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August 2, 2021

VIA EMAIL AND FEDEX

Saurav Ghosh
Federal Election Commission
1050 First Street, NE
Washington, DC 20002
SGhosh@fec.gov

Re: MURs 7165 & 7196 (Jesse Benton)

Dear Mr. Ghosh:

Our firm represents respondent Jesse R. Benton. Please see the attached Motion to Reconsider and Rescind the Reason to Believe Finding and to Quash the Subpoena in Matters Under Review 7165 and 7196. We are sending a courtesy copy to the commissioners to ensure that they receive it in a timely manner given the constraints imposed by the COVID-19 pandemic and the Federal Election Commission's remote work circumstances. Commissioners Trainor, Weintraub, and Walther are copied on this message as they have publicly available electronic messages.

Regards,

David Warrington
and
Michael A. Columbo
Counsel for Jesse R. Benton

cc: James E. "Trey" Trainor III, Commissioner
Ellen L. Weintraub, Commissioner
Steven T. Walther, Commissioner

FEDERAL ELECTION COMMISSION

Jesse Benton,	)	MURs 7165 & 7196
Respondent	)	
	)	

JESSIE BENTON'S MOTION TO RECONSIDER AND RESCIND REASON TO BELIEVE FINDING, QUASH SUBPOENA, AND CLOSE THE FILE

Through undersigned counsel, Respondent Jesse Benton respectfully requests that the Commission reconsider and rescind its reason to believe finding in this matter, quash the subpoena issued to him, and close the file in this matter. As a matter of law, there is no reason to believe ("RTB") Mr. Benton solicited a foreign national contribution, and it would not be a prudent use of the Commission's resources to pursue this matter further.

SUMMARY

There are two erroneous legal conclusions in the Factual and Legal Analysis ("F&LA") that led to the Commission's RTB finding, which was based on a wholly fictitious scenario that does not support any violation of the Federal Election Campaign Act ("Act").

The first legal error is that, for the first time in the Commission's 45-year history, the Commission asserts that a person's alleged attempted solicitation of a "fictitious foreigner," which was set up as a stunt by a media organization, constitutes a violation of Act. This assertion has no basis in the text of the Act or in Commission regulations.

The second erroneous legal conclusion is that a person like Benton, to whom a committee introduced an *unsolicited* donor already offering to make a contribution, solicits that donor by merely talking to them further about their *unsolicited* donation to the committee. Both of these legal propositions are essential to the Commission's RTB finding against Mr. Benton and both conclusions are wrong as a matter of law.

In addition to the erroneous legal foundation upon which the RTB is premised, it also has no factual basis. There was no foreign national for Mr. Benton to solicit. As the Commission concedes, the entire stunt was premised on a wholly fictitious foreigner and scenario. Thus any purported violation of the Act was factually impossible.

Given the factual impossibility of an actual violation, the Commission cannot now invent new violations that Congress did not include in the Act, such as a violation for an unsuccessful, indeed impossible, attempted solicitation of a foreign national contribution. Nor can the Commission adopt a new and expanded meaning of what it means to "solicit" that encompasses unsolicited contributions.

Even when the Commission has the power to create new rules, the Act prohibits using an enforcement matter to do so. And Due Process forbids the Commission from using an enforcement matter to retroactively punish Mr. Benton for violating new rules it creates in that enforcement matter.

Further, if the Commission is not inclined to conclusively determine that there is no reason to believe a violation of the Act has occurred, it should dismiss this matter in an exercise of its prosecutorial discretion pursuant to *Heckler v. Chaney*, 470 US 821 (1985).

Pursuit of an investigation into an allegedly attempted but impossible violation that did not occur involving a contributor that did not exist under new violations of law not found in the Act—all based on an event orchestrated by a foreign national entity—cannot be a prudent use of the Commission's resources in light of the Commission's backlog of hundreds of enforcement cases involving actual potential violations. Moreover, as explained below, pursuit of this matter into District Court could risk the loss of parts of the Commission's foreign national prohibition regulation that are not supported by the Act. Finally, the Commission has already obtained a settlement with the Committee to whom the fake unsolicited contribution was offered by the fictitious foreign national and extracted a penalty from that Committee. There is little to no apparent marginal benefit to pursuing Mr. Benton separately given the potential costs listed above.

The Commission should, therefore, reconsider and rescind its RTB finding, quash the subpoena, and close the file in this matter.

ANALYSIS

I. The Commission Does Not Have Authority to Punish "Attempted" Violations Under Existing Laws and Regulations

In this matter, two agents of the *Telegraph*, a foreign corporation,[1] "pos[ed] as representatives of a Chinese national offering to contribute $2 million to GAP." F&LA at 2. There is no dispute that these foreign agents approached a co-Chair of Great America PAC ("Committee") with their offer, unsolicited, as part of a sting operation in which they recorded their efforts for the purpose of causing embarrassment to the Committee immediately before the 2016 election. And there is no dispute that these foreign agents were lying about the existence of a foreign national donor. *Id.* at 1.

The FLA states that the Commission found reason to believe that, *after* the agents' subsequent introduction to Mr. Benton, he knowingly and willfully solicited a foreign national by speaking with these foreign agents about their unsolicited phony contribution. Although a solicitation is normally a simple matter to demonstrate, the lengthy F&LA comprises a tortuous

[1] The F&LA refers to the Telegraph's agents as journalists but there is no foundation for that characterization. The scandal-plagued Telegraph is not the conservative press entity it was years ago. See https://www.opendemocracy.net/en/opendemocracyuk/why-i-have-resigned-from-telegraph/. It is a foreign corporation, certainly, and it clearly creates online content. But participation in an online video featuring cherry-picked context-less secret recordings, standing alone, does not make one a "journalist." There is no Telegraph news article cited in the F&LA and no byline identifying the Telegraph employees who were in the video. The foreign company's choice to de-publish the video also raises questions about its reliability. That persons undertook actions at their foreign employer's expense to influence the American public and election through a published communication, now disavowed, raises additional questions, including substantial issues under the Foreign Agents Registration Act.

legal argument as to how Mr. Benton can be punished for soliciting a foreign national that didn't exist and soliciting a fictitious contribution that had already been offered.

The first solution in the F&LA was to create a new rule prohibiting attempted violations. *See* F&LA at 9-10, nn. 23, 27. Congress, however, did not authorize the Commission to punish attempted or intended, but unsuccessful or incomplete, violations of the Act. Congress certainly knew it could use the word "attempt" because it used it five times in the Act: once in reference to a tax code provision the Act was not meant to affect (52 U.S.C. § 30104(f)(7)), and four times in reference to the Commission's duties to attempt conciliation. *Id*., § 30109(4).

Rather, the Act empowers the Commission to investigate a complaint if there is reason to believe one of two things: either that a person "*has committed*, or *is about to commit*, a violation of the Act." *See* 52 U.S.C. § 30109(a)(2) (italics added). Following a finding of probable cause, the Commission is accordingly required to attempt "to *correct* or *prevent* such violation." *See id.*, § 30109(a)(2) (italics added). If the Commission cannot "correct" a past violation or "prevent" a future violation, it may file suit to seek an order for civil penalties for a past violation or an injunction to stop a future violation. *See id.*, § 30109(a)(6). There is no gray area in-between committing and not committing a past violation that the Commission may seek to correct. Congress never empowered the Commission to punish a person for a violation they haven't committed. But that is precisely the claimed authority in the F&LA under the rubric of a strained "attempted violation" theory.

Section 30121(a)(2), the Act's provision that the F&LA contends Mr. Benton violated, does not include the word "attempt" or any similar notion. It succinctly states that it is unlawful for "a person to solicit, accept, or receive a contribution or donation" from a foreign national. The F&LA instead depends on the Commission's regulation at 11 C.F.R. § 110.20 implementing this provision. That regulation goes far beyond Congress's prohibition in section 30121 and is therefore vulnerable if litigated, but even it does not come close to supporting the imaginatively expansive interpretation asserted in the F&LA.

Section 110.20(g) states that "[n]o person shall knowingly solicit, accept, or receive from a foreign national any contribution or donation." One way the regulation differs from the Act is its addition of the word "knowingly." The only plausible way to interpret the regulation's qualification of "solicit," "accept," or "receive" with the added "knowingly" adverb is that the regulation clarifies, by narrowing, the range of behavior constituting a violation from what it might otherwise be based on the plain the text of the Act. For example, the regulation makes it clear that the rule is not one of strict liability, that is, it certainly excludes a person who had no way of knowing that a person they solicited was a foreign national.

The regulation further defines its supplemental "knowingly" intent element to include, in addition to *actual knowledge* a person is a foreign national, a *negligent* solicitation of a foreign national as well as a duty to investigate potentially foreign sources. *See* 110.20(a)(4). But to violate regulation 110.20, a person must still solicit a person who is actually a foreign national (negligently or with actual knowledge). There is no other reasonable way to read the text of the statute or the regulation. In any event, the regulation's limiting intent requirement certainly does

not support the F&LA's contention that it conceals a massive expansion of the power of the Commission to punish incomplete, even impossible, non-violations based on a person's intent alone.

Accordingly, the unambiguous plain letter of the Act and Commission's regulation establish that, absent the involvement of an actual foreign national whom a person indeed solicited (deliberately or negligently), there is no reason to believe that a person violates section 30121(a)(2) or Commission regulation 110.20(g), under an "attempted solicitation" theory, by soliciting a contribution from people pretending to be agents of a non-existent foreign person for a click-bait video.[2]

II. Discussing an Unsolicited Contribution Offer is Not a Solicitation

Despite finding RTB that Mr. Benton solicited a foreign national, the F&LA does not identify a solicitation. Rather, the F&LA asserts that Mr. Benton solicited a contribution from the Telegraph's agents after they already offered to make an unsolicited contribution to the Committee by merely speaking to them about the contribution they offered.

The Commission's regulation implementing the foreign national contribution ban incorporates by reference the definition of "solicit" found at 11 C.F.R. § 300.2(m). *See* 11 C.F.R. § 110.20(a)(6). This common definition of solicit is also used for the Commission's disclaimer requirements. Equating, as section 110.20(a)(6) does, the concept of a solicitation for the purpose of the foreign national prohibitions with the concept of a solicitation for the purpose of the Commission's disclaimer rules means there is only one meaning for the word "solicitation," that is, there is only one class of communications that constitute a solicitation for all purposes of the Act. Accordingly, any new rule re-defining solicitations created by this MUR will affect the rest of the Commission's rules on solicitations with implications that are not discussed in the F&LA.

Section 300.2(m) is a remarkable regulation that thoroughly explains the meaning of the word "solicitation," and it includes illustrative examples of what are, and what are not, solicitations. The regulation begins with a straightforward statement that "*to solicit* means to ask, request, or recommend, explicitly or implicitly, that another person make a contribution . . ." It continues, further clarifying that a solicitation is a "clear message asking, requesting, or recommending that another person make a contribution . . ." Everything that follows necessarily illuminates the meaning of the word within this definition. The list of examples included in section 300.2(m) similarly corroborate that a solicitation is a statement from one person to another that asks them to make a contribution, including sending someone a communication that includes instructions for how to make a contribution, which implicitly asks for a contribution.

[2] We note that the actual RTB finding recited in the Commission's notification letter to Mr. Benton omits that the solicitation violation was an "attempted" violation (or an "intended" violation, as suggested by the language of the F&LA, which ominously sounds like a "thoughtcrime"). *See* George Orwell, 1984 (Harcourt 2003) (1949). Accordingly, the violation described in the F&LA does match the Commission's RTB finding.

But a solicitation cannot include *any* conversation with someone who has already offered to make a contribution. If the act of responding to an unsolicited contribution was itself a solicitation of a contribution, there would be no such thing as an unsolicited contribution and every discussion of any contribution would have to be handled as a solicitation. Had Congress wanted disclaimers included in any communication or discussion with a contributor, it could easily have said so—though it would be absurd.

Instead, the Commission has routinely acknowledged the possibility and propriety of, for example, separate segregated funds accepting *unsolicited* contributions. *See* FEC Corporation and Labor Organization Campaign Guide at 37 ("An SSF may accept an unsolicited contribution that is otherwise lawful[.]"); *compare* 11 C.F.R. § 114.5(g)(1) (an SSF may only solicit contributions from its restricted class) *with id.*, § 114.5(j) (an SSF "may accept contributions from persons otherwise permitted by law to make contributions"); *Americans in Contact PAC*, First General Counsel's Report at 5, MUR 6746 ("An SSF may accept an unsolicited contribution that is otherwise lawful[.]"). The Commission cannot publish unequivocal guidance stating committees can lawfully accept unsolicited contributions but then punish people for discussing an unsolicited contribution with the contributor, including informing the contributor where their unsolicited contribution can be sent. Therefore, a conversation with a donor who has offered an unsolicited contribution cannot be a solicitation under the existing text of the Act and Commission regulations.

There is no factual assertion in the F&LA indicating that Mr. Benton solicited any contribution, that is, that he asked, requested, or recommended that the fictitious donor make a contribution to the Committee. In this matter, the F&LA states that two *Telegraph* agents approached the committee pretending to be agents of a foreign national and offering to make a $2 million contribution to the Committee, which they recorded for a short-lived click-bait video they have since deleted. *See* F&LA at 2. By offering to make the contribution, unsolicited, there was no contribution for Mr. Benton to solicit.

Indeed, in a recently-closed MUR, the Commission instead demonstrated that it does not expansively interpret the concept of a solicitation. In MUR 7271 (Democratic National Committee, Alexandra Chalupa, *et al*.), a Democratic party operative emailed a foreign government to suggest it use its head of state's press conference to attack then-candidate Trump and suggested how to do so, orchestrating an effort to have ABC News ask a question that she prepared the foreign official to answer for this purpose. A majority of the Commission rejected the Office of General Counsel's theory that this constituted a solicitation of a foreign national. *See* Statement of Reasons of Commissioner Ellen Weintraub, MUR 7271 (DNC, Chalupa, *et al*.) at 3-4 (*inter alia*, "the email contains no solicitation"); Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey And James E. "Trey" Trainor III, MUR 7271 (*inter alia*, "the available evidence did not establish that Chalupa made a request to the official"). Here, Benton was allegedly introduced to phony agents of a non-existent foreign national who, unsolicited, lied about offering to make a contribution to the committee so their foreign employer could publish a video of clips of the conversation shortly before the election. There was nothing

for Benton to solicit at that point and his conversation did not constitute a solicitation as the Commission has interpreted that term.

An announcement in this MUR that discussing an unsolicited contribution is itself a solicitation would constitute the making of a new rule beyond that which is in the Act and Commission regulations, and a departure from the Commission's interpretation of what constitutes a solicitation.

III. The Factual and Legal Analysis Impermissibly Creates New Law Beyond the Provisions of the Act

To find RTB that Mr. Benton solicited a foreign national, the F&LA had to overcome two obstacles: First, Section 30121 requires a foreign national to be solicited but there was no foreign national for Mr. Benton to solicit; Second, the Telegraph's agents approached the Committee, unsolicited, offering to make a contribution, so there was no solicitation for Mr. Benton to make. The F&LA's solution to both of these challenges is to create two new extra-statutory rules: a rule that the Commission has the power to punish attempted violations of the Act and a rule that a solicitation includes discussing an already-offered unsolicited contribution.

Courts have repeatedly admonished the Commission for straying from its statutory mandate and yet the F&LA attempts to dramatically expand the Commission's power after failing to find *any* support in the Act for its attempted violation theory. In bold rhetorical Jiu Jitsu, the F&LA justifies its creation of a new "attempt" violation by citing the plain absence of any text in the Act supporting an attempt violation along with the obvious corollary statements that no prior Commission has "addressed the issue," the courts are silent on it, and there is no precedent on point. *See* F&LA at 4. These were all unmistakable signs that there is no such violation—not an unbounded license for the Commission to empower itself to use a MUR to create new law and use it to retroactively inflict punishment.

Where, as here, the Act's provisions are unambiguous, "[t]he Commission, as an independent agency created by Congress for the sole purpose of enforcing FECA ha[s] no authority to write a regulation that [goes] beyond the Act itself." *Swallow v. FEC*, 304 F.Supp.3d 1113, 1115 (D.Utah 2018). No matter how good an idea it may or may not be to add a new kind of violation to the Act, "such expansion may happen only through an Act of Congress, pursuant to Article I of the United States Constitution. Such power does not exist in an independent agency comprised of six unelected commissioners." *Id*. at 1116.

The claimed existence of a secret "attempt" violation in this matter that nobody has noticed since the Commission's creation is similar to the Commission's unsuccessful contentions in *Swallow*. In that case, the rule the Commission created to prohibit aiding and abetting (i.e., assisting) a violation of the Act's prohibition against the making of a contribution in the name of another was based on the Commission's expansive re-interpretation of one word, "make." The Court flatly rejected the Commission's reinterpretation as "illogical." *Id.* at 1117. What the Commission cannot do by promulgating a regulation, it surely cannot do in a MUR.

The *Swallow* case is also relevant to the F&LA's counter-factual insistence that Mr. Benton solicited a contribution. The plain facts in the F&LA state that the Telegraph's agents sought to entrap and record *the Committee* accepting their offer of an unsolicited foreign contribution, and that they were then introduced to Mr. Benton to discuss the making of the contribution. As in *Swallow*, the Commission in this matter is attempting to make unlawful Mr. Benton's alleged assistance in the commission of an alleged violation by another principal (the Committee), albeit a fabricated extra-statutory "attempted" violation that doesn't exist and was impossible to begin with.

The Court in Swallow found that "the statute is unambiguous" so "the prohibition under the Act" applies to the principal who commits the violation, "not a person whose role is limited to helping or assisting the" principal. "Again, the law clearly focuses on principals, not the secondary actors who . . . only perform a supporting role. *Id.* "[T]he government cannot infer secondary liability when the statute in question is silent on that subject. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994); *see also Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 –89 (7th Cir. 2008) (en banc) ("[S]tatutory silence on the subject of secondary liability means there is none."), *cert. denied sub nom. Boim v. Salah*, 558 U.S. 981, 130 S.Ct. 458, 175 L.Ed.2d 324 (2009).[3]

The Commission cannot use this MUR, and the novel "attempted" violation theory, to resurrect its unlawful practice of imposing secondary liability.

The F&LA's justification for the Commission's power to create new rules is deeply flawed. The F&LA: (a) inverts a basic principle of administrative law by assuming that the FEC has unfettered power to expand its own authority unless Congress or the Courts stand in its way; (b) finds "plain meaning" for the desired authority in the Act's utter omission of the proposition the F&LA is trying to prove; (c) claims license to legislate in furtherance of the spirit of the Act; and (d) claims power through selective clippings of provisions of the Act not at issue here, in addition to inappropriate references to criminal law. The F&LA thus states: "In the absence of any precedent squarely on point, the Commission interprets the Act and forms a conclusion based on the plain meaning of section 30121(a)(2), the policy behind the longstanding prohibition on foreign national involvement in elections, the act's parallel restriction on soliciting soft money, and the interpretation of related federal anti-corruption statutes." There is no authority cited to support this proposition and each element withers under the lightest scrutiny.

As explained above, the Commission has no authority to deviate from or add to the plain meaning of the statute it is charged with implementing. There is no ambiguity in the meaning of

[3] The F&LA cites a regulatory provision at 11 C.F.R. § 110.20(h) that prohibits knowingly providing "substantial assistance in the solicitation, making, acceptance, or receipt" of a prohibited foreign national contribution, a prohibition not found in the Act, but the RTB finding did not state that Mr. Benton violated this regulation. This provision is certainly liable to being struck, as the similar provision in the Commission's straw donor regulation was eliminated in *Swallow* on the same grounds.

section 30121(a)(2), the plain meaning of which is summarized above. The absence of a power an agency desires in its statute is not "ambiguity." To illustrate the F&LA's circular reasoning: an "absence of precedent" punishing people for a rule that did not exist until it was fabricated in the F&LA at issue is not a statutory ambiguity that permits the Commission to fabricate that rule in the F&LA at issue.

The F&LA—in its "plain meaning" analysis—goes off the rails with this sentence:

> Thus, by implication, the person making a solicitation does not need to know for certain that the target of a solicitation . . . is a foreign national. Rather, it is sufficient for the solicitor to be aware of facts that would lead to a reasonable conclusion that the potential contributor is a foreign national, even if that conclusion is ultimately wrong because, e.g., the person being solicited is a U.S. national, or is fictitious.

F&LA at 5-6. In sum, the Commission is asserting that it can investigate and punish a person for violating the federal prohibition against the solicitation of contributions from foreign nationals to a state or federal committee *even if the person they solicit is in fact an American* —and, by extension, the Department of Justice can presumably imprison them for knowingly and willfully soliciting an American they erroneously thought was a foreign national.

The linchpin of the F&LA's theory is that the Commission's addition of the word "knowing" to the statutory prohibition makes unlawful the solicitation of Americans if a reasonable person would have incorrectly thought they were not Americans. As discussed above, the "knowing" qualification *narrows* the reach of the foreign national prohibition to the solicitation of an actual foreign national where there was actual knowledge or reason to know the person was a foreign national. The F&LA's theory appears to be that a *knowing* solicitation of a foreign national includes a person *not knowing* they are *not* soliciting a foreign national.

Having concluded the "plain meaning" of section 30121 prohibits the solicitation of contributions from Americans or fictitious people under some circumstances, the F&LA goes on to examine the history of the foreign national prohibition. But if the statute is unambiguous, why appeal to legislative history? The F&LA thus attempts to explain why it believes a statute meant to "prevent foreign national funds from influencing elections" applies with full force to the solicitation of contributions from Americans and people who don't exist.

The next section of the F&LA refers to the Bipartisan Campaign Reform Act's application of the foreign national contribution ban to soft money contributions. There is no analysis in this section before a conclusory *non sequitur*: "In light of Congress's decision to broaden the scope of section 30121 in BCRA, Section 30121 forecloses any solicitation of foreign money into the electoral process, even if such a solicitation could not have succeeded because of a circumstance unknown to the person soliciting the contribution or donation." There is nothing about the application of Section 30121 to soft money contributions that causes Section 30121 to apply when a foreign national is not being solicited, either because the solicited person is not a foreign national or doesn't exist.

The F&LA then begins a selective and self-serving foray into criminal law. The American legal system is divided into criminal and civil laws, which courts have interpreted into wholly different bodies of precedent and norms governed by different procedures and handled by differently specialized attorneys. The Commission has "exclusive jurisdiction with respect to the civil enforcement of" the Act but no authority to prosecute criminal violations of the Act, 52 U.S.C. §§ 30106(b)(1); 30107(a)(6), or any experience interpreting criminal law. Criminal prosecutions implicate a host of special Constitutional rights and corresponding limitations in codes and common law on the government's fearsome criminal power. The Commission, as a creation of civil administrative law empowered only to civilly enforce its statute, is not competent or authorized to cherry pick powers from the realm of criminal law for its own convenience.

The Factual and Legal Analysis inappropriately plucks notions from criminal law to reach the startling conclusion that there is an unwritten "attempt" violation that complements every violation in the Act, which the Commission has never before realized in its 45-year existence. Federal criminal law includes statutes specifically prohibiting attempted violations, unlike the Act which does not have any provisions prohibiting attempted violations. *See, e.g.*, 18 U.S. Code § 3301 (a "'securities fraud offense' means a violation of, or a conspiracy or an attempt to violate" various listed laws); 18 U.S.C. § 872 (attempted extortion); 18 U.S.C. § 1344 (attempt to defraud a financial institution); 21 U.S.C. § 846 (attempt to commit drug offense); 26 U.S.C. § 7201 (attempt to evade or defeat tax). So, there is no basis to assume all federal laws, much less the Act's civil provisions regulating the public's political activity, include an *unstated* "attempt" violation.

In fact, when rejecting a defense that an attempted crime was impossible, courts often look to the statute to determine whether in fact Congress intended for an impossible attempt to be prosecutable. The notable absence of a prohibition against attempted violations, in addition to the sensitive nature of the political activity that the Act regulates, and a 45-year run without any sign of this secret power, further establishes there is no attempt violation in the Act.

The F&LA states that law enforcement officers can run sting operations in which criminals poised to commit serious crimes can be caught using fake transactions staged by the officers. Not one case cited involves a civil enforcement agency, much less the FEC or one that similarly regulates core First Amendment activity. That criminal law tolerates the American government conducting sting operations to catch and prosecute serious criminals preying on Americans has no bearing on the FEC's processing of a complaint in which a sketchy foreign company pretends to offer a contribution from a non-existent foreign national to embarrass an American political committee shortly before an election.

If the Commission is going to dabble in criminal law, then its analysis must at least address the basic elements of an alleged federal attempt crime, which are curiously omitted from the F&LA. "A person is guilty of an attempt to commit a crime when the defendant '(1) acted with the requisite intent to violate the statute, and (2) performed an act that, under the circumstances as he believes them to be, constitutes a substantial step in the commission of the crime.'" *United States v. Walker*, 824 F. App'x 124, 127 (3d Cir. 2020). "[T]he 'substantial step'

element requires something more than 'mere preparation' but falls short of completion of the offense." *Id.*, at 127. The Commission cannot give itself quasi-criminal prosecutorial power beyond that granted by Congress, much less omit the half of the equation that protects the targets of that power from being punished prematurely.

Here, the basis of the F&LA is limited to a few selective clips of a retracted video by a disgraced foreign corporation that only show Mr. Benton talking with people who offered an unsolicited contribution while they lied about working for a nonexistent foreign national. The F&LA shows nothing beyond initial discussions that would even amount to "mere preparations," which still would not be enough to constitute an attempt under criminal law doctrine.

IV. New Rules, Consistent with the Act, May Only Be Adopted Pursuant to the Commission's Rulemaking Process

As shown above, the Act and Commission regulations against soliciting a foreign national contribution do not impose liability on a person for not soliciting a contribution from a person who doesn't exist (or might be an American!) under an "attempted violation" theory that has invisibly hidden in the law undiscovered for 45 years. The only way the Commission could try to make such an odd rule is through its rulemaking process, not an enforcement proceeding.

The Commission has the authority to make rules "to carry out the provisions of the Act," 52 U.S. Code §§ 30107(a)(8); 30111(a)(8), pursuant to the procedures in 30111(d)—but: (1) "as an independent agency created by Congress for the sole purpose of enforcing FECA [it has] no authority to write a regulation that [goes] beyond the Act itself," *Swallow* at 1115; and (2) the rulemaking process is the *only* method of proposing "[a]ny rule of law which is not stated in this Act." 52 U.S.C. § 30108(b).

Congress did not grant the Commission the power to punish attempted violations and the Commission cannot create a new rule through an enforcement matter. A rulemaking in which the Commission considers expanding its own enforcement power to include punishing attempted violations involves complex and unclear ramifications across all substantive violations must take place pursuant to the legally required procedures, which require notices, drafts, and public comment before the rule can be enacted.

V. Due Process Forbids the Commission from Retroactively Punishing Respondent Under a Novel Rule Prohibiting "Attempted" Violations or for Merely Discussing an Unsolicited Contribution

The Supreme Court has held that it is a "fundamental principle . . . that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required" and that the "rule of law entails . . . that '[all persons] are entitled to be in-formed as to what the State commands or forbids." *Federal Communications Commission v. Fox Television Stations*, 567 U.S. 239, 253 (2012) (internal citations omitted). "This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *Id.* "When speech is involved," the government must act with "rigorous adherence" to "two connected but discrete due process concerns: first, that regulated parties should know what is

required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id. at 253-254.*

The public has no notice that the Commission would punish attempted violations of the Act because there is no provision of the Act or the Commission's regulations that indicates it could and Commission has never asserted that power in its forty-five-year existence. Further, given the well-established permissibility of accepting unsolicited contributions, there is no notice to the public that the Commission would regulate, as a solicitation, a person's discussion of an unsolicited contribution.

VI. Unlawfully Pursuing Allegations of Impossible Non-Violations Based on a Foreign Corporation's Retracted 3-Minute Click-Bait Video Is A Poor Use of Commission Resources Under the Commission's Current Circumstances

If the Commission is not inclined to drop this matter with a no reason to believe finding, it is also ripe for dismissal in an exercise of the Commission's prosecutorial discretion.

There was no foreign national contributor or contribution, and thus no risk of a foreign national spending funds to influence U.S. elections (other than the *Telegraph*'s financing and publication of a since-retracted video targeting an American political committee shortly before the election). Proceeding with the matter does entail identifiable risks in the form of potential elimination of components of the Commission's foreign national contribution regulation that go beyond the prohibitions in the Act, as was done to the Commission's straw donor regulation in the *Swallow* case. A reviewing court would also scrutinize the unsupported violation theories examined here and the attempts to create new violations in the enforcement process and retroactively apply them to punish Mr. Benton. This includes theories of liability for attempted but impossible violations, and the asserted power to punish, as solicitations of foreign nationals, a person's solicitation of Americans or fictitious persons and the treatment of discussions of unsolicited contributions as solicitations. Leaving aside substantive issues and litigation risk, the Commission must have higher priorities than pursuing Mr. Benton over cherry-picked clips of a nearly five-year old secretly recorded conversation appearing in a video that has been retracted after the Commission has already conciliated with the Committee.

In sum, it is not a prudent use of Commission resources to pursue a stale extra-statutory non-violation posing no risk to the public that was staged by a foreign national corporation for a selective video montage that has been retracted, particularly given the Commission's backlog of hundreds of enforcement matters that may actually involve a harm done through violations that Congress tasked the Commission with punishing.

VII. Commission's Consideration of Exculpatory Evidence

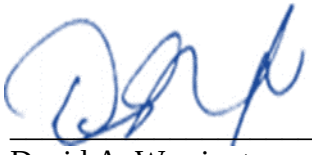
This entire enforcement matter is predicated on a single retracted video originally posted by a foreign national entity. The short video is itself merely a series of disjointed clips of recordings, selectively chosen by the foreign entity and released shortly before the November 2016 election. The F&LA makes no mention of any other evidence, including portions of the

recorded conversations that the foreign entity did not include in its retracted video, or unrecorded conversations that add essential context to the recorded clips. Mr. Benton contends that the video omitted exculpatory statements made by him that would have led the Commission to not find RTB, or to close this matter if discovered after its RTB finding. If the Office of General Counsel obtained any such information, Mr. Benton requests that this information be presented to the Commission forthwith and appropriately documented for production to Mr. Benton if the Commission proceeds with this matter.

* * * *

For these reasons, Mr. Benton respectfully requests that the Commission reconsider and rescind its RTB finding, quash the subpoena issued to Mr. Benton, and close this matter.

Respectfully submitted,



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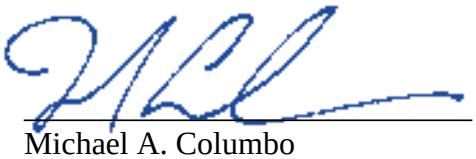

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Allen Dickerson, Vice Chair
James E. "Trey" Trainor III, Commissioner
Sean J. Cooksey, Commissioner
Ellen L. Weintraub, Commissioner
Steven T. Walther, Commissioner