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March 17, 2021

Acting General Counsel Lisa J. Stevenson
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

RE: Request for Pre-Probable Cause Conciliation in MURs 7165 & 7196

Dear Ms. Stevenson,

In the above-captioned matters, the Federal Election Commission ("FEC" or "the Commission") has found reason to believe Respondent Great America PAC ("GAP" or "the Committee") and Dan Backer, in his official capacity as GAP's treasurer, violated 52 U.S.C. § 30121(b)(2) by soliciting a contribution from a foreign national, as well as 11 C.F.R. § 110.20(h) by knowingly providing substantial assistance in such solicitation.

Pursuant to 11 C.F.R. § 111.18(d), Respondents GAP and Backer desire to enter into negotiations directed towards reaching a conciliation agreement with the Federal Election Commission ("FEC" or "the Commission") prior to a Commission finding of probable cause in Matters Under Review ("MUR") 7165 and 7196. Respondents would be willing to enter into a reasonable conciliation agreement to resolve this matter quickly and without unnecessary expense or inconvenience.

As a preliminary matter, undersigned counsel does not represent Jesse Benton in connection with these, or any other, MURs. As discussed at greater length below, Benton is not an agent of GAP, and was not acting as an agent of GAP during the timeframe at issue here, or any time thereafter. Accordingly, any conciliation entered into by GAP and Backer is with respect to GAP and Backer only.

To the extent Benton's conduct may give rise to allegations he violated federal law, he did so independently of GAP—not as an agent of GAP. GAP had no control over Benton, and he was not acting at its direction. Nor is there any evidence to support such erroneous suppositions. There is simply no basis in fact or law for attributing vicarious liability for Benton's actions to either GAP or Backer. The only evidence directly relating to GAP is the clear and unambiguous statement by its co-chair, "I would never let you guys give to the PAC . . . because that's illegal." Investigations Team, *Exclusive Investigation: Donald Trump Faces Foreign Donor Fundraising Scandal*, THE TELEGRAPH, at 12 (Oct. 24, 2016) (hereafter, "The Article"); *see also* The Telegraph, *Pro-Trump Fundraisers Agree to Accept Illegal Foreign Donation*, YOUTUBE, at 3:16 to 3:21 (Oct. 24, 2016), https://www.youtube.com/ watch?v=xQnOxM9iqOw (hereafter, "The Video").

Accordingly, there is no probable cause for pursuing administrative proceedings against GAP or Backer, and Respondents are confident they would prevail on the merits. Nevertheless, to put this matter to rest and move on, GAP is willing to enter into conciliation.

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FACTUAL BACKGROUND

The administrative complaints that triggered these proceedings were based solely on an article that appeared on the website of a foreign newspaper, *The Telegraph*, along with a video comprised of snippets of dialogue selectively edited together for dramatic effect. The Article arose from an undercover "sting" operation concocted by foreign reporters allegedly pretending to be intermediaries for a Chinese billionaire.

At the outset, it is important to recognize the video does not show ***any*** of the initial exchange between Beach and the reporters. Following that conversation, Beach referred the reporters to Benton, since GAP could not legally accept any contributions from them. The video does not contain the entirety of either the ensuing exchange between Benton and the reporters, or Beach's subsequent conversation with the reporters after their meeting with Benton. Rather, both the video and article were a series of brief, selectively chosen excerpts that were selected, arranged, and presented to attempt to convey the appearance of wrongdoing. As to Beach and GAP, those efforts failed.

There is no indication as to the order in which any of the statements in the video were made, the questions to which many of those statements were responding, or any additional context, explanation, or qualifications that may have been provided later in the conversation. Rather, the video jumps back and forth between fragments of two different conversations with two different people (Beach and Benton) at two different points in time. Even the *New York Times* itself—a progressive publication steadfastly opposed to GAP's mission of supporting the election of President Donald Trump in 2016—was forced to reluctantly admit, "[T]he video does not show how the reporters identified themselves and reflects only snippets of the reporters' conversations with Mr. Benton, making it difficult to verify exactly what Mr. Benton had offered or whether any laws were broken." Nicholas Confessore, *Consultant with Ties to Donald Trump Linked to Offer to Hide Source of Donations*, N.Y. Times (Oct. 24, 2016), https://www.nytimes.com/2016/10/25/us/politics/consultant-with-ties-to-donald-trump-linked-to-offer-to-hide-source-of-donations.html. The Commission cannot credibly draw any reliable conclusions from a selective series of snippets stitched together into a suspicious pastiche by reporters with a substantial motive to justify their deceptive scheme and achieve public recognition. When dealing with an area as complex as campaign finance law, it is easy to rip words and phrases out of context and reassemble them to present what appears to be an incriminating narrative. Moreover, neither the Commission nor Respondents have access to exculpatory statements the reporters recorded which did not fit their narrative and were accordingly relegated to the cutting room floor. The Commission should not base a probable cause finding on such cut-and-paste chicanery.

In addition to these pervasive fundamental problems, on several occasions, the *FEC Analysis* also makes factual assumptions and conclusions that exceed the evidence before it. For example, the Commission incorrectly claims "undercover journalists posing as representatives of a Chinese national contacted Beach offering to contribute $2 million to GAP." FEC, *Factual and Legal Analysis*, MURs 7165 & 7196, at 12, lines 3-4 (hereafter, "*FEC Analysis*"). To the contrary, the Article never states or implies the reporters revealed to Beach the magnitude or amount of the supposed potential donation. *See* The Article, *supra* at 4 ("The reporter said a Chinese client wished to donate to the PAC to support [Mr.] Trump's campaign); *id*. at 8 ("In an initial call on

October 4 the reporter explained that the benefactor wanted to donate to support [Mr.] Trump's campaign, 'but he's not a US national.'"). The Video contains an image stating the reporters "offered $2m to a super PAC raising money to support the Trump campaign." The Video, *supra* at 0:12. Not even the Video claims this offer was made specifically to Beach, however, and superimposing such text over pictures of Beach and Benton does not constitute evidence.

Elsewhere, the Commission falsely asserts the reporters "pos[ed] as consultants for a fictitious Chinese donor and discuss[ed] ***a series of transactions*** with Eric Beach." *FEC Analysis*, at 1, lines 13-14 (emphasis added). To the contrary, the reporters did not discuss "a series of transactions" with Beach. Rather, the Article reveals they only stated "a Chinese client wished to donate to the PAC to support [Mr.] Trump's campaign." The Article, *supra* at 4. Beach suggested it might be legal for the Chinese donor to instead contribute to a 501(c)(4) organization. *Id*. ("[Beach] suggested the donation could be put through a social welfare organization called a 501(c)(4)—or C4—which unlike a PAC is not subject to a blanket ban on receiving foreign money . . . ."); *see also id*. at 8 (explaining Beach made "a suggestion involving a 501(c)(4)—a tax-exempt 'social welfare organization'—which he described as a 'non-disclose entity' through which the client could make a contribution for a 'specific purpose'").[1] Beach further emphasized, "[A]ny path we recommend is legal." *Id*. The Article does not contend Beach ever went on to suggest any of the foreign businessman's funds could be funneled directly or indirectly to GAP. *See id*.; In short, Beach neither discussed nor sought to involve GAP in "a series of transactions." The FEC undermines its own credibility by attempting to paint GAP in an incriminating light by twisting the details of the underlying events.

Despite its factual flaws, the *FEC Analysis* points to very little involvement by Eric Beach, GAP's co-chair. It (falsely) alleges the "undercover journalists contacted Beach posing as representatives of a Chinese national offering to contribute $2 million to GAP." *FEC Analysis*, at 2, lines 3-4. Yet, all of the statements the *FEC Analysis* quotes from Beach are clearly exculpatory. During Beach's brief initial conversation with the reporters—which was not included in the video accompanying the *Telegraph* article—Beach "rais[ed] concerns about [the putative donor's] nationality." *Id*. at 2, line 9. Beach also emphasized he would "need to know the origins" of any contribution to GAP before accepting it. *Id*. at 2, lines 9-10. Likewise, when the reporters returned to Beach after meeting with Benton—in an excerpt the FEC chose to omit from its Analysis—Beach reiterated, "I would never let you guys give to the PAC, to give to the C4, because that is illegal." *See* The Article, *supra* at 12; The Video, *supra* at 3:16 to 3:20. Nothing in the *FEC Analysis* suggests Beach ever solicited or attempted to solicit a direct or indirect contribution or donation from the fabricated Chinese businessman.

After the initial conversation in which Beach told the reporters GAP could not accept their contribution, *see id*. he referred them to Jesse Benton, a former advisor to GAP who ran an independent political strategy firm called Titan Strategies, LLC ("Titan"). The *FEC Analysis* is bereft of any evidence to suggest Beach referred the reporters to Benton to arrange an illegal contribution to GAP. To the contrary, all of the evidence is consistent with Beach's uncontradicted explanation that he simply introduced two parties so they could see if there were any legal arrangements they wished to work out with each other. That is the extent of Beach's involvement;

[1] This letter identifies a range of potentially legal options Benton could have recommended upon receiving such a referral. *See infra* Page 4.

there was no conspiracy or attempt by Beach or GAP to arrange some convoluted illegal transaction.

Beach's referral to Benton does not imply he was seeking to further an illicit scheme. Despite 52 U.S.C. § 30121, numerous legal ways existed for a foreign contributor to impact American political issues. For example, a contribution to a § 501(c)(4) social welfare organization, including one involved in policy issues, would be legal. *See generally* T. Hart Benton, Comment, *Rethinking Political Party Contribution Limits: A Road to Reform*, 63 LOY. L. REV. 257, 270-71 (2017) (explaining how federal campaign finance law generally does not regulate contributions to § 501(c)(4) organizations). Alternatively, a foreign contributor could have a foreign corporation with a U.S. subsidiary which could establish a separate segregated fund ("SSF") that could legally contribute to U.S. candidates and political committees, so long as those decisions were controlled by U.S. citizens (potentially including Benton himself). *See* FEC, *Mercedez-Benz*, A.O. 2009-14, at 3 ("[D]omestic subsidiaries of foreign corporations may establish and administer SSFs if they are discrete entities whose principal place of business is the United States and if those exercising decision-making authority over the SSF are not foreign nationals." (citing FEC, *Revere Sugar*, A.O. 1980-100)). Benton also could have registered under the Foreign Agents Registration Act ("FARA") to lobby on behalf of a foreign principle like the fabricated Chinese businessman. *See* 22 U.S.C. § 612(a). Or he could have guided the fabricated Chinese businessman to funding purely issue-oriented advertisements and other public communications that did not fall within the scope of § 30121. In short, federal law is very complicated, and there were numerous potential ways in which Benton could have legally attempted to aid a foreign citizen. And Beach expressly emphasized—both before, *FEC Analysis*, at 2, lines 9-10, and after, *see* The Article, *supra* at 12, the reporters' meeting with Benton—GAP could not and would not accept illegal contributions from a foreign national. Thus, there was nothing suspicious about the referral. To the contrary, it was completely in line with the ordinary business practices of the political consulting industry.

The FEC's acknowledges its entire case against GAP rests on the actions of Jesse Benton. The FEC declares—as a boldfaced Section heading, no less—"***GAP, Through its Agent Benton***, Solicited a Contribution from a Source that Benton Knew or Reasonably Believed to be a Foreign National." *FEC Analysis*, at 10, lines 11-12 (emphasis added); *see also id*. at 1, line 9 (alleging without factual support Benton was "a consultant for GAP during the relevant time"); *id*. at 11, line 1 (asserting conclusory that Benton was "acting as GAP's agent"); *id*. at 12, lines 1-2 (reiterating, without any evidentiary support, "GAP, through its agent Benton, made a 'solicitation' under the Act"). This assertion is the lynchpin of the FEC's case against GAP. Yet it is both false and completely unsupported by any evidence in the *FEC Analysis*.

Benton stopped being GAP's agent in May 2016. The Commission accurately notes, "Benton was a strategist for GAP until May 2016, when he resigned and opened an independent political consulting firm, Titan Strategies LLC." *FEC Analysis*, page 1, line 22; page 2, lines 1-2. Indeed, even the *Telegraph* article on which the Commission relies recognizes Benton resigned from GAP in May 2016. *See* The Article, *supra* at 9. And Benton emphasizes Beach—GAP's co-chair—"needed to be kept 'deliberately ignorant' of the 'exact arrangements'" to which Benton and the reporters agreed. *Id*. at 12. Benton's apparent desire to maintain secrets from Beach is in tension with the FEC's contention he was GAP's agent, attempting to cooperate to funnel illegal foreign contributions to it. The most reasonable interpretation of events is Benton sought to enrich himself, not GAP, and was acting on behalf of himself and Titan. The Commission draws

incriminating inferences against Benton based on his exhortation to the reporters to avoid "put[ting] any of this on paper." *FEC Analysis*, at 16, lines 7-9. His similar desire to keep his proposals secret from Beach should give rise to a comparable inference he was acting on his own behalf, for his own benefit, rather than seeking to benefit GAP.

The *FEC Analysis*'s entire explanation of the agency issue is limited to a single footnote which neither discusses these material facts nor provides any evidence to establish Benton was an agent of GAP. *See FEC Analysis* at page 12 n.33. Instead, the footnote focuses primarily on citing a few definitions of the term "agent." *Id*. Under the *Restatement* definition quoted by the Commission, "Actual authority . . . is created by a principal's manifestation to an agent that, as reasonable understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf." *Id*. (quoting *Restatement (Third) of Agency* § 300.1 [sic] (2006)). Likewise, FEC regulations from a completely inapplicable context—soft-money restrictions—defines "agent" as "any person who has actual authority, either express or implied, . . . [t]o solicit . . . any contribution, donation, or transfer of funds." *Id*. (quoting 11 C.F.R. § 300.2(b)(1)(i)).

Out of its detailed 16-page legal analysis, the FEC's entire basis for claiming Benton acted as GAP's agent is limited to a single conclusory sentence at the end of this footnote, completely bereft of any evidentiary or other support. *Id*. The *FEC Analysis* asserts, "Benton was an agent of GAP for the purposes of this solicitation because, as a consultant for GAP to whom Beach apparently delegated authority to act, he had actual authority to act on GAP's behalf, despite assertions to the contrary." *FEC Analysis* at 12 n.33. Virtually every assertion in this sentence is both wrong and wholly unsupported by any evidence in the administrative record before the Commission.

First, there is no evidence Benton was "a consultant for GAP." *Id*. To the contrary, the FEC expressly states Benton ran a political consulting firm called Titan. After Beach, GAP's co-chair, concluded it would be illegal for GAP to accept the contributions the reporters were discussing, he referred them to Benton. Nothing in the article, *FEC Analysis*, or the rest of the record suggests Beach referred the reporters to Benton as a consultant ***for GAP***. Benton ran a completely independent entity which provided political consulting services. Since Beach could not accept a foreign businessman's funds, he quite reasonably referred the reporters to a political consultant who might have the time and ability to interact with such a client and be more familiar with any legal avenues available to the foreign businessman.

The article explains when Benton reached out to the reporters, he identified himself as a political "consultant"; the article does not contend he identified himself as a consultant for GAP or Beach. As clearly noted by the FEC itself, Benton operated Titan, a political consulting firm; by truthfully identifying himself as a consultant, Benton could not reasonably be understood as suggesting he was ***GAP's*** consultant. If anything, it appears he was seeking to provide political consulting services to the reporters and alleged Chinese businessman. Political committees and consultants regularly refer potential clients to each other. It would be absurd and directly contrary to established industry practice to presume or conclude such a referral either implies or gives rise to an agency relationship.

In any event, even if Benton had said or implied he was a consultant for GAP, there is no evidence to suggest Beach or GAP knew Benton had made any such statement, or had authorized

him to do so. Benton's unilateral actions cannot give rise to vicarious liability for GAP. Even if he had claimed he was a consultant for GAP—and there is no evidence he did—such unilateral declarations neither give rise to agency authority nor render GAP liable for Benton's actions. *See Restatement (Third) of Agency*, § 3.03(b) (explaining a person's "apparent authority" as an agent can only "originate[] with expressive conduct ***by the principal*** toward a third party . . . Apparent [agency] authority is present only when a third party's belief [an agency relationship exists] is traceable to manifestations of the principal"). Neither the Article, the Video, or the *FEC Analysis* recount any statements by Beach stating or implying Benton was an agent for either Beach or GAP. Consequently, the evidence fails to provide probable cause Benton had actual or apparent authority as an agent for GAP.

Second, the *FEC Analysis* claims "Beach [had] apparently delegated authority" to Benton "to act" as GAP's agent. Again, this assertion is simply fabricated. *FEC Analysis* at 12 n.33. Under general common law principles, "[A]n agent's actual authority originates with expressive conduct by the principal toward the agent by which the principal manifests assent to action by the agent with legal consequences for the principal." *Restatement (Third) of Agency*, § 3.01(b). In this case, there is no evidence in the record Beach ever delegated any authority to Benton, or otherwise manifested its assent that Benton act as GAP's agent following Benton's resignation from the committee in May 2016. Indeed, the *FEC Analysis* does not identify any acts Beach took that would be sufficient to give rise to any such delegation. Thus, there is no evidence Benton had been delegated actual authority to act as GAP's agent. The Commission's case for holding GAP liable rests on this unsupported conclusory assumption. *See FEC Analysis* at 12 n.33. GAP cannot be held vicariously liable for the acts of a third party with whom it has no actual or apparent agency relationship. *See, e.g.*, *MGIC Indem. Corp. v. Moore*, No. 89-57709, 1991 U.S. App. LEXIS 31301, at *5-7 (9th Cir. Dec. 27, 1991) (affirming ruling which concluded a real estate investment company was not vicariously liable for a third party's actions, because there was no evidence the third party was an agent of the investment company); *see also Restatement (Third) of Agency*, § 7.03 (identifying the only circumstances in which an alleged principal is directly or vicariously liable for the tortious acts of a third party).

Finally, nothing in the *FEC Analysis*, article, or other facts of this case come close to satisfying the requirements for an agency relationship. On the contrary, the *FEC Analysis* clearly states Benton resigned from GAP in May 2016—a fact that heavily weighs against continuation of agency status past that point. *See Restatement (Third) of Agency*, §§ 3.06(5), 3.10(1) (explaining an agency relationship is terminated through "renunciation by the agent to the principal" of his position). Between his resignation in May 2016, through the events at issue here in October 2016, and continuing on to the present, neither Benton nor his company Titan have: (i) held any positions with GAP, (ii) provided any services to GAP, (iii) entered into any contracts with GAP, (iv) received any payments from GAP, or (v) been expressly or implicitly authorized to hold themselves out as agents, officers, employees, or contractors of GAP. The *FEC Analysis* does not contend otherwise. The FEC provides no evidence Beach or anyone else at GAP "manifest[ed] . . . assent" for Benton to act as GAP's agent following his resignation. *Cf. FEC Analysis*, at 12 n.33 (quoting *Restatement (Third) of Agency*). The FEC cannot provide any such evidence, because this event never occurred. So it simply assumes such a manifestation occurred in a transparent attempt to conjure an agency relationship into existence. There is none. Benton had his own independent consulting firm. Beach referred Benton a potential client. Neither GAP nor Beach are vicariously liable for anything Benton may have done from that point forward. *See Restatement (Third) of*

Agency, § 2.02 cmt. e (distinguishing an agency relationship from "a party dealing at arm's length with another").

LEGAL ANALYSIS

The *FEC Analysis* does not contain probable cause to believe GAP illegally solicited a contribution from a foreign national, for several reasons.

First, the FEC's only basis for finding reason to believe GAP violated 52 U.S.C. § 30121 and 11 C.F.R. § 110.20(h) is the completely unfounded and false assertion Benton was acting as an agent for GAP during his conversations with the reporters in October 2016. *FEC Analysis*, at 12 n.33. As explained above, that conclusion is demonstrably false and the record evidence is insufficient to give rise to probable cause to believe any such agency relationship existed, whether as a matter of actual agency authority, *see Restatement (Third) of Agency*, § 3.01, or apparent authority, *see id*. § 3.03. In contrast, GAP's co-chair expressly told the reporters he would "never let [them] give to the PAC . . . because that's illegal" since they were representing a non-citizen. The Article, *supra* at 12; The Video, *supra* at 3:16 to 3:20. And while giving to a (c)(4) organization "is technically not illegal, . . . it's just not the best way to go." The Article, *supra* at 12; The Video, *supra* at 3:16 to 3:20. The Commission should not attempt to manufacture an agency relationship to hold GAP liable when its indisputable agent—Beach—expressly and emphatically disclaimed any interest in illegally accepting foreign contributions.

Second, as discussed earlier, the video upon which the *FEC Analysis* rests consists of a series of isolated statements, devoid of surrounding context, stitched together by reporters with a substantial motive to craft an incriminating narrative. We do not know the order in which these statements were made, the questions to which many of those statements were responding, or any other potentially exculpatory qualifications, clarifications, or explanations that were also made. Moreover, the *FEC Analysis* assumes all of these quotes are referring to the same potential transaction. To the contrary, we have no way to know how many minutes elapsed between each of the quoted excerpts, what alternatives may have been introduced in between each excerpt, and whether all of the excerpts are referring to the same potential plan or different possible alternatives. Without the original unedited and unredacted recordings, the Commission has no grounds to determine the extent to which the recording patched together by the reporters fairly and accurately conveys the substance of any meetings or communications. *Cf. Bridges v. State*, 516 So. 2d 895, 900 (Ala. Crim. App. 1987) (collecting cases concluding the fact a video was edited "affect[s] the weight" it should be accorded); *see also Wilkinson v. Nord Anglia Educ. Ltd.*, No. 17 Civ. 7421 (PAE), 2019 U.S. Dist. LEXIS 126863 (S.D.N.Y. July 30, 2019) (explaining a recording containing only "fragments of the conversation" can be "susceptible to multiple inferences").[2]

[2] Respondents also note if the Commission chose to proceed with civil or criminal litigation, it would likely have to procure the in-person testimony of the foreign reporters involved in this "sting" operation to both authenticate the Video, FED. R. EVID. 901(a) (requiring authentication of evidence), and testify as to the statements of Benton and Beach quoted in the Article, *id*. R. 802 (prohibiting hearsay); *Nooner v. Norris*, 594 F.3d 592 (8th Cir. 2010) ("Newspapers are 'rank hearsay.' Even if [a speaker's] statement is viewed as a non-hearsay admission of a party opponent, the newspaper article reporting the statement is offered to prove the truth of the matter asserted and is not covered by a hearsay exception (quoting *Miller v. Tony & Susan Alamo Found.*, 924 F.2d 143, 147 (8th Cir. 1991)); *Green v. Baca*, 226 F.R.D. 624, 637-38 (C.D. Cal. 2005) ("Even when the actual statements quoted in a newspaper article constitute nonhearsay, or fall within a hearsay exception, their repetition in the newspaper creates a hearsay

Third, all of the communications at issue were based on fabrications by foreign reporters looking to gin up a political scandal by manufacturing crimes. The *FEC Analysis* explains how prosecutions have been upheld where defendants have illegally solicited non-existent people fabricated by law enforcement agents in the officially authorized course of their duties. The Commission fails to cite a single precedent, however, allowing a private citizen—particularly a foreign citizen—to generate crimes under any federal anti-corruption law by deputizing themselves as roving private attorneys general and conducting undercover sting operations. *Cf. FEC Analysis* at 8, lines 12-16 & n.23 (citing cases involving government-run undercover operations and stings). Moreover, continuing to pursue administrative proceedings based on the *Telegraph* article will only encourage and instigate an endless procession of such private "sting" operations by candidates, political parties, PACs, journalists, politically active private citizens, and even foreigners or foreign governments. *Cf. Obama for America*, MUR 6687 (devoting Commission resources to resolving another undercover sting operation by journalists and ultimately declining to pursue further proceedings); *Hillary for America, et al.*, MURs 6962 & 6982, at 7-8 (declining to pursue administrative action arising from a privately conducted undercover "sting" operation). The specter of James O'Keefe and Project Veritas approaching virtually every low-ranking staffer for every Democratic candidate throughout the country to see who is greedy enough to attempt to accept a contribution from a (non-existent) foreign donor should itself be enough for the Commission to reject such vigilantism.

Additionally, it does not appear any court has ever construed 52 U.S.C. § 30121 as applying where there was not actually a foreign national to be solicited for illegal contributions. To the contrary, the purpose of § 30121 is to "prevent foreign funds from influencing elections." FEC, *Contribution Limitations and Prohibitions*, 67 Fed. Reg. 69,928, 69,945 (Nov. 19, 2002) (Explanation and Justification). Applying the statute in the context of an undercover sting operation by foreign journalists where there was no actual foreign contributor and no foreign funds at issue would not further that statutory purpose. To the contrary, applying § 30121 here would directly undermine that provision's purpose by facilitating and encouraging foreign interference in American elections. *See Wagner v. FEC*, 717 F.3d 1007, 1013 (D.C. Cir. 2013) (interpreting FECA based on "the legislative purpose underlying" the provision at issue). Thus, because there was never a Chinese billionaire who could be solicited in the first place, and he was solely a fiction created by foreign reporters (rather than American law enforcement agents), Benton's conduct likely could not have violated 52 U.S.C. § 30121.

Finally, although the FEC excerpts several of Benton's assertions, there is not probable cause to believe any of them actually amount to a violation of 52 U.S.C. § 30121. Section 30121 prohibits a person from soliciting a foreign national to make a contribution or expenditure in connection with a federal election. None of the excerpts satisfy these elements. None of the language quoted by either Benton or the reporters actually reference or mention a foreign national. *See FEC Analysis* at 2-3. None of the quotes from Benton solicit any contributions or expenditures. *Id*. At best, Benton's discussion with the reporters shows they were in the initial stages of exploring

problem."). The Commission would also likely encounter obstacles in attempting to subpoena such witnesses. *See* Fed. R. Civ. P. 45(c)(1)(A); *cf.* 28 U.S.C. § 1783(a) (allowing federal courts to issue subpoenas to "a national or resident of the United States who is in a foreign country"). The need for such heavy reliance on overseas media witnesses is a powerful prudential reason to conciliate this case on reasonable terms.

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potential avenues to attempt to identify legally permissible alternatives. Such initial discussions cannot constitute a completed, illegal "solicitation."

FEC regulations provide to "solicit" means "to ask, request, or recommend, explicitly or implicitly, that another person make a contribution." 11 C.F.R. §§ 110.20(a)(6); 300.2(m). The regulations provide a safe harbor, however, specifying, "A solicitation does not include . . . mere guidance as to the applicability of a particular law or regulation." *Id*. § 300.2(m). Discussions about potential ways in which a (non-existent) foreign businessman might legally participate in American public policy matters fall much closer to § 300.2(m)'s safe harbor than the underlying prohibition.

And, in any event, none of Benton's statements requested money for GAP. *Id*. Although Benton refers on two occasions to "the super PAC," nothing in the *FEC Analysis* provides probable cause he was referring to GAP. *Cf*. *id*. at 12, lines 10, 14; *id*. at 13, line 1. Obviously aware of this evidentiary deficit, the *FEC Analysis* simply took the liberty of repeatedly supplementing and embellishing the evidence.[3] For example:

- "Benton also confirmed that 'all of it'—meaning the full $2 million that the reporters' client intended to donate—would then be 'passed on to the Super PAC ***[GAP]***' from the 501(c)(4)." *FEC Analysis* at 12, lines 8-10;

- "He confirmed the reporter's question that those funds 'would be spend by the Super PAC ***[GAP]***.'" *Id*. at 12, line 14; *id*. at 13, line 1;

- "When the reporters asked Benton how much of the money would be passed on to the Super PAC, ***GAP***, he told them, 'All of it.'" *Id*. at 13, line 8. Here, the FEC altered the reporter's words. The original question from the reporters did not mention GAP. Instead, the reporters asked, "How much do you think you can pass on to the Super PAC because I think that's what I am going to get asked." *Id*. at 3, lines 5-6.

Despite the impression the *FEC Analysis* might leave on a reader, there is no evidence Benton was discussing GAP. Indeed, the FEC contends Benton was acting as an agent for GAP despite the fact—based on the Article, Video, and *FEC Analysis*—he apparently never once mentioned GAP's activities, its influence, its founder Ed Rollins, its co-chair Eric Beach, its other supporters, or anything at all about it. The FEC's apparent need to enhance Benton's and the reporters' quotes to such an extent underscores the lack of probable cause concerning any involvement by GAP in Benton's plans. Indeed, since both the *FEC Analysis* and the underlying *Telegraph* article that gave rise to it are both based solely on collection of conversational snippets ripped completely out of context, it is difficult to draw sufficiently reliable inferences about what specifically Benton was referring to.

[3] When Benton is recorded saying "You shouldn't put any of this on paper," the FEC construes that as consciousness of guilt. *See FEC Analysis*, at 16, lines 7-9. Yet the FEC has no problem playing a Mad Libs game of filling in the blanks by inserting GAP's name where it did not appear in his communications. Whatever Benton says or writes seems irrelevant, since the FEC will alter it to further its preconceived narrative.

CONCLUSION

There is no probable cause to believe GAP or Backer, in his official capacity as GAP's treasurer, violated 52 U.S.C. § 30121 or 11 C.F.R. § 110.20(h). Nevertheless, Respondents are willing to enter into pre-probable cause conciliation to quickly settle this matter rather than incurring the cost and inconvenience of continued administrative proceedings.

Respectfully submitted,

Dan Backer
Counsel for Great America PAC
and in his Official Capacity as Treasurer

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