

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)
4)
5 Jesse Benton) MURs 7165 and 7196
6)
7

8 **GENERAL COUNSEL’S BRIEF**

9
10 **I. STATEMENT OF THE CASE**

11 These matters arose from complaints alleging that Jesse Benton, a consultant for an
12 independent-expenditure only political committee, Great America PAC (“GAP”), knowingly and
13 willfully solicited a \$2 million contribution from a foreign national in violation of the Federal
14 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations.¹ The
15 complaints base their allegations on an October 24, 2016, article appearing on *The Telegraph*
16 *UK*’s website, which chronicles how two reporters posed as consultants claiming to represent a
17 foreign national donor, and includes a video showing that Benton met with the reporters and
18 recommended routing a \$2 million contribution from their purported foreign national client to
19 GAP through two layers of conduits.²

20 On February 25, 2021, the Commission found reason to believe that Benton knowingly
21 and willfully violated 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g) by knowingly
22 soliciting a contribution from a foreign national.³ Pursuant to the Commission’s findings and

¹ Compl. ¶¶ 23-28, MUR 7165 (Oct. 27, 2016); Compl. at 5, MUR 7196 (Nov. 10, 2016).

² Investigative Team, *Exclusive Investigation: Donald Trump Faces Foreign Donor Fundraising Scandal*, TELEGRAPH (Oct. 24, 2016, 8:10 PM), <http://www.telegraph.co.uk/news/2016/10/24/exclusive-investigation-donald-trump-faces-foreign-donor-fundrai/> (“Investigative Team Article”); see *Pro-Trump Fundraisers Agree to Accept Illicit Foreign Donation*, YOUTUBE, <https://www.youtube.com/watch?v=xQnOxM9iqOw> (posted Oct. 24, 2016) (“Telegraph Video”). The video is no longer available on the *Telegraph* website, but a copy is available on YouTube.

³ Certification ¶ 2, MURs 7165 and 7196 (Great America PAC, *et al.*) (Feb. 25, 2021).

1 authorization of compulsory process, the Office of the General Counsel commenced an
2 investigation.⁴

3 The information developed through the investigation confirms that Benton knowingly
4 solicited a contribution from a foreign national. The overall record indicates that Benton
5 recommended a plan or method by which a purported foreign national seeking to make a
6 \$2 million contribution to GAP could do so using a limited liability company and two 501(c)(4)
7 organizations as conduits to conceal the identity of the purported contributor. In addition, the
8 Commission is aware of information confirming that Benton made the solicitation with GAP's
9 knowledge and on its behalf.

10 Accordingly, this Office is prepared to recommend that the Commission find probable
11 cause to believe that Benton knowingly and willfully violated 52 U.S.C. § 30121(a)(2) and
12 11 C.F.R. § 110.20(g).

13 **II. FACTUAL BACKGROUND**

14 GAP is an independent-expenditure-only political committee that supported Donald J.
15 Trump during the 2016 presidential election.⁵ Eric Beach was one of GAP's co-chairs at all
16 times relevant to these matters.⁶ Benton was a strategist for GAP until May 2016, when he
17 resigned and opened an independent political consulting firm, Titan Strategies LLC ("Titan").⁷

⁴ *Id.* ¶ 4.

⁵ *See* GAP, Amend. Statement of Org. (Mar. 14, 2016).

⁶ Investigative Team Article.

⁷ *Id.*

1 According to the complaints, undercover journalists contacted Beach posing as
2 representatives of a Chinese national offering to contribute \$2 million to GAP.⁸ The initial
3 contact occurred “[i]n or around October 2016” and Beach reportedly told the reporters that he
4 needed information about the donor and “rais[ed] concerns [with them] about his nationality,”
5 and that he would “need to know the origins” of contributions to GAP.⁹ Beach then referred the
6 reporters to Benton,¹⁰ who met with the reporters and offered to transmit the \$2 million
7 contribution to GAP through his company, Titan, and two 501(c)(4) organizations.¹¹ The
8 reporters recorded their discussions with Benton, and clips of those recordings are shown in the
9 *Telegraph* video, which includes the following exchanges between Benton and the reporters:¹²

10 Jesse Benton: “I’ll actually probably send, I’ll send money from my company to
11 both.”

12 ***

13 Undercover reporter: “So I’m just thinking also about logistics, how this would
14 actually work. That is the 501(c)(4) that the money is going into — yeah?”

15 Jesse Benton: “Correct.”

16 Undercover reporter: “Yeah. And that’s through your company, yeah?”

17 Jesse Benton: “That’s correct.”

18 ***

19 Undercover reporter: “How much do you think you can pass on to the super PAC
20 because I think that’s what I am going to get asked.”

21 Jesse Benton: “All of it.”

⁸ Compl. at 2-3, MUR 7165; Compl. at 2, MUR 7196; *Telegraph* Video.

⁹ Investigative Team Article; see 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> (“NY Times Article”).

¹⁰ NY Times Article.

¹¹ MUR 7165 Compl. at 3-4; MUR 7196 Compl. at 3.

¹² *Telegraph* Video.

1 Undercover reporter: "All of it?"
2 [Benton nods his head]

3 ***

4 Undercover reporter: "Can I report back that it's getting used for on-the-ground
5 grassroots stuff or it's getting used for TV, or could be a mixture?"
6 Jesse Benton: "It's a mixture."

7 ***

8 Jesse Benton: "It will definitely allow us to spend two million more dollars on
9 digital and television advertising for Mr. Trump."
10 Undercover reporter: "Right, and that'll be spent by the super PAC?"
11 Jesse Benton: "Yes it will be."

12 ***

13 Jesse Benton: "You shouldn't put any of this on paper."

14 ***

15 Undercover reporter: "It's not like he's asking for anything directly but he just
16 wants to know that he won't just be treated as 'A N Other' — what do you think?"
17 Jesse Benton: "It'll do that, yeah."

18 ***

19 Jesse Benton: "And we can have that whispered into Mr. Trump's ear whenever your
20 client feels it's appropriate."

21 Through its investigation, the Commission has obtained information confirming Benton's
22 role in soliciting a \$2 million contribution from a foreign national on its behalf. Specifically, the
23 information confirms that Benton remained in contact with Beach after ending his employment
24 with GAP and that Beach referred the reporters to Benton to discuss whether he could potentially
25 help them with their proposed contribution. On the key issue of whether Benton *knowingly*
26 solicited a foreign national, the information confirms that Benton, acting on GAP's behalf and
27 with its knowledge, proceeded to recommend a plan for the reporters' client to make a
28 contribution, after having been informed that the source of the contribution would be a foreign

1 national. Information obtained by the Commission further confirms that Benton took measures
2 to conceal the scheme, supporting the conclusion that Benton knew that his plan was illegal.

3 **III. LEGAL ANALYSIS**

4 The record before the Commission indicates that Benton knowingly solicited a
5 contribution from a foreign national when he devised and recommended a plan or method by
6 which the reporters' purported client, someone who was represented to Benton as a foreign
7 national, could make a contribution to GAP through two layers of conduits, including Benton's
8 consulting company, Titan, and two 501(c)(4) organizations.

9 **A. The Foreign National Prohibition**

10 The Act and Commission regulations prohibit any "foreign national" from directly or
11 indirectly making a contribution or donation of money or other thing of value, or an expenditure,
12 independent expenditure, or disbursement, in connection with a federal, state, or local election.¹³
13 Moreover, the Act prohibits any person from soliciting, accepting, or receiving any such
14 contribution or donation from a foreign national.¹⁴ The Act's definition of "foreign national"
15 includes an individual who is not a citizen or national of the United States and who is not
16 lawfully admitted for permanent residence.¹⁵

¹³ 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20(b), (c), (e), (f). Courts have consistently upheld the provisions of the Act prohibiting foreign national contributions on the ground that the government has a clear, compelling interest in limiting the influence of foreigners over the activities and processes that are integral to democratic self-government, which include making political contributions. *See Bluman v. FEC*, 800 F. Supp. 2d 281, 288–89 (D.D.C. 2011), *aff'd* 132 S. Ct. 1087 (2012); *United States v. Singh*, 924 F.3d 1030, 1041–44 (9th Cir. 2019).

¹⁴ 52 U.S.C. § 30121(a)(2). The Commission's implementing regulation at 11 C.F.R. § 110.20(g) provides that "no person shall *knowingly* solicit" a contribution or donation from a foreign national — and "knowingly" is defined, in this context, to include "actual knowledge," as well as "aware[ness] of facts that would lead a reasonable person to conclude that there is a substantial probability," that the target of the solicitation is a foreign national. 11 C.F.R. § 110.20(a)(4)(i)-(ii).

¹⁵ 52 U.S.C. § 30121(b)(2).

1 Commission regulations also provide that to “solicit” means to “ask, request, or
2 recommend, explicitly or implicitly, that another person make a contribution, donation, transfer
3 of funds, or otherwise provide anything of value.”¹⁶ Furthermore:

4 A solicitation is an oral or written communication that, construed
5 as reasonably understood in the context in which it is made,
6 contains a clear message asking, requesting, or recommending that
7 another person make a contribution, donation, transfer of funds, or
8 otherwise provide anything of value. A solicitation may be made
9 directly or indirectly. The context includes the conduct of persons
10 involved in the communication. A solicitation does not include
11 mere statements of political support or mere guidance as to the
12 applicability of a particular law or regulation.¹⁷

13 Commission regulations provide examples of statements that would qualify as
14 solicitations, including but not limited to: “Giving \$100,000 to Group X would be a very smart
15 idea”¹⁸ and “I am not permitted to ask for contributions, but unsolicited contributions will be
16 accepted at the following address.”¹⁹ However, the Commission has “emphasized that the
17 definition . . . is not tied in any way to a candidate’s use of particular ‘magic words’ or specific
18 phrases.”²⁰ The Commission has also explained that communications must be reasonably

¹⁶ 11 C.F.R. § 110.20(a)(6) (cross-referencing 11 C.F.R. § 300.2(m)).

¹⁷ *Id.* § 300.2(m).

¹⁸ *Id.* § 300.2(m)(2)(v).

¹⁹ *Id.* § 300.2(m)(2)(vii).

²⁰ Definitions of “Solicit” and “Direct,” 71 Fed. Reg. 13,926, 13,928 (Mar. 20, 2006) (“Solicitation E&J”). The Commission revised the definition of “to solicit” in 2006, specifically in response to *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), in which the U.S. Court of Appeals for the D.C. Circuit invalidated the Commission’s original definition because it covered only “explicit direct requests” and left open the possibility that candidates could evade the statutory restriction on soft money solicitations with “winks, nods, and circumlocutions to channel money in favored directions — anything that makes their intention clear without overtly ‘asking’ for money.” *See Shays*, 414 F.3d at 106.

1 construed in context, such that “the Commission’s objective standard hinges on whether the
2 recipient should have reasonably understood that a solicitation was made.”²¹

3 Although the Commission had never previously applied the Act’s prohibitions on the
4 solicitation of foreign national contributions to the solicitation of a fictitious foreign contributor,
5 at the reason to believe stage of these matters, the Commission determined — based on the plain
6 meaning of section 30121(a)(2), the legislative history animating the longstanding prohibition on
7 foreign national interference in U.S. elections, the Act’s parallel restriction on soliciting soft
8 money, and the interpretation of federal bribery and anti-corruption statutes — that section
9 30121 prohibits all “knowing” solicitations of foreign nationals, whether the person making the
10 solicitation has “actual knowledge” that the person being solicited is a foreign national, or is
11 aware of facts that would lead a reasonable person to conclude that there is a reasonable
12 probability that the person being solicited is a foreign national (including, *e.g.*, because the
13 person making the solicitation is *told* the person being solicited is a foreign national), even if that
14 conclusion is ultimately wrong.²²

²¹ Solicitation E&J, 71 Fed. Reg. at 13,929 (“[I]t is necessary to reasonably construe the communication in context, rather than hinging the application of the law on subjective interpretations of the Federal candidate’s or officeholder’s communications or on the varied understandings of the listener. The revised definition reflects the need to account for the context of the communication and the necessity of doing so through an objective test.”); *see* Factual & Legal Analysis at 6, MUR 6939 (Mike Huckabee, *et al.*) (dismissing an allegation that a candidate solicited an excessive contribution by saying, in a speech announcing his candidacy, “If you want to give a million dollars, please do it,” because, in context, “an objective listener would not reasonably have understood” the statement to be a solicitation for “million-dollar contributions,” as opposed to “a humorous aside in the course of his speech”).

²² *See* Factual and Legal Analysis at 4-10, MURs 7165 and 7196 (Jesse Benton).

1 **B. Benton Knowingly and Willfully Violated the Act by Soliciting a Foreign**
2 **National to Make a \$2 Million Contribution to GAP through Two Layers of**
3 **Conduits**

4 The record in this matter indicates that Benton made a solicitation for a \$2 million
5 contribution, directed at someone that Benton clearly believed to be a foreign national.

6 1. Solicitation

7 Benton's recorded statements to the reporters satisfy the meaning of "to solicit" in that
8 Benton "ask[ed], request[ed], or recommend[ed], explicitly or implicitly," that the reporter's
9 client make a contribution to GAP.²³ For instance, Benton provided the reporters with a specific
10 "method of making a contribution" so that it could not be traced back to their client.²⁴ Benton
11 told the reporters that he would "send . . . [the] money from my company to both" in reference to
12 the two 501(c)(4) organizations, and confirmed the reporter's queries "about logistics" — *i.e.*,
13 that the funds would be passed through Benton's company into the 501(c)(4)s.²⁵ Benton also
14 confirmed that "all of it" — meaning the full \$2 million that the reporters' client intended to
15 donate — would then be "pass[ed] on to the Super PAC [GAP]" from the 501(c)(4)s.²⁶ Benton's
16 words are analogous to the Commission's examples of statements that constitute a solicitation,
17 such as "I am not permitted to ask for contributions, but unsolicited contributions will be
18 accepted at the following address."²⁷ As in the Commission's example, Benton provided a plan
19 or method for the reporters' client to make a contribution to GAP that would facially appear

²³ 11 C.F.R. § 110.20(a)(6) (cross-referencing 11 C.F.R. § 300.2(m)).

²⁴ 11 C.F.R. § 300.2(m)(1)(i).

²⁵ Telegraph Video.

²⁶ *Id.*

²⁷ 11 C.F.R. § 300.2(m)(2)(vii).

1 unsolicited but which was, in fact, made using a transaction scheme devised and recommended
2 by Benton.

3 Benton further confirmed that the money would be provided to GAP for its activities in
4 support of Trump's 2016 presidential candidacy when he told the reporters: "It [the donation]
5 will definitely allow us to spend two million more dollars on digital and television advertising
6 for Mr. Trump."²⁸ He confirmed the reporter's question that those funds "would be spent by the
7 Super PAC [GAP]."²⁹ Here again, Benton's recorded statements, which provide a detailed plan
8 for the reporters' client to make a contribution to GAP without public disclosure of their client's
9 identity, parallel Commission examples of "solicitations" that "recommend" that the target of the
10 statement make a contribution, such as, *e.g.*, "The money you will help us raise will allow us to
11 communicate our message through Labor Day."³⁰ Accordingly, Benton made a solicitation
12 through his statements to the reporters.

13 In a response to the Commission's Factual and Legal Analysis, Benton argues that his
14 statements do not constitute a solicitation because "a solicitation cannot include *any* conversation
15 with someone who has already offered to make a contribution."³¹ Benton contends that because
16 the reporters, on their client's behalf, were "offering to make the contribution, unsolicited, there
17 was no contribution for Mr. Benton to solicit."³² This argument misreads the plain text of the
18 regulation and ignores several of the examples of "solicit" that the Commission provided. The

²⁸ Telegraph Video.

²⁹ *Id.*

³⁰ 11 C.F.R. § 300.2(m)(2)(xiv).

³¹ Jesse Benton's Motion to Reconsider and Rescind Reason to Believe Finding, Quash Subpoena, and Close the File at 4 (Aug. 2, 2021) ("Benton Motion") (emphasis in original).

³² *Id.* at 5.

1 regulation plainly states that to solicit means “to ask, request, or recommend, explicitly or
2 implicitly, that another person make a contribution,” and it is the word “recommend” that most
3 closely aligns with Benton’s conduct in this matter. To “recommend” that another person make
4 a contribution plainly encompasses providing specific instructions or general words of
5 encouragement to those already interested in making a contribution, such as someone informing
6 potential donors where and how to submit their donations,³³ a statement at a fundraiser that any
7 contribution would “mean a great deal” to a candidate or political committee,³⁴ or the
8 exhortation that “[g]iving \$100,000 to [the candidate or political committee] would be a very
9 smart idea.”³⁵

10 Indeed, the definition of “solicit” goes beyond communications that seek or invite
11 contributions to include those that provide more logistical information, such as supplying a
12 “method of making a contribution,” including to persons already interested in making one.³⁶ The
13 list of examples in the regulation explicitly includes a situation where the person making the
14 solicitation tells a potential contributor, “I am not permitted to ask for contributions, but
15 *unsolicited* contributions will be accepted at the following address.”³⁷ Benton errs in arguing to
16 the contrary,³⁸ and the argument offered in response to the Commission’s prior finding entirely
17 ignores Benton’s many statements recommending the logistical details of his proposed method of

³³ 11 C.F.R. § 300.2(m)(1)(ii).

³⁴ *Id.* § 300.2(m)(2)(xiii).

³⁵ *Id.* § 300.2(m)(2)(v).

³⁶ *Id.* § 300.2(m)(1)(i).

³⁷ *Id.* § 300.2(m)(2)(vii) (emphasis added).

³⁸ Benton also appears to misread the Commission’s decision not to find probable cause in MUR 7271 (DNC, *et al.*). There, the Commission disagreed with this Office’s assessment that there was any solicitation made, but did not base that conclusion on the understanding that the matter involved an unsolicited contribution.

1 contributing through his company, Titan, and two 501(c)(4) organizations, as well as his
2 statement suggesting that the true attribution for the contribution could be “whispered” in the ear
3 of the supported candidate whenever the reporters’ client “feels it’s appropriate.”³⁹

4 2. Contribution

5 It is uncontroverted that Benton sought a “contribution” under the Act. A “contribution”
6 includes “any gift, subscription, loan, advance, or deposit of money or anything of value made
7 by any person for the purpose of influencing any election for Federal office.”⁴⁰ According to the
8 *Telegraph* video, the reporters said that they represented a Chinese national offering to provide
9 \$2 million to GAP in support of Trump’s 2016 presidential candidacy, which clearly would have
10 constituted a “contribution.”

11 3. Foreign National

12 Under the Act and Commission regulations, Benton “knowingly” solicited a contribution
13 from a foreign national source — *i.e.*, he actually knew, or was “aware of facts that would lead a
14 reasonable person to conclude that . . . the source of the funds solicited . . . is a foreign
15 national.”⁴¹ The record indicates that after the reporters contacted Beach purporting to represent
16 a Chinese national interested in making a contribution, Beach “rais[ed] concerns about his
17 nationality,” and that he would “need to know the origins” of contributions to GAP.⁴² Beach
18 then referred the matter to Benton, and Benton’s discussion with the reporters, as captured in the
19 *Telegraph* video, leaves no doubt that the reporters told Benton that their purported client was a

³⁹ Telegraph Video.

⁴⁰ 52 U.S.C. § 30101(8)(A).

⁴¹ 11 C.F.R. § 110.20(a)(4)(ii).

⁴² NYTimes Article.

1 Chinese national, *i.e.*, a “foreign national” prohibited from making contributions under the Act.⁴³

2 The record shows that Benton then provided the reporters with a detailed plan for the foreign
3 national to make a contribution to GAP through his company and two 501(c)(4) organizations.⁴⁴

4 The contribution plan that Benton recommended to the reporters further supports a
5 conclusion that Benton was aware that the source of the contribution — the reporter’s purported
6 client — was a foreign national and could not therefore make any contribution directly to GAP,
7 necessitating a contribution made through intermediaries to mask its origin. In response to a
8 question about “how this would actually work,” Benton affirmed that the funds would go
9 through his company, Titan, to two 501(c)(4) organizations, and then “all of” the \$2 million
10 would be provided to GAP; he reiterated that the contribution would allow “the super PAC”
11 — *i.e.*, GAP — to “spend two million more dollars on digital and television advertising for Mr.
12 Trump.”⁴⁵ Benton also assured the reporters that their client’s contribution would have the effect
13 of ensuring he would not be treated as just “A N Other” supporter, but one whose name could be
14 “whispered into Mr. Trump’s ear whenever your client feels it’s appropriate.”⁴⁶

15 Considered together, Benton’s statements and proposal to funnel the \$2 million
16 contribution to GAP through two layers of conduits — to obscure the true source of those funds
17 — demonstrate that Benton knew or was aware of sufficient facts to reasonably conclude that the
18 person being solicited to provide the funds was a foreign national who could not legally make a
19 contribution to GAP or appear on GAP’s disclosure reports. By proceeding to formulate and

⁴³ Telegraph Video; *see* 52 U.S.C. § 30121(a), (b).

⁴⁴ Telegraph Video.

⁴⁵ *Id.*

⁴⁶ *Id.*

1 recommend a contribution plan to the undercover reporters with a clear belief that the client was
2 represented to be a foreign national, Benton solicited a \$2 million contribution to GAP in support
3 of its electoral activities during the 2016 election from someone he knew or reasonably believed
4 to be a foreign national.

5 Benton argues that the Act's foreign national prohibition requires that the target of the
6 solicitation be a foreign national, and that because the target of his solicitation was not a foreign
7 national (and did not actually exist), his conduct could not have resulted in a violation.⁴⁷ As
8 discussed above, the Commission previously considered this argument and, in finding reason to
9 believe, determined that the Act *does* prohibit soliciting a contribution from a person that the
10 person making the solicitation reasonably believes to be a foreign national, even if that
11 conclusion is wrong.⁴⁸ As the Commission previously found, "Section 30121 . . . prohibits all
12 'knowing' solicitations of foreign nationals," including instances where "the person making the
13 solicitation . . . is aware of facts that would lead a reasonable person to conclude that the person
14 being solicited is a foreign national — even if that conclusion is wrong" because, as in this case,
15 the target of the solicitation is misrepresented as a foreign national.⁴⁹

16 Benton errs in claiming that "the 'knowing' qualification *narrows* the reach of the foreign
17 national prohibition to the solicitation of an actual foreign national where there was actual
18 knowledge or reason to know the person was a foreign national,"⁵⁰ and cites no support for this
19 claim. The Commission's 2003 Explanation and Justification states that the "substantial

⁴⁷ Benton Motion at 8.

⁴⁸ *See supra* note 22.

⁴⁹ Factual and Legal Analysis at 10, MURs 7165 and 7196 (Jesse Benton).

⁵⁰ Benton Motion at 8 (emphasis in original).

1 probability” aspect of the *mens rea* standard at 11 C.F.R. § 110.20(a)(4)(ii) — *i.e.*, awareness of
2 facts would lead a reasonable person to conclude that there is a substantial probability that the
3 contribution or donation comes from a foreign source — “is, in effect, a ‘reason to know’
4 standard under which a person should have acted as though a fact existed until it could be proven
5 otherwise.”⁵¹

6 In other words, credible information that a potential contributor is a foreign national
7 should, under this *mens rea* standard, give pause to the soliciting person until he or she can prove
8 the contrary (that the person being solicited is *not* a foreign national). But that is the opposite of
9 what happened here. When the reporters told Benton that their client, the potential contributor,
10 was a foreign national, Benton had “reason to know” that the contribution would come from a
11 foreign source and “should have acted” accordingly, “until it could be proven otherwise.”⁵²
12 Benton instead made the solicitation by recommending a method for the reporters’ client to make
13 a contribution to GAP, and his understanding of the represented contributor’s foreign nationality
14 impacted his actions only in that the plan he recommended was intended to conceal the true
15 provenance of the contribution because he knew that it would come from an illegal source.

16 Benton also argues that the Act does not prohibit “attempted violations” because
17 Congress “did not authorize the Commission to punish attempted or intended, but unsuccessful
18 or incomplete, violations of the Act.”⁵³ Instead, Benton argues, the Commission is empowered
19 only to pursue violations of the Act that a person “has committed or is about to commit.”⁵⁴ Even

⁵¹ Contribution Limitations and Prohibitions, 67 Fed. Reg. 69,928, 69,941 (Nov. 19, 2003).

⁵² *Id.*

⁵³ Benton Motion at 3.

⁵⁴ *Id.* (quoting 52 U.S.C. § 30109(a)(2)).

1 if Benton is correct that the Act does not proscribe attempted violations, this argument elides that
2 the Act prohibits not only the making, accepting, or receiving of foreign national contributions,
3 but the *solicitation* of such contributions as well.⁵⁵ Benton's actions constituted a completed
4 violation of the solicitation prohibition, not an attempted one. Benton violated the "solicitation"
5 aspect of the statutory prohibition when, after being told that a foreign national would like to
6 make a contribution to GAP, he responded by recommending a particular method by which the
7 foreign national could, in fact, do so without being detected.

8 Benton relatedly argues that the Commission can only announce new rules implementing
9 the Act through a rulemaking, not an enforcement matter, and cannot enforce a new rule
10 retroactively without violating the Due Process clause of the Fifth Amendment.⁵⁶ However, this
11 argument is inapposite to the matters at hand: As discussed above, the Commission has not
12 made a new rule regarding "attempted violations" of the Act, and that is not the violation for
13 which the Commission found reason to believe in these matters. Section 30121 and the
14 Commission's implementing regulation have long prohibited knowingly soliciting a contribution
15 from a foreign national, and the Commission, applying that longstanding prohibition to these
16 facts, found reason to believe that Benton solicited a contribution from a source that he knew to
17 be a foreign national. The application of a longstanding prohibition in a new factual context
18 does not amount to a new rule requiring prior notice.

19 Moreover, Benton's notice argument is undermined by the facts here. Benton's actions
20 betrayed no contemporaneous awareness that the potential contributor was fictitious (or was not
21 a foreign national), and Benton's proposed contribution scheme reflected a deliberate attempt to

⁵⁵ See 52 U.S.C. § 30121(a).

⁵⁶ Benton Motion at 10.

1 conceal the true contributor's identity, evincing Benton's awareness that the contribution was
2 illegal and undercutting any assertion that Benton lacked notice that it is unlawful to knowingly
3 solicit a contribution from a foreign national. Benton's own effort to conceal his actions — the
4 basis for the Commission's knowing and willful finding — indicates that he was "give[n] fair
5 notice of conduct that is forbidden or required" of him.⁵⁷

6 4. Benton's Violation was Knowing and Willful

7 Benton's effort to conceal his violations demonstrates that the violation was knowing and
8 willful. A violation of the Act is knowing and willful when the respondent acts "with full
9 knowledge of all the relevant facts and a recognition that the action is prohibited by law."⁵⁸ This
10 standard does not require proving knowledge of the specific statute or regulation the respondent
11 violated.⁵⁹ Rather, it is sufficient to demonstrate that a respondent "acted voluntarily and was
12 aware that his conduct was unlawful."⁶⁰ This awareness may be shown through circumstantial
13 evidence, such as a "defendant's elaborate scheme for disguising" her actions, or other "facts and
14 circumstances from which the jury reasonably could infer [the defendant] knew her conduct was
15 unauthorized and illegal."⁶¹

⁵⁷ *Id.* (quoting *FCC v. Fox Television Stations*, 567 U.S. 239, 253 (2012)).

⁵⁸ 122 Cong. Rec. H3778 (daily ed. May 3, 1976).

⁵⁹ *See United States v. Danielczyk*, 917 F. Supp. 2d 573, 579 (E.D. Va. 2013) (citing *Bryan v. United States*, 524 U.S. 184, 195 & n.23 (1998) (holding that, to establish that a violation is willful, the government needs to show only that the defendant acted with knowledge that her conduct was unlawful, not knowledge of the specific statutory provision violated)).

⁶⁰ *Id.* (internal quotation marks omitted).

⁶¹ *United States v. Hopkins*, 916 F.2d 207, 213-15 (5th Cir. 1990) (internal quotation marks omitted). As the *Hopkins* court noted, "It has long been recognized that 'efforts at concealment [may] be reasonably explainable only in terms of motivation to evade' lawful obligations." *Id.* at 214 (quoting *Ingram v. United States*, 360 U.S. 672, 679 (1959)).

1 Based on the *Telegraph* video, there is evidence that Benton was aware that his conduct
2 was illegal and that he engaged in an elaborate scheme to conceal it. Benton's plan to use two
3 layers of conduits to obscure the true contributor, whom he believed to be a foreign national, as
4 well as to conceal his role in facilitating the contribution, was an "elaborate scheme for
5 disguising" an illegal foreign national contribution.⁶² Moreover, Benton explicitly told the
6 reporters, "You shouldn't put any of this on paper."⁶³ Benton therefore appears to have known
7 that his plan was illegal and took numerous steps to conceal it.⁶⁴

8 **C. Pursuing These Matters Would Advance Crucial Enforcement Interests**

9 Benton raises a prudential argument that the Commission should dismiss these matters in
10 an exercise of its prosecutorial discretion, both because the substantive issues raised could
11 present a litigation risk, and because the Commission has other priorities.⁶⁵ Neither argument
12 presents a compelling rationale for dismissing these matters. Benton contends that the decision
13 to pursue these matters presents a risk that a reviewing court might strike down parts of the
14 Commission's regulations implementing the Act's foreign national prohibition, comparing this
15 situation to the one presented in *Swallow v. FEC*, 304 F. Supp. 3d 1113, 1115 (D. Utah 2018),
16 but the comparison is inapt. In *Swallow*, the court determined that the Commission regulation
17 prohibiting any person from "help[ing] or assist[ing]" in making a contribution in the name of
18 another impermissibly exceeded the ambit of the statutory provision at 52 U.S.C. § 30122,
19 because it created a category of secondary liability when the provision establishes only primary

⁶² *Hopkins*, 916 F.2d at 213-15.

⁶³ Telegraph Video.

⁶⁴ See 122 Cong. Rec. H3778; *Hopkins*, 916 F.2d 207, 213-15; *Danielczyk*, 917 F. Supp. 2d at 579.

⁶⁵ Benton Motion at 11.

1 liability. But Benton's actions did not amount to "helping and assisting" in the making of a
2 foreign national contribution and are not reflective of secondary liability for soliciting a
3 prohibited foreign national contribution; they are instead reflective of primary liability through
4 his direct solicitation of a contribution.

5 The Commission should pursue enforcement in these matters because doing so would
6 help deter efforts to evade the Act's foreign national prohibition and advance the Act's clear goal
7 of eliminating foreign influence in U.S. elections, including foreign influence that is solicited by
8 domestic actors. In fact, the Commission has observed and relied on the substantial and growing
9 concern regarding foreign influence in the processes of American democratic self-governance in
10 shaping its enforcement priorities,⁶⁶ and the Commission has informed Congress that it continues
11 to enforce the foreign national provision and prioritize cases involving allegations of foreign
12 influence.⁶⁷ Finally, to the extent that Benton requests that the Commission exercise its
13 prosecutorial discretion to dismiss these matters, certain of the factors that bear on the question
14 of prosecutorial discretion, such as use of agency resources, have been mooted by the completion

⁶⁶ See, e.g., Minutes of Open Meeting of Fed. Election Comm'n at 13 (Sept. 16, 2016) (directing this Office to prioritize cases "involving allegations of foreign influence"); Responses to Questions from the Comm. on House Administration, Fed. Election Comm'n at 41-42 (May 1, 2019); see also *Explanatory Statement to Consolidated Appropriations Act, 2018*, 164 Cong. Rec. H2045, H2520 (Mar. 22, 2018) ("Preserving the integrity of elections, and protecting them from undue foreign influence, is an important function of government at all levels.").

⁶⁷ See Ltr. to House Comm. on Appropriations and Senate Comm. on Appropriations, Fed. Election Comm'n at 1, 17-18 (Sept. 18, 2018) (reporting on Commission's role "in enforcing the foreign national prohibition, including how it identifies foreign contributions to elections, and what it plans to do in the future" as required by Explanatory Statement for 2018 Appropriations Act); *Explanatory Statement to Consolidated Appropriations Act, 2018*, 164 Cong. Rec. at H2520.

1 of significant work on the matter, including the Commission's reason-to-believe finding and
2 investigation.

3 **V. CONCLUSION**

4 The overall record in these matters indicates that Benton knowingly and willfully violated
5 the Act and Commission regulations by knowingly soliciting a contribution from a foreign
6 national source. The *Telegraph* article and video show that Benton, reasonably believing that he
7 was speaking with the representatives of a foreign national interested in making a \$2 million
8 contribution, presented and recommended a method for that contribution to be made through his
9 company and two 501(c)(4) organizations, thereby evading public scrutiny and the laws
10 prohibiting such contributions. Accordingly, this Office is prepared to recommend that the
11 Commission find probable cause to believe that Benton knowingly and willfully violated
12 52 U.S.C. § 30121(a)(2) and 11 C.F.R. § 110.20(g).

13
14 August 10, 2021

15
16 Date

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