before the full House on second reading.

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12. The voting records regarding House Bill 394 in the official journal of the 2001 House of Representatives are identical to the records found on the Montana Legislature's website.

STATEMENT OF FINDINGS

Benefield is accused of violating Montana Code Annotated § 13-37-131(1), which provides:

> **Misrepresentation of voting record -- political civil libel.** (1) It is unlawful for a person to misrepresent a candidate's public voting record or any other matter that is relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false.
> . . .
>
> (3) For the purposes of this section, the public voting record of a candidate who was previously a member of the legislature includes a vote of that candidate recorded in committee minutes or in journals of the senate or the house of representatives. Failure of a person to verify a public voting record is evidence of the person's reckless disregard if the statement made by the person . . . is false.

To establish a violation of this statute, it would be necessary to prove that when Benefield published a campaign advertisement that represented Curtiss' vote on House Bill 394, she either did so "with knowledge that the assertion is false" or "with a reckless disregard of whether or not the assertion is false."

The mental state requirement in the statute is derived from the seminal case of New York Times v. Sullivan, 376 U.S. 254(1964). In that case the United States Supreme Court held that a public official could not recover on a claim for defamation brought against a newspaper unless he proved "actual malice," which the Court defined as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." Id., 376 U.S. at 279-80. The Court based its decision on the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." Id., 376 U.S. at 270. The high degree of First

Amendment protection afforded by the New York Times rule is underscored by the requirement that actual malice must be proven with "convincing clarity." Id., 376 U.S. at 285-86.[1]

In several later opinions the Court applied the New York Times standard in libel actions brought by two candidates against newspapers that had printed allegedly defamatory statements about them. Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971). In Monitor Patriot Co. the Supreme Court stated:

> And if it be conceded that the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," [citation omitted], then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

Monitor Patriot Co., 401 U.S. at 271-72.

While the standard enunciated by the Supreme Court in New York Times and its progeny developed in libel actions, the standard also applies to statutes authorizing penalties for violation of election laws that limit campaign speech:

> Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount.

Brown v. Hartlage, 456 U.S. 45, 61 (1982). In Vanasco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975) (affirmed 423 U.S. 1041 (1978)), Riccio, a political candidate who lost an election to Ferris, complained to the New York State Board of Elections that Ferris had misrepresented Riccio's voting record in a handbill distributed prior to the election. The statute at issue, which was somewhat similar to Montana's, provided:

[1] In Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974), the Supreme Court noted that the New York Times rule calls for "clear and convincing proof that the defamatory falsehood was made with knowledge of a falsity or with reckless disregard for the truth."

> No person, . . . during the course of any campaign for nomination or election to public office . . . shall . . . engage in or commit any of the following:
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> Misrepresentation of any candidate's position including, . . . misrepresentation as to political issues or his voting record . . .

Vanasco, 401 F. Supp. At 101. The court found the statute unconstitutional because it did not include the New York Times actual malice mental state requirement. The court also noted that proof by "clear and convincing" evidence is a constitutional requirement, and a standard of proof requiring only "substantial evidence" would be insufficient. Vanasco, 401 F. Supp. At 99.

It is important to note that the "clear and convincing" standard of proof is a "more exacting measure of persuasion" than the standard burden of proof by a preponderance of the evidence in typical civil actions. John W. Strong, et al., *McCormick on Evidence* § 340 at 575 (4th Ed. 1992). Moreover, the "actual malice" standard requires application of a subjective, rather than an objective test. In St. Amant v. Thompson 390 U.S. 727 (1968), the Supreme Court considered a case where a political candidate (St. Amant) made allegedly defamatory statements about his opponent. The Louisiana Supreme Court applied an objective test of recklessness in finding that St. Amant had violated the "reckless disregard of the truth" standard when making his statements. Rejecting this analysis, the United States Supreme Court held that proof of actual malice requires proof of "an awareness . . of the probable falsity" of the statement. St. Amant, 390 U.S. at 732. As the Court explained, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Id., 390 U.S. at 731. See also Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n. 6 (1974).

Of course, the New York Times standard itself reflects the principle that not all speech made during the course of a political campaign is protected by the First

Amendment. The Supreme Court made this clear in Garrison v. Louisiana, 379 U.S. 64, 75 (1964), when it stated:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of a known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Thus, while there is no question that speech uttered during political campaigns is entitled to considerable protection under the First Amendment, it is equally clear that candidates are not entitled to deliberately lie, or use "calculated falsehoods" in their campaigns.

The question for resolution in this case is whether the campaign advertisement published by Benefield meets the New York Times actual malice standard, thereby constituting a violation of Montana Code Annotated § 13-37-131(1). Upon review of the summary of facts, there is not "clear and convincing evidence" that it meets that standard. The evidence is less than clear and convincing that Benefield misrepresented Curtiss' voting record with knowledge that the assertion was false or with reckless disregard of whether or not the assertion was false.

Curtiss contends that Benefield's advertisement misrepresented Curtiss' voting record on House Bill 394. Curtiss notes that the bill was tabled by the House Committee on Business and Labor. Since Curtiss was not a member of the committee, she did not vote on the bill. Thus, she argues, it was inaccurate for Benefield to claim

that Curtiss even "voted" on the bill. Benefield, however, points out that Curtiss did participate in a floor vote on the bill, voting "no" on the motion to take House Bill 394 from the table in the House committee and place it on second reading before the Committee of the Whole (the full House). While the vote against taking the bill from the table was a procedural vote, according to Benefield, the effect of Curtiss' "no" vote on the motion, combined with the other "no" votes that defeated the motion, was that the bill remained on the table in the House committee and ultimately missed the transmittal deadline. Benefield contends that, based on Curtiss' "no" vote on the motion, it was accurate to represent that Curtiss voted "no" on the bill.

The United States Supreme Court has determined that candidates should be given considerable leeway when it comes to making representations about their opponents during political campaigns. Curtiss obviously believes that Benefield's advertisement misrepresented her vote on House Bill 394. The standard for actual malice, however, is subjective, and it applies to the person who is accused of violating the statute. There is no "clear and convincing" evidence that Benefield had a subjective "awareness . . of the probable falsity" of the representations in her advertisement or that she "in fact entertained serious doubts as to the truth" of the publication. St. Amant, 390 U.S. at 731 and 732. As described above, Benefield believed that her interpretation of Curtiss' vote regarding House Bill 394 was accurate. Given the high bar established by the United States Supreme Court in New York Times and subsequent decisions, and the Court's consistent recognition that First Amendment free speech rights are paramount in political campaigns, I have concluded that there is insufficient clear and convincing evidence in this case to prove a violation of Montana Code Annotated § 13-37-131(1).

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CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings, there is insufficient evidence to justify a civil prosecution based on allegations that Gayla Benefield violated Montana campaign practices law.

Dated this _____ day of July, 2003.

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Linda L. Vaughey
Commissioner