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AFFIRMING CONGRESS' CONSTITUTIONAL OVERSIGHT RESPONSIBILITIES: SUBPOENA AUTHORITY AND RECOURSE FOR FAILURE TO COMPLY WITH LAWFULLY ISSUED SUBPOENAS

HEARING

BEFORE THE

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

September 14, 2016

Serial No. 114–92

Printed for the use of the Committee on Science, Space, and Technology

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AFFIRMING CONGRESS' CONSTITUTIONAL OVERSIGHT RESPONSIBILITIES: SUBPOENA AUTHORITY AND RECOURSE FOR FAILURE TO COMPLY WITH LAWFULLY ISSUED SUBPOENAS

WEDNESDAY, SEPTEMBER 14, 2016

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY,
Washington, D.C.

The Committee met, pursuant to call, at 10:02 a.m., in Room 2318 of the Rayburn House Office Building, Hon. Lamar Smith [Chairman of the Committee] presiding.

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

Full Committee

Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas

Wednesday, September 14, 2016
10:00 a.m.
2318 Rayburn House Office Building

Witnesses

Prof. Jonathan Turley, J.B. & Maurice C. Shapiro Professor of Public Interest Law, The George Washington University Law School

Prof. Ronald D. Rotunda, Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University Dale E. Fowler School of Law

Prof. Charles Tiefer, Professor of Law, University of Baltimore; Former Acting General Counsel, U.S. House of Representatives

Prof. Elizabeth Price Foley, Professor of Law, Florida International University College of Law

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

HEARING CHARTER

Wednesday, September 14, 2016

TO: Members, Committee on Science, Space, and Technology

FROM: Majority Staff, Committee on Science, Space, and Technology

SUBJECT: Full Committee hearing "Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas"

The Committee on Science, Space, and Technology will hold a hearing titled *"Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas"* on Wednesday, September 14, 2016, at 10:00 a.m. in Room 2318 of Rayburn House Office Building.

Hearing Purpose:

On July 13, 2016, the Committee issued subpoenas to the New York and Massachusetts State Attorneys General ("the AGs") and several environmental organizations ("the organizations"). To date, both the AGs and organizations have refused to comply with the Committee's subpoenas citing various Constitutional and state law provisions. This hearing will examine Congress' investigative authority as it relates to the Committee's oversight of the impact of investigations undertaken by the AGs at the behest of the organizations. Specifically, the hearing will explore the validity of the Committee's current inquiry in the context of Congress' broad oversight authority, as defined by legal precedent.

Witness List

- **Jonathan Turley**, J.B. & Maurice C. Shapiro Professor of Public Interest Law, The George Washington University Law School
- **Ronald D. Rotunda**, Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University Dale E. Fowler School of Law
- **Elizabeth Price Foley**, Professor of Law, Florida International University College of Law
- **Charles Tiefer**, Professor of Law, University of Baltimore; Former Acting General Counsel, U.S. House of Representatives

Staff Contact

For questions related to the hearing, please contact Ashley Callen of the majority staff at (202) 225-6917.

Chairman SMITH. The Committee on Science, Space, and Technology will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

Welcome to today's hearing titled "Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas." I am going to recognize myself for an opening statement and then the Ranking Member for her opening statement.

Today's hearing has dual purposes, one general and one specific. First, this hearing will explore the scope of Congress's investigative authority as a general matter. Second, and in particular, this hearing will affirm the legitimacy of the Committee's ongoing inquiry, which includes the issuance and enforcement of its subpoenas.

Let me begin with the factual background. For months, the Science Committee sent correspondence and requests for voluntary cooperation and information from two state Attorneys General and several environmental groups. After these requests were stonewalled, on July 13, 2016, the Committee issued subpoenas for information that relates to the origin of state investigations into scientific research conducted by nonprofit organizations, private companies, and individual scientists. The Committee is concerned that such investigations may have an adverse impact on federally funded scientific research. If this is the case, it would be the responsibility of the Committee to change existing law and possibly appropriate additional funds to even out any such imbalances caused as a result.

So far, many of the subpoenas' recipients have failed to meaningfully engage with the Committee or make a good-faith effort to gather and produce responsive documents. In lieu of cooperation, these recipients have provided a myriad of spurious legal arguments. They say, for example, that the Committee lacks authority to conduct this investigation; that responsive documents would be privileged under common law or state law; that the First or Tenth Amendments shield them from having to comply with a Congressional subpoena; or that the subpoena is invalid because it is vague and overbroad.

None of these arguments are persuasive. As we will hear today, the Committee has the power to issue these subpoenas and enforce their compliance. In fact, the Committee has a constitutional obligation to conduct oversight any time the United States scientific enterprise is potentially impacted.

The documents demanded by the subpoena will inform the Committee about the actions of the Attorneys General and the environmental groups. The documents also will allow the Committee to assess the effects of these actions on America's scientific research and development funding, and the documents demanded will allow the Committee to assess the breadth and depth of the AGs' investigations and inform our understanding of whether their actions have a chilling impact on scientific research and development.

Committee staff have repeatedly attempted to reach out to every party to encourage cooperation and compliance with the subpoena. The Committee wants the truth, Americans deserve the truth, and the Constitution requires that we seek the truth. The refusal of the

Attorneys General to comply with the Committee's subpoenas should trouble everyone sitting on this dais, everyone in this room, and every American.

The question we explore today isn't partisan; it's institutional. What is the scope of Congress' oversight powers? Congress has an obligation and a Constitutional responsibility to enforce its compulsory legal authority where warranted. To the extent that this authority is blunted by parties' rejection of lawfully issued subpoenas, all lawmakers, Republicans and Democrats alike, should be concerned. Allowing subpoenaed parties to ignore compliance based on the politics of the subject sets a dangerous precedent. It diminishes transparency and accountability and undermines Congress' Article I powers in the Constitution.

I look forward to hearing about these issues from our witnesses today. All are constitutional law professors with outstanding expertise. They will address Congress's ability and obligation to conduct rigorous oversight and the consequences of allowing those who would like to evade inquiry to do so. These consequences could include depositions, contempt proceedings, and legal actions.

[The prepared statement of Chairman Smith follows:]

Committee on Science, Space, and Technology
Chairman Lamar Smith
Hearing on
"Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas"
10:00 a.m. on Wednesday, September 14, 2016
2318 Rayburn

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###

Chairman SMITH. That concludes my opening statement, and the gentlewoman from Texas, the Ranking Member, is recognized for hers.

Ms. JOHNSON. Thank you, Mr. Chairman, and good morning.

I must say that I am disappointed and disheartened to be here today. Congressional oversight is critically important. It is a fundamental function of our government, and it helps to root out cases of waste, fraud, abuse and mismanagement in federal government. When Congressional oversight is done right, it can help to effect profound positive changes in our society.

Since the Science Committee was first established 58 years ago, it has traditionally used its legitimate oversight authority and its investigative tools effectively, identifying technical challenges and helping to resolve real problems, often in a bipartisan manner.

But this has changed recently. Today the Majority seems to view its oversight powers as a political tool and the Committee's investigative authority as unbounded. This hearing appears to be the culmination of a politically motivated oversight agenda that has been applauded by oil, gas, and mining interests and broadly condemned by the public, the media and the independent scientific community across the country and around the world. The Committee Majority has abused the Committee's oversight powers to harass NOAA climate scientists, going so far as to threaten former NASA astronaut, and current NOAA Administrator Kathy Sullivan, with contempt, all in an attempt to undercut the notion of human-caused climate change.

The Chairman has issued subpoenas in a reckless attempt to obtain the health records of hundreds of thousands of American citizens so they could be provided to tobacco industry consultants—all part of some bizarre attempt to disprove the notion that air pollution is bad for people's health. The Chairman has also demanded documents and testimony from the EPA in a naked attempt to assist a foreign mining company in their active litigation against the U.S. government.

That brings us to the latest embarrassment to this Committee in the name of oversight: the Majority's brazen attempts to assist ExxonMobil in the face of legitimate fraud investigations by various Attorneys General. The Majority has claimed that their investigation is about protecting the First Amendment rights of ExxonMobil. However, the law is clear: fraud is not protected by the First Amendment. If any companies in the oil industry defrauded the public or their shareholders in their well-documented disinformation campaign on global warming, then that is a matter for the state Attorneys General and the courts, not the Committee on Science.

I also want to take a moment to highlight the irony in the Chairman's nine subpoenas issued to various NGOs. In his stated attempt to protect ExxonMobil's supposed First Amendment rights, the Chairman is unequivocally violating these groups' First Amendment rights to petition the government. I hope all the members of the Majority think long and hard about the precedent the Chairman is setting here, and whether you'd like Democratic members to take these same kinds of actions against certain conservative-minded groups when Democrats are in the Majority.

I look forward to hearing from Professor Charles Tiefer, who worked as the General Counsel for the House of Representatives for 11 years, who can help us understand the clear limits to the Committee's legal authority to interfere with ongoing investigations by state law enforcement agencies. The Majority's misguided efforts undermine the Science Committee's important and legitimate oversight authority, and dramatically increase the public's distaste and distrust of this body. That is extremely troubling, particularly at a time when we are confronted with critical scientific and technological challenges affecting the health and safety of the public, the sustainability and diversity of our environment, and the security of our nation and our neighborhoods. These are the issues the Committee should be overseeing, exploring and investigating.

In closing, let me be clear. The Majority's actions are not without consequence. Public contempt for the Committee's recent actions may hinder our ability to effectively conduct legitimate oversight in the future. I hope that members of the Majority will take a moment to contemplate the lasting damage to this Committee and to this Congress that will result if we continue down the path we are currently on.

Lastly, I would like to enter the Committee's correspondence on this issue into the record. It is not only important that the public hears what you have to say and what I have to say on this subject but I believe it is important the public gets to hear what the nine non-governmental organizations, or NGOs, that utilized their constitutional right to petition the government and the two state law enforcement agencies that are investigating ExxonMobil for potentially defrauding its investors have said about this subject and the Committee's subpoenas to them. I want to submit the letter from the Attorney General of Maryland to the record.

Thank you. And I yield back.

[The prepared statement of Ms. Johnson follows:]

OPENING STATEMENT
Ranking Member Eddie Bernice Johnson (D-TX)

House Committee on Science, Space, and Technology
"Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas"
September 14, 2016

Thank you Mr. Chairman.

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When Congressional oversight is done right, it can help to effect profound positive changes in our society. Since the Science Committee was first established 58-years ago, it has traditionally used its legitimate oversight authority and its investigative tools effectively, identifying technical challenges and helping to resolve real problems, often in a bipartisan manner. But this has changed recently. Today the Majority seems to view its oversight powers as a political tool, and the Committee's investigative authority as unbounded.

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Thank you. I yield back.

Chairman SMITH. Without objection, so ordered.

[The information appears in Appendix II]

Chairman SMITH. Thank you, Mrs. Johnson.

Let me introduce our witnesses, and our first witness today is Jonathan Turley, a Professor of Public Interest Law at the George Washington University Law School. Professor Turley is a nationally recognized legal scholar who had written extensively in areas that range from constitutional law to legal theory to tort law. He's also worked as a consultant on homeland security and constitutional issues and served as counsel in some of the most notable cases in the last two decades. These include representing Area 51 workers at a secret air base in Nevada, the nuclear couriers at Oak Ridge, Tennessee, and four former U.S. Attorneys General during the Clinton impeachment litigation. Professor Turley received his bachelor's degree from the University of Chicago and his law degree from Northwestern University.

Our next witness is Ronald Rotunda, Distinguished Professor of Jurisprudence at Chapman University School of Law. Mr. Rotunda previously served as Special Counsel at the Department of Defense and is a Senior Fellow in constitutional studies at the Cato Institute. Additionally, he served as Commissioner of the Thayer Political Practice Commission in California, a state regulatory agency and California's independent political watchdog. Mr. Rotunda's multitude of published works have been cited more than 1,000 times by state and federal courts at every level from trial courts to the U.S. Supreme Court. Professor Rotunda received both his bachelor's degree and his law degree from Harvard University.

Our third witness is Professor Charles Tiefer, a Professor of Law at the University of Baltimore, and Former Acting General Counsel of the U.S. House of Representatives. Mr. Tiefer previously clerked as a law—served as a law clerk for the DC. Circuit and Associate Editor of the Harvard Law Review, a Trial Attorney with the Civil Rights Division of the U.S. Department of Justice, and as Assistant Legal Counsel for the Senate. Professor Tiefer received his bachelor's degree from Columbia College and his law degree from Harvard University.

Our final witness is Professor Elizabeth Price Foley, a Professor of Law at Florida International University College of Law. She also serves as Of Counsel for Baker Hostettler LLP, where she practices constitutional and appellate law. Professor Foley is the author of numerous journal articles and op-eds in constitutional law and has penned three books on the topic. She serves on the editorial board of the Cato Supreme Court Review, on the Research Advisory Board of the James Madison Institute, and as a member of the Florida State Advisory Committee of U.S. Commission on Civil Rights. Professor Foley received her bachelor's degree from Emory University, her law degree from University of Tennessee College of Law, and her master's in law degree from Harvard Law School.

We welcome you all. It's nice to have this expertise present today.

And Professor Turley, we'll begin with you.

TESTIMONY OF MR. JONATHAN TURLEY,
J.B. & MAURICE C. SHAPIRO PROFESSOR
OF PUBLIC INTEREST LAW,
THE GEORGE WASHINGTON UNIVERSITY
LAW SCHOOL

Mr. TURLEY. Thank you, Chairman Smith, Ranking Member Johnson, Members of the Committee. Thank you for the honor to address you today. It's also an honor to appear before you with my colleagues and friends, who are the only four people I know of that find subpoena power under Article I to be an exciting subject, and so on behalf of my fellow constitutional dweebs, we thank you.

But at the outset I should note that I've been a long advocate for action on combating climate change. Indeed, one of the reasons I voted for President Obama back in 2008 was his position on this issue, but I am called not to give scientific testimony but to give constitutional testimony, and indeed, the question before this Committee should turn on how one views the ultimate wisdom of an investigation or the merits of climate change, it should turn on the Constitution.

There are novel questions raised here, an intermix of the Tenth Amendment, First Amendment, statutory issues that are very difficult. In fact, I told the Chairman just now that every time I'm called, the problems seem to get tougher, or I must just be getting older, but this is a tough question, and there are very difficult issues on both sides. However, I have to say in all honesty the suggestion that there is a threshold barrier to the enforcement of the subpoenas by this Committee I believe is fundamentally flawed. This Committee clearly has the ability under Article I to insist on compliance with its subpoenas.

Indeed, I think that for public interest groups, many of which I support, the arguments go too far, and for these groups, this amounts to sawing off the branch or sitting on it because, you know, the arguments being made against the Committee are the same arguments that were made against the original investigation in terms of countermanding free speech, associational rights and the like.

Legislative authority means nothing unless committees can understand and at times uncover insular actions by institutions or organizations that affect federal law and policy. The Supreme Court has repeatedly emphasized that, and the case in McGrain is a very good example, McGrain versus Daugherty. The Supreme Court said it understood that information is not always volunteered, it's also not always accurate or complete, and that committees need to be able to acquire the information needed to conduct its work.

In Wilkinson and other cases, the Supreme Court said that it does not delve into motivations behind committees because that's a slippery slope that the apolitical courts do not feel comfortable in exploring. Many subpoenas will in fact touch on political decisions and associational ties. That's the nature of Congressional investigations. As I say in my testimony, the three factors laid out in Wilkinson, the broad subject matter of an area being authorized, the valid legislative purpose, the pertinence to such broad subject

matter in my view is well established in this case. I don't see the basis for a challenge on those issues.

Putting aside that you have a disagreement with what the investigation is concerning, for people that object to these individuals, they're making the same types of arguments that it is in fact the state Attorneys General who are intervening and threatening the First Amendment. For those they feel that this is analogous to the McCarthy period, so both sides are raising these McCarthy-era cases and saying that the other side is pursuing critics. For those scientists and companies, they feel like they're being accused of unenvironmental activities instead of un-American activities, and for them, they fear that, you know, the questions amount to are you and have you ever been a climate change denier. Now, obviously I don't think that either side of this Committee wants to return to that very dark period of the Red Scare, and I don't think that the state Attorneys General are trying to do that. I do think that they have been incautious. I do think that what they have done contravenes academic freedom and free speech, even though I agree with their position on climate change.

So I would suggest to the Committee that I do not see a threshold objection that can be made on the basis of these being state Attorneys General or environmental groups. There are absolute questions that have been raised, threshold immunities and protections, that I believe are poorly supported. To put it simply, that dog won't hunt, in my view.

Now, that doesn't end the question. The constitution only protects us from unconstitutional choices, not bad choices, but if we can strip away the rhetoric, we might be able to get into some type of resolution and preferably a compromise so that this doesn't end up in litigation and then cooler minds might prevail in the debate over global warming.

Thank you very much.

[The prepared statement of Mr. Turley follows:]

Written Statement

Jonathan Turley,
Shapiro Professor of Public Interest Law
The George Washington University Law School

"Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas."

Rayburn House Office Building
United States House of Representatives
Committee on Science, Space, and Technology

September 14, 2016

I. INTRODUCTION

Chairman Smith, Ranking Member Johnson, and members of the Committee, my name is Jonathan Turley, and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law. It is an honor to appear before you today to discuss the current conflict between Congress and various state attorneys general over the subpoena power of the Committee.

At the outset, I believe that it is incumbent upon me to say that I have been a long advocate for action in combating climate change and that I believe the failure to take such action will have dire consequences for our country. Indeed, I agree with President Barack Obama in his effort to pursue remedial measures on climate change and voted for him in 2008 in part due to his position on this issue. However, I have not been called as a scientific but as a constitutional expert. Accordingly, my view of the merits of this policy dispute are ultimately immaterial, and the question of the authority of this Committee should not be dependent on how one views the ultimate wisdom or purpose of the exercise of its authority. Frankly, principle often demands conclusions that conflict with our personal preferences. This is one such case.

The use of the subpoena authority to compel the disclosure of information from state attorneys general raises a number of novel constitutional issues, and the objections raised by the attorneys general are not frivolous, particularly with regard to federalism and free speech concerns. However, in my view, their threshold challenge of congressional authority to force such disclosure is fundamentally flawed, and this Committee clearly has the authority under Article I of the Constitution to demand compliance with its subpoenas.[1] Indeed, those who are arguing for the curtailment of that authority should consider the implications of their arguments for the future. The

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[1] The Committee has also subpoenaed public interest groups like Greenpeace, which I believe raise different and more problematic applications of congressional authority. Such subpoenas would likely become moot if the state attorneys general are compelled to comply with the duly issued subpoenas of this Committee.

sweeping claims of the attorneys general and public interest groups would create a gaping hole in the authority of Congress to seek legislative solutions to problems, including problems like climate change. In this sense, the arguments opposing these subpoenas amount to sawing off the very branch upon which advocates are sitting. Indeed, the actions taken by the state attorneys general (with the support of these environmental groups) raise the very same concerns over free speech, associational rights, and academic freedom. As I discuss below, the subpoenas issued by the state attorneys general are broader in scope and more menacing in application for conservative public interest organizations. As an academic, I find the demands of these state investigations to be chilling in their implications for experts and academics alike. The moral high ground for environmental groups in objecting to the congressional subpoena is rather illusory given the sweeping demands covering dozens of conservative groups and experts.

As in most conflicts over congressional investigations, this is a matter that should ideally end in a compromise without forcing the parties into the courts. Congress has oversight authority that cannot be denied. These state attorneys general have compelling concerns over their right to pursue their own investigations. The solution would seem to be an accommodation in both the scope and the form of discovery to respect both the institutional interests of Congress and the states. However, if such a compromise is not possible (and we are certainly living in a period of conflict rather than compromise), my analysis below reflects the relative strengths of the rivaling claims made in this controversy. In the end, I believe that it is Congress that holds the advantage in such disputes and that the threshold bar on subpoena powers suggested by the attorneys general would fall short under constitutional scrutiny.

II. CONGRESSIONAL OVERSIGHT AND SUBPOENA AUTHORITY.

The subpoena authority of Congress is an implied rather than express power within Article I of the Constitution. Nevertheless, it is a power that is essential to the functioning of any legislative body based on representative democratic values. Indeed, John Stuart Mill famously wrote:

> [T]he proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts: to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust ... to expel them from office, and either expressly or virtually appoint their successors.[2]

Legislative authority means nothing without the ability to understand, and at times uncover, the insular actions of the institutions and organizations that influence public policies and programs. It is for that reason that the Supreme Court readily recognized that the scope of legislative investigatory powers must be commensurate with the scope of legislative jurisdiction. Thus, in *McGrain v. Daugherty*,[3] the Supreme Court was

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2 John Stuart Mill, Considerations on Representative Government, 42 (1861).

3 *See generally* McGrain v. Daugherty, 273 U.S. 135 (1927).

faced with a dispute rising from the Teapot Dome scandal under President Warren Harding. The scandal was a classic matter of legislative investigation. Secretary of the Interior Albert Bacon Fall stood accused of bribery after he leased Navy petroleum reserves at Teapot Dome in Wyoming and two other locations at bargain rates and did not put up the leases for competitive bidding. During this period, Congress pursued a wider range of alleged fraud and exercised oversight over the failure of the Administration to prosecute powerful figures and companies for violations under the Sherman and Clayton Acts. That investigation ultimately turned to the role of Attorney General Harry M. Daugherty and his brother (and Ohio bank president) Mally S. Daugherty. Mally Daugherty refused to comply with a subpoena to testify and was arrested. In referencing the "ample warrant for thinking, as we do,"[4] the Supreme Court issued a resounding defense of congressional investigative authority, including compelling testimony from individuals and companies. The Court held that "the power of inquiry-with process to enforce it-is an essential and appropriate auxiliary to the legislative function."[5] The Court emphasized that congressional authority to compel disclosures is necessary for committees to have a complete understanding of "the conditions which the legislation is intended to affect or change."[6]

The limiting principle for this power was set by the scope of legislative jurisdiction. However, even on this limiting principle, the Supreme Court has recognized a minimal threshold test: exercise of oversight power must be undertaken with some "valid legislative purpose" in mind."[7] Indeed, even with the questionable uses of subpoena authority as during the Red Scare period, the Court maintained that it would not assume bad motivations in the exercise of congressional power.

Thus, in *Wilkinson v. United States*,[8] the Court faced what was in my view an abusive use of congressional authority in pursuit of political dissidents and civil libertarians. In that case, the target was a Frank Wilkinson who (like Carl Braden) was a civil libertarian and campaigned against the work of the House Committee on Un-American Activities. It is clear that the men were targeted for the exercise of their free speech. The Court, however, separated the question of the motivation from the means of congressional investigations. It decided both *Wilkinson v. United States* and *Braden v. United States*[1] on the same day in 1961. It dismissed the free speech elements in the cases and affirmed the congressional authority to demand such testimony. In *McGrain*, the Court noted that Congress is often seeking to force information from opposing or reluctant parties but that such information is essential to determining what, if any, legislative actions is needed:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information-which not infrequently is true-recourse must be had to others who

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4 *Id.* at 175

5 *Id.* at 174

6 *Id.* at 175.

7 Barenblatt v. United States, 360 U.S. 109, 126(1959).

8 *See generally* Wilkinson v. United States, 365 U.S. 399 (1961).

> possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate-indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.[9]

In so holding, the Court not only reaffirmed the power of Congress to compel testimony but also rejected the notion that it would evaluate the motivations or wisdom of the use of that inherent power. The *Wilkinson* Court saw the matter of whether Congress could compel testimony in the area and held:

> it is not for us to speculate as to the motivations that may have prompted the decision of individual members of the subcommittee to summon the petitioner. As was said in Watkins, supra, "a solution to our problem is not to be found in testing the motives of committee members for this purpose. Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served.[10]

That position is in line with other holdings, including *Braden.*[11] Thus, the analysis turns on the scope of congressional jurisdiction, not congressional motivation, in these cases.

I will confess a high degree of unease with these decisions from the McCarthy period. The Supreme Court at the time had a narrower view of free speech protections and indeed reaffirmed the authority to pursue communists simply because of their beliefs (though, as discussed below, the Court did limit some congressional actions). In *Barenblatt v. United States*, the Court described the crackdown on communists as a public policy that was "hardly debatable."[12] The Court's acquiescence to such crackdowns on free speech is of course highly "debatable" and in my view reprehensible. It was one of the lowest points in the Court's history. Moreover, the Court appeared in a transitional period on free speech and associational cases. For example, see *NAACP v. Alabama,*[13] where the Court required a showing of a compelling state interest in a state agency forcing the disclosure of NAACP membership rolls. Likewise, in *Sweezy v. New Hampshire,*[14] the Court curtailed investigations of academics to protect academic freedom and free speech. *Sweezy* is particularly interesting because it involved Paul Sweezy who was being investigated for un-American and communist activities in New

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9 McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

10 Wilkinson v. United States, 365 U.S. 399, 412 (1961).

11 *See generally* Braden v. United States, 365 U.S. 431 (1961).

12 Barenblatt v. United States, 360 U.S. 109, 127 (1959).

13 *See generally* NAACP v. Alabama, 357 U.S. 449 (1963).

14 *See generally* Sweezy v. New Hampshire, 354 U.S. 234 (1957).

Hampshire. He appeared under subpoena in New Hampshire and testified. However, he drew a line at questions regarding his lectures at the University of New Hampshire. The state supreme court ultimately agreed that his free speech and associational rights were being abridged, but the court upheld the contempt order based on his being declared a subversive by the New Hampshire Attorney General. A plurality of the United States Supreme Court reversed on the grounds that the questions violated Sweezy's First Amendment rights.

The reconciliation of these cases can be found in the narrowing of the question in *Wilkinson* to the validity of the subpoena itself and clarity of the scope of the investigation. Congress is allowed to gather information. It is constrained, however, in punishing citizens on the basis of their exercise of free speech. This obviously creates a gray zone where the disclosure of information can chill speech and associational speech – a line that Congress is wise to avoid. However, it is also worth noting the difficulty that Congress can face with such objections. Congressional inquiries often touch upon political decisions and associational ties of a witness. Even cases of fraud routinely raise political alliances and a myriad of institutional and organizational relationships. While courts should draw "bright line rules" to curtail efforts to censor or punish the exercise of free speech, it is more difficult to draw such a line with regard to testimony before a court or Congress where the demand is only for information. That is why the main basis for refusing to give such information remains the privilege against self-incrimination, where the disclosure would put the person at legal jeopardy based on that person's own words. Like a grand jury proceeding (which is designed to secure information rather than adjudicate a final verdict of guilt), a congressional committee seeks information that may or may not lead to collateral consequences or congressional action.

Ironically, the current controversy demonstrates how the free speech line can shift with one's perspective. From the perspective of those who question climate change, these attorneys general (and supporting organizations) are the ones curtailing free speech and chilling academics and researchers. These investigations are pursuing those who hold opposing scientific views, and these investigations will necessarily intrude upon the very same interests raised in opposition to the congressional subpoenas. Which then is the scourge of free speech: the state investigation into climate change critics or the congressional investigation into those pursuing those critics? As an academic, I view the effort of the state attorneys general to be highly intrusive into academic freedom and free speech much like the inquiry in *Sweezy*. Indeed, just as Sweezy was targeted after criticizing the McCarthy era investigations, conservative groups have raised the same concern in this controversy. For example, there is legitimate concern over the targeting of opposing groups like the Competitive Enterprise Institute, which was previously critical of the criminal investigation.[15]

I fail to see the principled basis for investigating those who hold an opposing view

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[15] In fairness to these groups, they clearly believe that Exxon and others are intentionally misleading the public and it is not uncommon for prosecutors to reach out to experts in a field to establish the foundation for an investigation. Groups like the Union of Concerned Scientists have science-based objections to the representations made by industry. As stated, however, I find the investigation of conservative groups to be highly problematic on free speech and academic freedom grounds.

on this issue. I also fail to see the analogy with the tobacco cases where companies long denied the dangers of cigarette smoking. The causal link between smoking and cancer has long been supported by direct scientific evidence. More importantly, I believe that it is still be protected speech for companies or individuals to maintain questions about that linkage. I would be equally aggrieved by efforts to harass academics who are questioning aspects of the causal link between tobacco and particular cancers. That does not however insulate companies from liability for products that kill many thousands of people every year.

Climate change is still a relatively new field of study with a great array of scientific variables. While I believe the evidence to be overwhelming and conclusive, there are clearly some academics who hold doubts over different aspects of the linkage between human conduct and climate change. Those views are varied with many accepting the fact of climate change while questioning either the role of human activity or the ability to arrest the climatic trend. Other scientists believe there are other contributing factors or that nature goes through periods of adjustment or flux. That is far different from the more linear question of how the inhalation of cigarette smoke causes carcinogenic responses.

The point is not to validate this minority view of climate change but to recognize that these scientists are engaging in protected speech and academic freedom in pursuing their research. From their prospective, the state attorneys general are making climate change critics the new communists. The effort to threaten, harass, or punish such critics should be anathema to any academic and, frankly, to any American. As I indicated previously, I have the same concerns for the environmental organizations being forced to reveal communications, even though I do not agree with their efforts in seeking the investigation of these scientists or companies for their opposing views. The point is that it is hard to claim the moral high ground on free speech when the controversy began with an effort to explore criminal charges against corporate or academic figures for maintaining a minority scientific view. This is particularly the case with the most controversial Virgin Island subpoena, which was sweeping in its scope and triggered a legal challenge. The New York subpoenas appear narrower and are focused on a civil fraud/shareholder action, though the office has indicated that criminal charges are possible.[16] Without getting into a schoolyard fight of who "started it," this controversy from the start implicated core free speech and associational rights. As discussed below, Congress clearly has the authority to investigate whether there is an effort to harass or chill opposing research in this area.

III. THE AUTHORITY OF CONGRESS TO INVESTIGATE OR COMPEL TESTIMONY AND DISCLOSURES.

As discussed above, the Court continues to decline inquiries into the motivation as opposed to the means of congressional investigations – the same position that it has

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[16] *See generally* John Schwartz, *Exxon Mobil Fraud Said To Focus On Future Than Past*, New York Times, August 19, 2016, available at https://www.nytimes.com/2016/08/20/science/exxon-mobil-fraud-inquiry-said-to-focus-more-on-future-than-past.html

applied in other areas such as police stops.[17] The *Wilkinson* factors continue to guide this analysis. The Court established a standard for whether the congressional investigatory authority is properly used: (1) whether the Committee's investigation of the broad subject matter area is authorized by Congress, (2) whether the investigation is pursuant to "a valid legislative purpose," and (3) whether the specific inquiries involved are pertinent to the broad subject matter areas which have been authorized by Congress.[18] Before addressing whether there is some fundamental barrier to congressional investigations of state agencies, it is useful to first address the *Wilkinson* factors as to the authority of Congress to issue any subpoenas in this area – the core inquiry in past federal cases.

A. Authorized Subject Matter Jurisdiction

The first inquiry is whether the Committee is exercising sufficiently broad authorized subject matter jurisdiction over the area in question. In my view, the Committee has such authorization. The scope of the authority of the House Committee on Science, Space, and Technology is stated under House Rule X and on the Committee's website to cover:

> (1) All energy research, development, and demonstration, and projects therefor, and all federally owned or operated nonmilitary energy laboratories.
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> (2) Astronautical research and development, including resources, personnel, equipment, and facilities.
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> (3) Civil aviation research and development.
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> (4) Environmental research and development.
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> (5) Marine research.
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> (6) Commercial application of energy technology.
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> (7) National Institute of Standards and Technology, standardization of weights and measures, and the metric system.
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> (8) National Aeronautics and Space Administration.
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> (9) National Space Council.
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> (10) National Science Foundation.

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[17] *See, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) ("We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.").

[18] Wilkinson v. United States, 365 U.S. 399, 409 (1961).

(11) National Weather Service.

(12) Outer space, including exploration and control thereof.

(13) Science scholarships.

(14) Scientific research, development, and demonstration, and projects therefor.[19]

In its general authorization to all committees, the rule also commits to the Committee's authority "all bills, resolutions, and other matters relating to subjects within [its] jurisdiction."[20] That is a remarkably broad authorization covering a massive amount of scientific research and institutions, including institutions with joint state and federal funding. It also covers funding that benefits state agencies. The House rules expressly give the Committee authority to conduct investigations with subpoena authority under House Rule XI.[21] In exercising that broad jurisdiction, Committee Rule XI, gives the Chair of the Committee the power to authorize subpoenas. Finally, the House Committee on Science, Space, and Technology has recognized oversight authority, which it has exercised in the past. This has included investigations into the retaliation against experts at the DOE and FDA as well as legislation designed to ensure free and uninhibited scientific research in areas like drug development.[22]

In its June 1, 2016 letter, Greenpeace asks "[w]hile the Committee surely could investigate the fossil fuel companies . . . how does Rule X(p) extend to review the work and especially the law enforcement activities of state attorneys general?"[23] First, it is entirely unclear why Greenpeace views this list as clearly allowing the investigation of corporations but not non-for-profit corporations or state agencies. Rule X states broad jurisdiction over this field and does not limit it to for-profit companies or one side of a controversy like climate change. Second, the climate change debate clearly falls under this Committee's jurisdiction of questions related to fossil fuels, scientific research, and environmental development. Greenpeace also insists that the controversy is clearly left to the Committee on the Judiciary since it entails questions of federalism and states' rights. This objection is also unfounded in my view. Most committees have overlapping areas

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[19] *Jurisdiction*, science.house.gov, https://science.house.gov/about/jurisdiction (last visited Sept. 11, 2016).

[20] Staff of H.R. Comm. on Science, Space, and Tech., 113th Cong., Oversight Plan for the 113th Cong. (Comm. Print 2013).

[21] Staff of H.R. Comm. on Science, Space, and Tech., 112th Cong., Rules Governing Proc. (Comm. Print 2012).

[22] One such recent measure came in the area of drug labeling and scientific research and conferences. *See* David C. Gibbons & Jeffrey N. Wasserstein, *First the Courts, Now Congress. . .*, fdalawblog.net, http://www.fdalawblog.net/fda_law_blog_hyman_phelps/2016/06/hpm-blog-first-the-courts-now-congress-house-committee-throws-its-weight-behind-evolving-legal-lands.html (last visited Sept. 11, 2016).

[23] Letter from Abbe David Lowell, Partner, Chadbourne & Parke LLP, to Hon. Lamar S. Smith, Chairman, Comm. on Science, Space, and Tech. (June 1, 2016).

with one or more sister committees. Indeed, if this matter were to be taken up by the House Judiciary Committee, one could easily expect others to ask why it is not more properly before the House Science Committee due to the issues of scientific judgment and research. Virtually any question before a congressional committee will raise constitutional or legal issues, including federalism questions. If all such questions belong exclusively to the House and Senate Judiciary Committees, there would be only one effective committee with dozens of subcommittees.

The House Science Committee has opened an investigation into the possible harassment and coercion of corporate scientists and experts researching climate change. Clearly, climate change is one of the biggest issues facing Congress and the issue of the science on both sides of the controversy has remained a central focus of the congressional debate. At a time when billions have been invested in research and regulations in the area, the House Science Committee clearly has the necessary authority to meet this first criterion.

B. Valid Legislative Purpose

The most obvious attack under the *Wilkinson* factors would likely be over the valid legislative purpose element. Critics have charged that the House Science Committee is pursuing an anti-climate change agenda in issuing the subpoenas. This type of argument would be problematic in a court of law for the reasons discussed earlier. The courts rarely delve into the motivations of investigations if the government can cite objective criteria for its actions. Moreover, this argument becomes as circular as the free speech argument. Critics in Congress view the state attorneys general as using their power to enforce an official or approved scientific viewpoint. Thus, Congress is responding to what it sees as retaliation against experts questioning climate change. Again, this comes a matter of perspective. The question for the courts is whether there is an objective legislative purpose – not whether that purpose is the true motivation of some or even all members.

Congressional investigations will often produce negative collateral consequences for witnesses that can range from job terminations to divorces to criminal charges. The Court, however, has been consistent in not treating consequences or motivations as the determinative factors. For example, in *Sinclair v. United States*,[24] the Senate pursued testimony from Harry F. Sinclair who refused to answer because he was facing a criminal trial on the allegations, stating "I shall reserve any evidence I may be able to give for those courts."[25] His counsel objected that the Senate was trying to elicit testimony and evidence outside of the court system. The concern was a legitimate one for a criminal defense. However, it is not a legitimate objection to a subpoena, though invoking the privilege against self-incrimination would have been available absent a grant of immunity. The Court considered the collateral consequences to the trial as entirely immaterial because lawsuits or trials do not "operate[] to divest the Senate or the committee of power further to investigate the actual administration of the land laws."[26] The Court has

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24 *See generally* Sinclair v. United States, 279 U.S. 263 (1929).

25 *Id.* at 270.

26 *Id.* at 272.

spoken honestly about its disinclination to judge the propriety or wisdom of broad committee functions:

> It is, of course, not the function of this Court to prescribe rigid rules for the Congress to follow in drafting resolutions establishing investigating committees. That is a matter peculiarly within the realm of the legislature, and its decisions will be accepted by the courts up to the point where their own duty to enforce the constitutionally protected rights of individuals is affected. An excessively broad charter, like that of the House Un-American Activities Committee, places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference. It is impossible in such a situation to ascertain whether any legislative purpose justifies the disclosures sought and, if so, the importance of that information to the Congress in furtherance of its legislative function. The reason no court can make this critical judgment is that the House of Representatives itself has never made it. Only the legislative assembly initiating an investigation can assay the relative necessity of specific disclosures."[27]

Thus, neither motivational questions nor collateral consequences have proven to be valid grounds to refuse subpoenas.

In this case, Congress has a variety of interests that could sustain the subpoena in a challenge. First, it has jurisdiction over scientific research, including the important field of climate change. Various members of Congress have objected to the pressure placed on academics to follow the overwhelming consensus of scientists regarding the role of human activities affecting climate change. Some of the scientists associated with Exxon are either eligible or possible recipients of federal grants for research. Second, the state investigations would chill scientists working outside of Exxon if the criticism of climate research can now be viewed as part of a criminal conspiracy. Third, these individual states are taking a position on research that is important to interstate commerce through universities, conferences, and ultimately investments. Finally, members can claim (as previously noted) that individual states are pursuing researchers and businesses to harass them for their exercise of academic freedom and free speech. Not only are academics likely to fear being called agents of fraud or crimes, but their universities (which depend in part on state and federal grants) are likely to increase pressure on those academics who might be deemed climate change deniers. From that perspective, it is the state investigation that raise McCarthy-like concerns in the effective investigation of "Un-Environmental Activities." The notion of "are you or have you ever been a climate change denier" does not seem so absurd when state prosecutors are exploring scientific views as the basis for criminal fraud allegations. Clearly, one can challenge such concerns, but courts are not tasked with judging merits but only means in such cases. Congress clearly has the means to pursue any of these legitimate legislative purposes.

The state prosecutors and public interest organizations have undermined their case against Congress through their public statements. Indeed, Attorney General

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[27] Watkins v. United States, 354 U.S. 178, 205-06 (1957).

Schneiderman seemed to go out of his way to suggest that his investigation was a response to political deadlock in Washington. After a meeting with environmental and advocacy groups, Schneiderman directly referred to the failure of Congress to act on climate change as the impetus for his office's initiative into the area: "With gridlock and dysfunction gripping Washington, it is up to the states to lead on the generation-defining issue of climate change. We stand ready to defend the next president's climate change agenda, and vow to fight any efforts to roll-back the meaningful progress we've made over the past eight years."[28] He is also quoted as saying that, in light of the position of Congress, he has assembled a "group of state actors [intended] to send the message that [they were] prepared to step into this [legislative] breach."[29] He noted as part of this new effort that he "had served a subpoena on ExxonMobil," to investigate "theories relating to consumer and securities fraud."[30] With such direct references to congressional efforts (or lack thereof), Schneiderman and his counterparts in the other states only reaffirm that the litigation is being shaped by (and seeks to respond to) congressional efforts. Given the broad scope of the discovery sought from Exxon, including communications with experts and academics, Congress can satisfy the standard of a legitimate legislative purpose.

C. Pertinence

The final prong under *Wilkinson* is that the congressional demand for testimony or documents is pertinent and reasonably related to the matter under investigation. Assuming that the Committee's interest in the investigation of climate change critics is legitimate, it is hard to see how the general demand for information on the investigation would not be pertinent. While I am not aware of the specific documents and evidence involved in this dispute, the general demand for information is pertinent in my view.

Pertinence is a standard component for reviewing the obligation of witnesses and was articulated by the Supreme Court in *Watkins v. United States*:

> [C]ommittees are restricted to the missions delegated to them, i.e., to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere. No witness can be compelled to make disclosures on matters outside that area. This is a jurisdictional concept of pertinency drawn from the nature of a congressional committee's source of authority.[31]

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[28] Press Release, A.G. Schneiderman, Former Vice President Al Gore and a Coalition of Attorneys General from Across the Country Announce Historic State-Based Effort to Combat Climate Change, Mar. 29, 2016, http://www.ag.ny.gov/press-release/ag-schneiderman-former-vicepresident-al-gore-and-coalition-attorneys-general-across.

[29] Client Alert, State AGs Announce Climate Change Investigations, King & Spalding LLP (Apr. 18, 2016).

[30] Exxon Mobil's Complaint for Declaratory and Injunctive Relief at 9, *Exxon Mobil Corp. v. Healey*, NO. 4:16-CV-469, 2016 WL 4501347 (N.D. Tex. Aug. 8, 2016).

[31] Watkins v. United States, 354 U.S. 178, 206 (1957).

In *Watkins*[32], the Court reversed a conviction of a witness who refused to give testimony before the House on Un-American Activities Committee. The Committee's purpose was to investigate the Communist infiltration of organized labor. However, roughly one-quarter of the individuals that labor leader John Thomas Watkins was asked about were unconnected to labor. The questions that he refused to answer were outside of the legislative purpose stated by the Committee. The same result occurred in *Sacher v. United States*,[33] where the Court ordered the dismissal of an indictment by a witness who refused to answer questions that were not pertinent to the authorized subject matter of the Subcommittee on Internal Security of the Senate Judiciary Committee.

While expressing great deference to congressional investigation within proper authorizations, the Court in *Watkins* stressed that "broad as is this power of inquiry, it is not unlimited."[34] As important as those limitations are, however, they are generally stated and relatively easily satisfied for any good-faith investigation. The Court has stressed that Congress has "no general authority to expose private affairs of individuals without justification in terms of the functions of the Congress." Moreover,"[n]o inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible."[35]

Given the abusive character of the McCarthy-era hearings, we will hopefully never come close to that line again in Congress. Congress, like any governmental institution, is not exempt from respecting the Bill of Rights. The danger of majoritarian tyranny lurks like a dormant virus in any democratic system, a lethal condition that erupts like a fever in the midst of political passions. In Federalist No. 10, James Madison expressly warned "[w]hen a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens."[36] Thus, specific questions can be objected to as outside of the subject matter or ambiguity in a congressional order[37] or questions about the very subject matter under investigation.[38] However, the Court has also recognized that:

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32 *See generally* Watkins v. United States, 354 U.S. 178 (1957).

33 *See generally* Sacher v. United States, 356 U.S. 576 (1958); see also Knowles v. United States, 280 F.2d 696, 696 (D.C. Cir. 1960) (finding subcommittee failed to establish pertinency of the questions for the witness); Bowers v. United States, 202 F.2d 447, 447 (D.C. Cir. 1953) (lack of demonstrated pertinency to sustain charge).

34 Watkins v. United States, 354 U.S. 178, 187 (1957).

35 *Id.*

36 James Madison, The Federalist No. 10 60-61 (Jacob E. Cooke ed., 1961).

37 Flaxer v. United States, 358 U.S. 147, 151 (1958) (overturning the conviction based on ambiguity of the order to turn over list containing names and addresses to Senate Committee) ("We stated in *Watkins* v. *United States*, . . . in reference to prosecutions for contempt under this Act that 'the courts must accord to the defendants every right which is guaranteed to defendants in all other criminal cases.').

38 Russell v. United States, 369 U.S. 749, 767-78 (1962) (finding indictment invalid for failure to clearly state the subject matter of the questions) ("It is difficult to imagine a case in which an indictment's insufficiency resulted so clearly in the indictment's failure to fulfill its primary office -- to inform the defendant of the nature of the accusation

> "The wisdom of congressional approach or methodology is not open to judicial veto. . . . Nor is the legitimacy of a congressional inquiry to be defined by what it produces. The very nature of the investigative function - like any research - is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result."[39]

The Court has distinguished cases like *Watkins* on the basis that they involved prior violations that resulted in criminal prosecutions. In cases of refusals to supply information and obstruction to congressional investigations, the Court has maintained that no balancing of the first amendment interests is warranted.[40]

The *Watkins* conditions are met so long as there is continuity between the stated and legitimate purpose of the hearing and the questions posed to witnesses.[41] While investigations of this kind can drift into troublesome areas, the general demand for information on the state investigations would seem to be clearly pertinent to the authorized subject matter of this Committee. If Congress believes that scientists, experts, or companies are being coerced or threatened to change their views of climate change, there is an obvious nexus to the demand information on the scope, motivations, and impact of possible criminal investigations. Beyond a scope challenge (which is normally handled though counsel-to-counsel discussions), the only remaining question is whether there is a threshold bar on congressional demands directed against state agencies or specifically state attorneys general.

IV. THE ABILITY OF CONGRESS TO SUBPOENA STATE ACTORS OR PUBLIC INTEREST ORGANIZATIONS.

It has been suggested that there is a constitutional bar on the ability of Congress to subpoena state attorneys general or public interest groups. While some of these concerns are clearly compelling and worthy of consideration, I do not believe that there is a threshold barrier to such congressional demands under existing case law.[42]

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against him. Price refused to answer some questions of a Senate subcommittee. He was not told at the time what subject the subcommittee was investigating.")

[39] Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509 (1975).

[40] *Id.* at 511.

[41] Braden v. United States, 365 U.S. 431, 431 (1961) (upholding Braden's conviction for refusing to answer questions before subcommittee of the House Un-American Activities Committee); Barenblatt v. United States, 360 U.S. 109, 109 (1958) (upholding conviction for contempt of Congress for refusing to answer whether petitioner was or had ever been a member of the Communist Party).

[42] This is not to cast aspirations on counsel for these groups who are legitimately asserting all possible privileges and rights on behalf of their clients. *See* D.C. Bar Leg. Ethics Comm., Ethics Op. 288 ("a lawyer has an obligation in the legislative process to raise all available, legitimate objections to a Congressional subpoena for confidential client information.").

A. State Attorneys General

The state attorneys general have raised ill-defined objections to the congressional subpoenas based on federalism and privilege concerns. The threshold issue for Tenth Amendment analysis is whether there is a bar on congressional investigations of state agencies as a whole. The answer is clearly no. State agencies can curtail federal laws or policies as well as impair civil liberties. Federal and state agencies share jurisdictions in many areas ranging from the environment to criminal enforcement to commerce. Indeed, many state agencies receive considerable federal support from grants, appropriations, and other sources. While the Tenth Amendment reserves any powers not given to the federal government to the citizens and the states, it does not preclude Congress from seeking information from states on how their activities are affecting federal policies or legislative concerns.

A bar on congressional investigations of state agencies would produce highly dysfunctional, even dangerous results. The same barrier, if it existed, would bar federal agencies, which investigate possible crimes and federal violations like the federal investigation of Arizona Sheriff Joe Arpaio.[43] For example, what if a state agency were suppressing minority voting or denying protections to homosexuals or inhibiting abortion clinics or committing state environmental violations? Most relevant to the current controversy, what if state agencies were seeking to penalize those who support the theories of climate change? There are a myriad of ways that states can negate federal policies, deny individual rights, or frustrate federal laws. Congress has the inherent right to seek out information on the actions and impact of state programs.

In *Printz v. United States*, the Supreme Court struck down parts of the Brady Act that required state officials to perform background-check requirements to execute federal laws.[44] The distinction drawn in that case is precisely the distinction missed by many of the state attorneys general. The late Justice Antonin Scalia was joined by four other justices in maintaining that "Congress cannot compel the States to enact or enforce a federal regulatory program."[45] Some federal laws can also "commandeer" state officials in a way that intrudes upon state authority.[46] However, these cases involved regular acts of administration or enforcement of federal laws. It is certainly possible for federal laws to cross this line in requiring states to perform information gathering or analysis functions.

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[43] Dennis Wagner, *Justice Department to Decide on Sheriff Joe Arpaio Criminal Contempt Charges*, The Arizona Republic, http://www.azcentral.com/story/news/local/phoenix/2016/08/26/justice-department-probe-sheriff-joe-arpaio/89443454/ (last visited Sept. 11, 2016).

[44] Printz v. United States, 521 U.S. 898, 935 (1997); *see also* Reno v. Condon, 528 U.S. 141, 151 (2000) ("It does not require the [Maryland] Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.").

[45] Printz v. United States, 521 U.S. 898, 935 (1997)

[46] Some seven justices also have taken the view against federal laws that effectively commandeer state officials or programs. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2566 (Scalia, Kennedy, Thomas & Alito, J., dissenting); *see also* Hodel v. Va.Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981).

The current controversy is different. This is not a statutory or regulatory program imposing a function on a state agency as part of a federal policy. Rather, it is a congressional committee seeking information from a target state office or agency to address a specific controversy.

The Fourth Circuit drew this same distinction in *Freilich v. Upper Chesapeake Health, Inc.*, where it faced a challenge to the Health Care Quality Improvement Act (HCQIA)[47] and its requirement for the submission of reports to the Board of Medical Examiners. The Fourth Circuit rejected this claim, stressing that "[a]ll that the HCQIA requires of states is the forwarding of information."[48] It is worth noting that this submission of information was an ongoing administrative program – not a congressional subpoena requiring the submission of responses to insular investigatory inquiries.

Greenpeace quotes *Printz* as warning that "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[49] The quote from *Printz* actually comes from *New York v. United States,*[50] where the Court was speaking of direct compulsion or regulation of the states. Thus, the quote goes on to say "The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."[51] However, the Court discusses how Congress can influence state choices and programs through various means that are "short of outright coercion."[52] This includes the very powers supporting instant subpoenas over grants and research. As a necessary predicate to such powers, Congress must be able to acquire information on the scope of the problem or controversy at issue.

If state agencies are not immune from federal subpoenas, the next question is whether there is something specific about state prosecuting offices that would bar this subpoena. For example, the New York Attorney General has raised the Tenth Amendment and claimed that, by demanding information, Congress is seeking to "install[] individual members of Congress as overseers of New York's local law enforcement decisions."[53] For the foregoing reasons, the Tenth Amendment challenge falls significantly short of existing case law and doctrine. Mr. Schneiderman's claim of some type of hostile takeover of his office is clearly hyperbolic. Congress is not asserting

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[47] *See generally* Freilich v. Upper Chesapeake Health, Inc., 313 F.3d 205 (4th Cir. 2002). The HCQIA is codified in 42 U.S.C. § 11101 *et seq.*.

[48] Freilich v. Upper Chesapeake Health, Inc., 313 F.3d 205, 214 (4th Cir. 2002); *see also* City of New York v. United States, 179 F.3d 29, 34-35 (2d Cir. 1999) (rejecting claim of the required submission of immigration data to federal agencies as unconstitutional).

[49] Letter from Faith E. Gay, Partner, Quinn Emanuel Urquhart & Sullivan LLP, to Hon. Lamar Smith, Chairman, Comm. on Science, Space, and Tech. (June 1, 2016); Printz v. United States, 521 U.S. 898, 924 (1997).

[50] New York v. United States, 505 U.S. 144, 166 (1992).

[51] *Id.*

[52] *Id.*

[53] Letter from Leslie B. Dubeck, Counsel for A.G. Eric T. Schneiderman, to Hon. Lamar Smith, Chairman, Comm. on Science, Space, and Tech. (July 26, 2016).

any decision-making or control over state prosecutorial decisions. It is inquiring into a very public alliance between prosecutors and environmental advocates to target a company and an insular group of scientists and experts. There may be material that is subject to collateral limitations under grand jury rules or confidentiality agreements. However, as a general proposition, there is no constitutional, *sui generis* distinction that exempts state attorneys general from congressional subpoenas. Schneiderman and his counterparts in other states openly discussed their efforts as a response to the action or inaction of Congress. Given the public character of this campaign and the calls to overcome congressional opposition to deal with climate change, a blanket refusal to comply with duly executed subpoenas of Congress would be ill conceived. I understand that the attorneys general are looking at possible false representations made by Exxon. However, the scope of its discovery is quite broad, and its impact on academic and corporate research could be chilling. Any objections will have to be made to specific productions and whether alternatives like redacted or summarized material can be used by agreement.

B. Public Interest Organizations

As I previously noted, I am most concerned about the congressional subpoenas targeting environmental groups like Greenpeace. Critics have charged that the state attorneys general investigation are part of a coordinated effort with some groups to target political opponents and to harass dissenting experts in the field. Yet, targeting public interest groups has an obvious chilling effect on free speech and association. As a prudential matter, Congress should avoid the investigation of public interest organizations in their advocacy efforts. Once again, however, I have been called upon to address the constitutional barriers, if any, to subjecting public interest organizations to congressional subpoenas. There is no such threshold protection that would attach to a public interest organization as opposed to any other organization. Indeed, few members would want such a bar when Congress routinely seeks information from the not-for-profit industry and advocacy groups on a variety of issues. Public interest organizations like Planned Parenthood and church-based groups receive federal and state funding. They also can be an active component in violating federal laws or in denying basic rights to citizens. Additionally, we have seen an explosion of different types of corporate structures created to shield political donations and carry out political agendas. Regardless of whether a target is a for-profit or a not-for-profit corporation, there is no threshold constitutional barrier to compelled testimony or production of information. There may be heightened first speech or associational interests involved in such demands, but those are highly case-specific (and evidence-specific) controversies.

In its letters to the House Science Committee, Greenpeace cites the right to free speech (*Synder v. Phelps*),[54] the right to association (*Knox v. Serv. Emp. Int'l Union Local 1000*),[55] and the right to petition (*United Mine Workers of Am., Dist, 12, v. Ill.*

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[54] Snyder v. Phelps, 562 U.S. 443 (2011).

[55] Knox v. Serv. Emp. Int'l Union, Local 1000, 132 S. Ct. 2277 (2012).

State Bar Ass'n).[56] These cases represent the broad statement of rights but do not include any direct authority to bar any subpoenas in our case. Greenpeace does cite *United States v. Rumely*,[57] where the Court upheld the reversal of a conviction of an activist who refused to answer questions from the House Select Committee on Lobbying Activities. However, the asserted scope of the demand by the Committee in that 1953 case was absurdly and abusively broad:

> "Surely it cannot be denied that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment."[58]

Notably, the Court elected not to consider a later narrowing of the demand since it would only judge the refusal on the facts and scope that existed at the time. Greenpeace also cited *Watkins*,[59] but, as previously noted, *Watkins* involved demands for information on individuals wholly unconnected to the authorized purpose of the investigation. In this case, the inquiry is tailored to address the specific effort to investigate a company and its supporting experts due to their position on climate change.

Greenpeace certainly raises core concerns in its citation of *NAACP v. Alabama*,[60] where the Court prevented a state from forcing the disclosure of the membership rolls of the NAACP – an act that the Court agreed could expose its members to violence and retribution.[61] The 1958 case does support the argument that some disclosures within the scope of the congressional subpoena could intrude upon core First Amendment rights. However, as a general matter, the subpoena is tied directly to the campaign against Exxon and its supporting experts. The two demands were:

1. All documents and communications between employees of [Greenpeace] and office of a state attorney general referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

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[56] United Mine Workers of Am., Dist, 12, v. Ill. State Bar Ass'n, 389 U.S. 217 (1967).

[57] *See generally* United States v. Rumely, 345 U.S. 41 (1953).

[58] *Id.* at 46.

[59] Letter from Faith E. Gay, Partner, Quinn Emanuel Urquhart & Sullivan LLP, to Hon. Lamar Smith, Chairman, Comm. on Science, Space, and Tech. (June 1, 2016).

[60] *Id.*

[61] *See generally* NAACP v. Alabama, 357 U.S. 449 (1958); see also *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972) ("[i]nquiries about the identity of persons with whom the witnesses were associated on the newspaper and in the Black Panther Party . . . infringed the right of associational privacy").

2. All documents and communications between employees of [Greenpeace] and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.[62]

The first demand covers communications with a government agency, which are generally public records or public disclosures absent a confidential agreement or recognized privilege. It is worth noting that the subpoena expressly states that the Committee does not recognize privilege barriers to production like attorney-client privilege or deliberative process privilege.[63] While there has long been a debate over the applicability of non-constitutionally based privileges in congressional proceedings, the long-standing practice has been that it is up to each committee to decide whether the need for information outweighs a claim under attorney-client privilege, deliberative process, or other privileges.[64]

The constitutional claims under free speech and association are also weakest with regard to the first demand on the subpoena schedule. First and foremost, the First Amendment has not been recognized as creating an absolute defense to testimony or production before Congress. Rather, as the Court stated in *Barenblatt v. United States*, "[w]here First Amendment rights are asserted to bar government interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[65] In this case, environmental groups were open about their working with this coalition of state prosecutors and public interest advocates. Greenpeace's support for this effort was not a secret. It was a communication outside of the organization with public employees. While Greenpeace cites the D.C. Circuit decision in *AFL-CIO v. FEC*, a communication with a government

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[62] Letter from House of Representatives Comm. on Science, Space, and Tech. to Annie Leonard, Executive Director, Greenpeace (May 18, 2016).

[63] The subpoena states "In complying with the subpoena, be apprised that the U.S. House of Representatives and the Committee on Science, Space, and Technology do not recognize: any of the purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections; any purported privileges or protections from disclosure under the Freedom of Information Act; or any purported contractual privileges, such as non-disclosure agreements." Subpoena from House of Representatives Comm. on Science, Space, and Tech. issued to Greenpeace USA (July 13, 2016).

[64] Todd Garvey & Alissa M. Dolan, Cong. Research Serv., RL34114, Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure 58-62 (May 8, 2014).

[65] Barenblatt v. United States, 360 U.S. 109, 126 (1959).

agency is not "an association's confidential internal material."[66] Indeed, at least one group has reported that it obtained many of the documents and correspondence refused to Congress under the Vermont Public Records Law.[67] I recently testified in June before the House Judiciary Committee on how the legislative authority has steadily eroded with the rise of a type of "fourth branch" of federal agencies, which now routinely defy congressional demands for documents and information. I noted that

> What is most notable, and alarming, about the current state of our government is that private litigants like Judicial Watch have been more successful in securing information from the Administration than the United States Congress. Thus, the relatively weak Freedom of Information Act (FOIA) has proven more effective than Article I of the Constitution in forcing disclosures about alleged governmental misconduct. That is a state of affairs that the Framers would never have anticipated, nor condoned.[68]

Now, it would appear that citizens and advocacy groups can secure more information from a state public records law than a committee with oversight authority. That would be a rather curious result in a system that relies so centrally on legislative oversight.

At most, a court would perform a balancing test in considering a challenge to these subpoenas. The Court applied such a balancing test in *Gibson v. Florida Legislative Investigation Committee*.[69] The Florida legislature targeted Theodore R. Gibson, president of the NAACP in Miami, in an abusive demand to disclose his membership and contributors. Notably, Gibson did testify and did give information to the Committee on the specific alleged communists in his organization. He denied that they had any role with the NAACP. The Court voted 5-4 that "it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."[70] It found that the NAACP had shown a "strong associational interest" with only a "slender showing" from the government. *Gibson* is a good case for these groups to raise but it is worth noting that there are a couple of obvious distinctions to draw. First, this was a state legislative committee, not Congress,

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[66] Letter from Faith E. Gay, Partner, Quinn Emanuel Urquhart & Sullivan LLP, to Hon. Lamar Smith, Chairman, Comm. on Science, Space, and Tech. (June 1, 2016); AFL-CIO v. FEC, 333 F.3d 168, 177 (D.C. Cir. 2003).

[67] The Energy & Environmental Legal Institute has posted statements contained in such communications back in April 2015. *See* Energy & Environmental Legal Institute, Emails Reveal Schneiderman, Other AG's Colluding With Al Gore and Greens To Investigate Climate Skeptics, April 15, 2016, available at http://eelegal.org/2016/04/15/release-emails-reveal-schneiderman-other-ags-colluding-with-al-gore-and-greens-to-investigate-climate-skeptics/

[68] United States House of Representatives, House Judiciary Committee, Regulatory Reform, Commercial and Antitrust Law, *"Examining The Allegations of Misconduct of IRS Commissioner John Koskinen"* June 22, 2016. (statement of Professor Jonathan Turley).

[69] 372 U.S. 539 (1963).

[70] *Id.* at 546.

which has generally prevailed in such first amendment challenges. Second, and most importantly, the demand of the state legislative committee was wildly out of sync with its stated goal in the hearing:

> "the Committee was not here seeking from the petitioner or the records of which he was custodian any information as to whether he, himself, or even other persons were members of the Communist Party, Communist front or affiliated organizations, or other allegedly subversive groups; instead, the entire thrust of the demands on the petitioner was that he disclose whether other persons were members of the N.A.A.C.P., itself a concededly legitimate and nonsubversive organization. Compelling such an organization, engaged in the exercise of First and Fourteenth Amendment rights, to disclose its membership presents, under our cases, a question wholly different from compelling the Communist Party to disclose its own membership."[71]

That is in stark contrast to the subpoenas in this matter. The underlying subject matter clearly shapes the production demand in limiting the disclosures to the specific investigation of Exxon, experts, and academics. There is a "substantial relation between the information sought and a subject of overriding and compelling [government] interest."[72] One may certainly disagree with the interest (as one can disagree with the state attorneys general investigations) but the interest of the Committee falls squarely within its authorized jurisdiction. Moreover, it is seeking documents in the custodial care of the subpoenaed groups. Finally, if a compelling interest is demanded, Congress can cite its concern over the criminalization of scientific dissent and its impact of federal research and policies. Our unparalleled research capacity is sustained by open and free debate among scientists and experts. Neither the scientific method nor the scientific culture can long be sustained if disagreements are to be handled by criminal indictments rather than academic exchanges.

Gibson does not create blanket immunities or protections for public interest groups in refusing subpoenas. Indeed, if that were so, the attorneys general could not be pursuing such groups within scope of their investigation. That does not mean that the principles and concerns articulated in *Gibson* are immaterial. If there are problematic elements, it would come with the production of specific documents rather than all production. After all, the NAACP president did testify. He did supply information. He then balked at the extraneous demands with first amendment implications for the organization. There may be some documents that raise such first amendment issues but those documents are normally identified as part of the process of creating an index and summary of documents. There can be agreements reached on redactions or limitations on scope. However, the threshold claim of the groups in refusing any production cannot be supported on the basis of *Gibson* in my view.

The second demand does raise communications that, while not *internal* to the organization, could be viewed as confidential communications between organizations. Some of this material may be deemed as effectively public due to its distribution. Moreover, unlike *NAACP v. Alabama*, Congress has specified the organizations that are

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71 *Id.* at 548-49.

72 *Id.* at 546.

known to have been involved in this campaign and the individuals subject to these organizations are presumably a matter of public record. Nevertheless, the inquiry could involve names of advocates and experts assisting these organizations and could reveal mutual strategic and tactical information. It is worth noting however that the subpoenas supported by these groups in the attorneys general investigations involved even more sweeping and threatening demands. These included a demand from Exxon to turn over "[a]ll Documents or Communications reflecting or concerning studies, research, or other reviews" questioning climate change. Dozens of scientists, advocates, and other professionals were reportedly encompassed in the subpoena demands. The communications covered by the subpoenas go back decades and would force disclosures of communications with conservative public interest groups like Heritage Foundation and the American Petroleum Institute.[73] The House subpoena is the model of brevity in comparison to some of these sweeping demands, which directly threaten free speech, academic freedom, and the right of association. In addition, subpoenas like the one out of the Virgin Islands targeting communications with conservative public interest groups were part of a criminal justice investigation seeking to support felony charges rather than a congressional investigation simply seeking possible information for legislative action. The environmental groups (which supported these intrusive demands involving other public interest groups) would need to explain how such investigatory demands are appropriate for the Executive Branch but somehow barred to the Legislative Branch.

The ruling in *Eastland v. United States*[74] is instructive on this point. In that case, a political group was subjected to a congressional subpoena that would have disclosed many of its members. This included a committee subpoena to a bank to provide information related to the membership. The case bears obvious analogies to the instant controversy as well as NAACP v. Alabama. The Court stressed that "[w]here we are presented with an attempt to interfere with an ongoing activity by Congress, and that activity is found to be within the legitimate legislative sphere, balancing plays no part."[75] While the Court focused on the interaction o the Speech and Debate Clause, it expressly rejected the claim (and position of the appellate court) that, because the group alleges a desire to harass or chill speech, "once it is alleged that First Amendment rights may be infringed by congressional action the Judiciary may intervene to protect those rights."[76] Once again, the Court reaffirmed that "Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."[77]

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[73] Lauren Kurtz, *Increasing Number of Investigations Into Fossil Fuel Industry's "Disinformation Campaign,"* Climate Change Blog, May 6, 2016, available at http://blogs.law.columbia.edu/climatechange/2016/05/06/increasing-number-of-investigations-into-fossil-fuel-disinformation/

[74] 421 U.S. 491 (1975).

[75] *Id.* at 511.

[76] *Id.* at 509.

[77] *Id.* at 508.

Most recently, a district court also rejected the same arguments raised in this controversy in *Senate Permanent Subcom. On Investigations v. Ferrer*,[78] where the Senate Committee issued a production order to Carl Ferrer, Chief Executive Officer of Backpage.com, an online website for classified ads. The order required the disclosure of information related to users as part of an investigation into the use of the Internet for illegal sex trafficking. The court rejected the challenge on the basis of the authorization of Committee, the scope of the order, and the free speech objections. The court rejected what it viewed as absolute claims under the first amendment and noted that "enforcement of the subpoena in the instant case does not impose a content-based restriction on any protected activity. However, Chief Justice John Roberts has granted a stay in the case.[79]

Various groups and advocates have submitted a well-reasoned and penetrating analysis of the legal and policy concerns over the investigation of public interest groups.[80] However, the Union admits in the letter that "there may be occasions where Congress could appropriately authorize an investigation into apparent systemic violations of constitutional rights that require a legislative response."[81] This is manifestly true. However, the scholars go on to object to this investigation by noting that "Congress is not a prosecutor and may not properly use its subpoena power simply to pursue perceived First Amendment violations."[82] It is not clear where the suggested line between "apparent systemic violations" and "perceived First Amendment violations" would be drawn or why Congress would have authority on one side of that line as opposed to the other. I assume that most people would want Congress to investigate the use of state powers to unleash a new McCarthy-like campaign or to harass experts based on their scientific judgment. The Committee has a myriad of legitimate institutional interests affected by such a campaign ranging from the interference with federal research to the impact on federal programs in the areas of energy and the environment.

Given the foregoing, it would seem unlikely that the public interest groups could prevail on a blanket refusal to comply with a congressional subpoena. There is no threshold immunity for such organizations recognized in past Supreme Court cases. Greenpeace was quite public in its advocacy for this potentially criminal investigation and, even if non-constitutional privileges were recognized by the Committee, much of these communications would not be viewed as privileged.[83] The ubiquitous character of not-for-profit corporations makes any threshold barrier impracticable. There is a plethora

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[78] 2016 U.S. Dist. LEXIS 103143 (August 5, 2016).

[79] The stay was issued on September 6, 2016 and is available at https://www.supremecourt.gov/orders/courtorders/090616zr_p8k0.pdf.

[80] Letter to Chairman Lamar Smith Re. Subpoena Dated July 13, 2016 Issued Union of Concerned Scientists, September 12, 2016.

[81] *Id.* at 4.

[82] *Id.*

[83] Joe Carroll & Christie Smith, *Exxon Probed by New York in Toughest U.S. Climate Crackdown Yet*, Bloomberg (Nov. 5, 2015), http://www.bloomberg.com/news/articles/2015-11-05/exxon-mobil-said-to-be-probed-by-n-y-over-climate-change.

of such groups set up by advocates from industry, academics, and public interest areas. Some could easily be viewed as part of a conspiracy or underlying effort to violate federal laws, as was the case with certain tobacco industry groups. Indeed, tobacco groups were subject to subpoenas to uncover the identities and activities of their sponsors and contributors. This included both hearings[84] in the House as well as federal investigations[85] and other litigation.[86]

In this sense, the actions of these groups and prosecutors raise the same costs in investigating climate change critics. Because many of these groups also have political interests, an alliance with some attorneys general raises equally serious concerns over (to use a paraphrase of Clausewitz) the use of prosecution as politics by another means.[87] Yet, such demands come at a high cost for the political system. The scope of the demand on public interest groups could raise specific concerns over the chilling effect on free speech and association. To be sure, there are cases where allegations necessitate the demand for communications made by not-for-profit corporations. It is for that reason that I would encourage both the attorneys general and Congress to minimize the investigation of academics and public interest groups in this controversy.

V. CONCLUSION

The dueling investigations of the state attorneys general and Congress present a novel issue of constitutional law with a maddening mix of Article I, First Amendment, Tenth Amendment, and statutory issues. My primary focus today is to simply set aside sweeping claims that seem more rhetorical and constitutional in character. Threshold claims of absolute constitutional immunities or protections from these subpoenas are, in my view, ill-conceived and poorly supported. I do not believe that such arguments would succeed under existing case law. Put simply, that dog won't hunt.

What remains are largely policy choices, though that does not reduce the gravity of this situation. The investigation of climate change critics is extremely troubling, particularly for those who value academic freedom. While I agree with President Obama on climate change and the need to act, this is another case where the means chosen by advocates are highly problematic. Indeed, these investigations will clearly pose a chilling effect on experts working in this field and add a menacing element for those who disagree with the common wisdom on climate change. Conversely, the investigation of

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[84] An example of such a hearing occurred under the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce under then Democratic Chairman Henry Waxman. Philip J. Hilts, *Tobacco Council's Objectivity*, New York Times, May 27, 1994, available at http://www.nytimes.com/1994/05/27/us/tobacco-council-s-objectivity-questioned.html

[85] Pierre Thomas & John Schwartz, *U.S. Widens Tobacco Investigation*, Washington Post, Sept. 8, 1996 available at https://www.washingtonpost.com/archive/politics/1996/09/08/us-widens-tobacco-investigation/e8dcda29-6813-4d79-b19e-70e9a3b1471b/

[86] *See, e.g., Sackman v. Liggett Group*, 173 F.R.D. 358, 364 (E.D.N.Y. 1997) (rejecting privilege arguments over documents from Council for Tobacco Research).

[87] *See generally* Carl von Clausewitz, On War (1832).

environmental public interest groups in their dealing with each other raises equally troubling elements.

The Constitution does not protect us from bad choices, only unconstitutional ones. The superheated debate over climate change is producing increasingly extreme political and legal confrontations. Conservative public interest groups and experts find themselves being swept into investigations due to their views while environmental public interest organizations are called to disclose their advocacy efforts. With the addition of case law from the McCarthy period, we seem to have the perfect storm.

In the end, this is a debate that needs to happen, and those who are critics or skeptics of climate change need to be part of that debate – not only on the issue of causation but remediation. Yet, this debate will not be resolved with threats of criminal fraud prosecutions or contempt citations. If the state attorneys general insist on pursing these troubling state investigations, they will have to accept that Congress has a valid jurisdictional claim for its own investigation. Perhaps by removing much of the unsupported rhetoric, the parties can at least agree to a compromise on the scope and form of production without the necessity of litigation. Then, cooler minds might prevail in the debate over global warming.

Thank you again for the honor of addressing the Committee today. I am happy to answer any questions that you may have.

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Professor Jonathan Turley is a nationally recognized legal scholar who has written extensively in areas ranging from constitutional law to legal theory to tort law. He has written over three dozen academic articles that have appeared in a variety of leading law journals at Cornell, Duke, Georgetown, Harvard, Northwestern, University of Chicago, and other schools.

After a stint at Tulane Law School, Professor Turley joined the George Washington faculty in 1990 and, in 1998, was given the prestigious Shapiro Chair for Public Interest Law, the youngest chaired professor in the school's history. In addition to his extensive publications, Professor Turley has served as counsel in some of the most notable cases in the last two decades including the representation of whistleblowers, military personnel, judges, members of Congress, and a wide range of other clients. He is also one of the few attorneys to successfully challenge both a federal and a state law — leading to courts striking down the federal Elizabeth Morgan law as well as the state criminalization of cohabitation.

In 2010, Professor Turley represented Judge G. Thomas Porteous in his impeachment trial. After a trial before the Senate, Professor Turley (on December 7, 2010) argued both the motions and gave the final argument to all 100 U.S. Senators from the well of the Senate floor — only the 14th time in history of the country that such a trial of a judge has reached the Senate floor. Judge Porteous was convicted of four articles of impeachments, including the acceptance of $2000 from an attorney and using a false name on a bankruptcy filing.

In 2011, Professor Turley filed a challenge to the Libyan War on behalf of ten members of Congress, including Representatives Roscoe Bartlett (R., Md); Dan Burton (R., Ind.); Mike Capuano (D., Mass.); Howard Coble (R., N.C.); John Conyers (D., Mich.); John J. Duncan (R., Tenn.); Tim Johnson (R., Ill.); Walter Jones (R., N.C.); Dennis Kucinich (D., Ohio); and Ron Paul (R., Tx). The lawsuit was before the United States District Court for the District of Columbia.

In November 2014, Turley agreed to serve as lead counsel to the United States House of Representatives in its constitutional challenge to changes ordered by President Obama to the Affordable Care Act. The litigation was approved by the House of Representatives to seek judicial review of the claims under the separation of powers. On May 12, 2016, the federal court handed down a historic victory for the House and ruled that the Obama

Administration violated the separation of powers in ordering billions to be paid to insurance companies without an appropriation of Congress.

Other cases include his representation of the Area 51 workers at a secret air base in Nevada; the nuclear couriers at Oak Ridge, Tennessee; the Rocky Flats grand jury in Colorado; Dr. Eric Foretich, the husband in the famous Elizabeth Morgan custody controversy; and four former United States Attorneys General during the Clinton impeachment litigation. In the Foretich case, Turley succeeded recently in reversing a trial court and striking down a federal statute through a rare "bill of attainder" challenge. Professor Turley has also served as counsel in a variety of national security cases, including espionage cases like that of Jim Nicholson, the highest ranking CIA officer ever accused of espionage. Turley also served as lead defense counsel in the successful defense of Petty Officer Daniel King, who faced the death penalty for alleged spying for Russia. Turley also served as defense counsel in the case of Dr. Tom Butler, who is faced criminal charges dealing with the importation and handling of thirty vials of plague in Texas. He also served as counsel to Larry Hanauer, the House Intelligence Committee staffer accused of leaking a classified Presidential National Intelligence Estimate to the New York Times. (Hanauer was cleared of all allegations).

Among his current cases, Professor Turley represents Dr. Ali Al-Timimi, who was convicted in Virginia in 2005 of violent speech against the United States who is accused of being the American leader of a terrorist organization while he was a university professor in Florida. Turley represented Dr. Al-Arian for eight years, much of which was in a determined defense against an indictment for criminal contempt. The case centered on the alleged violation of a plea bargain by the Justice Department after Dr. Al-Arian was largely exonerated of terrorism charges in Tampa, Florida. On June 27, 2014, all charges were dropped against Dr. Al-Arian. He also represented pilots approaching or over the age of 60 in their challenge to the mandatory retirement age of the FAA. He also represented David Murphee Faulk, the whistleblower who disclosed abuses in the surveillance operations at NSA's Fort Gordon facility in Georgia.

Professor Turley also agreed to serve as lead counsel representing the Brown family from the TLC "Sister Wives, a reality show on plural marriage or polygamy. On December 13, 2013, the federal court in Utah struck down the criminalization of polygamy — the first such decision in history — on free exercise and due process grounds. On September 26, 2014, the court

also ruled in favor of the Browns under Section 1983 — giving them a clean sweep on all of the statutory and constitutional claims. In April 2015, a panel reversed the decision on standing grounds and that decision is now on appeal.

Professor Turley was also lead counsel in the World Bank protest case stemming from the mass arrest of people in 2002 by the federal and district governments during demonstrations of the IMF and World Bank. Turley and his co-lead counsel Dan Schwartz (and the law firm of Bryan Cave) were the first to file and represented student journalists arrested without probable cause. In April 2015, after 13 years of intense litigation, the case was settled for $2.8 million, including $115,000 for each arrestee — a record damage award in a case of this kind and over twice the amount of prior damages for individual protesters. The case also exposed government destruction and withholding of evidence as well as the admitted mass arrest of hundreds of people without probable cause.

Professor Turley also served as the legal expert in the review of polygamy laws in the British of Columbia (Canada) Supreme Court. In the latter case, he argued for the decriminalization of plural union and conjugal unions. In 2012, Turley also represented the makers of "Five Wives Vodka" (Ogden's Own Distillery) in challenging an effective ban on the product in Idaho after officials declared the product to be offensive to Mormons. After opposing to the ban on free speech and other grounds, the state of Idaho issued a letter apologizing for public statements made by officials and lifting the ban on sale for "Five Wives Vodka."

Turley has served as a consultant on homeland security and constitutional issues, including the Florida House of Representatives. He also served as the consultant to the Puerto Rico House of Representatives on the impeachment of Gov. Aníbal Acevedo Vilá.

Professor Turley is a frequent witness before the House and Senate on constitutional and statutory issues as well as tort reform legislation. Professor Turley is also a nationally recognized legal commentator. Professor Turley was ranked as 38th in the top 100 most cited "public intellectuals" in the recent study by Judge Richard Posner. Turley was also found to be the second most cited law professor in the country. He has been repeatedly ranked in the nation's top 500 lawyers in annual surveys (including in the latest rankings by LawDragon) – one of only a handful of academics. In prior years, he was ranked as one of the nation's top ten

lawyers in military law cases as well as one of the top 40 lawyers under 40. He was also selected in the last five years as one of the 100 top Irish lawyers in the world. In 2016, he was ranked as one of the 100 most famous (past and present) law professors.

Professor Turley's articles on legal and policy issues appear regularly in national publications with hundreds of articles in such newspapers as the New York Times, Washington Post, USA Today, Los Angeles Times and Wall Street Journal. He is a columnist for USA Today. In 2005, Turley was given the Columnist of the Year award for Single-Issue Advocacy for his columns on civil liberties by the Aspen Institute and the Week Magazine. Professor Turley also appears regularly as a legal expert on all of the major television networks. Since the 1990s, he has worked under contract as the on-air Legal Analyst for NBC News and CBS News to cover stories that ranged from the Clinton impeachment to the presidential elections. Professor Turley has been a repeated guest on Sunday talk shows with over two-dozen appearances on Meet the Press, ABC This Week, Face the Nation, and Fox Sunday. Professor Turley has taught courses on constitutional law, constitutional criminal law, environmental law, litigation, and torts. He is the founder and executive director of the Project for Older Prisoners (POPS). His work with older prisoners has been honored in various states, including his selection as the 2011 recipient of the Dr. Mary Ann Quaranta Elder Justice Award at Fordham University.

His award-winning blog is routinely ranked as one of the most popular legal blogs by AVVO. His blog was selected as the top News/Analysis site in 2013, the top Legal Opinion Blog in 2011 as well as prior selections as the top Law Professor Blog and Legal Theory Blog. It has been regularly ranked by the ABA Journal in the top 100 blogs in the world. In 2012, Turley has selected as one of the top 20 legal experts on Twitter by Business Insider. In 2013, the ABA Journal inducted the Turley Blog into its Hall of Fame.

Professor Turley received his B.A. at the University of Chicago and his J.D. at Northwestern. In 2008, he was given an honorary Doctorate of Law from John Marshall Law School for his contributions to civil liberties and the public interest.

Chairman SMITH. Thank you, Professor Turley.

And Professor Rotunda.

TESTIMONY OF MR. RONALD ROTUNDA RONALD D. ROTUNDA, DOY AND DEE HENLEY CHAIR AND DISTINGUISHED PROFESSOR OF JURISPRUDENCE, CHAPMAN UNIVERSITY DALE E. FOWLER SCHOOL OF LAW

Mr. ROTUNDA. Thank you for inviting me.

Last spring, the Attorney General of New York, 16 other Attorneys General, all of them Democratic except for one Independent, announced they're going to investigate global warming. At the press conference, Eric Schneiderman said that the bottom line was simple: climate change is real, it is a threat. Meanwhile, Senator Whitehouse has encouraged the Department of Justice to investigate it and institute grand-jury investigations and possible criminal prosecution.

Now, I assume that global warming is real, and humans cause it. That still does not justify criminal prosecution of those who seek to prove the contrary. If you think the science is wrong, then attack the science, not the messengers.

First, the Committee needs to find out what's going on on the state level so they can recommend appropriate legislation. This is—Representative Johnson said this is a matter for the courts. Of course it's a matter for the courts, the Department of Justice, but it's also a matter for this Committee. In fact, if Congress cannot investigate things like this, the Senate Watergate Committee would never have gotten off the ground. I was Assistant Majority Counsel there, and we were investigating things that were also—could be before the courts, could be investigated by the Department of Justice, but we didn't think they were.

At the press conference, Mr. Schneiderman had next to him Vice President Gore, who stood proudly in saying that we can't allow these fossil fuel industry and people investigating to mislead the public about the health of our planet. Recently leaked documents show that George Soros is a major funder of Al Gore to the tune of $10 million a year for three years to his Alliance for Climate Protection. The American people really have a right to know and this Committee has a right to know to see if they should enact appropriate legislation, if Mr. Schneiderman is working on his own or is he part of a corrupt deal with some of these climate groups and George Soros. In fact, in one of those investigations, one of the parties has asked for any common interest agreements he has with private activists. Mr. Schneiderman refuses to comply. People that don't comply with subpoenas have something to hide. That's why they don't comply.

As I mentioned in my written statement, Professor Jerry Mitrovica of Harvard said he likes investigating the climate of 3 million years ago or more because he said that's safer from the politically charged scientific atmosphere we have now. That should be scary with all of us that scientists including this one who believes in global warming, apparently is worried about not giving the politically correct answer.

The state prosecutor's inaction and refusal to comply with subpoenas reminds me of the biblical verse about the person who saw the mote in his brother's eye while ignoring the beam in his own eye. That beam may well be billionaire George Soros.

Now, my second major point is that the government has repeatedly been wrong about what is scientific truth. That should give you a little bit of pause when you say you should investigate to see if other officials, in this case state officials, are interfering with scientific inquiry. There's the old saw about the three lies of the 20th century: the check's in the mail, I'll love you just as much in the morning, I'm from the government and I'm here to help you. Then there's the three lies of the 21st century: My BMW is paid for, this is only a cold sore, and I'm from the government and here to help you. Some things never change, and that last statement never changes. The government suffers from the fatal conceit that it knows what's best and will refuse to reply to the subpoenas to tell us what's going on.

Now, the government's been wrong before. In 1991, the World Health Organization said that coffee was a possible carcinogen and you should avoid drinking it. They repeatedly warned us about the cancer risk. We kept drinking coffee. Starbucks added new coffee houses about as fast as rabbits multiply. Starbucks never publicized the WHO findings—the World Health Organization—and now WHO says, sorry, we made a mistake.

Forensic evidence—for decades, state and federal governments have assured us with all the certainty of New York Attorney General Schneiderman, assured us about global warming. They're assured us that their scientific and forensic analysis is trustworthy. The government's prosecutors including Mr. Schneiderman routinely introduce scientific evidence. Now we know they may well be wrong. The President's Advisory Council says that it's become increasingly clear that lack of rigor in the assessment of the scientific inquiry in forensic evidence is not just a hypothetical problem but a real one. Maybe Mr. Schneiderman should investigate that in his home state.

Oh, my time is almost up and I have so much more to say, but we've been wrong about whole milk. People followed the food pyramid. They cut back their use of wheat, eggs, red meat. That dropped 17 percent or more, and diabetes doubled, and we now find out that some of those things are actually good for you. In the 1970s, scientists were unequivocal, many of them were unequivocal, there's going to be global cooling, the next Ice Age. They may be right, but it's like a stopped clock. If you say enough, eventually you're right about something.

Thank you very much.

[The prepared statement of Mr. Rotunda follows:]

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14 September 2016

TESTIMONY OF RONALD D. ROTUNDA

My name is Ronald D. Rotunda, the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law.

Summary

I will focus on several points. FIRST, it is a violation of free speech, injurious to scientific method, and just plain wrong for the Government to threaten scientists and entities (whether corporation, foundations, or any other entity) with criminal prosecutions because they do not embrace a belief in human-caused global warming. What the Government is doing now is chilling scientists who work in this area. Harvard Professor Jerry Mitrovica focuses on mid-Pliocene ice age of three million years ago; he tells us that he seeks in the distant past, "a temporary refuge from politically charged scientific debates."[1]

If this Committee's investigation shows that one or more State Attorneys General are chilling scientific investigations into global warming, the Committee should offer legislation to increase or redirect federal funds in order to counterbalance this harassment. The Committee might well propose other remedies. However, this Committee cannot know the extent of the harassment unless it investigates and it cannot investigate if the State Attorneys General refuse to comply with its subpoenas, which are quite limited in time and reasonable in scope. The State Attorneys General have no privilege to refuse to comply with these subpoenas.

SECOND, the government has a very poor record of accomplishment when it comes to telling us what we should accept as scientific gospel. To put it bluntly, the government is often wrong. Government should not engage in the fatal conceit of thinking it knows what is best for the rest of us. Government should not harass scientific investigation by issuing burdensome

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1 http://harvardmagazine.com/2016/09/the-plastic-earth

subpoenas — e.g., a subpoena for a decade's worth of emails — accompanied by threats of criminal prosecution of those who take positions that dispute what other scientists believe.

THIRD, Congress engages in one of its most important functions — the informing function — when it investigates the question whether other government officials, including State Attorneys General are in a corrupt conspiracy to abuse the power of government.

State Attorneys General are refusing to cooperate with Congressional subpoenas claiming that they interfere with "federalism" or "states' rights." That argument is specious. Surely, everyone knows that the First Amendment trumps federalism. No state law can interfere with Congress investigating whether State Attorneys General are part of a corrupt conspiracy. The State Attorneys General should be anxious to comply with these Congressional subpoenas to show that they are not in any corrupt arrangement with non-government entities. The Attorneys General of each state are supposed to use their powers to protect our constitutional right, not restrict them.

If companies that sell fossil fuels could "suppress" any research about global warming, they have done a remarkably poor job of it: studies that warn about global warming have been published continually for decades. These Attorneys General investigations affect fundamental First Amendment values because government should never use law enforcement to chill free speech or scientific inquiry.

GOVERNMENT SUBPOENAS AND THREATS OF CRIMINAL PROSECUTION CHILL SCIENTIFIC INQUIRY

Last spring, New York Attorney General Eric T. Schneiderman, and 16 other attorneys general (15 Democrats and one independent) announced that they are investigating energy companies and scientists who do not embrace global warming with the certainty of Euclidian geometry. At the press conference, Schneiderman said, "**The bottom line is simple: Climate change is real; it is a threat** to all the people we represent."

Other Attorneys General echo his certainty. "Climate change has real and lasting impacts on our environment, public health, and the economy," said California Attorney General Kamala D. Harris. Hence, money must be behind the refusal of some to believe in global warming. Shortly after that, Senator Sheldon Whitehorse (D. R.I.) warned us, "Fossil fuel companies and their allies are funding a massive and sophisticated campaign to mislead the American people about the environmental harm caused by carbon pollution," and so he urged the Department of Justice to prosecute all those involved.

If you do not believe that mankind is causing global warming, then you must be engaged in a fraud.

Yet, in spite of the well-publicized research by those who embrace the certainty of these State Attorneys General, many Americans are not convinced. It seems that a large majority of do not believe that humans cause Global Warming or that Global Warming is a serious problem – a skepticism they share with much of the rest of the world. One recent poll found only 9.2% of

Americans rate global warming as a top concern.[2] What to do? Sue someone, of course. It's the American way.

It's even better if the lawsuits contain threats of criminal investigation, because these threats have the useful purpose of chilling free speech and scientific inquiry. But you do not have to take my word for it. Scientists say that. We would like to know more facts and hone and perfect our scientific models, but instead of scientific objectivity, distinguished scientists working in this area bemoan the politicization of the science. Professor Jerry Mitrovica, a distinguished Harvard scientist, says that focusing on earth's distant past because it gives "him and his students a temporary refuge from **politically charged scientific debates**."[3]

The prosecutors are chilling free speech. We learned in August that N.Y. Attorney General Schneiderman is demanding "extensive emails, financial records and other documents," which imposes an extensive undertaking on all those subject to these demands.

In addition to New York Attorney General and the California Attorney General investigating, there has been a pile-on, with nearly a score of other state attorneys general exploring alleged crimes. That will teach those who question Global Warming that the Government is not fooling around. Investigations will impose serious costs on the companies and the scientists who much answer subpoenas and respond to interrogatories concerning many years of work.

The State Attorneys General say they only want to determine if fossil fuel companies *lied* to the public about Global Warming, and, if they did, whether that amounts to securities fraud.

- If the Attorneys General were serious, they would comply with the Congressional subpoenas in order to show all of us that they were not involved in any common interest agreements with private groups to harass those who disagree.
- If the Attorneys General were serious, they would publish in scientific journals what they think are the scientific errors.
- But the Attorneys General do none of the above — and stonewalling is the course one would take if the real point of their state investigations is to chill scientific inquiry.

THE GOVERNMENT'S TRACK RECORD ON PROCLAIMING SCIENTIFIC TRUTH DOES NOT INSPIRE CONFIDENCE

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[2] http://dailycaller.com/2016/02/01/poll-91-of-americans-arent-worried-about-global-warming/

[3] Bold emphasis added. See also, *id.*, "At the beginning of his career, Mitrovica never imagined that his research would become politicized."

The Government has repeatedly been wrong about what is scientific truth. That should give it pause when it tries to chill scientific inquiry while claiming it knows the truth.

There is the old saw about the three lies of the twentieth century:

- the check in in the mail;
- I'll love you just as much in the morning; and
- I'm from the government and here to help you.

The three lies of the twenty-first century:

- My BMW is paid for;
- this is only a cold sore; and
- I'm from the government and here to help you.

You see, some things never change. Government often suffers from the fatal conceit that it knows what is best. History should teach it more modesty.

Coffee

In 1991, the World Health Organization's International Agency for Research on Cancer (IARC) classified coffee as "possibly carcinogenic." IARC warned us repeatedly about the potential cancer risks of coffee, yet Americans kept drinking coffee and Starbucks added new coffee houses almost as fast as rabbits multiply. In 2016, the IARC did an about-face and said it was wrong.[4] Starbucks knew about the WHO study — everyone did, but the company sold coffee anyway.

Government Assurances of Forensic Analysis

For decades, state and federal governments have assured us, with all the certainly that N.Y. Attorney General Schneiderman has about Global Warming, that the prosecutors' scientific and forensic analysis are trustworthy. Government prosecutors (like Mr. Schneiderman) routinely

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[4] Dana Loomis, Kathryn Z Guyton, Yann Grosse, Béatrice Lauby-Secretan, Fatiha El Ghissassi, Véronique Bouvard, Lamia Benbrahim-Tallaa, Neela Guha, Heidi Mattock, Kurt Straif on behalf of the International Agency for Research on Cancer Monograph Working Group, *Carcinogenicity of drinking coffee, mate, and very hot beverages,* THE LANCET, Vol. 17, #7, at pp. 877-78 (July 2016) http://www.thelancet.com/journals/lanonc/article/PIIS1470-2045(16)30239-X/fulltext . See also, http://www.refinery29.com/2016/06/113998/who-hot-drinks-coffee-cancer-research

introduce this forensic evidence into court to convict people and take away their liberty, fortune, and life is trustworthy.

We know now that the science was too often wrong. The draft review by the advisory council of scientists and engineers advised, "It has become increasingly clear in recent years that lack of rigor in the assessment of the scientific validity of forensic evidence is not just a hypothetical problem but a real and significant weakness in the judicial system."[5]

"A Justice Department spokeswoman declined to comment on the draft report."[6]

Salt

In the 1970s, Brookhaven National Laboratory claimed there was "unequivocal" evidence that salt causes hypertension. In April 2010, the Institute of Medicine urged the FDA to regulate the amount of salt that food manufacturers use in their products; New York City Mayor Michael Bloomberg convinced 16 companies to do so voluntarily, with the threat of government regulation in the background.[7]

Yet, a study that the American Journal of Medicine published in 2006 showed that the more sodium people ate, the *less* likely they were to die from heart disease.[8] The evidence linking salt to heart disease "has always been tenuous."

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[5] Gary Fields and Kate O'Keeffe, *Presidential Advisory Council Questions Validity of Forensics in Criminal Trials: Group Sees Lack of Science Behind Much of Bite-Mark, Hair, Footwear, Firearm And Tool-Mark Analysis*, Wall Street Journal, Sept. 2, 2016, at p. A3.

[6] Gary Fields and Kate O'Keeffe, *Presidential Advisory Council Questions Validity of Forensics in Criminal Trials: Group Sees Lack of Science Behind Much of Bite-Mark, Hair, Footwear, Firearm And Tool-Mark Analysis*, Wall Street Journal, Sept. 2, 2016, at p. A3.

[7] Melinda Wenner Moyer, *It's Time to End the War on Salt: The Zealous Drive by Politicians to Limit our Salt Intake Has little Basis in Science*, SCIENTIFIC AMERICAN, July 8, 2011, http://www.scientificamerican.com/article/its-time-to-end-the-war-on-salt/

[8] Melinda Wenner Moyer, *It's Time to End the War on Salt: The Zealous Drive by Politicians to Limit our Salt Intake Has little Basis in Science*, SCIENTIFIC AMERICAN, July 8, 2011, http://www.scientificamerican.com/article/its-time-to-end-the-war-on-salt/

A 2011 study, which the Journal of the American Medical Association reported, found that that the less sodium that study subjects excreted in their urine—an excellent measure of prior consumption—the *greater* their risk was of dying from heart disease. [9]

We now know that low-salt diets could have adverse side effects. When people cut their intake of salt, "the body responds by releasing renin and aldosterone, an enzyme and a hormone, respectively, that increase blood pressure." [10]

Marijuana

For many decades, the Government told us that marijuana is a drug, with no legitimate use. During that time, the Federal Government funded advocacy research to show that marijuana is detrimental. Should the State Attorneys General investigate those who received these federal grants and threaten to prosecute them for "lying" about marijuana because they engaged in advocacy research?

The Federal Government will soon reschedule marijuana. That change will allow researchers to study whether marijuana can be beneficial. Once the Federal Government reschedules marijuana, will the N.Y. Attorney General be investigating those who engage in advocacy research to show the beneficial effects of marijuana? Or will he investigate and threaten those who still insist that marijuana is harmful?

Red Meat, Egg Yolks, and Fat

In 1970 and for years after that, the Government urged us to avoid red meat, egg yolks, and whole milk (too much fat). We complied with the food pyramid. From 1970 to 2005, the Department of Agriculture reported, proudly, that consumption of eggs and red meat fell by 17% and whole milk by 73%.

We should be glad that there were no ambitious State Attorneys General around, because they would investigate the food industry companies if they funded research into the *benefits* of eggs, meat and milk. The State Attorneys General would have subpoenaed a decade of records and questioned scientists who took a contrary view.

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[9] Melinda Wenner Moyer, *It's Time to End the War on Salt: The Zealous Drive by Politicians to Limit our Salt Intake Has little Basis in Science*, SCIENTIFIC AMERICAN, July 8, 2011, http://www.scientificamerican.com/article/its-time-to-end-the-war-on-salt/

[10] Melinda Wenner Moyer, *It's Time to End the War on Salt: The Zealous Drive by Politicians to Limit our Salt Intake Has little Basis in Science*, SCIENTIFIC AMERICAN, July 8, 2011, http://www.scientificamerican.com/article/its-time-to-end-the-war-on-salt/

The people believed in the food pyramid and followed the Government's advice. Bad idea. During that *same* period (1970-2005) when the public followed the Federal Food Pyramid, the incidence of diabetes doubled! Studies now show that people eating dairy products like whole milk have less of a problem with heart disease than those who do not. The Government's certainty in its food pyramid was wrong. Dairy producers and cattle ranchers were right. No government criminalized scientific disagreement.

Global Cooling

In the 1970s, many scientists confidently told us to fear Global *Cooling*. Starting in about 1970, various publications warned about the coming ice age. In 1970 alone, the New York Times, the Washington Post, the Boston Globe, and the LA Times all published stories with headlines like "Scientists See Ice Age in the Future."[11] Time Magazine's cover story on Jan. 31, 1973 (still posted on the Magazine's website)[12] was all about "The Big Freeze."[13] Two years later, Newsweek reported, "There are ominous signs that the earth's weather patterns have begun to change dramatically and that these changes may portend a drastic decline in food production — with serious political implications."[14] The problem — warming? No, it's cooling. The story concluded by advising us, "Meteorologists disagree about the cause and extent of the cooling trend," but "they are *almost unanimous* in the view that will reduce agricultural productivity for the rest of the century." [Emphasis added.] The Christian Science Monitor's reported in 1977, the concern of John A. Eddy of the Harvard-Smithsonian Center for Astrophysics that, "Sunspot lull may bring on new ice age."

If the American people do not believe that man-made Global Warming is a problem that demands that the Government interfere, perhaps it is because many American people do not trust the Government.

Such a conclusion is hardly irrational, not only because the Government has often been wrong but because some of the same scientists who argue that the evidence is conclusive do not act as if they believe what they say. The emails leaks of 2009 demonstrate that.

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[11] http://www.newsbusters.org/blogs/jack-coleman/2015/04/18/wrong-bill-maher-reporting-global-cooling-70s-not-limited-single-story

[12] http://content.time.com/time/covers/0,16641,19770131,00.html

[13] http://www.populartechnology.net/2013/02/the-1970s-global-cooling-alarmism.html

[14] http://www.scribd.com/doc/225798861/Newsweek-s-Global-Cooling-Article-From-April-28-1975

The Email Leak of 2009 by Global Warming Supporters

Recall that in 2009, the Climate Research Unit (CRU) at the University of East Anglia suffered a massive email leak. Supporters of global warming claimed the disclosures were out of context, but when you read the emails, it is easy to see that their most natural interpretation is that supporters of global warming were manipulating data.

In one of the quoted emails, Professor Phil Jones, while discussing paleo-data used to reconstruct past temperatures, says, "I've just completed Mike's *Nature trick of adding* in the real temps to each series for the last 20 years (i.e. from 1981 onwards) and from 1961 for Keith's to *hide the decline.*"(Emphasis added.) How clever to use this trick to manipulate data.

The House of Commons investigated and concluded, "insofar as we have been able to consider accusations of dishonesty--for example, Professor Jones's alleged attempt to 'hide the decline'--we consider that there is no case to answer." Not answering is frankly, not an answer. For those of us who understand English, it seems that the scientists are engaging in what they call "tricks" so that they can reach their predetermined conclusion.

There Is Never a "Bottom Line" (to quote Attorney General Schneiderman) About Any Interesting Scientific Question

Scientists and everyone else have the free speech right to argue whether man will ever be able to travel faster than light, whether we live in one universe out of an infinite number, or is our universe is alone, or whether time travel will ever occur. Some scientists believe that the universe is in a steady state, with the spontaneous creation of matter and energy out of a vacuum. Others think, like T.S. Eliot, that the world will end — "Not with a bang but a whimper."

It was not until 1985 that scientists discovered physical evidence of the Big Bang. We develop human knowledge by testing competing theories. For most of human history, scientists though that the universe has always been here. The Book of Genesis disagreed. There was a consensus among scientists, and those who funded them, that Genesis was wrong.

Georges Lemaître, a physicist at the Catholic University of Leuven and a Belgian priest, disagreed with the orthodox view. He first proposed the Big Bang in 1927. Einstein rejected Lemaître's theory, saying, "Your calculations are correct, but your physics is atrocious."[15] Although Einstein *knew* Lemaître was wrong, Einstein did not seek to silence him. This is not the Middle Ages, when people suffered punishment because they did not believe that the earth was in

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[15] "Vos calculs sont corrects, mais votre physique est abominable" ("Your calculations are correct, but your physics is atrocious.") https://en.wikipedia.org/wiki/Georges_Lemaître

the center of the Solar System. The purpose of the Bible is to teach how to go to Heaven, not how the Heavens go.

We now know that Lemaître was correct while Einstein was wrong. Einstein posited a finite-size static universe, and eventually accepted that he was wrong and Lemaître was right. Empirical evidence now supports Lemaître's version of the Big Bang over what Steven Hawking was advocating.[16]

In the Twentieth Century, no democratic government (leave aside dictatorships like Russia., Iran, etc.) would investigate Lemaître to determine if there was possible fraud in propounding his theory. No democratic government, in the 20th Century, would threaten criminal prosecutions and harass Lemaître with subpoenas, depositions, etc.

One could see how Lemaître's theory might develop in our more intolerant 21st Century. The Catholic Church funded Lemaître because he was a Catholic priest. How much was that funding? Did it affect his beliefs? If a religious believer paid for part of Lemaître's visit to MIT, did that affect how Lemaître viewed mathematics? Government, in today's world, would fire a volley of subpoenas against him, his Bishop, and the Vatican to see if that funding over the last decade somehow affected Lemaître's investigations. "We are just investigating," the Government prosecutors might say; "comply with our subpoenas, our investigators, our interrogatories, search through your records for the last decade, accept this burden, and worry about criminal prosecutions or shift your attention to less controversial investigations."

If the Government had decided to prosecute, its expert witness at trial would be none other than Albert Einstein himself, winner of the Nobel Prize in Physics in 1921. The Government would have a strong case, under Mr. Schneiderman's theory. The Government would be wrong, but the efforts to chill Father Lemaître's scientific theories would be successful.

Now, most scientists believe that our university had a beginning, and they debate whether it will have an end. (I think it will end, with a whimper, not a bang.) The thought that government authority would investigate those who advocate one position or the other is baffling.

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16 "After decades of struggle, other scientists came to accept the Big Bang as fact. But while most scientists — including the mathematician Stephen Hawking — predicted that gravity would eventually slow down the expansion of the universe and make the universe fall back toward its center, Lemaitre believed that the universe would keep expanding. He argued that the Big Bang was a unique event, while other scientists believed that the universe would shrink to the point of another Big Bang, and so on. The observations made in Berkeley supported Lemaitre's contention that the Big Bang was in fact 'a day without yesterday.'"
http://www.catholiceducation.org/en/science/faith-and-science/a-day-without-yesterday-georges-lemaitre-amp-the-big-bang.html

WE NEED ADVOCACY RESEARCH OPPOSED TO GLOBAL WARMING, BECAUSE THAT IS HOW SCIENCE ADVANCES: MR. SCHNEIDERMAN'S SUBPOENAS CHILL INQUIRY

Questions about Global Warming — why has the rate of Global Warming not followed what the scientific models predict;[17] are the oceans absorbing substantially more carbon dioxide that anyone expects; should there have been warming spikes during WWI and WWII bombings, unleashing deluge of carbon dioxide — are always constitutionally protected.

A distinguished Harvard scientist, using his models, has predicted that "If Greenland's ice sheet melted entirely, sea level would *fall* 20 to 50 meters at the adjacent coast," with the sea levels dropping as far as 2000 kilometers away.[18]

This scientist, Professor Jerry Mitrovica (who is concerned about global warming), also has shown that for the last 2,000 years, there has been virtually no change in sea level on the Italian coast. During this time-period, earth suffered from a Little Ice Age from approximately 1300 to 1850, and a Medieval Warm Period from about 950 to 1250. Yet, the sea level appeared not to notice. More recently, it is rising slightly, but less than the standard models predict. These are all interesting and important questions to investigate, without fear of political prosecutions.

Professor Mitrovica has studied the mid-Pliocene ice age (three million years ago), when "the earth was as warm as we are about to get in the next 100 years," so it should be of interest to the issues of today. Yet, he says, "we don't really know how the polar ice sheets fared." We should study that issue as well, but in the political world of global warming, there is no sanctuary from political correctness.

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[17] Holman W. Jenkins, Jr., *How the Exxon Case Unraveled*, WALL STREET JOURNAL, Aug. 30, 2016, http://www.wsj.com/articles/how-the-exxon-case-unraveled-1472598472 :

> "In its most recent report, issued in 2013, the U.N.'s Intergovernmental Panel on Climate Change assumes a doubling of atmospheric CO2 and predicts warming of 1.5 to 4.5 degrees Celsius—i.e., an uncertainty of output, not input.
>
> "What's more, this represents an increase in uncertainty over its 2007 report (when the range was 2.0 to 4.5 degrees). In fact, the IPCC's new estimate is now identical to Exxon's 1977 estimate and the 1979 estimate of the U.S. National Research Council.
>
> "In other words, on the crucial question, the help we're getting from climate models has not improved in 40 years and has been going backward of late."

[18] http://harvardmagazine.com/2016/09/the-plastic-earth (emphasis in original).

Some scientists (University of Northumbria) think that the greater danger may be a possible mini-ice age, because solar sunspots and 11-year cycles in the weather will converge in the 2030s. Others reject that view, arguing that human-created carbon will overwhelm any cooling brought by solar activity.[19] These scientists differ with each other, while leaked emails from a major supporter of global warming show scientists trying to silence those who disagreed with the narrative of global warming.

So, what should we do about those people who are trying to show that global warming is not man-made, that it is not coming as soon as others claim, or that the benefits of warming outweigh the burdens? We could emulate the open debate between Lemaître and Einstein.

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[19] ***Thames Frost Fair*, 1683–84, by Thomas Wyke,** https://en.wikipedia.org/wiki/River_Thames_frost_fairs -- "River Thames frost fairs were held on the tideway of the River Thames at London in some winters between the 17th century and early 19th century, during the period known as the Little Ice Age, when the river froze over."

Ah, that's so twentieth century; this is the twenty-first century. If the people do not believe something, the Government prosecutors should threaten criminal prosecution and extensive investigations.

FREE SPEECH, SCIENTIFIC INQUIRY, AND THE PROSECUTION'S EFFORTS TO CHILL FREE SPEECH

Fortunately, the First Amendment protects free speech and prohibits Government from using its mighty power to harass scientists and others by imposing burdensome subpoenas, discovery, depositions, threats, etc.

In *United States v. Alvarez* (2012)(6 to 3)[20], the Supreme Court told us that we have a constitutional right to lie about receiving the Congressional Medal of Honor. The Court was not recommending lying, but it recognized that if the Government can punish that, we start going a slippery slope with a very steep incline.

Justice Kennedy, for several Justices, said simply that the Government cannot "compile a list of subjects about which false statements are punishable." Justice Breyer also defended lying, "even in technical, philosophical, and *scientific* contexts, where (as Socrates' methods suggest) examination of *a false statement (even if made deliberately to mislead)* can promote a form of thought that ultimately helps realize the truth."[21]

There were three dissenters in *Alvarez*, but all three would protect lying in matters of science. "Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern" would "present a grave and unacceptable danger of suppressing truthful speech."

The marketplace of ideas, not the subpoena power of government, should decide what is true or false.

What should *the Government* do about this general disbelief about global warming? If the government should do anything, it would be to encourage further scientific research, not threaten to prosecute those who do not toe the line. If others embrace an incorrect view of the facts, the remedy is more speech (not less) so that we can test the speech in the market place of ideas.

Justice Oliver Wendell Holmes, Jr. told us nearly a century ago that the "ultimate good desired is better reached by free trade in ideas —that the best test of truth is the power of the

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[20] *United States v. Alvarez*, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012). 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.32(c) (Thomson Reuters 5th ed. 2013).

[21] Emphasis added.

thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."[22]

Even if the other fellow argues something you know is impossible (he claims to have squared the circle[23]), just allow more speech, and others will eventually understand that he is wrong if we protect the free market place of ideas. This free market place will allow us to discover that one cannot square the circle. [24]

What Government should *not* do is chill the free speech of scientists. What Hippocrates said nearly 2,500 years ago about medical doctors applies to prosecutors: first, do no harm.

In addition, Government should investigate those prosecutors who do chill free inquiry by scientists. That is why the House should enforce it subpoenas.

The motive of these prosecutors is suspect because they are not investigating people who believe in global warming, only those who think that there is more to investigate. Let me explain. At Schneiderman's press conference, former Vice President Al Gore stood proudly saying, "We cannot continue to allow the fossil fuel industry or any industry" to "mislead the public" about" the health of our planet."

Is Schneiderman investigating Al Gore? Hardly — even though recently leaked documents show that George Soros is a major funder of Al Gore and his climate agenda. Soros uses one his organizations to fund millions to support "political space for aggressive U.S. action" to combat global warming. Soros committed "$10 million per year for three years to Al Gore's Alliance for Climate Protection."

The American people have a right to know with which private groups Mr. Schneiderman was working, what were the terms of the deal were when he launched this crusade, and what

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22 *Abrams v. United States*, 250 U.S. 616,630 (1919)(Holmes, J., dissenting).

23 To square the circle is to construct a square with the same area as a given circle by using only a finite number of steps, using only a compass and straightedge.

24 In 1882, that Carl Louis Ferdinand von Lindemann proved that π (pi) is a transcendental number — not a root of any polynomial with rational coefficients. Before the Lindemann's proof, mathematicians knew that if π were transcendental, then it would be impossible to square the circle by compass and straightedge. https://en.wikipedia.org/wiki/Ferdinand_von_Lindemann

political and economic motives lie behind these prosecutorial actions.[25] One subject of Mr. Schneiderman's subpoenas has asked for any "common interest agreements" he has with "private activists" in connection with his criminal investigations. Mr. Schneiderman has refused to reveal that information.

The prosecutors' inaction concerning Al Gore reminds me of the Biblical verse about the person who saw the mote in his brother's eye while ignoring the beam in his own eye. (Matthew, 7:3-5.) That beam is billionaire George Soros.

CONCLUSION

As Benjamin Franklin warned us in 1731:

> Printers are educated in the Belief that when Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick; and that when Truth and Error have fair Play, the former is always an overmatch for the latter. Hence they cheerfully serve all contending Writers that pay them well, without regarding on which side they are of the Question in Dispute.[26]

The New York Attorney General has opposed Congressional subpoenas trying to get to the truth as to whether the Attorney General is part of a conspiracy to abuse government power and to silence those who question the orthodoxy of Global Warming.

The First Amendment always overrides federalism or states' rights. The Supremacy Clause of our Constitution makes that clear. No state law can interfere with Congress investigating whether State Attorneys General are part of a corrupt conspiracy.

The State Attorneys General should be anxious to comply with these Congressional subpoenas to show that they are not in any corrupt arrangement with non-government entities. The Attorneys General of each state are supposed to use their powers to protect our constitutional right, not restrict them.

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[25] See, e.g., Editorial, *Schneiderman's Climate Secrets: What is New York's Attorney General Trying to Hide?*, WALL STREET JOURNAL, April 31, 2016, http://www.wsj.com/articles/schneidermans-climate-secrets-1472616000

[26] Benjamin Franklin, *Apology for Printers*, THE PENNSYLVANIA GAZETTE, June 10, 1731, reprinted in, http://nationalhumanitiescenter.org/pds/becomingamer/ideas/text5/franklinprinting.pdf

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SHORT NARRATIVE BIOGRAPHY of RONALD D. ROTUNDA

Ronald D. Rotunda is a chaired law professor at Chapman University. Before that, he held chairs at George Mason U. and the U. of Illinois. He is the author of a leading course book on constitutional law, Modern Constitutional Law (11th ed. 2015), and co-author of: the most-widely used course book on legal ethics, Problems and Materials on Professional Responsibility (12th ed. 2014); the leading Ethics Treatise, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility (published by the ABA & West/Thompson 2016); and the 6-volume Treatise on Constitutional Law (5th ed. 2012). He also authored several other books and over 500 articles in law reviews, journals, newspapers, in this country and abroad. His books and articles are translated into Japanese, Korean, Chinese, French, Portuguese, German, Czech, and Russian, and cited more than 2000 times by state and federal courts (including the U.S. Supreme Court), and by foreign courts and law reviews.

He was Assistant Majority Counsel to the Senate Watergate Committee (1973 to 1974) and Special Counsel to the Independent Counsel in the Whitewater Investigation (1997 to 1999). He has been a member of the Publications Board of the A.B.A. Center for Professional Responsibility since 1994.

He was a Fulbright Professor in Venezuela and a Fulbright Research Scholar in Italy. He assisted the Czech Republic in drafting its first Rules of Ethics for lawyers. He was visiting professor at the University of Alabama, Visiting Scholar, Katholieke Universiteit Leuven, Belgium, visiting lecturer, Institut für Recht und Ökonomik, University of Hamburg. In 1993, he was the Constitutional Law Adviser to the Supreme National Council of Cambodia, assisting Cambodia in writing its first democratic constitution. He has consulted with new democracies in Eastern Europe on their proposed constitutions.

In May 2000, *American Law Media*, publisher of *The American Lawyer* and *National Law Journal*, picked Rotunda as one of the ten most influential Illinois Lawyers. Also in 2000, the U. of Chicago Press published a study that measured the influence, productivity, and reputations of law professors over the last several decades: Rotunda was 17th highest in the nation. The 2002-2003 *New Educational Quality Ranking* of U.S. Law Schools (EQR) [the last year records are available] ranked Rotunda the 11th most cited of all law professors. He was selected Best Lawyer in Washington, DC, in 2009 in Ethics and Professional Responsibility Law, as published in the *Washington Post* in association with the *Legal Times*. He was also selected as one of the Best Lawyers in Southern California, in 2010, 2011, 2012, 2013, 2014, 2015, 2016, in Ethics and Professional Responsibility.

Chairman SMITH. Thank you, Professor Rotunda.
And Professor Tiefer.

TESTIMONY OF MR. CHARLES TIEFER, PROFESSOR OF LAW, UNIVERSITY OF BALTIMORE; FORMER ACTING GENERAL COUNSEL, U.S. HOUSE OF REPRESENTATIVES

Mr. TIEFER. Thank you for the opportunity to testify today.

I served in the House General Counsel's Office for 11 years, becoming General Counsel of the House of Representatives. Since then I have been a Professor at the University of Baltimore School of Law. So I have lengthy, full-time experience in the House including extensive work on Congressional subpoenas and contempt. I stood behind the dais of committees like this many, many, many times, which few others have done, advising chairmen on the legitimate lawful use of Congressional oversight authority. I note that I've kept my hand in in testifying in a bipartisan way. Chairman Sensenbrenner called me as a lead witness in a hearing. I was Chairman Issa's lead witness in a hearing.

So no House committee has ever tried nor should ever try to enforce subpoenas against state Attorneys General. I can say none has ever tried based on extensive firsthand experience of mine, the literature on investigations, and all the research for this hearing.

The Committee has failed to identify even one single House subpoena enforcement in 200 years to a state attorney general. The reason: It's never happened. Never.

Today, a House committee with no precedent is going squarely against a key component of state sovereignty. Consider also that the only enforcement route is statutory criminal contempt of Congress under 2 U.S.C. 192, inherent contempt, meaning that the House itself acts as a court and holds a trial itself is a nonstarter. There's not been inherent contempt since 1935.

There's another rare, specialized kind of matter, non-statutory contempt. It's been done for two executive officials, Myers and Holder, but these went ahead because the claim which was their claim of federal executive privilege rendered these unsuitable for regulatory statutory methods that simply don't apply to states. There could never be contempt enforcement, criminal contempt enforcement, by the Justice Department or by courts against state Attorneys General.

Now, I want to say that the gravamen of today's state Attorney General investigations is that ExxonMobil made statements to investors about the absence of climate risk while meanwhile they had files of scientific studies in their own offices showing the perils. So the Exxon statements conflicted factually and materially with the company's own extensive record of research. It was a climate peril they knew about and lied about that state Attorneys General investigating. The supposed constitutional rights explanation by the Majority, that the people in Exxon's pay, in Exxon's offices were exercising First Amendment rights is without merit. Fraud investigation is the legitimate bread and butter of state Attorneys General, and fraud is not protected by these rights. I might note that the New York Attorney General who is taking the lead here has special

statutory authority called the Martin Act to proceed against misleading investors in this way.

The Committee has also issued extremely broad subpoenas against environmental groups. These are groups that petition state agencies regarding potential fraud by ExxonMobil involving statements about climate change. Statements, I might note, that were covered extensively by the Los Angeles Times last year. Traditionally, broad subpoenas have not been enforceable against advocacy groups. The rights of such groups of free association would be negated by such broad subpoenas. The key precedent, protecting such advocacy groups, is Gibson versus Florida Legislative Investigative Committee. The key group protected by these cases was the NAACP. There's a clear parallel between the rights of the NAACP then and the rights of environmental groups now.

The Science Committee's own authority is over federal, not state, federal scientific "government activities." Same clear limits on its jurisdiction apply to subpoenas to Attorneys General and subpoenas to environmental groups.

In conclusion, the Science Committee cannot and should not try to enforce subpoenas against state Attorneys General or environmental groups looking into climate risk fraud.

I yield back the balance of my time, Mr. Chairman.

[The prepared statement of Mr. Tiefer follows:]

UNIVERSITY OF BALTIMORE SCHOOL OF LAW

Charles Tiefer
Professor of Law

Hearing on September 14, 2016

TESTIMONY BEFORE THE HOUSE COMMITTEE ON SCIENCE, SPACE AND TECHNOLOGY

by Professor Charles Tiefer

Re: The Committee Cannot and Should Not Try to Enforce Subpoenas Against State Attorneys General Investigating Exxon's Climate Risk Fraud

Outline of Tiefer Testimony

No House Committee has ever tried, nor should try, to enforce subpoenas against state Attorneys General.

I can say none has ever tried -- based on extensive first-hand-experience, the literature on investigations, and all the research for this hearing.

If committees felt AG subpoenas were legitimate, in two centuries they would have tried.

The federalism barrier is like the "executive-commandeering" principle.

There could never be enforcement by the Justice Department or by courts.

The Science Committee has no authority to enforce subpoenas against state AGs.

The "constitutional rights" explanation is without merit for fraud.

Committees must have clear authority. *Tobin v. United States.*

The Science Committee authority is over federal scientific "Government activities," not state AGs.

Environmental groups are protected from harassment via broad subpoena.

Thank you for the opportunity to testify today. I served in the House General Counsel's office in 1984-1995, becoming General Counsel (Acting). (Since 1995, I have

been Professor at the University of Baltimore School of Law,) So, I have lengthy full-time experience, including extensive work on Congressional subpoenas. My work takes in whether the House, or this Committee, may justifiably try to enforce subpoenas against state Attorneys General (the answer being: no). I have had more years of experience than almost anyone else in House history focused on this area. While the other professors on this panel have done various things, none has been the House General Counsel. I stood behind the dais of committees many, many times, which few did, advising Chairmen on the legitimate lawful use of Congressional oversight authority.

In 1987 I was Special Deputy Chief Counsel of the House Iran-Contra Committee and worked intensively on the most advanced of all House investigative issues. Since becoming Professor I have written extensively on investigative and related issues. Charles Tiefer, "*The Specially Investigated President*," 5 Univ. of Chicago Roundtable 143-204 (1998); see also Charles Tiefer, The Polarized Congress: The Post-Traditional Procedure of Its Current Struggles (University Press of America, 2016).

I might note that I have kept my hand in, in a bipartisan way, hearings involving matters like those here. Chairman Sensenbrenner (R-Wis.) called me as lead witness at his hearing on the FBI raid on a Member's office.[1] I was Chairman Issa's (R-Cal.) lead witness at his hearing on the demand for Justice Department materials that became the House's contempt case against Attorney General Holder.[2]

Let me say again in the plainest terms: when committees under a Republican majority sought materials to which they were entitled, I was vigorously on their side, and Chairman Issa and Sensenbrenner were glad to rely on me; when you seek material from State Attorneys General on their investigation of climate risk fraud, however, your position is without constitutional and legal merit. It is simply bogus.

I.No House Committee Has Ever Tried, Nor Should Try, To Enforce Subpoenas Against State AGs

I-A No House Committee Has Ever Tried; Look at the Majority's Testimony – Its Empty Abstractions Fail to Identify Even a Single House Subpoena Enforcement, in 200 Years, to a State AG

[1] "The Search Warrant Raid Was an Unnecessary and Radical Step," in Reckless Justice: Did the Saturday Night Raid of Congress Trample the Constitution?, Hearing Before the House Committee on the Judiciary (May 30, 2006).

[2] "Congressional Committee Conducting Oversight of ATF Program to Sell Weapons to Smugglers, Notwithstanding Pending Cases," in Hearing on Justice Department Response to Congressional Subpoenas: Hearing Before the House Committee on Government Oversight (June 13, 2011).

No House Committee has ever tried to enforce subpoenas against state Attorneys General. I challenge, bluntly, the majority witnesses to do what their written testimony does not do – provide written citations for any House committee, in over two hundred years of House investigations, to have ever tried to enforce a subpoena against state Attorneys General.[3]

Why can I say there have been no such subpoenas enforced against State AGs? First, from extensive first-hand experience. For my eleven years in the House Counsel's office, every House committee subpoena was examined by me. At the time I left that office, I had personally examined more than half of all the House committee subpoenas in all of history (this being more than half because the pace had picked up markedly during my years, including the high-powered House Iran-contra Committee, for which I personally drafted most of the subpoenas with document demands). And, I saw the research files for subpoenas before my time of service. I saw who those hundreds of subpoenas were directed at. The upshot: House committees did not enforce subpoenas to state Attorneys General.

Second, both to start my role in the Senate and House Counsel offices, and to stay in touch afterwards, I have read a great deal of the literature about investigations. To illustrate from the related sphere of House procedure, I authored a treatise with 1000 pages and 2000 footnotes; this year I have published a new book on the same House subject, with almost 200 pages. I had the benefit of hundreds of pages from the Congressional Research Service, as well as law review articles and the like. I was, of course, particularly interested in more striking or controversial instances, of which something about state Attorneys General would have been front and center. I studied deeply about every kind of special subpoenas from tax records to immunized witnesses. No enforcement of House committee subpoenas to state Attorneys General could be found.[4]

Third, in connection with this investigation, vast research forces have been mobilized from all direction. The Congressional Research Service looked again. So did majority witnesses. So, presumably, did majority staff. With all that research firepower, no enforcement of House committee subpoenas to state Attorneys General could be found.

Why does it matter that there have been no established examples? After all, new things do happen. But, consider the subject. New subjects may arise for which established examples would not exist. For example, an FBI raid on a House Member's office raised the relatively novel question, not long ago, of how to investigate Member

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[3] I am not referring to the distinguishable *Tobin* case, discussed below, in which enforcement lost in a subpoena to a interstate compact authority, not to a state AG.

[4] Quite the opposite, in *House Practice: A Guide to the Rules, Precedents and Procedures of the House* (GPO 2011) I found: "The investigative power cannot be used to expose merely for the sake of exposure or to inquire into matters which are within the exclusive province of one of the other branches of government <u>or which are reserved to the States</u>." (Underlining added)

computer hard drives. On that novel subject of hard drives, the lack of historic examples is not surprising. Hard drives were unheard of awhile back.

But, for two centuries, there have been House committees, and, state Attorneys General. The explanation for the absence of precedent is hardly one of novelty. It was always a possibility, for House committees to attempt something. Suppose we assume that at least a quarter (25%) of the time, the chair of a House Committee is in the opposition party to some prominent state Attorneys General, just like this chair is for the subpoena recipients. Figure at least a half-dozen House Committees each Congress, and just one century of history (that is, 50 Congresses) to keep the numbers low, and 25% party opposition, and there are obviously many dozens of times, if not hundreds, when the incentive would have been there for House committees to subpoena state Attorneys General – that is **if** they considered it legitimate to try to enforce committee subpoenas against state AGs. Against this background, the fact that not one single solitary example of it, shows there is an overwhelming historical consensus against what Chairman Smith is trying to do.

I-B. No House Committee Should Try To Enforce Subpoenas Against State AGs

Looking particularly at these subpoenas, they concern state Attorney General law enforcement investigations of climate risk fraud. These go against the combination of mutually reinforcing aspects of resistance, namely, federalism and law enforcement.

It is not merely that in this matter, a House Committee is going into an area that is largely left to the states, like crime on school premises. Rather, a House Committee is going squarely against a key component of state sovereignty itself, namely, state Attorneys General. Could Congress abolish state Attorneys General? Could Congress put state Attorneys General under the command of the nearest U.S. Attorneys? Could Congress require state Attorneys General to investigate what does not interest them, but does interest the majority party of the House? Even to suggest these things is to see the strong barrier of state sovereignty.

An example of the cases supporting the federalism barrier is the "anti-commandeering" principle. *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United Sates*, 404 U.S. 144 (1992); *compare Reno v. Condon*, 528 U.S. 141 (2000). This line of cases looks back at history and particularly at the earliest Congresses. The issue in *Printz* was whether Congress could oblige state officials to do background checks on handgun buyers. The Supreme Court said "no." Such "executive-commandeering statutes" did not appear until "very recent years." 521 U.S. at 916.

This applies with maximum force to enforcement of committee subpoenas against Attorneys General. The ban on committee subpoena enforcement against state AGs has the same powerful length of history and comparable protections of federalism. This position is expressed with great force and eloquence in the submissions by the state

Attorney Generals themselves to this committee. I will not attempt to repeat what they have said. I simply direct the Committee's attention to the state AGs' submissions.

Suppose a House Committee blundered ahead blindly, and attempted quixotically to enforce subpoenas against state Attorneys General. Suppose even the House backed the Committee and voted for enforcement, presumably along party lines, further underlining that the issue is merely political. The answer is that there could never be enforcement, only further demonstrations of the illegitimate nature of the effort.

Consider, first, that the only enforcement route is contempt of Congress under 2 USC 192. There is no civil enforcement statute for the House (in contrast to the Senate). And, this enforcement discussed in today's hearing does not involve federal executive officials invoking federal executive privilege, the special, unique justification expressed for the couple of recent trial judge House contempt decisions. 2 USC 192 is the live route for House contempt. I personally directed, at the staff level, one of the last successful 2 USC 192 efforts by the House, forcing Ferdinand Marcos's recalcitrant law firm to surrender the secrets of his hidden wealth, only after a (bipartisan) House vote of contempt. There have been many scores of House contempt votes under 2 USC 192, particularly during the red-baiting period in the 1950s and 1960s.

Second, however, it would take a decision of the Justice Department to go ahead with a 2 USC 192 case against a state Attorney General. Based on my own experience, and all I have learned from a multitude of sources about contempt, that is simply a non-starter. The Federal Justice Department sees state Attorneys General as their colleagues and partners in law enforcement. There is no aspect of this case to differentiate it as involving some personal wrongdoing of a corrupt nature. The Justice Department does not go into court seeking orders intruding into the work of the other sovereign law enforcement officers – not even injunctive orders. A contempt case under 2 USC 192 carries a sentence of a year in jail. No federal Justice Department is going to seek to declare as a criminal, and to imprison, a state Attorney General for a year just on the notion this vindicates the right of a House committee to enforce subpoenas.

Third, even making the far-out assumption that the federal Justice Department did indict a state AG to enforce a House committee subpoena, no federal judge could ever be expected to uphold such an indictment and send the state AG to prison. Federal judges see state AGs as chosen leaders of a parallel sovereign (noting again that this is not about personal wrongdoing of a corrupt nature). They rule sometimes on state AG cases, but they do not render criminal judgments against state AGs themselves. Much less would judges do so, not for some broad crusade by the federal Executive Branch on behalf of some helpless minority being grievously oppressed under a state, but rather in vindication of a House committee venturing without support to go where no committee before it has ever gone.

II. The Science Committee Has No Authority to Enforce Subpoenas Against State AGs

II-A The Supposed "Constitutional Rights" Explanation by the Majority is Without Merit.

The gravamen of the state AG investigations is: Exxon Mobil made statements to investors about (absence of established) climate risks; these Exxon statements to investors conflicted factually with the company's own extensive record of research, about the real peril of climate change. In a word, Exxon committed fraud about climate change risk. Obviously, since Exxon dominates the carbon fuel business, a conflict between what it misrepresents to investors, vs. what it actually digs into itself about that, is material.

The issue is similar to the tobacco companies being untruthful. Their statements about nicotine not being addictive, conflicted with their own research. State Attorneys General sued successfully to hold them accountable.

Now, it appears, the House Science Committee deems this state AG investigation to violate Exxon's First Amendment rights. So the Science Committee deems itself to be riding to the First Amendment rescue of Exxon, and push back against the state AGs even trying to look into fraud.

However, the supposed "constitutional rights" explanation by the majority is without merit. Fraud investigation is the legitimate bread and butter of state AG investigations. The Supreme Court holds that the First Amendment does not protect such fraud. In *Illinois ex rel. Lisa Madigan, Attorney General of Illinois, v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003), the Illinois Attorney General sued professional charitable fundraisers for fraud. It is noteworthy that this was a state AG investigation of fraud, just like in our matter. It is also noteworthy that this was, as Supreme Court cases go, quite recent, and certainly one that is as solid a precedent today as the day it was handed down.

The Supreme Court cited a string of strong precedents to declare that "the First Amendment does not shield fraud." 538 U.S. at 612. As it quoted from prior cases, "the government's power 'to protect people against fraud' has 'always been recognized in this country and is firmly established." *Id.* "The 'intentional lie' is 'no essential part of any exposition of ideas.'" *Id.* That case itself shows that not only does fraud lack First Amendment protection in general, it lacks First Amendment protection vis-à-vis state AGs in particular.

II-B House Rule X(3)(k) Makes Clear the Science Committee Has No Pertinent Authority

Other committees recognize that they do not have authority to investigate State Attorneys General the way this committee seeks to. Rep. Chaffetz, Chairman of the Committee on Oversight and Government Reform recently commented to Wolf Blitzer on CNN that he would not be investigating the Florida Attorney General. He said: "Well,

I don't see the federal jurisdiction in this case. It does look to me to be a state issue. It is regarding an attorney general in Florida. I just don't see the federal jurisdiction."

Even if, *arguendo*, some committee were to march out and defend the asserted First Amendment rights of businesses to give false reports to their investors, it would not be this committee. This Committee is not the one that proposes constitutional amendments; not the one that proposes civil rights bills; and, not the one that conducts oversight over parts of the government policing civil rights.

This Committee's legislative jurisdiction is set forth in House Rule X 1.(p) and special oversight functions in X 3.(k).

The Supreme Court and the lower courts have long made clear that committee authority to enforce subpoenas, in constitutionally questionable subjects like today's hearing, must be stated with special clarity, which we will see in a moment, is not stated with respect to the Science Committee and state AGs. In *United States v. Rumely*, 345 U.S. 41 (1953), the Court considered a contempt of a House Select Committee on Lobbying Activities. Rumely was selling pamphlets described by the Court as "of a particular political tendentiousness," and the Committee was looking into bulk purchases for distribution. By ordinary language, bulk purchasing of political pamphlets could come under the Committee's stated authority. But, Justice Frankfurter, in his opinion for the Court, insisted on avoiding constitutional issues because the charter of the committee did not give it sharply clear authority over Rumely. "Certainly it does not do violence to the phrase 'lobbying activities' to give it a more restricted scope." *Id.* at 48.

This principle is particularly reinforced when dealing with state officials. As previously stated, there are no instances of subpoena enforcement against state Attorneys General. There is one case, which goes against what the Science Committee majority is trying to do, as to an interstate compact agency. This interstate compact agency, the New York – New Jersey Port Authority, came into existence (as states themselves, of course, do not) by Congressional approval of the interstate compact. And, the head of the authority, Austin Tobin, was involved in the mundane matters of transportation, not the law enforcement activity of state AGs.

A House committee tried to enforce, by contempt, a subpoena for documents from Tobin. The D.C. Circuit threw out a contempt conviction. Tobin presented as a defense that the subpoena sought internal matters from the State. The Court followed *Rumely* and found that the House Committee lacked the necessary sharply clear authority for its subpoena. As it said about Tobin, "Appellant is no criminal and no one seriously considers him one." *Tobin v. United States*, 306 F.2d 270, 275 (D.C. Cir. 1962). It would not enforce a subpoena because "To avoid such constitutional holdings is our duty, particularly in the area of the right of Congress to inform itself. *United States v. Rumely*, 345 U.S. 41 (1953)." *Id.* at 274.

What *Rumely* and *Tobin* say, about not giving broad reading to federal instruments as to their reaching into state matters, is good law today. As recently as 2014, the Supreme Court decided *Bond v. United States*, 134 S. Ct. 2077 (2014). It refuses to interpret the chemical weapons ban to apply to state-level crime, despite Justice Department advocacy of its doing so, for a conviction at the trial level affirmed at the circuit level. The ban had to be interpreted narrowly, because "The Government's reading of section 229 would alter sensitive federal-state relationships,'" and by "denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Id.* at 2092.

No one has found any other case on Congressional investigations into state-level bodies, putting aside the interstate compact agency in *Tobin* (which discarded the House committee's effort anyway). That *Tobin* House Committee's loss would be front and center at the Justice Department, and front and center in court, if the Science Committee tried to enforce its subpoena. The House Committee could not evade nor escape the question: where is its clear authority to subpoena state AGs?

Viewed in this light, the Science Committee simply has no real authority to enforce subpoenas against state AGs. Neither its legislative authority nor its oversight authority speak of state officials at all, let alone state AGs. Its legislative authority, in House Rule X.1(p) speaks of many agencies, like "federally owned or operated nonmilitary energy laboratories," and specific agencies like NASA and NSF. But, it does not speak of any state ones, let alone state AGs. Nor does it speak of constitutional rights, nor of fraud.

Its oversight functions in X.3(k) says: "The Committee on Science, Space, and Technology shall review and study on a continuing basis laws, programs, and <u>Government</u> activities relating to nonmilitary research and development." (Underlining added.) Throughout Rule X.3, the capitalized word "Government" is meant as Federal Government. For example, it could hardly be imagined that Rule X.3(f) is referring to states when it says that "(f) The Committee on Foreign Affairs shall review and study on a continuing basis laws, programs, and Government activities relating to customs administration, intelligence activities relating to foreign policy, international financial and monetary organizations, and international fishing agreements." It is the federal "Government," not the states, which handles customs, foreign intelligence, and international financial and monetary matters.

A separate question is raised by the Committee subpoenas to organizations advocating strong environmental beliefs and positions. In some respects, these environmental advocacy organizations are like civil rights groups during the civil rights movement. Namely, in some parts of the country, like coal or oil producing regions with intense feelings on the subject, for example, for a member of the organization or other idealistic related person to have their name published and condemned might expose them to harassment or worse for simple advocacy. It is a well-established judicial principle, going back to the era of the civil rights movement, that broad legislative subpoenas will

not be enforced that expose organizations of such vulnerable advocacy. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 558 (1963).

In conclusion, the Science Committee cannot and should not try to enforce subpoenas against State Attorneys General looking into climate risk fraud.

CHARLES TIEFER biography

Charles Tiefer is a professor of law at the University of Baltimore Law School where he teaches Legislation and other courses. He recently served for three years as one of eight Commissioners on the Congressional authorized *Commission on Wartime Contracting in Iraq and Afghanistan*. He is the author of six books, including The Polarized Congress: The Post-Traditional Procedure of its Current Struggles (2016), as well as numerous law review and other articles and papers.

He regularly serves as a witness or expert in complex government matters. He has testified before Congressional Committees a number of times.

Prior to joining the University of Baltimore Law School in 1995, he was General Counsel (Acting) and Deputy General Counsel to the U.S. House of Representatives for 11 years and assistant legal counsel to the U.S. Senate prior to that. He was Special Deputy Chief Counsel to the House Iran-Contra Committee in 1987.

He is a summa cum laude graduate of Columbia University and a magna cum laude graduate of Harvard Law School where he served on the Harvard Law Review.

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Chairman SMITH. Thank you, Professor Tiefer.
And Professor Foley.

TESTIMONY OF MS. ELIZABETH PRICE FOLEY,
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Ms. FOLEY. Mr. Chairman, Ranking Member Johnson, Members of the Committee, thanks very much for the opportunity to speak about enforcing Congressional subpoenas. I think it is a particularly important topic because I'm sure you've noticed that respect for Congress, particularly its subpoenas, is at an all-time low, and I think one of the reasons that this is the case is because Congress in the last few years has sort of increasingly ceded its power to an increasingly aggressive executive branch, and this has upset the Constitution's delicate balance of powers. Regardless of whether one likes the President, the current President or any future President, aggrandizement of executive power is just not good for our constitutional republic.

My primary message for you today is that self-help should not be considered a last resort for Congress in any matter including the enforcement of its subpoenas. This is because Congress is a coequal branch to the executive and the judiciary, and so self-help should arguably be its first resort whenever it's possible. Congress shouldn't be dependent upon the other branches to enforce its subpoenas. If it is, it suggests that this dependency means that Congress is not a coequal branch, it also suggests that it is a weak branch and it insults the dignity of the institution.

My written testimony details the three different ways that Congress can enforce its subpoena. There's an inherent contempt authority, there's the possibility of criminal contempt proceedings, and there's the possibility also of civil proceedings, and of these three possibilities, I believe that Congress should focus on reinvigorating its inherent contempt authority. While Congress has not relied on this inherent authority since 1934, it has strong and unquestioned constitutional validity.

The other two methods of enforcing Congressional subpoenas, the criminal process and the civil process, have one common deficiency: they both require Congress to rely on a prior blessing from one of the other two branches. So for example, civil contempt proceedings require pre-enforcement scrutiny by the judicial branch and ultimately that branch's blessing. It takes many years of litigation, especially if appeals are involved, and many taxpayer dollars will be spent.

The criminal contempt proceedings likewise are bad because they require not only the blessing of the judicial branch but also the executive branch. First you have to have the U.S. attorney agree to initiate a grand jury proceeding. If that happens, then you also have to go to the judicial branch, and in this context, the judicial branch is required to very closely scrutinize Congress's subpoena power because there's a panoply of specific rights that attach in criminal proceedings. This criminal contempt process costs even more taxpayer dollars and takes even longer than the civil enforcement process.

It's only Congress's inherent contempt power that allows Congress to go it alone, to enforce its subpoenas without the blessing of the other branches of government. Inherent contempt is faster, it's more efficient, it's less costly, and it's perfectly constitutional. It also allows Congress to reassert itself in a way that I think is very badly needed today.

I should also note that as I've detailed in my written statement, there's a potential hybrid method of enforcing Congressional subpoenas that honestly has never been tried before but may be worth considering. The Supreme Court's precedent in a case called Nagel versus Cunningham said that Congress can use the resources of the executive branch in helping the other branches of government—the judiciary and, here, Congress—in carrying out its constitutional authority. In particular, what Congress could do is invoke its inherent contempt authority and then use the Nagel precedent to require the President, the executive branch, to use the resources of the U.S. Marshal, which was what was involved in Nagel, to arrest and detain the contemnor pending the proceeding of a House proceeding at the bar. In this particular way, if we use Nagel, we might be able to invoke inherent contempt power and use the aid of the executive branch, but it wouldn't require the approval of the executive branch the way it does with criminal contempt. Anyway, that's food for thought.

Let me spend the rest of my limited time on the federalism objections that have been voiced to this Committee's subpoenas. The Supreme Court's decision in Garcia made it clear that the Tenth Amendment has no judicially enforceable content, and what this means is that states' rights are considered by the Court to be adequately protected by the very structure of the federal government. Think about how Congress is structured: two Senators from both—from each state and then apportionment in the House based on state population. Now, post-Garcia, what the Supreme Court has done is develop two specific federalism doctrines that try to refine its federalism analysis. The first one is called the anti-coercion doctrine. I won't waste time on it here because it hasn't been invoked by the state AGs. But what they have invoked is what's called the anti-commandeering doctrine, and this is evinced in cases like New York versus United States and Prince versus United States. What this doctrine holds is that Congress cannot commandeer state executive or legislative branches and force those branches to carry out a federal regulatory program. If Congress wants to carry out a federal regulatory program, it has to do so by itself. It has to preempt state law and then it has to use its own resources and its own employees to carry out that federal program. What Congress cannot do under the anti-commandeering doctrine is conscript state employees to do the federal government's work. That is the anti-commandeering doctrine, and it presents absolutely zero impediment to a legitimate Congressional subpoena. If a Congressional subpoena is in fact valid, meaning that it seeks information that is relevant to a legislative inquiry, there simply is no federalism objection that can stop that Congressional subpoena.

I see I'm out of time almost, and I'd like to talk to you a little bit about the First Amendment objections that have been raised, but I'll do so in the context of the questions.

[The prepared statement of Ms. Foley follows:]

Written Statement

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"Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas"

Committee on Science, Space & Technology
U.S. House of Representatives

September 14, 2016

Chairman Smith, Ranking Member Johnson, and members of the Committee, thank you for the opportunity to discuss congressional subpoena authority and the means by which it may be enforced. I am a tenured, full Professor of Law at Florida International University College of Law, a public law school located in Miami, where I teach constitutional law. I also serve Of Counsel with the Washington, D.C. office of BakerHostetler, LLP, where I practice in the areas of constitutional law, appellate law, and food and drug law.

In July 2016, the Committee issued subpoenas to New York Attorney General Eric Schneiderman, Massachusetts Attorney General Maura Healey and nine environmental organizations. The subpoenas requested documents and communications aimed at determining whether investigatory actions initiated by the New York and Massachusetts AGs offices are part of a coordinated attempt to deprive companies, non-profit organizations and scientists of their First Amendment rights, and whether or how such investigatory actions may adversely impact federally-funded scientific research. The recipients of the Committee's subpoenas have refused to comply, citing several bases for their non-compliance, including objections based on federalism concerns, the Committee's jurisdiction, and the First Amendment.

This hearing of the Committee is designed to explore both the nature and extent of the Committee's subpoena authority, and its legal recourse for the failure to comply with its lawfully issued subpoenas. Accordingly, I will proceed to discuss these two issues.

I. The Nature and Extent of Congressional Subpoena Authority

While the Constitution does not expressly mention a "power of inquiry" of Congress, the courts have long accepted that such power—with the concomitant power of enforcement via contempt—is a necessary part of Congress's exclusive power to legislate.[1] Without such a power, Congress could not "wisely or effectively" evaluate "the conditions which legislation is intended to affect or change" and "some means of compulsion are essential to obtain what is needed" to conduct such legislative investigation.[2]

The Supreme Court has repeatedly stated that Congress's investigatory power "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] Because the power to investigate is a necessary derivative of the power of making laws, it "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social economic or political system for the purpose of enabling the Congress to remedy them."[4] If a matter is within the legitimate sphere of legislative activity—i.e., if "legislation could be had"[5] on the subject matter of the investigation—the inquiry is constitutionally valid as an exercise of Congress's legislative power under Article I, section one. Investigations into how federal taxpayer dollars are being spent, administered, affected, and similar matters relating to congressional appropriations, are certainly within the legitimate scope of congressional inquiry.[6]

It should also be noted at the outset that the Supreme Court, in *Eastland v. United States Servicemen's Fund* (1975),[7] held that the Speech and Debate Clause of Article I, section six[8] absolutely immunizes Members of Congress and their staffs from any civil lawsuits seeking injunctive or declaratory relief to ward off the imposition of a congressional contempt citation. In *Eastland*, the plaintiffs were a servicemen's organization and two members who initiated a civil lawsuit against the chair and various members of a Senate subcommittee and the subcommittee's chief counsel, seeking declaratory and injunctive relief to prevent the organization's bank from having to comply with a subpoena to produce the organization's banking records.

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[1] McGrain v. Daugherty, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."); *accord* Watkins v. United States, 354 U.S. 178, 187 (1957) (power to investigate is "inherent in the legislative process"); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 (1975) (power to investigate and do so through compulsory process is inherent in the power to make laws).
[2] *McGrain*, 273 U.S. at 175.
[3] Barenblatt v. United States, 360 U.S. 109, 111 (1959); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 n.15 (1975).
[4] Watkins v. United States, 354 U.S. 178, 187 (1957).
[5] McGrain, 273 U.S. at 177; *accord* Eastland, 421 U.S. at 506.
[6] *Id.* (matters relating to how the Department of Justice "is maintained and its [how] its activities are carried on under such appropriations" is within the congressional power of inquiry).
[7] 421 U.S. 491 (1975).
[8] The Speech and Debate Clause declares that Senators and Representatives "for any speech or debate in either House, they shall not be questioned in any other place." U.S. CONST. art. I, § 6.

The *Eastland* Court concluded that the sweeping language of the Speech and Debate Clause imposed an absolute bar to the exercise of judicial jurisdiction over action challenging action taken "within the sphere of legitimate legislative activity."[9] The Court then inquired as to whether the Senate subcommittee's investigation into the servicemen's organization bank account was part of a legitimate legislative investigation. The Court observed that the Senate resolution had authorized it to broadly investigate the "administration, operation, and enforcement of the Internal Security Act" and that the investigation into the sources of the organization's funding was relevant to its investigation into activities that "have a potential for undermining the morale of the Armed Forces."[10] That the activities of the organization had not violated any existing laws as "not relevant" because the "inquiry was intended to inform Congress in an area where legislation may be had."[11] The Speech and Debate Clause thus insulated the Members and its "alter ego" staff from the civil lawsuit.[12]

The *Eastland* Court also rejected a First Amendment objection to the subcommittee's investigation, concluding that the absolute immunity provided by the Speech and Debate Clause was not amenable to a First Amendment exception.

The Speech and Debate Clause will not, however, prevent challenges to congressional subpoenas initiated in the context of petitions for a writ of habeas corpus to challenge an exercise of inherent contempt power, or in the context of criminal or civil contempt proceedings initiated by the U.S. Department of Justice (in the case of a criminal contempt prosecution) or specific congressional committee/subcommittee (in the case of a civil contempt proceeding).

The jurisdiction of the House Committee on Science, Space and Technology is defined by House Rule X as follows:

> (p) Committee on Science, Space, and Technology.
>
> > (1) All energy research, development, projects therefor, and all federally owned or operated nonmilitary energy laboratories.
> > (2) Astronautical research and development, including resources, personnel, equipment, and facilities.
> > (3) Civil aviation research and development.
> > (4) Environmental research and development.
> > (5) Marine research.
> > (6) Commercial application of energy technology.
> > (7) National Institute of Standards and Technology, standardization of weights and measures, and the metric system.
> > (8) National Aeronautics and Space Administration.
> > (9) National Space Council.
> > (10) National Science Foundation.

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[9] *Id.* at 503.
[10] *Id.* at 506.
[11] *Id.*
[12] *Id.* at 507.

(11) National Weather Service.
(12) Outer space, including exploration and control thereof.
(13) Science scholarships.
(14) Scientific research, development, and demonstration, and projects therefor.[13]

Rule X further provides that the Committee "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."[14] Under Rule 5(a)(1) of the Science Committee, the Committee may issue subpoenas *duces tecum* or *ad testificandum* "when authorized by majority vote of the Committee or Subcommittee (as the case may be), a majority of the Committee or Subcommittee being present."

The Committee has stated that its legislative purpose behind the subpoenas issued to State AGs and environmental groups is "ensuring that scientists are free to pursue research and intellectual inquiry in accordance with scientific principles without fear of reprisal, harassment, or undue burden" so that "the American scientific enterprise [can] remain successful" and also "for federal funding of scientific research to be most effective."[15]

Congress has broad remedial authority under section five of the Fourteenth Amendment[16] to enact legislation designed to enforce the guarantees of the Amendment's provisions, including the Due Process Clause. Pursuant to its power under section five, Congress enacted a well-known statute, codified at 42 U.S.C. § 1983, that provides a private right of action for anyone whose federal constitutional rights—including First Amendment rights—have been deprived under color of state law.[17] Section 1983 actions are a concrete statutory manifestation of Congress's broad power to authorize investigations of, and concomitant interference with, all state officers' actions, including the actions of State AGs, that may violate federal constitutional rights.

The Committee has articulated that its investigation is aimed at State AGs possible violations of the First Amendment rights of corporations, scientists and other groups who have been targeted with state subpoenas based upon their views on the issue of climate change. The Committee has broad authority to investigate matters relating to scientific research, and legislation may be had, under section five of the Fourteenth Amendment, the appropriations process, or otherwise, that could deter or otherwise remedy any First Amendment abuses committed by the State AGs.

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[13] Rule X, Rules of the House of Representatives, 114th Cong. (Jan. 6, 2015).
[14] *Id.*
[15] *See, e.g.*, Letter from Lamar Smith, Chair, House Comm. on Science, Space & Tech. to Eric Schneiderman, Atty. Gen., State of New York, p. 2 (Aug. 23, 2016).
[16] Section 5 declares, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."
[17] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. § 1983.

With these basic principles in mind, I will proceed to discuss the three distinct means of enforcing congressional investigatory subpoenas: (1) Congress's inherent contempt power; (2) the criminal contempt statutes; and (3) civil contempt proceedings.

A. Inherent Contempt Power

Because a criminal contempt statute was not enacted until 1857, the early history of Congress's invocation and use of contempt power relied solely upon its "inherent" power of contempt. The first assertion of congressional contempt authority occurred in 1795, just seven years after ratification of the Constitution. On December 28, 1795, the House of Representatives passed a resolution ordering the arrest and detention of two men, Robert Randall and Charles Whitney, pending further House consideration of charges that the two men had attempted to bribe several members of the House.[18] The following day, the Sergeant-at-Arms arrested the two men and detained them pending further action by the House.[19] The House then authorized and appointed a special committee to "report a mode of proceeding," which recommended that the men be brought before the bar of the House to be interrogated via written interrogatories proposed by Members of the House.[20] Following such procedure, on January 5, 1796, the House voted 78-17 to adopt a resolution that Mr. Randall be found guilty of contempt, reprimanded by the Speaker, and held in custody by the Sergeant-at-Arms until further House determination.[21] On January 12, 1796, Randall petitioned the House for release from custody; the House granted his petition on January 13—after eight days of detention.[22]

Similar exercises of inherent contempt power occurred in the Senate's detention (of several weeks' duration) in 1800 of newspaper editor William Duane for his failure to appear as ordered by the Senate investigating an allegedly libelous article,[23] and the House's 1812 resolution holding Nathaniel Rounsavell in contempt for failure to answer a committee's questions.[24] Following the passage of the House contempt resolution, Mr. Rounsavell provided the information sought by the chamber and he was accordingly not detained.[25]

1. Anderson v. Dunn (1921)

The Supreme Court has issued opinions in five main cases explicating the metes and bounds of Congress's inherent contempt power. The first case, *Anderson v. Dunn* (1921), involved the attempted bribe of a member of the House by John Anderson.[26] The House adopted a resolution ordering the Sergeant-at-Arms to arrest Mr. Anderson to appear before the bar of the House and show cause why he should not be held in contempt for the alleged attempted bribery. Mr. Anderson was accordingly arrested, appeared before the House with the benefit of counsel, and

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[18] 2 ASHER C. HINDS, 2 PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 1599 (1907).
[19] *Id.*
[20] *Id.* at § 1600.
[21] *Id.* at §§ 1601-03.
[22] *Id.* at § 1603.
[23] *Id.* at § 1604.
[24] CARL BECK, CONTEMPT OF CONGRESS: A STUDY OF THE PROSECUTIONS INITIATED BY THE COMMITTEE ON UN-AMERICAN ACTIVITIES 1945-1957 192 (1959)
[25] *Id.*
[26] 19 U.S. 204 (1821).

was consequently reprimanded by the Speaker and detained. Anderson then filed a lawsuit alleging various tort theories such as assault, battery and false imprisonment against the Sergeant-at-Arms, Mr. Thomas Dunn.[27] Anderson argued that Congress possessed no inherent contempt power, because such power belongs exclusively to the judicial, not legislative, branch.[28] The Supreme Court rejected this argument, concluding that Congress possesses a power to punish contempt that is necessarily implied as part of its power to legislate, lest its powers be destroyed by refusals to cooperate:

> But what is the alternative? The argument obviously leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them . . . . that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.[29]

The *Anderson* Court then concluded that the "principle of self-preservation"[30] justified the recognition of an inherent contempt power. The *Anderson* Court further recognized that the inherent contempt power was not boundless, but was limited to preserving/defending the legitimate power of the legislative body, and suggested that any resulting imprisonment of the contemnor "must terminate with [Congress's] adjournment."[31] Such limitations, said the Court, helped reduce the risk that the inherent contempt power would be abused by "strong passions or wicked leaders."[32]

The Court also noted that, in exercising its inherent contempt power, "the distance to which the process might reach" was not confined to the District of Columbia, but instead knew "no bounds that can be prescribed to its range but those of the United States," since the legislative powers of Congress extend nationwide, and the inhabitants in Louisiana or Maine are as likely to engage in contemptuous behavior as residents of the District of Columbia.[33]

2. Kilbourn v. Thompson (1880)

The second Supreme Court case addressing inherent contempt power is *Kilbourn v. Thompson* (1880), a case involving the investigation by a House select committee into the collapse of a real estate pool, Jay Cooke & Company, which had gone into bankruptcy, leaving various creditors—including the United States—to suffer significant losses.[34] Kilbourn was summoned to appear before the committee to testify and bring certain documents with him. Kilbourn appeared but during his examination by the committee, he was asked: "Will you state where each of the five

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[27] *Id.* at 213.
[28] *Id.* at 214.
[29] *Id.* at 228-29.
[30] *Id.* at 230.
[31] *Id.* at 234.
[32] *Id.*
[33] *Id.*
[34] 103 U.S. 168 (1880).

members [of the real estate pool] reside, and will you please state their names?" Kilbourn refused to answer or produce the requested documents.

Following his refusal, the House adopted a resolution ordering the Sergeant-at-Arms to take him into custody to appear before the House and show cause as to why he should not be punished for contempt. Kilbourn was accordingly brought to appear before the House, examined through questions posed by the Speaker, and continued to refuse to answer the question or produce any of the requested documents. The House then passed another resolution adjudging Kilbourn in contempt and committing him to indefinite detention in the common jail of the District of Columbia until such time as he complied with the chamber's request.

Kilbourn filed a petition for a writ of habeas corpus in the D.C. court, contending that Congress possessed no inherent contempt power. He also argued that even if Congress initially possessed an inherent contempt power, the enactment of a criminal contempt statute in 1857[35] supplanted the inherent power, rendering it moribund.

The Supreme Court disagreed that the inherent contempt power no longer existed, but agreed with Mr. Kilbourn that exercising such power was improper in his particular case. Specifically, the *Kilbourn* Court concluded that the House's investigation into the bankruptcy of the real estate pool was "judicial, not legislative"[36] in nature because while the U.S. was one of several jilted creditors of the pool, the only appropriate remedy for creditors was via an ongoing bankruptcy proceeding pending in the Eastern District of Pennsylvania.[37] Because the "matter was still pending in a court" the Supreme Court believed that Congress had no right "to interfere with a suit pending in a court of competent jurisdiction" and could offer no redress beyond that available in the court.[38] The case was accordingly "one of a judicial nature, for which the power of the courts usually afford the only remedy," and there was "no suggestion . . . of what the House of Representatives or the Congress could have done in the way of remedying the wrong or securing the creditors of Jay Cooke & Co., or even the United States."[39] The House investigation was accordingly a "fruitless investigation into the personal affairs" of individual members of the pool because "it could result in no valid legislation on the subject to which the inquiry referred."[40]

From *Kilbourn*, therefore, it is clear that an inquiry of Congress that "could result in no valid legislation" is beyond the reach of congressional power. To be valid, a congressional subpoena must inquire into matters within the legislative competence of Congress and be capable of resulting in legislation (though no actual legislation must actually ensue).

3. Marshall v. Gordon (1917)

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[35] The criminal contempt statute is now located at 2 U.S.C. §§ 192, 194. These statutes will be discussed in detail in the section discussing criminal contempt.
[36] *Kilbourn*, 103 U.S. at 193.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 194-95.
[40] *Id.* at 195.

In the third case involving inherent contempt power, *Marshall v. Gordon* (1917), the Supreme Court once again ruled in favor of the contemnor.[41] Specifically, in *Marshall*, the defendant, Snowden Marshall, was the U.S. Attorney for the Southern District of New York. The Sergeant-at-Arms, Robert Gordon, arrested Mr. Marshall after the House concluded that Mr. Marshall was guilty of contempt by writing a letter to a subcommittee chair that insulted the honor and dignity of the House.[42]

The *Marshall* Court concluded that because inherent contempt power was necessary to Congress's "right of self-preservation, that is, the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty, or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed,"[43] Marshall's writing of an "irritating" letter to a subcommittee chair could not be the proper object of the inherent contempt power.[44] While the accusatory and uncomplimentary letter may have produced untoward effects on the public mind or caused a sense of indignation by Members of the House, such effects were "not intrinsic to the right of the House to preserve the means of discharging its legislative duties but [were] extrinsic to the discharge of such duties and related only to the presumed operation which the letter might have in the public mind and the indignation naturally felt by members of the committee on the subject."[45] As such, using inherent power to punish him for contempt, based upon such a letter, was not appropriate; the letter did not impair or impede Congress's legislative function.

4. McGrain v. Daugherty (1927)

The fourth inherent contempt case, *McGrain v. Daugherty* (1927)[46], upheld contempt against a former U.S. Attorney General, Harry Daugherty, who had resigned in 1924 amid charges of misfeasance and nonfeasance in the Department of Justice.[47] The Senate created a select committee to investigate possible corruption at the DOJ, centering on the Department's failure to prosecute monopolies and restraints of trade under the Sherman and Clayton Acts.[48] The select committee subpoenaed the AG's brother, Mally Daugherty, who was the President of an Ohio bank, seeking both his testimony and documents relating to bank deposit; he refused to appear or turn over such documents.[49]

The Senate consequently passed a resolution directing the Sergeant-at-Arms to arrest Daugherty and bring him before the bar of the Senate to show cause why he should not be held in contempt.[50] The deputy Sergeant-at-Arms arrested Daugherty in Cincinnati and Daugherty promptly filed a petition for a writ of habeas corpus in the federal district court in Cincinnati.[51]

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[41] 243 U.S. 521 (1917).
[42] *Id.* at 531-32.
[43] *Id.* at 542.
[44] *Id.* at 545-46.
[45] *Id.* at 546.
[46] 273 U.S. 135 (1927).
[47] *Id.* at 150-51.
[48] *Id.* at 151.
[49] *Id.* at 152.
[50] *Id.* at 153.
[51] *Id.* at 154.

The Supreme Court in *McGrain* reaffirmed that "the power of inquiry—with the process to enforce it—is an essential and appropriate auxiliary to the legislative function"[52] because a "legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change . . . ."[53] While acknowledging *Kilbourn*'s limitation that the matter being investigated by Congress must be within the legitimate sphere of legislative competency and the information sought must be pertinent to such legislative investigation,[54] the *McGrain* Court concluded that the Senate's investigation into the proper administration of the Department of Justice was "[p]lainly" a "subject . . . on which legislation could be had"—including appropriations for the DOJ—and accordingly was within the proper scope of inherent contempt power.[55]

The *McGrain* Court also interestingly rejected a mootness argument made by Daugherty, concluding that although the 68th Congress that authorized the select committee's initial investigation had since expired, the Senate had not discharged the committee, and the Senate's status as a "continuing body" (unlike the House, which completely turns over every Congress) lead to the conclusion that the committee's authority was still active, and the case consequently not moot.[56]

5. Jurney v. MacCracken (1935)

The last time Congress relied upon its inherent contempt power was in 1934, when the Senate used its inherent power to hold William MacCracken in contempt. MacCracken's objection to being held in contempt was reviewed by the Supreme Court in *Jurney v. MacCracken* (1935), which upheld the Senate's use of inherent contempt power against MacCracken.[57]

MacCracken was issued a subpoena *duces tecum* by a Senate select committee on January 31, 1934. He appeared before the committee but refused to produce the requested documents, citing attorney-client privilege and stating that he would first need to obtain his client's assent to waive such privilege.[58] On February 1, MacCracken produced documents relating to business of clients who had consented to such turnover. On February 2, MacCracken again appeared before the committee, stating that some clients had taken back the relevant documents, some with MacCracken's permission. The committee then concluded that the documents could not be withheld under the privilege claim[59] and MacCracken subsequently obtain waivers of privilege from all relevant clients, producing the requested documents on February 3.[60] On February 5, the Senate adopted a resolution ordering MacCracken to show cause why he should not be held in

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[52] *Id.* at 174.
[53] *Id.* at 174-75.
[54] *Id.* at 176.
[55] *Id.* at 177-78.
[56] *Id.* at 181-82.
[57] 294 U.S. 125 (1935).
[58] *Id.* at 145.
[59] As will be discussed in the relevant section *infra* relating to privileges, congressional committees are not obligated to honor non-constitutional privileges such as the attorney-client or work product privileges.
[60] *MacCracken*, 273 U.S. at 146-47.

contempt of the chamber.[61] MacCracken refused to appear before the bar of the Senate and a warrant was issued for his arrest by the Sergeant-at-Arms on February 9. MacCracken was arrested by the Sergeant-at-Arms on February 12 and promptly filed a petition for writ of habeas corpus in the D.C. courts.[62]

MacCracken's argument before the Supreme Court was that the Senate lacked power to use its inherent contempt authority over him because his turnover of all the relevant documents prior to issuance of the Senate's contempt finding meant that his refusal/recalcitrance did not obstruct the Senate's legislative duties. Because MacCracken had voluntarily "removed" any obstruction to the Senate's investigation by voluntarily turning the documents over, he asserted, the chamber could not "punish" him under its inherent power.[63]

The Supreme Court rejected MacCracken's argument, first noting that it was true that Congress's inherent power of contempt was designed to prevent obstruction of its legislative power, including its power of investigation.[64] The Court concluded, however, that "where the offending act was of a nature to obstruct the legislative process the fact that the obstruction has since been removed, or that is removal has become impossible, is without legal significance."[65] The *MacCracken* Court noted that its earlier decision in *Marshall v. Gordon* (1917) was not to the contrary, and that "the only jurisdictional test to be applied by the court is the character of the offense; and that the continuance of the obstruction, or the likelihood of its repetition, are considerations for the discretion of the legislators in meting out the punishment."[66]

The *MacCracken* Court also agreed with the *Kilbourn* Court that enactment of the 1857 criminal contempt statute did not impair or supersede Congress's inherent contempt power: "The power of either House of Congress to punish for contempt was not impaired by the enactment in 1857 of the statute making refusal to answer or produce papers before either House, or one of its committees, a misdemeanor."[67] The criminal contempt statute, it stated, was designed "merely to supplement the power of contempt by providing for additional punishment" via the criminal court process.[68]

6. Cunningham v. Neagle (1890)

A sixth Supreme Court case, *Cunningham v. Neagle*,[69] may provide a unique method by which Congress may exercise its inherent contempt power, by harnessing the executive branch's constitutional duty to "take care that the laws be faithfully executed."[70] In *Neagle*, the sheriff of a California county appealed the judgment of a federal circuit court discharging David Neagle

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[61] *Id.* at 143-44.
[62] *Id.* at 143.
[63] *Id.* at 147.
[64] *Id.* at 147-48.
[65] *Id.* at 148.
[66] *Id.* at 149.
[67] *Id.* at 151 (internal citation omitted).
[68] *Id.*
[69] 135 U.S. 1 (1890).
[70] U.S. CONST. art. II, § 3.

from the sheriff's custody, where Neagle was being held on murder charges relating to the death of David Terry.

Neagle was a deputy U.S. Marshal who had been assigned by the U.S. Marshal to protect Supreme Court Justice Stephen Field after Field had been threatened by David Terry.[71] When Justice Field rode circuit in California, Neagle accompanied Field for protection. While in California at a restaurant, Terry struck Justice Field on the face repeatedly.[72] Neagle arose to defend Justice Field and killed Terry with his revolver.[73] Neagle was arrested by the local sheriff and charged with Terry's murder. Neagle filed a writ of habeas corpus in the federal courts, arguing that under the words of the federal habeas statute, he was held "in custody for an act done in pursuance of a law of the United States."[74]

The question before the Court in *Neagle*, therefore, was whether Neagle's shooting of Terry was an "act done in pursuance of the United States" because Neagle shot Terry while serving as a U.S. Marshall assigned to protect a Supreme Court Justice.[75] The Court noted that Congress had not passed a specific statute to authorize U.S. Marshals—officers of the executive branch—to guard federal judges.[76] Nonetheless, the *Neagle* Court found that the President's constitutional duty under the Take Care Clause required the President not only to take care that congressional statutes be faithfully executed, but that the "laws" of the U.S. be faithfully executed—a word that encompassed duties and obligations "growing out of the constitution itself."[77]

Thus, the Court observed that no one could doubt the authority of the President or other delegated executive branch officer to make an order to protect the mail or protect public lands, even though Congress had not enacted specific statutes ordering such protection.[78] The President's authority to provide such protection derived from the Take Care Clause because the mails and public lands were creatures of Congress's constitutional authority under Article I, section eight. Similarly, the Court concluded, "We cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death."[79]

The possible relevance of *Neagle* is this: If the President's duty under the Take Care Clause includes a duty to employ executive branch officers (e.g., U.S. Marshals) to ensure that federal judges may carry out their constitutional authority under Article III, it arguably includes a corollary duty to employ executive branch officers to ensure that *Congress* may carry out its constitutional authority under Article I. If the President's duty under the Take Care Clause includes a duty to protect the mails and public lands—as the *Neagle* Court stated that it did—then the Clause should also include a duty to protect Congress's broad investigatory power,

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[71] *Neagle*, 135 U.S. at 5.
[72] *Id.* at 52-53.
[73] *Id.* at 53.
[74] *Id.* at 40-41.
[75] *Id.* at 58.
[76] *Id.* at 63.
[77] *Id.* at 64.
[78] *Id.* at 65.
[79] *Id.* at 67.

including its inherent contempt power, which are both necessarily derived from Article I, section one's grant of legislative power. Congress, in other words, may assert that, in carrying out its inherent contempt power, it may choose to employ the Sergeant-at-Arms, but it may also call upon the President to "faithfully execute" Congress's inherent constitutional authority to enforce contempt.

Neagle thus offers a "hybrid" enforcement option, whereby Congress exercises its inherent contempt authority—without resorting to the judicial branch—but asks the executive branch, pursuant to its Take Care Clause duty, to arrest (and potentially detain) the contemnor. This approach would have the advantage of relative expedition (compared to resort to judicial proceedings) and cooperation of the other political branch. While the executive branch may refuse such cooperation on the ground that its Take Care Clause duty does not extend so far, it would be required to articulate why *Neagle* is distinguishable, thus shifting the burden onto the executive branch to justify its refusal to execute the exercise of congressional authority.

B. Criminal Contempt Statutes

There are three statutes, enacted in 1857, that relate to contempt and which are now codified at 2 U.S.C. §§ 192-194. As just stated in the previous section, the Supreme Court has made it clear that these criminal contempt statutes are supplements, or alternatives, to Congress's inherent contempt power, but do not replace such inherent power.[80] The main concern motivating enactment of the criminal contempt statute appears to be the concern that, pursuant to *Anderson v. Dunn*, inherent contempt power only allowed incarceration until the expiration of the Congress that passed the contempt resolution[81], which may not be sufficient punishment in instances where the contumacy occurred near adjournment.[82]

Section 192 of Title 2 makes any "willful" default of any person summoned to testify or produce papers a misdemeanor, punishable by a fine of not more than $100,000 and imprisonment of not more than twelve months.[83] Section 193 then proclaims, "No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined . . . upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him

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[80] *See id.* at 151; In re Chapman, 166 U.S. 661, 671-72 (1897).
[81] *Anderson*, 19 U.S. at 231.
[82] *See* 42 CONG. GLOBE, 34th Cong., 3d Sess. 404 (1857) (statement of Mr. Orr) ("Suppose that two days before the adjournment of this Congress there is a gross attempt on the privileges of this House by corrupt means of any description; then the power of this House extends only to those two days. Is that an adequate punishment? Ought we not then, to pass a law which will make the authority of the House respected . . . .").
[83] Section 192 states *in toto*:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

2 U.S.C. § 192.

or otherwise render him infamous."[84] Section 194 then sets forth the specific process for pursuing criminal contempt sanctions, necessitating a "statement of fact constituting such failure" to testify/produce that is reported to the President of the Senate/Speaker of the House. The President of the Senate/Speaker of the House then "shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, *whose duty it shall be to bring the matter before the grand jury* for its action."[85]

The Supreme Court has decided numerous cases under the criminal contempt statutes, and one of the most prominent distinctions between criminal contempt and inherent contempt is the availability in criminal contempt proceedings of "pertinency" objections. The pertinency objection emanates from the specific language of Section 192, which states that if any person "refuses to answer any question *pertinent to the question under inquiry*," he commits a misdemeanor. The Supreme Court has interpreted this statutory language as placing the burden of proof and persuasion upon the U.S. Attorney, in a criminal contempt prosecution, to establish that the question being posed to a congressional witness "pertained to some matter under investigation."[86] The question of pertinency, moreover, is akin to relevancy, and is a question of law to resolved by the court, not the jury.[87]

When the pertinency of a question propounded to a congressional witness is not clear in a criminal contempt proceeding, conviction cannot be had because the lack of pertinency creates a vagueness problem that violates the Fifth Amendment's Due Process Clause.[88] Thus, in *Watkins v. United States* (1957), the Supreme Court found that questions posed to a witness before the House Un-American Activities Committee were not "pertinent" to that Committee's investigation of communist activities in labor because the questions asked the witness to divulge whether third parties he knew may have engaged in communist activities in the past.[89] The questions accordingly did not involve any activities of Watkins himself (but rather third parties whom he knew), and it did not involve any present communist activities of those third parties (but rather past activities).

The *Watkins* Court concluded that the precise questions that Watkins was charged with refusing to answer were therefore not "pertinent" to the Committee's investigation of present communist infiltration in labor.[90] Moreover, because the investigation was broadly announced as an investigation of "subversion" and not subversion of labor specifically—and because six out of nine of the witnesses at the hearing had no connection to labor—the Court believed that Watkins, as a witness, was not properly apprised of the pertinency of questions regarding past Communist associations of third parties involved in the labor movement.[91] The vagueness of the Committee's jurisdiction, the vagueness of its hearing agenda, and the lack of clarity regarding the relationship of the questions asked of Watkins to the Committee's investigation all combined to create a lack of "fair opportunity" for Watkins to "determine whether he was within his rights in refusing to

[84] 2 U.S.C. § 193.
[85] *Id.* at § 194 (emphasis added).
[86] Sinclair v. United States, 279 U.S. 263, 296-97(1929).
[87] *Id.* at 298-99.
[88] Watkins v. United States, 354 U.S. 178, 215 (1957).
[89] *Id.* at 185, 213-15.
[90] *Id.* at 213.
[91] *Id.* at 213-15.

answer" the Committee's questions, causing a due process defect deriving from the lack of pertinency.[92] As Justice Frankfurter's separate concurrence in *Watkins* emphasized, the decision to invoke the criminal contempt statute—rather than inherent contempt authority—"necessarily brings into play the specific provisions of the Constitution relating to the prosecution of offenses and those implied restrictions under which courts function."[93] The aspects of the Fifth Amendment's Due Process Clause relating to criminal trials—including vagueness prohibitions—are an unavoidable consequence of opting to pursue criminal contempt sanctions.

A similar case decided two years after *Watkins*, *Barenblatt v. United States* (1959),[94] reached the opposite conclusion regarding a pertinency objection filed by a defendant being prosecuted under the criminal contempt statute. Specifically, Barenblatt was a witness before a subcommittee of the House Un-American Activities Committee and was asked questions regarding his own Communist activities while at the University of Michigan.[95] The Supreme Court concluded that, unlike the questions posed in *Watkins*, the questions posed to Barenblatt were "pertinent" to the subcommittee's investigation of Communist infiltration in education.[96] The *Barenblatt* Court observed that the history of the committee's activities showed that the committee had investigated Communist activity in the specific field of education on many occasions.[97] Moreover, the Court found that the subject matter of the subcommittee's investigation had been identified at the commencement of its investigation and that the questions posed to Barenblatt related directly to his own involvement in such Communist activities.[98] Accordingly, there was no "vagueness" problem regarding the scope of the Committee's inquiry, as there had been in *Watkins*.

The *Barenblatt* Court also directly addressed a First Amendment objection raised by Barenblatt. Specifically, Barenblatt argued that the questions posed to him regarding his potential Communist activities infringed his First Amendment rights.[99] The Court disposed of this objection in two short paragraphs, noting that it had found that the Committee's inquiry was in pursuance of a legitimate legislative investigation and "the record is barren of other factors which in themselves might sometimes lead to the conclusion that the individual interests at stake were not subordinate to those of the state."[100] It then elaborated on what sort of "individual interests" in the context of the First Amendment might trump Congress's legitimate investigative inquiry:

> There is no indication in this record that the Subcommittee was attempting to pillory witnesses. Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information

[92] *Id.* at 215.
[93] *Id.* at 216 (Frankfurter, J., concurring).
[94] 360 U.S. 109 (1959).
[95] *Id.* at 114.
[96] *Id.* at 124.
[97] *Id.* at 121.
[98] *Id.* at 124-25.
[99] *Id.* at 116.
[100] *Id.* at 134.

> which might be helpful to the Subcommittee. And the relevancy of the questions put to him by the Subcommittee is not open to doubt.[101]

The Court then stated, "We conclude that the balance between the individual and the government interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended."[102]

Under *Barenblatt*, therefore, there is no First Amendment "right" to refuse to answer a question that is pertinent to Congress's legitimate investigation. While the First Amendment may place some broad outer limits on such investigations—such as prohibiting the pillorying (public ridicule) of witnesses, calling witnesses without probable cause that they possess useful information, and the requirement of pertinency (relevancy) of questions posed—that can, in the right circumstances, outweigh Congress's/the public's interests in the inquiry, the First Amendment does not provide a full-throated, much less absolute, bar to an otherwise legitimate congressional inquiry. Assuming Congress has a legitimate legislative purpose for its investigation, the public interest will be weighty, and it will be outweighed by First Amendment concerns only in the sort of egregious examples provided by the Court in *Barenblatt*. Mr. Barenblatt's possible First Amendment right to associate with Communist organizations or sympathizers, therefore, was not a sufficiently weighty private interest to outweigh Congress's substantial public interest motivating its investigative inquiry.

The Court's rationale in *Barenblatt* were essentially echoed verbatim in its decision two years later in *Wilkinson v. United States* (1961), in which the Court again rejected pertinency and First Amendment objections to a criminal contempt proceeding initiated at the best of a subcommittee of the House Un-American Activities Committee.[103] With regard to Mr. Wilkinson's First Amendment objections, the Court stated, "The subcommittee had reasonable ground to suppose the petitioner was an active Communist Party member, and that as such he possessed information that would substantially aid it in its legislative investigation. As the Barenblatt opinion makes clear, it is the nature of the Communist activity involved . . . that establishes the Government's overbalancing interest."[104] Because the subcommittee's investigation was a legitimate one and the questions posed pertinent to its legitimate investigation, the defendant's First Amendment objection could not be sustained.

Criminal contempt proceedings under the relevant authorizing statutes inherently require that Congress rely upon the executive branch—namely, the U.S. Attorney—to initiate a grand jury proceeding pursuant to 2 U.S.C. § 194. While the statute declares it the "duty" of the U.S. Attorney "to bring the matter before the grand jury," there is no clear court decision holding that referral to the grand jury is non-discretionary. There is dicta in a 1940 decision of the Federal District Court for the District of Columbia, *Ex Parte Frankfeld*, that declares the duty non-discretionary, but it is merely dicta; the holding in the case is limited to declaring the contempt warrant invalid because it was issued by an employee of the committee and not the committee

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[101] *Id.*
[102] *Id.*
[103] 365 U.S. 399 (1961).
[104] *Id.* at 414.

itself, as required by the statute.[105] Similar dicta is found in another D.D.C. case from 1983, *United States v. United States House of Representatives.*[106]

Moreover, the experience in the *Miers* and *Holder* civil contempt proceedings, discussed *infra*, confirms that, despite the seemingly mandatory nature of the language of the criminal contempt statute, the U.S. Attorney is unlikely to refer a matter to a grand jury, citing prosecutorial discretion. Given the availability of other remedies (besides criminal contempt) and the ubiquity of prosecutorial discretion in various other criminal statutory contexts, courts would be unlikely to deny the existence of such prosecutorial discretion in the particular context of the congressional criminal contempt statute.

C. Civil Contempt Proceedings

The Senate has statutory authority to pursue civil contempt actions[107], but the House does not. Nonetheless, the lower courts have recognized that the House may pursue civil contempt provided the chamber has provided an authorizing resolution. For example, in *Committee on Judiciary v. Miers*, the House Judiciary Committee sought a declaratory judgment in the Federal District Court for the District of Columbia that the White House counsel, Harriet Miers, and the President's Chief of Staff, Joshua Bolten, were required to comply with the Committee's subpoena to testify and produce documents relating to its investigation into the forced resignation of none U.S. Attorneys.[108] Both Ms. Miers and Mr. Bolton invoked Executive Privilege and refused to comply with the Committee's subpoena.[109] Consequently, the House passed a resolution declaring them both in contempt and authorizing Judiciary Chairman Conyers to initiate a civil action in federal court to seek declaratory and injunctive relief "affirming the duty of any individual to comply with any subpoena."[110]

The parties in *Miers* conceded that the district court had subject matter jurisdiction under the federal question statute, 28 U.S.C. § 1331, to adjudicate the claims in the suit.[111] The court then concluded that the House had institutional standing to assert injury based on the loss of information to which it is entitled and the institutional diminution of its subpoena power, which is a necessary part of its legislative power.[112] The court noted that a civil action to enforce a congressional subpoena was the least controversial way for Congress to vindicate its investigative authority, as it does not involve the use of the Sergeant-at-Arms (as does inherent contempt) nor require reliance on prosecution by the executive branch (as does criminal contempt).[113] It also rejected the argument that the existence of specific statutory authorization for civil contempt proceedings in the Senate implied the non-existence of such authority in the House, concluding that the Senate-specific statutes were merely a "more specific application" of

[105] 32 F. Supp. 915 (D.D.C. 1940).
[106] 556 F. Supp. 150, 151 (D.D.C. 1983).
[107] 2 U.S.C. §§ 288b(b), 288d.
[108] 558 F. Supp.2d 53 (D.D.C. 2008).
[109] *Id.* at 62.
[110] *Id.* at 63.
[111] *Id.* at 64.
[112] *Id.* at 71.
[113] *Id.* at 76-76 (discussing opinions in 1984 and 1986 by the Office of Legal Counsel, both of which confirmed congressional power to pursue civil contempt).

the general relief allowed by the Declaratory Judgment Act.[114] The *Miers* court concluded that the claim of executive privilege was limited to a qualified privilege for presidential advisors in the particular context of the case and that Ms. Miers was accordingly required to appear before the committee and could raise specific assertions of executive privilege in response to specific questions at that time.[115] Likewise, both Ms. Miers and Mr. Bolten were directed to "produce a detailed list and description of the nature and scope of the documents it seeks to withhold on the basis of executive privilege sufficient to enable [court] resolution of any privilege claims."[116]

Miers and Bolton subsequently filed an appeal with the D.C. Circuit and moved for a stay pending disposition of the appeal. On October 6, 2008, the D.C. Circuit granted the stay and denied the House's motion for expedited consideration of the appeal.[117] The House that authorized the contempt citations of Miers and Bolton—the 110th Congress—ended just three months later, on January 3, 2009, and the D.C. Circuit noted that the subpoenas would consequently expire on that date and the case would become moot.[118] Miers and Bolten moved for voluntary dismissal of their appeal several days later and it was granted.[119]

The Federal District Court for the District of Columbia similarly exercised subject matter jurisdiction to entertain a civil contempt proceeding initiated by the House Oversight and Government Reform Committee against Attorney General Eric Holder, who had refused to produce documents, on grounds of executive privilege, relating to the committee's investigation of the Operation Fast and Furious, a law enforcement operation conducted by the Bureau of Alcohol, Tobacco and Firearms and the U.S. Attorney's office in Phoenix, Arizona.[120] The House had authorized the civil contempt proceeding pursuant to passage of a specific House Resolution, after an earlier resolution held the Attorney General in Contempt and the U.S. Attorney refused to refer the matter to a grand jury for criminal contempt prosecution.[121] Following the expiration of the 112th Congress in January 2013, the new 113th Congress then authorized the Committee to act as successor in interest to the 112th Congress Committee and the Committee re-issued the subpoena to Holder.[122]

Like the district court in *Miers*, the *Holder* court held that it had subject matter jurisdiction, that the House had institutional standing to enforce its subpoena by civil process, and denied to dismiss the case pursuant to the political question doctrine and accordingly denied the Attorney General's motion to dismiss for want of subject matter jurisdiction (12(b)(1)) or failure to state a claim upon which relief may be granted (12(b)(6)).[123] It did not reach the claims of executive privilege on the motion to dismiss. The Attorney General subsequently sought interlocutory

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[114] *Id.* at 86.
[115] *Id.* at 106.
[116] *Id.*
[117] Comm. on the Judiciary v. Miers, 542 F.3d 909 (D.C. Cir. 2008) (per curiam).
[118] *Id.* at 911.
[119] 2009 WL 3568649 (D.C. Cir. Oct. 14, 2009).
[120] Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp.2d 1 (D.D.C. 2013).
[121] *Id.* at 7.
[122] *Id.* at 8.
[123] *Id.* at 1, 26.

appeal to the D.C. Circuit via certification pursuant to 28 U.S.C. § 1292(b), but such certification was denied by the district court.[124] There is no subsequent history on the case.

The *Miers* and *Holder* decisions appear to confirm the power of the House to pursue civil contempt proceedings if it so chooses, provided there is an explicit authorization for such a lawsuit via passage of a House resolution. Such a resolution ensures House standing to vindicate its investigatory power, and the usual rules relating to the enforcement of congressional subpoenas—e.g., the subpoena must seek information relevant to a legitimate legislative investigation—will apply to the civil proceeding. Such a civil proceeding has the advantage of not requiring resort to use of the Sergeant-at-Arms (as with inherent contempt), and it also does not require either adherence to constitutional rights associated with criminal prosecutions, or cooperation by the executive branch (as with criminal contempt). Civil contempt proceedings do, however, require resort to the judicial branch for ultimate resolution, and they are potentially (as with criminal contempt) quite time consuming and expensive.

I will now proceed to discuss the specific objections to the Committee's subpoenas that have been raised by the New York and Massachusetts Attorneys General and private organizations.

III. Federalism Objections to a Congressional Subpoena

Both the New York and Massachusetts AGs have objected to the Committee's subpoenas on grounds of federalism. The Massachusetts AG, for example, states that the subpoenas are an "affront to states' rights" and a "violation of states' rights and constitutional principles of federalism."[125] Similarly, the New York AG states that the Committee's subpoena "raises grave federalism concerns" because, under the Tenth Amendment, "Congress's authority ends where States' sovereign rights begin."[126] Both the New York and Massachusetts AGs, for example, cite the Supreme Court's decision in *New York v. United States* (1992)[127] as supporting their federalism objections to the Committee's subpoenas.

It should be noted at the outset that the *New York* Court made it clear that the principle of federalism, which is evidenced in numerous constitutional provisions, is not about protecting the states *qua* states, but instead about dividing the power of government between the federal and state governments to better protect individual liberty.[128] In *Garcia v. San Antonio Metropolitan Transit Authority* (1985),[129] the Supreme Court rejected its holding from only nine years earlier

[124] 2013 WL 11241275 (D.D.C. Nov. 18, 2013).
[125] Letter from Richard A. Johnston, Chief Legal Counsel, Commonwealth of Mass., Office of the Atty. Gen. to Chairman Lamar Smith, House Comm. on Science, Space & Tech. 1, 13 (July 26, 2016) [hereinafter *Mass. AG Subpoena Response*].
[126] Letter from Leslie B. Dubeck, Counsel, State of N.Y., Office of the Atty. Gen. to Chairman Lamar Smith, House Comm. on Science, Space & Tech. 1, 2 (July 26, 2016) [hereinafter *N.Y. AG Subpoena Response*].
[127] 505 U.S. 144 (1992).
[128] *Id.* at 181 ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals."); *accord* Bond v. United States, 564 U.S. 211, 221-22 (2011) ("Federalism secures the freedom of the individual. . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.").
[129] 469 U.S. 528 (1985).

in *National League of Cities v. Usery* (1976),[130] in which the Tenth Amendment protected "areas of traditional [state] governmental functions" from federal encroachment.[131]

Specifically, the *Garcia* Court held that "the structure" of the federal government as a whole—including the Electoral College, the Senate, and House apportionment—is adequate to protect so-called "states' rights."[132] The Tenth Amendment's declaration that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people," according to *Garcia,* "offers no guidance about where the frontier between state and federal power lies" and hence the courts "have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause."[133]

Garcia has not been overruled. The basic proposition that the Tenth Amendment itself has no enforceable substance remains. If Congress exercises one of its enumerated powers—e.g., the commerce power—the Tenth Amendment can provide no limit on such power. The Supreme Court has, however, recognized that the principle of federalism offers two substantive limits on the exercise of an otherwise legitimate exercise of congressional power: (1) the anti-commandeering doctrine; and (2) the anti-coercion doctrine. As the state AGs do not raise the applicability of the anti-coercion doctrine (nor could they),[134] I will focus solely on the anti-commandeering doctrine.

The anti-commandeering doctrine is reflected in a pair of cases, *New York v. United States* (1992) and *Printz v. United States* (1997). In *New York*, the Court held that Congress could not exercise its commerce in such a way as to "commandeer" a state's legislative branch to carry out a federal regulatory regime.[135] While Congress could preempt state action altogether and carry out its own regulatory regime, it is not free to command that a state legislature carry out the federal government's regulatory regime[136]; doing so creates distortions in political accountability among the federal and state governments.[137]

Similarly, in *Printz*, the Court invalidated a provision of the federal Brady Handgun Violence Prevention Act under the anti-commandeering principle because the Act forced state executive officers to carry out federally mandated criminal background checks on handgun purchasers.[138] Similar distortions of political accountability motivated the decision in *Printz*: "By forcing state

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[130] 426 U.S. 833 (1976).
[131] *Id.* at 852.
[132] *Garcia*, 469 U.S. at 551.
[133] *Id.* at 550.
[134] The coercion doctrine is grounded in dicta from the Supreme Court's decision in *South Dakota v. Dole*, 483 U.S. 203 (1987). The Supreme Court's recent decision in *NFIB v. Sebelius*, ruled that the Medicaid expansion provision of the Affordable Care Act violated the coercion doctrine because it withheld a substantial portion of federal matching funds and was accordingly tantamount to a "gun to the head" of States in which they had no real choice as to whether to continue operating a Medicaid program. NFIB v. Sebelius, 132 S. Ct. 2566, 2604 (2012). Because the Committee's issuance of a subpoena does not involve an exercise of the federal spending power—and hence, the withholding of federal funds—there is no reasonable argument that the subpoenas violate the anti-coercion doctrine.
[135] *New York*, 505 U.S. at 175-76.
[136] *Id.* at 178.
[137] *Id.* at 168-69.
[138] Printz v. United States, 521 U.S. 898, 932 (1997).

governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and its defects."[139]

The anti-commandeering doctrine of *New York* and *Printz* do not support the federalism objections voiced by the Massachusetts and New York AGs to the Committee's subpoenas. As a general matter, *Garcia* still stands for the proposition that "states' rights" under the Tenth Amendment are not capable of judicial ascertainment and enforcement, and such "states' rights" are adequately protected by the national political process, including the nature of the composition of Congress itself. As such, if Congress is exercising one of its constitutional powers, any "states' rights" objection is, pursuant to *Garcia*, at an end. *New York* and *Printz* hold only that Congress, in exercising its constitutional powers, cannot "commandeer" a state's legislative or executive branches and force them to carry out a federal regulatory regime. If Congress wishes to exercise its powers, it must do so directly via its preemption (Supremacy Clause) power, and not employ state legislatures or executive officials as "agents" of the federal government.

If the Committee's subpoena is relevant to a subject over which the Committee has jurisdiction and on which "legislation may be had," Congress's supreme legislative power trumps any "states' rights" objection voiced by Massachusetts and New York. The states, in other words, simply have no basis for impeding an otherwise legitimate exercise of congressional power; indeed, this is the essence and meaning of the Supremacy Clause. A legitimate congressional subpoena would not "commandeer" the Attorneys General of Massachusetts or New York to carry out a federal regulatory regime; it would direct them to comply with a superior federal investigatory command. There is no distortion of political accountability with a congressional subpoena: If the state AGs comply with the subpoena, the citizens of Massachusetts and New York can clearly see and understand that acts taken pursuant to the subpoena's command—and the political responsibility therefor—lies with Congress, and Congress alone. Indeed, because a congressional subpoena is an inherent manifestation of Congress's power of legislation, it is no different from a "states' rights" perspective than an exercise of any other legislative power such as the commerce power which, when exercised, would be entitled the preemptive effect of the Supremacy Clause.

The one additional case cited by the state AGs—other than *New York* and *Printz*—as supporting their federalism objection is an obscure 1962 case from the D.C. Circuit, *Tobin v. United States*.[140] *Tobin* involved the prosecution for criminal contempt of Congress by the Executive Director of the Port of New York Authority, who refused to comply with a subpoena *duces tecum* of a subcommittee of the House Judiciary Committee. The D.C. Circuit acknowledged that the subcommittee had broad jurisdiction to investigate matters relating to interstate compacts, and that the Port of New York Authority was the creature of a interstate compact between New York and New Jersey.[141]

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[139] *Id.* at 930.
[140] 306 F.2d 270 (D.C. Cir. 1962).
[141] *Id.* at 271.

Mr. Tobin objected to the Committee's subpoena pursuant to the instruction of the Governor of New York, who stated that the subpoena was "too broad" to be valid.[142] After the district court convicted Mr. Tobin of the criminal contempt charge, the D.C. Circuit was presented with two constitutional objections to the subcommittee's subpoena: (1) because Congress had already approved the interstate compact that created the Port of New York Authority, it had no constitutional power to "alter, amend or repeal" its consent thereto; and (2) because the subpoena requested documents relating to the internal administration of the Port Authority, it was an unconstitutional invasion of the powers reserved to the States under the Tenth Amendment.[143]

The *Tobin* court did not rule on the Tenth Amendment objection, instead basing its decision on the first objection relating to the subcommittee's power to investigate pursuant to its authority to "alter, amend or repeal" interstate compacts. The Compact Clause of Article I, section ten of the Constitution declares "No state shall, without the consent of Congress . . . enter into any agreement or compact with another state . . . ." The *Tobin* court acknowledged that the Clause does not specifically confer upon Congress the power to alter, amend or repeal interstate compacts that have already been approved by Congress.[144] It further acknowledged that it had "no way of knowing what ramifications would result" from holding that Congress has the power to alter, amend or repeal existing interstate compacts, of which there were many in effect.[145]

The D.C. Circuit concluded that because the case was a criminal contempt prosecution, it needed to bear in mind that Tobin was "entitled to all of the safeguards" of the criminal justice system, including the hesitation to decide matters collateral to the crime for which the accused stands trial, particularly broad constitutional questions such as the power of Congress to alter, amend or repeal existing interstate compacts.[146] It decided to construe the House subcommittee's jurisdiction narrowly to avoid this constitutional question relating to the Compact Clause, stating that "if Congress had intended the Judiciary Committee to conduct such a novel investigation [of the need to repeal, amend or alter an existing compact], it would have spelled out this intention in words more explicit than the general terms found in the authorizing resolutions under consideration."[147] The court accordingly approved the subpoena, but narrowly construed its scope to encompass only information relating to actual activities of the Port Authority and not documents relating to "why" the Authority engaged in such activities.[148]

The *Tobin* case does not stand for the proposition that a lawful congressional subpoena may be refused by a state official on Tenth Amendment grounds. Indeed, the D.C. Circuit in *Tobin* did not base its opinion on the Tenth Amendment, but instead on its concerns about the constitutional objection relating to Congress's power under the Compact Clause. Even if the *Tobin* decision *had*, arguendo, ruled on the basis of Tobin's Tenth Amendment objection to the congressional subpoena, any such ruling would have long predated the Supreme Court's decision in *Garcia*, which made it clear that "states' rights" arguments under the Tenth Amendment are not justiciable because "states' rights" are adequately protected by the national political process.

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[142] *Id.* at 271-72.
[143] *Id.* at 272.
[144] *Id.* at 273.
[145] *Id.*
[146] *Id.* at 274.
[147] *Id.* at 275.
[148] *Id.* at 276.

As such, under *Garcia*, the very structure of Congress—comprised of two Senators representing each State and Representatives apportioned according to each State's population—ensures that the Congress can be trusted to adequately consider "states' rights" in the course of exercising its constitutional powers.

Tobin also did not address either the anti-commandeering or anti-coercion doctrines that have developed post-*Garcia*, but as already discussed, neither doctrine would apply to bar the enforcement of a legitimate congressional subpoena.

IV. Privilege Objections to a Congressional Subpoena

Both the Massachusetts and New York AGs object to the Committee's subpoenas on the basis of the attorney-client and work product privileges, and the common interest doctrine that is derived from the attorney-client privilege.[149]

A. State Common or Statutory Law Privileges

Congress is not obligated to recognize privileges grounded in state common or statutory law, such as the attorney-client or work product privileges, as state law privileges are not binding on the federal sovereign and, when there is a federal law analog, it is a creature of federal judicial, not legislative, process. The question often arises in the context of federal grand jury proceedings, and even there, federal courts routinely rule that such state law privileges are not binding on the federal government.[150]

Congress has power under Article I, section 5 to "determine the rules of its proceedings" and its power to investigate is grounded in Article I, section one of the Constitution (giving Congress sole legislative power). This rulemaking authority, combined with the Supremacy Clause of Article VI,[151] suggests that Congress has the power to decide for itself whether to honor state law judicial privileges, as its constitutional powers are supreme to any state law, including state statutory or common law privileges. Moreover, any rule requiring congressional recognition of privileges created for use in judicial adversarial proceedings would raise significant separation of powers issues: "Indeed, the suggestion that the investigatory authority of the legislative branch of government is subject to non-constitutional, common law rules developed by the judicial branch

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[149] *N.Y. AG Subpoena Response*, at p. 9; *Mass. AG Subpoena Response*, at p. 12.

[150] *See, e.g.,* In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997), *cert. denied sub. nom.* Office of the President v. Office of the Independent Counsel, 521 U.S. 1105 (1997) (claims of First Lady of attorney-client and work-product privilege with respect notes taken by White House Counsel Office attorneys rejected); In re Lindsey (Grand Jury Testimony), 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied*, 525 U.S. 996 (1998) (White House attorney may not invoke attorney-client privilege in response to grand jury subpoena seeking information on possible commission of federal crimes); In re Sealed Case (Espy), 121 F.3d 729 (D.C. Cir. 1997) (deliberative process privilege is a common law agency privilege which is easily overcome by showing of need by an investigating body); In re A Witness Before the Special Grand Jury, 288 F.3d 289 (7th Cir. 2002) (attorney-client privilege not applicable to communications between state government counsel and state office holder).

[151] The Supremacy Clause states, "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. art. VI.

to govern its proceedings is arguably contrary to the concept of separation of powers. It would, in effect, permit the judiciary to determine congressional procedures and is therefore difficult to reconcile with the constitutional authority granted each House of Congress to determine its own rules. Moreover, importation of the privileges and procedures of the judicial forum is likely to have a paralyzing effect on the investigatory process of the legislature. Such judicialization is antithetical to the consensus, interest oriented approach to policy development of the legislative process."[152]

In practice, however, congressional committees have used their discretion to accept claims of privilege grounded in state law, such as the attorney-client privilege, by weighing Congress's need for disclosure against any possible injury to the party invoking the privilege.[153] In the *MacCracken* case discussed *supra*, for example, the Senate committee denied MacCracken's invocation of attorney-client privilege and ordered his compliance with its subpoena *duces tecum*.[154]

B. Federal Constitutional Privileges

The Fifth Amendment's privilege against self-incrimination states that "No person shall . . . be compelled in any criminal case to be a witness against himself."[155] Despite the amendment's textual application to "criminal cases[s]," the Supreme Court has suggested that it applies to congressional investigations result in criminal contempt proceedings.[156] While the privilege generally protects only against being compelled to testify (subpoena *ad testificandum*), it may also apply in situations where compulsion to produce certain documents (subpoena *duces tecum*) could constitute implicit testimonial authentication of the documents produced.[157]

The refusal of several of the private environmental groups subpoenaed by the Committee is based, in part, on objections grounded in the First Amendment. For example, the letter dated July 26, 2015 to Chairman Smith from counsel for the Union of Concerned Scientists states that the subpoena "makes no allegation of wrong doing on the part of UCS and UCS is determined to defend its constitutional rights to peaceful assembly with like-mined groups, to petition the government, and to free speech on the issue of climate change and other matters."[158] Likewise, counsel for the Pawa Law Group and the Global Warming Legal Action Project object to the Committee's subpoenas on the basis of the First Amendment, citing *Hentoff v. Ichord* (D.D.C. 1970).[159]

As discussed in the preceding section discussing criminal statutory contempt proceedings, the First Amendment offers no general privilege against congressional inquiry, and are generally denied because the public need for the information being sought by Congress will outweigh any

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[152] Morton Rosenberg, Cong. Research Service Rep. No. 95-464, *Investigative Oversight: An Introduction to the Law, Practice & Procedure of Congressional Inquiry* 36 (Apr. 7, 1995).
[153] *Id.* at 32.
[154] *MacCracken*, 294 U.S. at 145-46.
[155] U.S. CONST. amend. V.
[156] *Watkins*, 354 U.S. at 195-96; Quinn v. United States, 394 U.S. 155 (1955).
[157] United States v. Coe, 465 U.S. 605 (1984); Fisher v. United States, 425 U.S. 391 (1976).
[158] Letter from Neil Quinter to Chairman Lamar Smith, Comm. on Science, Space & Tech., July 26, 2016.
[159] Letter from Catherine S. Duval to Chairman Lamar Smith, Comm. on Science, Space & Tech., July 26, 2016.

individual, private interest in preventing disclosure of association or communications with others.[160] The Supreme Court has, however, narrowly construed the scope of a committee's authority to avoid reaching a First Amendment issue.[161] So long as the matter inquired into is pertinent to a legitimate legislative investigation, the government's interest in effective inquiry will generally trump any private interest based upon free speech or association rights; to hold otherwise would create a gaping hole in Congress's investigatory power.

The D.D.C. case cited by counsel for the Pawa Law Group and Global Warming Legal Action Project, *Hentoff v. Ichord*,[162] is unavailing. In *Hentoff*, the plaintiffs brought a class action seeking declaratory and injunctive relief to stop publication and distribution of a Report of the House Committee on Internal Security, listing names of college speakers whom the Committee suspected of being affiliated with radical leftist groups. The plaintiffs' contended that the publication of such names did not further any legitimate legislative purpose, and the district court began its analysis of this contention with recognition that the judiciary owes "great deference" to Congress on this question.[163]

The *Hentoff* court concluded that the Committee's report itself "fails to indicate any legitimate legislative purpose" and that the report "on its face contradicts any assertion of such a purpose."[164] The report appealed to college administrators, alumni and parents in an attempt to "inhibit further speech on college campuses by those listed individuals and others whose political persuasion is not in accord with that of members of the Committee."[165] The report did not purport to investigate the financing of subversive organizations or whether the honoraria paid to such speakers was being funneled to such organizations.[166] Accordingly the court concluded, "If a report has no relationship to any existing or future proper legislative purpose and is issued solely for the sake of exposure or intimidation, then it exceeds the legislative function of Congress; and where publication will inhibit free speech and assembly, publication and distribution in official form at government expense may be enjoyed. This is such a report."[167]

The *Hentoff* decision did not involve the use of Congress's subpoena power (no subpoena had been issued to the plaintiffs). Instead, it was a prophylactic civil suit to prevent publication of a House report, brought against members of the relevant House Committee, its Chief Counsel, the Public Printer and Superintendent of Documents.[168] The district court, unlike the Supreme Court in *Eastland*,[169] ruled that the Speech and Debate Clause did not apply to the printing of a committee report for public distribution, and therefore the committee's report could be enjoined.[170] More importantly for present cases, the *Hentoff* decision has no relevance where: (1) Congress has exercised its subpoena power; (2) the subpoena seeks information that is relevant

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[160] *See Wilkinson,* 365 U.S. at 414; *Barenblatt*, 360 U.S. at 112; *Watkins*, 354 U.S. at 198.
[161] United States v. Rumely, 345 U.S. 41 (1953).
[162] 318 F. Supp. 1175 (D.D.C. 1970).
[163] *Id.* at 1181.
[164] *Id.* at 1182.
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.* at 1176.
[169] 421 U.S. 491 (1975). The *Eastland* case is discussed in detail *infra* section I.
[170] *Id.* at 1180-81.

to a legitimate legislative inquiry. *Hentoff* certainly does not stand for the proposition that the recipient of a congressional subpoena may refuse to comply with a legitimate legislative inquiry on First Amendment grounds. If such a legitimate legislative inquiry exists, the balancing of interests set forth in cases such as *Wilkinson*, *Barenblatt* and *Watson* would apply, with the government's interests in obtaining information necessary to conduct its inquiry being given strong weight.[171]

[171] *See Wilkinson,* 365 U.S. at 414; *Barenblatt*, 360 U.S. at 112; *Watkins*, 354 U.S. at 198.

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Prior to joining FIU, Professor Foley was a Professor of Law at Michigan State University College of Law and an Adjunct Professor at the MSU College of Human Medicine. She previously served as a law clerk to the Honorable Carolyn King of the U.S. Court of Appeals for the Fifth Circuit in Houston, Texas, and spent several years on Capitol Hill as a health policy advisor to Representative (now U.S. Senator) Ron Wyden (D-OR) and Representative Michael Andrews (D-TX).

Professor Foley graduated as the valedictorian of her law school class at the University of Tennessee College of Law. She has bachelor's degree in History from Emory University and an LL.M. from Harvard Law School.

Chairman SMITH. Thank you, Professor Foley.

Professor Turley, let me address my first question to you and say I know it wasn't easy to be here but I appreciate the integrity it took to appear.

Let me quote a sentence from your testimony that particularly was impressive to me. You said this Committee clearly has the authority under Article I of the Constitution to demand compliance with its subpoenas. You said what you did about favoring what the Administration wants to do in regard to climate change but said that that was your personal opinion, you're here to talk about the Constitution. So I appreciate your supporting what the Committee is trying to do, but my question is this: When we have parties, the AGs or others, who refuse to comply with our subpoenas, what recourse do we have? What remedies do we have? Professor Foley mentioned several. I was going to get your take on that same subject.

Mr. TURLEY. Thank you, sir. I actually testified not long ago in the Judiciary Committee about the same issue that Elizabeth talked about, which is the erosion of Congressional authority, which I consider quite alarming within our system. It didn't just start with the Obama Administration. It's a long erosion of Congress and its ability to force agencies and others to comply with subpoenas. Part of that is due, in my view, to the Justice Department failing to enforce contempt powers, and I said this for over a decade: I do not know why Congress has allowed the Justice Department to be so obstructionist in the enforcement of contempt of Congress, and that is not unique to this Administration. I made this same objection during the Bush Administration.

The most obvious response of the Committee if groups are refusing to comply with subpoenas would be statutory contempt. There is of course inherent contempt, which has never been rejected by the Supreme Court, but the important thing is that Congress needs to respond. Otherwise they're playing with their own obsolescence. You are becoming increasingly a decorative element in this system of government when you have agencies and others saying we're just not going to comply. These groups may have legitimate objections to make on the scope of your subpoenas but they have to comply with them and raise those objections and try to reach a compromise, and that's how it's been done in the past.

Chairman SMITH. And you would stick with contempt as a recommendation then, as a——

Mr. TURLEY. That's the most obvious response of a committee when someone refuses to comply.

Chairman SMITH. Thank you, Professor Turley, and Professor Rotunda, in a recent opinion piece for justia.com, you assert that the actions of the Attorneys General investigations is an attempt to chill scientific inquiry regarding climate change. Could you explain why you reached that conclusion?

Mr. ROTUNDA. Well, one of the examples is Professor Jerry Mitrovica at Harvard. He's been studying—he said he prefers studying the Pliocene Age 3 million years ago because he said that seems to be politically safe, and he's gotten concerned about political repercussions and prosecutions when some of what happened 3 million years ago is relevant today. For example, he tells us that

in the last 2,000 years, there's been virtually no change in the sea level on the Italian coast, and he has an explanation of how he discovered this. During that period, we had a medieval warm period and a mini ice age, a little ice age, and yet we're—it doesn't go up and down. It's been about the same for at least 2,000 years. He'd like to know what's going to happen in the future, and he says that we are concerned, he says, that this will raise political controversy. He's shown by his mathematical models that if Greenland's ice sheet melted entirely, sea level would fall 20 to 50 meters off the adjacent coast of Greenland with sea levels dropping as far as 2,000 kilometers away. This would help Holland and the Netherlands rather than hurt it. But he says he's concerned that there would be political repercussions.

So we've gotten into a world in which scientists say you know, I better either come up with the right answer or go to a different answer because I'm going to be subject to a lot of subpoenas. There's the threat of criminal investigation and indictments, and that means we're not getting the science for the money. You give out these grants and you're not getting objective science.

Chairman SMITH. That is exactly what we're concerned about.

Professor Foley, I appreciate your testimony. Let me get your opinion on something. Why do you think the Attorney General refusing to comply with our subpoenas, do you think that their objection is grounded in law or do you think it's more political?

Ms. FOLEY. Well, I don't actually see a valid legal objection to the subpoena itself. As Professor Turley suggested, if they have privileges that they want to assert, which is common in the Congressional subpoena context, those are generally resolved by negotiation by the committee. The Committee, for example, does not have to honor, if it doesn't want to, any state law-based privilege including the attorney-client privilege and the work product privilege, which are the two that are being raised by the state Attorneys General here, and the only one that Congress does have to honor are constitutional-based privileges such as the Fifth Amendment privilege against self-incrimination.

So considering the fact that there has not yet been that negotiation regarding those privileges and that there is no valid federalism objection here, it seems to me that the only explanation reasonably is politics.

Chairman SMITH. Okay. Thank you, Professor Foley.

That concludes my questions, and the gentlewoman from Texas, Ms. Johnson, is recognized for hers.

Ms. JOHNSON. Thank you very much, Mr. Chairman.

Let me start with Professor Tiefer. I've been serving on this Committee over 23 years. It'll be 24 at the end of this term. In that time, I've seen a lot of Congressional investigations come and go but I've never seen a committee attempt to subpoena a state attorney general.

You mention in your testimony just how unprecedented the Chairman's actions are in this regard. Could you please comment on just how unusual this is and also what that implies about the validity of the Chair's subpoenas?

Mr. TIEFER. Thank you, Ms. Johnson.

I do not—there hasn't been a subpoena enforcement against a state attorney general in 200 years, and I may note because you might think well, new things happen, this is—there was—you go back to the beginning of Congress, there were Congressional investigating committees and there were state Attorneys General and they were very often, very often of opposite political parties so if the Congressional committees thought that they could subpoena Attorneys General, then during those 200 years they would have. They're not doing it, and there's an excellent reason. State Attorneys General have their own state sovereign authority. They are frequently elected. They have their own base, their own electoral base, their own mission, and their mission is to pursue things that Congress can't.

So in a word, it's unprecedented to enforce against state AGs.

Ms. JOHNSON. Thank you. I have also never seen a committee attack with compulsory processes a group of non-governmental organizations the way this Committee has attacked the nine environmental NGOs the Chairman has subpoenaed. In my own mind, I have to go back to the Red Scares of the fifties to recall a similar effort.

Could you comment on how unusual it is for us to subpoena these type of NGOs for no other apparent reason than they disagree with the Chair's position on climate change?

Mr. TIEFER. As House Counsel investigating committees would come to us and talk with us about what they should do, and if they ever had said we want to do broad subpoenas against such groups, I would have pointed out that the Supreme Court precedent, Florida versus—excuse me—Gibson versus Florida Legislative Investigating Committee, made quite clear that you'd be violating these groups' freedom of association by trying to subpoena like that. That's what I would have told them.

Ms. JOHNSON. Thank you.

Now, let me ask you, in Professor Foley's testimony, she writes that the Science Committee may issue subpoenas, and I quote, "when authorized by the majority vote of the Committee or Subcommittee as this case may be, a majority of the Committee or Subcommittee being present."

As I believe you know, that has not been true for some time on this Committee. The Chairman of the Science Committee was granted unilateral subpoena power this Congress. We have not had a vote or a meeting of any more than—for any of the 20 or more subpoenas that the Chairman has issued.

Now, you spent 11 years working in the House Counsel's Office and three years in the Senate Counsel's Office. You dealt with reviewing subpoenas often. Based on your experience, do you think that the unilateral subpoena power the Science Committee currently has is a positive thing for Congressional oversight authority?

Mr. TIEFER. Absolutely not. It's one thing to issue a friendly subpoena to a group that just says please, we need a piece of paper, but—and have a chairman alone do that, but when you're going to issue controversial subpoenas like these, very controversial, and start talking about contempt, we would all—we always said get a vote of the full committee before you try to do something controversial like that.

Ms. JOHNSON. Thank you very much.

Thank you, Mr. Chairman.

Chairman SMITH. Thank you, Ms. Johnson.

The gentleman from Oklahoma, Mr. Lucas, is recognized.

Mr. LUCAS. Thank you, Mr. Chairman.

I would ask unanimous consent to enter into the record an article by Charles Grodin Gray for the Investors Daily or Business Daily supporting the Committee's investigation into the actions of the Attorneys General and the environment groups and solidifying that Attorneys General, environmental groups should comply with the Committee's subpoenas.

Chairman SMITH. Without objection, we'll put that in the record.

[The information appears in Appendix II]

Mr. LUCAS. Thank you, Mr. Chairman, and Mr. Chairman, I take very seriously my role as your Vice Chairman on this Committee, and before I had the responsibilities and the honor of being Vice Chairman of the Science Committee, I chaired another committee in this House body, and on one occasion we were compelled to use the subpoena process to bring a very unhappy witness to testify before us. We had to send the federal marshals physically out to find him and his attorneys and to present the paperwork.

Now, that said, based on my experiences that sometimes these things are important, first I would ask Mr. Turley, my understanding is various committees routinely subpoena state officials. Does the title of the state official make any difference? Is a state official a state official?

Mr. TURLEY. I don't think so, and I disagree with my friend Professor Tiefer. I've never received as a counsel or heard of a friendly subpoena. All subpoenas tend to be rather unfriendly because you could just give information to committees. You don't have to be subpoenaed but sometimes subpoenas might be wanted. But it doesn't mean that they're different in kind. The question is, what is this Committee's authority to issue subpoenas, and is there a threshold problem, and in my testimony I say, you can look at the first question, is there a problem with subpoenaing state agency. The answer to that is clearly no, and you wouldn't want that because state agencies can deny federal programs, deny federal rights. They did so for long periods of time. The last thing this Committee wants to do is acknowledge that type of threshold doesn't exist. So the next question is, is there something about this state agency being states' Attorneys General. The answer is no, not in terms of any threshold, absolute privilege. Now, they may have arguments to make to the Committee as to the scope but that's the difference, and what I hear from my friend Charles object to is really what should, not what is. Something that may be unprecedented doesn't mean it's unconstitutional, and I think we have to separate the wheat from the chaff in that sense and say look, this Committee clearly can subpoena state agencies, and there's no magic aspect of this particular state agency that would stop the Committee from issuing a subpoena, and you wouldn't want to. You could have state Attorneys General who are eradicating the rights of abortion clinics or environmental protection or voting rights. Would you want to say that you can't subpoena those state agencies when they're interfering with federal rights? I doubt that.

Mr. LUCAS. Setting the political discussion aside, which you handed that, and focusing strictly on the legal perspective that you have, and I am not an attorney, so let's talk for a minute. Could you expand on that Supreme Court case, Wilkinson, that dealt with the three-prong test of what's legit? Could you further discuss that?

Mr. TURLEY. Yes. I mean, Wilkinson, first of all, you should know——

Mr. LUCAS. And how long ago was the case decided?

Mr. TURLEY. Wilkinson was 1961, I believe, but in Wilkinson, the court specifically identified three areas that had to be satisfied, but I want to note that Wilkinson also rejected this idea that the court would delve into motivations. Now, anyone can certainly challenge the purpose or the motivation of a committee going for a particular target but the court said it's not going to get into that. It said, "Such is not our function." Their motives alone would not viciate an investigation that's been instituted by the House if that assembly's legislative purpose is served. And so what the court looks at is the broad authorization of a committee, whether this is pertinent to that scope of authority, and issues of that kind, and then where it has problems is when a committee goes outside of its scope and starts asking witnesses questions that are not germane or pertinent. There have been a few cases like that. But the vast majority of cases by the Supreme Court give overwhelming support for the necessity, not just the ability, the necessity of committees to have great leeway in the enforcement of subpoenas.

Mr. LUCAS. Thank you, Professor.

In the last few moments left, Professor Foley, expand a little more on the federalism principle issues in what time I have left if you would, please.

Ms. FOLEY. Yeah, absolutely. I mean, you know, when I teach constitutional law, the first thing I tell my students is, read the text of the Tenth Amendment. The Tenth Amendment says that the powers not delegated by this Constitution to the United States belong to the states respectively or to the people. So that text says that if we haven't given the power to the federal government, it belongs to the states respectively or to the people. So the $6 million question is, have we given the power to the federal government? And that's basically what the Supreme Court said in Garcia. It said the only legal question in states' rights, which is actually a misnomer because it's about individual liberty, not really states, but the only real question in states' rights is have we given the power to the federal government. If we have, the federal government can exercise that power. It has a preemptive scope under the supremacy clause. It's game over except for two federalism doctrines that the Supreme Court has carved out post Garcia, and those two doctrines are only the anti-coercion doctrine, which deals with spending power, which is not at issue here, that was part of the Affordable Care Act case, NIFB versus Sebelius, and then this anti-commandeering doctrine, which is the doctrine that's being invoked.

Mr. LUCAS. Thank you, Professor.

Thank you, Chairman.

Chairman SMITH. Thank you, Mr. Lucas.

I also want to point out just in this Congress, there are three committees who have directed subpoenas to state officials. It's not unusual.

The gentlewoman from California, Ms. Lofgren, is recognized.

Ms. LOFGREN. Thank you, Mr. Chairman.

This has been an interesting exercise here to look at these things, and Professor Tiefer, I especially appreciate the experience that you had. A lot of people in the country don't even know there is a General Counsel's Office in the House of Representatives and that they are appointed and serve on a nonpartisan basis and provide legal advice to the House that is completely like the parliamentarians. I mean, they're just aside from the whoever's in the majority. And I have had occasion to rely on the General Counsel's advice many times in my years here in the Congress.

One of the things—we're talking about the validity, really, of these subpoenas, but one of the things that I thought was really odd, honestly, is that the Science Committee would be issuing these subpoenas. It seems to me that the—you know, there are committees that investigate various things. I serve along with the Chairman on the Judiciary Committee. But in your experience, how would you find jurisdiction here in the Science Committee?

Mr. TIEFER. I thank you for your kind words about the House Counsel's Office, Congresswoman.

There's several reasons that I would not find jurisdiction here. Number one, the Committee has jurisdiction over federal—oversight jurisdiction over federal bodies like NASA and the National Science Foundation, and the fact these are spelled out in the rules negates by implication that it can reach to everybody anywhere about anything in the United States. And secondly, yes, you're on the Judiciary Committee. You look into infringements in constitutional rights. The Science Committee doesn't have that.

Ms. LOFGREN. I want to talk also about really the fundamental issue, which is that the U.S. Congress has never done something like this in over 200 years of history, and I think when you do something that is completely unprecedented, I think that it bears examination.

One of the things that I was struck with is that the AGs are investigating potentially criminal conduct, and that a committee that probably lacks jurisdiction could attempt to interfere with that criminal prosecution, to me seems, you know, extraordinary. Is that the basis for, you know, the Congress not intervening? Do we—I guess we can't know for sure why every other Congress in the history of the United States never did something like this, but it seems to me an extraordinary misuse of authority to try and intervene in a criminal prosecution.

I was interested in Professor Foley's discussion about inherent contempt because we had some discussion of this in the Judiciary Committee when the President's Counsel refused to respond to subpoenas relative to dismissal of U.S. Attorneys, and it turns out there used to be an actual jail in the basement of the Capitol. But as we got into discussion how does the Congress enforce its subpoenas, we envisioned this thing where, you know, the sergeant at arms would go and face off with the Secret Service. You know, in this case, our Attorney General in California has initiated inves-

tigation. You know, would we send the sergeant at arms to face off at the California Highway Patrol? Would there be an armed conflict? I think that's the reason why we have not used that basis. Our system of government, the three branches, just like we all learned in school, is meant to work in a peaceful way to resolve disputes, and that's why we go to the judiciary to pursue enforcement. Is that your take on this, Professor?

Mr. TIEFER. I have to say, Congresswoman, that what used to be the Capitol jail was the cafeteria now in the basement.

Ms. LOFGREN. Well, it's no longer available. We know that.

Mr. TIEFER. Some say the kitchen stayed the same.

Yeah, there was a time that the Congress used to lock up people but that's from a bygone era. We would have to turn ourselves into a courtroom here, which could never be done. You really would end up having the U.S. attorney criminally prosecute and try to put in jail the states Attorneys General? It boggles the mind to think that we could enforce a subpoena.

Ms. LOFGREN. Well, I just think these subpoenas are a huge mistake. They're not based in precedent or law. They will intimidate scientists, and they are a departure from our structure of government, a huge mistake, and I thank the Chairman for allowing me to have——

Chairman SMITH. Thank you, Ms. Lofgren.

And the gentleman from Texas, Mr. Neugebauer, is recognized for his questions.

Mr. NEUGEBAUER. Thank you, Mr. Chairman.

Mr. Chairman, I'd like to enter for the record two recent media reports related to New York Attorney General Eric Schneiderman. The first from the New York Post reports on an attempt by the Attorney General to reach out to hedge fund mogul and environmental activist Tom Stiler seeking support for his run for governor in 2018. And the second report highlights a large number of campaign contributions the Attorney General has received from wealthy liberals like George Soros and environmental activists and philanthropists like the Rockefeller family and lawyers who stand to profit from the legal judgment against that, so——

Chairman SMITH. Without objection. Thank you.

[The information appears in Appendix II]

Mr. NEUGEBAUER. Professor Foley, you were starting to talk a little bit about the First Amendment protections that have been raised. Would you like to finish your thoughts on that?

Ms. FOLEY. Yes. Thank you for that opportunity. I really want to emphasize a couple of things. First of all, all the cases that are being relied upon by the state AGs and these private organizations involve the use of a subpoena to obtain membership lists or name of members of organizations. That was the case in the Wilkinson case, the Baron Black case, numerous other Supreme Court cases involving the House Un-American Activities Committee. It also was the case in NAACP versus Alabama. It was the case in the Gibson versus Florida Investigative Legislative Committee, which was cited. And that's a fundamentally different question because what the court says in the membership list cases is that when you turn over a list of the names of people who belong to certain organiza-

tions, that clearly implicates First Amendment associational rights because it can chill those associations.

It should be noted for the record that this Committee's subpoenas are not seeking membership lists. It is seeking ordinary documents and communications shared amongst these groups and with the Attorneys General. That kind of information is routinely turned over in civil litigation. There's a Federal Rule of Civil Procedure 34, request for production of documents, that makes these kinds of documents routinely available. When it's issued against non-parties, Federal Rule 45 allows a subpoena duces tecum to obtain these kinds of documents and communications, and they have never been thought to implicate any First Amendment rights. If it did, if turning over simple communications amongst parties implicated First Amendment rights, Federal Rule 34 and 45 would be unconstitutional, and that's simply not the case.

Also, let me just point out in those membership list cases, those only succeed when the organization whose membership is sought to be turned over can make a prima facie evidentiary showing that turning over the names of the members will result in intimidation or harassment of the members. That certainly is not in play here, and even when it is potentially, the courts don't buy those arguments. Just in 2015, the most liberal federal Court of Appeals, the U.S. Court of Appeals for the Ninth Circuit, held in a case involving the Center for Competitive Politics that that organization had to turn over its membership lists despite its First Amendment objections.

Mr. NEUGEBAUER. Amplifying on that, in your view, does Backpage court differentiate between the First Amendment protections in the realm of Congressional investigation when such investigation may implicate a criminal activity as opposed to an investigation where the subject matter is decidedly not criminal in nature?

Ms. FOLEY. Is that directed to me, sir?

Mr. NEUGEBAUER. Uh-huh.

Ms. FOLEY. Yes. That's a good point. In fact, I really want to emphasize the cases that have involved First Amendment objections have all been in the context of criminal proceedings. It hasn't arisen in the civil proceedings. In those limited proceedings the only objection has been executive privilege. And it's never—the First Amendment has never come into play in any of the inherent contempt authority cases of the Supreme Court.

When it is a criminal case, it is a different show, right, because there are heightened considerations about special constitutional rights that attach to a criminal defendant, so courts are particularly sensitive in criminal cases in a way that they're not in the civil or the inherent authority context.

Mr. NEUGEBAUER. Professor Rotunda, in your opinion, what is the best method for carrying out scientific inquiry on an important question such as climate change?

Mr. ROTUNDA. Doing it without fear of prosecution, without fear of threats of prosecution, without having to turn over tons of documents going back many, many years because that takes a lot of effort to do. You would just like to be able to go in your lab, do experiments, publish the results, and then people can decide whether

you're right or you're wrong based on whether they can replicate your experiments or they think your math is wrong or something like that.

You know, years ago, Father Lemaitre, a Belgian priest, a Belgian priest who was teaching at the Catholic University of Leuven, where I used to teach briefly, he presented his argument why the universe had a beginning. This was the beginning of the 20th century, and Einstein wrote him—they were friends—he said your math is correct but your physics is atrocious. And the reason you can attack Father Lemaitre by looking at what his math is like, trying to replicate his experiments.

Nowadays I guess, you know, we're the more intolerant 21st century, we'd prosecute him. You took money from the Vatican? Who paid for your education? You teach at a Catholic university? Eventually Einstein said that Lemaitre was right and Einstein was wrong, and at the time, by the way, Lemaitre said that, every scientist or purported scientist going back to Aristotle thought the universe was always here. Now we know it has a beginning. And what we'd like to do is have these scientists argue freely about whether or not the globe is warming, why the climate change models are off, and it's never as bad as they think it's going to be. That's what we should do.

Chairman SMITH. The gentleman's time is expired. Thank you, Mr. Neugebauer.

The gentlewoman from Oregon, Ms. Bonamici, is recognized.

Ms. BONAMICI. Thank you, Mr. Chairman.

Last month I was home in Oregon and I did a series of town hall meetings around northwest Oregon, and my constituents, both Democrats and Republicans, care a lot about climate change. They know I'm on the Science Committee and they always want to know what we are doing. I assure you this is—what we're doing today is not what they expect and certainly not what they deserve.

So my constituents of course are justifiably concerned about the subpoenas that certain members of this Committee have sent to the Attorneys General of New York and Massachusetts, to the Union of Concerned Scientists, to the Rockefeller Foundation. I'm having trouble with the valid basis for the Committee to send those subpoenas, and I understand we have a scholarly disagreement here.

But what's even more baffling is why is the Committee making this a priority when there's so many issues that deserve our attention and our action like ocean acidification, melting glaciers, ways to find and curb greenhouse gas emissions, and in this Committee we should be learning facts that may be helpful in creating positive legislation. And so I know the Majority is claiming that the Attorneys General and the subpoenaed groups are allegedly involved in some kind of attempt to infringe the free speech rights of ExxonMobil but in fact the Attorneys General are doing their jobs by investigating whether ExxonMobil withheld important information from its shareholders about the connection between fossil fuels and climate change, and that is certainly within the appropriate scope of responsibility of Attorneys General. If ExxonMobil has a problem with the AGs' subpoenas, the company can certainly challenge them in the court of jurisdiction, which I understand they

have done. But that challenge would be in the judicial branch. This is the U.S. House Committee on Science, Space and Technology. We're not prosecutors. We're not here to adjudicate whether a petroleum company's free speech rights are being violated, although I will add, and it's been mentioned already, that it's pretty clear that there's no free speech right to commit fraud.

In fact, I'm more concerned about the chilling effect that the Committee subpoenas might have on the free speech rights of those, not only the subpoena recipients but on other organizations that are doing that important work of researching and addressing the threat of climate change.

So Professor Tiefer, where's the most serious First Amendment threat here? Is it the issuing of subpoenas by the Science Committee or the investigation by the Attorneys General, and why?

Mr. TIEFER. Congresswoman, ExxonMobil can take care of itself. I would like to be their lawyers. I would like to get what they can pay their lawyers instead of—I mean, it's not being bad being a professor. I'm not complaining.

Anyway, the First Amendment rights of organizations are very important. The ones historically were both left-leaning. They were gone after in the red-baiting period, and the Supreme Court recognized the First Amendment rights of—and civil rights organizations that got legislative subpoenas in our era. The freedoms involved are not merely membership lists, although those are the most prominent example, but all parts of the freedom of association belong to these groups.

Ms. BONAMICI. Thank you. And we know here what the state Attorneys General are asserting, that—and they have supporting evidence. We're not here to adjudicate that but they're asserting that ExxonMobil has known for years that climate change is real, that burning fossil fuels contributes to climate change, and scientists as far back as the Carter Administration spoke with trade associations about how climate change is anthropogenic, and they're also asserting that despite this internal knowledge, Exxon until recently publicly stated the opposite working to challenge the emerging scientific consensus on climate change, assuring investors that climate change would not affect their bottom line, and not publicly disclosing its internal stockpile of evidence to the contrary.

So given all those assertions, and again we're not here to adjudicate that. That's up to the court. But given those assertions and given that the New York Attorney general has fairly broad investigative powers and the Financial Crimes Bureau to prosecute securities and investigation fraud, if Exxon scientists are saying one thing behind closed doors and the company is telling its shareholders something else, is it not appropriate for the Attorney General to investigate that?

Mr. TIEFER. Absolutely. I see what's going on here. It's very similar to what happened in tobacco industry investigations where the tobacco industry had files and records that nicotine was addictive but was making public statements including statements to its stockholders but also potential lung cancer victims. So—and the state Attorneys General went after that. That was the only level, the only place that you had a willingness to investigate that. So

once again, we need to get out what's in those files and the state AGs are the ones who are going to do it.

Ms. BONAMICI. Thank you very much. I see my time has expired. I yield back. Thank you, Mr. Chairman.

Chairman SMITH. Thank you, Ms. Bonamici.

And the gentleman from Alabama, Mr. Brooks, is recognized.

Mr. BROOKS. Thank you, Mr. Chairman.

I ask unanimous consent to enter into the record an article written by witness Ronald Rotunda for Justia.com regarding the motives of the Attorneys General and environmental groups to chill scientific inquiry into climate research.

Chairman SMITH. Without objection, in the record. Thank you.

[The information appears in Appendix II]

Mr. BROOKS. Thank you, Mr. Chairman.

Before I get to my questions, let me emphasize something about this, ″climate change phrase″. I know of no person on Earth who denies that climate change occurs. Anyone who knows anything about Earth's history knows the Earth's climate has always changed to hotter, to colder, to wetter, to dryer, and the like. And the Earth's climate always will change. Rather, the so-called climate change debate is about the role humanity has played, if any, in today's version of climate change to the cost to humanity in terms of depressed economies and lost lives of implementing so-called climate change cures, whether that cost to humanity of so-called climate change cures does more damage than good, i.e., whether the purported cure is worse than the alleged disease, whether so-called cure is a cure at all, and the like.

That having been said, this seems to be a hearing more on legal issues as opposed to those types of issues related to climate research, and with that as a backdrop, I'm going to focus on the Wilkinson versus United States case, and I'm going to ask each of you to share your views. In order to determine if the Committee's investigation is legally sufficient, the Supreme Court in Wilkinson versus United States established a three-prong test. The court must determine, one, the committee's investigation of broad subject matter must be authorized by Congress; two, the committee must have a valid legislative purpose; three, the demand in this case, the subpoena, must be pertinent to the subject matter authorized by Congress. With respect to the second one, valid legislative purpose, I just note some quotes by Professor Turley in his written testimony: "As an academic, I find the demands of these state investigations to be chilling in their implications for experts and academics alike." "As an academic, I view the effort of the state Attorneys General to be highly intrusive into academic freedom and free speech." I hope that we all can agree here that freedom of speech, freedom of researchers to do valid scientific research is a right that is protected in the United States Constitution is certainly something that this Committee has the right to make inquiry concerning.

That having been said, my question is this: In your opinion, does the Committee's investigation of the Attorneys General and environmental groups satisfy the three-prong test of the Wilkinson case? Professor Turley, as I understand it, your testimony is yes. Is that correct?

Mr. TURLEY. Yes, and I would add that I disagree with Professor Tiefer in that when I look at Rule 10, I don't see how you could possibly argue that this falls outside the scope of Rule 10. Rule 10 talks about—it's certainly about federal concerns but no committee is limited to the narrow definition that he's presenting, in my view, about federal research or federal issues of that kind. This Committee is allowed to investigate things that impact upon those areas that it is given, and second, all committees deal routinely with free speech issues, with potentially criminal issues. If that wasn't the case, we would just have a huge Judiciary Committee and dozens of subcommittees because this is a routine type of conflict that comes up.

Mr. BROOKS. Professor Rotunda?

Mr. ROTUNDA. Oh, I agree with everything he said. I think the—the purpose of this Committee and the purpose of the Committee's subpoenas is not to stop the Attorneys General of the states from subpoenaing. They want to investigate fraud. We want to know whether there was a corrupt agreement. Well, there is a corrupt agreement between the state Attorneys General, some environmental groups, and George Soros, and you have to know that to decide if you're going to propose legislation to take that into account. There may be more money because it's taken into account that people are chilled when leaving the subject. Maybe you want to fund advocacy research. The government for decades studied advocacy research on why marijuana is bad when other people said it wasn't bad. Maybe they were high when they said that. But the fact is that the—I was on the Senate Watergate Committee. We came up with legislation at the end. We didn't know at the beginning what it would like because we didn't know the depth of the problem, and I think you ought to find out what is the depth of the problem here. Is it really true that the Attorneys General are part of a corrupt agreement, or is that all made up, in which case you might decide to propose nothing, but you cannot make that step unless you first investigate.

Mr. BROOKS. Mr. Chairman, I see my time has expired. If you wish for Professor Foley and Professor Tiefer to respond, of course, that's at your discretion, but if not, I understand.

Chairman SMITH. Okay. I'm afraid the gentleman's time is expired but the gentleman is welcome to put questions in the record and direct those to the witnesses as well.

The gentleman from Virginia, Mr. Beyer, is recognized for questions.

Mr. BEYER. Thank you, Mr. Chairman.

Before I begin, I'd like to enter into the record an editorial board piece from the Washington Post which calls the Science Committee's subpoena of NOAA "a fishing expedition."

I'd also like to submit a letter that Congresswoman Edwards and other members of the Virginia, Maryland and Washington, D.C., delegations and I sent to Chairman Smith back in June in response to his request for documents from the state Attorneys General, and lastly, a letter from three constitutional scholars at Duke, Chapel Hill and the University of Virginia, especially Brandon Garrett, questioning the—denying the Committee's authority to issue subpoenas to state——

Chairman SMITH. Without objection, they'll be put in the record.

[The information appears in Appendix II]

Mr. BEYER. Thank you, Mr. Chairman.

Professor Tiefer, you were Acting General Counsel for the House of Representatives for 11 years so you have extensive knowledge of the oversight authority of the House and even specific committees of the House. In terms of investigative authority, how would you would describe the oversight authority of the Committee on Oversight and Government Reform compared to this Committee, the Science Committee? And please be brief because——

Mr. TIEFER. Much worse, much broader. They have total oversight where this just has a slice of it.

Mr. BEYER. So in your understanding, OGR has a greater scope of investigative jurisdiction?

Mr. TIEFER. Definitely.

Mr. BEYER. That is interesting because Congressman Jason Chaffetz, who chairs the OGR, told Wolf Blitzer on CNN last week that he didn't believe this Committee had the authority to investigate Florida Attorney General Pam Biondi in accusations of pay-to-play. If I could ask for a quick few seconds of this, please?

[Playback of video]

Mr. BEYER. Professor Tiefer, how do you square Representative Chaffetz' understanding of OGR Committee's investigative jurisdiction with the Science Committee Majority's understanding of its investigative jurisdiction?

Mr. TIEFER. They don't have it; you don't have it.

Mr. BEYER. All right. Professor Turley, you said clearly that Article I gives this Committee the power to issue subpoenas. Professor Tiefer's response was that fraud investigation is a legitimate bread-and-butter state AG investigations, and the Supreme Court holds that the First Amendment does not protect such fraud. How do you reconcile his interpretation that it doesn't protect the fraud investigation? And let me give you one—because you used the word "chilling" a bunch of times. How does it chill scientific research when the attorney general's fraud investigation is taken existing scientific research from ExxonMobil, a public record that says it was real, with their statements, some would say lies, to their investors about what the research shows? Is that chilling scientific research or is that simply saying you can't do one thing and say something different to your investors?

Mr. TURLEY. I think it is chilling scientific research beyond this even though I happen to agree with the other side in this, with the Obama Administration, with the people who are supporting these state investigations. I think this is a step too far. I think that this was a uniquely bad idea. I think it's delving into areas of a difference of opinion. I happen to think the record's clear but there are very good people who disagree with me, and as academics, were used to having peer review, not a jury of our peers, decide those questions.

Now, in terms of the fraud issue, I'm afraid I have to disagree with Professor Tiefer. It's easy to call anything fraud. During the Red Scare, they called communists inherent subversives. You can—anyone can say that your views amount to fraud. I find it very difficult to accept the premise of these state investigations on an issue

of scientific disagreement as an academic but simply saying that this might be fraud or it might be a problem under shareholder laws, it maybe doesn't change the dynamic here. From the perspective of the other side of this, they believe that what's happening here is that it is analogous to the Red Scare, that climate change, you know, skeptics are being treated like the new communists.

Now, on your side, you believe that that's a closer analogy to the environmental groups. You know, frankly, I'm not interested in the school yard fight issue of who started this, but I do think that the arguments you're making today would seriously undermine the arguments made in these states as well. I think both actually have authority to do what they're doing, and it would be better for them to reach a compromise on scope and stop fighting on threshold questions.

Mr. BEYER. Mr. Chair, I yield back.

Chairman SMITH. Thank you, Mr. Beyer. I trust you're persuaded by Professor Turley's last remarks.

The gentleman from Ohio, Mr. Davidson, is recognized for his questions.

Mr. DAVIDSON. Thank you, Mr. Chairman. Thank you all for being here today.

And without objection, I'd like to enter into the record a statement from the Washington Post, Dennis Vacco. Mr. Chairman, the article from Mr. Vacco says his concern was that he served as Attorney General for the State of New York from 1995 to 1999, and during that time he investigated and sued the tobacco companies for fraud. Mr. Vacco differentiates the tobacco cases from the Exxon investigation and suggests that the Attorneys General investigations into science, climate science, is for political purposes. It's a very clear distinction from the references to the tobacco settlement.

Chairman SMITH. Okay. Without objection, that'll be made a part of the record.

[The information appears in Appendix II]

Mr. DAVIDSON. And just to clarify, you know, the concern here is that this is really not just a chilling effect but perhaps even a chance to criminalize scientific inquiry, to basically say dissent that others might have is going to subject you to criminal inquiry.

The broader concern, to address Ms. Bonamici's, you know, comments, we are focused on the actions of the Attorneys General and the effects of those actions on research and development in the United States, of which a significant portion is funded by Congress. The Attorneys General subpoenas demand documents and research of public and private scientists. We spent a lot of time talking about ExxonMobil but this is also targeted at individual scientists, groups, nonprofits and, you know, could spill over into universities as well. So this is really an effort to shape research, not just object to fraud.

And so, Professor Turley, you know, could you comment on, is there an inherent conflict with the Attorney Generals' ability to respond to our subpoena and their ability to pursue a case for fraud?

Mr. TURLEY. There isn't a conflict in that sense. You know, the New York Attorney General said that this Committee is trying to effectively do a hostile takeover of his office. That's obviously hy-

perbole. It's not true. The Committee has asked for information. It's not like the commandeering cases, the relatively few such cases where the court has viewed it in that way. He can proceed in the same way he's doing now. But I would also note that my understanding is that at least one group has acquired many of this—much of this information through the Vermont Public Records Law, and back in June I testified in the Judiciary Committee and noted that groups like Judicial Watch were actually acquiring evidenced through FOIA that the Committee had not been given by the Administration, and this creates an absolutely bizarre situation where committees with oversight actually have less authority, less ability to get information than citizen groups or individual citizens, and the fact that you can acquire some of this information through the Vermont Public Records Law should be very, very troubling to anyone on this Committee.

What we have to look at is, is there a constitutional threshold barrier to asking the states Attorneys General information specifically geared towards this investigation in light of what this Committee views as the inherent impact upon academics. The answer is no. Does the—can the attorney general make objections that some information should not be turned over? Certainly, and most of the times I've seen this happen, committees have tried to accommodate, and I'm pretty sure this Committee would do the same.

Mr. DAVIDSON. Thank you for that.

I'd like to address Professor Foley. You talked about the concerns really not just in this case but broadly, and it's been a trend of subpoenas and inaccurate statements being given to Congressional committees, so kind of the proliferation of these events. What is the net effect on the power of Congress to receive honest and accurate testimony, and receive the information rightfully requested under subpoena? We've seen numerous instances where the evidence request has been destroyed. So could you comment on that, please?

Ms. FOLEY. Yeah. I mean, I think you see the effect almost daily, it seems, where Congressional subpoenas are being routinely ignored and disrespected. The problem is that for some reason, this branch of government, which the framers thought was going to be the most powerful, the most vigorous of the three branches, has turned out to be relatively infuscate over time, and I think that's because—I heard it a little bit earlier today from someone in this Committee who suggested they couldn't even envision really Congress using its inherent authority to go out and send the sergeant at arms to arrest someone. Well, guess what? That power was routinely exercised by early Congresses. Early Congresses were not afraid to assert their constitutional prerogatives, and I don't think you should be either.

Mr. DAVIDSON. Thank you. My time is expired.

Chairman SMITH. Thank you, Mr. Davidson.

And the gentleman from New York, Mr. Tonko, is recognized for his questions.

Mr. TONKO. Thank you, Mr. Chair.

I find it extremely concerning that these subpoenas may interfere with legitimate investigations of fraud. Many of our colleagues share this concern, which is why 18 members of the New York delegation recently expressed our disappointment in the Majority's de-

cision to issue unilateral and unprecedented subpoenas, and I have a copy of this letter, Mr. Chair, that has been forwarded to you before the hearing, I believe yesterday. And let me just state that that's not our opinion as a group; it's based on research done by CRS.

I'm also concerned that these subpoenas not only set a bad precedent but also damage the credibility of both this esteemed committee and Congress as a whole. The state Attorneys General investigation of possible fraud under state laws, and let me repeat that, state laws, by ExxonMobil bear a striking resemblance to earlier state AG fraud investigations of Big Tobacco in the 1990s. Those investigations led to settlement agreements between all 50 states and the tobacco industry for hundreds of billions of dollars. The Department of Justice then sued and Big Tobacco was found liable for fraud under the federal RICO Act. This is despite the fact that Big Tobacco made similar arguments to what we are hearing from our Majority today.

So perhaps it is understandable why Exxon and their Congressional allies are going to such lengths to interfere with legitimate fraud investigations. I would like to add that this is not the first time the Science Committee has abused its oversight authority to defend oil-and-gas interests, and it is not the first time those actions have been condemned. Last year, the New York Times editorial board condemned the Majority's subpoena to NOAA climate scientists, which seemed to be based on political beliefs and not substantive evidence of wrongdoing of any sort.

I would like to ask for unanimous consent to enter that editorial, Mr. Chair, into the record.

Chairman SMITH. Without objection, it'll be in the record.

[The information appears in Appendix II]

Mr. TONKO. Thank you.

Today, these state AGs including the Attorney General from my home State of New York are investigating potential fraud. They are not infringing on the First Amendment rights of ExxonMobil or industry scientists. As became clear in tobacco litigation, fraudulent speech is not protected by the First Amendment.

Professor Tiefer, you have already addressed this tobacco litigation but can you further expand upon the similarities between those cases and the current investigations into potential fraud by Exxon?

Mr. TIEFER. They're very similar. The state Attorneys General often working through the National Association of Attorneys General, NAAG, have evolved a process by which states group together, often with a leader, in this case, New York State, as you say, and to investigate fraud by companies. It's a major activity of theirs and a legitimate activity.

Mr. TONKO. Well, I thank you for that, and I also have serious concerns about subpoenas, the subpoenas issued by the Majority to some nine environmental advocacy organizations, and how these groups have been treated in the process.

Ken Kimmel, the President of the Union of Concerned Scientists, wrote an op-ed called "When Subpoenas Threaten Climate Science." I agree with the sentiment that these types of scare tactics threaten the vital work of many organizations. I would like to

ask for unanimous consent to also enter this op-ed into the record, Mr. Chair.

Chairman SMITH. Without objection.

[The information appears in Appendix II]

Mr. TONKO. And much of the legal community, the scientific community, and Congressional experts like Professional Tiefer and CRS all agree that these subpoenas are unprecedented. There is an obvious political agenda here, I believe, and I hope that we will put an end to infringing on states' rights so that our AGs can conduct their rightful enforcement of the law. I believe that's an important part of this process, and based on some of the progress that we made on behalf of consumers as it relates to tobacco industry resulted in outstanding benefits, public health benefits for this country, and I think that we should take heed of what's happened in the past year and understand that we're well served by allowing for our states via the AGs to do their work and to do it abundantly well, and with that, I yield back, Mr. Chair.

Chairman SMITH. Thank you, Mr. Tonko. I might encourage the gentleman to get the most recent submission by CRS. They updated their memo and made some corrections to it.

The gentleman from Georgia, Mr. Loudermilk, is recognized for his questions.

Mr. LOUDERMILK. Thank you, Mr. Chairman, and I thank the witnesses for being here.

Mr. Chairman, I ask unanimous consent to enter into the record an article in the Wall Street Journal by Hallman Jenkins entitled "How the Exxon Case Unraveled," which illustrates the fluidity of the argument by the New York Attorney General in his justification for this case, which continually is changing, and to me is evidence that this effort is to express—or suppress a dissenting view, which being able to challenge status quo is the history of America. If we haven't had the freedom to challenge what was generally accepted ideas and models, even scientific models, we would still believe the world was flat, which was the accepted government idea at the time. If Orville and Wilbur had not had the freedom to challenge generally accepted aerodynamic theorems that they developed new ones, we wouldn't have an Air and Space Museum today.

[The information appears in Appendix II]

Mr. LOUDERMILK. The generally accepted idea of scientists was that we could not leave the orbit of the Earth and travel to the moon or the four-minute mile could not be accomplished.

I agree this is chilling, and what the chilling effect of this is, the government using the power and the strength of law to suppress a dissenting view regardless of whether you agree with it or not.

Professor Foley, thank you so much for recognizing that the Tenth Amendment is a succession of powers, not rights, that individuals hold rights, not government. Government holds power. Thank you. You don't hear that very often. I'd like to ask you a couple of questions. I like what you said, and you articulating that there are three separate and coequal branches of government. However, it appears throughout history, especially in the Civil Rights movement, that the executive branch has quite often interjected itself in states' issues, for instance, when LBJ sent federal troops to protect the voting rights march in March of 1965. Is that

within the constitutional realm, in your opinion, that the executive branch has instituted itself to protect rights, especially a First Amendment right?

Ms. FOLEY. Of course.

Mr. LOUDERMILK. Okay. It concerns me that Professor Tiefer, though, is taking the approach, if we take his approach, then with that idea the executive branch then has more power than the legislative branch. Am I correct in that?

Ms. FOLEY. I assume that is the implication.

Mr. LOUDERMILK. Okay. According to the Constitution, Article I, section 4, who's responsible for elections, states or the federal government?

Ms. FOLEY. States.

Mr. LOUDERMILK. States are given the constitutional authority for elections, correct?

Ms. FOLEY. Correct.

Mr. LOUDERMILK. However, federal troops were sent by the executive branch to protect the voting rights of individuals during—throughout our history, especially during the civil rights movement. Am I correct on that?

Ms. FOLEY. And thank goodness.

Mr. LOUDERMILK. Was that proper constitutional authority?

Ms. FOLEY. Of course.

Mr. LOUDERMILK. Could you opine then, how is it that we have coequal branches of government but one branch has an executive authority to intervene when rights are being violated but not the Congressional branch——

Ms. FOLEY. Well——

Mr. LOUDERMILK. —or the legislative branch?

Ms. FOLEY. And let me just echo this by saying you may have gotten to this but section 5 of the Fourteenth Amendment, the enabling clause gives Congress the power to enforce the Bill of Rights, which have been incorporated into the states via the due process clause of the Fourteenth Amendment. So one of Congress's most important responsibilities is to protect the Bill of Rights and prevent state officials from violating those rights.

Mr. LOUDERMILK. And I would say this for the record, that I would take the same stance if the tides were turned and it was the government trying to suppress the views that there is climate change when the government was assessing that there is not.

Professor Turley, can I ask you real quick to opine on the video of Chairman Chaffetz, that it was brought up that we're taking two sides of an issue here? What is your opinion on his authority to investigate?

Mr. TURLEY. Well, it's always fun to testify with Wolf, but I think that it's hard to compare the two investigations. I'm not particularly familiar with that one. Obviously I'm familiar with this one. I don't see how any of the arguments being made with regard to this Committee's authority, particularly with AGs, can be challenged just because it's a criminal—potentially a criminal matter. First of all, the New York AG is doing a shareholder investigation, which by its nature is more civil than criminal, but it could involve criminal charges, but if you look at cases like Sinclair versus United States, the Supreme Court rejected these type of collateral

consequences. That wasn't with an AG. But you had someone who objected to the fact there was a criminal case going on. There was a core criminal matter, and the court rejected it and said that doesn't take away the fact that the Committee has a legitimate interest in all this.

Now, we can debate whether in fact the state investigations are threatening academics. I have to view it that way. As an academic, it makes me feel extremely uncomfortable to have these investigations and their impact on people with dissenting scientific views. But that's a matter of policy, that's a matter of choice. I don't see much argument about the unconstitutionality. Whether something's unprecedented doesn't move the ball in the analysis. The question is, it is unconstitutional, and I don't see that basis.

Mr. LOUDERMILK. Okay. So in summary, you can say——

Chairman SMITH. The gentleman's time——

Mr. LOUDERMILK. —it doesn't meet the three-prong test and Chaffetz——

Chairman SMITH. The gentleman's time has expired.

Mr. LOUDERMILK. I apologize, Mr. Chairman.

Chairman SMITH. Good question. We'll follow up on it.

The gentlewoman from Maryland, Ms. Edwards, is recognized for her questions.

Ms. EDWARDS. Thank you very much, Mr. Chairman, and thank you to the witnesses today. You're reminding me that I probably shouldn't have slept through that week of law school.

But I wanted to focus today on, you know, a couple of things that I've heard. One, the earlier analogy, which I think is actually appropriate with respect to the lawsuits that ensued against Big Tobacco, and I would note that the chief prosecutor, the federal prosecutor's actually in the audience today from the case, Sharon Eubanks, so thanks for joining us. You know, over these last several weeks, and of course, the Maryland Attorney General was subpoenaed as well, a letter went out, and it's been widely denounced in a lot of quarters, and particularly by the Baltimore Sun, which is not a liberal bastion newspaper. In their editorial board, they noted that the Committee had previously held "witch hunt hearings" and they also explained a simple fact that the Majority apparently seems to have some trouble grasping and that is what Attorneys General, the Baltimore Sun editorial says, are looking into is whether energy companies like ExxonMobil have crossed the line into criminal behavior in their attempts to knowingly sabotage scientific evidence of manmade climate change. At issue, for instance, the Sun continues, is whether the companies may have deliberately deceived investors and consumers about the consequences of burning their products and thus deserve to be held accountable. And I'd like to ask that the Baltimore Sun editorial be entered into the record. It's from June 1st, Mr. Chairman.

Chairman SMITH. Without objection.

[The information appears in Appendix II]

Ms. EDWARDS. Thank you.

I also note that Professor Tiefer, in your testimony, you note also that the subpoenas are without merit, and I really appreciate both the experience that you bring in terms of your scholarly work but also as a practitioner here in the House, and I'm concerned about

the Majority's actions on the institution and what will happen with the institution. I would note, for example, that in looking at the breadth of the subpoenas, in the letter at least my Attorney General, Brian Frosh in Maryland, the request was as follows: "Your office funded with taxpayers dollars is using legal actions and investigative tactics in close coordination with certain special interest groups and trial attorneys that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office," and I'm just really curious why the Congress of the United States and this Committee has any jurisdiction whatsoever over Maryland taxpayer, my taxpayer dollars being used in Maryland for the purposes of our Attorney General's investigation. It does seem to me that that is completely outside of the scope of this Committee even if you extend it in its most broad form. And I think that if the Committee continues this kind of partisan attack, that it's going to be very problematic for our institution.

I would note, for example, that, you know, in our work there was no first negotiation, Professor Foley. The first negotiation that should have taken place should have taken place in this Committee with Republicans and Democrats looking at what was being requested and then even reaching out to organizations and institutions to figure out what it is that we could get, that should have been the first negotiation, and instead a letter singularly went out from the Majority to our Attorneys General and all of these organizations without any consultation with the Majority, and frankly, without a Majority, without all of the signatures of the Minority. And so clearly, there's a problem for the institution, and I'll give you, Professor Tiefer, the remaining comments because your advice to Congress in these matters also takes into account what will happen in the future in this institution.

Mr. TIEFER. I thank the gentlelady, Congresswoman, and there's a very good reason that for 200 years you haven't seen these things going back and forth. What's next? I think the next thing would be for House committees to subpoena the constituent files of Senators and for Senate committees to subpoena the constituent files of the House. You might look to where there's a privilege over there. There's no privilege but the two chambers respect each other and in the same—and don't mess with each other, and in the same way, the House committees for 200 years have respected and, excuse the colloquialism, not messed with the state Attorneys General.

Chairman SMITH. Thank you, Ms. Edwards.

And the gentleman from Texas, Mr. Babin, is recognized.

Mr. BABIN. Thank you, Mr. Chairman, and I want to thank you witnesses for being here today.

I would like to, in light of what my distinguished colleague from the other side of the table asked, I'd like to ask you a question, Professor Turley. Under the House Rules and the Committee Rules, isn't it true that our Chairman of SST here has the authority to issue subpoenas without a vote of the full Committee?

Mr. TURLEY. Yes, it is.

Mr. BABIN. Okay. Thank you.

And now I'd like to enter into the record, I'm asking without objection, a Wall Street Journal op-ed that was written by Profes-

sional Foley, which says—asks us to read for how far the left will go to enforce climate change orthodoxy and that the ultimate goal would be to chill First Amendment rights for those who are dissenting from this—from their theory that human-caused climate change will be a disaster. I submit that the disaster will be coming from the chilling of our research and development——

Chairman SMITH. Without objection, the op-ed will be in the record.

[The information appears in Appendix II]

Mr. BABIN. Okay. Thank you.

I submit that that will be—the biggest disaster will be the chilling of First Amendment rights for free speech and the arena of thought and ideas for our scientists. And so I would like to ask you, Professor Foley, a couple of questions.

Do you agree that the Committee's legislative jurisdiction includes the authorization over the federal government scientific enterprise that we fund?

Ms. FOLEY. House Rule X clearly says so.

Mr. BABIN. Absolutely. Okay. And then also, do you agree that the investigatory actions of the Attorneys General will have an impact on research and development?

Ms. FOLEY. Oh, absolutely, not just of ExxonMobil but the scientists involved in climate change research as well as the nonprofit organizations.

Mr. BABIN. Okay. Thank you. And the suppression and intimidation and persecution of scientific research and development is absolutely nothing new, as we heard my colleague, Barry Loudermilk from Georgia, say. Copernicus, Galileo, perfect examples of that.

So I would also ask you if you are claiming—excuse me—that the Attorneys General are claiming that the subpoenas are unconstitutional based on federalism principles? You alluded to this, I think, earlier in the questioning, but isn't this ironic that we would see the groups that are collaborating with these Attorneys General have gone against federalism many, many times in the past and now are claiming that as a defense. Do you—is your—is it your analysis of the Committee's subpoenas to the Attorneys General of New York and Massachusetts represent a legitimate Congressional inquiry into what of these warrants—excuse me—that would warrant compliance?

Ms. FOLEY. Yeah, absolutely. You know, this Committee under House Rule X has the authority to investigate matters relating to scientific research and development. The House as a whole and certainly this Committee with jurisdiction over scientific research and development has the responsibility, really the absolute duty, to make sure that state officers including state Attorneys General do not violate individuals' federal constitutional rights including the First Amendment, and therefore if the state AGs are taking action that would chill the First Amendment freedoms of scientists. This Committee can take cognizance of that and can issue subpoenas to get at the heart of the matter.

Mr. BABIN. Okay. That's all I have, Mr. Chairman. Thank you.

Chairman SMITH. Thank you, Mr. Babin.

And the gentleman from Illinois, Mr. Foster, is recognized.

Mr. FOSTER. Thank you, Mr. Chairman, and thank you to all the witnesses here today.

You know, as the only Ph.D. scientist in the U.S. Congress, I have to say that I'm sort of disappointed with today's hearing. The job of the House Science, Space, and Technology Committee is supposed to be oversight of the federal government's research and development agenda, so I'm rather disappointed that instead of having a serious conversation about how to analyze and mitigate the effects of climate change, we are taking about subpoenas and legal arguments involving shareholder fraud investigations by states' Attorneys General. Instead of learning about the next generation of batteries or discussing how to ensure that the United States stays on the leading edge of scientific discovery and innovation, we're here arguing about subpoenas that have been issued unilaterally and I believe irresponsibly by the Majority party that controls this Committee.

Now, I'm not a lawyer. I am a scientist and a businessman, and as a businessman, I understand that a company's management has a real duty to inform its investors in a timely manner when it becomes aware of dangers that put the financial viability of its products at risk in exactly the way that a drug company must inform its investors in a timely manner when, for example, its research uncovers a significant side effect or dangers from a drug that it is developing or marketing. To do anything less is fraud, and the investigations into potential fraud by states' Attorneys General is simply doing their job.

But while I cannot speak with authority on the legal and jurisdictional hairs that we're splitting here today, I can speak on the scientific ones. There is no doubt that the fossil fuel industry is carrying on its books trillions of dollars of proven reserves and there is no doubt that the scientific reality of fossil fuel-induced climate change calls into question their ability to economically extract these assets, and because the real issues here to me are not just legal and jurisdictional ones; they're scientific and in fact political, and whether or not this hearing ends up being just another gigantic waste of time and taxpayer money depends really on how the science underlying global warming lands. This hearing, to my mind, is just another example of a rear action by a group of people who didn't accept the facts of climate change and are abusing their positions in the Majority to undertake hearings that will in fact end up being a giant waste of taxpayer money.

It's long past time that this Committee accepts the scientific facts of climate change like the vast majority of scientists have and take on the very serious work of figuring out where we go from here as a country and as an economy. This is the challenge of our lifetime.

And now if I could make a small effort to try to actually return to a scientific point here, Professor Rotunda, I was fascinated by what seemed to be your support of an argument that the Greenland ice sheet would melt and thereby lower the sea level, and I was wondering if you can expound on how exactly the physics of this works.

Mr. ROTUNDA. I'll try to summarize. I gave you the citation for the article and I'll summarize I think what the Harvard professor said. Ice has mass. Mass has gravity. When the ice sheet melts, all

the gravity that was then part of the island in Greenland disappears into the ocean, just goes away, and that ice has been pushing Greenland down,and pulling the water up, and now Greenland will be moving up because the water is all over the place. He said that Netherlands should be more worried about the Antarctic ice rather than the arctic ice. Now——

Mr. FOSTER. So is it your belief that when Greenland ice sheets melt, there will obviously be a local effect where the land will pop up where the load of the ice sheets.

Mr. ROTUNDA. So 2,000 kilometers away, up to 2,000 kilometers away——

Mr. FOSTER. But overall, the effect just from general principles has to be to significantly raise water levels worldwide unless——

Mr. ROTUNDA. Well, we——

Mr. FOSTER. —there's new physics I'm not aware of, I think that's sort of fundamental.

Mr. ROTUNDA. Read his article. I mean, that's what he says.

Mr. FOSTER. Now, this was a peer-reviewed journal or——

Mr. ROTUNDA. He—the article is summarizing his research, which was in peer-reviewed journals. I read it in the translation form in Harvard magazine. He said that he liked doing the Pliocene Age because it was far away and not subject to this controversy. When he—as he studies this, he discovers it has an effect today. He puts his math in his papers, which were peer-reviewed and published. It's an article about review. In fact, you illustrate the problem of scientists, that he can't believe this, that can't be right, so we should investigate. In fact, we have this strong world that——

Mr. FOSTER. Has he come under any——

Mr. ROTUNDA. Let me finish my sentence. When the House of Representatives sent a subpoena to non-government NGO groups, that's chilling. When the state attorney general sends subpoenas to NGOs and threatens criminal prosecution, that's——

Mr. FOSTER. I'm trying to answer a scientific question. It just seems amazing that the overall water levels would change in the direction that you seem to believe——

Mr. ROTUNDA. For 2,000 kilometers. After that——

Mr. FOSTER. Oh, you're talking about the local depression, but it would be a big problem for the rest of the world if the Greenland ice sheets——

Mr. ROTUNDA. Well, I mean——

Chairman SMITH. The gentleman——

Mr. ROTUNDA. —it's not going to be a problem——

Mr. FOSTER. Anyway, I am past my time here, and at some point I'd like to return to science in this Committee, and thank you.

Chairman SMITH. Thank you, Mr. Foster.

The gentleman from Alabama, Mr. Palmer, is recognized.

Mr. PALMER. Thank you, Mr. Chairman. I just want to raise something that ought to be obvious to everybody on the Committee about this. Article I, section A, clause 8 says in regard to the power of Congress "to promote progress of science"—that's among our delegated powers. I have always assumed when I was asked to come on this Committee that we had that authority.

With regard to the federalism argument, this Committee is not seeking to commandeer the AGs' investigations. We can do that together and coexist. Our investigation and the AGs' is in regard to how this impacts what we do here, and in regard to our jurisdiction, I mentioned to promote progress of science, it appears to me that many of our colleagues have pointed out the actions of the AGs appear to be aimed at specific groups and the scientists whose research findings are in opposition to the findings of other groups. And to Professor Turley's point about a chilling effect on the First Amendment, I think it has a chilling effect on scientific research. Do you agree with that?

Mr. TURLEY. I do, and I think it's broader than what's been suggested. As an academic, one of the things that concerned me when I first read about these investigations is that when you suggest that the conclusions that these scientists reach as to their skepticism or opposition to climate change research could be the basis of a fraud investigation, it doesn't just affect them, it affects the universities. Universities accept grants. Academics can come under pressure from universities. Universities don't want to get pulled into some type of fraud investigation. That's the reason I prefer to have this debate handled between academics and advocates in the public realm, not through indictments or subpoenas, and so it depends on whose ox is being gored here, but there are public interest organizations on the other side who felt threatened by the state investigation. There's public interest organizations on the other side that feel threatened by this Committee. There's groups on both sides. I don't distinguish between them.

And also, during the tobacco investigation, you had the subpoena of groups associated with the tobacco industry. There wasn't a hue and cry about it but those were directed towards not-for-profit organizations. So once again we have to separate between the policy choice and the legal issue, between the rhetorical and the constitutional, and frankly, I don't see the threshold problem.

Mr. PALMER. Well, that—I think that's the point we've made here is that we have jurisdiction over this, that we do have a legitimate legislative purpose to investigate. Would you agree with that, Professor Rotunda?

Mr. ROTUNDA. Absolutely.

Mr. PALMER. Professor Foley, the federal government and by extension Congress is entitled to act within its delegated powers. Is that correct?

Ms. FOLEY. Yes.

Mr. PALMER. And would you agree that Article I, section A, clause 8 is delegated power?

Ms. FOLEY. Yes.

Mr. PALMER. So we're here for a good reason. Would you agree with that?

Ms. FOLEY. I hope so.

Mr. PALMER. Well, that's great, because I'd hate to be wasting my time, Mr. Chairman, coming here to talk about this.

My concern too, and this has been mentioned by our colleagues on the other side of the aisle a number of times about the money that's involved here. You know, they implied that there's a political agenda, there's a money agenda. I just want to point out that we've

got a number of billionaires, one of whom, Tom Stiler, who pledged $100 million in contributions to pro-environmentalist Congressional campaigns—I don't think you can avoid the politics of it but I really don't think that's what this investigation ought to be about. This investigation ought to be about protecting the rights of scientists to do their jobs. It doesn't matter whether or not we agree with their findings. But everybody should be able to conduct scientific research without the fear of reprisal from the government at any level. I'll open that up to the panel. Would anybody agree or disagree with that?

Mr. TURLEY. Agree.

Mr. TIEFER. Disagree.

Mr. PALMER. You disagree? I'm shocked. Well, my time——

Mr. TIEFER. If I can just say why?

Mr. PALMER. So you think the government has a legitimate role to impose itself upon scientific research, to act——

Mr. TIEFER. No, that's not what you asked.

Mr. PALMER. —in a heavy-handed—no, that's what exactly what I asked. I asked, does—should scientists be able to conduct their research without fear of reprisal from the government, honest, legitimate research, and you disagreed with that, and I find that shocking.

Mr. TIEFER. There's fraudulent statements being made by Exxon when it says there's no peril by——

Mr. PALMER. Well, you're talking about Exxon and you're talking—and you're trying to make them——

Mr. TIEFER. It's fraudulent.

Mr. PALMER. I'm talking principle, you're talking politics.

Mr. Chairman——

Chairman SMITH. The gentleman's——

Mr. PALMER. —just—I'd like to enter something into the record in regard to the wonderful new discovery by our Democrat colleagues and the Tenth Amendment. If it's okay with you, I'd like to enter the Constitution into the record.

Chairman SMITH. Without objection. Do you want to limit it to any particular part of the Constitution?

Mr. PALMER. Why don't we limit it to Article I and the Tenth Amendment.

Chairman SMITH. Great. Without objection, that'll be made a part of the record.

[The information appears in Appendix II]

Mr. PALMER. I yield back.

Chairman SMITH. The gentleman from Colorado, Mr. Perlmutter, is recognized.

Mr. PERLMUTTER. Thanks, Mr. Chair, and thank you to the panel.

First question. Nobody on the panel is a chemist, are they? Anybody a physicist? Anybody an astronomer?

Ms. FOLEY. Amateur only.

Mr. PERLMUTTER. Amateur astronomer.

And Professor Rotunda, I've had a chance to read some of your articles, and you kind of have an opinion about a lot of different things—anti-Semitism, buying cars, the export-import bank, a

number of different things. You're kind of a philosopher about some things, are you not?

Mr. ROTUNDA. A philosopher? I hadn't thought about it that way but I like you, yes.

Mr. PERLMUTTER. And I like your tie, by the way.

Mr. ROTUNDA. Thank you.

Mr. PERLMUTTER. So just a couple questions, and first, Mr. Chairman, I'd like to introduce into the record a letter to you dated September 13th from some 2,100 scientists concerning that there is no chilling effect concerning the activities of these Attorneys General.

Chairman SMITH. Without objection.

[The information appears in Appendix II]

Mr. PERLMUTTER. But nobody's a scientist on the panel, correct? You're all law professors.

So I just—you know, we've been going through jurisdiction. Can somebody, Professor Turley, define jurisdiction for me. I mean, let's get back to the basics here because we're talking about whether the power of the Congress exists to subpoena Attorneys General or anybody else, for that matter. What's the definition of jurisdiction?

Mr. TURLEY. Well, the courts look at jurisdiction in terms of——

Mr. PERLMUTTER. I didn't ask the—what's your definition of jurisdiction?

Mr. TURLEY. Well, my definition necessarily is going to be what is legally recognized——

Mr. PERLMUTTER. What is your definition of jurisdiction?

Mr. TURLEY. It is the scope of authority that this Committee has through sources like the Constitution——

Mr. PERLMUTTER. The scope of authority that anybody, a court might have to exercise power, exercise—whether it's over a territory or a person, correct?

Mr. TURLEY. Sure.

Mr. PERLMUTTER. So some of you have referenced the rules that we operate by here in the Congress, and I don't know, I've got the book here someplace. Oh, here it is. Okay. And so my question is anybody take a look at—Professor Foley, you looked at Rule X, I assume, subsection P, correct? And you've listed that in your statement?

Ms. FOLEY. Correct.

Mr. PERLMUTTER. And you also—so you think that there is at least subject matter jurisdiction——

Ms. FOLEY. That's correct.

Mr. PERLMUTTER. —by this Committee to reach out to these Attorneys General?

Ms. FOLEY. Correct, to investigate scientific research.

Mr. PERLMUTTER. So my next question to you is, did you look at Rule XI, clause II, section 3(a)(1)?

Ms. FOLEY. Well, tell me what it says and I'll tell you——

Mr. PERLMUTTER. It says "Except as provided in subdivision (a)(2), a subpoena may be authorized and issued by a committee or subcommittee under subparagraph (1)(b) in the conduct of an investigation or a series of investigations or activities only when authorized by the committee or subcommittee, a majority being present."

Ms. FOLEY. Yes, I've seen that.

Mr. PERLMUTTER. You've seen that. Do you know when we took a vote, when this Committee took a vote to issue these subpoenas?

Ms. FOLEY. I'm not aware of——

Mr. PERLMUTTER. Did you ask?

Ms. FOLEY. —the goings-on——

Mr. PERLMUTTER. Did you ask?

Ms. FOLEY. No. My understanding is that this Committee has been given the authority to—via the Chairman to issue a unilateral subpoena.

Mr. PERLMUTTER. Do you think the Committee is limited by the Rules of the House?

Ms. FOLEY. I'm sorry?

Mr. PERLMUTTER. Do you think this Committee is limited by the Rules of the House?

Ms. FOLEY. I hope so.

Mr. PERLMUTTER. I mean, I can't—can I go out—under your theory of the law, can Ed Perlmutter go issue a subpoena to Attorney General Biondi in Florida and say okay, why did you not pursue Trump University? Can I do that? Do I have that authority?

Ms. FOLEY. Because you're not the Chairman of the Committee, no, you do not.

Mr. PERLMUTTER. Okay. So the Chairman of the Committee may have that authority. Do you know whether we took a vote?

Ms. FOLEY. I do not know what——

Mr. PERLMUTTER. You're assuming that we did. Are you assuming that we did?

Ms. FOLEY. Here's what I do know. I'll tell you what I know. Maybe that will help.

Mr. PERLMUTTER. Do you know whether——

Chairman SMITH. Let Professor Foley respond. If you're going to ask questions, let her respond to the question. Let her respond to the question.

Mr. PERLMUTTER. I asked a question. Do you know whether we took a vote on the subpoenas to these Attorneys General?

Ms. FOLEY. My understanding is that that is not necessary because the Chairman of the Committee has unilateral authority.

Mr. PERLMUTTER. Okay. So let me ask you this. In issuing these, do you think that 3(a)(1) limits the authority of the Chairman?

Ms. FOLEY. I believe that it is my understanding that the Chairman of this Committee has unilateral authority to issue subpoenas.

Mr. PERLMUTTER. Okay. And do you know how many subpoenas have been issued by the Science Committee since its beginning?

Ms. FOLEY. No clue.

Mr. PERLMUTTER. Until this year and last year?

Ms. FOLEY. No, sir, I do not know.

Mr. PERLMUTTER. Okay. What if I told you that since 1958, only one subpoena has been issued by this Committee, would that surprise you?

Ms. FOLEY. No, and I would not see the relevance to this particular issue.

Mr. PERLMUTTER. Okay. So—and that was a subpoena involving Rocky Flats, which is in my backyard, and costs the country sev-

eral billion dollars to clean up. Would it surprise you if I told you that during this session, we've issued 24 subpoenas?

Ms. FOLEY. I would say you have an active and interested Committee.

Chairman SMITH. The gentleman's time is expired, but let me correct him. I think it's 25 and still counting.

Mr. PERLMUTTER. All right.

Chairman SMITH. Thank you, Mr. Perlmutter, for your questions.

The gentleman from Illinois, Mr. LaHood, is recognized for his questions.

Mr. LAHOOD. Thank you, Mr. Chairman.

Mr. Chairman, I ask unanimous consent to enter into the record an article published in the Washington Times that discusses the public disapproval of the Attorneys General's investigation. The article highlighted a recent poll that shows a majority of voters including Democrats oppose the investigation.

Chairman SMITH. Without objection. Thank you for putting that in the record.

[The information appears in Appendix II]

Chairman SMITH. By the way, just to clarify, that was 65 percent support what we're doing and only 15 percent support the Attorneys General.

Mr. LAHOOD. Thank you, Mr. Chairman, and I want to thank the panel being here today. Excellent panel and a good discussion.

And while I've enjoyed Professor Tiefer for being here, I would have enjoyed as the minority witness having Attorney General Schneiderman here. It would have been nice to have him here to justify why he's engaged with this obstruction, and he seems like a very capable, smart, accomplished guy who's not afraid to be in the limelight on a lot of different issues, but it would have been nice to have him here to explain that legal reasoning for why they continue to obstruct, and so—and I would also mention, you know, it's been written just recently in the Wall Street Journal that this investigation by the Attorneys General is "unraveling." We had a federal district court judge here in Washington, D.C., that basically ridiculed the U.S. Attorney from the Virgin Islands on the subpoenas that were issued, and I think that's an interesting read if you look at that. And so it would be nice to hear firsthand on the justification, and we don't have that here today.

I guess, Professor Turley, in looking at the legal foundation or principle that the Attorneys General are relying on, what is that in your view?

Mr. TURLEY. Well, I find it very problematic, the idea that—look, you can say that the refusal to accept your view amounts to fraud. You know, that's a very easy thing to do. It's a conversation stopper. We tend not to do that in academia. We tend to present countervailing views with our colleagues. There are many people, not just scientists but citizens who don't agree with the climate change research. I happen to agree with it, but there are many people I know that do not. It is an ongoing debate. To treat that as a matter of fraud for a company to be opposed to the thrust of that research, I think is a dangerous precedent.

You know, the framers were very concerned about what was called majoritarian tyranny, the idea that in a democracy there's

a sort of dormant virus that exists where you can have the majority become a threat to its own freedoms, and part of that is to declare certain facts as inviolate and the denial of those facts to be now crimes or fraud. That characterization alone doesn't have any magic impact upon the jurisdiction of this Committee. You can disagree with what the Committee's doing but in terms of the authority to do it, I'd be surprised if you would want to maintain that position because the next case maybe state AGs who are unraveling other rights that are considered more dear or suggesting that certain facts are now facts that cannot be denied, and that's the reason this is so troubling.

Mr. LAHOOD. And just to follow up on that, Professor Turley, I mean, for the layperson out there when we talk about these subpoenas, I mean, we're not asking—the subpoenas in no way ask the Attorneys General to stop their investigation or stop what they're doing, correct?

Mr. TURLEY. That's right. It's to demand information, and that alone as a court has been very strong in terms of supporting the right of committees to get that type of information. Where the court has problems is when you order state agencies to enforce or carry out federal functions. That's where you cross the line into commandeering agencies. But submission of reports—there was a recent case probably about 2002 called Freelig in the 4th Circuit where they rejected this type of claim, that the submission of information was unconstitutional, and they said that's part of information gathering.

Mr. LAHOOD. And I would also mention there was some comment from the other side that we're not asking that they can't enforce their laws in their state or anything like that, correct?

Mr. TURLEY. Correct.

Mr. LAHOOD. And Professor Foley, is it your legal opinion and analysis that no state official may resist a federal subpoena if there's a federal nexus there?

Ms. FOLEY. Yes, as long as you have a legitimate investigative purpose.

Mr. LAHOOD. Thank you. Those are all my questions, Mr. Chairman.

Chairman SMITH. Thank you, Mr. LaHood.

And the gentlewoman from Massachusetts, Ms. Clark, is recognized.

Ms. CLARK. Thank you, Mr. Chairman. I would like to thank our panelists, and I'd like to thank Ranking Member Johnson for all of her and her staff's hard work on this issue, and I'd like to express my unequivocal support for the Attorney General from Massachusetts, Maura Healey, and the other Attorneys General who have been subjected to, in my opinion, truly disturbing Congressional overreach and interference with their jobs. There are a lot of people who believe this is a gross and unconstitutional overreach of Congressional power who are not able to testify at this hearing.

At this time I'd like to ask unanimous consent to enter three documents into the record. The first is a letter from 14 prominent lawyers and advocacy groups expressing their opposition to this Committee's subpoenas. The second is a letter, and I have it here, with 32,000 signatures of citizens in opposition to what we are doing

today, what we are discussing, and these subpoenas. And the third is a passionate editorial from the Boston Globe calling this process "Congressional bullying on behalf of Big Oil."

Chairman SMITH. Without objection, those three documents will be made a part of the record. You may want to reconsider the second one because that was an online petition where one individual could sign up a thousand different names, and we had such people on that petition like Karl Rove, who I doubt seriously would have signed it, and we have individuals from the city of Newark, Delaware, and Dystopia, Alaska, and other made-up names. So just bear that in mind. Without objection, though, those documents will be made a part of the record.

[The information appears in Appendix II]

Ms. CLARK. Thank you.

With that said, Professor Tiefer, I have some questions for you. I'd like to talk about the basis for the state investigations that led to the subpoenas we're discussing today. Documents indicate that internally for decades, Exxon has known that the burning of fossil fuels would contribute to the change in climate, in global climate. Meanwhile, outwardly it appears the company worked to sow doubt in the growing body of evidence surrounding climate change among the general public and its own investors.

Whether or not anyone is ultimately successful in proving that Exxon defrauded, committed a crime, it is the state Attorneys General responsibility and their province to investigate crimes against their constituents and that are based on state law, and that includes fraud, and we know from U.S. versus Philip Morris that fraud is not covered by the First Amendment.

I have a mom who suffers from Alzheimer's but she still likes to answer the phone, and she believes people who are calling her, and we get a lot of calls, supposedly from the IRS, supposedly from people who are going to sell her a contract to fix her computer she doesn't own. It goes on and on. We get a lot of magazines that are, shall we say, age-inappropriate because she is defrauded. If Attorney General Maura Healey decided under state law consumer protection like is the basis of the case we are discussing today to pursue a fraudulent claim for consumer protection purposes, is that—and then this Congress decided to get involved, and to hold an investigation into that investigation, do you see there would be any grounds for Congress? And if not, is there any difference in this case?

Mr. TIEFER. Thank you, Congresswoman. To go to one part of your question, the case went to the Supreme Court about whether the Florida Attorney General could look into fraud in charitable solicitations, which is one kind of what you're talking about coming in over the phone and the Supreme Court said it's fraud, the state AG can look at it. That's my short answer. Do you want a longer answer?

Ms. CLARK. What I want to know, is there any difference? If Congress decides to interfere in that investigation, couldn't we be chilling the First Amendment rights of those companies?

Mr. TIEFER. You mean the companies——

Ms. CLARK. The fraudulent companies.

Mr. TIEFER. Well, it would be said that you—you can say that when Congress investigates it's chilling things——

Ms. CLARK. No, I'm talking about if the investigation, would that be—wouldn't that be chilling those rights and wouldn't that give Congress a right? We have many laws regarding investments, the IRS, a whole bunch of topics on which there is consumer fraud in states. Don't we need to be protecting those First Amendment rights of those companies?

Mr. TIEFER. The short answer is, there's no—Congress doesn't get the investigative right just because Attorneys General are looking into fraud. There's no comparison. AGs are enforcing the law. We're only allowed to do oversight, and in this Committee's case at the federal level.

Ms. CLARK. I am also concerned that these messages—the message these subpoenas and this hearing is sending that if a company is big enough, it can commit fraud and know that at the hint of an investigation, Congress is going to step in and protect it, and conversely, the state officials should not dare to investigate major companies for state offenses without being prepared to be dragged in front of Congress. We can already see in the Virgin Islands citing limited resources, they have already withdrawn its investigation.

In your opinion——

Chairman SMITH. The gentlewoman's time has expired. She's welcome as others to submit questions to the witnesses and we'll get responses.

Ms. CLARK. Thank you.

Chairman SMITH. Thank you.

The gentleman from Illinois, Mr. Hultgren, is recognized.

Mr. HULTGREN. Thank you, Mr. Chairman. Thank you all for being here. I know your time is very valuable, and we appreciate you being a part of this.

I want to address my first couple questions to Professor Turley and also Professor Foley if that's all right.

According to the District Court, must groups asserting a First Amendment claim still define the universe of responsive documents and search for those documents even if they maintain that those documents are privileged and must groups produce documents responsive to a Congressional subpoena that are not privileged?

Mr. TURLEY. If I understand your question correctly, the issue of free speech arguments and privilege arguments are generally raised in the process of answering subpoenas. You can do that through the submission of an index. You can note on the index privilege or other objections to be made. You work it out with the Committee. Whether a privilege is accepted by a committee has been left to the committee when you're talking about non-constitutional privilege.

Mr. HULTGREN. Professor Foley?

Ms. FOLEY. Yes. It's typical to provide a privilege log and have in-camera inspection by the court.

Mr. HULTGREN. Okay. According to the court, must those groups also provide Congress with a detailed privilege log like you're talking about delineating what information they are asserting a First Amendment claim to, and what would that adequate privilege log

look like going into a little bit more detail of what you've referenced? For example, does the party asserting the privilege need to specify facts that would establish each element of the privilege they seek to assert or is it simply pointing to swaths of documents including that a privilege applies or not?

Ms. FOLEY. Yeah, under the Federal Rules of Civil Procedure, if you claim objection based on privilege, you must provide a statement as to the basis for that privilege to allow the court—the opposing party to understand the basis of your objection and then of course the full document is submitted to the court for inspection.

Mr. HULTGREN. Mr. Turley, any other thoughts on that?

Mr. TURLEY. That's right, and one of the things that comes up then when you submit these types of indexes or logs with these objections is also the question of whether this material has been previously disclosed. One of the issues that would come out of this controversy is that many of the groups were open about their coordination on this campaign so there is in fact a lot of public information which tends to waive privilege objections and also there is this question of things like the Vermont public records law being able to get records that perhaps this Committee has not received, and so those are the types of conflicts that are then explored with Committee staff and with these groups.

Mr. HULTGREN. Asking the same two witnesses, going a little bit further on the privilege, First Amendment privilege, do the Attorneys General not have the ability to assert this Attorneys General not have the ability to assert this privilege because there is a lack of standing?

Mr. TURLEY. I'm not too sure I would agree that they don't have the ability to assert the privilege. I think that when it comes to committee objections certainly and dealing with committees, you do have free speech objections that are raised, associational questions, it seems to me that the AG does have a legitimate issue here in telling the committee look, some of these communications are with people coming to us and saying we want an investigation, and that's going to chill what we do if you make those disclosures, and those are the types of compromises committees can work out. They can allow redactions, they can allow summaries, and that's very common.

Mr. HULTGREN. Professor Foley?

Ms. FOLEY. So long as the state Attorneys General are raising their own privileges, they have the standing to assert them.

Mr. HULTGREN. Just going, I guess, more your thoughts and opinions as you've studied this, do you believe the Attorneys General are attempting to raise an impermissible defense solely for the purpose of attempting to garner positive press coverage and cast the Committee's investigation in a negative light? Again, this is your personal opinion.

Mr. TURLEY. I wouldn't say that. I think that the state—I think these Attorneys General do have legitimate issues to raise. I don't agree with their investigation. I think the investigation is very problematic in terms of academic freedom even though I don't subscribe to the view being investigated. I have a serious problem with it as an academic. But I also think that these AGs have legitimate issues to raise. This is our investigation. We are two separate

sovereignties. But you've got to keep in mind that it's not uncommon for the federal and state bodies to have overlapping jurisdictions in areas of the environment and other areas. It's very common for the Congress to butt up against these agencies, and sometimes the agencies themselves are the problem that Congress is looking into.

Mr. HULTGREN. Professor Foley?

Ms. FOLEY. My personal opinion would be that when the Attorneys General use their prosecutorial power to investigate scientists because the scientists are not embracing an orthodox view of climate change or anything else, that that is an abuse of prosecutorial power.

Mr. HULTGREN. Again, thank you all so much for being here. I appreciate your time and your expertise on this.

With that, I yield back, Chairman.

Chairman SMITH. Thank you, Mr. Hultgren.

And the Ranking Member, Ms. Johnson, is recognized.

Ms. JOHNSON. Thank you very much. I just wanted to make a correction on the survey that Representative LaHood read. The question that he asked was, should the government investigate and prosecute scientists—wait a minute—and others including major corporations who question global warming. The question was whether or not they could question scientists and not in general.

Chairman SMITH. That's correct, and it was 65 percent versus 15. Is that correct too? Fifteen percent, they should not?

Ms. JOHNSON. Well, the question should have been to the Attorneys General, not the scientists.

Chairman SMITH. Okay. In any case, we've made that poll a part of the record. People can read it.

The gentleman from California, Mr. Rohrabacher, is recognized for questions.

Mr. ROHRABACHER. I was at a doctor's appointment all morning. I apologize for missing this important hearing. Let me just express my concern, Mr. Chairman, that in the last year of this Administration, just time and time again I've been confronted with arguments about why someone who fundamentally disagrees with the ideology of the Administration is a bigot or is now, the latest one, deplorable or is actually some kind of a fascist or a homophobe or whatever. The Commission on Civil Rights simply just—the head of the Civil Rights Commission, I understand, talked about freedom—people talking about religious freedom and claiming religious freedom are really a bunch of bigots. Well, look, and now we have, you know, a candidate talking about people being deplorable, and this suggests to me that what we have here is a breakdown in the respect that people should have for each other and for varied opinions in our society, and I think the worst example of that—and I'm sorry that I missed your testimony and I will read it and read the transcript from this hearing—the worst example is when you have a group of people over a very serious issue, scientific issue, which is global warming, where you have not only paying saying you're wrong or even calling you names but now even taking steps to try to silence someone who disagrees with them. This is outrageous. This is something that we—that nobody on either side of the aisle should excuse. We have our backs and forths, and for us to look

into this I think was vitally important for the basics, and the basics, if we don't have freedom to express our scientific disagreements, we don't have that, and instead efforts are made to silence someone. That is definitely something that we should not ignore, and I'm very proud of our chairman for making this an important issue of discussion today.

I'm sorry I don't have anything else to add, but I will——

Chairman SMITH. That's a good way to end.

Mr. ROHRABACHER. But I will——

Chairman SMITH. I appreciate those comments.

Mr. ROHRABACHER. I will read the hearing testimony.

Chairman SMITH. The gentleman from Arkansas, Mr. Westerman, is recognized for his questions.

Mr. WESTERMAN. Thank you, Mr. Chairman. I would also like to thank the witnesses for being here today, and the question was asked earlier if any of you are scientists, but I would like to ask the question, are you all constitutional lawyers? And the subject we're addressing today is on a matter of free speech, not necessarily the issue of what the free speech is over, so I appreciate you being here with your expertise.

Professor Foley, I would like to ask you, is the First Amendment a blanket shield that can be used to prevent compliance with Congressional subpoenas?

Ms. FOLEY. No, it's never been viewed that way by the court, and in fact, in the criminal contempt cases where it has been raised, what the court has said needs to happen is a balancing. It balances on the one hand the weight of the interest of Congress in obtaining the information, which is usually given what the court calls great weight, and they balance that against the interest of the private individual from whom the information is being sought, and unless the court sees some prima facie evidence that the information is being sought by Congress for the purpose of harassment or intimidation, usually that balance comes out in favor of Congress.

Mr. WESTERMAN. So the U.S. District Court for the District of Columbia recently ruled regarding a First Amendment privilege claim in response to a Congressional subpoena. Are you familiar with this ruling?

Ms. FOLEY. Which ruling is it? Tobin?

Mr. WESTERMAN. Yes.

Ms. FOLEY. Yes.

Mr. WESTERMAN. So would you summarize the District Court's ruling in this case?

Ms. FOLEY. Yeah, the Tobin case is one of those balancing cases, and I believe that—let me see if I can find it. I think I've got it here in front of me. No, I don't. I believe that the court basically did the same balancing that I'm talking about, and——

Mr. WESTERMAN. I was actually referring to the Backpage.

Ms. FOLEY. Which one?

Mr. WESTERMAN. On CEO Carl Farrar on the—Chief Justice Roberts has currently stayed the Senate committee subpoena, the Backpage for the legal opinion.

Ms. FOLEY. I'm not sure which document you're referring to. Chief Justice Roberts stayed an opinion?

Mr. WESTERMAN. So Professor Turley, are you familiar with this?

Mr. TURLEY. Yes. I mean, the District Court gave a very strong endorsement of the power of Congress to seek the information. I believe it was Judge Collier who issued the opinion, a very respected judge. Chief Justice Roberts, though, did issue a stay and has ordered for further argument to occur.

Mr. WESTERMAN. So given the District Court's ruling, do you agree that groups asserting First Amendment privileges in instances where Congressional subpoena has been served cannot use as a blanket shield to prevent the production of any information to Congress?

Mr. TURLEY. Generally, no. Generally, that's an issue that's worked out with logs and indexes and negotiations. What you'll notice, by the way, about many of these cases that we're citing is that in many of the cases, these people did in fact testify but then they refused to answer some questions, and those issues went to the court, and on a couple of occasions the court has said look, that had nothing to do with what your authorization was, the subject matter, but actually in these cases what's often ignored is that they actually did respond to Congress. They did testify. They drew a line as did the NAACP cases of answering questions with regard to membership. The idea that you can just say well, look, I have a First Amendment protection here, I'm not going to respond to any information that the Committee's seeking including information that may in fact be public in some regards I don't think would be accepted by any court.

Mr. WESTERMAN. Okay. So according to the District Court, groups asserting a First Amendment claim still define the universe of responsive documents and search for those documents even if they maintain that those documents are privileged?

Mr. TURLEY. What you do is you then work that out through the index and the log. You raise your basis for the privilege. If it's a non-constitutional privilege, the Committee then has to decide whether to respect that. In my experience being around this place for a while, most committees in fact do reach compromises. A lot of times it's not to have a fight over much of the stuff, and you can get summaries of redactions that avoid those issues.

Mr. WESTERMAN. So must groups produce documents responsive to Congressional subpoena that are not privileged?

Mr. TURLEY. Yes, and the other thing to remember is that whatever Congress does, particularly with these groups, are going to have usually an element of free speech associational interest. That's very, very common. Every committee has to deal with that. What is important is that principle doesn't require you to be civil. It doesn't require you to be consistent, and the committees of Congress have in fact subpoenaed public interest organizations like the tobacco groups to produce information and they've worked out these disputes in the past.

Mr. WESTERMAN. And Mr. Chairman, I would like to submit for the record an article here. It says the Supreme Court refuses to block Backpage subpoenas in sex trafficking investigation, referring to this Backpage case.

Chairman SMITH. Okay. Without objection, that'll be in the record.

[The information appears in Appendix II]

Mr. WESTERMAN. I yield back.

Chairman SMITH. Okay. Thank you, Mr. Westerman.

That concludes our hearing. No more members here to ask questions, and I just want to thank you all. This has been an excellent hearing because of our outstanding witnesses, and appreciate all your contributions today and look forward to staying in touch with you all. Thank you.

[Whereupon, at 12:32 p.m., the Committee was adjourned.]

Appendix I

Answers to Post-Hearing Questions

ANSWERS TO POST-HEARING QUESTIONS

Responses by Mr. Charles Tiefer

Questions for the Record
Hearing of the House Committee on Science, Space, and Technology
"Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas"

September 14, 2016

Never in the more than two-hundred-year history of Congress has the U.S. House of Representatives ever subpoenaed a State Attorney General's office.

Question 1 for Professor Charles Tiefer

Professor Tiefer, is the Committee on Science, Space, and Technology the appropriate venue to litigate a potential fraud investigation? It seems to me that if Exxon disputes the authority of the state Attorney Generals to subpoena them in the course of the Attorney Generals fraud investigations, that Exxon can avail themselves of a more traditional legal venue – the courts. In fact, my understanding is that Exxon has done so, and filed motions against the Massachusetts subpoenas in both Texas and Massachusetts courts. Isn't that the appropriate forum to resolve these legal issues, rather than a congressional committee?

Tiefer:
There is a double reason why, instead of the Science Committee second-guessing the state Attorneys General, any disputes by Exxon should be left to the state courts.

First, this is a state matter. The expertise about this is at the state level, not the federal level (where Congress is). The question is whether, under New York and Massachusetts state law, Exxon has committed a violation. There is no experience or familiarity with, and no expertise in, New York law at the federal (Congressional) level. The New York Attorney General asserts there is a particularly expansive state securities law in that state. Who, at the federal level, has what it takes to dispute this?

Second, this is judicial matter. It belongs to the courts, not Congress. It is a matter of judging the legal claims and counterclaims of Exxon and the state Attorneys

General. A judge in the matter has all the necessary elements of objectivity and neutrality. Can the majority members of this committee claim the same – that as far as Exxon and its industrial allies, the Members have a neutral voting record, are always seen by those on different sides of issues as completely detached and objective, and would never be considered pro- or anti-Exxon? Leave the Exxon matters to the judges.

Question 2 for Professor Charles Tiefer

The State Attorney Generals argue, with supporting evidence, that Exxon Mobil has known for nearly forty years that climate change is real and that the burning of fossil fuels contributes to climate change. Exxon scientists, as far back as the Carter administration, spoke with industry trade associations about how climate change was a real, man-made phenomenon. Despite this internal knowledge, Exxon, until very recently, has publically stated the opposite. Exxon worked to publically "challenge" the emerging scientific consensus on climate change, and consistently assured investors that "climate change" was a fictitious idea that would not affect Exxon's bottom line. Exxon did not publically disclose its growing internal reservoir of evidence to the contrary. Exxon internally knew one thing, but publically represented the opposite—all for pecuniary gain.

Tiefer:

I have familiarized myself with the materials cited by the various correspondence and submissions. It is perfectly natural to understand how Exxon conducted extensive studies starting in the 1990s about climate change (especially, global warming). Exxon had extensive drilling interests and opportunities in the Arctic that would be developed and productive over a 35-40 year period. There was every reason for Exxon to study whether the Arctic ice cover would shrink, as it has, and the cumulative effect of the shrinking of the ice cover together with the other aspects of climate change. There was every reason, in short, for Exxon to conduct studies about how bad climate change would become.

On the other hand, it is startling that Exxon would take the public stance it has – of a climate denier, not just in the 1990s, but even now, when those studies have been proven right by such things as the already-occurring changes in Arctic climate. There is no understanding why Exxon would represent a climate-denying story to its stockholders, among others in the public – any more than it can be understood why it would tell any other trail of falsehoods in that way. Of course, it is the regular business of the New York State Attorney General to get to the bottom of

such a combination of documented corporate knowledge and the knowing corporate issuance of such falsehoods.

Question 3 for Professor Charles Tiefer

Professor Tiefer, do you believe what the State Attorney Generals are looking at is justified and reasonable from a legal perspective?

Tiefer:
So, yes, I believe that what the State Attorneys General are looking at is justified and reasonable from a legal perspective.

Appendix II

Additional Material for the Record

DOCUMENTS SUBMITTED BY COMMITTEE RANKING MEMBER
EDDIE BERNICE JOHSNON

Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 • Olympia, WA 98504-0100

May 31, 2016

The Honorable Lamar Smith
Chairman, Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515-6301

RE: Request for Attorney General's Office Communications Related to Climate Change Investigations

Dear Chairman Smith:

This letter responds to your May 18, 2016, correspondence requesting information from the Washington State Attorney General's Office. You requested our office's communications with other states, the federal government and third parties related to any investigations or potential prosecutions of various companies, organizations and individuals on the topic of climate change. We respectfully decline to provide the requested information to you. The Attorney General is authorized by the Washington Legislature to conduct investigations into potential violations of state law. Neither Congress, nor the Committee, has authority to interfere with the Attorney General's implementation of such authority. Moreover, the information you seek is privileged.

The Washington State Attorney General has authority granted by the laws of the State of Washington to take all necessary actions to fulfill the duties of the office. Wash. Const. art. III, § 21 (designating the attorney general as the legal adviser of the state officers, and the official who shall perform duties as may be prescribed by law); Wash. Rev. Code § 43.10.030 (2016) (authorizing the attorney general to institute all actions and proceedings necessary to execute the duties of the office). These authorities extend to statutory grants of subpoena power to investigate violations of law related to climate change. *See, e.g.*, Wash. Rev. Code § 19.86.110.

Congress has certain enumerated powers to govern the individual citizens of the United States; however, the Constitution does not authorize Congress to require the States to govern according to Congress' instructions. *New York v. United States*, 505 U.S. 144, 162 (1992) (citing *Coyle v. Smith*, 221 U.S. 559, 565 (1911)). The Constitution divides

authority between federal and state governments for the protection of individuals in order to secure to citizens the liberties that derive from the diffusion of sovereign power. *New York v. United States*, 505 U.S. at 181 (citing *Coleman v. Thompson,* 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

There is nothing in law that authorizes Congress or the committee to require a state official such as the Attorney General to turn over information about the State of Washington's coordination with other states, or any related investigation of violations of state law related to climate change.

Moreover, the information you request would be privileged and protected from dissemination under common interest, work product, deliberative process, investigative, and attorney-client privileges.

To ensure effective implementation of our authorities under law, the Attorney General's Office does not discuss whether we are or will be investigating any particular matter, nor share information related to the same.

Though we respectfully decline your request for information as tendered, Washington State has a Public Records Act. Wash. Rev. Code 42.56 (2016). We are not construing your request as invoking the Public Record Act, since you are not a typical requester under the Act. However, if you wish us to treat your request under the Public Records Act we will certainly do so, and provide whatever information is not otherwise exempt from disclosure under the Act.

If you have any questions regarding this matter, please contact me at (360) 664-2961.

Sincerely,

ROB COSTELLO
Deputy Attorney General

RC/jlg

cc: The Honorable Eddie Bernice Johnson
Ranking Member, Committee on Science, Space, and Technology

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

June 17, 2016

The Honorable Robert W. Ferguson
Attorney General
State of Washington
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100

Dear Attorney General Ferguson,

Thank you for your May 31, 2016, response. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[1] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[2] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] However, Congress' investigatory power is not without limits.[4] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.
[3] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[4] *Watkins v. U.S.*, 354 U.S. 178 (1957).

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[5] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[6] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[7] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[8] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[9] organizations that violate the civil rights of individuals,[10] state agencies involved in the Hurricane Katrina response,[11] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138 billion to fund research and development.[12] Of that total federal spending, approximately $40 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of

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[5] *McGrain* at 177, 181-182.
[6] *See McGrain*, 273 U.S. at 177, 181-182.
[7] *Eastland* at 509.
[8] CRS Report at 26.
[9] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[10] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[11] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[12] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

the Science Committee that offices such as yours and those similarly situated should not be taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued and contemplated by members the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes**, but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[13]

This statement suggests that his office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, he is saying that if his office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.

Additionally, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[14] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions

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[13] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available at* http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[14] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

and those of your fellow attorneys general indeed are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of Washington and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Washington and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Washington and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Rep. Lamar Smith
Chairman

Frank D. Lucas
Rep. Frank D. Lucas
Vice Chairman

The Honorable Robert W. Ferguson
June 17, 2016
Page 5

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

Ms. May Boeve
Executive Director
350.org
20 Jay St, Suite 732
Brooklyn, NY 11201

Dear Ms. Boeve,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced that they were cooperating on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based not on sound legal or scientific arguments, but rather on a long-term strategy developed by political activist organizations such the Union of Concerned Scientists. To assist in the Committee's oversight of this matter, we are writing to request information related to your organization's role in developing and coordinating the recent actions taken by a number of state attorneys general.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[2] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La Jolla, California.[3] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff.[4]

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

[3] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at*

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[5] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[6] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents may exist):"[7]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[8]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between Attorneys General Offices and Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists met at the Manhattan offices of the Rockefeller Family Fund.[9] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[10] According to media reports, the meeting also

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http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[4] *Id.*

[5] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages,* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[6] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[7] *Id.* [emphasis added]

[8] *Id.* [emphasis added]

[9] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe,* WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.

[10] *Id.*

included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[11] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[12]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference, members of the Green 20 were briefed by 2012 workshop attendees including UCS's Peter Frumhoff and Matthew Pawa, an attorney and founder of the Global Warming Legal Action Project. It has since come to light that the New York Attorney General's office attempted to willfully conceal the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa, wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[13] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[14]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[15]

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of the current Green 20 investigations. Their actions appear to be the result of a long-standing, coordinated effort by activist groups such as UCS to target industrial, non-profit, and scientific organizations and individuals who question the activist groups' conclusions.

To assist the Committee in its oversight of this infringement on the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from

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[11] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund*, Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*

[12] *Id.*

[13] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show*, WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

[14] *Id.*

[15] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions*, WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

intimidation and threats of prosecution, we request the following documents and information as soon as possible, but no later than noon on June 1, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between employees of your organization and any office of a state attorney general referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between employees of your organization and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, Greenpeace, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Rep. Lamar Smith
Chairman

Frank D. Lucas
Rep. Frank D. Lucas
Vice Chairman

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Dana Rohrabacher
Rep. Dana Rohrabacher
Member of Congress

Ms. May Boeve
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Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
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cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

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WRITER'S EMAIL ADDRESS
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June 1, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

We write on behalf of 350.org in response to your letter of May 18, 2016, signed by certain members of the House Committee on Science, Space and Technology ("HCSST"). The letter selectively describes some of the background relating to investigations by a number of states, through their Attorneys General, into potential securities violations and fraud (the "State Investigations") by companies that may have intentionally misled the markets, the public, and state governments regarding the causes of climate change and the risks upon business. The letter requests that 350.org provide to HCSST "[a]ll documents and communications" referring or relating to the State Investigations (1) between its employees and any office of a state attorney general, and (2) between its employees and listed non-profit organizations.

350.org is a non-profit organization founded in 2008 with the express purpose of building awareness about the urgency of climate change, based on sound science and principles of equity. Since that time, it has been engaged in efforts to educate, mobilize, and connect people all over the world who are concerned about the issue. This outreach and advocacy includes engaging with government to encourage the enforcement of laws and working with other advocacy groups when that will increase the effectiveness of its advocacy.

Your request that 350.org disclose all communications with the highest state law enforcement officials and with other individuals and organizations about its advocacy on climate change strikes at the heart of the protections of the First Amendment of the U.S. Constitution. 350.org has a constitutional right to speak out on issues, to associate with others in order to advocate more effectively, and to petition federal and state government. We appreciate that the views and positions of 350.org on climate change, informed by the overwhelming consensus of scientists, may differ from that of the members of the HCSST who signed the letter. Yet the right to petition government and to disagree with certain government officials is a core value protected by the First Amendment. Because your letter does not and cannot provide any legitimate justification for this infringement upon First Amendment rights, our client respectfully

declines to provide documents in response.

350.org has nothing to hide from the HCSST or any congressional committee. In many ways, it would be easier simply to produce documents than to object. But in a democracy built on principles and the rule of law, 350.org cannot in good faith comply with an illegitimate government request that encroaches so fundamentally on its and its colleagues' protected constitutional rights. Committee staff were gracious enough to meet with us briefly as an introduction, and we would appreciate the opportunity to discuss more fully the basis of our good-faith position that your request falls outside the scope of permissible inquiry. To facilitate such a discussion, we outline below the legal grounds of our response.

First, freedom of speech, freedom of association, and the right to petition the government constitute the very foundations of our democracy. As the Supreme Court of the United States has held: "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." Snyder v. Phelps, 562 U.S. 443, 452 (2011) (internal quotation marks omitted). The same is true for freedom of association: "the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed." Knox v. Serv. Employees Int'l Union, Local 1000, 132 S. Ct. 2277, 2288 (2012). Moreover, the "right to petition [the government is] one of the most precious of the liberties safeguarded by the Bill of Rights" because "the right is implied by the very idea of a government, republican in form." BE&K Constr. Co. v. NLRB, 536 U.S. 516, 524-25 (2002) (internal quotation marks omitted).

As you are aware, there is a long and well-established history of courts protecting First Amendment rights against unjustified congressional inquiry. "[T]he constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. . . . Nor can the First Amendment freedoms of speech, press, religion or political belief and association be abridged." Watkins v. United States, 354 U.S. 178, 188 (1957); see also United States v. Rumely, 345 U.S. 41, 46 (1953). Courts have balanced First Amendment rights with the needs of discovery by holding that the First Amendment creates a qualified privilege from disclosure of certain information. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462-63 (1958). If there is a reasonable probability that the disclosure will chill First Amendment rights, then it can be justified only by a compelling need for the requested information. See Perry v. Schwarzenegger, 591 F.3d 1147, 1161 (9th Cir. 2010).

In applying this balancing test, the Supreme Court has held that required disclosure of membership lists infringes the First Amendment freedom of association. See NAACP, 357 U.S. at 466. Courts have consistently applied the same principle to disclosure of the communications of advocacy groups. "Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private. Compelling disclosure of internal campaign communications can chill the exercise of these rights." Perry, 591 F.3d at 1162-63 (footnote omitted). Where the government "compels public disclosure of an association's confidential internal materials, it intrudes on the privacy of association and belief guaranteed by the First Amendment, as well as seriously interferes with internal group operations and effectiveness." AFL-CIO v. FEC, 333 F.3d 168, 177-78 (D.C. Cir. 2003) (internal quotation marks and citation omitted).

These fundamental rights, central to the Bill of Rights and repeatedly affirmed by the Supreme Court, are squarely implicated by your letter, which self-evidently seeks to chill and suppress the expression of views on climate change and corporate action, and related petitions for government action, that are inconsistent with those of the signatories of the letter. There is also no question of the public importance of the issues at stake, which implicate national security, public health, poverty, pollution, extreme weather events, and rising sea levels, among others. Further, the chilling effect on First Amendment rights extends beyond 350.org to that of other associations and individuals who are less able to resist similar demands.

Second, the letter does not and cannot express a legitimate basis for the requested information, let alone the compelling need that would be required to justify the infringement of First Amendment rights. As the Supreme Court has stated, "[t]here is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress." Watkins, 354 U.S. at 187.

The principal rationale that your letter puts forward is that the speech and petitions of 350.org somehow threaten the First Amendment rights of unnamed "companies, nonprofit organizations, and scientists" who hold contrary views. But communications made by employees of a private organization cannot violate anyone's First Amendment rights under the well-established "state action" doctrine. See, e.g., Hudgens v. NLRB, 424 U.S. 507, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."). The exercise of freedom of speech, freedom of association, and the right to petition states' attorneys general is an affirmation of First Amendment rights, not an abridgment. 350.org exercises core First Amendment rights when it expresses its positions and opinions about climate change and corporate conduct to public officials and other individuals and organizations, including views as to the securities fraud or other misconduct by corporate actors.

The request also constitutes a legally impermissible interference with state autonomy. According to your letter, the rationale behind the request is a disagreement with state investigations and prosecutions by sovereign states, through their Attorneys General. Here we agree with the Office of the Attorney General of the State of New York, for the reasons stated in its letter dated May 26, 2016, that your committee cannot interfere with state investigations and prosecutions. As the Supreme Court has long recognized, "[f]ederal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework." Cameron v. Johnson, 390 U.S. 611, 618 (1968) (internal quotation marks omitted); see also Younger v. Harris, 401 U.S. 37 (1971) (creating abstention rule for federal courts where state criminal prosecution is ongoing); Printz v. United States, 521 U.S. 898, 924 (1997) ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts . . . .") (internal quotation marks and citation omitted). Because you cannot interfere directly with state investigations and prosecutions, you cannot do so indirectly by requesting communications from private organizations with state attorneys general or others about state investigations and prosecutions.

Finally, the request is unreasonably onerous, as it concerns "[a]ll documents and communications" over a period of many years, regardless as to form. Given the enormous scope of the request, it would essentially function as a punishment for 350.org's exercise of its First Amendment rights, without any legitimate governmental interest to justify it.

In light of the extraordinary scope of your request and the vital constitutional rights that would be imperiled by compliance, 350.org respectfully refuses to comply with the request. We would appreciate the opportunity to discuss these legal issues with you at your convenience.

Very truly yours,

Faith E. Gay

Faith E. Gay
Philippe Z. Selendy
Jennifer M. Selendy
David M. Cooper

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New York, New York 10010

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Quinn Emanuel Urquhart & Sullivan, LLP

cc: Honorable Eddie Bernice Johnson Counsel
Ranking Member, Committee on Science, Space, and Technology

Majority Staff, Committee on Science, Space, and Technology
Rayburn House Office Building, Room 2321

Minority Staff, Committee on Science, Space, and Technology
Ford House Office Building, Room 394

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
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Congress of the United States
House of Representatives

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June 17, 2016

Ms. Faith E. Gay
Quinn Emanuel
51 Madison Avenue, 22nd Floor
New York, New York 10010

Dear Ms. Gay,

Thank you for your June 1, 2016, response. The House Science, Space, and Technology Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with the contentions in your letter. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that your client provides the documents and information previously requested in our May 18, 2016, letter.[1]

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[2] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[3] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[4] However, Congress' investigatory power is not without limits.[5] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast

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[1] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.
[2] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[3] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23 [hereinafter CRS Report, RL30240].
[4] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[5] *Watkins v. U.S.*, 354 U.S. 178 (1957).

and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[6] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[7] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[8] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[9] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[10] organizations that violate the civil rights of individuals,[11] state agencies involved in the Hurricane Katrina response,[12] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138.069 billion to fund research and development.[13] Of that total federal spending, $31.8 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and

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[6] *McGrain* at 177, 181-182.
[7] *See McGrain*, 273 U.S. at 177, 181-182.
[8] *Eastland* at 509.
[9] CRS Report, RL30240 at 26.
[10] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[11] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[12] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[13] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of the Science Committee that organizations such as your client's and those similarly situated should not be inciting legal action based on debatable science to undermine the First Amendment of the Constitution.

The investigative efforts supported by your client and other similar organizations are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes,** but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[14]

This statement suggests that the Attorney General's office and those who support his actions will be deciding what science is valid and what science is invalid. In essence, the attorney general is saying that if he disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Congress has a duty to protect scientists and researchers from the criminalization of scientific inquiry.

Accordingly, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of these investigations, Congress can investigate the effects your client's advocacy may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[15] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your client's efforts and those of the so called "Green 20"

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[14] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available* at http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[15] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your client's actions are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The website of the Union of Concerned Scientists, one of the organizations now supporting the Green 20's investigations, describes a 2010 investigation by the Virginia Attorney General of a University of Virginia scientist as "a campaign of harassment," and "a threat[] [to the] the ability of scientists in Virginia to ask tough questions about our world—and pursue contentious lines of research." The current efforts by the Green 20, supported by your client's organization, appear to be no different.[16]

The First Amendment is Not a Shield to Congressional Inquiry

Unlike the Fifth Amendment, the First Amendment is not an impermeable shield to Congressional investigations. In *Barenblatt v. United States,* the Supreme Court stated "where the First Amendment rights are asserted to bar government interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[17] Moreover, when balancing the interests of the parties in *Watkins v. United States*, the Court held "the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness."[18] These cases are important precisely because they provide examples of congressional investigations – sustained by the Supreme Court – involving organizations similar to those of your client. The parties being investigated in the cases noted above are no different than the recipients of the Science Committee's May 18 letter.

Congress frequently and rigorously has investigated private citizens and advocacy groups for various types of conduct. In almost all instances these investigations have withstood judicial scrutiny, with little, if any, restriction imposed upon them. Recently, the Democratic Chairman of the House Oversight and Government Reform Committee, Henry Waxman, investigated numerous charities benefiting veterans.[19] When the founder of one of the charities under investigation failed to comply with Chairman Waxman's request for documents and testimony, the Chairman issued a subpoena compelling the necessary information.[20] Eventually, the

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[16] Union of Concerned Scientists, Center for Science & Democracy, *Science under Attack: Legal Harassment of Climate Scientist Michael Mann available at* http://www.ucsusa.org/center-science-and-democracy/protecting-scientists-harassment/cuccinelli-mann.html#.VImpBfkrKUk (last visited June 9, 2016).
[17] *Barenblatt v. U.S.*, 360 U.S. 109, 126 (1959).
[18] *Watkins v. U.S.*, 354 U.S. 178, 198 (1957).
[19] Philip Rucker, *Panel Probes Spending of Veterans Charities*, WASH. POST, Dec. 14, 2007.
[20] Matthew Jaffe and Rhonda Schwartz, *Director of Veterans Charity in Hiding*, MILITARY.COM *available at* http://www.military.com/NewsContent/0,13319,158246,00.html (last visited June 9, 2016).

Oversight Committee received all documents, information, and testimony as part of that congressional investigation.[21]

The Committee's Document Requests

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between employees of your organization and any office of a state attorney general referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between employees of your organization and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, 350.org, the Rockefeller Brothers Fund, Greenpeace, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. Dana Rohrabacher
Member of Congress

[21] Philip Rucker, *Chief of Veterans Charities Grilled on Groups' Spending*, WASH. POST, Jan. 18, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/01/17/AR2008011703620.html (last visited June 9, 2016).

Ms. Faith E. Gay
June 17, 2016
Page 6

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

chadbourne

Abbe David Lowell
direct tel +1 202 974 5605
adlowell@chadbourne.com

Chadbourne & Parke LLP
1200 New Hampshire Avenue NW
Washington, DC 20036
telephone: (202) 974-5600

June 24, 2016

VIA HAND DELIVERY

The Hon. Lamar S. Smith
Chairman
Committee on Science, Space, and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515-6301

Re: June 17, 2016 Letter

Dear Chairman Smith:

On behalf of Greenpeace USA and 350.org, we write in response to the Committee's June 17, 2016 letter. As the Committee appears to have written the same letter to each of the recipients of its document requests, a joint response to the Committee's latest letter is in order.

As you know, Greenpeace and 350.org are private organizations committed to addressing climate change. Although the Committee's letter describes the science underlying climate changes as "debatable," 6/17/16 Letter at 3, scientists from around the world are now more certain than at any other point in history that climate change exists, and that it is caused by humans. Since 1901, the planet has warmed, on average, at least 1.6 degrees Celsius. We have already seen the damage and loss that warming has caused. Those same scientists tell us that without the necessary shift away from fossil fuels, warming will continue and the future damage we are facing is unprecedented. The science is certain; remedial policy must follow it.

Despite the fact that Greenpeace USA and 350.org are private organizations engaged in education and advocacy regarding the public issue of climate change, the Committee's letter persists in requesting that these private organizations turn over their constitutionally-protected communications regarding climate change to the Committee. For the reasons set forth below, we respectfully object to the Committee's requests and decline to provide the requested materials.

I. The Committee Lacks Jurisdiction Over the Requested Materials

As the Committee itself acknowledges, the investigatory power of Congress is broad but not unlimited. *See* 6/17/16 Letter at 1. "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress.... No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of

the Congress." *Watkins v. United States*, 354 U.S. 178, 187 (1957). "Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government." *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959). "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Watkins*, 354 U.S. at 187.

As Greenpeace and 350.org explained in their June 1 letters, the Committee lacks jurisdiction over the subject matter of the present inquiry—namely, ongoing investigations by state attorneys general regarding whether one fossil fuel company (ExxonMobil) broke securities and consumer fraud laws by misrepresenting to the public what it knew about climate change. Contrary to the assertions in the Committee's June 17 letter, neither the state attorneys general leading these investigation nor the private environmental organizations singled out in the Committee's letter "will be deciding what science is valid and what science is invalid," or opining on the validity of scientific research conducted with taxpayer dollars. Rather, based on the statements of Attorney General Schneiderman quoted in the Committee's own letter, *see* 6/17/16 Letter at 3, the investigations are focused on whether ExxonMobil told the public, regulators, and shareholders one thing about climate change when it knew, based upon its own research, that the opposite was true. We are not aware of any House Rule conferring jurisdiction upon the House Committee on Science, Space, and Technology to investigate these types of state criminal or law enforcement proceedings, and the Committee's letter does not identify any such provision.

Rather, the Committee asserts that it has jurisdiction to investigate the state attorneys general investigations due to the speculative, indirect "effects" of the ongoing state investigations on scientific research. *See* 6/17/16 Letter at 3 ("Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change."). The Committee's requests, however, do not seek information regarding this purported "chilling effect," but rather appear designed to chill the very speech of those organizations advocating meaningful governmental action on climate change. Similarly, the Committee asserts that it is conducting an investigation "relating to scientific research ... with the intent of providing a legislative remedy, if warranted." 6/17/16 Letter at 4. The Committee's earlier letter (and the accompanying document requests) belie any such suggestion, as those materials make clear that the focus of the Committee's investigation is not "scientific research," but rather certain state attorneys general and environmental organizations who have questioned public statements made by the fossil fuel industry. Any "legislative remedy" to the problem of state attorneys general investigating ExxonMobil for securities and consumer fraud would plainly violate the Constitution. *See Cameron v. Johnson*, 390 U.S. 611, 618 (1968) ("Federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework." (internal quotation marks omitted)).

II. The Committee's Requests Violate the First Amendment

As the Committee also acknowledges, *see* 6/17/16 Letter at 4, Congress' investigatory power is further limited by the freedoms afforded private citizens under the First Amendment. "Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly." *Watkins*, 354 U.S. at 197. Because "speech on public issues occupies the highest rung of the hierarchy of First Amendment values," the right of Greenpeace, 350.org, and similar organizations to advocate in favor of meaningful action to address climate change is entitled to "special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Thus, contrary to the broad assertions in the Committee's letter, the mere fact that Congress "frequently and rigorously has investigated private citizens and advocacy groups" in the past does not mean that the present investigation is constitutional. 6/17/16 Letter at 4. "[T]here is no congressional power to expose for the sake of exposure." *Watkins*, 354 U.S. at 200.

"Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." *Barenblatt*, 360 U.S. at 126. In any such balancing, "[t]he first question is whether [the] investigation was related to a valid legislative purpose." *Id.* at 127; *see also Watkins*, 354 U.S. at 198-99 ("[W]hen First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter."). "We cannot simply assume ... that every congressional investigation is justified by a public need that overbalances any private rights affected." *Watkins*, 354 U.S. at 199. Rather, the specific interests of the parties much be "judged in the concrete, not on the basis of abstractions." *Barenblatt*, 360 U.S. at 112.

As Greenpeace and 350.org explained in their prior letters, the Committee's requests violate the First Amendment for at least two reasons. First, as noted above, the Committee lacks jurisdiction over the subject matter identified in the requests. The requests thus fail at the first step of the balancing inquiry because they are not related to a valid legislative purpose. *See Watkins*, 354 U.S. at 206 ("[Congressional committees] are restricted to the missions delegated to them, i.e., to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere. No witness can be compelled to make disclosures on matters outside that area.").

Second, the "public interests" in disclosure asserted by the Committee are far too speculative and attenuated to outweigh the private interests of Greenpeace and 350.org to speak freely, to assemble, and to petition the government on climate change. Although the Committee theorizes ("the possibility exist[s]") that the state attorney general investigations of ExxonMobil "*could* have a chilling effect on scientists performing federally funded research" and "*could* infringe on the civil rights of scientists who become targets of these inquiries," 6/17/16 Letter at 3 (emphasis added), such speculative "abstractions" are insufficient to justify disclosure under the First Amendment. *Barenblatt*, 360 U.S. at 112. Moreover, if the Committee is truly interested in investigating this potential "chilling effect,"

the Committee has far less intrusive means of inquiry at its disposal—it can simply request information from those scientists whose speech could possibly be chilled. The Committee's letter, however, contains no evidence of any such chilling effect, nor does it explain how the speech of scientists performing federally funded research might be chilled by private communications between an environmental organization and a state law enforcement authority, or between two private environmental organizations.[1] In the absence of any "concrete" public interest, the constitutional balance plainly weighs in favor of the private interests of Greenpeace and 350.org to resist disclosure.

III. The Committee's Requests Are Impermissibly Vague, Overbroad, and Burdensome

Finally, the Committee's June 17 letter does not address several of our objections to the form and overbreadth of the Committee's requests. As both Greenpeace and 350.org explained in their June 1 letters, the Committee's requests for "all" documents and communications over a four-and-a-half year period "relating to" possible prosecutions "related to" the issue of climate change are vague, overbroad, and unreasonably onerous. *See* A. D. Lowell 6/1/16 Letter at 3; F. Gay 6/1/16 Letter at 4. The Committee has not made any effort to clarify or narrow its requests.

Similarly, Greenpeace requested clarification from the Committee that the signatories of the letter complied with the Committee's Rules regarding meetings, quorums, and other matters of procedure, and that the Committee did not intend for recipients of its requests to disobey any applicable privilege. *See* A. D. Lowell 6/1/16 Letter at 3. The Committee's response is silent on these matters as well. We therefore renew our objections to the content and form of the Committee's requests, which are not tailored to any legitimate congressional purpose but rather indiscriminately seek broad categories of private, First Amendment-protected material.

* * *

Greenpeace and 350.org remain committed to cooperating with any authorized and legitimate inquiry of Congress into climate change, one of the most pressing issues of our time. The Committee's requests, however, violate the First Amendment, fall outside the

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[1] The Committee's request for all documents and communications between employees of several private organizations is particularly offensive to the First Amendment, as such communications are wholly private and unrelated to state action.

proper jurisdiction of the Committee, and are impermissibly vague, overbroad, and burdensome. For these reasons, Greenpeace and 350.org respectfully refuse to comply with the Committee's requests.

Sincerely,

Abbe David Lowell

cc: Ranking Member Eddie Bernice Johnson

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

July 6, 2016

Mr. Abbe David Lowell
Chadbourne & Parke LLP
1301 Avenue of the Americas
New York, NY 10019

Dear Mr. Lowell,

The Committee on Science, Space, and Technology is in receipt of your June 24, 2016, response to its request for information related to ongoing oversight of coordinated attempts to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. This response marks the second time your clients, Greenpeace USA and 350.org, have refused to produce documents in response to oversight letters signed by 17 Members of the Committee. Further, your office has not attempted to engage the Committee in a dialogue related to our requests. This is disappointing. I urge you and your clients to engage with the Committee as soon as possible to discuss the Committee's requests.

The Committee maintains its authority to investigate your clients' activities and communications with various state attorneys general and other non-profit organizations. As previously stated in the Committee's June 17, 2016, letter, this authority is grounded in both the Constitution and rules of the U.S. House of Representatives.[1] The Committee maintains that the First Amendment, as interpreted by the Supreme Court, is not an impenetrable shield to Congressional inquiry.[2] Moreover, the Committee is concerned that the objections raised in your June 24, 2016, letter appear to selectively apply the law based solely upon the political party to which your clients and affiliated groups supply information.

On June 22, 2016, the House Progressive Caucus held a forum entitled "Oil is the New Tobacco." The forum was attended by (i) multiple members of the Union of Concerned Scientists (UCS), specifically Ms. Kathy Mulvey and Mr. Peter Frumhoff, (ii) Dr. Naomi Oreskes, founder of the Climate Accountability Institute (CAI), as well as (iii) other participants

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] *Watkins v. U.S.*, 354 U.S. 178, 198 (1957); *Barenblatt v. U.S.*, 360 U.S. 109, 126 (1959).

in the 2012 La Jolla Conference – an event also attended by your clients.[3] During the forum, Rep. Paul Tonko (D-NY), asked: "Have any of you had interactions with the any of the AGs?"[4] Both Dr. Oreskes of CAI and Ms. Mulvey of UCS responded in a candid and forthcoming manner about the assistance and information that they and their organizations have provided to the attorneys general investigating companies, scientists, and non-profit groups.[5] It appears that your clients' affiliates have no First Amendment concerns providing information to Members of the House Progressive Caucus; yet, continually and improperly refuse to provide any information to this Committee. That your clients' affiliates appear to have cast aside any First Amendment concerns when interacting with the Members of the House Progressive Caucus, but purport to be unwilling to provide this Committee similar information is, at minimum, concerning. It is clear that Members on both sides of the aisle have legitimate questions regarding the activities of your clients with regard to the assistance provided to the attorneys general, and I urge you to reconsider your unwillingness to provide information to the Committee.

Accordingly, the Committee reiterates its May 18, 2016, requests and asks that your clients produce responsive documents and communications to the Committee on or before July 13, 2016, at 12:00 p.m. As explained in detail in the Committee's June 17, 2016, letter, this request is a legitimate exercise of the Committee's oversight duties under the Constitution and the Rules of the House.

If your clients continue to refuse to provide information responsive to the Committee's requests on a voluntary basis, I will be left with no alternative but to utilize the tools delegated to the Committee by the Rules of the House of Representatives. Specifically, the Committee will consider use of compulsory process to obtain responsive documents in the possession, custody, or control of your clients.

At any point, I welcome the opportunity to discuss the Committee's request with you or your staff. To arrange a meeting or discuss matters over the phone prior to July 13, 2016, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

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[3] Congressional Progressive Caucus Facebook Page Video release entitled *LIVE: CPC & SEEC Forum "Oil Is The New Tobacco" available at* https://www.facebook.com/USProgressives/ (last visited July 1, 2016).

[4] *Id.*

[5] *Id.*

chadbourne

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1200 New Hampshire Avenue NW
Washington, DC 20036
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Abbe David Lowell
direct tel +1 202 974 5605
adlowell@chadbourne.com

July 13, 2016

VIA HAND DELIVERY

The Hon. Lamar S. Smith
Chairman
Committee on Science, Space, and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515-6301

Re: July 6, 2016 Letter

Dear Chairman Smith:

On behalf of Greenpeace USA and 350.org, we write in response to your July 6, 2016 letter. The July 6th letter misstates and mischaracterizes the grounds upon which Greenpeace and 350.org have declined to provide the constitutionally-protected communications requested by the Committee, and altogether fails to address several of the objections raised in our prior letters. We therefore write this letter to correct your mischaracterizations and to reiterate our objections to the Committee's requests.

First, the July 6th letter asserts that Greenpeace and 350.org "[have] not attempted to engage the Committee in a dialogue related to [the Committee's] requests." 7/6/16 Letter at 1. That is false. In our very first response, on June 1, we offered to meet with the Committee and its staff to further discuss these issues. *See* A.D. Lowell 6/1/16 Letter at 4; F. Gay 6/1/16 Letter at 2, 4. More than six weeks later, the Committee has yet to take us up on this offer. Moreover, this is the third letter in which we have engaged in "dialogue" with the Committee regarding its requests. To date, the Committee has yet to provide a meaningful response to many of the specific objections that we have raised.

Second, the July 6th letter asserts—without citation or explanation—that Greenpeace's and 350.org's objections to the Committee's requests "appear to selectively apply the law based solely upon the political party to which [Greenpeace and 350.org] and affiliated groups supply information." This, again, is incorrect. The First Amendment guarantees the rights of all private citizens to speak or not to speak, to petition or not to petition, and to associate or not to associate with, whomever they choose. The fact that who or what you call an "affiliate" of Greenpeace or 350.org decides to speak with, petition, or associate with some elected officials (*e.g.*, Members of the House Progressive Caucus) and

not others (*e.g.*, Republican House Members accepting thousands of dollars in campaign contributions from ExxonMobil)[1] does not mean that First Amendment law is being "selectively applied." To the contrary, the freedom to choose with whom one speaks, petitions, or associates, regardless of political affiliation, lies at the very heart of the First Amendment.

Third, the July 6th letter asserts that "Members on both sides of the aisle have legitimate questions" regarding Greenpeace's and 350.org's work on climate change (although, to our knowledge, all of your prior letters and requests have been signed only by Republican Members). As we have stated in both of our prior letters, Greenpeace and 350.org remain committed to cooperating with any authorized and legitimate inquiry of Congress into climate change, one of the most pressing issues of our time.

Your continued insistence, however, that Greenpeace and 350.org should cast aside their First Amendment protections and voluntarily provide broad categories of private, constitutionally-protected communications to the Committee raises several questions regarding with whom some Members of the Committee may, to use your term, be "affiliated." Based on the partisan tone of the July 6th letter, we are concerned that the true purpose of the Committee's requests is not to examine the science of climate change, but rather to silence those who would shine a spotlight on the role of the fossil fuel industry, and ExxonMobil in particular, in undermining climate science and blocking and delaying meaningful action on climate change.

If we are able to agree upon an appropriate, bipartisan meeting with the Committee, we can discuss the issues we have raised in our letters and would also have some questions of our own: Have Committee Members or staff had private meetings with ExxonMobil or fossil fuel industry lobbyists to discuss the state and territorial attorneys general investigations? Is the Committee consulting with any outside counsel that also have ties to ExxonMobil or the fossil fuel industry? Has ExxonMobil or any other implicated entity provided information to the Committee regarding the state attorneys general investigations, or been asked to do so? Have Committee Members or staff discussed this investigation with other fossil fuel companies, industry front groups, trade associations, foundations, public relations firms, nonprofits, think tanks, or other allied organizations, such as the American Petroleum Institute, the Competitive Enterprise Institute, the American Legislative Exchange Council, or the Energy and Environment Legal Institute? In addition to any direct contributions, how

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[1] *See* Andrew Seifter, *What Media Should Know About the House Science Committee Members Defending Exxon*, Media Matters for America, June 21, 2016, *available at* http://mediamatters.org/research/2016/06/21/what-media-should-know-about-house-science-committee-members-defending-exxon/210539.

much money or other support have Committee Members received from ExxonMobil, the fossil fuel industry, related PACs, and industry front groups, such as those named above? If Committee Members are truly concerned about the right of scientists to conduct scientific research "free from intimidation and threats of prosecution," 7/6/16 Letter at 1, why did the Chair of the Committee previously subpoena the chief of NOAA, a scientist herself, demanding that her agency turn over thousands of pages of emails and communications? How is this not chilling speech?

The requests served upon Greenpeace and 350.org simply cannot be squared with the Committee's stated concerns regarding freedom of speech and scientific inquiry. As we have explained in detail in our prior letters to the Committee, the Committee's requests violate basic First Amendment protections, fall outside the proper jurisdiction of the Committee, and are impermissibly vague, overbroad, and burdensome. For these reasons, Greenpeace and 350.org respectfully refuse to comply with the Committee's requests.

If the Committee is serious about having a further "dialogue," please let me know.

Sincerely,

Abbe David Lowell

cc: Ranking Member Eddie Bernice Johnson

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Ms. May Boeve, Executive Director
350.org

You are hereby commanded to be and appear before the
Committee on Science, Space, and Technology

of the House of Representatives of the United States at the place, date, and time specified below.

☑ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: 2321 Rayburn House Office Building, Washington, D.C. 20515

Date: July 27, 2016 Time: 12:00 noon

☐ **to testify at a deposition** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

☐ **to testify at a hearing** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

To any authorized staff member or the U.S. Marshals Service

to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, D.C. this 13th day of July, 2016.

Lamar Smith
Chairman or Authorized Member

Attest:
Karen L. Haas
Clerk

SCHEDULE

In accordance with the attached schedule instructions, you, May Boeve, are required to produce the things described below:

1. All documents and communications between any officer or employee of 350.org and any officer or employee of the office of a state attorney general, referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between any officer or employee of 350.org and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, Greenpeace, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Schedule Instructions

1. In complying with this subpoena, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Subpoenaed records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this subpoena has been, or is also known by any other name than that herein denoted, the subpoena shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF") files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this subpoena shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the subpoena was served.

8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the subpoenaed information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the subpoena cannot be made in full by July 27, 2016, at 12:00 noon, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided no later than July 26, 2016, at 12:00 noon.

12. In the event that a document is withheld in whole or in part on any basis, provide a log containing the following information concerning any such document: (a) the basis for withholding the document; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. In complying with the subpoena, be apprised that the U.S. House of Representatives and the Committee on Science, Space, and Technology do not recognize: any of the purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections; any purported privileges or protections from disclosure under the Freedom of Information Act; or any purported contractual privileges, such as non-disclosure agreements.

14. If any document responsive to this subpoena was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

15. If a date or other descriptive detail set forth in this subpoena referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the subpoena, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.

16. The things described in the schedule shall be produced in their current condition, as of July 13, 2016.

17. This subpoena is continuing in nature and applies to any newly-discovered information as to the time period January 1, 2012 to July 27, 2016. Any responsive record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

18. All documents shall be Bates-stamped sequentially and produced sequentially.

19. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building.

20. Upon completion of the production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in

your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), text messages, Google chat communications or other instant message communications, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

8. "You" or "your" means and refers to you as natural person and in your capacity as Executive Director of 350.org, and any, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction in your personal capacity or at 350.org.

Abbe David Lowell
direct tel +1 202 974 5605
adlowell@chadbourne.com

chadbourne
Chadbourne & Parke LLP
1200 New Hampshire Avenue NW
Washington, DC 20036
telephone: (202) 974-5600

July 27, 2016

VIA HAND DELIVERY

RECEIVED
JUL 27 2016
COMMITTEE ON SCIENCE
& TECHNOLOGY

The Hon. Lamar S. Smith
Chairman
Committee on Science, Space, and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515-6301

Re: Formal Objections to Subpoena

Dear Chairman Smith:

On July 13, 2016, we wrote to you on behalf of Greenpeace USA and 350.org to reiterate our concerns regarding the unconstitutional requests made by the Committee and to offer, once again, to discuss those concerns with the Committee and its staff.

Within hours of the delivery of our letter (and without any further "dialogue" from the Committee that your last letter said should occur), you issued subpoenas to the Executive Directors of Greenpeace USA and 350.org demanding the production of broad categories of constitutionally-protected, private communications. No effort was made to narrow the Committee's requests, or to address the First Amendment concerns raised by Greenpeace and 350.org. Instead, during a hastily-arranged press conference, Committee Members repeated many of the same misstatements and mischaracterizations identified and addressed in our July 13 letter, without correction.

For the reasons explained in our prior letters of June 1, June 24, and July 13, which are attached and incorporated herein, we now formally object to the requests made in the Committee's subpoena because, *inter alia*, (1) the Committee's requests violate the First Amendment; (2) the Committee lacks jurisdiction over ongoing criminal investigations conducted by state law enforcement authorities; and (3) the Committee's requests are vague, overbroad, and unreasonably burdensome. Each of these objections was first raised with the Committee on June 1, 2016, and the Committee has not taken any action since that time to address these concerns or to engage in a meaningful dialogue regarding climate change.

Accordingly, for the reasons set forth above and described in our prior letters, Ms. Leonard and Ms. Boeve, as representatives of their organizations, decline to comply with the vague, overbroad, and unconstitutional demands made in the subpoena issued by the Committee.

Sincerely,

Abbe David Lowell

cc: Ranking Member Eddie Bernice Johnson

Enclosures:
A. D. Lowell 6/1/16 Letter to Chairman Smith
F. Gay 6/1/16 Letter to Chairman Smith
A. D. Lowell 6/24/16 Letter to Chairman Smith
A. D. Lowell 7/13/16 Letter to Chairman Smith

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August 19, 2016

VIA HAND DELIVERY

The Hon. Lamar S. Smith
Chairman
Committee on Science, Space, and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515-6301

Re: July 15, 2016 Subpoena

Dear Chairman Smith:

This letter will follow up on communications I have had with the Majority Staff concerning the Committee's July 15, 2016 subpoena. As you know, by letter dated July 27, 2016, on behalf of our clients, we objected to various procedural and substantive aspects of the subpoena. In this letter, as with prior correspondence, we expressed a request for and willingness to have a meeting to discuss the subpoena and the issue of climate change underlying that subpoena.

In earlier correspondence, we noted that the letter requests of the Committee were signed only by Members in the Majority, and we asked whether the Minority Members and staff were included. We did not get responses to those questions. Apparently, the subpoena was issued, also without involvement by the Minority. For the meeting we proposed and were trying to schedule, I asked your staff to consult with the Minority staff so that they could attend. Eventually, I received an email from your staff suggesting a call "to discuss [my] questions" concerning participation by the Minority. It appears the Majority staff did not want to explain in writing the Committee's dealing with the Minority Members and staff. I made that call.

During the conversation, your staff member stated that the Minority chose not to join the investigation or the requests for information and so, under "long-standing" Committee practice, the Minority would not be invited to any meeting about the document subpoena or requests. I have been involved advising clients on congressional inquiries for some time, and I have served as special counsel on congressional investigations. In the past, even in your Committee, the "practice" had been to require a full Committee vote or consent of the Ranking Member before the issuance of a subpoena. In addition, we have seen statements (e.g., July 7, 2016) from the Ranking Minority Member asking for a Committee meeting and involvement in the process.

Even if the Committee now creates a new policy of excluding its Members from its work, we do not think that is a process that achieves the stated goal of any congressional

oversight activity – to fairly explore issues of national importance like climate change. Nor is this a policy and procedure in which we can participate in good faith. Such a one-sided process also affirms the view in the public's eye that Congress has become a partisan institution that is not serious about addressing real problems.

On behalf of our clients, then, let me reiterate their willingness to participate in any fair proceedings of the Committee, including meeting with you and the Ranking Member or the staffs of the Majority and the Minority to see if we can provide information.

Sincerely,

Abbe David Lowell

cc: Ranking Member Eddie Bernice Johnson

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

Mr. Richard Heede
Board of Directors
Climate Accountability Institute
1626 Gateway Road
Snowmass, Colorado 81654

Dear Mr. Heede,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced that they were cooperating on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based not on sound legal or scientific arguments, but rather on a long-term strategy developed by political activist organizations such the Union of Concerned Scientists. To assist in the Committee's oversight of this matter, we are writing to request information related to your organization's role in developing and coordinating the recent actions taken by a number of state attorneys general.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[2] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La Jolla, California.[3] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff.[4]

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

[3] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at*

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[5] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[6] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[7]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[8]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between Attorneys General Offices and Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists met at the Manhattan offices of the Rockefeller Family Fund.[9] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[10] According to media reports, the meeting also

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http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[4] *Id.*

[5] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[6] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[7] *Id.* [emphasis added]

[8] *Id.* [emphasis added]

[9] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe*, WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.

[10] *Id.*

included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[11] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[12]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference, members of the Green 20 were briefed by 2012 workshop attendees including UCS's Peter Frumhoff and Matthew Pawa, an attorney and founder of the Global Warming Legal Action Project. It has since come to light that the New York Attorney General's office attempted to willfully conceal the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa, wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[13] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[14]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[15]

The Committee's Request for Transparency

This sequence of events -- from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of the current Green 20 investigations. Their actions appear to be the result of a long-standing, coordinated effort by activist groups such as UCS to target industrial, non-profit, and scientific organizations and individuals who question the activist groups' conclusions.

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[11] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund,* Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*
[12] *Id.*
[13] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show,* WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.
[14] *Id.*
[15] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions,* WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

To assist the Committee in its oversight of this infringement on the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but no later than noon on June 1, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between employees of your organization and any office of a state attorney general referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between employees of your organization and any officer or employee of the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Mr. Richard Heede
May 18, 2016
Page 5

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

CLIMATE
ACCOUNTABILITY
INSTITUTE

1 June 2016

The Honorable Lamar Smith
Chairman
Committee on Science, Space, and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515

Re: Response to the Committee's letter of 18 May 2016.

Dear Mr. Chairman:

The Climate Accountability Institute is in receipt of your letter dated 18 May 2016. Based on the rationale put forth in the response of the Union of Concerned Scientists, I respectfully decline your invitation to provide documents and communications to the Committee.

Respectfully,

Richard Heede

Director, CAI

Note: temporary address through August 2016:
Richard Heede, 3020 Bridgeway PMB 289, Sausalito, CA 94965

Richard Heede
heede@climateaccountability.org

Climate Accountability Institute
www.clinateaccountability.org

1626 Gateway Road, Snowmass,
Colorado, 81654, USA 970-343-0707

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
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June 17, 2016

Mr. Richard Heede
Board of Directors
Climate Accountability Institute
3020 Bridgeway PMB 289
Sausalito, CA 94965

Dear Mr. Heede,

Thank you for your June 1, 2016, response. The House Science, Space, and Technology Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with the contentions in your letter. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.[1]

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[2] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[3] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[4] However, Congress' investigatory power is not without limits.[5] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast

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[1] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.
[2] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[3] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23 [hereinafter CRS Report, RL30240].
[4] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[5] *Watkins v. U.S.*, 354 U.S. 178 (1957).

and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[6] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[7] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[8] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[9] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[10] organizations that violate the civil rights of individuals,[11] state agencies involved in the Hurricane Katrina response,[12] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138.069 billion to fund research and development.[13] Of that total federal spending, $31.8 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and

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[6] *McGrain* at 177, 181-182.
[7] *See McGrain*, 273 U.S. at 177, 181-182.
[8] *Eastland* at 509.
[9] CRS Report, RL30240 at 26.
[10] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[11] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[12] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[13] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of the Science Committee that your organization and those similarly situated should not be inciting legal action based on debatable science to undermine the First Amendment of the Constitution.

The investigative efforts supported by your organization and other similar organizations are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes,** but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[14]

This statement suggests that the Attorney General's office and those who support his actions will be deciding what science is valid and what science is invalid. In essence, the attorney general is saying that if he disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Congress has a duty to protect scientists and researchers from the criminalization of scientific inquiry.

Accordingly, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of these investigations, Congress can investigate the effects your organization's advocacy may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[15] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your organization's efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded.

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[14] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available* at http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[15] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

The Committee's investigation is intended to determine whether your organization's actions are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The website of the Union of Concerned Scientists, one of the organizations now supporting the Green 20's investigations, describes a 2010 investigation by the Virginia Attorney General of a University of Virginia scientist as "a campaign of harassment," and "a threat[] [to the] the ability of scientists in Virginia to ask tough questions about our world—and pursue contentious lines of research." The current efforts by the Green 20, supported by your organization, appear to be no different.[16]

The First Amendment is Not a Shield to Congressional Inquiry

Unlike the Fifth Amendment, the First Amendment is not an impermeable shield to Congressional investigations. In *Barenblatt v. United States,* the Supreme Court stated "where the First Amendment rights are asserted to bar government interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[17] Moreover, when balancing the interests of the parties in *Watkins v. United States*, the Court held "the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness."[18] These cases are important precisely because they provide examples of congressional investigations – sustained by the Supreme Court – involving organizations similar to yours. The parties being investigated in the cases noted above are no different than the recipients of the Science Committee's May 18 letter.

Congress frequently and rigorously has investigated private citizens and advocacy groups for various types of conduct. In almost all instances these investigations have withstood judicial scrutiny, with little, if any, restriction imposed upon them. Recently, the Democratic Chairman of the House Oversight and Government Reform Committee, Henry Waxman, investigated numerous charities benefiting veterans.[19] When the founder of one of the charities under investigation failed to comply with Chairman Waxman's request for documents and testimony, the Chairman issued a subpoena compelling the necessary information.[20] Eventually, the Oversight Committee received all documents, information, and testimony as part of that congressional investigation.[21]

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[16] Union of Concerned Scientists, Center for Science & Democracy, *Science under Attack: Legal Harassment of Climate Scientist Michael Mann available at* http://www.ucsusa.org/center-science-and-democracy/protecting-scientists-harassment/cuccinelli-mann.html#.V1mpBfkrKUk (last visited June 9, 2016).
[17] *Barenblatt v. U.S.*, 360 U.S. 109, 126 (1959).
[18] *Watkins v. U.S.*, 354 U.S. 178, 198 (1957).
[19] Philip Rucker, *Panel Probes Spending of Veterans Charities*, WASH. POST, Dec. 14, 2007.
[20] Matthew Jaffe and Rhonda Schwartz, *Director of Veterans Charity in Hiding*, MILITARY.COM *available at* http://www.military.com/NewsContent/0,13319,158246,00.html (last visited June 9, 2016).
[21] Philip Rucker, *Chief of Veterans Charities Grilled on Groups' Spending*, WASH. POST, Jan. 18, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/01/17/AR2008011703620.html (last visited June 9, 2016).

The Committee's Document Requests

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between employees of your organization and any office of a state attorney general referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between employees of your organization and any officer or employee of the Union of Concerned Scientists, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, Greenpeace, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. Dana Rohrabacher
Member of Congress

Mr. Richard Heede
June 17, 2016
Page 6

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

CLIMATE
ACCOUNTABILITY
INSTITUTE

27 June 2016

The Honorable Lamar Smith
Chairman
Committee on Science, Space, and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515

Re: Response to the Committee's letter of 17 June 2016.

Dear Mr. Chairman:

The Climate Accountability Institute is in receipt of your letter dated 17 June 2016.

The Climate Accountability Institute stands by the results of its scientific work on the historic contributions to increased atmospheric carbon dioxide and methane emissions by the world's major fossil fuel producers through their extraction and provision of carbon fuels since the 1880s to the present. Furthermore, the threat of further human-caused climate change and climate damages will be exacerbated by the production of each company's proven recoverable reserves and their commitment to invest in additional exploration, discovery, production, and marketing of carbon fuels.

This is the kind of independent scientific work the Climate Accountability Institute engages in. In the course of our scientific work we have not infringed on the First Amendment rights of other organizations, companies, trade associations, or scientists through intimidation or threat of litigation. The irony of the Committee's request has been highlighted by Ranking Member Eddie Bernice Johnson and other respondents to your inquiry.

I am an independent scientist with funding from individuals and charitable foundations. The Institute receives no funding from the Federal Government.

I do not concur with your contention that the Science Committee has oversight or legislative authority over our work, past or present, or over our collaborate work with a number of other organizations, many of which are named in your letter of 18 May 2016.

I respectfully decline your invitation to provide documents and communications to the Committee.

Sincerely,

Richard Heede

Director, Climate Accountability Institute

Cc: The Honorable Eddie Bernice Johnson
Ranking Member, Committee on Science, Space, and Technology, USHR.

Richard Heede
heede@climateaccountability.org

Climate Accountability Institute
www.climateaccountability.org

1626 Gateway Road, Snowmass,
Colorado, 81654, USA 970-343-0707

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

July 6, 2016

Mr. Richard Heede
Board of Directors
Climate Accountability Institute
3020 Bridgeway PMB 289
Sausalito, CA 94965

Dear Mr. Heede,

The Committee on Science, Space, and Technology is in receipt of your June 27, 2016, response to its request for information related to ongoing oversight of coordinated attempts to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. This response marks the second time your organization, the Climate Accountability Institute, has refused to produce documents in response to oversight letters signed by 17 Members of the Committee. Further, your office has not attempted to engage the Committee in a dialogue related to our requests. This is disappointing. I urge you and your organization to engage with the Committee as soon as possible to discuss the Committee's requests.

The Committee maintains its authority to investigate your organization's activities and communications with various state attorneys general and other non-profit organizations. As previously stated in the Committee's June 17, 2016, letter, this authority is grounded in both the Constitution and rules of the U.S. House of Representatives.[1] The Committee maintains that the First Amendment, as interpreted by the Supreme Court, is not an impenetrable shield to Congressional inquiry.[2] Moreover, the Committee is concerned that the objections raised in your June 27, 2016, letter appear to selectively apply the law based solely upon the political party to which your organization supply information.

On June 22, 2016, the House Progressive Caucus held a forum entitled "Oil is the New Tobacco." The forum was attended by (i) multiple members of the Union of Concerned Scientists (UCS), specifically Ms. Kathy Mulvey and Mr. Peter Frumhoff, (ii) Dr. Naomi Oreskes, founder of the Climate Accountability Institute (CAI), as well as (iii) other participants

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] *Watkins v. U.S.*, 354 U.S. 178, 198 (1957); *Barenblatt v. U.S.*, 360 U.S. 109, 126 (1959).

in the 2012 La Jolla Conference.[3] During the forum, Rep. Paul Tonko (D-NY), asked: "Have any of you had interactions with the any of the AGs?"[4] Both Dr. Oreskes of CAI and Ms. Mulvey of UCS responded in a candid and forthcoming manner about the assistance and information that your organization has provided to the attorneys general investigating companies, scientists, and non-profit groups.[5] It appears that your organization has no First Amendment concerns providing information to Members of the House Progressive Caucus; yet, continually and improperly refuses to provide any information to this Committee. That your organization appears to have cast aside any First Amendment concerns when interacting with the Members of the House Progressive Caucus, but purports to be unwilling to provide this Committee similar information is, at minimum, concerning. It is clear that Members on both sides of the aisle have legitimate questions regarding the activities of your organization with regard to the assistance provided to the attorneys general, and I urge you to reconsider your unwillingness to provide information to the Committee.

Accordingly, the Committee reiterates its May 18, 2016, requests and asks that your organization produce responsive documents and communications to the Committee on or before July 13, 2016, at 12:00 p.m. As explained in detail in the Committee's June 17, 2016, letter, this request is a legitimate exercise of the Committee's oversight duties under the Constitution and the Rules of the House.

If your organization continues to refuse to provide information responsive to the Committee's requests on a voluntary basis, I will be left with no alternative but to utilize the tools delegated to the Committee by the Rules of the House of Representatives. Specifically, the Committee will consider use of compulsory process to obtain responsive documents in the possession, custody, or control of your organization.

At any point, I welcome the opportunity to discuss the Committee's request with you or your staff. To arrange a meeting or discuss matters over the phone prior to July 13, 2016, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

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[3] Congressional Progressive Caucus Facebook Page Video release entitled *LIVE: CPC & SEEC Forum "Oil Is The New Tobacco" available at* https://www.facebook.com/USProgressives/ (last visited July 1, 2016).

[4] *Id.*

[5] *Id.*

CLIMATE
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INSTITUTE

13 July 2016

The Honorable Lamar Smith
Chairman
Committee on Science, Space, and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515

Re: Response to the Committee's letter of 6 July 2016.

Dear Mr. Chairman:

The Climate Accountability Institute's work has focused since its establishment in 2011 on the emissions of carbon dioxide and methane traceable to the production of oil, natural gas, and coal by major companies that provide carbon fuels to world markets with the knowledge that the waste product of combustion is carbon dioxide. CAI and our colleagues have argued in peer reviewed papers that oil and gas and coal companies have a moral and perhaps legal responsibility for climate-related damages and a burden to prevent further climate change by investing in non-carbon energy sources and to potentially keep a proportion of carbon reserves undeveloped in alignment with science-based targets for future emissions.[1]

I am, as Director of the Institute, pleased to coordinate a meeting with you, other majority members, and minority members in order to discuss the nature and results of our research findings with respect to tracing emissions of carbon dioxide to the primary producers of carbon fuels. Our work has been referred to in the press as "the ninety Carbon Majors,"[2] and in our scientific papers as "major carbon producers."[3] Our work has quantified the emissions of CO_2 and methane from the production and consumption of fossil fuels to the world's largest multinational and state-owned oil, gas, and coal companies from as early as 1854 to 2013; we are currently updating production and emissions to 2015.

CAI has not met with or otherwise discussed our quantitative and accountability work with State Attorneys General. CAI has and will continue to support legal and quantitative work regarding the attribution of greenhouse gas emissions to fossil fuel producers and the responsibility of producers to avoid emissions that will exceed safe targets for atmospheric CO_2 concentrations as determined by international scientific work. CAI is engaging with a leading international oil and gas company to strategize about an effective response to the challenge of anthropogenic climate change aligned with the internationally recognized target of a global temperature rise not exceeding 2°C. CAI is available to discuss effective

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[1] Frumhoff, Peter C., Richard Heede, & Naomi Oreskes (2015) The climate responsibilities of industrial carbon producers, *Climatic Change*, vol. 132(2):157-171; URL: link.springer.com/article/10.1007/s10584-015-1472-5.

[2] Goldenberg, Suzanne (2013) Just 90 companies caused two-thirds of man-made global warming emissions, *The Guardian*, 20 November 2013, available at: tinyurl.com/qbcbbq3.

[3] Heede, Richard (2014) Tracing anthropogenic CO_2 and methane emissions to fossil fuel and cement producers 1854-2010, *Climatic Change*, vol. 122(1): 229-241; URL: link.springer.com/article/10.1007/s10584-013-0986-y.
Heede, Richard, & Naomi Oreskes (2016) Potential emissions of CO_2 and methane from proved reserves of fossil fuels: An alternative analysis, *Global Env. Change*, vol. 36:12-20; URL: sciencedirect.com/science/article/pii/S0959378015300637.

Richard Heede
heede@climateaccountability.org

Climate Accountability Institute
www.climateaccountability.org

1626 Gateway Road, Snowmass, Colorado, 81654, USA 970-343-0707

CLIMATE
ACCOUNTABILITY
INSTITUTE

solutions to the rising threat posed by continued combustion of fossil fuels with the House Committee on Science, Space, and Technology and with any oil and gas company wishing to discuss the central role that the industry can and, in my view, should take with respect to future production of carbon fuels and investments in non-carbon energy sources and carbon offsets.

CAI will *not*, however, provide documents and communications to the Committee regarding our collaborative work with other organizations named in your request. It is my position — based on legal arguments submitted to the Committee on behalf of the Union of Concerned Scientists, Greenpeace, 350, and other NGOs, as well as by Ranking Member Eddie Bernice Johnson[4] — that your request for "documents and communications"[5] lacks jurisdictional authority and is a violation of my First Amendment rights as an independent scientist to exercise free speech and my freedom to assemble with other scientists and thinkers.

Our work has not and does not "deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution."[6] Scientists from these companies, trade associations, and think tanks are free to discuss and publish their work in peer-reviewed journals and other media. To be clear, CAI is respectful of contrarian opinions and dissenting science. We have no need, nor any ability, to intimidate these individuals, nor to threaten the First Amendment rights of ExxonMobil or other major oil and gas companies.

It is up to the courts to decide any matter of legal culpability for fraudulent statements made by oil & gas or coal companies with respect to either climate science or the risks posed by climate change to the producibility and valuation of assets owned by companies on behalf of shareholders. CAI does not engage in filing lawsuits. We do, however, stand by our scientific work, and we are prepared to provide expert testimony if requested.

I do not concur with your contention that the Science Committee has oversight or legislative authority over our work, past or present, or over our collaborate work with a number of other organizations, some of which are named in your letter of 18 May 2016.

I respectfully decline your invitation to provide documents and communications to the Committee. I am, however, pleased to discuss our scientific and policy work with the Committee as long as members from both sides of the aisle will be able to participate.

Sincerely,

Director, Climate Accountability Institute

CC: Ranking Member Eddie Bernice Johnson.

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[4] Honorable Eddie Bernice Johnson (2016) Letter to Honorable Lamar Smith, Chairman, USHR Committee on Science, Space, and Technology, 23 June 2016.

[5] Smith, Lamar (2016) Letters to Climate Accountability Institute dated 18 May 2016, 17 June 2016, and 6 July 2016.

[6] *Ibid.*

Richard Heede
heede@climateaccountability.org

Climate Accountability Institute
www.climateaccountability.org

1626 Gateway Road, Snowmass, Colorado, 81654, USA 970-343-0707

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Mr. Richard Heede, Founder and Director
Climate Accountability Institute

You are hereby commanded to be and appear before the
Committee on Science, Space, and Technology

of the House of Representatives of the United States at the place, date, and time specified below.

☑ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: 2321 Rayburn House Office Building, Washington, D.C. 20515

Date: July 27, 2016 Time: 12:00 noon

☐ **to testify at a deposition** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

☐ **to testify at a hearing** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

To any authorized staff member or the U.S. Marshals Service
to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, D.C. this 13th day of July, 2016.

Lamar Smith
Chairman or Authorized Member

Attest:
Kaun S. Haas
Clerk

SCHEDULE

In accordance with the attached schedule instructions, you, Richard Heede, are required to produce the things described below:

1. All documents and communications between any officer or employee of the Climate Accountability Institute and any officer or employee of the office of a state attorney general, referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between any officer or employee of the Climate Accountability Institute and any officer or employee of the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Schedule Instructions

1. In complying with this subpoena, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Subpoenaed records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this subpoena has been, or is also known by any other name than that herein denoted, the subpoena shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF") files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this subpoena shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the subpoena was served.

8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the subpoenaed information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the subpoena cannot be made in full by July 27, 2016, at 12:00 noon, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided no later than July 26, 2016, at 12:00 noon.

12. In the event that a document is withheld in whole or in part on any basis, provide a log containing the following information concerning any such document: (a) the basis for withholding the document; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. In complying with the subpoena, be apprised that the U.S. House of Representatives and the Committee on Science, Space, and Technology do not recognize: any of the purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections; any purported privileges or protections from disclosure under the Freedom of Information Act; or any purported contractual privileges, such as non-disclosure agreements.

14. If any document responsive to this subpoena was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

15. If a date or other descriptive detail set forth in this subpoena referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the subpoena, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.

16. The things described in the schedule shall be produced in their current condition, as of July 13, 2016.

17. This subpoena is continuing in nature and applies to any newly-discovered information as to the time period January 1, 2012 to July 27, 2016. Any responsive record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

18. All documents shall be Bates-stamped sequentially and produced sequentially.

19. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building.

20. Upon completion of the production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in

your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), text messages, Google chat communications or other instant message communications, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

8. "You" or "your" means and refers to you as natural person and in your capacity as Founder and Director of the Climate Accountability Institute ("CAI"), and any, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction in your personal capacity or at the CAI.

Brownstein Hyatt
Farber Schreck

July 27, 2016

Neil F. Quinter
Attorney at Law
202.872.5287 tel
202.296.7009 fax
nquinter@bhfs.com

BY ELECTRONIC MAIL

The Honorable Lamar Smith
Chairman
Committee on Science, Space and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515

RE: Response to Committee's July 13, 2016 Subpoena to the Climate Accountability Institute

Dear Mr. Chairman:

I write on behalf of the Climate Accountability Institute (CAI) in response to your July 13, 2016 subpoena demanding documents relating to communications between CAI employees and state attorneys general, and communications between CAI employees and other groups or individuals "related to the issue of climate change." Because these communications are protected by the First Amendment to the U.S. Constitution and the House Science Committee lacks jurisdiction to investigate CAI regarding this matter, they will not comply with the subpoena. We note, as CAI did in its July 13, 2016, letter to you, that it "has not met with or otherwise discussed [its] quantitative and accountability work with State Attorneys General."

The subpoena makes no allegation of wrong doing on the part of CAI, and it will defend its constitutional rights vigorously. CAI associates itself with the rationale outlined in our written objections to the Committee's requests for documents and subpoena to the Union of Concerned Scientists (UCS) that we submitted on behalf of UCS in letters dated June 1, June 27, July 13, and July 26, which we have enclosed and hereby incorporate as part of our response to your subpoena. In sum, 1) the Committee does not have the jurisdiction to issue this subpoena; and 2) the subpoena violates our client's First Amendment rights.

CAI continues to be willing to discuss its important climate change work with the Committee. We understand that the Committee may exercise options available to it to attempt to compel our client to provide the subpoenaed documents, and perhaps punish

it for standing up for its First Amendment rights. We would appreciate receiving advance notification before such action is taken.

Sincerely,

Neil Quinter

cc: The Honorable Eddie Bernice Johnson,
Ranking Member, Committee on Science, Space and Technology

Enclosures: Letter from Neil Quinter to the Honorable Lamar Smith (June 1, 2016)
Letter from Neil Quinter to the Honorable Lamar Smith (June 27, 2016)
Letter from Neil Quinter to the Honorable Lamar Smith (July 13, 2016)
Letter from Neil Quinter to the Honorable Lamar Smith (July 26, 2016)
Letter from Richard Heede to the Honorable Lamar Smith (June 1, 2016)
Letter from Richard Heede to the Honorable Lamar Smith (June 27, 2016)
Letter from Richard Heede to the Honorable Lamar Smith (July 13, 2016)

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

The Honorable Al Gore
Chairman
Mr. Ken Berlin
President and CEO
The Climate Reality Project
750 9th Street, NW
Suite 520
Washington, DC 20001

Dear Senator Gore and Mr. Berlin,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced that they were cooperating on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based not on sound legal or scientific arguments, but rather on a long-term strategy developed by political activist organizations such the Union of Concerned Scientists. To assist in the Committee's oversight of this matter, we are writing to request information related to your organization's role in developing and coordinating the recent actions taken by a number of state attorneys general.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[2] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[3] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff.[4]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[5] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[6] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[7]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[8]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between Attorneys General Offices and Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists met at the Manhattan offices of the Rockefeller Family Fund.[9] The meeting was held to develop a strategy

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[3] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[4] *Id.*

[5] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages,* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[6] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[7] *Id.* [emphasis added]

[8] *Id.* [emphasis added]

[9] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe,* WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-

"to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[10] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[11] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[12]

Finally, on March 29, 2016, in the hours before members of the Green 20, held a widely-publicized press conference, members of the Green 20 were briefed by 2012 workshop attendees including UCS's Peter Frumhoff and Matthew Pawa, an attorney and founder of the Global Warming Legal Action Project. It has since come to light that the New York Attorney General's office attempted to willfully conceal the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa, wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[13] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[14]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[15]

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of the current Green 20 investigations. Their actions appear to be the result of a long-standing, coordinated effort by

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1460574535?cb=logged0.4458549134086849.

[10] *Id.*

[11] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund,* Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*

[12] *Id.*

[13] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show,* WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

[14] *Id.*

[15] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions,* WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

activist groups such as UCS to target industrial, non-profit, and scientific organizations and individuals who question the activist groups' conclusions.

To assist the Committee in its oversight of this infringement on the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but no later than noon on June 1, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between employees of your organization and any office of a state attorney general referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between employees of your organizations and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, Greenpeace, 350.org, the Rockefeller Brothers Fund, or the Rockefeller Family Fund referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Rep. Lamar Smith
Chairman

Frank D. Lucas
Rep. Frank D. Lucas
Vice Chairman

The Honorable Al Gore, Mr. Ken Berlin
May 18, 2016
Page 5

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

Michael E. Zolandz
Partner

michael.zolandz@dentons.com
D +1 202 408 9204

Dentons US LLP
1900 K Street, NW
Washington, DC 20006
United States

大成 Salans FMC SNR Denton McKenna Long
dentons.com

June 24, 2016

The Honorable Lamar Smith
Chair
Committee on Science, Space and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

On behalf of our client, The Climate Reality Project, we acknowledge receipt of your letter dated June 17, 2016. At this time, we respectfully decline to produce any materials in connection with the Committee's inquiry. Should you should have any questions, please feel free to contact me either at michael.zolandz@dentons.com or 202-408-9204.

Sincerely,

Michael E. Zolandz
Partner

cc: Rep. Eddie Bernice Johnson, Ranking Member
Rep. Frank Lucas
Rep. Dana Rohrabacher
Rep. Randy Neugebauer
Rep. Michael T. McCaul
Rep. Mo Brooks
Rep. Bill Posey
Rep. Jim Bridenstine
Rep. Randy Weber
Rep. John Moolenaar
Rep. Brian Babin
Rep. Bruce Westerman
Rep. Gary Palmer
Rep. Barry Loudermilk
Rep. Ralph Lee Abraham
Rep. Darin LaHood
Rep. Warren Davidson

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

July 6, 2016

Mr. Michael E. Zolandz
Dentons US LLP
1900 K Street, NW
Washington, DC 20006

Dear Mr. Zolandz,

The Committee on Science, Space, and Technology is in receipt of your June 24, 2016, response to its request for information related to ongoing oversight of coordinated attempts to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. This response marks the second time your client, the Climate Reality Project, has refused to produce documents in response to oversight letters signed by 17 Members of the Committee. Further, your office has not attempted to engage the Committee in a dialogue related to our requests. This is disappointing. I urge you and your client to engage with the Committee as soon as possible to discuss the Committee's requests.

The Committee maintains its authority to investigate your client's activities and communications with various state attorneys general and other non-profit organizations. As previously stated in the Committee's June 17, 2016, letter, this authority is grounded in both the Constitution and rules of the U.S. House of Representatives.[1] The Committee maintains that the First Amendment, as interpreted by the Supreme Court, is not an impenetrable shield to Congressional inquiry.[2] Moreover, the Committee is concerned that the objections raised in your June 24, 2016, letter appear to selectively apply the law based solely upon the political party to which your client and affiliated groups supply information.

On June 22, 2016, the House Progressive Caucus held a forum entitled "Oil is the New Tobacco." The forum was attended by (i) multiple members of the Union of Concerned Scientists (UCS), specifically Ms. Kathy Mulvey and Mr. Peter Frumhoff, (ii) Dr. Naomi Oreskes, founder of the Climate Accountability Institute (CAI), as well as (iii) other participants

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] *Watkins v. U.S.*, 354 U.S. 178, 198 (1957); *Barenblatt v. U.S.*, 360 U.S. 109, 126 (1959).

in the 2012 La Jolla Conference – an event also attended by your client.[3] During the forum, Rep. Paul Tonko (D-NY), asked: "Have any of you had interactions with the any of the AGs?"[4] Both Dr. Oreskes of CAI and Ms. Mulvey of UCS responded in a candid and forthcoming manner about the assistance and information that their organizations have provided to the attorneys general investigating companies, scientists, and non-profit groups.[5] It appears that your client's affiliates have no First Amendment concerns providing information to Members of the House Progressive Caucus; yet, continually and improperly refuse to provide any information to this Committee. That your client's affiliates appear to have cast aside any First Amendment concerns when interacting with the Members of the House Progressive Caucus, but purport to be unwilling to provide this Committee similar information is, at minimum, concerning. It is clear that Members on both sides of the aisle have legitimate questions regarding the activities of your client with regard to the assistance provided to the attorneys general, and I urge you to reconsider your unwillingness to provide information to the Committee.

Accordingly, the Committee reiterates its May 18, 2016, requests and asks that your client produce responsive documents and communications to the Committee on or before July 13, 2016, at 12:00 p.m. As explained in detail in the Committee's June 17, 2016, letter, this request is a legitimate exercise of the Committee's oversight duties under the Constitution and the Rules of the House.

If your client continues to refuse to provide information responsive to the Committee's requests on a voluntary basis, I will be left with no alternative but to utilize the tools delegated to the Committee by the Rules of the House of Representatives. Specifically, the Committee will consider use of compulsory process to obtain responsive documents in the possession, custody, or control of your client.

At any point, I welcome the opportunity to discuss the Committee's request with you or your staff. To arrange a meeting or discuss matters over the phone prior to July 13, 2016, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology
Enclosure

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[3] Congressional Progressive Caucus Facebook Page Video release entitled *LIVE: CPC & SEEC Forum "Oil Is The New Tobacco" available at* https://www.facebook.com/USProgressives/ (last visited July 1, 2016).
[4] *Id.*
[5] *Id.*

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Mr. Ken Berlin, President and Chief Executive Officer
Climate Reality Project

You are hereby commanded to be and appear before the
Committee on Science, Space, and Technology

of the House of Representatives of the United States at the place, date, and time specified below.

☑ to **produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: 2321 Rayburn House Office Building, Washington, D.C. 20515

Date: July 27, 2016 Time: 12:00 noon

☐ to **testify at a deposition** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

☐ to **testify at a hearing** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time _____

To any authorized staff member or the U.S. Marshals Service
_____ to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, D.C. this 13th day of July, 2016.

Lamar Smith
Chairman or Authorized Member

Attest:
Karen L. Haas
Clerk

SCHEDULE

In accordance with the attached schedule instructions, you, Ken Berlin, are required to produce the things described below:

1. All documents and communications between any officer or employee of the Climate Reality Project and any officer or employee of the office of a state attorney general, referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between any officer or employee of the Climate Reality Project and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, Global Warming Legal Action Project, or the Pawa Law Group referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Schedule Instructions

1. In complying with this subpoena, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Subpoenaed records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this subpoena has been, or is also known by any other name than that herein denoted, the subpoena shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF") files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this subpoena shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the subpoena was served.

8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the subpoenaed information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the subpoena cannot be made in full by July 27, 2016, at 12:00 noon, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided no later than July 26, 2016, at 12:00 noon.

12. In the event that a document is withheld in whole or in part on any basis, provide a log containing the following information concerning any such document: (a) the basis for withholding the document; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. In complying with the subpoena, be apprised that the U.S. House of Representatives and the Committee on Science, Space, and Technology do not recognize: any of the purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections; any purported privileges or protections from disclosure under the Freedom of Information Act; or any purported contractual privileges, such as non-disclosure agreements.

14. If any document responsive to this subpoena was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

15. If a date or other descriptive detail set forth in this subpoena referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the subpoena, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.

16. The things described in the schedule shall be produced in their current condition, as of July 13, 2016.

17. This subpoena is continuing in nature and applies to any newly-discovered information as to the time period January 1, 2012 to July 27, 2016. Any responsive record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

18. All documents shall be Bates-stamped sequentially and produced sequentially.

19. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building.

20. Upon completion of the production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in

your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), text messages, Google chat communications or other instant message communications, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or meaus of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

8. "You" or "your" means and refers to you as natural person and in your capacity as President and Chief Executive Officer of the Climate Reality Project, and any, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction in your personal capacity or at the Climate Reality Project.

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

Ms. Annie Leonard
Executive Director
Greenpeace
702 H Street, NW
Suite 300
Washington, D.C. 20001

Dear Ms. Leonard,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced that they were cooperating on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based not on sound legal or scientific arguments, but rather on a long-term strategy developed by political activist organizations such the Union of Concerned Scientists. To assist in the Committee's oversight of this matter, we are writing to request information related to your organization's role in developing and coordinating the recent actions taken by a number of state attorneys general.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[2] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La Jolla, California.[3] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff.[4]

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

[3] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[5] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[6] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[7]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[8]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between Attorneys General Offices and Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists met at the Manhattan offices of the Rockefeller Family Fund.[9] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into

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Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[4] *Id.*

[5] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages,* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[6] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[7] *Id.* [emphasis added]

[8] *Id.* [emphasis added]

[9] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe,* WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.

[the] center of [the] 2016 election cycle."[10] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[11] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[12]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference, members of the Green 20 were briefed by 2012 workshop attendees including UCS's Peter Frumhoff and Matthew Pawa, an attorney and founder of the Global Warming Legal Action Project. It has since come to light that the New York Attorney General's office attempted to willfully conceal the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa, wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[13] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[14]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[15]

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of the current Green 20 investigations. Their actions appear to be the result of a long-standing, coordinated effort by activist groups such as UCS to target industrial, non-profit, and scientific organizations and individuals who question the activist groups' conclusions.

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[10] *Id.*

[11] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund,* Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*

[12] *Id.*

[13] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show,* WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

[14] *Id.*

[15] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions,* WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

To assist the Committee in its oversight of this infringement on the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but no later than noon on June 1, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between employees of your organization and any office of a state attorney general referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between employees of your organization and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Ms. Annie Leonard
May 18, 2016
Page 5

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

chadbourne

Abbe David Lowell
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telephone: +1 (212) 408-5100

June 1, 2016

VIA HAND DELIVERY

The Hon. Lamar S. Smith
Chairman
Committee of Science, Space and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515-6301

RECEIVED
JUN 01 2016
COMMITTEE ON SCIENCE
& TECHNOLOGY

Re: May 18, 2016 Letter

Dear Chairman Smith:

We represent Greenpeace USA and respond to the Committee's May 18, 2016 letter. Greenpeace received your letter and has a number of preliminary questions and concerns. For one, just the sheer breadth of the requests would require more time than the June 1, 2016 date proposed in your letter for a full response. In addition, your letter raises a number of troubling legal issues. Greenpeace is proud of its work and has nothing to hide in its efforts to address climate change. Nevertheless, we have to ensure that the Committee (as any entity) is operating properly before undertaking to respond to any request for information.

As you know, Greenpeace is an organization that welcomes any public airing of the issues on which it is committed, including the now certain evidence of climate change. To the extent the Committee is engaging in serious review of the need to address this critical issue, Greenpeace could not be more willing to participate. Let me start with some background on Greenpeace's commitment to the environment and its work on the subject of climate change.

For more than a decade, Greenpeace has worked to reduce the emissions that cause climate change, advocated for corporate and government policies that address climate change, and exposed the corporations, lobbyists, and front groups that deny the existence of climate change and its causes. This work has always been and will always be informed by the underlying science that confirms that climate change is real, and is caused by man-made emissions (http://www.theguardian.com/environment/climate-consensus-97-per-cent/2016/apr/19/study-humans-have-caused-all-the-global-warming-since-1950). Greenpeace's activism on climate change ranges from opposing drilling in the Arctic, to helping technology giants power their data centers with renewable energy, to exposing the funding from the fossil fuel industry to politicians, scientists, and lobby groups who deny climate change and block necessary action to address it. Greenpeace's long-running commitment to finding solutions for climate change is based on the scientific consensus that action cannot be delayed by politics or false debate.

As I understand it, the Committee is looking to determine whether state attorneys general and non-profit, non-governmental, or other groups committed to protecting the earth and its environment have somehow colluded to stifle first amendment protected speech of one or more of the most powerful and wealthiest companies in the world. I am sure that you, your colleagues, and your staff could not help but notice the irony in your inquiry. In the name of protecting the free speech of these companies, you are looking to examine the very free speech activity of groups actively trying to advance public discussion on such a vital topic. In doing so, your inquiry attacks some of the most basic rights upon which this country was founded – "speech on public issues," *Snyder v. Phelps*, 562 U.S. 443, 452 (2011); "the ability of like-minded individuals to associate" to express commonly held views, *Knox v. Serv. Employees Int'l Union Local 1000,* 132 S. Ct. 2277, 2288 (2012); and the right to petition the government. *United Mine Workers v. Ill. State Bar Ass'n,* 389 U.S. 217, 222 (1967) (holding the right to petition government is "among the most precious of the liberties safeguarded by the Bill of Rights"). Congress is not outside the protections afforded to Greenpeace and others to enjoy these constitutional rights. *Watkins v. United States,* 354 U.S. 178 (1957).

In addition, the articles written about the efforts of state attorneys general indicate that their activity is directed at determining whether at least one fossil fuel company – ExxonMobil – broke securities and consumer fraud laws by making false statements about their activities and the known scientific and market risks of those activities with regard to climate change. These alleged false statements occurred in public and were made to affect the behavior of consumers and investors. In other words, while Greenpeace's work on climate change has been to follow the science, the fossil fuel industry is being investigated for trying to cover up that science. As you surely know, the law does not protect the dissemination of false statements, especially if they are part of fraudulently misleading consumers and investors. *See United States v. Phillip Morris USA Inc.*, 566 F. 3d 1095, 1123 (D.C. Cir. 2009) (holding tobacco industry's public statements were not protected speech because "it is well settled that the First Amendment does not protect fraud"). Is the Committee investigating these possible false statements or those trying to determine whether false statements were made?

Also, if the Committee is truly engaged in oversight activity, it appears it already has reached its conclusions. For example, just seven lines into your letter you conclude that the activities of the state attorneys general "were efforts to silence speech." The letter then goes on for three full pages filled with similar conclusions (e.g., "The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial power to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms."). If the Committee has already reached these conclusions, then what is the real purpose of the inquiry? I also noticed that the letter is signed only by some Republican members of the Committee. That fact alone would cause many observers to question whether this is merely a partisan effort to protect fossil fuel companies.

We recognize that Congress and your Committee have broad authority to conduct legislative research and various oversight activities. Even still, as you know, this authority is not unlimited. The Committee must operate under the House and its own rules, must have jurisdiction to inquire into specific areas, must have authority to conduct its activity, and must comply with legal requirements for seeking information. Your letter cites some of the rules, but a number of questions are raised by your letter:

1. House Rule X defines the power of the committees, including yours. While the Committee surely could investigate the fossil fuel companies at the heart of the issue of climate change, how does Rule X(p) extend to review the work and especially the law enforcement activities of state attorneys general? Putting aside issues of federalism, states' rights, and the Tenth Amendment to the Constitution, it would appear this type of oversight is assigned to the Committee on the Judiciary under House Rule X(l).

2. The Committee's rules, for example Rule II, define the Committee's requirements on meetings and quorums and other procedures. Can you provide us any indication that the underlying actions behind this letter and the letter requests themselves were taken in compliance with these rules? We think you would agree that ensuring regularity and compliance are things we have to confirm on our client's behalf.

3. Committee Rule VIII defines the Committee's oversight authority. That rule and all of its related provisions seem to suggest that the Committee looks to determine if federal laws are being followed or need adjustment by reviewing the actions or inactions of federal agencies over which Congress has jurisdiction. How does the general thrust of oversight apply to this attempt to regulate the activity of state agencies?

4. The two actual requests in the letter are vague and overbroad and likely would be declared so if issued by an executive branch agency or private litigant. For example, the word "all" qualifying documents and communications can be sweeping if left undefined. Similarly, the phrase "relating to" leaves so much to interpretation (as opposed to the phrase "referring to") that it is impossible to understand how to apply it.

5. Depending on whether any communications of any kind actually exist, they might also implicate privileges (e.g., attorney-client, common interest) that are recognized in every forum in the United States. We assume the Committee does not intend any recipient of a request (let alone a letter request) to disobey such privileges.

6. Finally, the period of time included – four and a half years – is a very long one. This in itself requires time to consider where any information might be located.

To be clear, Greenpeace will always cooperate with any authorized and legitimate inquiry of Congress or anyone else into one of the most pressing issues of our time – one that will affect our children and their children for generations to come. At this point, the issues raised by your letter, outlined above, prevent Greenpeace from providing the information requested. We are willing to meet with you and/or Committee staff to further discuss our questions and concerns. Thank you for your consideration.

Sincerely,

Abbe David Lowell

cc: Ranking Member Eddie Bernice Johnson

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

June 17, 2016

Mr. Abbe David Lowell
Chadbourne & Parke LLP
1301 Avenue of the Americas
New York, NY 10019

Dear Mr. Lowell,

Thank you for your June 1, 2016, response. The House Science, Space, and Technology Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with the contentions in your letter. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that your client provides the documents and information previously requested in our May 18, 2016, letter.[1]

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[2] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[3] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[4] However, Congress' investigatory power is not without limits.[5] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast

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[1] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.
[2] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[3] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23 [hereinafter CRS Report, RL30240].
[4] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[5] *Watkins v. U.S.*, 354 U.S. 178 (1957).

and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[6] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[7] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[8] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[9] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[10] organizations that violate the civil rights of individuals,[11] state agencies involved in the Hurricane Katrina response,[12] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138.069 billion to fund research and development.[13] Of that total federal spending, $31.8 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and

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[6] *McGrain* at 177, 181-182.
[7] *See McGrain*, 273 U.S. at 177, 181-182.
[8] *Eastland* at 509.
[9] CRS Report, RL30240 at 26.
[10] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[11] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[12] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[13] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of the Science Committee that organizations such as your client's and those similarly situated should not be inciting legal action based on debatable science to undermine the First Amendment of the Constitution.

The investigative efforts supported by your client and other similar organizations are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes**, but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[14]

This statement suggests that the Attorney General's office and those who support his actions will be deciding what science is valid and what science is invalid. In essence, the attorney general is saying that if he disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Congress has a duty to protect scientists and researchers from the criminalization of scientific inquiry.

Accordingly, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of these investigations, Congress can investigate the effects your client's advocacy may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[15] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your client's efforts and those of the so called "Green 20"

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[14] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available* at http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[15] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your client's actions are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The website of the Union of Concerned Scientists, one of the organizations now supporting the Green 20's investigations, describes a 2010 investigation by the Virginia Attorney General of a University of Virginia scientist as "a campaign of harassment," and "a threat[] [to the] the ability of scientists in Virginia to ask tough questions about our world—and pursue contentious lines of research." The current efforts by the Green 20, supported by your client's organization, appear to be no different.[16]

The First Amendment is Not a Shield to Congressional Inquiry

Unlike the Fifth Amendment, the First Amendment is not an impermeable shield to Congressional investigations. In *Barenblatt v. United States*, the Supreme Court stated "where the First Amendment rights are asserted to bar government interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[17] Moreover, when balancing the interests of the parties in *Watkins v. United States*, the Court held "the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness."[18] These cases are important precisely because they provide examples of congressional investigations – sustained by the Supreme Court – involving organizations similar to those of your client. The parties being investigated in the cases noted above are no different than the recipients of the Science Committee's May 18 letter.

Congress frequently and rigorously has investigated private citizens and advocacy groups for various types of conduct. In almost all instances these investigations have withstood judicial scrutiny, with little, if any, restriction imposed upon them. Recently, the Democratic Chairman of the House Oversight and Government Reform Committee, Henry Waxman, investigated numerous charities benefiting veterans.[19] When the founder of one of the charities under investigation failed to comply with Chairman Waxman's request for documents and testimony, the Chairman issued a subpoena compelling the necessary information.[20] Eventually, the

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[16] Union of Concerned Scientists, Center for Science & Democracy, *Science under Attack: Legal Harassment of Climate Scientist Michael Mann available at* http://www.ucsusa.org/center-science-and-democracy/protecting-scientists-harassment/cuccinelli-mann.html#.VImpBfkrKUk (last visited June 9, 2016).
[17] *Barenblatt v. U.S.*, 360 U.S. 109, 126 (1959).
[18] *Watkins v. U.S.*, 354 U.S. 178, 198 (1957).
[19] Philip Rucker, *Panel Probes Spending of Veterans Charities*, WASH. POST, Dec. 14, 2007.
[20] Matthew Jaffe and Rhonda Schwartz, *Director of Veterans Charity in Hiding*, MILITARY.COM *available at* http://www.military.com/NewsContent/0,13319,158246,00.html (last visited June 9, 2016).

Oversight Committee received all documents, information, and testimony as part of that congressional investigation.[21]

The Committee's Document Requests

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between employees of your organization and any office of a state attorney general referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between employees of your organization and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. Dana Rohrabacher
Member of Congress

[21] Philip Rucker, *Chief of Veterans Charities Grilled on Groups' Spending*, WASH. POST, Jan. 18, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/01/17/AR2008011703620.html (last visited June 9, 2016).

Mr. Abbe David Lowell
June 17, 2016
Page 6

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

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June 24, 2016

VIA HAND DELIVERY

The Hon. Lamar S. Smith
Chairman
Committee on Science, Space, and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515-6301

Re: June 17, 2016 Letter

Dear Chairman Smith:

On behalf of Greenpeace USA and 350.org, we write in response to the Committee's June 17, 2016 letter. As the Committee appears to have written the same letter to each of the recipients of its document requests, a joint response to the Committee's latest letter is in order.

As you know, Greenpeace and 350.org are private organizations committed to addressing climate change. Although the Committee's letter describes the science underlying climate changes as "debatable," 6/17/16 Letter at 3, scientists from around the world are now more certain than at any other point in history that climate change exists, and that it is caused by humans. Since 1901, the planet has warmed, on average, at least 1.6 degrees Celsius. We have already seen the damage and loss that warming has caused. Those same scientists tell us that without the necessary shift away from fossil fuels, warming will continue and the future damage we are facing is unprecedented. The science is certain; remedial policy must follow it.

Despite the fact that Greenpeace USA and 350.org are private organizations engaged in education and advocacy regarding the public issue of climate change, the Committee's letter persists in requesting that these private organizations turn over their constitutionally-protected communications regarding climate change to the Committee. For the reasons set forth below, we respectfully object to the Committee's requests and decline to provide the requested materials.

I. The Committee Lacks Jurisdiction Over the Requested Materials

As the Committee itself acknowledges, the investigatory power of Congress is broad but not unlimited. *See* 6/17/16 Letter at 1. "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress.... No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of

the Congress." *Watkins v. United States*, 354 U.S. 178, 187 (1957). "Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government." *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959). "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Watkins*, 354 U.S. at 187.

As Greenpeace and 350.org explained in their June 1 letters, the Committee lacks jurisdiction over the subject matter of the present inquiry—namely, ongoing investigations by state attorneys general regarding whether one fossil fuel company (ExxonMobil) broke securities and consumer fraud laws by misrepresenting to the public what it knew about climate change. Contrary to the assertions in the Committee's June 17 letter, neither the state attorneys general leading these investigation nor the private environmental organizations singled out in the Committee's letter "will be deciding what science is valid and what science is invalid," or opining on the validity of scientific research conducted with taxpayer dollars. Rather, based on the statements of Attorney General Schneiderman quoted in the Committee's own letter, *see* 6/17/16 Letter at 3, the investigations are focused on whether ExxonMobil told the public, regulators, and shareholders one thing about climate change when it knew, based upon its own research, that the opposite was true. We are not aware of any House Rule conferring jurisdiction upon the House Committee on Science, Space, and Technology to investigate these types of state criminal or law enforcement proceedings, and the Committee's letter does not identify any such provision.

Rather, the Committee asserts that it has jurisdiction to investigate the state attorneys general investigations due to the speculative, indirect "effects" of the ongoing state investigations on scientific research. *See* 6/17/16 Letter at 3 ("Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change."). The Committee's requests, however, do not seek information regarding this purported "chilling effect," but rather appear designed to chill the very speech of those organizations advocating meaningful governmental action on climate change. Similarly, the Committee asserts that it is conducting an investigation "relating to scientific research ... with the intent of providing a legislative remedy, if warranted." 6/17/16 Letter at 4. The Committee's earlier letter (and the accompanying document requests) belie any such suggestion, as those materials make clear that the focus of the Committee's investigation is not "scientific research," but rather certain state attorneys general and environmental organizations who have questioned public statements made by the fossil fuel industry. Any "legislative remedy" to the problem of state attorneys general investigating ExxonMobil for securities and consumer fraud would plainly violate the Constitution. *See Cameron v. Johnson*, 390 U.S. 611, 618 (1968) ("Federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework." (internal quotation marks omitted)).

II. The Committee's Requests Violate the First Amendment

As the Committee also acknowledges, *see* 6/17/16 Letter at 4, Congress' investigatory power is further limited by the freedoms afforded private citizens under the First Amendment. "Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly." *Watkins*, 354 U.S. at 197. Because "speech on public issues occupies the highest rung of the hierarchy of First Amendment values," the right of Greenpeace, 350.org, and similar organizations to advocate in favor of meaningful action to address climate change is entitled to "special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Thus, contrary to the broad assertions in the Committee's letter, the mere fact that Congress "frequently and rigorously has investigated private citizens and advocacy groups" in the past does not mean that the present investigation is constitutional. 6/17/16 Letter at 4. "[T]here is no congressional power to expose for the sake of exposure." *Watkins*, 354 U.S. at 200.

"Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." *Barenblatt*, 360 U.S. at 126. In any such balancing, "[t]he first question is whether [the] investigation was related to a valid legislative purpose." *Id.* at 127; *see also Watkins*, 354 U.S. at 198-99 ("[W]hen First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter."). "We cannot simply assume ... that every congressional investigation is justified by a public need that overbalances any private rights affected." *Watkins*, 354 U.S. at 199. Rather, the specific interests of the parties much be "judged in the concrete, not on the basis of abstractions." *Barenblatt*, 360 U.S. at 112.

As Greenpeace and 350.org explained in their prior letters, the Committee's requests violate the First Amendment for at least two reasons. First, as noted above, the Committee lacks jurisdiction over the subject matter identified in the requests. The requests thus fail at the first step of the balancing inquiry because they are not related to a valid legislative purpose. *See Watkins*, 354 U.S. at 206 ("[Congressional committees] are restricted to the missions delegated to them, i.e., to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere. No witness can be compelled to make disclosures on matters outside that area.").

Second, the "public interests" in disclosure asserted by the Committee are far too speculative and attenuated to outweigh the private interests of Greenpeace and 350.org to speak freely, to assemble, and to petition the government on climate change. Although the Committee theorizes ("the possibility exist[s]") that the state attorney general investigations of ExxonMobil "*could* have a chilling effect on scientists performing federally funded research" and "*could* infringe on the civil rights of scientists who become targets of these inquiries," 6/17/16 Letter at 3 (emphasis added), such speculative "abstractions" are insufficient to justify disclosure under the First Amendment. *Barenblatt*, 360 U.S. at 112. Moreover, if the Committee is truly interested in investigating this potential "chilling effect,"

the Committee has far less intrusive means of inquiry at its disposal—it can simply request information from those scientists whose speech could possibly be chilled. The Committee's letter, however, contains no evidence of any such chilling effect, nor does it explain how the speech of scientists performing federally funded research might be chilled by private communications between an environmental organization and a state law enforcement authority, or between two private environmental organizations.[1] In the absence of any "concrete" public interest, the constitutional balance plainly weighs in favor of the private interests of Greenpeace and 350.org to resist disclosure.

III. The Committee's Requests Are Impermissibly Vague, Overbroad, and Burdensome

Finally, the Committee's June 17 letter does not address several of our objections to the form and overbreadth of the Committee's requests. As both Greenpeace and 350.org explained in their June 1 letters, the Committee's requests for "all" documents and communications over a four-and-a-half year period "relating to" possible prosecutions "related to" the issue of climate change are vague, overbroad, and unreasonably onerous. *See* A. D. Lowell 6/1/16 Letter at 3; F. Gay 6/1/16 Letter at 4. The Committee has not made any effort to clarify or narrow its requests.

Similarly, Greenpeace requested clarification from the Committee that the signatories of the letter complied with the Committee's Rules regarding meetings, quorums, and other matters of procedure, and that the Committee did not intend for recipients of its requests to disobey any applicable privilege. *See* A. D. Lowell 6/1/16 Letter at 3. The Committee's response is silent on these matters as well. We therefore renew our objections to the content and form of the Committee's requests, which are not tailored to any legitimate congressional purpose but rather indiscriminately seek broad categories of private, First Amendment-protected material.

* * *

Greenpeace and 350.org remain committed to cooperating with any authorized and legitimate inquiry of Congress into climate change, one of the most pressing issues of our time. The Committee's requests, however, violate the First Amendment, fall outside the

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[1] The Committee's request for all documents and communications between employees of several private organizations is particularly offensive to the First Amendment, as such communications are wholly private and unrelated to state action.

proper jurisdiction of the Committee, and are impermissibly vague, overbroad, and burdensome. For these reasons, Greenpeace and 350.org respectfully refuse to comply with the Committee's requests.

Sincerely,

Abbe David Lowell

cc: Ranking Member Eddie Bernice Johnson

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

July 6, 2016

Mr. Abbe David Lowell
Chadbourne & Parke LLP
1301 Avenue of the Americas
New York, NY 10019

Dear Mr. Lowell,

The Committee on Science, Space, and Technology is in receipt of your June 24, 2016, response to its request for information related to ongoing oversight of coordinated attempts to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. This response marks the second time your clients, Greenpeace USA and 350.org, have refused to produce documents in response to oversight letters signed by 17 Members of the Committee. Further, your office has not attempted to engage the Committee in a dialogue related to our requests. This is disappointing. I urge you and your clients to engage with the Committee as soon as possible to discuss the Committee's requests.

The Committee maintains its authority to investigate your clients' activities and communications with various state attorneys general and other non-profit organizations. As previously stated in the Committee's June 17, 2016, letter, this authority is grounded in both the Constitution and rules of the U.S. House of Representatives.[1] The Committee maintains that the First Amendment, as interpreted by the Supreme Court, is not an impenetrable shield to Congressional inquiry.[2] Moreover, the Committee is concerned that the objections raised in your June 24, 2016, letter appear to selectively apply the law based solely upon the political party to which your clients and affiliated groups supply information.

On June 22, 2016, the House Progressive Caucus held a forum entitled "Oil is the New Tobacco." The forum was attended by (i) multiple members of the Union of Concerned Scientists (UCS), specifically Ms. Kathy Mulvey and Mr. Peter Frumhoff, (ii) Dr. Naomi Oreskes, founder of the Climate Accountability Institute (CAI), as well as (iii) other participants

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).

[2] *Watkins v. U.S.*, 354 U.S. 178, 198 (1957); *Barenblatt v. U.S.*, 360 U.S. 109, 126 (1959).

in the 2012 La Jolla Conference – an event also attended by your clients.[3] During the forum, Rep. Paul Tonko (D-NY), asked: "Have any of you had interactions with the any of the AGs?"[4] Both Dr. Oreskes of CAI and Ms. Mulvey of UCS responded in a candid and forthcoming manner about the assistance and information that they and their organizations have provided to the attorneys general investigating companies, scientists, and non-profit groups.[5] It appears that your clients' affiliates have no First Amendment concerns providing information to Members of the House Progressive Caucus; yet, continually and improperly refuse to provide any information to this Committee. That your clients' affiliates appear to have cast aside any First Amendment concerns when interacting with the Members of the House Progressive Caucus, but purport to be unwilling to provide this Committee similar information is, at minimum, concerning. It is clear that Members on both sides of the aisle have legitimate questions regarding the activities of your clients with regard to the assistance provided to the attorneys general, and I urge you to reconsider your unwillingness to provide information to the Committee.

Accordingly, the Committee reiterates its May 18, 2016, requests and asks that your clients produce responsive documents and communications to the Committee on or before July 13, 2016, at 12:00 p.m. As explained in detail in the Committee's June 17, 2016, letter, this request is a legitimate exercise of the Committee's oversight duties under the Constitution and the Rules of the House.

If your clients continue to refuse to provide information responsive to the Committee's requests on a voluntary basis, I will be left with no alternative but to utilize the tools delegated to the Committee by the Rules of the House of Representatives. Specifically, the Committee will consider use of compulsory process to obtain responsive documents in the possession, custody, or control of your clients.

At any point, I welcome the opportunity to discuss the Committee's request with you or your staff. To arrange a meeting or discuss matters over the phone prior to July 13, 2016, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology
Enclosure

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[3] Congressional Progressive Caucus Facebook Page Video release entitled *LIVE: CPC & SEEC Forum "Oil Is The New Tobacco" available at* https://www.facebook.com/USProgressives/ (last visited July 1, 2016).
[4] *Id.*
[5] *Id.*

chadbourne

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Abbe David Lowell
direct tel +1 202 974 5605
adlowell@chadbourne.com

July 13, 2016

VIA HAND DELIVERY

The Hon. Lamar S. Smith
Chairman
Committee on Science, Space, and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515-6301

Re: July 6, 2016 Letter

Dear Chairman Smith:

On behalf of Greenpeace USA and 350.org, we write in response to your July 6, 2016 letter. The July 6th letter misstates and mischaracterizes the grounds upon which Greenpeace and 350.org have declined to provide the constitutionally-protected communications requested by the Committee, and altogether fails to address several of the objections raised in our prior letters. We therefore write this letter to correct your mischaracterizations and to reiterate our objections to the Committee's requests.

First, the July 6th letter asserts that Greenpeace and 350.org "[have] not attempted to engage the Committee in a dialogue related to [the Committee's] requests." 7/6/16 Letter at 1. That is false. In our very first response, on June 1, we offered to meet with the Committee and its staff to further discuss these issues. *See* A.D. Lowell 6/1/16 Letter at 4; F. Gay 6/1/16 Letter at 2, 4. More than six weeks later, the Committee has yet to take us up on this offer. Moreover, this is the third letter in which we have engaged in "dialogue" with the Committee regarding its requests. To date, the Committee has yet to provide a meaningful response to many of the specific objections that we have raised.

Second, the July 6th letter asserts—without citation or explanation—that Greenpeace's and 350.org's objections to the Committee's requests "appear to selectively apply the law based solely upon the political party to which [Greenpeace and 350.org] and affiliated groups supply information." This, again, is incorrect. The First Amendment guarantees the rights of all private citizens to speak or not to speak, to petition or not to petition, and to associate or not to associate with, whomever they choose. The fact that who or what you call an "affiliate" of Greenpeace or 350.org decides to speak with, petition, or associate with some elected officials (*e.g.*, Members of the House Progressive Caucus) and

not others (*e.g.*, Republican House Members accepting thousands of dollars in campaign contributions from ExxonMobil)[1] does not mean that First Amendment law is being "selectively applied." To the contrary, the freedom to choose with whom one speaks, petitions, or associates, regardless of political affiliation, lies at the very heart of the First Amendment.

Third, the July 6th letter asserts that "Members on both sides of the aisle have legitimate questions" regarding Greenpeace's and 350.org's work on climate change (although, to our knowledge, all of your prior letters and requests have been signed only by Republican Members). As we have stated in both of our prior letters, Greenpeace and 350.org remain committed to cooperating with any authorized and legitimate inquiry of Congress into climate change, one of the most pressing issues of our time.

Your continued insistence, however, that Greenpeace and 350.org should cast aside their First Amendment protections and voluntarily provide broad categories of private, constitutionally-protected communications to the Committee raises several questions regarding with whom some Members of the Committee may, to use your term, be "affiliated." Based on the partisan tone of the July 6th letter, we are concerned that the true purpose of the Committee's requests is not to examine the science of climate change, but rather to silence those who would shine a spotlight on the role of the fossil fuel industry, and ExxonMobil in particular, in undermining climate science and blocking and delaying meaningful action on climate change.

If we are able to agree upon an appropriate, bipartisan meeting with the Committee, we can discuss the issues we have raised in our letters and would also have some questions of our own: Have Committee Members or staff had private meetings with ExxonMobil or fossil fuel industry lobbyists to discuss the state and territorial attorneys general investigations? Is the Committee consulting with any outside counsel that also have ties to ExxonMobil or the fossil fuel industry? Has ExxonMobil or any other implicated entity provided information to the Committee regarding the state attorneys general investigations, or been asked to do so? Have Committee Members or staff discussed this investigation with other fossil fuel companies, industry front groups, trade associations, foundations, public relations firms, nonprofits, think tanks, or other allied organizations, such as the American Petroleum Institute, the Competitive Enterprise Institute, the American Legislative Exchange Council, or the Energy and Environment Legal Institute? In addition to any direct contributions, how

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[1] *See* Andrew Seifter, *What Media Should Know About the House Science Committee Members Defending Exxon*, Media Matters for America, June 21, 2016, *available at* http://mediamatters.org/research/2016/06/21/what-media-should-know-about-house-science-committee-members-defending-exxon/210539.

much money or other support have Committee Members received from ExxonMobil, the fossil fuel industry, related PACs, and industry front groups, such as those named above? If Committee Members are truly concerned about the right of scientists to conduct scientific research "free from intimidation and threats of prosecution," 7/6/16 Letter at 1, why did the Chair of the Committee previously subpoena the chief of NOAA, a scientist herself, demanding that her agency turn over thousands of pages of emails and communications? How is this not chilling speech?

The requests served upon Greenpeace and 350.org simply cannot be squared with the Committee's stated concerns regarding freedom of speech and scientific inquiry. As we have explained in detail in our prior letters to the Committee, the Committee's requests violate basic First Amendment protections, fall outside the proper jurisdiction of the Committee, and are impermissibly vague, overbroad, and burdensome. For these reasons, Greenpeace and 350.org respectfully refuse to comply with the Committee's requests.

If the Committee is serious about having a further "dialogue," please let me know.

Sincerely,

Abbe David Lowell

cc: Ranking Member Eddie Bernice Johnson

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Ms. Annie Leonard, Executive Director
Greenpeace

You are hereby commanded to be and appear before the
Committee on Science, Space, and Technology

of the House of Representatives of the United States at the place, date, and time specified below.

☑ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: 2321 Rayburn House Office Building, Washington, D.C. 20515

Date: July 27, 2016 Time: 12:00 noon

☐ **to testify at a deposition** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

☐ **to testify at a hearing** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time _____

To any authorized staff member or the U.S. Marshals Service

to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, D.C. this 13th day of July, 2016.

Lamar Smith
Chairman or Authorized Member

Attest:
Kaun L. Haas
Clerk

SCHEDULE

In accordance with the attached schedule instructions, you, Annie Leonard, are required to produce the things described below:

1. All documents and communications between any officer or employee of Greenpeace and any officer or employee of the office of a state attorney general, referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between any officer or employee of Greenpeace and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Schedule Instructions

1. In complying with this subpoena, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Subpoenaed records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this subpoena has been, or is also known by any other name than that herein denoted, the subpoena shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF") files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this subpoena shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the subpoena was served.

8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the subpoenaed information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the subpoena cannot be made in full by July 27, 2016, at 12:00 noon, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided no later than July 26, 2016, at 12:00 noon.

12. In the event that a document is withheld in whole or in part on any basis, provide a log containing the following information concerning any such document: (a) the basis for withholding the document; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. In complying with the subpoena, be apprised that the U.S. House of Representatives and the Committee on Science, Space, and Technology do not recognize: any of the purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections; any purported privileges or protections from disclosure under the Freedom of Information Act; or any purported contractual privileges, such as non-disclosure agreements.

14. If any document responsive to this subpoena was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

15. If a date or other descriptive detail set forth in this subpoena referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the subpoena, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.

16. The things described in the schedule shall be produced in their current condition, as of July 13, 2016.

17. This subpoena is continuing in nature and applies to any newly-discovered information as to the time period January 1, 2012 to July 27, 2016. Any responsive record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

18. All documents shall be Bates-stamped sequentially and produced sequentially.

19. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building.

20. Upon completion of the production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in

your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), text messages, Google chat communications or other instant message communications, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

8. "You" or "your" means and refers to you as natural person and in your capacity as Executive Director of Greenpeace, and any, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction in your personal capacity or at Greenpeace.

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July 27, 2016

RECEIVED
JUL 27 2016
COMMITTEE ON SCIENCE
& TECHNOLOGY

VIA HAND DELIVERY

The Hon. Lamar S. Smith
Chairman
Committee on Science, Space, and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515-6301

Re: Formal Objections to Subpoena

Dear Chairman Smith:

On July 13, 2016, we wrote to you on behalf of Greenpeace USA and 350.org to reiterate our concerns regarding the unconstitutional requests made by the Committee and to offer, once again, to discuss those concerns with the Committee and its staff.

Within hours of the delivery of our letter (and without any further "dialogue" from the Committee that your last letter said should occur), you issued subpoenas to the Executive Directors of Greenpeace USA and 350.org demanding the production of broad categories of constitutionally-protected, private communications. No effort was made to narrow the Committee's requests, or to address the First Amendment concerns raised by Greenpeace and 350.org. Instead, during a hastily-arranged press conference, Committee Members repeated many of the same misstatements and mischaracterizations identified and addressed in our July 13 letter, without correction.

For the reasons explained in our prior letters of June 1, June 24, and July 13, which are attached and incorporated herein, we now formally object to the requests made in the Committee's subpoena because, *inter alia*, (1) the Committee's requests violate the First Amendment; (2) the Committee lacks jurisdiction over ongoing criminal investigations conducted by state law enforcement authorities; and (3) the Committee's requests are vague, overbroad, and unreasonably burdensome. Each of these objections was first raised with the Committee on June 1, 2016, and the Committee has not taken any action since that time to address these concerns or to engage in a meaningful dialogue regarding climate change.

Accordingly, for the reasons set forth above and described in our prior letters, Ms. Leonard and Ms. Boeve, as representatives of their organizations, decline to comply with the vague, overbroad, and unconstitutional demands made in the subpoena issued by the Committee.

Sincerely,

Abbe David Lowell

cc: Ranking Member Eddie Bernice Johnson

Enclosures:
A. D. Lowell 6/1/16 Letter to Chairman Smith
F. Gay 6/1/16 Letter to Chairman Smith
A. D. Lowell 6/24/16 Letter to Chairman Smith
A. D. Lowell 7/13/16 Letter to Chairman Smith

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telephone: (202) 974-5600

August 19, 2016

VIA HAND DELIVERY

The Hon. Lamar S. Smith
Chairman
Committee on Science, Space, and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515-6301

Re: July 15, 2016 Subpoena

Dear Chairman Smith:

This letter will follow up on communications I have had with the Majority Staff concerning the Committee's July 15, 2016 subpoena. As you know, by letter dated July 27, 2016, on behalf of our clients, we objected to various procedural and substantive aspects of the subpoena. In this letter, as with prior correspondence, we expressed a request for and willingness to have a meeting to discuss the subpoena and the issue of climate change underlying that subpoena.

In earlier correspondence, we noted that the letter requests of the Committee were signed only by Members in the Majority, and we asked whether the Minority Members and staff were included. We did not get responses to those questions. Apparently, the subpoena was issued, also without involvement by the Minority. For the meeting we proposed and were trying to schedule, I asked your staff to consult with the Minority staff so that they could attend. Eventually, I received an email from your staff suggesting a call "to discuss [my] questions" concerning participation by the Minority. It appears the Majority staff did not want to explain in writing the Committee's dealing with the Minority Members and staff. I made that call.

During the conversation, your staff member stated that the Minority chose not to join the investigation or the requests for information and so, under "long-standing" Committee practice, the Minority would not be invited to any meeting about the document subpoena or requests. I have been involved advising clients on congressional inquiries for some time, and I have served as special counsel on congressional investigations. In the past, even in your Committee, the "practice" had been to require a full Committee vote or consent of the Ranking Member before the issuance of a subpoena. In addition, we have seen statements (e.g., July 7, 2016) from the Ranking Minority Member asking for a Committee meeting and involvement in the process.

Even if the Committee now creates a new policy of excluding its Members from its work, we do not think that is a process that achieves the stated goal of any congressional

oversight activity – to fairly explore issues of national importance like climate change. Nor is this a policy and procedure in which we can participate in good faith. Such a one-sided process also affirms the view in the public's eye that Congress has become a partisan institution that is not serious about addressing real problems.

On behalf of our clients, then, let me reiterate their willingness to participate in any fair proceedings of the Committee, including meeting with you and the Ranking Member or the staffs of the Majority and the Minority to see if we can provide information.

Sincerely,

Abbe David Lowell

cc: Ranking Member Eddie Bernice Johnson

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
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May 18, 2016

Matthew F. Pawa
President
Pawa Law Group, P.C.
Legal Director
The Global Warming Legal Action
1280 Centre Street, Suite 230
Newton Centre, MA 02459

Dear Mr. Pawa,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced that they were cooperating on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based not on sound legal or scientific arguments, but rather on a long-term strategy developed by political activist organizations such the Union of Concerned Scientists. To assist in the Committee's oversight of this matter, we are writing to request information related to your organization's role in developing and coordinating the recent actions taken by a number of state attorneys general.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[2] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[3] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff.[4]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[5] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[6] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[7]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[8]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between Attorneys General Offices and Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists met at the Manhattan offices of the Rockefeller Family Fund.[9] The meeting was held to develop a strategy

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[3] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[4] *Id.*
[5] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages,* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[6] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[7] *Id.* [emphasis added]
[8] *Id.* [emphasis added]
[9] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe,* WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-

"to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[10] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[11] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[12]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference, we understand that 2012 workshop attendees, including yourself and UCS's Peter Frumhoff, provided a briefing to members of the Green 20. It has since come to light that the New York Attorney General's office attempted to willfully conceal the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, you wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with you about the pre-conference briefing. You asked the attorney, "What should I say if she asks if I attended?"[13] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[14]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[15]

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of the current Green 20 investigations. Their actions appear to be the result of a long-standing, coordinated effort by

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1460574535?cb=logged0.4458549134086849.

[10] *Id.*

[11] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund*, Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*

[12] *Id.*

[13] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show*, WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

[14] *Id.*

[15] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions*, WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

activist groups such as UCS to target industrial, non-profit, and scientific organizations and individuals who question the activist groups' conclusions.

To assist the Committee in its oversight of this infringement on the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but no later than noon on June 1, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between employees of your organization and any office of a state attorney general referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between employees of your organizations and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Rep. Lamar Smith
Chairman

Frank D. Lucas
Rep. Frank D. Lucas
Vice Chairman

Mr. Matthew F. Pawa
May 18, 2016
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Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

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CATHERINE S. DIPIAZZA
Partner
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June 1, 2016

VIA U.S. MAIL and E-MAIL

Congressman Lamar Smith, Chairman
Congressman Frank D. Lucas, Vice Chairman
U.S. House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515-6301

Dear Congressman Smith and Congressman Lucas:

The Pawa Law Group, P.C. and the Global Warming Legal Action Project recently retained my firm in connection with responding your May 18, 2016 letter.

As you may know, the Pawa Law Group's legal practice entails representation of states and non-profit groups in environmental matters. For example, the Pawa Law Group has represented the State of New Hampshire since 2003 in a groundwater pollution case against numerous national oil companies, including ExxonMobil, Irving Oil, Shell Oil Co., Hess Corp., and others, and which resulted in a jury verdict in 2013 for the State and against the only non-settling defendant, Exxon Mobil Corporation; the state supreme court affirmed this verdict in 2015 and the U.S. Supreme Court denied Exxon's petition for *certiorari* last month. The Pawa Law Group also was co-counsel with eight state attorneys general in *Connecticut v. American Electric Power Co.*, which reached the U.S. Supreme Court in 2011; Pawa Law Group represented the land trust co-plaintiffs in that matter, which sought limits on greenhouse gas emissions under common law tort claims. Pawa Law Group has represented Clean Power Now, a non-profit group that intervened in legal cases and administrative proceedings on behalf of the Cape Wind project – a rare example of non-profit intervention in favor of a controversial development proposal. Pawa Law Group represented Greenpeace, U.S.A. in a case brought by subsidiaries of Shell Oil Co. in 2015, which sought to restrict Greenpeace U.S.A.'s protests against Arctic drilling in a unique and pristine American wilderness and that raised significant concerns related to global warming. From 2008 through 2013, the Pawa Law Group represented an Inupiat Eskimo tribe and Alaska municipality against major oil and electric power corporations and the nation's largest coal company in *Native Village of Kivalina, et al. v.*

ExxonMobil Corporation, et al., which sought monetary damages due to defendants' contributions to global warming, a process that is destroying the village.[1]

Although you may disagree with work of the Pawa Law Group and its clients' positions on environmental issues such as global warming, I trust the concern expressed in your letter regarding exercise of First Amendment rights extends to my clients. Citizens, non-profit groups and associations, and their counsel must be free to petition government, associate freely, and pursue legal redress; state governments must be free to receive confidential legal advice, as well as citizens' petitions, without fear of prying or interference by the federal government. In the context of First Amendment protections, the Supreme Court has stated that "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." *NAACP v. Button*, 371 U.S. 415, 430 (1963). The Court "has emphasized that there is no congressional power to investigate merely for the sake of exposure or punishment, particularly in the First Amendment area." *Gojack v. United States*, 384 U.S. 702, 711 (1966). The rights of States under the U.S. Constitution to exercise their sovereign prerogatives, including prosecutorial powers, without federal interference, is also sacrosanct. *See, e.g., Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) ("In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder.").

Your expansive information request not only raises constitutional issues, it also conflicts with my clients' professional obligations. In light of the fact that my clients frequently work with state governments and public interest groups, sometimes as co-counsel and other times as their attorneys, representing and/or providing confidential legal advice to the state governments or interest groups, communications responsive to your request would include documents that are privileged and/or subject to the work product doctrine and/or the common interest doctrine. As you know, attorneys are bound by their ethical obligations to, *inter alia*, preserve clients' confidences and secrets. *See* ABA Model Rule of Professional Conduct 1.6.

[1] Chairman Smith filed an amicus brief for the fossil fuel companies in *Kivalina v. ExxonMobil*, opposing the tribe's position.

ZUCKERMAN SPAEDER LLP

Congressman Lamar Smith, Chairman
Congressman Frank D. Lucas, Vice Chairman
June 1, 2016
Page 3

I would be happy to meet with you or your staff to discuss any of the above issues and learn more about the Committee's inquiry.

Sincerely,

Catherine S. Duval

cc: Congresswoman Eddie Bernice Johnson, Ranking Member

5341070.1

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
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June 17, 2016

Ms. Catherine S. Duval
Partner
Zuckerman Spaeder LLP
1800 M Street, NW
Washington, DC 20036-5807

Dear Ms. Duval,

Thank you for your June 1, 2016, response. The House Science, Space, and Technology Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with the contentions in your letter. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that your client provides the documents and information previously requested in our May 18, 2016, letter.[1]

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[2] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[3] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[4] However, Congress' investigatory power is not without limits.[5] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast

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[1] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.
[2] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[3] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23 [hereinafter CRS Report, RL30240].
[4] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[5] *Watkins v. U.S.*, 354 U.S. 178 (1957).

and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[6] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[7] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[8] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[9] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[10] organizations that violate the civil rights of individuals,[11] state agencies involved in the Hurricane Katrina response,[12] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138.069 billion to fund research and development.[13] Of that total federal spending, $31.8 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and

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[6] *McGrain* at 177, 181-182.
[7] *See McGrain*, 273 U.S. at 177, 181-182.
[8] *Eastland* at 509.
[9] CRS Report, RL30240 at 26.
[10] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[11] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[12] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[13] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of the Science Committee that organizations such as your client's and those similarly situated should not be inciting legal action based on debatable science to undermine the First Amendment of the Constitution.

The investigative efforts supported by your client and other similar organizations are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes,** but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[14]

This statement suggests that the Attorney General's office and those who support his actions will be deciding what science is valid and what science is invalid. In essence, the attorney general is saying that if he disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Congress has a duty to protect scientists and researchers from the criminalization of scientific inquiry.

Accordingly, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of these investigations, Congress can investigate the effects your client's advocacy may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[15] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your client's efforts and those of the so called "Green 20"

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[14] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available* at http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[15] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your client's actions are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The website of the Union of Concerned Scientists, one of the organizations now supporting the Green 20's investigations, describes a 2010 investigation by the Virginia Attorney General of a University of Virginia scientist as "a campaign of harassment," and "a threat[] [to the] the ability of scientists in Virginia to ask tough questions about our world—and pursue contentious lines of research." The current efforts by the Green 20, supported by your client's organization, appear to be no different.[16]

The First Amendment is Not a Shield to Congressional Inquiry

Unlike the Fifth Amendment, the First Amendment is not an impermeable shield to Congressional investigations. In *Barenblatt v. United States,* the Supreme Court stated "where the First Amendment rights are asserted to bar government interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[17] Moreover, when balancing the interests of the parties in *Watkins v. United States*, the Court held "the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness."[18] These cases are important precisely because they provide examples of congressional investigations – sustained by the Supreme Court – involving organizations similar to those of your client. The parties being investigated in the cases noted above are no different than the recipients of the Science Committee's May 18 letter.

Congress frequently and rigorously has investigated private citizens and advocacy groups for various types of conduct. In almost all instances these investigations have withstood judicial scrutiny, with little, if any, restriction imposed upon them. Recently, the Democratic Chairman of the House Oversight and Government Reform Committee, Henry Waxman, investigated numerous charities benefiting veterans.[19] When the founder of one of the charities under investigation failed to comply with Chairman Waxman's request for documents and testimony, the Chairman issued a subpoena compelling the necessary information.[20] Eventually, the

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[16] Union of Concerned Scientists, Center for Science & Democracy, *Science under Attack: Legal Harassment of Climate Scientist Michael Mann available at* http://www.ucsusa.org/center-science-and-democracy/protecting-scientists-harassment/cuccinelli-mann.html#.VImpBfkrKUk (last visited June 9, 2016).
[17] *Barenblatt v. U.S.*, 360 U.S. 109, 126 (1959).
[18] *Watkins v. U.S.*, 354 U.S. 178, 198 (1957).
[19] Philip Rucker, *Panel Probes Spending of Veterans Charities*, WASH. POST, Dec. 14, 2007.
[20] Matthew Jaffe and Rhonda Schwartz, *Director of Veterans Charity in Hiding*, MILITARY.COM *available at* http://www.military.com/NewsContent/0,13319,158246,00.html (last visited June 9, 2016).

Oversight Committee received all documents, information, and testimony as part of that congressional investigation.[21]

The Committee's Document Requests

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between employees of your organization and any office of a state attorney general referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between employees of your organization and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, 350.org, Greenpeace, the Rockefeller Brothers Fund, the Rockefeller Family Fund, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Rep. Lamar Smith
Chairman

Frank D. Lucas
Rep. Frank D. Lucas
Vice Chairman

Dana Rohrabacher
Rep. Dana Rohrabacher
Member of Congress

[21] Philip Rucker, *Chief of Veterans Charities Grilled on Groups' Spending*, WASH. POST, Jan. 18, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/01/17/AR2008011703620.html (last visited June 9, 2016).

Ms. Catherine S. Duval
June 17, 2016
Page 6

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Ms. Catherine S. Duval
June 17, 2016
Page 7

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

ZUCKERMAN SPAEDER LLP

June 24, 2016

VIA U.S. MAIL and E-MAIL

Congressman Lamar Smith, Chairman
U.S. House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515-6301

Dear Chairman Smith:

On behalf of the Pawa Law Group, P.C. and the Global Warming Legal Action Project, I write to respond to the letter of June 17, 2016 from you and certain other members of the House Committee on Science, Space, and Technology.

Your letter asserts that investigations by State Attorneys General into potentially fraudulent statements by Exxon Mobil Corporation "could have a chilling effect" on scientists performing federally-funded climate research. Citing two cases from the McCarthy era, *Barenblatt v. United States*, 360 U.S. 109 (1959) and *Watkins v. United States*, 354 U.S. 178 (1957), it contends that the Committee's interest in protecting this federal research outweighs First Amendment rights held by lawyers and activists to associate with one another, to speak out about Exxon's misstatements, and to petition government to take action against these misstatements. With respect, we disagree.

First Amendment Burden. One clear limit on congressional authority is the First Amendment. Under the Supreme Court's decision in *Watkins*, when a Committee undertakes investigations that burden First Amendment rights (as this investigation clearly does), it has a duty to describe the topic under inquiry with "undisputable clarity," to provide "the connective reasoning" that links this topic to the Committee's "precise questions," and to show that the information sought is to be used by the Committee "in coping with a problem that falls within its legislative sphere." *Id.* at 206, 215. In addition, the inquiry must be justified by a compelling government interest – for example, *Barenblatt* held that the government's "self-preservation" justified congressional inquiry into the Communist Party, an organization devoted to the violent overthrow of the United States. *Barenblatt*, 360 U.S. at 128.

Respectfully, the proposed inquiry does not meet these high standards. Apart from *Barenblatt* – which considered a congressional witch hunt now widely regarded as a stain on Congress – you have not brought to our attention any decision sustaining such a broad power to burden First Amendment rights. In addition, the present requests are much more burdensome

than the inquiry in *Barenblatt*, which concerned a single individual's refusal to answer questions regarding his membership in the Communist Party.

Questions Regarding Jurisdiction and Legislative Purpose. While it is true that the Committee has jurisdiction over federal climate research funding, the initial information request did not even mention federal research. Instead, it described your disagreement with the State AG investigations, and the burden these investigations could have on the rights "of American citizens [like Exxon] and *their* ability to fund and conduct scientific research." May 18 Letter at 4 (emphasis added).[1] Nor does the June 17 letter identify any federal researcher, federal research program, or federal funding stream likely to be directly or indirectly affected by any State's fraud investigation. Indeed, it would be surprising if such research even exists: the federal government long ago concluded that human emissions of greenhouse gases had altered the atmosphere and would, if not curtailed, substantially alter the Earth's climate.[2] Exxon's own scientists reached the same conclusion during the same time period,[3] prior to Exxon's notorious campaign of deception and denial on the issue.

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[1] *See Hentoff v. Ichord*, 318 F. Supp. 1175, 1182 (D.D.C. 1970) (congressional investigation was improper where "the Committee made no attempt to ascertain" whether information might be relevant to alleged legislative purpose; real purpose of investigation was to "inhibit further speech" by targets of investigation and by "others whose political persuasion is not in accord with that of members of the Committee").

[2] In 1979, the National Academy of Sciences issued an authoritative report on climate change. *See Carbon Dioxide and Climate: A Scientific Assessment, Report of an Ad Hoc Study Group on Carbon Dioxide and Climate to the Climate Research Board, Assembly of Mathematical and Physical Sciences*, National Research Council (1979), http://download.nap.edu/cart/download.cgi?record_id=12181. It stated: "We now have incontrovertible evidence that the atmosphere is indeed changing and that we ourselves contribute to that change. Atmospheric concentrations of carbon dioxide are steadily increasing, and these changes are linked with man's use of fossil fuels and exploitation of the land." *Id.* at vii. It concluded that a doubling of the CO_2 concentration in the atmosphere would cause a global average surface temperature increase of 2°C to 3.5°C. *Id.* at 1. This projection remains valid. *See, e.g.*, IPCC, Climate Change 2013, The Physical Science Basis, Summary for Policymakers at 16, *available at* https://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_SPM_FINAL.pdf.

[3] For example, *InsideClimate News* has disclosed a 1982 Exxon memo acknowledging that a "clear scientific consensus has emerged . . . that a doubling of atmospheric CO2 from its pre-industrial revolution value would result in an average global temperature rise of (3.0 ± 1.5) °C." The same memo states that there is "unanimous agreement in the scientific community that a temperature increase of this magnitude would bring about significant changes in the earth's climate, including rainfall distribution and alterations in the biosphere." http://insideclimatenews.org/documents/consensus-co2-impacts-1982.

Moreover, neither letter from the Committee addresses or articulates what possible legislation might result from your investigation. In sum, it appears to be highly questionable whether any interest and jurisdiction the Committee may have in safeguarding federal climate research is (a) related to these investigative requests from certain Committee members[4] or (b) sufficiently compelling to justify the significant burden on my clients' First Amendment rights.

Federalism, Division of Powers, and States' Rights. This investigation appears to put Congress in the awkward position of overseeing attempts by State officials to execute laws that are well within States' traditional police powers. Such an interference with State prerogatives may violate the States' sovereignty (*e.g.*, under the Tenth Amendment), and/or may be beyond Congress's enumerated powers. *See, e.g.*, *United States v. Printz*, 521 U.S. 898 (1997) (federal government may not "command the States' executive power"). I and lawyers representing other organizations raised this issue in response to your initial information requests, without receiving any response in your most recent letter.

Overbreadth and Privilege Issues. Finally, as we previously indicated, the request seeks information that is privileged and confidential. The request is directed at a law firm/legal project and seeks communications related to, among other things, pending litigation in Texas.[5] As you know, an attorney is prohibited from divulging privileged information.

I remain happy to meet with you or your staff to discuss any of the above issues. In the meantime, however, my clients do not expect to produce documents responsive to your information request, for the reasons given above.

Sincerely,

Catherine S. Duval

cc: Congresswoman Eddie Bernice Johnson, Ranking Member

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[4] We join in requests for clarification about whether this investigation is authorized by the House Rules and by the Committee's own rules. *See Watkins*, 354 U.S. at 198 ("when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter"). As an example, both the original information request and your most recent letter were signed by only a minority of the Committee; we seek clarity as to whether these members are authorized to initiate an investigation.

[5] *See* http://insideclimatenews.org/news/16062016/exxon-sues-massachusetts-attorney-general-climate-change-fraud-investigation.

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

July 6, 2016

Ms. Catherine S. Duval
Partner
Zuckerman Spader
1800 M. Street, NW Suite 1000
Washington, DC 20036

Dear Ms. Duval,

The Committee on Scienee, Space, and Technology is in receipt of your June 24, 2016, response to its request for information related to ongoing oversight of coordinated attempts to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. This response marks the second time your clients, Pawa Law Group and the Global Warming Legal Action Project, have refused to produce documents in response to oversight letters signed by 17 Members of the Committee. Further, your office has not attempted to engage the Committee in a dialogue related to our requests. This is disappointing. I urge you and your clients to engage with the Committee as soon as possible to discuss the Committee's requests.

The Committee maintains its authority to investigate your clients' activities and communications with various state attorneys general and other non-profit organizations. As previously stated in the Committee's June 17, 2016, letter, this authority is grounded in both the Constitution and rules of the U.S. House of Representatives.[1] The Committee maintains that the First Amendment, as interpreted by the Supreme Court, is not an impenetrable shield to Congressional inquiry.[2] Moreover, the Committee is concerned that the objections raised in your June 24, 2016, letter appear to selectively apply the law based solely upon the political party to which your clients and affiliated groups supply information.

On June 22, 2016, the House Progressive Caucus held a forum entitled "Oil is the New Tobacco." The forum was attended by (i) multiple members of the Union of Concerned Scientists (UCS), specifically Ms. Kathy Mulvey and Mr. Peter Frumhoff, (ii) Dr. Naomi Oreskes, founder of the Climate Accountability Institute (CAI), as well as (iii) other participants

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] *Watkins v. U.S.*, 354 U.S. 178, 198 (1957); *Barenblatt v. U.S.*, 360 U.S. 109, 126 (1959).

in the 2012 La Jolla Conference – an event also attended by your clients.[3] During the forum, Rep. Paul Tonko (D-NY), asked: "Have any of you had interactions with the any of the AGs?"[4] Both Dr. Oreskes of CAI and Ms. Mulvey of UCS responded in a candid and forthcoming manner about the assistance and information that their organizations have provided to the attorneys general investigating companies, scientists, and non-profit groups.[5] It appears that your clients' affiliates have no First Amendment concerns providing information to Members of the House Progressive Caucus; yet, continually and improperly refuse to provide any information to this Committee. That your clients' affiliates appear to have cast aside any First Amendment concerns when interacting with the Members of the House Progressive Caucus, but purport to be unwilling to provide this Committee similar information is, at minimum, concerning. It is clear that Members on both sides of the aisle have legitimate questions regarding the activities of your clients with regard to the assistance provided to the attorneys general, and I urge you to reconsider your unwillingness to provide information to the Committee.

Accordingly, the Committee reiterates its May 18, 2016, requests and asks that your clients produce responsive documents and communications to the Committee on or before July 13, 2016, at 12:00 p.m. As explained in detail in the Committee's June 17, 2016, letter, this request is a legitimate exercise of the Committee's oversight duties under the Constitution and the Rules of the House.

If your clients continue to refuse to provide information responsive to the Committee's requests on a voluntary basis, I will be left with no alternative but to utilize the tools delegated to the Committee by the Rules of the House of Representatives. Specifically, the Committee will consider use of compulsory process to obtain responsive documents in the possession, custody, or control of your clients.

At any point, I welcome the opportunity to discuss the Committee's request with you or your staff. To arrange a meeting or discuss matters over the phone prior to July 13, 2016, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

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[3] Congressional Progressive Caucus Facebook Page Video release entitled *LIVE: CPC & SEEC Forum "Oil Is The New Tobacco" available at* https://www.facebook.com/USProgressives/ (last visited July 1, 2016).
[4] *Id.*
[5] *Id.*

July 13, 2016

VIA U.S. MAIL and E-MAIL

Congressman Lamar Smith, Chairman
U.S. House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515-6301

Dear Chairman Smith:

On behalf of the Pawa Law Group, P.C. and the Global Warming Legal Action Project, I write to respond to your letter of July 6, 2016.

We remain concerned that your proposed inquiry infringes on my clients' First Amendment rights, including free speech, free association, and the right to petition government. In addition, we are not persuaded that the House Committee on Science, Space, and Technology has oversight authority to examine confidential or privileged communications related to investigations by state Attorneys General. The fact that environmental advocates publicly discussed these investigations in no way changes that analysis.

As noted in my earlier letters, I am happy to meet with you or your staff and discuss any of the issues raised in our prior correspondence. To date, I have not been contacted, but hope that at the appropriate time – and certainly before any compulsory process is considered – you or your staff will reach out. Please do not hesitate to get in touch.

Sincerely,

Catherine S. Duval

cc: Congresswoman Eddie Bernice Johnson, Ranking Member

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Mr. Matthew F. Pawa, President
Pawa Law Group, P.C.

You are hereby commanded to be and appear before the
Committee on Science, Space, and Technology

of the House of Representatives of the United States at the place, date, and time specified below.

☑ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: 2321 Rayburn House Office Building, Washington, D.C. 20515

Date: July 27, 2016 Time: 12:00 noon

☐ **to testify at a deposition** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

☐ **to testify at a hearing** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

To any authorized staff member or the U.S. Marshals Service

to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, D.C. this 13th day of July, 2016

Lamar Smith
Chairman or Authorized Member

Attest:

Kaun S. Haas
Clerk

SCHEDULE

In accordance with the attached schedule instructions, you, Matthew F. Pawa, are required to produce the things described below:

1. All documents and communications between any officer or employee of the Pawa Law Group and any officer or employee of the office of a state attorney general, referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between any officer or employee of the Pawa Law Group and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, Global Warming Legal Action Project, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Schedule Instructions

1. In complying with this subpoena, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Subpoenaed records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this subpoena has been, or is also known by any other name than that herein denoted, the subpoena shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF") files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this subpoena shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the subpoena was served.

8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the subpoenaed information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the subpoena cannot be made in full by July 27, 2016, at 12:00 noon, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided no later than July 26, 2016, at 12:00 noon.

12. In the event that a document is withheld in whole or in part on any basis, provide a log containing the following information concerning any such document: (a) the basis for withholding the document; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. In complying with the subpoena, be apprised that the U.S. House of Representatives and the Committee on Science, Space, and Technology do not recognize: any of the purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections; any purported privileges or protections from disclosure under the Freedom of Information Act; or any purported contractual privileges, such as non-disclosure agreements.

14. If any document responsive to this subpoena was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

15. If a date or other descriptive detail set forth in this subpoena referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the subpoena, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.

16. The things described in the schedule shall be produced in their current condition, as of July 13, 2016.

17. This subpoena is continuing in nature and applies to any newly-discovered information as to the time period January 1, 2012 to July 27, 2016. Any responsive record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

18. All documents shall be Bates-stamped sequentially and produced sequentially.

19. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building.

20. Upon completion of the production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in

your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), text messages, Google chat communications or other instant message communications, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

8. "You" or "your" means and refers to you as natural person and in your capacity as President of the Pawa Law Group, and any, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction in your personal capacity or at the Pawa Law Group.

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Mr. Matthew F. Pawa, Legal Director
Global Warming Legal Action Project

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Committee on Science, Space, and Technology

of the House of Representatives of the United States at the place, date, and time specified below.

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Date: _____ Time: _____

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To any authorized staff member or the U.S. Marshals Service

to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, D.C. this 13th day of July, 2016.

Lamar Smith
Chairman or Authorized Member

Attest: Karen L. Haas
Clerk

SCHEDULE

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2. All documents and communications between any officer or employee of the Global Warming Legal Action Project and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

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14. If any document responsive to this subpoena was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

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your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), text messages, Google chat communications or other instant message communications, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

8. "You" or "your" means and refers to you as natural person and in your capacity as Legal Director of the Global Warming Legal Action Project, and any, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction in your personal capacity or at the Global Warming Legal Action Project.

July 26, 2016

VIA U.S. MAIL and E-MAIL

Congressman Lamar Smith, Chairman
U.S. House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515-6301

Dear Chairman Smith:

I am writing on behalf of the Pawa Law Group, P.C. and the Global Warming Legal Action Project to describe our objections to your subpoenas of July 13. My previous letters of June 1, June 24, and July 13 described our many areas of concern regarding your request for this information;[1] they are again summarized below. None has been addressed.

First Amendment Burden. Your subpoenas target communications by environmental protection groups and lawyers whom you accuse of trying to "demonize the fossil fuel industry." But disagreement with advocacy groups or their tactics is not a legally sufficient reason to subpoena their confidential communications. "Congress to be sure has wide powers to investigate and report in aid of legislation, but where its activities encroach upon constitutionally protected liberties, a subordinating interest of the State must be affirmatively shown." *See Hentoff v. Ichord*, 318 F. Supp. 1175, 1181-82 (D.D.C. 1970) (congressional investigation improper when real purpose was to "inhibit further speech" by targets of investigation and by "others whose political persuasion is not in accord with that of members of the Committee").

Jurisdiction and Legislative Purpose. "No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress." *Watkins v. United States*, 354 U.S. 178, 187 (1957). No proper jurisdictional basis or legislative purpose for your subpoena has been identified. For example, the cases you cited as support in footnote 1 of your July 6 letter involved an investigation of a federal government agency or an inquiry regarding an

[1] Our objections incorporate by reference the arguments and case law in my previous letters as well as those in letters you received from the environmental protection groups and State Attorneys General from whom you have sought similar information. *See* correspondence *available at* http://democrats.science.house.gov/letter/document-requests-sent-state-attorneys-general-and-environmental-groups

organization's potential effects on the U.S. Armed Forces. Your current inquiry implicates no such federal governmental interest, nor does it fall within the jurisdiction of your Committee.[2]

Federalism, Division of Powers, and States' Rights. The Attorneys General from whom you requested information wrote compelling letters regarding states' rights and Congress' lack of authority to oversee ongoing investigations and lawful actions of state officers. These rights encompass the provision of legal advice and counsel to States.

Overbreadth and Vagueness. Your subpoenas call for a broad range of information over a long timeframe: four and a half years. Interpreted literally, they demand documents that involve climate change, legal process, and many types of organizations and individuals. For a law firm that specializes in environmental litigation, this request would likely encompass large portions of client files on certain cases.

Privilege and the Duty of Confidentiality. Subpoenaed materials "referring or relating to the investigation, *subpoenas duces tecum* or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change"[3] necessarily includes information regarding legal strategies and, potentially, law enforcement information. In other words, documents related to potential, past, or current legal proceedings that my clients are duty-bound to keep privileged or confidential.

Our objections are carefully considered and deeply held; we cannot comply with the July 13 subpoenas. Please let me know if it would be constructive to meet with you or your staff and

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[2] Under the Rule X, subsection(p) of the U.S. House of Representatives, the jurisdiction of the Committee on Science, Space, and Technology is not unlimited; rather, it is: "(1) All energy research, development, and demonstration, and projects therefor, and all federally owned or operated nonmilitary energy laboratories. (2) Astronautical research and development, including resources, personnel, equipment, and facilities. (3) Civil aviation research and development. (4) Environmental research and development. (5) Marine research. (6) Commercial application of energy technology. (7) National Institute of Standards and Technology, standardization of weights and measures, and the metric system. (8) National Aeronautics and Space Administration. (9) National Space Council. (10) National Science Foundation. (11) National Weather Service. (12) Outer space, including exploration and control thereof. (13) Science scholarships. 14) Scientific research, development, and demonstration, and projects therefor."

[3] *See* July 13 subpoena and definitions.

discuss this letter or any of our prior correspondence. It is disappointing that despite repeated offers, made in writing to you and on the phone to your staff, no such conversation occurred before subpoenas were signed and sent.

Sincerely,

Catherine S. Duval

cc: Congresswoman Eddie Bernice Johnson, Ranking Member

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

Mr. Stephen Heintz
President
The Rockefeller Brothers Fund
475 Riverside Drive, Suite 900
New York, NY 10115

Dear Mr. Heintz,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced that they were cooperating on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based not on sound legal or scientific arguments, but rather on a long-term strategy developed by political activist organizations such the Union of Concerned Scientists. To assist in the Committee's oversight of this matter, we are writing to request information related to your organization's role in developing and coordinating the recent actions taken by a number of state attorneys general.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[2] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La Jolla, California.[3] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff.[4]

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

[3] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at*

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[5] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[6] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[7]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[8]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between Attorneys General Offices and Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists met at the Manhattan offices of the Rockefeller Family Fund.[9] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[10] According to media reports, the meeting also

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http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[4] *Id.*

[5] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages*, Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[6] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[7] *Id.* [emphasis added]

[8] *Id.* [emphasis added]

[9] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe,* WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.

[10] *Id.*

included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[11] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[12]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference, members of the Green 20 were briefed by 2012 workshop attendees including UCS's Peter Frumhoff and Matthew Pawa, an attorney and founder of the Global Warming Legal Action Project. It has since come to light that the New York Attorney General's office attempted to willfully conceal the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa, wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[13] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[14]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[15]

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of the current Green 20 investigations. Their actions appear to be the result of a long-standing, coordinated effort by activist groups such as UCS to target industrial, non-profit, and scientific organizations and individuals who question the activist groups' conclusions.

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[11] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund*, Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*
[12] *Id.*
[13] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show*, WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.
[14] *Id.*
[15] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions*, WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

Mr. Stephen Heintz
May 18, 2016
Page 4

To assist the Committee in its oversight of this infringement on the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but no later than noon on June 1, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between employees of your organization and any office of a state attorney general referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between employees of your organization and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, Greenpeace, 350.org, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Rep. Lamar Smith
Chairman

Frank D. Lucas
Rep. Frank D. Lucas
Vice Chairman

Mr. Stephen Heintz
May 18, 2016
Page 5

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

Patterson Belknap Webb & Tyler LLP

1133 Avenue of the Americas New York, NY 10036-6710 212.336.2000 fax 212.336.2222 www.pbwt.com

June 1, 2016

Harry Sandick
Partner
(212) 336-2723
hsandick@pbwt.com

By Fax and E-mail

The Honorable Lamar S. Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

We represent the Rockefeller Brothers Fund (the "Fund") and we write in response to your letter of May 18, 2016 (the "Letter") requesting the production of documents in connection with oversight being conducted by the House Committee on Science, Space, and Technology (the "Committee"). We have considered your letter and for the reasons discussed below, we respectfully decline the Committee's request.

Background

The Fund is a private foundation created in 1940 by the sons of John D. Rockefeller Jr.—John D. 3rd, Nelson, Winthrop, Laurance, and David—as a vehicle to share advice and research on charitable activities and to coordinate their philanthropic efforts. Today, through a variety of grant-making programs, the Rockefeller Brothers Fund seeks to advance social change that will contribute to a more just, sustainable and peaceful world.

One of the Fund's programs is the Sustainable Development Program, which is primarily concerned with climate change. The Fund conducts its charitable activities in a transparent manner and the Sustainable Development Program's guidelines and grant spending are publicly disclosed on the Fund's website.[1] Any person wishing to learn about the full range of the Fund's grant-making activities relating to the Sustainable Development Program may do so by using the search engine provided on this website.[2]

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[1] *See, e.g.*, "Sustainable Development," at http://www.rbf.org/programs/sustainable-development; *see also* "Sustainable Development Guidelines," at http://www.rbf.org/programs/sustainable-development/guidelines.

[2] *See* "Grants Search," http://www.rbf.org/grants-search (permitting the public to search for grants made by the Rockefeller Brothers Fund from 2003 to the present).

The Committee's Letter

The Letter asks the Fund to provide two categories of documents to the Committee. First, the Letter seeks communications between the Fund's personnel and the offices of State attorneys general relating to investigations and lawsuits concerning the issue of climate change. Second, the Letter seeks communications between the Fund's personnel and several private organizations relating to investigations and lawsuits concerning the issue of climate change. The Letter locates the Committee's authority to seek these documents in House Rule X.

The Rockefeller Brothers Fund's Response To The Committee

For the following reasons, we cannot comply with the Letter's request.

First, the Letter seeks documents that are protected by a qualified privilege that emanates from rights guaranteed by the First Amendment: freedom of speech and freedom of association. Speech on public issues is entitled to "special protection" under the First Amendment. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). The Supreme Court also has recognized "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition, for the redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). "Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages and to do so in private." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010). For these reasons, any state action that may curtail the freedom to associate is subject to the closest scrutiny. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

This First Amendment privacy interest is "not easily overridden"; the party seeking the information must assert a "compelling interest" in obtaining the information. *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976). Congress is subject to the limitations of the First Amendment whether it is acting in its legislative or investigative capacity. *See Watkins v. United States*, 354 U.S. 178, 197 (1957).

Second, the Rockefeller Brothers Fund has a fundamental right to keep private the particular communications sought by the Committee members. The Letter seeks internal documents and communications relating to the support for litigation provided by foundations and public charities. Support of litigation is a form of expression and association that is protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 428-29 (1963). Courts have declined to compel litigants to identify even the names of those who support their lawsuits, let alone the broader type of information sought by the Letter. *See AFL-CIO v. FEC*, 333 F.3d 168, 177-78 (D.C. Cir. 2003) (holding that the "compel[led] public disclosure of an association's confidential internal materials . . . intrudes on the privacy of association and belief guaranteed by the First Amendment"); *Beinin v. Center for the Study of Popular Culture*, 2007 U.S. Dist. LEXIS 47546

(N.D. Cal. Jun. 20, 2007) ("First Amendment interests are implicated . . . when the identity of those who have privately offered verbal support for litigation is sought in discovery."); *see also Eilers v. Palmer*, 575 F. Supp. 1259, 1261 (D. Minn. 1984) (holding that compelled disclosure of the identities of those supporting litigation might burden the First Amendment rights of both the litigants and their supporters). The compelled disclosure of the materials requested by the Committee would burden the Fund's "significant First Amendment interest in associational autonomy" because it would interfere with the Fund's "internal operations and with their effectiveness" and would likely "chill future individual political activity" by some of the parties involved in the communications. *AFL-CIO*, 333 F.3d at 176-77.

The decision reached by the United States District Court for the District of Kansas in *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 U.S. Dist. LEXIS 19475 (D. Kan. Mar. 16, 2007), is instructive. In *Heartland*, the court refused to enforce a subpoena for a trade association's internal documents because the advocacy of particular policy or legislative ends "is precisely the type of internal associational activity and past political activity that the First Amendment is designed to protected." *Id.* at *20. In short, the exact type of document request propounded by the Committee here has been rejected by courts as improper under the First Amendment.

Third, the compelling interests of the Fund outweigh any interest that the Committee may have in obtaining these internal documents. The Committee may act only based on a valid legislative purpose. *See Watkins v. United States*, 354 U.S. 178, 197 (1957) ("[C]ompulsory process is used only in furtherance of a legislative purpose"); *see also Russell v. United States*, 369 U.S. 749 (1962) ("The power to investigate is limited to a valid legislative function.") (Douglas, J., concurring). "We cannot simply assume . . . that every congressional investigation is justified by a public need that overbalances any private rights affected." *See Watkins*, 354 U.S. at 197.

We believe the Committee's interests in the Fund's internal documents are uncertain at best. Rule X, cited in the Letter, does not justify this document request. The language quoted by the Committee—that the Committee "shall review and study on a continuing basis laws, programs and Government activities relating to nonmilitary research and development"—has no obvious connection to the documents requested in the Letter. It is not clear to us what valid legislative purpose lies behind the request for documents to the extent that the Committee seeks to regulate the conduct of State attorneys general. For the reasons discussed in the letter submitted on May 26, 2016 by the New York State Attorney General, the Committee does not have the authority to oversee or legislate the work done by State prosecutors or regulators. *See New York v. United States*, 505 U.S. 144, 162 (1992) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.").

The Letter also speaks of a concern that these State attorneys general may be somehow impacting the free speech rights of certain corporations or individuals. These concerns

are also outside of the scope of Rule X, as they do not pertain to "laws, programs and Government activities." But even if Rule X did somehow reach this subject, the response to a threat to free speech cannot itself be an infringement on First Amendment rights. As Justice Brandeis wrote many years ago, "[i]f there be time to expose through discussion the falsehood and fallacies, ... the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *see also Citizens United v. FEC*, 558 U.S. 310, 361 (2010) ("[I]t is our tradition that more speech, not less, is the governing rule."). The Committee should not burden the free expression rights of the Fund in order to vindicate the free expression rights belonging to others.

Fourth, the Letter is not narrowly tailored to achieve a compelling governmental purpose, which is required when strict scrutiny is employed. The Letter seeks "[a]ll documents and communications" of all Fund personnel over a four-and-one-half year time period, with scores of other individuals and institutions, about a subject—climate change—which is a program area for the Fund. Due to its breadth, compliance with the Letter, even if a compelling government purpose had been articulated, would itself burden the First Amendment rights of the Fund.

* * *

We are available to discuss the Letter and the serious concerns expressed in this response. We also direct the Committee to the Fund's website, which contains detailed information about the Fund's grant-making and other program activities. These public materials will permit the Committee to learn about many of the issues that relate to the Letter in a manner than does not impose a burden on First Amendment rights. The Fund otherwise respectfully declines to comply with the Letter's request for documents and information.

Respectfully submitted,

Harry Sandick

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
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June 17, 2016

Mr. Harry Sandick
Partner
Patterson Belknap Webb & Tyler
1133 Avenue of the Americas
New York, New York 10036

Dear Mr. Sandick,

Thank you for your June 1, 2016, response. The House Science, Space, and Technology Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with the contentions in your letter. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that your client provides the documents and information previously requested in our May 18, 2016, letter.[1]

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[2] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[3] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[4] However, Congress' investigatory power is not without limits.[5] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast

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[1] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.
[2] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[3] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23 [hereinafter CRS Report, RL30240].
[4] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[5] *Watkins v. U.S.*, 354 U.S. 178 (1957).

and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[6] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[7] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[8] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[9] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[10] organizations that violate the civil rights of individuals,[11] state agencies involved in the Hurricane Katrina response,[12] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138.069 billion to fund research and development.[13] Of that total federal spending, $31.8 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and

[6] *McGrain* at 177, 181-182.
[7] *See McGrain*, 273 U.S. at 177, 181-182.
[8] *Eastland* at 509.
[9] CRS Report, RL30240 at 26.
[10] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[11] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[12] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[13] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of the Science Committee that organizations such as your client's and those similarly situated should not be inciting legal action based on debatable science to undermine the First Amendment of the Constitution.

The investigative efforts supported by your client and other similar organizations are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes,** but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[14]

This statement suggests that the Attorney General's office and those who support his actions will be deciding what science is valid and what science is invalid. In essence, the attorney general is saying that if he disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Congress has a duty to protect scientists and researchers from the criminalization of scientific inquiry.

Accordingly, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of these investigations, Congress can investigate the effects your client's advocacy may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[15] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your client's efforts and those of the so called "Green 20"

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[14] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available* at http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[15] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your client's actions are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The website of the Union of Concerned Scientists, one of the organizations now supporting the Green 20's investigations, describes a 2010 investigation by the Virginia Attorney General of a University of Virginia scientist as "a campaign of harassment," and "a threat[] [to the] the ability of scientists in Virginia to ask tough questions about our world—and pursue contentious lines of research." The current efforts by the Green 20, supported by your client's organization, appear to be no different.[16]

The First Amendment is Not a Shield to Congressional Inquiry

Unlike the Fifth Amendment, the First Amendment is not an impermeable shield to Congressional investigations. In *Barenblatt v. United States,* the Supreme Court stated "where the First Amendment rights are asserted to bar government interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[17] Moreover, when balancing the interests of the parties in *Watkins v. United States*, the Court held "the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness."[18] These cases are important precisely because they provide examples of congressional investigations – sustained by the Supreme Court – involving organizations similar to those of your client. The parties being investigated in the cases noted above are no different than the recipients of the Science Committee's May 18 letter.

Congress frequently and rigorously has investigated private citizens and advocacy groups for various types of conduct. In almost all instances these investigations have withstood judicial scrutiny, with little, if any, restriction imposed upon them. Recently, the Democratic Chairman of the House Oversight and Government Reform Committee, Henry Waxman, investigated numerous charities benefiting veterans.[19] When the founder of one of the charities under investigation failed to comply with Chairman Waxman's request for documents and testimony, the Chairman issued a subpoena compelling the necessary information.[20] Eventually, the

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[16] Union of Concerned Scientists, Center for Science & Democracy, *Science under Attack: Legal Harassment of Climate Scientist Michael Mann available at* http://www.ucsusa.org/center-science-and-democracy/protecting-scientists-harassment/cuccinelli-mann.html#.V1mpBfkrKUk (last visited June 9, 2016).
[17] *Barenblatt v. U.S.*, 360 U.S. 109, 126 (1959).
[18] *Watkins v. U.S.*, 354 U.S. 178, 198 (1957).
[19] Philip Rucker, *Panel Probes Spending of Veterans Charities*, WASH. POST, Dec. 14, 2007.
[20] Matthew Jaffe and Rhonda Schwartz, *Director of Veterans Charity in Hiding*, MILITARY.COM *available at* http://www.military.com/NewsContent/0,13319,158246,00.html (last visited June 9, 2016).

Oversight Committee received all documents, information, and testimony as part of that congressional investigation.[21]

The Committee's Document Requests

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between employees of your organization and any office of a state attorney general referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between employees of your organization and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, 350.org, the Rockefeller Family Fund, Greenpeace, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. Dana Rohrabacher
Member of Congress

[21] Philip Rucker, *Chief of Veterans Charities Grilled on Groups' Spending*, WASH. POST, Jan. 18, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/01/17/AR2008011703620.html (last visited June 9, 2016).

Mr. Harry Sandick
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Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

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Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

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June 24, 2016

Harry Sandick
Partner
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By Fax and E-mail

The Honorable Lamar S. Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

We represent the Rockefeller Brothers Fund ("RBF"), and along with David Angeli, Esq., we are now co-counsel to the Rockefeller Family Fund ("RFF"). We write in response to the June 17, 2016 letter (the "June Letter") sent by the House Committee on Science, Space, and Technology (the "Committee") to both the RBF and RFF (together, the "Funds"). The June Letter asks the Funds to produce documents in connection with oversight being conducted by the Committee. We have reviewed the June Letter and for the reasons discussed below, we must respectfully decline the Committee's request to produce documents.

Background

As you know, the June Letter represents the Committee's second request to the Funds seeking the production of internal documents related to the Funds' communications with other entities concerning investigations being conducted by state attorneys general. The initial request was made in identical letters to the Funds dated May 18, 2016 (the "May Letter"). The Funds responded to the May Letter in separate letters dated June 1, 2016, in which the Funds explained their concerns that the Committee's request imperiled the Funds' First Amendment rights and that the scope of the request was unduly burdensome.

Congress's Investigatory Power Is Not Unlimited

We have three principal concerns about the June Letter. First, the Committee does not appear to acknowledge the boundaries of its investigatory power. Second, the Committee makes no effort to balance the Committee's prerogatives with the fundamental rights guaranteed to the Funds under our Constitution. Third, even apart from those defects, the June Letter restates without modification the burdensome document requests set forth in the May Letter. We address each of these issues in turn.

The June Letter states that the Committee's investigatory power is derived from the legislative function assigned to Congress in the Constitution: "While Congress often must

conduct investigations to aid its execution of its legislative function, this requirement is flexible." (June Letter, at 2). We agree that Congress's investigatory power is intertwined with its execution of its legislative function, but we disagree that this requirement is flexible enough to encompass the pending request for documents. The absence of any possible legitimate legislative end restrains the Committee's ability to press its document request.

Several of the cases in the June Letter do not support the Committee's assertion of authority to press forward with these requests. The Committee cites to *Watkins v. United States*, 354 U.S. 178, 187 (1957), in which the Supreme Court held that "[t]here is no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress." *Watkins* stands for the proposition that while Congress has broad investigatory powers, those powers are not without bounds. The Court explained that "[n]o inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress." 354 U.S. 178, 187 (1957). Indeed, in *Watkins* the Supreme Court rejected the efforts of the House Un-American Affairs Committee to compel witness testimony when it vacated a conviction for criminal contempt. *Watkins* undercuts, rather than supports, the Committee's request for documents.

The June Letter also cites *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), for the proposition that a legislative inquiry can be valid even if there is "no predictable end result." (June Letter, at 2). While the Court in *Eastland* allowed the subpoena to be enforced, *Eastland* does not give *carte blanche* to an unbounded Congressional investigation. *Eastland* itself notes that Congress's power to investigate is "not unlimited," and that "[t]he subject of any inquiry always must be one on which legislation could be had." 421 U.S. at 504 n. 15 (internal quotation omitted). Anticipating the issues presented here, the *Eastland* Court held that "Congress is not invested with a 'general' power to inquire into private affairs." *Id.*

Here, the June Letter never suggests what possible legislation might relate to this inquiry, or how the documents held by the Funds are related to such legislation. Even accepting that there need not be a "predictable end result" for Congress to conduct an investigation, it must be possible to contemplate an end result consisting of constitutionally permitted legislation. At one point, the June Letter states that Congress finances scientific research and that the ongoing state attorneys general investigations might somehow deter such scientific research, but the June Letter fails to identify such funded research (when was such research conducted and by whom?) or to explain the relationship between the government's funding of scientific work and an investigation into the conduct of two private philanthropies.[1]

The June Letter expresses concern about the investigation conducted by the New York Attorney General but we do not see how his investigation into state law securities fraud

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[1] Please refer to the letters RBF and RFF previously sent to the Committee, in response to the Committee's May Letter for more background information on the Funds and their activities.

could deter scientific research or how this state regulatory investigation is within the Committee's purview. The June Letter quotes a statement made by Attorney General Schneiderman in which he asks whether Exxon-Mobil conducted scientific research that produced results that were inconsistent with Exxon-Mobil's required disclosures to shareholders. Attorney General Schneiderman suggests that false or misleading statements to shareholders might be actionable under New York law.[2] The June Letter states that the New York Attorney General's statement reflects an effort to pass judgment on the civil rights of scientists and the validity of their scientific work, but all that the quoted passage concerns is whether Exxon-Mobil violated securities law by providing an account of climate change to its shareholders that it knew—by virtue of its own internal scientific research—to be untrue. None of this, in any event, points towards a role for the Committee in proposing possible federal legislation, and the Committee does not demonstrate otherwise.

In short, the Committee does not have unlimited authority and the absence of a connection between the investigations being conducted by state attorneys general and any conceivable federal legislation is fatal to the Committee's request.

The Funds' First Amendment Interests Outweigh Any Interest the Committee May Have

We agree with the Committee that "the First Amendment is not an impermeable shield to Congressional investigations." (June Letter, at 4). The First Amendment does, however, subject Congressional investigations to the "closest scrutiny" if those investigations have the potential to chill the rights protected by the First Amendment. *See NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (applying this principle in the context of a state civil contempt prosecution). The propriety of a Congressional inquiry like this one—which interferes with the Funds' First Amendment rights to freedom of speech and freedom of association—can therefore be justified "only by demonstrating that [the compelled disclosure] directly serves a compelling state interest." *AFL-CIO v. FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003). On Page 4 of the June Letter, the Committee recognizes the applicability of this rights-balancing framework, yet the Letter never discusses or addresses the requisite balancing.[3]

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[2] In New York, the Martin Act grants the Attorney General "broad regulatory and remedial powers to prevent fraudulent securities practices." *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*, 906 N.E.2d 1049, 1054 (N.Y. 2009).

[3] The Supreme Court has narrowly construed the congressional power to investigate when necessary to avoid deciding an issue of constitutional law. *See United States v. Rumely*, 345 U.S. 41, 46-47 (1953) ("Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits.").

As we explained in our prior letters to the Committee, compliance with the Committee's document request would chill the Funds' First Amendment rights. (June 1, 2016 Letter from RFF to the Committee, at 2-3; June 1, 2016 Letter from RBF to the Committee, at 2-3). Advocacy on matters of public policy is exactly the type of internal associational activity and past political activity that the First Amendment was designed to protect. *See AFL-CIO*, 333 F.3d at 176-77; *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 U.S. Dist. LEXIS 19475 (D. Kan. Mar. 16, 2007). The Committee itself recognizes the importance of First Amendment rights; it expresses a concern that "inciting legal action based on debatable science" could "undermine the First Amendment of the Constitution" by interfering with Exxon-Mobil's free speech rights. (June Letter, at 3) (citing to *Barenblatt v. United States*, 360 U.S. 109, 126 (1959)). The Committee shows solicitude for Exxon-Mobil's rights while simultaneously overlooking the fact that those same rights belong to the Funds and the other non-governmental recipients of the subpoenas.

Weighed against the Funds' rights is the Committee's interest in conducting an investigation into the actions of certain state attorneys general. Whether or not this is a proper investigative function, it is unrelated to the Funds or its documents. The Funds did not issue the subpoenas about which the Committee is concerned. Any concern that the Committee may have about the relative merits of the state attorney general actions is a matter between the Committee and the state attorneys general; it cannot be addressed or resolved by seeking documents from the Funds. To the extent that the Funds or their grant recipients—which are independent of the Funds—engaged in advocacy with government officials, this is their right under our Constitution.

In discussing the Committee's authority to obtain information protected by the First Amendment, the June Letter relies heavily on *Barenblatt v. United States*, 360 U.S. 109 (1959), a case in which the Supreme Court sustained the conviction of an individual who declined to answer questions posed by the House Un-American Affairs Committee. Even this opinion, which dates from a sad episode in our nation's history, makes clear that "Congress may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation to [a valid legislative] purpose." *Id.* at 127. *Barenblatt* was decided against the defendant only because the Court held that special rules applied to an investigation into the operations and goals of the Communist Party, which sought "the ultimate overthrow of the Government of the United States by force and violence." *Id.* at 128. Justice Harlan explained that "in a different context," the congressional inquiry "would certainly have raised constitutional issues of the gravest character." The June Letter alleges no plot against America, and in the very different factual context presented here, *Barenblatt* supports the position taken by the Funds, not the position taken by the Committee.[4] *See also Gibson v. Florida Legislative*

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[4] In his dissent, Justice Black warned of the dangers of applying *Barenblatt* outside of its narrow context of preventing the spread of communism. *See Barenblatt*, 360 U.S. at 152 ("It is, sadly, no answer to say that this Court will not allow the trend to overwhelm us; that today's holding

Investigation Commission, 372 U.S. 539, 549 (1963) (holding that an attempt to compel the NAACP to disclose its membership is "wholly different from compelling the Communist Party to disclose its own membership").

In short, given the potential chilling effect that can arise from a decision to "incit[e] legal action" without justification, and the absence of any valid government interest—notwithstanding that the Committee must prove a *compelling* government interest—the balance of interests weighs against compelling disclosure and in favor of protecting the Funds' First Amendment rights.

The Investigations Cited As Precedent Are Distinguishable

In support of the document request, the June Letter refers to a number of other Congressional investigations, but those investigations are distinguishable. For example, the investigation conducted by the House Committee on Oversight and Government Reform into the misuse of money by veterans' charities was a bipartisan effort to look at whether those charities, which solicited money through direct mailers to the public, were committing fraud by donating little of the funds they raised to veterans. The investigation was conducted with an eye towards possible legislation that would require greater transparency from charitable organizations in order to make sure that the public was not misled when solicited to provide assistance to our nation's veterans. *See* Philip Rucker, *Chief of Veterans Charities Grilled on Groups' Spending*, WASH POST, Jan. 18, 2008. There is no analogy between that investigation and this one. The Committee has not—nor could it—assert that members of the public were defrauded in any way by the Funds' use of their endowments to make grants to organizations that engaged in independent public advocacy protected by the First Amendment.

Other investigations identified by the Committee have a clear and direct relationship to subjects that are without question within the scope of federal legislative activity: Iran-Contra (whether the President violated federal law by selling weapons to Iran and using the proceeds to fund one side in a civil war in Nicaragua); Whitewater (investigating conduct by a federally regulated savings and loan and later exercising the legislative function of impeachment); Fast and Furious (whether a federal agency conducted an investigation deemed not to be in the public interest); and Benghazi (whether the State Department security laws and procedures were sufficient to protect United States personnel in Libya). An investigation into the legitimacy of state regulatory action bears no resemblance to these prior investigations.

The June Letter also makes a reference to an investigation conducted by former Virginia Attorney General Ken Cuccinelli that used the state government subpoena power to chill speech related to the dangers of climate change. The June Letter attempts to draw an

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will be strictly confined to 'Communists,' as the Court's language implies.") (Black, J., dissenting).

analogy between that state action and the conduct of the Funds, which are non-governmental entities. A campaign of harassment conducted by a state prosecutor against a scientist at the University of Virginia bears no relation to private foundations making grants to organizations engaged in public advocacy. There is no comparison. In any event, the subpoenas issued by Mr. Cuccinelli were ultimately quashed. *See Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 722 S.E.2d 626 (Va. 2012).

The Committee's Document Request is Unduly Burdensome

Finally, even if the Committee's actions were in furtherance of a compelling government interest, the June Letter is not narrowly tailored to achieve such an interest. The June Letter seeks "[a]ll documents and communications" of all personnel of the Funds over a four-and-one-half year time period, with myriad other individuals and institutions, about a broad subject—climate change advocacy involving state regulators—that relates to a program area for the Funds. Due to its breadth, compliance with the June Letter, even if a compelling government purpose had been articulated, would itself burden the First Amendment rights of the Funds. Despite the Funds' objections to the May Letter, the June Letter restated the request in the May Letter without modification. Even where the legislature is entitled to conduct an investigation, it does not follow that "the investigatory body is free to inquire into or demand all forms of information." *Gibson*, 372 U.S. at 545.

* * *

We are available to discuss the June Letter and the serious concerns expressed in this response. Given the essential constitutional rights endangered by the June Letter's request and the extraordinary breadth of the request, the Funds respectfully decline to comply with the request.

Respectfully submitted,

Harry Sandick

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
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July 6, 2016

Mr. Harry Sandick
Partner
Patterson Belknap Webb & Tyler
1133 Avenue of the Americas
New York, New York 10036

Dear Mr. Sandick,

The Committee on Science, Space, and Technology is in receipt of your June 24, 2016, response to its request for information related to ongoing oversight of coordinated attempts to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. This response marks the second time your clients, the Rockefeller Family Fund and the Rockefeller Brothers Fund, have refused to produce documents in response to oversight letters signed by 17 Members of the Committee. Further, your office has not attempted to engage the Committee in a dialogue related to our requests. This is disappointing. I urge you and your clients to engage with the Committee as soon as possible to discuss the Committee's requests.

The Committee maintains its authority to investigate your clients' activities and communications with various state attorneys general and other non-profit organizations. As previously stated in the Committee's June 17, 2016, letter, this authority is grounded in both the Constitution and rules of the U.S. House of Representatives.[1] The Committee maintains that the First Amendment, as interpreted by the Supreme Court, is not an impenetrable shield to Congressional inquiry.[2] Moreover, the Committee is concerned that the objections raised in your June 24, 2016, letter appear to selectively apply the law based solely upon the political party to which your clients and affiliated groups supply information.

On June 22, 2016, the House Progressive Caucus held a forum entitled "Oil is the New Tobacco." The forum was attended by (i) multiple members of the Union of Concerned Scientists (UCS), specifically Ms. Kathy Mulvey and Mr. Peter Frumhoff, (ii) Dr. Naomi Oreskes, founder of the Climate Accountability Institute (CAI), as well as (iii) other participants

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).

[2] *Watkins v. U.S.*, 354 U.S. 178, 198 (1957); *Barenblatt v. U.S.*, 360 U.S. 109, 126 (1959).

in the 2012 La Jolla Conference – an event also attended by your clients.[3] During the forum, Rep. Paul Tonko (D-NY), asked: "Have any of you had interactions with the any of the AGs?"[4] Both Dr. Oreskes of CAI and Ms. Mulvey of UCS responded in a candid and forthcoming manner about the assistance and information that they and their organizations have provided to the attorneys general investigating companies, scientists, and non-profit groups.[5] It appears that your clients' affiliates have no First Amendment concerns providing information to Members of the House Progressive Caucus; yet, continually and improperly refuse to provide any information to this Committee. That your clients' affiliates appear to have cast aside any First Amendment concerns when interacting with the Members of the House Progressive Caucus, but purport to be unwilling to provide this Committee similar information is, at minimum, concerning. It is clear that Members on both sides of the aisle have legitimate questions regarding the activities of your clients with regard to the assistance provided to the attorneys general, and I urge you to reconsider your unwillingness to provide information to the Committee.

Accordingly, the Committee reiterates its May 18, 2016, requests and asks that your clients produce responsive documents and communications to the Committee on or before July 13, 2016, at 12:00 p.m. As explained in detail in the Committee's June 17, 2016, letter, this request is a legitimate exercise of the Committee's oversight duties under the Constitution and the Rules of the House.

If your clients continue to refuse to provide information responsive to the Committee's requests on a voluntary basis, I will be left with no alternative but to utilize the tools delegated to the Committee by the Rules of the House of Representatives. Specifically, the Committee will consider use of compulsory process to obtain responsive documents in the possession, custody, or control of your clients.

At any point, I welcome the opportunity to discuss the Committee's request with you or your staff. To arrange a meeting or discuss matters over the phone prior to July 13, 2016, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

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[3] Congressional Progressive Caucus Facebook Page Video release entitled *LIVE: CPC & SEEC Forum "Oil Is The New Tobacco" available at* https://www.facebook.com/USProgressives/ (last visited July 1, 2016).

[4] *Id.*

[5] *Id.*

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July 13, 2016

Harry Sandick
Partner
(212) 336-2723
hsandick@pbwt.com

By Fax and E-mail

The Honorable Lamar S. Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

We represent the Rockefeller Brothers Fund ("RBF"), and along with David Angeli, Esq., we are co-counsel to the Rockefeller Family Fund ("RFF"). We write in response to the July 6, 2016 letter (the "July Letter") sent by the House Committee on Science, Space, and Technology (the "Committee") to both the RBF and RFF (together, the "Funds"). We wish to respond to certain points made in the July Letter. We also provided some of this information to Mr. Mark Marin in a phone call on July 11, 2016.

First, in response to the Committee's suggestion that we speak to the Committee staff by phone or in person, we have now done so. In addition, prior counsel to RFF did meet with the Committee staff on May 23, 2016 after the Committee's initial letter relating to the document request that is renewed in the July Letter. We remain open to further dialogue if it will help address the Committee's concerns.

Second, neither of the Funds participated in the June 22, 2016 meeting with the House Progressive Caucus or the 2012 conference on climate change held in La Jolla, California, both of which are mentioned in the July Letter. None of the participants in those meetings were "affiliates" of the Funds. Although certain of the meeting participants may have, at some point in time, received grants from the Funds, the grantees are independent of the Funds, with separate boards and management. We believe that the work of these organizations is important, but they are not affiliates of the Funds.

Third, we continue to be concerned that the Committee's request, as presently formulated, intrudes upon First Amendment rights for the reasons explained more fully in our earlier correspondence. While we appreciate that the Committee is focused on correspondence between the Funds and state attorneys general or the identified organizations rather than the Funds' internal deliberative process, we are concerned that these communications will necessarily curtail the Funds' freedom to associate. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010)

("Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages and to do so in private.").

We also question the relevance of the Funds to the investigation being conducted by the Committee. The Committee has expressed concern about the propriety of the lawsuits being filed or contemplated by certain state attorneys general. The Funds have no authority to initiate lawsuits on behalf of the state attorneys general, and as a result the Funds have limited relevance to the Committee's investigation.

As a compromise to resolve this issue, the Funds are prepared—if it would be accepted in satisfaction of the document requests—to produce factual information relating to grants made to the organizations in your prior correspondence. Such information would include (a) the names of the grantee organizations; (b) the dates and amounts of any prior grants; and (c) the general purpose of such grants. This information (from January 1, 2012 to May 18, 2016) would provide the Committee with information about whether the Funds provided financial support to the identified organizations, without impinging on the Funds' First Amendment rights. The Funds make this offer without admitting or denying that such grants were offered to support work by the grantees related to the consideration of the actions initiated by the state attorneys general.

Respectfully submitted,

Harry Sandick

9061469v.1

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Mr. Stephen Heintz, President
Rockefeller Brothers Fund

You are hereby commanded to be and appear before the
Committee on Science, Space, and Technology

of the House of Representatives of the United States at the place, date, and time specified below.

☑ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: 2321 Rayburn House Office Building, Washington, D.C. 20515

Date: July 27, 2016 Time: 12:00 noon

☐ **to testify at a deposition** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

☐ **to testify at a hearing** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

To any authorized staff member or the U.S. Marshals Service

to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, D.C. this 13th day of July, 2016.

Lamar Smith
Chairman or Authorized Member

Attest:
Karen L. Haas
Clerk

SCHEDULE

In accordance with the attached schedule instructions, you, Stephen Heintz, are required to produce the things described below:

1. All documents and communications between any officer or employee of the Rockefeller Brothers Fund and any officer or employee of the office of a state attorney general, referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between any officer or employee of the Rockefeller Brothers Fund and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, Greenpeace, 350.org, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Schedule Instructions

1. In complying with this subpoena, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Subpoenaed records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this subpoena has been, or is also known by any other name than that herein denoted, the subpoena shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF") files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this subpoena shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the subpoena was served.

8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the subpoenaed information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the subpoena cannot be made in full by July 27, 2016, at 12:00 noon, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided no later than July 26, 2016, at 12:00 noon.

12. In the event that a document is withheld in whole or in part on any basis, provide a log containing the following information concerning any such document: (a) the basis for withholding the document; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. In complying with the subpoena, be apprised that the U.S. House of Representatives and the Committee on Science, Space, and Technology do not recognize: any of the purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections; any purported privileges or protections from disclosure under the Freedom of Information Act; or any purported contractual privileges, such as non-disclosure agreements.

14. If any document responsive to this subpoena was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

15. If a date or other descriptive detail set forth in this subpoena referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the subpoena, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.

16. The things described in the schedule shall be produced in their current condition, as of July 13, 2016.

17. This subpoena is continuing in nature and applies to any newly-discovered information as to the time period January 1, 2012 to July 27, 2016. Any responsive record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

18. All documents shall be Bates-stamped sequentially and produced sequentially.

19. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building.

20. Upon completion of the production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in

your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), text messages, Google chat communications or other instant message communications, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

8. "You" or "your" means and refers to you as natural person and in your capacity as President of the Rockefeller Brothers Fund ("RBF"), and any, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction in your personal capacity or at the RBF.

Patterson Belknap Webb & Tyler LLP

1133 Avenue of the Americas New York, NY 10036-6710 212.336.2000 fax 212.336.2222 www.pbwt.com

July 27, 2016

Harry Sandick
Partner
(212) 336-2723
hsandick@pbwt.com

By Fax and E-mail

The Honorable Lamar S. Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

We represent the Rockefeller Brothers Fund ("RBF"), and along with David Angeli, Esq., we are co-counsel to the Rockefeller Family Fund ("RFF," and together the "Funds"). We write in response to the July 13, 2016 subpoenas issued by the Committee on Science, Space, and Technology (the "Committee") to Mr. Stephen Heintz, President, RBF, and Mr. Lee Wasserman, Director, RFF (together, the "Subpoenas").

We have already shared with you and your staff our grave concerns about the Subpoenas, which seek documents and communications, to the extent they exist, between the Funds and certain non-profit organizations and between the Funds and state Attorney Generals. The Subpoenas, as currently formulated, invade RBF and RFF's First Amendment rights by seeking documents that would reveal the internal processes of our clients, and of some of the non-profit organizations to which they award grants. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010) ("Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages and to do so in private."). If the Funds are compelled to turn over materials, such as documents reflecting strategic communications between the Funds and their grantees, the rights of association of the Funds and the non-profit organizations will be chilled.

Despite our exchange of letters, we do not have a clear understanding of why the Committee views the documents requested by the Subpoena as relevant to its investigation. We understand that the Committee's primary interest is the validity of certain aspects of the investigations brought by the Attorneys General of various states. We continue to question whether Congressional supervision of enforcement of state statutes is appropriate; the Attorney General investigations will rise and fall on their own merits. *See Cameron v. Johnson*, 390 U.S. 611 (1971). In any event, however, we believe the Subpoenas are so broadly drafted that they encompass documents well beyond those tied to the Committee's stated endeavor.

We remain convinced that we can reach agreement on an approach that will address the Committee's investigative concerns while preventing a chilling effect on the Funds' freedom of association. To that end, our letter of July 13, 2016, proposed that the Funds produce factual information relating to grants made to the organizations named in the Subpoenas, and we remain open to discussing this or other paths forward. We respectfully request an opportunity to discuss the Subpoenas with you and your staff in the hopes of reaching a mutually agreeable resolution.

Respectfully submitted,

Harry Sandick

cc: The Hon. Eddie Bernice Johnson
2468 Rayburn Office Building
Washington, D.C. 20515

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

Mr. Lee Wasserman
Director
Rockefeller Family Fund
475 Riverside Drive, Suite 900
New York, NY 10115

Dear Mr. Wasserman,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced that they were cooperating on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based not on sound legal or scientific arguments, but rather on a long-term strategy developed by political activist organizations such the Union of Concerned Scientists. To assist in the Committee's oversight of this matter, we are writing to request information related to your organization's role in developing and coordinating the recent actions taken by a number of state attorneys general.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[2] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La Jolla, California.[3] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff.[4]

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

[3] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at*

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[5] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[6] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[7]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[8]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between Attorneys General Offices and Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists met at the Manhattan offices of the Rockefeller Family Fund.[9] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[10] According to media reports, the meeting also

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http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[4] *Id.*

[5] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages,* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[6] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[7] *Id.* [emphasis added]

[8] *Id.* [emphasis added]

[9] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe,* WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.

[10] *Id.*

included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[11] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[12]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference, members of the Green 20 were briefed by 2012 workshop attendees including UCS's Peter Frumhoff and Matthew Pawa, an attorney and founder of the Global Warming Legal Action Project. It has since come to light that the New York Attorney General's office attempted to willfully conceal the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa, wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[13] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[14]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[15]

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of the current Green 20 investigations. Their actions appear to be the result of a long-standing, coordinated effort by activist groups such as UCS to target industrial, non-profit, and scientific organizations and individuals who question the activist groups' conclusions.

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[11] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund,* Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*
[12] *Id.*
[13] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show,* WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.
[14] *Id.*
[15] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions,* WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

To assist the Committee in its oversight of this infringement on the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but no later than noon on June 1, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between employees of your organization and any office of a state attorney general referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between employees of your organization and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Rep. Lamar Smith
Chairman

Frank D Lucas
Rep. Frank D. Lucas
Vice Chairman

Mr. Lee Wasserman
May 18, 2016
Page 5

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

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WRITER'S DIRECT DIAL NO.
(212) 849-7220

WRITER'S EMAIL ADDRESS
faithgay@quinnemanuel.com

June 1, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

We write on behalf of the Rockefeller Family Fund in response to your letter of May 18, 2016, signed by certain members of the House Committee on Science, Space and Technology ("HCSST"). The letter selectively describes some of the background relating to investigations by a number of states, through their Attorneys General, into potential securities violations and fraud (the "State Investigations") by companies that may have intentionally misled the markets, the public, and state governments regarding the causes of climate change and the risks upon business. The letter requests that the Rockefeller Family Fund provide to HCSST "[a]ll documents and communications" referring or relating to the State Investigations (1) between its employees and any office of a state attorney general, and (2) between its employees and listed non-profit organizations.

The Rockefeller Family Fund is a non-profit organization founded in 1967 by Martha, John, Laurance, Nelson, and David Rockefeller. It is well known for its record of public policy innovation and advocacy in such areas as protecting the environment, advancing the economic rights of women, and improving our democracy.

Your request that the Rockefeller Family Fund disclose all communications with the highest state law enforcement officials and with other individuals and organizations about its advocacy on climate change strikes at the heart of the protections of the First Amendment of the U.S. Constitution. The Rockefeller Family Fund has a constitutional right to speak out on issues, to associate with others in order to advocate more effectively, and to petition federal and state government. We appreciate that the views and positions of the Rockefeller Family Fund on climate change, informed by the overwhelming consensus of scientists, may differ from that of the members of the HCSST who signed the letter. Yet the right to petition government and to disagree with certain government officials is a core value protected by the First Amendment. Because your letter does not and cannot provide any legitimate justification for this infringement

upon First Amendment rights, our client respectfully declines to provide documents in response.

The Rockefeller Family Fund has nothing to hide from the HCSST or any congressional committee. In many ways, it would be easier simply to produce documents than to object. But in a democracy built on principles and the rule of law, the Rockefeller Family Fund cannot in good faith comply with an illegitimate government request that encroaches so fundamentally on its and its colleagues' protected constitutional rights. Committee staff were gracious enough to meet with us briefly as an introduction, and we would appreciate the opportunity to discuss more fully the basis of our good-faith position that your request falls outside the scope of permissible inquiry. To facilitate such a discussion, we outline below the legal grounds of our response.

First, freedom of speech, freedom of association, and the right to petition the government constitute the very foundations of our democracy. As the Supreme Court of the United States has held: "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." Snyder v. Phelps, 562 U.S. 443, 452 (2011) (internal quotation marks omitted). The same is true for freedom of association: "the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed." Knox v. Serv. Employees Int'l Union, Local 1000, 132 S. Ct. 2277, 2288 (2012). Moreover, the "right to petition [the government is] one of the most precious of the liberties safeguarded by the Bill of Rights" because "the right is implied by the very idea of a government, republican in form." BE&K Constr. Co. v. NLRB, 536 U.S. 516, 524-25 (2002) (internal quotation marks omitted).

As you are aware, there is a long and well-established history of courts protecting First Amendment rights against unjustified congressional inquiry. "[T]he constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. . . . Nor can the First Amendment freedoms of speech, press, religion or political belief and association be abridged." Watkins v. United States, 354 U.S. 178, 188 (1957); see also United States v. Rumely, 345 U.S. 41, 46 (1953). Courts have balanced First Amendment rights with the needs of discovery by holding that the First Amendment creates a qualified privilege from disclosure of certain information. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462-63 (1958). If there is a reasonable probability that the disclosure will chill First Amendment rights, then it can be justified only by a compelling need for the requested information. See Perry v. Schwarzenegger, 591 F.3d 1147, 1161 (9th Cir. 2010).

In applying this balancing test, the Supreme Court has held that required disclosure of membership lists infringes the First Amendment freedom of association. See NAACP, 357 U.S. at 466. Courts have consistently applied the same principle to disclosure of the communications of advocacy groups. "Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private. Compelling disclosure of internal campaign communications can chill the exercise of these rights." Perry, 591 F.3d at 1162-63 (footnote omitted). Where the government "compels public disclosure of an association's confidential internal materials, it intrudes on the privacy of association and belief guaranteed by the First Amendment, as well as seriously interferes with internal group operations and effectiveness." AFL-CIO v. FEC, 333 F.3d 168, 177-78 (D.C. Cir. 2003) (internal quotation marks and citation omitted).

These fundamental rights, central to the Bill of Rights and repeatedly affirmed by the Supreme Court, are squarely implicated by your letter, which self-evidently seeks to chill and suppress the expression of views on climate change and corporate action, and related petitions for government action, that are inconsistent with those of the signatories of the letter. There is also no question of the public importance of the issues at stake, which implicate national security, public health, poverty, pollution, extreme weather events, and rising sea levels, among others. Further, the chilling effect on First Amendment rights extends beyond the Rockefeller Family Fund to that of other associations and individuals who are less able to resist similar demands.

Second, the letter does not and cannot express a legitimate basis for the requested information, let alone the compelling need that would be required to justify the infringement of First Amendment rights. As the Supreme Court has stated, "[t]here is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress." Watkins, 354 U.S. at 187.

The principal rationale that your letter puts forward is that the speech and petitions of the Rockefeller Family Fund somehow threaten the First Amendment rights of unnamed "companies, nonprofit organizations, and scientists" who hold contrary views. But communications made by employees of a private organization cannot violate anyone's First Amendment rights under the well-established "state action" doctrine. See, e.g., Hudgens v. NLRB, 424 U.S. 507, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."). The exercise of freedom of speech, freedom of association, and the right to petition states' attorneys general is an affirmation of First Amendment rights, not an abridgment. The Rockefeller Family Fund exercises core First Amendment rights when it expresses its positions and opinions about climate change and corporate conduct to public officials and other individuals and organizations, including views as to the securities fraud or other misconduct by corporate actors.

The request also constitutes a legally impermissible interference with state autonomy. According to your letter, the rationale behind the request is a disagreement with state investigations and prosecutions by sovereign states, through their Attorneys General. Here we agree with the Office of the Attorney General of the State of New York, for the reasons stated in its letter dated May 26, 2016, that your committee cannot interfere with state investigations and prosecutions. As the Supreme Court has long recognized, "[f]ederal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework." Cameron v. Johnson, 390 U.S. 611, 618 (1968) (internal quotation marks omitted); see also Younger v. Harris, 401 U.S. 37 (1971) (creating abstention rule for federal courts where state criminal prosecution is ongoing); Printz v. United States, 521 U.S. 898, 924 (1997) ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts . . . .") (internal quotation marks and citation omitted). Because you cannot interfere directly with state investigations and prosecutions, you cannot do so indirectly by requesting

communications from private organizations with state attorneys general or others about state investigations and prosecutions.

Finally, the request is unreasonably onerous, as it concerns "[a]ll documents and communications" over a period of many years, regardless as to form. Given the enormous scope of the request, it would essentially function as a punishment for the Rockefeller Family Fund's exercise of its First Amendment rights, without any legitimate governmental interest to justify it.

In light of the extraordinary scope of your request and the vital constitutional rights that would be imperiled by compliance, the Rockefeller Family Fund respectfully refuses to comply with the request. We would appreciate the opportunity to discuss these legal issues with you at your convenience.

Very truly yours,

Faith E. Gay

Faith E. Gay
Philippe Z. Selendy
Jennifer M. Selendy
David M. Cooper

51 Madison Avenue, 22nd Floor
New York, New York 10010

Jenny A. Durkan

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Washington D.C. 20001

Quinn Emanuel Urquhart & Sullivan, LLP

cc: Honorable Eddie Bernice Johnson Counsel
Ranking Member, Committee on Science, Space, and Technology

Majority Staff, Committee on Science, Space, and Technology
Rayburn House Office Building, Room 2321

Minority Staff, Committee on Science, Space, and Technology
Ford House Office Building, Room 394

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CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
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House of Representatives
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June 17, 2016

Ms. Faith E. Gay
Quinn Emanuel
51 Madison Avenue, 22nd Floor
New York, New York 10010

Dear Ms. Gay,

Thank you for your June 1, 2016, response. The House Science, Space, and Technology Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with the contentions in your letter. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that your client provides the documents and information previously requested in our May 18, 2016, letter.[1]

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[2] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[3] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[4] However, Congress' investigatory power is not without limits.[5] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast

[1] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.
[2] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[3] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23 [hereinafter CRS Report, RL30240].
[4] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[5] *Watkins v. U.S.*, 354 U.S. 178 (1957).

and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[6] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[7] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[8] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[9] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[10] organizations that violate the civil rights of individuals,[11] state agencies involved in the Hurricane Katrina response,[12] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138.069 billion to fund research and development.[13] Of that total federal spending, $31.8 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and

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[6] *McGrain* at 177, 181-182.
[7] *See McGrain*, 273 U.S. at 177, 181-182.
[8] *Eastland* at 509.
[9] CRS Report, RL30240 at 26.
[10] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[11] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[12] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[13] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of the Science Committee that organizations such as your client's and those similarly situated should not be inciting legal action based on debatable science to undermine the First Amendment of the Constitution.

The investigative efforts supported by your client and other similar organizations are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes**, but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[14]

This statement suggests that the Attorney General's office and those who support his actions will be deciding what science is valid and what science is invalid. In essence, the attorney general is saying that if he disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Congress has a duty to protect scientists and researchers from the criminalization of scientific inquiry.

Accordingly, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of these investigations, Congress can investigate the effects your client's advocacy may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[15] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your client's efforts and those of the so called "Green 20"

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[14] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available* at http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[15] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your client's actions are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The website of the Union of Concerned Scientists, one of the organizations now supporting the Green 20's investigations, describes a 2010 investigation by the Virginia Attorney General of a University of Virginia scientist as "a campaign of harassment," and "a threat[] [to the] the ability of scientists in Virginia to ask tough questions about our world—and pursue contentious lines of research." The current efforts by the Green 20, supported by your client's organization, appear to be no different.[16]

The First Amendment is Not a Shield to Congressional Inquiry

Unlike the Fifth Amendment, the First Amendment is not an impermeable shield to Congressional investigations. In *Barenblatt v. United States,* the Supreme Court stated "where the First Amendment rights are asserted to bar government interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[17] Moreover, when balancing the interests of the parties in *Watkins v. United States*, the Court held "the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness."[18] These cases are important precisely because they provide examples of congressional investigations – sustained by the Supreme Court – involving organizations similar to those of your client. The parties being investigated in the cases noted above are no different than the recipients of the Science Committee's May 18 letter.

Congress frequently and rigorously has investigated private citizens and advocacy groups for various types of conduct. In almost all instances these investigations have withstood judicial scrutiny, with little, if any, restriction imposed upon them. Recently, the Democratic Chairman of the House Oversight and Government Reform Committee, Henry Waxman, investigated numerous charities benefiting veterans.[19] When the founder of one of the charities under investigation failed to comply with Chairman Waxman's request for documents and testimony, the Chairman issued a subpoena compelling the necessary information.[20] Eventually, the

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[16] Union of Concerned Scientists, Center for Science & Democracy, *Science under Attack: Legal Harassment of Climate Scientist Michael Mann available at* http://www.ucsusa.org/center-science-and-democracy/protecting-scientists-harassment/cuccinelli-mann.html#.VImpBfkrKUk (last visited June 9, 2016).
[17] *Barenblatt v. U.S.*, 360 U.S. 109, 126 (1959).
[18] *Watkins v. U.S.*, 354 U.S. 178, 198 (1957).
[19] Philip Rucker, *Panel Probes Spending of Veterans Charities*, WASH. POST, Dec. 14, 2007.
[20] Matthew Jaffe and Rhonda Schwartz, *Director of Veterans Charity in Hiding*, MILITARY.COM *available at* http://www.military.com/NewsContent/0,13319,158246,00.html (last visited June 9, 2016).

Oversight Committee received all documents, information, and testimony as part of that congressional investigation.[21]

The Committee's Document Requests

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between employees of your organization and any office of a state attorney general referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between employees of your organization and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, the Rockefeller Brothers Fund, the Rockefeller Family Fund, Greenpeace, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. Dana Rohrabacher
Member of Congress

[21] Philip Rucker, *Chief of Veterans Charities Grilled on Groups' Spending*, WASH. POST, Jan. 18, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/01/17/AR2008011703620.html (last visited June 9, 2016).

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Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

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Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

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June 24, 2016

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By Fax and E-mail

The Honorable Lamar S. Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

We represent the Rockefeller Brothers Fund ("RBF"), and along with David Angeli, Esq., we are now co-counsel to the Rockefeller Family Fund ("RFF"). We write in response to the June 17, 2016 letter (the "June Letter") sent by the House Committee on Science, Space, and Technology (the "Committee") to both the RBF and RFF (together, the "Funds"). The June Letter asks the Funds to produce documents in connection with oversight being conducted by the Committee. We have reviewed the June Letter and for the reasons discussed below, we must respectfully decline the Committee's request to produce documents.

Background

As you know, the June Letter represents the Committee's second request to the Funds seeking the production of internal documents related to the Funds' communications with other entities concerning investigations being conducted by state attorneys general. The initial request was made in identical letters to the Funds dated May 18, 2016 (the "May Letter"). The Funds responded to the May Letter in separate letters dated June 1, 2016, in which the Funds explained their concerns that the Committee's request imperiled the Funds' First Amendment rights and that the scope of the request was unduly burdensome.

Congress's Investigatory Power Is Not Unlimited

We have three principal concerns about the June Letter. First, the Committee does not appear to acknowledge the boundaries of its investigatory power. Second, the Committee makes no effort to balance the Committee's prerogatives with the fundamental rights guaranteed to the Funds under our Constitution. Third, even apart from those defects, the June Letter restates without modification the burdensome document requests set forth in the May Letter. We address each of these issues in turn.

The June Letter states that the Committee's investigatory power is derived from the legislative function assigned to Congress in the Constitution: "While Congress often must

conduct investigations to aid its execution of its legislative function, this requirement is flexible." (June Letter, at 2). We agree that Congress's investigatory power is intertwined with its execution of its legislative function, but we disagree that this requirement is flexible enough to encompass the pending request for documents. The absence of any possible legitimate legislative end restrains the Committee's ability to press its document request.

Several of the cases in the June Letter do not support the Committee's assertion of authority to press forward with these requests. The Committee cites to *Watkins v. United States*, 354 U.S. 178, 187 (1957), in which the Supreme Court held that "[t]here is no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress." *Watkins* stands for the proposition that while Congress has broad investigatory powers, those powers are not without bounds. The Court explained that "[n]o inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress." 354 U.S. 178, 187 (1957). Indeed, in *Watkins* the Supreme Court rejected the efforts of the House Un-American Affairs Committee to compel witness testimony when it vacated a conviction for criminal contempt. *Watkins* undercuts, rather than supports, the Committee's request for documents.

The June Letter also cites *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), for the proposition that a legislative inquiry can be valid even if there is "no predictable end result." (June Letter, at 2). While the Court in *Eastland* allowed the subpoena to be enforced, *Eastland* does not give *carte blanche* to an unbounded Congressional investigation. *Eastland* itself notes that Congress's power to investigate is "not unlimited," and that "[t]he subject of any inquiry always must be one on which legislation could be had." 421 U.S. at 504 n. 15 (internal quotation omitted). Anticipating the issues presented here, the *Eastland* Court held that "Congress is not invested with a 'general' power to inquire into private affairs." *Id.*

Here, the June Letter never suggests what possible legislation might relate to this inquiry, or how the documents held by the Funds are related to such legislation. Even accepting that there need not be a "predictable end result" for Congress to conduct an investigation, it must be possible to contemplate an end result consisting of constitutionally permitted legislation. At one point, the June Letter states that Congress finances scientific research and that the ongoing state attorneys general investigations might somehow deter such scientific research, but the June Letter fails to identify such funded research (when was such research conducted and by whom?) or to explain the relationship between the government's funding of scientific work and an investigation into the conduct of two private philanthropies.[1]

The June Letter expresses concern about the investigation conducted by the New York Attorney General but we do not see how his investigation into state law securities fraud

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[1] Please refer to the letters RBF and RFF previously sent to the Committee, in response to the Committee's May Letter for more background information on the Funds and their activities.

could deter scientific research or how this state regulatory investigation is within the Committee's purview. The June Letter quotes a statement made by Attorney General Schneiderman in which he asks whether Exxon-Mobil conducted scientific research that produced results that were inconsistent with Exxon-Mobil's required disclosures to shareholders. Attorney General Schneiderman suggests that false or misleading statements to shareholders might be actionable under New York law.[2] The June Letter states that the New York Attorney General's statement reflects an effort to pass judgment on the civil rights of scientists and the validity of their scientific work, but all that the quoted passage concerns is whether Exxon-Mobil violated securities law by providing an account of climate change to its shareholders that it knew—by virtue of its own internal scientific research—to be untrue. None of this, in any event, points towards a role for the Committee in proposing possible federal legislation, and the Committee does not demonstrate otherwise.

In short, the Committee does not have unlimited authority and the absence of a connection between the investigations being conducted by state attorneys general and any conceivable federal legislation is fatal to the Committee's request.

The Funds' First Amendment Interests Outweigh Any Interest the Committee May Have

We agree with the Committee that "the First Amendment is not an impermeable shield to Congressional investigations." (June Letter, at 4). The First Amendment does, however, subject Congressional investigations to the "closest scrutiny" if those investigations have the potential to chill the rights protected by the First Amendment. *See NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (applying this principle in the context of a state civil contempt prosecution). The propriety of a Congressional inquiry like this one—which interferes with the Funds' First Amendment rights to freedom of speech and freedom of association—can therefore be justified "only by demonstrating that [the compelled disclosure] directly serves a compelling state interest." *AFL-CIO v. FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003). On Page 4 of the June Letter, the Committee recognizes the applicability of this rights-balancing framework, yet the Letter never discusses or addresses the requisite balancing.[3]

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[2] In New York, the Martin Act grants the Attorney General "broad regulatory and remedial powers to prevent fraudulent securities practices." *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*, 906 N.E.2d 1049, 1054 (N.Y. 2009).

[3] The Supreme Court has narrowly construed the congressional power to investigate when necessary to avoid deciding an issue of constitutional law. *See United States v. Rumely*, 345 U.S. 41, 46-47 (1953) ("Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits.").

As we explained in our prior letters to the Committee, compliance with the Committee's document request would chill the Funds' First Amendment rights. (June 1, 2016 Letter from RFF to the Committee, at 2-3; June 1, 2016 Letter from RBF to the Committee, at 2-3). Advocacy on matters of public policy is exactly the type of internal associational activity and past political activity that the First Amendment was designed to protect. *See AFL-CIO*, 333 F.3d at 176-77; *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 U.S. Dist. LEXIS 19475 (D. Kan. Mar. 16, 2007). The Committee itself recognizes the importance of First Amendment rights; it expresses a concern that "inciting legal action based on debatable science" could "undermine the First Amendment of the Constitution" by interfering with Exxon-Mobil's free speech rights. (June Letter, at 3) (citing to *Barenblatt v. United States*, 360 U.S. 109, 126 (1959)). The Committee shows solicitude for Exxon-Mobil's rights while simultaneously overlooking the fact that those same rights belong to the Funds and the other non-governmental recipients of the subpoenas.

Weighed against the Funds' rights is the Committee's interest in conducting an investigation into the actions of certain state attorneys general. Whether or not this is a proper investigative function, it is unrelated to the Funds or its documents. The Funds did not issue the subpoenas about which the Committee is concerned. Any concern that the Committee may have about the relative merits of the state attorney general actions is a matter between the Committee and the state attorneys general; it cannot be addressed or resolved by seeking documents from the Funds. To the extent that the Funds or their grant recipients—which are independent of the Funds—engaged in advocacy with government officials, this is their right under our Constitution.

In discussing the Committee's authority to obtain information protected by the First Amendment, the June Letter relies heavily on *Barenblatt v. United States*, 360 U.S. 109 (1959), a case in which the Supreme Court sustained the conviction of an individual who declined to answer questions posed by the House Un-American Affairs Committee. Even this opinion, which dates from a sad episode in our nation's history, makes clear that "Congress may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation to [a valid legislative] purpose." *Id.* at 127. *Barenblatt* was decided against the defendant only because the Court held that special rules applied to an investigation into the operations and goals of the Communist Party, which sought "the ultimate overthrow of the Government of the United States by force and violence." *Id.* at 128. Justice Harlan explained that "in a different context," the congressional inquiry "would certainly have raised constitutional issues of the gravest character." The June Letter alleges no plot against America, and in the very different factual context presented here, *Barenblatt* supports the position taken by the Funds, not the position taken by the Committee.[4] *See also Gibson v. Florida Legislative*

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[4] In his dissent, Justice Black warned of the dangers of applying *Barenblatt* outside of its narrow context of preventing the spread of communism. *See Barenblatt*, 360 U.S. at 152 ("It is, sadly, no answer to say that this Court will not allow the trend to overwhelm us; that today's holding

Investigation Commission, 372 U.S. 539, 549 (1963) (holding that an attempt to compel the NAACP to disclose its membership is "wholly different from compelling the Communist Party to disclose its own membership").

In short, given the potential chilling effect that can arise from a decision to "incit[e] legal action" without justification, and the absence of any valid government interest—notwithstanding that the Committee must prove a *compelling* government interest—the balance of interests weighs against compelling disclosure and in favor of protecting the Funds' First Amendment rights.

The Investigations Cited As Precedent Are Distinguishable

In support of the document request, the June Letter refers to a number of other Congressional investigations, but those investigations are distinguishable. For example, the investigation conducted by the House Committee on Oversight and Government Reform into the misuse of money by veterans' charities was a bipartisan effort to look at whether those charities, which solicited money through direct mailers to the public, were committing fraud by donating little of the funds they raised to veterans. The investigation was conducted with an eye towards possible legislation that would require greater transparency from charitable organizations in order to make sure that the public was not misled when solicited to provide assistance to our nation's veterans. *See* Philip Rucker, *Chief of Veterans Charities Grilled on Groups' Spending*, WASH POST, Jan. 18, 2008. There is no analogy between that investigation and this one. The Committee has not—nor could it—assert that members of the public were defrauded in any way by the Funds' use of their endowments to make grants to organizations that engaged in independent public advocacy protected by the First Amendment.

Other investigations identified by the Committee have a clear and direct relationship to subjects that are without question within the scope of federal legislative activity: Iran-Contra (whether the President violated federal law by selling weapons to Iran and using the proceeds to fund one side in a civil war in Nicaragua); Whitewater (investigating conduct by a federally regulated savings and loan and later exercising the legislative function of impeachment); Fast and Furious (whether a federal agency conducted an investigation deemed not to be in the public interest); and Benghazi (whether the State Department security laws and procedures were sufficient to protect United States personnel in Libya). An investigation into the legitimacy of state regulatory action bears no resemblance to these prior investigations.

The June Letter also makes a reference to an investigation conducted by former Virginia Attorney General Ken Cuccinelli that used the state government subpoena power to chill speech related to the dangers of climate change. The June Letter attempts to draw an

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will be strictly confined to 'Communists,' as the Court's language implies.") (Black, J., dissenting).

analogy between that state action and the conduct of the Funds, which are non-governmental entities. A campaign of harassment conducted by a state prosecutor against a scientist at the University of Virginia bears no relation to private foundations making grants to organizations engaged in public advocacy. There is no comparison. In any event, the subpoenas issued by Mr. Cuccinelli were ultimately quashed. *See Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 722 S.E.2d 626 (Va. 2012).

The Committee's Document Request is Unduly Burdensome

Finally, even if the Committee's actions were in furtherance of a compelling government interest, the June Letter is not narrowly tailored to achieve such an interest. The June Letter seeks "[a]ll documents and communications" of all personnel of the Funds over a four-and-one-half year time period, with myriad other individuals and institutions, about a broad subject—climate change advocacy involving state regulators—that relates to a program area for the Funds. Due to its breadth, compliance with the June Letter, even if a compelling government purpose had been articulated, would itself burden the First Amendment rights of the Funds. Despite the Funds' objections to the May Letter, the June Letter restated the request in the May Letter without modification. Even where the legislature is entitled to conduct an investigation, it does not follow that "the investigatory body is free to inquire into or demand all forms of information." *Gibson*, 372 U.S. at 545.

* * *

We are available to discuss the June Letter and the serious concerns expressed in this response. Given the essential constitutional rights endangered by the June Letter's request and the extraordinary breadth of the request, the Funds respectfully decline to comply with the request.

Respectfully submitted,

Harry Sandick

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

July 6, 2016

Mr. Harry Sandick
Partner
Patterson Belknap Webb & Tyler
1133 Avenue of the Americas
New York, New York 10036

Dear Mr. Sandick,

The Committee on Science, Space, and Technology is in receipt of your June 24, 2016, response to its request for information related to ongoing oversight of coordinated attempts to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. This response marks the second time your clients, the Rockefeller Family Fund and the Rockefeller Brothers Fund, have refused to produce documents in response to oversight letters signed by 17 Members of the Committee. Further, your office has not attempted to engage the Committee in a dialogue related to our requests. This is disappointing. I urge you and your clients to engage with the Committee as soon as possible to discuss the Committee's requests.

The Committee maintains its authority to investigate your clients' activities and communications with various state attorneys general and other non-profit organizations. As previously stated in the Committee's June 17, 2016, letter, this authority is grounded in both the Constitution and rules of the U.S. House of Representatives.[1] The Committee maintains that the First Amendment, as interpreted by the Supreme Court, is not an impenetrable shield to Congressional inquiry.[2] Moreover, the Committee is concerned that the objections raised in your June 24, 2016, letter appear to selectively apply the law based solely upon the political party to which your clients and affiliated groups supply information.

On June 22, 2016, the House Progressive Caucus held a forum entitled "Oil is the New Tobacco." The forum was attended by (i) multiple members of the Union of Concerned Scientists (UCS), specifically Ms. Kathy Mulvey and Mr. Peter Frumhoff, (ii) Dr. Naomi Oreskes, founder of the Climate Accountability Institute (CAI), as well as (iii) other participants

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] *Watkins v. U.S.*, 354 U.S. 178, 198 (1957); *Barenblatt v. U.S.*, 360 U.S. 109, 126 (1959).

in the 2012 La Jolla Conference – an event also attended by your clients.[3] During the forum, Rep. Paul Tonko (D-NY), asked: "Have any of you had interactions with the any of the AGs?"[4] Both Dr. Oreskes of CAI and Ms. Mulvey of UCS responded in a candid and forthcoming manner about the assistance and information that they and their organizations have provided to the attorneys general investigating companies, scientists, and non-profit groups.[5] It appears that your clients' affiliates have no First Amendment concerns providing information to Members of the House Progressive Caucus; yet, continually and improperly refuse to provide any information to this Committee. That your clients' affiliates appear to have cast aside any First Amendment concerns when interacting with the Members of the House Progressive Caucus, but purport to be unwilling to provide this Committee similar information is, at minimum, concerning. It is clear that Members on both sides of the aisle have legitimate questions regarding the activities of your clients with regard to the assistance provided to the attorneys general, and I urge you to reconsider your unwillingness to provide information to the Committee.

Accordingly, the Committee reiterates its May 18, 2016, requests and asks that your clients produce responsive documents and communications to the Committee on or before July 13, 2016, at 12:00 p.m. As explained in detail in the Committee's June 17, 2016, letter, this request is a legitimate exercise of the Committee's oversight duties under the Constitution and the Rules of the House.

If your clients continue to refuse to provide information responsive to the Committee's requests on a voluntary basis, I will be left with no alternative but to utilize the tools delegated to the Committee by the Rules of the House of Representatives. Specifically, the Committee will consider use of compulsory process to obtain responsive documents in the possession, custody, or control of your clients.

At any point, I welcome the opportunity to discuss the Committee's request with you or your staff. To arrange a meeting or discuss matters over the phone prior to July 13, 2016, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

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[3] Congressional Progressive Caucus Facebook Page Video release entitled *LIVE: CPC & SEEC Forum "Oil Is The New Tobacco" available at* https://www.facebook.com/USProgressives/ (last visited July 1, 2016).

[4] *Id.*

[5] *Id.*

Patterson Belknap Webb & Tyler LLP

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July 13, 2016

Harry Sandick
Partner
(212) 336-2723
hsandick@pbwt.com

By Fax and E-mail

The Honorable Lamar S. Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

We represent the Rockefeller Brothers Fund ("RBF"), and along with David Angeli, Esq., we are co-counsel to the Rockefeller Family Fund ("RFF"). We write in response to the July 6, 2016 letter (the "July Letter") sent by the House Committee on Science, Space, and Technology (the "Committee") to both the RBF and RFF (together, the "Funds"). We wish to respond to certain points made in the July Letter. We also provided some of this information to Mr. Mark Marin in a phone call on July 11, 2016.

First, in response to the Committee's suggestion that we speak to the Committee staff by phone or in person, we have now done so. In addition, prior counsel to RFF did meet with the Committee staff on May 23, 2016 after the Committee's initial letter relating to the document request that is renewed in the July Letter. We remain open to further dialogue if it will help address the Committee's concerns.

Second, neither of the Funds participated in the June 22, 2016 meeting with the House Progressive Caucus or the 2012 conference on climate change held in La Jolla, California, both of which are mentioned in the July Letter. None of the participants in those meetings were "affiliates" of the Funds. Although certain of the meeting participants may have, at some point in time, received grants from the Funds, the grantees are independent of the Funds, with separate boards and management. We believe that the work of these organizations is important, but they are not affiliates of the Funds.

Third, we continue to be concerned that the Committee's request, as presently formulated, intrudes upon First Amendment rights for the reasons explained more fully in our earlier correspondence. While we appreciate that the Committee is focused on correspondence between the Funds and state attorneys general or the identified organizations rather than the Funds' internal deliberative process, we are concerned that these communications will necessarily curtail the Funds' freedom to associate. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010)

("Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages and to do so in private.").

We also question the relevance of the Funds to the investigation being conducted by the Committee. The Committee has expressed concern about the propriety of the lawsuits being filed or contemplated by certain state attorneys general. The Funds have no authority to initiate lawsuits on behalf of the state attorneys general, and as a result the Funds have limited relevance to the Committee's investigation.

As a compromise to resolve this issue, the Funds are prepared—if it would be accepted in satisfaction of the document requests—to produce factual information relating to grants made to the organizations in your prior correspondence. Such information would include (a) the names of the grantee organizations; (b) the dates and amounts of any prior grants; and (c) the general purpose of such grants. This information (from January 1, 2012 to May 18, 2016) would provide the Committee with information about whether the Funds provided financial support to the identified organizations, without impinging on the Funds' First Amendment rights. The Funds make this offer without admitting or denying that such grants were offered to support work by the grantees related to the consideration of the actions initiated by the state attorneys general.

Respectfully submitted,

Harry Sandick

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Mr. Lee Wasserman, Director
Rockefeller Family Fund

You are hereby commanded to be and appear before the
Committee on Science, Space, and Technology

of the House of Representatives of the United States at the place, date, and time specified below.

☑ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: 2321 Rayburn House Office Building, Washington, D.C. 20515

Date: July 27, 2016 Time: 12:00 noon

☐ **to testify at a deposition** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

☐ **to testify at a hearing** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time _____

To any authorized staff member or the U.S. Marshals Service

to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, D.C. this 13th day of July, 2016.

Lamar Smith
Chairman or Authorized Member

Attest: Karen L. Haas
Clerk

SCHEDULE

In accordance with the attached schedule instructions, you, Lee Wasserman, are required to produce the things described below:

1. All documents and communications between any officer or employee of the Rockefeller Family Fund and any officer or employee of the office of a state attorney general, referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between any officer or employee of the Rockefeller Family Fund and any officer or employee of the Union of Concerned Scientists, Climate Accountability Institute, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Schedule Instructions

1. In complying with this subpoena, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Subpoenaed records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this subpoena has been, or is also known by any other name than that herein denoted, the subpoena shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF") files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this subpoena shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the subpoena was served.

8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the subpoenaed information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the subpoena cannot be made in full by July 27, 2016, at 12:00 noon, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided no later than July 26, 2016, at 12:00 noon.

12. In the event that a document is withheld in whole or in part on any basis, provide a log containing the following information concerning any such document: (a) the basis for withholding the document; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. In complying with the subpoena, be apprised that the U.S. House of Representatives and the Committee on Science, Space, and Technology do not recognize: any of the purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections; any purported privileges or protections from disclosure under the Freedom of Information Act; or any purported contractual privileges, such as non-disclosure agreements.

14. If any document responsive to this subpoena was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

15. If a date or other descriptive detail set forth in this subpoena referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the subpoena, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.

16. The things described in the schedule shall be produced in their current condition, as of July 13, 2016.

17. This subpoena is continuing in nature and applies to any newly-discovered information as to the time period January 1, 2012 to July 27, 2016. Any responsive record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

18. All documents shall be Bates-stamped sequentially and produced sequentially.

19. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building.

20. Upon completion of the production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in

your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), text messages, Google chat communications or other instant message communications, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

8. "You" or "your" means and refers to you as natural person and in your capacity as President of the Rockefeller Family Fund ("RFF"), and any, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction in your personal capacity or at the RFF.

Patterson Belknap Webb & Tyler LLP

1133 Avenue of the Americas New York, NY 10036-6710 212.336.2000 fax 212.336.2222 www.pbwt.com

July 27, 2016

Harry Sandick
Partner
(212) 336-2723
hsandick@pbwt.com

By Fax and E-mail

The Honorable Lamar S. Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

We represent the Rockefeller Brothers Fund ("RBF"), and along with David Angeli, Esq., we are co-counsel to the Rockefeller Family Fund ("RFF," and together the "Funds"). We write in response to the July 13, 2016 subpoenas issued by the Committee on Science, Space, and Technology (the "Committee") to Mr. Stephen Heintz, President, RBF, and Mr. Lee Wasserman, Director, RFF (together, the "Subpoenas").

We have already shared with you and your staff our grave concerns about the Subpoenas, which seek documents and communications, to the extent they exist, between the Funds and certain non-profit organizations and between the Funds and state Attorney Generals. The Subpoenas, as currently formulated, invade RBF and RFF's First Amendment rights by seeking documents that would reveal the internal processes of our clients, and of some of the non-profit organizations to which they award grants. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010) ("Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages and to do so in private."). If the Funds are compelled to turn over materials, such as documents reflecting strategic communications between the Funds and their grantees, the rights of association of the Funds and the non-profit organizations will be chilled.

Despite our exchange of letters, we do not have a clear understanding of why the Committee views the documents requested by the Subpoena as relevant to its investigation. We understand that the Committee's primary interest is the validity of certain aspects of the investigations brought by the Attorneys General of various states. We continue to question whether Congressional supervision of enforcement of state statutes is appropriate; the Attorney General investigations will rise and fall on their own merits. *See Cameron v. Johnson*, 390 U.S. 611 (1971). In any event, however, we believe the Subpoenas are so broadly drafted that they encompass documents well beyond those tied to the Committee's stated endeavor.

We remain convinced that we can reach agreement on an approach that will address the Committee's investigative concerns while preventing a chilling effect on the Funds' freedom of association. To that end, our letter of July 13, 2016, proposed that the Funds produce factual information relating to grants made to the organizations named in the Subpoenas, and we remain open to discussing this or other paths forward. We respectfully request an opportunity to discuss the Subpoenas with you and your staff in the hopes of reaching a mutually agreeable resolution.

Respectfully submitted,

Harry Sandick

cc: The Hon. Eddie Bernice Johnson
2468 Rayburn Office Building
Washington, D.C. 20515

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
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May 18, 2016

Mr. Kenneth Kimmell
President
Union of Concerned Scientists
Two Brattle Sq.
Cambridge, MA 02138-3780

Dear Mr. Kimmell,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced that they were cooperating on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based not on sound legal or scientific arguments, but rather on a long-term strategy developed by political activist organizations such the Union of Concerned Scientists. To assist in the Committee's oversight of this matter, we are writing to request information related to your organization's role in developing and coordinating the recent actions taken by a number of state attorneys general.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[2] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La Jolla, California.[3] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff.[4]

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

[3] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at*

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[5] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[6] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[7]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[8]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between Attorneys General Offices and Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists met at the Manhattan offices of the Rockefeller Family Fund.[9] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[10] According to media reports, the meeting also

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http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[4] *Id.*

[5] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages,* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[6] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

[7] *Id.* [emphasis added]

[8] *Id.* [emphasis added]

[9] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe,* WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.

[10] *Id.*

included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[11] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[12]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference, members of the Green 20 were briefed by 2012 workshop attendees including UCS's Peter Frumhoff and Matthew Pawa, an attorney and founder of the Global Warming Legal Action Project. It has since come to light that the New York Attorney General's office attempted to willfully conceal the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa, wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[13] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[14]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[15]

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of the current Green 20 investigations. Their actions appear to be the result of a long-standing, coordinated effort by activist groups such as UCS to target industrial, non-profit, and scientific organizations and individuals who question the activist groups' conclusions.

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[11] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund*, Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*

[12] *Id.*

[13] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show*, WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

[14] *Id.*

[15] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions*, WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

To assist the Committee in its oversight of this infringement on the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but no later than noon on June 1, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between employees of your organization and any office of a state attorney general referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between employees of your organization and any officer or employee of the Climate Accountability Institute, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Mr. Kenneth Kimmell
May 18, 2016
Page 5

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

Brownstein Hyatt
Farber Schreck

June 1, 2016

Neil F. Quinter
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202.872.5287 tel
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The Honorable Lamar Smith
Chairman
Committee on Science, Space and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515

Re: Response to Committee's May 18, 2016 Letter

Dear Mr. Chairman:

I write on behalf of the Union of Concerned Scientists (UCS) in response to your May 18, 2016 letter signed by you and 12 other Republican members of the House Committee on Science, Space and Technology, seeking documents relating to the Committee's "oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution." The Committee requests documents that fall into two categories: communications between UCS employees and state Attorneys General and communications between UCS employees and other groups or individuals "related to the issue of climate change." We respectfully decline your request for documents because the request infringes directly the First Amendment rights of UCS to discuss "the issue of climate change" and because the House Science Committee lacks jurisdiction over this matter.

It is without doubt that the UCS's communications with other groups about issues of important national -- indeed, global -- public policy is the type of speech fundamental to the protections afforded by the First Amendment. Furthermore, that those groups having assembled may have petitioned government officials should not be surprising or discouraged. The ability to communicate to government officials is the very activity intended for First Amendment protection. You highlight that you are concerned about the "strategy developed by political activist organizations such as the [UCS]." Taking this stated concern at face value, activities conducted by "political activist organizations," such as peacefully assembling and associating with like-minded groups to petition the government, and speaking about vital issues of national concern, are the very type of activities that are protected by the First Amendment.[1] Regarding this, there is no unsettled law or debate.

Every day across America, groups of individuals assemble to discuss issues of common interests and to collectively pursue those interests in numerous ways, including by petitioning their government to take actions believed to be in the public interest. Unlike other parts of the world, such activity is protected and encouraged in America because "[t]he right of the people peaceably to assemble . . . is an attribute of

[1] It is also black letter law that the right to petition the government does not guarantee a result or even a response. "Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Minnesota Board for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984).

national citizenship. . . . The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for redress of grievances."[2] Furthermore, the Supreme Court has stated that protecting the right to peacefully assemble is critical "to maintain the opportunity for free political discussion" and that "[t]he holding of meetings for peaceable political action cannot be proscribed."[3] If the government had the authority to review those activities at will -- particularly because it did not agree with the views expressed in such an assembly -- such First Amendment activity would be, at a minimum, chilled and discouraged. It is a long-held American value to permit political speech with which one may vehemently disagree in order to protect the speech rights of all Americans.

We respectfully must point out the irony of investigating alleged violations of First Amendment-protected activity by utilizing means that infringe First Amendment rights. Significantly, we note that your letter makes no allegation that UCS violated any law or regulation. Instead, it is directly focused on what its employees said to whom about "the issue of climate change." Although your investigation is not bound by rules adopted by another branch of government, we think it instructive that the institution charged with investigating serious crime and terrorism – the Federal Bureau of Investigation – is barred from "investigating or collecting or maintaining information on United States persons solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or laws of the United States."[4] We suggest that government authorities in all branches of government hew to this standard based in the Constitution and informed by previous abuse. Furthermore, the Supreme Court has recognized the First Amendment as a bar to a legislative inquiry, holding that "groups which themselves are neither engaged in subversive or other illegal or improper activities nor demonstrated to have any substantial connections with such activities are to be protected in their rights of free and private association. . . . To permit legislative inquiry to proceed on less than an adequate foundation would be to sanction unjustified and unwarranted intrusions into the very heart of the constitutional privilege to be secure in associations in legitimate organizations engaged in the exercise of First and Fourteenth Amendment rights . . ."[5]

We also object to the Committee's request on jurisdictional grounds.[6] You note that "[t]he Committee on Science, Space and Technology has jurisdiction over environmental and scientific programs." However, Rule X of the Rules of the House of Representatives does not confer on the Committee jurisdiction to institute "oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution."[7] To the extent Congress even has jurisdiction over these matters – deprivation of First Amendment rights, intimidation, and threat of prosecution – they would fall within the jurisdiction of other committees of the House.

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[2] *United States v. Cruikshank*, 92 U.S. 542, 552-553 (1876).
[3] *De Jonge v. State of Oregon*, 299 U.S. 353, 365 (1937).
[4] The Attorney General's Guidelines For Domestic FBI Operations (Sept. 29, 2008).
[5] *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 558 (1963) (reversing contempt judgment against president of the Miami Branch of the National Association for the Advancement of Colored People for refusing to divulge membership records to Florida legislative committee).
[6] Congressional oversight authority is delegated by the full House or Senate and any committee inquiry must be within the scope of that delegated authority. *United States v. Rumely*, 345 U.S. 41, 42, 44 (1953); *Watkins v. United States*, 354 U.S. 178, 198 (1957).
[7] Letter from Representative Lamar Smith, Chairman, Committee on Science, Space and Technology, United States House of Representatives, to Kenneth Kimmell, President, Union of Concerned Scientists, May 18, 2016 (hereinafter "Smith letter"), p.1.

We recognize that the oversight power of Congress is broad; however, it is not unlimited. It must be exercised "in aid of the legislative function,"[8] which includes "proposed or possibly needed statutes."[9] However, it cannot be used for the sake of exposure alone.[10] Your request for information comes under a heading in your letter styled "**The Committee's Request for Transparency**".[11] The Supreme Court has noted that "[t]here is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress . . . [n]or is the Congress a law enforcement or trial agency. . . . [An] inquiry . . . must be related to, and in furtherance of, a legitimate task of Congress."[12] It is clear that your oversight request does not encompass a review of current federal statutes within the Science Committee's jurisdiction, and we are having significant difficulty comprehending what "proposed or possibly needed statutes" could possibly be enacted to address the Committee's concerns and that also fall within the Science Committee's Rule X jurisdiction.

Because the Committee's request infringes UCS's rights under the First Amendment of the U.S. Constitution, and because the House Science Committee lacks jurisdiction over this matter, the Union of Concerned Scientists respectfully declines the invitation to provide the requested documents.

Sincerely,

Neil Quinter

cc: The Honorable Eddie Bernice Johnson,
Ranking Member, Committee on Science, Space and Technology

Signatories of Smith Letter

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[8] *Kilbourn v.Thompson*, 103 U.S. 168, 189 (1880).
[9] *Watkins v. United States*, 354 U.S. 178, 187 (1961).
[10] "There is no congressional power to expose for the sake of exposure . . ." *Watkins*, 354 U.S. at 200.
[11] Smith letter, p.3.
[12] *Watkins*, 354 U.S. at 187.

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

June 17, 2016

Mr. Neil F. Quinter
Attorney at Law
Brownstein Hyatt Farber Schrek
1350 I St NW #510
Washington, DC 20005

Dear Mr. Quinter,

Thank you for your June 1, 2016, response. The House Science, Space, and Technology Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with the contentions in your letter. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that your client provides the documents and information previously requested in our May 18, 2016, letter.[1]

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[2] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[3] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[4] However, Congress' investigatory power is not without limits.[5] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast

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[1] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.
[2] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[3] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23 [hereinafter CRS Report, RL30240].
[4] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[5] *Watkins v. U.S.*, 354 U.S. 178 (1957).

and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[6] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[7] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[8] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[9] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[10] organizations that violate the civil rights of individuals,[11] state agencies involved in the Hurricane Katrina response,[12] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138.069 billion to fund research and development.[13] Of that total federal spending, $31.8 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and

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[6] *McGrain* at 177, 181-182.
[7] *See McGrain*, 273 U.S. at 177, 181-182.
[8] *Eastland* at 509.
[9] CRS Report, RL30240 at 26.
[10] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[11] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[12] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[13] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of the Science Committee that organizations such as your client's and those similarly situated should not be inciting legal action based on debatable science to undermine the First Amendment of the Constitution.

The investigative efforts supported by your client and other similar organizations are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes,** but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[14]

This statement suggests that the Attorney General's office and those who support his actions will be deciding what science is valid and what science is invalid. In essence, the attorney general is saying that if he disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Congress has a duty to protect scientists and researchers from the criminalization of scientific inquiry.

Accordingly, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of these investigations, Congress can investigate the effects your client's advocacy may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[15] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your client's efforts and those of the so called "Green 20"

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[14] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available* at http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[15] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your client's actions are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The website of the Union of Concerned Scientists, one of the organizations now supporting the Green 20's investigations, describes a 2010 investigation by the Virginia Attorney General of a University of Virginia scientist as "a campaign of harassment," and "a threat[] [to the] the ability of scientists in Virginia to ask tough questions about our world—and pursue contentious lines of research." The current efforts by the Green 20, supported by your client's organization, appear to be no different.[16]

The First Amendment is Not a Shield to Congressional Inquiry

Unlike the Fifth Amendment, the First Amendment is not an impermeable shield to Congressional investigations. In *Barenblatt v. United States,* the Supreme Court stated "where the First Amendment rights are asserted to bar government interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[17] Moreover, when balancing the interests of the parties in *Watkins v. United States*, the Court held "the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness."[18] These cases are important precisely because they provide examples of congressional investigations – sustained by the Supreme Court – involving organizations similar to those of your client. The parties being investigated in the cases noted above are no different than the recipients of the Science Committee's May 18 letter.

Congress frequently and rigorously has investigated private citizens and advocacy groups for various types of conduct. In almost all instances these investigations have withstood judicial scrutiny, with little, if any, restriction imposed upon them. Recently, the Democratic Chairman of the House Oversight and Government Reform Committee, Henry Waxman, investigated numerous charities benefiting veterans.[19] When the founder of one of the charities under investigation failed to comply with Chairman Waxman's request for documents and testimony, the Chairman issued a subpoena compelling the necessary information.[20] Eventually, the

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[16] Union of Concerned Scientists, Center for Science & Democracy, *Science under Attack: Legal Harassment of Climate Scientist Michael Mann available at* http://www.ucsusa.org/center-science-and-democracy/protecting-scientists-harassment/cuccinelli-mann.html#.VImpBfkrKUk (last visited June 9, 2016).
[17] *Barenblatt v. U.S.*, 360 U.S. 109, 126 (1959).
[18] *Watkins v. U.S.*, 354 U.S. 178, 198 (1957).
[19] Philip Rucker, *Panel Probes Spending of Veterans Charities*, WASH. POST, Dec. 14, 2007.
[20] Matthew Jaffe and Rhonda Schwartz, *Director of Veterans Charity in Hiding*, MILITARY.COM *available at* http://www.military.com/NewsContent/0,13319,158246,00.html (last visited June 9, 2016).

Oversight Committee received all documents, information, and testimony as part of that congressional investigation.[21]

The Committee's Document Requests

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between employees of your organization and any office of a state attorney general referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between employees of your organization and any officer or employee of the Climate Accountability Institute, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, Greenpeace, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. Dana Rohrabacher
Member of Congress

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[21] Philip Rucker, *Chief of Veterans Charities Grilled on Groups' Spending*, WASH. POST, Jan. 18, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/01/17/AR2008011703620.html (last visited June 9, 2016).

Mr. Neil F. Quinter
June 17, 2016
Page 6

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

Brownstein Hyatt
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Neil F. Quinter
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June 27, 2016

By Electronic Mail

The Honorable Lamar Smith
Chairman
Committee on Science, Space and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515

Re: Response to Committee's June 17, 2016 Letter

Dear Mr. Chairman:

I write on behalf of the Union of Concerned Scientists (UCS) in response to your June 17, 2016 letter again requesting documents relating to communications between UCS employees and state attorneys general, and communications between UCS employees and other groups or individuals "related to the issue of climate change." For the reasons set forth in our June 1 letter, and as further explained below, UCS continues to object to this request because it infringes its First Amendment rights and because the Committee lacks jurisdiction over this matter. We feel compelled to note again that you have made no allegation that UCS violated any law or regulation.

UCS has the right and responsibility to provide information to state prosecutors when it has reason to suspect corporate wrongdoing. By your letter, you are requesting the full communications of private citizens who are reporting potential fraud to state prosecutors who are charged with enforcing laws against corruption and fraud, and for consumer protection.

UCS asserts that they and several other nonprofits and news organizations have uncovered documents showing that ExxonMobil scientists conducted research dating back decades on the risks of climate change and shared their assessment of these risks with company leaders. They and others contend that subsequently, and for years, ExxonMobil downplayed these risks in communications with shareholders and the public. With this evidence, it is entirely appropriate for state prosecutors to take steps to determine whether this alleged misrepresentation of science constitutes fraud.

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Committee Mischaracterizes UCS Actions

Your June 17 letter announces the Committee's intention to "continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution."[1] This mischaracterizes the work of UCS, which has not called up anyone to investigate ExxonMobil's *scientists*. UCS strongly believes and advocates for the First Amendment right of scientists, including those employed by ExxonMobil. Rather, their focus is on the inconsistency between what ExxonMobil's scientists (and most other scientists) had understood about climate change, and what the company said publicly about climate change science in an effort to mislead its investors and the public about the harm caused by its product. It is very well settled that fraud is not protected by the First Amendment.

UCS uses rigorous independent science to help inform public policy. They are deeply committed to addressing climate change, which is an urgent threat to our world. The vast majority of climate researchers and, UCS alleges, many of ExxonMobil's own scientists have understood for decades that climate change represents a significant threat. Your disagreement with UCS's understanding of the broad scientific consensus on climate change does not justify your inquiry.

In addition to pointing out how you mischaracterized UCS's work, we have two other observations related to your request. First, UCS cannot threaten anyone with prosecution, and therefore any oversight directed at UCS for this reason is also inappropriate. Second, we are dubious that ExxonMobil, with a market capitalization of nearly $380 billion, is intimidated by UCS. To the extent they or others are intimidated by UCS's exercise of its constitutionally protected rights, the usual response is to engage in countervailing speech.[2] Any oversight directed at UCS because someone somewhere feels intimidated by its speech is inappropriate.

Committee's Oversight Infringes the First Amendment Rights of UCS

The Committee's oversight request bears directly on UCS's First Amendment-protected activities. Specifically, the request seeks to expose UCS's conversations with other like-minded organizations, which specifically infringes the right of assembly. In seeking any communications with state attorneys general offices, the request also infringes the UCS's right to petition the government. There is no doubt these activities are protected by the First Amendment.

Notwithstanding the clear First Amendment principles at stake, you assert, citing *Barenblatt v. United States* and *Watkins v. United States*, that the "First Amendment is not an impermeable shield to Congressional investigations."[3] However, those cases also clearly affirm that the First Amendment can be invoked when congressional investigations infringe the rights it guarantees. And those cases further stand for the proposition that in instances when First Amendment rights are

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[1] Letter from Rep. Lamar Smith, Chairman, Committee on Science, Space and Technology, United States House of Representatives, to Kenneth Kimmell, President, Union of Concerned Scientists (June 17, 2016) (hereinafter "Smith Letter II"), page 1.
[2] *Citizens United v. FEC*, 558 U.S. 310, 361 (2010) ("[I]t is our tradition that more speech, not less, is the governing rule.").
[3] Smith Letter II at 4.

in jeopardy, Congress' interest in fact finding must be balanced against the First Amendment interests in question. You make no attempt to explain why you believe the Committee's interests outweighs the First Amendment interests of the UCS, and we assert that you can't. Instead, you perfunctorily conclude that the Committee's request is justified in light of these cases. However, you completely ignore the Supreme Court's admonition in *Watkins* that "[w]e cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected."[4] The Committee's oversight clearly infringes the UCS's constitutional rights and can't be justified under the cases cited by the Committee.

The Committee Incorrectly Applies Case Law from House Un-American Activities Committee

UCS disagrees with your assertion that the *Barenblatt* and *Watkins* cases are "important precisely because they provide examples of congressional investigations – sustained by the Supreme Court – involving organizations similar to those of your client."[5] Written within a year of each other, both *Watkins* and *Barenblatt* opinions involved the House Un-American Activities Committee's investigation of communist activity in America, during a very different era in which fear of communism was rampant, and to some observers, had reached hysterical proportions.

Furthermore, it is clear that the "Communist Party cases" have not been followed with respect to other groups. In 1963, just four years after *Barenblatt* was decided, the Supreme Court overturned a conviction for contempt of the Florida Legislature, a committee of which was investigating alleged communist infiltration in Florida, including the Miami branch of the National Association for the Advancement of Colored People (NAACP). In applying the Communist Party cases, the Court stated "that it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relationship between the information sought and a subject of overriding and compelling state interest."[6] In analyzing the previous Communist Party cases, the Court observed that "[i]t is apparent that the necessary preponderating governmental interest and, in fact, the very result in those [communism] cases were founded on the holding that the Communist Party is not an ordinary or legitimate political party . . . ."[7] The Court further explained that just because they had recognized a compelling legislative interest in *Barenblatt*, does not *ipso facto* mean all other inquiries that conflict with the First Amendment are also permissible.[8] In

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[4] *Watkins v. United States*, 354 U.S. 178, 198 (1957). *See also, Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) ("There is no doubt that legislative investigations, whether on the federal or state level, are capable of encroaching upon the constitutional liberties of individuals. It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community.").

[5] Watkins did not "sustain" the congressional investigation. It overturned a contempt of Congress conviction because the pertinency of the information sought was unclear and that analysis was undertaken with great care because of the important First Amendment and Due Process concerns.

[6] *Gibson v. Florida Legislative Investigative Comm.*, 372 U.S. 539, 546 (1963).

[7] *Id.* at 547.

[8] *Id.* at 549 ("The fact that governmental interest was deemed compelling in *Barenblatt* [and other communist party cases] and held to support the inquiries there made into membership in the Communist Party does not resolve the issue here, where the challenged questions go to membership in an admittedly lawful organization.").

overturning the contempt conviction, the Court balanced the equities in favor of the NAACP, referring to the latter as "a concededly legitimate and nonsubversive organization."[9] Like the NAACP, UCS is a legitimate, law abiding organization that for nearly half a century has combined the knowledge and influence of the scientific community with the passion of concerned citizens to build a healthy planet and a safer world.

Based on the foregoing, the Committee's inquiry is barred by the First Amendment. The cases relied upon by the Committee to justify its oversight request bear no relation at all to this case and do not support the proposition that the Committee has the requisite compelling state interest needed to override the UCS's First Amendment rights.

Committee Lacks Jurisdiction

As mentioned in our previous letter, Rule X of the Rules of the House of Representatives does not confer jurisdiction over this matter to the Committee. The attempt to bootstrap jurisdiction over federally funded research to this inquiry, which you did not do in the May 18 letter, is a superficial pretext. Furthermore, you assert that "[m]uch of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars."[10] It is not clear to what federally funded research you could be referring, and you do not identify that funding in your letter. The news reports that have surfaced thus far reveal that ExxonMobil scientists were being paid by the company to research climate change. Thus, while we disagree with your theory of jurisdiction, we also question its factual support. We would further note that "when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter.[11] We understand Rule X to be clear and that it does not authorize the Committee to investigation UCS's protected First Amendment activities.

In sum, this investigation is based on a mischaracterization of UCS's work and violates their First Amendment rights. Further, as demonstrated above, the case law you cite does not apply, and the Committee lacks jurisdiction. This line of inquiry risks chilling the ability of private citizens to expose waste, fraud, and abuse. Because of all of these reasons, we continue to respectfully decline to provide the requested documents.

Sincerely,

Neil Quinter

cc: The Honorable Eddie Bernice Johnson,
Ranking Member, Committee on Science, Space and Technology

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[9] *Id.*
[10] Smith Letter II at 3.
[11] *Watkins v. United States*, 354 U.S. 178, 198 (1957).

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

July 6, 2016

Neil F. Quinter
Attorney at Law
Brownstein Hyatt Farber Schrek
1350 I St NW #510
Washington, DC 20005

Dear Mr. Quinter,

The Committee on Science, Space, and Technology is in receipt of your June 27, 2016, response to its request for information related to ongoing oversight of coordinated attempts to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. This response marks the second time your client, the Union of Concerned Scientists, has refused to produce documents in response to oversight letters signed by 17 Members of the Committee. Further, your office has not attempted to engage the Committee in a dialogue related to our requests. This is disappointing. I urge you and your client to engage with the Committee as soon as possible to discuss the Committee's requests.

The Committee maintains its authority to investigate your client's activities and communications with various state attorneys general and other non-profit organizations. As previously stated in the Committee's June 17, 2016, letter, this authority is grounded in both the Constitution and rules of the U.S. House of Representatives.[1] The Committee maintains that the First Amendment, as interpreted by the Supreme Court, is not an impenetrable shield to Congressional inquiry.[2] Moreover, the Committee is concerned that the objections raised in your June 27, 2016, letter appear to selectively apply the law based solely upon the political party to which your client supplies information.

On June 22, 2016, the House Progressive Caucus held a forum entitled "Oil is the New Tobacco." The forum was attended by (i) multiple members of the Union of Concerned Scientists (UCS), specifically Ms. Kathy Mulvey and Mr. Peter Frumhoff, (ii) Dr. Naomi Oreskes, founder of the Climate Accountability Institute (CAI), as well as (iii) other participants

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[1] *See generally* U.S. Constitution, Art. 1; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] *Watkins v. U.S.*, 354 U.S. 178, 198 (1957); *Barenblatt v. U.S.*, 360 U.S. 109, 126 (1959).

in the 2012 La Jolla Conference.[3] During the forum, Rep. Paul Tonko (D-NY), asked: "Have any of you had interactions with the any of the AGs?"[4] Both Dr. Oreskes of CAI and Ms. Mulvey of UCS responded in a candid and forthcoming manner about the assistance and information they have provided to the attorneys general investigating companies, scientists, and non-profit groups.[5] It appears that your client has no First Amendment concerns providing information to Members of the House Progressive Caucus; yet, continually and improperly refuses to provide any information to this Committee. That your client appears to have cast aside any First Amendment concerns when interacting with the Members of the House Progressive Caucus, but purports to be unwilling to provide this Committee similar information is, at minimum, concerning. It is clear that Members on both sides of the aisle have legitimate questions regarding the activities of your client with regard to the assistance provided to the attorneys general, and I urge you to reconsider your unwillingness to provide information to the Committee.

Accordingly, the Committee reiterates its May 18, 2016, requests and asks that your client produce responsive documents and communications to the Committee on or before July 13, 2016, at 12:00 p.m. As explained in detail in the Committee's June 17, 2016, letter, this request is a legitimate exercise of the Committee's oversight duties under the Constitution and the Rules of the House.

If your client continues to refuse to provide information responsive to the Committee's requests on a voluntary basis, I will be left with no alternative but to utilize the tools delegated to the Committee by the Rules of the House of Representatives. Specifically, the Committee will consider use of compulsory process to obtain responsive documents in the possession, custody, or control of your client.

At any point, I welcome the opportunity to discuss the Committee's request with you or your staff. To arrange a meeting or discuss matters over the phone prior to July 13, 2016, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology
Enclosure

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[3] Congressional Progressive Caucus Facebook Page Video release entitled *LIVE: CPC & SEEC Forum "Oil Is The New Tobacco" available at* https://www.facebook.com/USProgressives/ (last visited July 1, 2016).
[4] *Id.*
[5] *Id.*

Brownstein Hyatt
Farber Schreck

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July 13, 2016

Chairman Lamar S. Smith
Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

I write on behalf of the Union of Concerned Scientists (UCS), in response to your letter of July 6, 2016, the third received from you since May 18, 2016.

You assert that you are investigating "attempts to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution."[1] UCS's activities are completely consistent with these purposes. In our previous letters to the House Committee on Science, Space, and Technology, we have spoken extensively of the need to vindicate our First Amendment rights, and not to deprive anyone else of theirs. And as we have previously detailed in our letters,[2] UCS's concern is not with the conduct of research—either inside fossil companies or outside—but rather with how fossil fuel companies have misrepresented and cast doubt upon such research with the public and their own shareholders.

UCS contends that extensive evidence suggests that ExxonMobil, for example, has long misrepresented the risks posed to its shareholders and to the public by climate change.[3] As you

[1] Letters to UCS from the House Committee on Science, Space, and Technology (May 18, 2016, June 17, 2016, July 6, 2016).
[2] Response Letters from UCS to the House Committee on Science, Space, and Technology (June 1, 2016 and June 27, 2016).
[3] See, for example: "Climate Deception Dossiers." Union of Concerned Scientists, 2015 Online at http://www.ucsusa.org/global-warming/fight-misinformation/climate-deception-dossiers-fossil-fuel-industry-memos#.V4UePfkrKUl; Banerjee, N., J.H. Cushman Jr., D. Hasemyer, and L. Song. "Exxon: The Road Not Taken." *InsideClimate News*, September 16 – December 22, 2015. Online at *https://insideclimatenews.org/content/Exxon-The-Road-Not-Taken*, accessed July 12, 2016; Jerving, S., K. Jennings, M. M. Hirsch, and S. Rust. "What Exxon Knew about the Earth's melting Arctic," *Los Angeles Times*, October 9, 2015. Online at *http://graphics.latimes.com/exxon-arctic/*, accessed July 12, 2016; Jennings, K., D. Grandoni, and S. Rust. "How Exxon Went from Leader to Skeptic on Climate Change Research," *Los Angeles Times*, October 23, 2015. Online at *http://graphics.latimes.com/exxon-research/*, accessed July 12, 2016; and Lieberman, A. and S. Rust. "Big Oil Braced for Global Warming while It Fought Regulations," *Los Angeles Times*, December 31, 2015. Online http://graphics.latimes.com/oil-operations/, accessed July 12, 2016.

know, the state attorneys general are investigating whether any of these activities constitutes fraud.

In your most recent letter, you also suggest that UCS has "cast aside any First Amendment concerns" that we raised in previous correspondence by participating in a forum hosted by the Congressional Progressive Caucus. However, this is a false equivalency: the information exchanged during the forum and the information you are seeking is significantly different.

During this forum – which was held in public --, Rep. Paul D. Tonko of New York expressed an interest in the attorneys' general investigation into whether the fossil fuel industry "moved along with a misinformation campaign." He then asks: "Have any of you had any interactions with any of the AGs?" Speaking on behalf of UCS, Kathy Mulvey responded:

Yes, UCS has also been involved in providing information to attorneys general about whether these companies violated any state laws in providing this information to shareholders and the public, so our interest is really ensuring that they have access to the best science on which to base any actions and also documenting the responsibilities of these companies in terms of their emissions and their role in providing deceptive information. So, our chief scientist, Peter Frumhoff, who is actually here with me as well, has briefed a number of AGs, and we co-convened a session with the Harvard Law School back in April that was attended by senior staff who many of the AGs who have also participated in dialogues.[4]

Rep. Tonko simply asked about what has long been a matter of public record: that UCS staff had met with several state attorneys general and their staff and provided them with climate science relevant to their work. At no point was Ms. Mulvey asked for, nor did she disclose, the content of communications between UCS and other non-profit groups and between UCS and attorneys general, which is what you have demanded.

Moreover, the Supreme Court has held that any waiver of First Amendment rights must be knowing, voluntary and intelligent, (*see D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 187, 92 S.Ct. 775, 782, 783, 31 L.Ed.2d 124 (1972)), and courts will "indulge every reasonable presumption against a waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 57 S. Ct. 809, 81 L. Ed. 1177 (1937). UCS has not waived its First Amendment rights.

For the reasons set forth in our previous letters, these communications are clearly protected under the First Amendment.

However, we note that with this third letter you have-- for the first time-- requested a dialogue with UCS. Consistent with UCS's longstanding transparent and open approach to their work, they are happy to share information on the issue of climate science and fossil fuel company

[4] K. Mulvey testimony, Congressional Progressive Caucus and Sustainable Energy and Environment Coalition Forum, "Oil is the New Tobacco," June 22, 2016. Video online at https://www.youtube.com/watch?v=sGzpNmKuw30, accessed July 13, 2016.

accountability with your Committee. UCS has made public a number of reports and other documents that should help you understand the intent and content of their work. UCS recently posted on their website a timeline of UCS's major activities with respect to climate science deception.[5]

This timeline provides detailed information about UCS's work to expose what ExxonMobil and other leading fossil fuel companies knew about climate change and when, as well as inconsistencies between fossil fuel companies and the trade groups that represent them with regard to how each represents climate science. It also notes UCS's interactions with state attorneys general and many other organizations. Taken together, this content provides a solid overview of the current evidence showing that a number of leading fossil fuel companies devised and executed a plan to deceive the public about the severity of climate change and the risk of their products.

This publicly available material should satisfy any reasonable desire on your part for information about UCS's activities with respect to climate science deception.

Notwithstanding our continued concern that you lack jurisdiction over these issues, we are amenable to discussing any follow up questions you and your committee may have about UCS's work in an informal setting with members of the minority present. Such a discussion could also inform our understanding of the relationship between your Committee, ExxonMobil, and groups such as the Energy and Environment Legal Institute.

We must insist that in engaging in a voluntary exchange of information, you respect UCS's First Amendment rights by not further seeking to compel disclosure of communications with other groups or state attorneys general. All citizens should take their First Amendment rights extremely seriously and should expect elected officials to protect and defend them. UCS is no exception.

I will follow up with your staff in the next few days to discuss whether the extensive publicly available information is sufficient to meet your needs and, if not, what steps you would like to take with regard to an informal discussion under the terms described above.

Sincerely,

Neil F. Quinter

[5] Union of Concerned Scientists Campaign on Fossil Fuel Climate Deception and Accountability: A Timeline. Online at: http://www.ucsusa.org/global-warming/fight-misinformation/campaign-timeline-fossil-fuel-climate-deception-accountability#.V4U3I_krKUm

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Kenneth Kimmell, President
Union of Concerned Scientists

You are hereby commanded to be and appear before the
Committee on Science, Space, and Technology

of the House of Representatives of the United States at the place, date, and time specified below.

☑ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: 2321 Rayburn House Office Building, Washington, D.C. 20515

Date: July 27, 2016 Time: 12:00 noon

☐ **to testify at a deposition** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

☐ **to testify at a hearing** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time _____

To any authorized staff member or the U.S. Marshals Service

to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, D.C. this 13th day of July, 2016.

Lamar Smith
Chairman or Authorized Member

Attest: Karen L. Haas
Clerk

SCHEDULE

In accordance with the attached schedule instructions, you, Kenneth Kimmell, are required to produce the things described below:

1. All documents and communications between any officer or employee of the Union of Concerned Scientists and any officer or employee of the office of a state attorney general, referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between any officer or employee of the Union of Concerned Scientists and any officer or employee of the Climate Accountability Institute, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Schedule Instructions

1. In complying with this subpoena, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Subpoenaed records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this subpoena has been, or is also known by any other name than that herein denoted, the subpoena shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF") files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this subpoena shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the subpoena was served.

8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the subpoenaed information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the subpoena cannot be made in full by July 27, 2016, at 12:00 noon, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided no later than July 26, 2016, at 12:00 noon.

12. In the event that a document is withheld in whole or in part on any basis, provide a log containing the following information concerning any such document: (a) the basis for withholding the document; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. In complying with the subpoena, be apprised that the U.S. House of Representatives and the Committee on Science, Space, and Technology do not recognize: any of the purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections; any purported privileges or protections from disclosure under the Freedom of Information Act; or any purported contractual privileges, such as non-disclosure agreements.

14. If any document responsive to this subpoena was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

15. If a date or other descriptive detail set forth in this subpoena referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the subpoena, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.

16. The things described in the schedule shall be produced in their current condition, as of July 13, 2016.

17. This subpoena is continuing in nature and applies to any newly-discovered information as to the time period January 1, 2012 to July 27, 2016. Any responsive record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

18. All documents shall be Bates-stamped sequentially and produced sequentially.

19. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building.

20. Upon completion of the production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in

your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), text messages, Google chat communications or other instant message communications, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

8. "You" or "your" means and refers to you as natural person and in your capacity as President of the Union of Concerned Scientists (the "UCS"), and any, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction in your personal capacity or at the Union of Concerned Scientists.

Brownstein Hyatt
Farber Schreck

July 26, 2016

Neil F. Quinter
Attorney at Law
202.872.5287 tel
202.296.7009 fax
nquinter@bhfs.com

BY ELECTRONIC MAIL

The Honorable Lamar Smith
Chairman
Committee on Science, Space and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

RE: Response to Committee's July 13, 2016 Subpoena

Dear Mr. Chairman:

I write on behalf of the Union of Concerned Scientists (UCS) in response to your July 13, 2016 subpoena demanding documents relating to communications between UCS employees and state attorneys general, and communications between UCS employees and other groups or individuals "related to the issue of climate change." These communications are protected by the First Amendment to the U.S. Constitution and the House Science Committee lacks jurisdiction to investigate them; therefore, UCS will not comply with the subpoena.

UCS has been transparent—by publishing on its website—documents and other material about its work exposing fossil fuel companies' misinformation, denial, and distortion of the climate risks of their products. In the case of Exxon Mobil, this includes evidence that the company's public messages on climate risk contradict the findings of the company's own scientists.

The subpoena makes no allegation of wrong doing on the part of UCS, and UCS is determined to defend its constitutional rights to peaceful assembly with like-minded groups, to petition the government, and to free speech on the issue of climate change and other public matters. We outlined in great detail our objections to the Committee's previous requests for documents in letters dated June 1, June 27, and July 13, which we have enclosed and hereby incorporate as part of our response to your subpoena. In sum, 1) the Committee does not have the jurisdiction to issue this subpoena; and 2) the subpoena violates our client's First Amendment rights.

We are not going to reiterate our objections in depth, but must note again that your claim of an interest in preserving "research free from intimidation" grossly misrepresents the attorneys general investigation, which focuses on whether ExxonMobil's willful distortion of the work of company scientists constitutes fraud. Further, the Committee has utterly failed to explain why this generalized and misapplied concern overrides UCS's specific, particularized and evident First Amendment rights. UCS has not violated any law or regulation and there is absolutely no evidence that its advocacy work has intimidated anyone. In contrast, your subpoena is intimidating and, if enforced, would interfere with our client's ability to participate freely in our democratic process. UCS will defend its rights so that it, and other advocacy groups, whatever their political perspectives or substantive agendas, may be free to exercise the birthright of all Americans – the rights to freely speak, associate, and petition their government.

UCS's offer to brief the committee made in our July 13 letter and subsequent conversation still stands. We understand that the Committee may exercise options available to it to attempt to compel our client to provide the subpoenaed documents, and perhaps punish it for standing up for its First Amendment rights. We would appreciate receiving advance notification before such action is taken.

Sincerely,

Neil Quinter

cc: The Honorable Eddie Bernice Johnson,
Ranking Member, Committee on Science, Space and Technology

Enclosures: Letter from Neil Quinter to the Honorable Lamar Smith (June 1, 2016)
Letter from Neil Quinter to the Honorable Lamar Smith (June 27, 2016)
Letter from Neil Quinter to the Honorable Lamar Smith (July 13, 2016)

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
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May 18, 2016

The Honorable Kamala D. Harris
Attorney General of California
1300 "I" Street
Sacramento, CA 95814-2919

Dear Madam Attorney General,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced cooperation on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve "as the guardian of the legal rights of the citizens" and to "assert, protect, and defend the rights of the people."[2] These legal actions may even amount to an abuse of prosecutorial discretion. To assist in the Committee's oversight of this matter, I am writing to request information related to your office's role in this investigation.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[3] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies*, N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Bureaus of Attorney General, New York, May 12, 2016, *available at http://www.ag.ny.gov/bureaus*; Office of the Attorney General, U.S. Virgin Islands, Dept. of Justice, May 12, 2016, *available at* http://usvidoj.codemeta.com/DivisionContent_1.php?divId=84.

[3] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[4] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff and activist trial attorney Matthew Pawa, founder of the Global Warming Legal Action Project.[5]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[6] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[7] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[8]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[9]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between the New York Attorney General and Extremist Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists, including 2012 workshop participant Matthew Pawa, as well as representatives from groups such as

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[4] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[5] *Id.*
[6] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages*, Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[7] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[8] *Id.* [emphasis added]
[9] *Id.* [emphasis added]

350.org and Greenpeace, met at the Manhattan offices of the Rockefeller Family Fund.[10] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[11] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[12] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[13]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference announcing cooperation on investigations against those who question the causes, magnitude, or best ways to address climate change, members of the group were briefed by 2012 workshop attendees Matthew Pawa of the Global Warming Legal Action Project and UCS's Peter Frumhoff. It has since come to light that the New York Attorney General's office willfully concealed the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[14] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[15]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[16]

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[10] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe*, WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.

[11] *Id.*

[12] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund*, Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*

[13] *Id.*

[14] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show*, WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

[15] *Id.*

[16] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions*, WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics in close coordination with certain special interest groups and trial attorneys that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.

To assist the Committee in its oversight of a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but by no later than noon on May 30, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of California and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of California and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of California and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

The Honorable Kamala D. Harris
May 18, 2016
Page 5

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

The Honorable Kamala D. Harris
May 18, 2016
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Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CALIFORNIA 94102-7004

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E-Mail: Martin.Goyette@doj.ca.gov

May 27, 2016

RECEIVED
MAY 31 2016
COMMITTEE ON SCIENCE
& TECHNOLOGY

The Honorable Lamar Smith
Chairman, Committee on Science, Space and Technology
2321 Rayburn House Office Building
Washington, DC 20515-6301

Dear Chairman Smith:

This responds to the May 18, 2016 letter to Attorney General Kamala D. Harris from you and certain other Majority members of the Committee on Science, Space and Technology. The accusations in your letter regarding the California Attorney General are inaccurate and unfortunate. Based on these accusations, you request records pertaining to the California Attorney General's "investigations or potential prosecutions" related to the issue of climate change.

Your request is for the following records, for the time frame from January 1, 2012 to the present, to be produced by no later than noon on May 30, 2016:

1. All documents and communications between or among employees of the Office of the Attorney General of California and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of California and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of California and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit, organizations, scientists, or other individuals related to the issue of climate change.

The California Attorney General objects to this request on multiple grounds, even apart from its basis in misstatement and conjecture. First and foremost, we do not believe it is within the jurisdiction of Congress to demand documents from a state law enforcement official such as the California Attorney General. Although Congress' investigative jurisdiction is broad, that is because it tracks Congress' power to legislate and appropriate concerning federal matters. But the power to investigate does not extend beyond those matters. (See, e.g., *Barenblatt v. U.S.* (1959) 360 U.S. 109, 111 ["Congress may only investigate into those areas in which it may potentially legislate or appropriate"].) Investigations and prosecutions of state law enforcement actions by state attorneys general are not federal matters. To the contrary, under the Constitution and laws of the United States, such activities partake of police powers reserved to the states, and are not subject to federal interference. (See, e.g., *New York v. U.S.* (1992) 505 U.S. 144, 162 ["the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions"].)

The limits of the Congressional power to investigate are also clear from the House of Representatives' own publication, *House Practice, A Guide to the Rules, Precedents and Procedures of the House*, authored by the Parliamentarians of the House: "The investigative power [of the House] cannot be used to expose merely for the sake of exposure or to inquire into matters which are... reserved to the States."[1] Not surprisingly, we have found no precedent to support an attempt by Congress to assert its investigative powers over a state attorney general in the manner sought here.

Aside from Congress' lack of jurisdiction and improper intrusion into state authority, the document request also seeks a range of materials which, under well-established doctrines and for many good reasons, are privileged and confidential. These include records of investigations or potential prosecutions (Cal. Evidence Code §1040; Cal. Government Code §§11183), attorney work product and records subject to attorney-client and deliberative process privileges (Cal. Code of Civil Procedure §2018.030, Cal. Evidence Code §§954, 1040), and communications subject to the common interest doctrine. (*OXY Resources California LLC v. Sup. Ct.* (2004) 115 Cal.App.4th 874, 887-91.)

[1] Brown, Johnson, Sullivan, *House Practice, A Guide to the Rules, Precedents and Procedures of the House*, USGPO 2011, p. 249.

In any event, regardless of whether members of the Committee Majority agree with her, the California Attorney General was elected by the people of the State of California as its chief law enforcement official and as such, has the discretion, unfettered by Congress, to investigate, and if she determines appropriate, prosecute violations of law. She also has every right to work, unhindered, with other law enforcement officials and other organizations to protect the people of California.

For all of these reasons, the California Attorney General respectfully declines to produce documents.

If you have any questions regarding this matter, please feel free to contact the undersigned.

Sincerely,

MARTIN GOYETTE
Senior Assistant Attorney General

For KAMALA D. HARRIS
Attorney General

cc: The Honorable Eddie Bernice Johnson, Ranking Member

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

FAX TRANSMISSION COVER SHEET

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DATE: May 27, 2016 **TIME:** 1:11 PM **NO. OF PAGES:** 4
(Including Fax Cover Sheet)

TO:

NAME: The Honorable Eddie Bernice Johnson
OFFICE:
LOCATION: Washington, DC
FAX NO.: (202) 226-1477 PHONE NO.:

FROM:

NAME: Martin Goyette, Senior Assistant Attorney General
OFFICE: Office of the Attorney General
LOCATION: 455 GOLDEN GATE AVENUE, SUITE 11000 , SAN FRANCISCO, CA
FAX NO.: (415) 703-5480 PHONE NO.: (415) 703-5940

MESSAGE/INSTRUCTIONS

PLEASE DELIVER AS SOON AS POSSIBLE!
FOR ASSISTANCE WITH THIS FAX, PLEASE CALL THE SENDER

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

June 17, 2016

The Honorable Kamala D. Harris
Attorney General
State of California
1300 "I" Street
Sacramento, CA 95814-2919

Dear Attorney General Harris,

Thank you for your May 27, 2016, response. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[1] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[2] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] However, Congress' investigatory power is not without limits.[4] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.
[3] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[4] *Watkins v. U.S.*, 354 U.S. 178 (1957).

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[5] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[6] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[7] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[8] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[9] organizations that violate the civil rights of individuals,[10] state agencies involved in the Hurricane Katrina response,[11] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138 billion to fund research and development.[12] Of that total federal spending, approximately $40 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of

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[5] *McGrain* at 177, 181-182.
[6] *See McGrain*, 273 U.S. at 177, 181-182.
[7] *Eastland* at 509.
[8] CRS Report at 26.
[9] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[10] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[11] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[12] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

the Science Committee that offices such as yours and those similarly situated should not be taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued and contemplated by members the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes**, but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[13]

This statement suggests that his office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, he is saying that if his office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.

Additionally, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[14] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions

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[13] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available at* http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[14] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

and those of your fellow attorneys general indeed are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of California and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of California and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of California and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

The Honorable Kamala D. Harris
June 17, 2016
Page 5

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
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June 24, 2016

The Honorable Lamar Smith
Chairman, Committee on Science, Space and Technology
2321 Rayburn House Office Building
Washington, DC 20515-6301

Dear Chairman Smith:

This responds to the June 17, 2016 letter to Attorney General Harris from you and certain other Majority members of the Committee on Science, Space and Technology. As we stated in our May 27 letter, and as you acknowledge, Congress' investigative jurisdiction is broad, but it has limits. We do not believe that the Committee has the authority under the Constitution, law, or Congress' own rules and precedents to demand documents from a state Attorney General regarding the investigation of potential state law enforcement actions. We have carefully reviewed your letter, but find nothing that specifically addresses this issue or supplies such authority. We therefore respectfully decline your request. We also reject the unfounded accusations contained in your letter.

If you have any questions regarding this matter, please contact the undersigned.

Sincerely,

MARTIN GOYETTE
Senior Assistant Attorney General

For KAMALA D. HARRIS
Attorney General

MHG: eyg

cc: The Honorable Eddie Bernice Johnson, Ranking Member

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

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DATE: June 24, 2016 **TIME:** 1:30 PM **NO. OF PAGES:** 2
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TO:

NAME: **The Honorable Lamar Smith**
OFFICE: **House Committee on Science, Space, and Technology**
LOCATION: **Washington, DC**
FAX NO.: **(202) 226-0113** PHONE NO.:

FROM:

NAME: **Martin Goyette, Senior Assistant Attorney General**
OFFICE: **Office of the Attorney General**
LOCATION: **455 GOLDEN GATE AVENUE, SUITE 11000 , SAN FRANCISCO, CA**
FAX NO.: **(415) 703-5480** PHONE NO.: **(415) 703-5940**

MESSAGE/INSTRUCTIONS

PLEASE DELIVER AS SOON AS POSSIBLE!
FOR ASSISTANCE WITH THIS FAX, PLEASE CALL THE SENDER

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

The Honorable George Jepsen
Attorney General of Connecticut
55 Elm Street
Hartford, CT 06106

Dear Mr. Attorney General,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced cooperation on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve "as the guardian of the legal rights of the citizens" and to "assert, protect, and defend the rights of the people."[2] These legal actions may even amount to an abuse of prosecutorial discretion. To assist in the Committee's oversight of this matter, I am writing to request information related to your office's role in this investigation.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[3] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Bureaus of Attorney General, New York, May 12, 2016, *available at http://www.ag.ny.gov/bureaus*; Office of the Attorney General, U.S. Virgin Islands, Dept. of Justice, May 12,2016, *available at* http://usvidoj.codemeta.com/DivisionContent_1.php?divId=84.

[3] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[4] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff and activist trial attorney Matthew Pawa, founder of the Global Warming Legal Action Project.[5]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[6] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[7] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[8]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[9]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between the New York Attorney General and Extremist Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists, including 2012 workshop participant Matthew Pawa, as well as representatives from groups such as

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[4] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[5] *Id.*
[6] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages*, Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[7] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[8] *Id.* [emphasis added]
[9] *Id.* [emphasis added]

350.org and Greenpeace, met at the Manhattan offices of the Rockefeller Family Fund.[10] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[11] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[12] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[13]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference announcing cooperation on investigations against those who question the causes, magnitude, or best ways to address climate change, members of the group were briefed by 2012 workshop attendees Matthew Pawa of the Global Warming Legal Action Project and UCS's Peter Frumhoff. It has since come to light that the New York Attorney General's office willfully concealed the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[14] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[15]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[16]

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[10] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe,* WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.
[11] *Id.*
[12] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund,* Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*
[13] *Id.*
[14] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show,* WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.
[15] *Id.*
[16] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions,* WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics in close coordination with certain special interest groups and trial attorneys that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.

To assist the Committee in its oversight of a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but by no later than noon on May 30, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of Connecticut and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Connecticut and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Connecticut and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all

documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

The Honorable George Jepsen
May 18, 2016
Page 6

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

GEORGE JEPSEN
ATTORNEY GENERAL

55 ELM STREET
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HARTFORD, CT 06141-0120

Office of the Attorney General
State of Connecticut

May 27, 2016

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Rep. Brian Babin
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Rep. Barry Loudermilk
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Washington, DC 20515

Dear Representatives,

I write in response to your letter, dated May 18, 2016, seeking documents and communications concerning this office's "investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individual related to the issue of climate change." Your letter accuses this office of using legal action and investigative tactics against those who have questioned the causes, magnitude and best responses to climate change. You also assert that we have undertaken legal actions that may rise to the level of abuse of authority and call this office's integrity into question. For the

reasons set forth below, your attacks on the integrity and conduct of this office are wholly unwarranted, and your request for information is misdirected.

You have accused the chief civil law enforcement official of a sovereign state of misconduct without any factual or legal basis – and, indeed, based entirely on a false factual premise. Your letter incorrectly asserts that this office has, in fact, commenced an investigation or other legal action into a party or parties based on their speech or beliefs concerning climate change. This office is not among the states or territories that have initiated investigations through issuance of subpoenas or other formal requests for production. Nor has this office threatened any entity or individual with investigation, prosecution, or other legal action. Indeed, we have not requested that any person or organization voluntarily produce information relating to their past statements or positions on climate change. (As a technical point, although your letter refers to "prosecutions," this office lacks authority to undertake criminal action.)

In light of the fact that Connecticut has not commenced or announced an investigation, your purpose is perhaps to intimidate this office or others from doing so. Be assured that this office reserves the full and unfettered right to conduct any investigation or enforcement action within its authority if we determine that doing so is in the best interests of the State of Connecticut. We acknowledge the overwhelming scientific consensus that climate change is real, that human activity has contributed to it, and that it represents a grave and escalating threat to the welfare of Connecticut's citizens and to its economy. With that in mind, we continue to evaluate if Connecticut law is available as an effective tool to address the impacts to our state from climate change. More particularly, the focus of our analysis is whether state laws, including consumer protection laws, may provide redress against knowingly false commercial speech concerning global warming and, if so, if applying such laws might produce relief that is meaningful in light of the resources required to obtain it.

I will not be dissuaded or intimidated from undertaking this review – or, if warranted, a formal investigation or enforcement – by heavy handed tactics from those with vested interests in avoiding legal scrutiny or their allies. Rather, we will be guided exclusively by the applicable law, facts, and the interest of the people of the State of Connecticut, and not by the interests of others on any side of this debate. Were we to undertake such an investigation, we would do so as a lawful exercise of authority properly reserved to the states and not subject to federal preemption or Congressional supervision. At this point, however, we have not instituted an investigation or other legal action. We, therefore, respectfully advise you that there are no documents responsive to your request for information concerning ongoing investigations or potential prosecutions.

Your letter notes this office's participation in an event hosted by the New York Attorney General's office on March 29, 2016. Contrary to your characterization, the event was not intended to announce a commitment to a joint investigation by all attendees of any particular target or targets relating to climate change, and it did not result in any such announcement. It was an occasion for discussion with colleagues on

opportunities to work together in a variety of ways to confront climate change, as we have previously, for example, in defending the Obama Administration's action to combat global warming.

In closing, I emphasize that my focus in evaluating potential avenues of legal action is not, and will never be, on academic or other non-commercial speech or intended to chill debate on issues of public importance. I trust that you, too, as responsible public servants, would avoid acting under the auspices of your committee to impede and dissuade discussion among public officials and others concerning climate change, an issue of collective and paramount concern to all of our constituents.

I hope that this letter adequately responds to your request for information.

Sincerely,

George Jepsen
Attorney General
State of Connecticut

cc: Representative Eddie Bernice Johnson, Senator Chris Murphy, Senator Richard Blumenthal, Representative John Larson, Representative Joe Courtney, Representative Rosa DeLauro, Representative Jim Himes, Representative Elizabeth Esty

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

June 17, 2016

The Honorable George Jepsen
Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

Dear Attorney General Jepsen,

The House Science, Space, and Technology Committee has yet to receive a response to its May 18, 2016, letter. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[1] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[2] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] However, Congress' investigatory power is not without limits.[4] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.
[3] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[4] *Watkins v. U.S.*, 354 U.S. 178 (1957).

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[5] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[6] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[7] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[8] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[9] organizations that violate the civil rights of individuals,[10] state agencies involved in the Hurricane Katrina response,[11] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138 billion to fund research and development.[12] Of that total federal spending, approximately $40 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of

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[5] *McGrain* at 177, 181-182.
[6] *See McGrain*, 273 U.S. at 177, 181-182.
[7] *Eastland* at 509.
[8] CRS Report at 26.
[9] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[10] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[11] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[12] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

the Science Committee that offices such as yours and those similarly situated should not be taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued and contemplated by members the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes,** but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[13]

This statement suggests that his office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, he is saying that if his office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.

Additionally, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[14] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions

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[13] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available at* http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[14] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

and those of your fellow attorneys general indeed are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of Connecticut and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Connecticut and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Connecticut and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

The Honorable George Jepsen
June 17, 2016
Page 5

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
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Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

GEORGE JEPSEN
ATTORNEY GENERAL

55 ELM STREET
P.O. BOX 120
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Office of the Attorney General
State of Connecticut

June 20, 2016

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Rep. Gary Palmer
206 Cannon HOB
Washington, DC 20515

Rep. Darin LaHood
2464 Rayburn HOB
Washington, DC 20515

Rep. Warren Davidson
1011 Longworth HOB
Washington, DC 20515

Dear Representatives,

This is in response to your letter dated June 17, 2016, which states that you did not receive a response to your previous letter of May 18, 2016. (Curiously, however, your latest letter also asserts that you "the Committee strongly disagrees with [our] contentions.") Please find enclosed a copy of our response to your original letter, mailed to you on May 27 advising you that this office does not have documents responsive to the Committee's requests.

Sincerely,

George Jepsen
Attorney General
State of Connecticut

cc: Representative Eddie Bernice Johnson, Senator Chris Murphy, Senator Richard Blumenthal, Representative John Larson, Representative Joe Courtney, Representative Rosa DeLauro, Representative Jim Himes, Representative Elizabeth Esty

GEORGE JEPSEN
ATTORNEY GENERAL

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Office of the Attorney General
State of Connecticut

May 27, 2016

Rep. Lamar Smith
2409 Rayburn HOB
Washington, DC 20515

Rep. Frank Lucas
2405 Rayburn HOB
Washington, DC 20515

Rep. F. James Sensenbrenner
2449 Rayburn HOB
Washington, DC 20515

Rep. Dana Rohrabacher
2300 Rayburn HOB
Washington, DC 20515

Rep. Randy Neugebauer
1424 Longworth HOB
Washington, DC 20515

Rep. Mo Brooks
1230 Longworth HOB
Washington, DC 20515

Rep. Ralph Lee Abraham
417 Cannon HOB
Washington, DC 20515

Rep. Bill Posey
120 Cannon HOB
Washington, DC 20515

Rep. Jim Bridenstine
216 Cannon HOB
Washington, DC 20515

Rep. Randy Weber
510 Cannon HOB
Washington, DC 20515

Rep. John Moolenaar
117 Cannon HOB
Washington, DC 20515

Rep. Brian Babin
316 Cannon HOB
Washington, DC 20515

Rep. Barry Loudermilk
238 Cannon HOB
Washington, DC 20515

Dear Representatives,

I write in response to your letter, dated May 18, 2016, seeking documents and communications concerning this office's "investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individual related to the issue of climate change." Your letter accuses this office of using legal action and investigative tactics against those who have questioned the causes, magnitude and best responses to climate change. You also assert that we have undertaken legal actions that may rise to the level of abuse of authority and call this office's integrity into question. For the

reasons set forth below, your attacks on the integrity and conduct of this office are wholly unwarranted, and your request for information is misdirected.

You have accused the chief civil law enforcement official of a sovereign state of misconduct without any factual or legal basis – and, indeed, based entirely on a false factual premise. Your letter incorrectly asserts that this office has, in fact, commenced an investigation or other legal action into a party or parties based on their speech or beliefs concerning climate change. This office is not among the states or territories that have initiated investigations through issuance of subpoenas or other formal requests for production. Nor has this office threatened any entity or individual with investigation, prosecution, or other legal action. Indeed, we have not requested that any person or organization voluntarily produce information relating to their past statements or positions on climate change. (As a technical point, although your letter refers to "prosecutions," this office lacks authority to undertake criminal action.)

In light of the fact that Connecticut has not commenced or announced an investigation, your purpose is perhaps to intimidate this office or others from doing so. Be assured that this office reserves the full and unfettered right to conduct any investigation or enforcement action within its authority if we determine that doing so is in the best interests of the State of Connecticut. We acknowledge the overwhelming scientific consensus that climate change is real, that human activity has contributed to it, and that it represents a grave and escalating threat to the welfare of Connecticut's citizens and to its economy. With that in mind, we continue to evaluate if Connecticut law is available as an effective tool to address the impacts to our state from climate change. More particularly, the focus of our analysis is whether state laws, including consumer protection laws, may provide redress against knowingly false commercial speech concerning global warming and, if so, if applying such laws might produce relief that is meaningful in light of the resources required to obtain it.

I will not be dissuaded or intimidated from undertaking this review – or, if warranted, a formal investigation or enforcement – by heavy handed tactics from those with vested interests in avoiding legal scrutiny or their allies. Rather, we will be guided exclusively by the applicable law, facts, and the interest of the people of the State of Connecticut, and not by the interests of others on any side of this debate. Were we to undertake such an investigation, we would do so as a lawful exercise of authority properly reserved to the states and not subject to federal preemption or Congressional supervision. At this point, however, we have not instituted an investigation or other legal action. We, therefore, respectfully advise you that there are no documents responsive to your request for information concerning ongoing investigations or potential prosecutions.

Your letter notes this office's participation in an event hosted by the New York Attorney General's office on March 29, 2016. Contrary to your characterization, the event was not intended to announce a commitment to a joint investigation by all attendees of any particular target or targets relating to climate change, and it did not result in any such announcement. It was an occasion for discussion with colleagues on

opportunities to work together in a variety of ways to confront climate change, as we have previously, for example, in defending the Obama Administration's action to combat global warming.

In closing, I emphasize that my focus in evaluating potential avenues of legal action is not, and will never be, on academic or other non-commercial speech or intended to chill debate on issues of public importance. I trust that you, too, as responsible public servants, would avoid acting under the auspices of your committee to impede and dissuade discussion among public officials and others concerning climate change, an issue of collective and paramount concern to all of our constituents.

I hope that this letter adequately responds to your request for information.

Sincerely,

George Jepsen
Attorney General
State of Connecticut

cc: Representative Eddie Bernice Johnson, Senator Chris Murphy, Senator Richard Blumenthal, Representative John Larson, Representative Joe Courtney, Representative Rosa DeLauro, Representative Jim Himes, Representative Elizabeth Esty

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

The Honorable Karl Racine
Attorney General of the District of Columbia
441 4th Street, NW
Washington, DC 20001

Dear Mr. Attorney General,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced cooperation on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve "as the guardian of the legal rights of the citizens" and to "assert, protect, and defend the rights of the people."[2] These legal actions may even amount to an abuse of prosecutorial discretion. To assist in the Committee's oversight of this matter, we are writing to request information related to your office's role in this investigation.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[3] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Bureaus of Attorney General, New York, May 12, 2016, *available at http://www.ag.ny.gov/bureaus*; Office of the Attorney General, U.S. Virgin Islands, Dept. of Justice, May 12, 2016, *available at* http://usvidoj.codemeta.com/DivisionContent_1.php?divId=84.

[3] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[4] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff and activist trial attorney Matthew Pawa, founder of the Global Warming Legal Action Project.[5]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[6] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[7] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[8]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[9]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between the New York Attorney General and Extremist Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists, including 2012 workshop participant Matthew Pawa, as well as representatives from groups such as

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[4] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[5] *Id.*
[6] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages*, Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[7] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[8] *Id.* [emphasis added]
[9] *Id.* [emphasis added]

350.org and Greenpeace, met at the Manhattan offices of the Rockefeller Family Fund.[10] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[11] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[12] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[13]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference announcing cooperation on investigations against those who question the causes, magnitude, or best ways to address climate change, members of the group were briefed by 2012 workshop attendees Matthew Pawa of the Global Warming Legal Action Project and UCS's Peter Frumhoff. It has since come to light that the New York Attorney General's office willfully concealed the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[14] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[15]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[16]

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[10] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe,* WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.

[11] *Id.*

[12] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund,* Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*

[13] *Id.*

[14] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show,* WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

[15] *Id.*

[16] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions,* WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics in close coordination with certain special interest groups and trial attorneys that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.

To assist the Committee in its oversight of a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but by no later than noon on May 30, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of the District of Columbia and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of the District of Columbia and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of the District of Columbia and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

The Honorable Karl Racine
May 18, 2016
Page 5

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

The Honorable Karl Racine
May 18, 2016
Page 6

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
KARL A. RACINE

May 31, 2016

The Honorable Lamar Smith
Chairman, Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515-6301

Dear Chairman Smith:

The Office of the Attorney General for the District of Columbia (OAG) is in receipt of the letter that you and 12 of your colleagues sent on May 18, 2016 requesting information about any investigation or potential prosecution of certain entities that have questioned the causes, magnitude, or best ways to address climate change. OAG has not initiated any formal investigation or prosecution of the nature that your letter describes. We therefore have no responsive documents that we can produce to you at this time.

Further, we note that your letter wholly mischaracterizes the functioning of our office. Pursuant to its legislative mandate, OAG is required to act in a manner that protects the public interest. We take seriously our duty to investigate and, where appropriate, bring suit to curb potentially fraudulent behavior that harms the public. Climate change is one of the most pressing issues of our time, and should we determine that is appropriate to take legal steps in this area, it is well within the mandate of this office to address the issue using our authorities in the manner we find prudent and effective.

If you or other members of your Committee have further questions, we would be happy to discuss.

Sincerely,

Natalie O Ludaway

Natalie O. Ludaway
Chief Deputy Attorney General

cc: The Honorable Eddie Bernice Johnson, Ranking Member

441 Fourth Street, NW, Suite 1100S, Washington, D.C. 20001, (202) 727-3400, Fax (202) 741-0580

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
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June 17, 2016

The Honorable Karl Racine
Attorney General
The District of Columbia
441 4th Street, NW
Washington, DC 20001

Dear Attorney General Racine,

Thank you for your May 31, 2016, response. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[1] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[2] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] However, Congress' investigatory power is not without limits.[4] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.
[3] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[4] *Watkins v. U.S.*, 354 U.S. 178 (1957).

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[5] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[6] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[7] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[8] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[9] organizations that violate the civil rights of individuals,[10] state agencies involved in the Hurricane Katrina response,[11] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138 billion to fund research and development.[12] Of that total federal spending, approximately $40 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of

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[5] *McGrain* at 177, 181-182.
[6] *See McGrain*, 273 U.S. at 177, 181-182.
[7] *Eastland* at 509.
[8] CRS Report at 26.
[9] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[10] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[11] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[12] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

the Science Committee that offices such as yours and those similarly situated should not be taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued and contemplated by members the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes,** but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[13]

This statement suggests that his office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, he is saying that if his office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.

Additionally, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[14] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions

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[13] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available at* http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[14] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

and those of your fellow attorneys general indeed are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of the District of Columbia and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of the District of Columbia and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of the District of Columbia and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Rep. Lamar Smith
Chairman

Frank D. Lucas
Rep. Frank D. Lucas
Vice Chairman

The Honorable Karl Racine
June 17, 2016
Page 5

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
KARL A. RACINE

June 24, 2016

The Honorable Lamar Smith
Chairman, Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515-6301

Dear Chairman Smith:

The Office of the Attorney General for the District of Columbia (OAG) is in receipt of the letter that you and 12 of your colleagues sent on June 17, 2016, following from your May 18, 2016 request for information. As we stated in our previous response, enclosed here, we do not have any responsive documents that we can produce to you.

If you or other members of your Committee have further questions, we would be happy to discuss.

Sincerely,

Natalie O. Ludaway
Chief Deputy Attorney General

cc: The Honorable Eddie Bernice Johnson, Ranking Member

Enclosure

441 Fourth Street, NW, Suite 1100S, Washington, D.C. 20001, (202) 727-3400, Fax (202) 741-0580

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
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May 18, 2016

The Honorable Tom Miller
Attorney General of Iowa
Hoover State Office Building
1305 E. Walnut Street
Des Moines IA 50319

Dear Mr. Attorney General,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced cooperation on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve "as the guardian of the legal rights of the citizens" and to "assert, protect, and defend the rights of the people."[2] These legal actions may even amount to an abuse of prosecutorial discretion. To assist in the Committee's oversight of this matter, we are writing to request information related to your office's role in this investigation.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[3] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Bureaus of Attorney General, New York, May 12, 2016, *available at http://www.ag.ny.gov/bureaus*; Office of the Attorney General, U.S. Virgin Islands, Dept. of Justice, May 12, 2016, *available at* http://usvidoj.codemeta.com/DivisionContent_1.php?divId=84.

[3] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[4] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff and activist trial attorney Matthew Pawa, founder of the Global Warming Legal Action Project.[5]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[6] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[7] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[8]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[9]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between the New York Attorney General and Extremist Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists, including 2012 workshop participant Matthew Pawa, as well as representatives from groups such as

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[4] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[5] *Id.*
[6] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages*, Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[7] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[8] *Id.* [emphasis added]
[9] *Id.* [emphasis added]

350.org and Greenpeace, met at the Manhattan offices of the Rockefeller Family Fund.[10] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[11] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[12] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[13]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference announcing cooperation on investigations against those who question the causes, magnitude, or best ways to address climate change, members of the group were briefed by 2012 workshop attendees Matthew Pawa of the Global Warming Legal Action Project and UCS's Peter Frumhoff. It has since come to light that the New York Attorney General's office willfully concealed the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[14] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[15]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[16]

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[10] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe*, WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.

[11] *Id.*

[12] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund*, Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*

[13] *Id.*

[14] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show*, WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

[15] *Id.*

[16] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions*, WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics in close coordination with certain special interest groups and trial attorneys that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.

To assist the Committee in its oversight of a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but by no later than noon on May 30, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of Iowa and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Iowa and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Iowa and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

The Honorable Tom Miller
May 18, 2016
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When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

The Honorable Tom Miller
May 18, 2016
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Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

THOMAS J. MILLER
ATTORNEY GENERAL

1305 E. WALNUT ST.
DES MOINES, IA 50319
P: 515-281-5164
www.iowaattorneygeneral.gov

IOWA DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

June 10, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

I write in response to the May 18, 2016 letter signed by you and several other Republican members of the House Committee on Science, Space, and Technology. The letter requests documents relating to alleged investigations and prosecutions by the Iowa Attorney General's Office concerning climate change.

In Iowa, the Attorney General is a constitutional officer with statutory duties established by the Iowa General Assembly. One of those duties is the enforcement of the Iowa Consumer Fraud Act. As discussed more fully in responsive letters sent to you by other state attorneys general, Congress does not have jurisdiction over a state attorney general's enforcement of a state's sovereign police powers. I answer to the people of Iowa about the manner in which my office enforces Iowa's consumer protection laws. I do not answer to Congress in this regard. For this reason, my office respectfully declines to produce documents in response to your letter.

As a courtesy to you, I am enclosing a letter sent to thirty-six Iowa legislators answering questions about my office's recent activities concerning consumer protection and climate change.

Finally, I would like to comment on statements contained in your letter. You state that my office "is using legal actions and investigative tactics . . . that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office." In my long tenure as Iowa Attorney General, rarely has the integrity of my office been questioned, particularly in such an uninformed and baseless manner. I can assure you that on all issues facing my office, including consumer protection and climate change, I am guided by the rule of law and try to "call them like I see them."

Sincerely yours,

Tom Miller

Tom Miller
Iowa Attorney General

Enclosure

THOMAS J. MILLER
ATTORNEY GENERAL

1305 E. WALNUT ST.
DES MOINES, IA 50319
P: 515-281-5164
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IOWA DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

May 19, 2016

The Honorable Steven Holt
State Representative
1430 – 3rd Avenue S
Denison, IA 52442

And Via E-mail

Dear Representative Holt:

I am responding to your letter dated April 13, 2016. I welcome the opportunity to clarify the role of the Attorney General's Office ("Office") in the matters you discuss.

Recent press reports have indicated that Exxon and its scientists have determined for decades that climate change is real. It was alleged that Exxon made important business decisions in drilling and construction, among others, based on climate change being real. It would appear that what it said to its customers and investors was quite different. If true, this could be a violation of state and federal consumer and securities laws.

State attorneys general have a rich history of working together. Seventeen of us have been working together in a very loose coalition to address legal issues related to climate change. The main activity has been to support the federal government's Clean Power Plan, which would substantially reduce carbon emissions through means within each state's capacity to comply, especially Iowa. A few weeks ago the loose coalition met in person for the first time to talk about continuing to work together on the Clean Power Plan, whether to conduct a consumer protection investigation of Exxon, and other ways to address climate change issues.

Three states and the Virgin Islands have decided to conduct a formal consumer investigation of Exxon. The other fourteen, including Iowa, are considering whether to do so.

A great deal of false information and wild accusations have been made in regard to these issues. Among those are that this is a "witch hunt" against anyone who questions climate change; it is an attempt to silence disagreement on climate change; and an assault on the First Amendment. It is said that anyone who questions climate change will be

investigated, sued and prosecuted. None of this is true. What is true is that the Iowa Attorney General's office is considering opening a consumer fraud investigation against Exxon concerning possible deceptive statements it made to its consumers. Other states are, also doing so. If Iowa or any state files a case, it will be filed individually in each state. Iowa would have no control over other States' cases or their investigations, and other States would have no control over an Iowa case or its investigation.

The sole focus of the Office at this time is gathering facts and reviewing the law to determine if there is any reason to pursue an investigation of Exxon for any potential violations of Iowa's consumer protection laws. These laws prohibit businesses from misleading consumers. Consumer protection cases do not seek to squelch corporate speech or beliefs; rather, they seek to hold people or entities accountable if there is deception or fraud directed toward consumers.

My Office will make its own decisions, regardless of decisions of other state attorneys general, on any potential course of action involving Exxon, including whether to open a formal investigation, based on a fair and objective review of the information and Iowa law. Iowa's investigation, if we decide to do one, will be done in a manner which respects the constitutional rights of all involved.

I, too, took an oath to defend the Iowa Constitution and United States Constitution. I take that oath very seriously. The work of my Office has always been guided by the rule of law. Enforcing consumer protection laws in no way infringes on First Amendment rights. On the contrary, consumer protection laws are intended to make the free market work efficiently by ridding the economy of deceptive and unfair business practices.

If you are in Des Moines in the coming weeks and would like to discuss anything related to the possible investigation of Exxon, please stop by my office and we can talk.

Sincerely yours,

Tom Miller
Iowa Attorney General

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

June 17, 2016

The Honorable Tom Miller
Attorney General
State of Iowa
Hoover State Office Building
1305 E. Walnut Street
Des Moines IA 50319

Dear Attorney General Miller,

Thank you for your June 10, 2016, response. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[1] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[2] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] However, Congress' investigatory power is not without limits.[4] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.
[3] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[4] *Watkins v. U.S.*, 354 U.S. 178 (1957).

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[5] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[6] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[7] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[8] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[9] organizations that violate the civil rights of individuals,[10] state agencies involved in the Hurricane Katrina response,[11] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138 billion to fund research and development.[12] Of that total federal spending, approximately $40 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of

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[5] *McGrain* at 177, 181-182.
[6] *See McGrain*, 273 U.S. at 177, 181-182.
[7] *Eastland* at 509.
[8] CRS Report at 26.
[9] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[10] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[11] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[12] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

the Science Committee that offices such as yours and those similarly situated should not be taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued and contemplated by members the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes,** but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[13]

This statement suggests that his office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, he is saying that if his office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.

Additionally, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[14] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions

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[13] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available at* http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[14] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

and those of your fellow attorneys general indeed are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of Iowa and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Iowa and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Iowa and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Rep. Lamar Smith
Chairman

Frank D. Lucas
Rep. Frank D. Lucas
Vice Chairman

The Honorable Tom Miller
June 17, 2016
Page 5

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

The Honorable Tom Miller
June 17, 2016
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Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

The Honorable Lisa Madigan
Attorney General of Illinois
500 South Second Street
Springfield, IL 62701

Dear Ms. Attorney General,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced cooperation on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve "as the guardian of the legal rights of the citizens" and to "assert, protect, and defend the rights of the people."[2] These legal actions may even amount to an abuse of prosecutorial discretion. To assist in the Committee's oversight of this matter, we are writing to request information related to your office's role in this investigation.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[3] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies*, N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Bureaus of Attorney General, New York, May 12, 2016, *available at http://www.ag.ny.gov/bureaus*; Office of the Attorney General, U.S. Virgin Islands, Dept. of Justice, May 12, 2016, *available at* http://usvidoj.codemeta.com/DivisionContent_1.php?divId=84.

[3] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[4] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff and activist trial attorney Matthew Pawa, founder of the Global Warming Legal Action Project.[5]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[6] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[7] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[8]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[9]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between the New York Attorney General and Extremist Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists, including 2012 workshop participant Matthew Pawa, as well as representatives from groups such as

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[6] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages*, Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
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[8] *Id.* [emphasis added]
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350.org and Greenpeace, met at the Manhattan offices of the Rockefeller Family Fund.[10] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[11] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[12] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[13]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference announcing cooperation on investigations against those who question the causes, magnitude, or best ways to address climate change, members of the group were briefed by 2012 workshop attendees Matthew Pawa of the Global Warming Legal Action Project and UCS's Peter Frumhoff. It has since come to light that the New York Attorney General's office willfully concealed the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[14] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[15]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[16]

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[11] *Id.*

[12] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund*, Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*

[13] *Id.*

[14] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show*, WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

[15] *Id.*

[16] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions*, WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics in close coordination with certain special interest groups and trial attorneys that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.

To assist the Committee in its oversight of a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but by no later than noon on May 30, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of Illinois and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Illinois and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Illinois and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 13, 2016

The Honorable Lamar Smith
Chairman, Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515-6301

Dear Chairman Smith:

I am writing in response to your May 18, 2016, request for documents related to the issue of climate change. As the basis for your request for documents, your letter makes numerous erroneous and unsupported claims about the actions of our office. We do not intend to respond to those allegations.

Our office is concerned about the threat to public health and welfare posed by the effects of climate change and has worked for many years with other state attorneys general to support reasonable efforts to regulate greenhouse gas emissions. As a result of this work, our office is in frequent communication with other state attorneys general, stakeholders and concerned citizens on the topic of climate change and carbon pollution.

With regard to your request for specific documents, however, we decline to respond. As an initial matter, we are not able to share confidential information about state law enforcement matters that may or may not be pending within the Illinois Attorney General's Office. Additionally, we are not aware of any legal basis providing Congress with jurisdiction to seek documents from a state law enforcement office regarding that office's exercise of the state's sovereign powers.

For these reasons, we respectfully decline to respond to your request.

Sincerely,

JAMES P. GIGNAC
Environmental and Energy Counsel
Illinois Attorney General's Office

cc: The Honorable Eddie Bernice Johnson, Ranking Member

500 South Second Street, Springfield, Illinois 62706 • (217) 782-1090 • TTY: (217) 785 -2771 • Fax: (217) 782-7046
100 West Randolph Street, Chicago, Illinois, 60601 • (312) 814-3000 • TTY: (312) 814-3374 • Fax: (312) 814-3806
1001 East Main, Carbondale, Illinois 62901 • (618) 529-6400 • TTY: (618) 529-6403 • Fax: (618) 529-6416

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

June 17, 2016

The Honorable Lisa Madigan
Attorney General
State of Illinois
500 South Second Street
Springfield, IL 62701

Dear Attorney General Madigan,

Thank you for your June 13, 2016, response. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[1] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[2] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] However, Congress' investigatory power is not without limits.[4] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.
[3] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[4] *Watkins v. U.S.*, 354 U.S. 178 (1957).

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[5] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[6] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[7] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[8] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[9] organizations that violate the civil rights of individuals,[10] state agencies involved in the Hurricane Katrina response,[11] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138 billion to fund research and development.[12] Of that total federal spending, approximately $40 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of

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[5] *McGrain* at 177, 181-182.
[6] *See McGrain*, 273 U.S. at 177, 181-182.
[7] *Eastland* at 509.
[8] CRS Report at 26.
[9] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[10] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[11] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[12] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

the Science Committee that offices such as yours and those similarly situated should not be taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued and contemplated by members the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes**, but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[13]

This statement suggests that his office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, he is saying that if his office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.

Additionally, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[14] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions

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[13] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available at* http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[14] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

and those of your fellow attorneys general indeed are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of Illinois and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Illinois and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Illinois and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

The Honorable Lisa Madigan
June 17, 2016
Page 5

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

The Honorable Maura Healey
Attorney General of Massachusetts
One Ashburton Place
Boston, MA 02108-1518

Dear Ms. Attorney General,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced cooperation on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve "as the guardian of the legal rights of the citizens" and to "assert, protect, and defend the rights of the people."[2] These legal actions may even amount to an abuse of prosecutorial discretion. To assist in the Committee's oversight of this matter, we are writing to request information related to your office's role in this investigation.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[3] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Bureaus of Attorney General, New York, May 12, 2016, *available at http://www.ag.ny.gov/bureaus*; Office of the Attorney General, U.S. Virgin Islands, Dept. of Justice, May 12,2016, *available at* http://usvidoj.codemeta.com/DivisionContent_1.php?divId=84.

[3] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[4] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff and activist trial attorney Matthew Pawa, founder of the Global Warming Legal Action Project.[5]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[6] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[7] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents may exist):"[8]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[9]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between the New York Attorney General and Extremist Environmental Groups and Trial Lawyers

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350.org and Greenpeace, met at the Manhattan offices of the Rockefeller Family Fund.[10] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[11] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[12] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[13]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference announcing cooperation on investigations against those who question the causes, magnitude, or best ways to address climate change, members of the group were briefed by 2012 workshop attendees Matthew Pawa of the Global Warming Legal Action Project and UCS's Peter Frumhoff. It has since come to light that the New York Attorney General's office willfully concealed the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[14] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[15]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[16]

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[16] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions,* WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics in close coordination with certain special interest groups and trial attorneys that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.

To assist the Committee in its oversight of a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but by no later than noon on May 30, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of Massachusetts and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Massachusetts and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Massachusetts and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

The Honorable Maura Healey
May 18, 2016
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When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

TEL: (617) 727-2200
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June 2, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

I write in response to the May 18, 2016, letter ("Letter") signed by you and several other members of the House Committee on Science, Space, and Technology ("Committee") seeking certain documents and information in connection with ongoing law enforcement and investigative activities of the Massachusetts Attorney General's Office ("MA AGO") regarding potential violations of Massachusetts's consumer protection and securities laws by ExxonMobil Corporation ("Exxon").

At the outset, the Committee's characterization of MA AGO's investigative activities is inaccurate. The Committee's assertion that the MA AGO is engaged in a "coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution," is absolutely incorrect, and the Committee's intimation that the MA AGO's actions "may even amount to an abuse of prosecutorial discretion" is without basis.

The MA AGO is authorized under Massachusetts law to represent the interests of the Commonwealth and its citizens, as well as to investigate corporate and other wrongdoing, including violations of laws protecting investors and consumers. Based on MA AGO's review of a number of publicly available Exxon documents and public statements by Exxon, MA AGO determined to investigate whether Exxon made false or misleading statements, in violation of Massachusetts law, to investors and consumers regarding the risks of climate change and the effect of those risks on Exxon's business.

Publicly available Exxon documents establish that at least by July 1977, Exxon's own scientists informed Exxon management that the release of carbon dioxide from burning fossil fuels was causing global temperatures to increase, a situation that would, the scientists warned Exxon

management, give rise to "the need for hard decisions regarding changes in energy strategies."[1] Publicly available Exxon documents also confirm that Exxon's scientists were, in the early 1980s, predicting significant increases in global temperature as a result of the combustion of fossil fuels, and that a 2 to 3 degree Celsius increase could lead to melting of polar ice, rising sea levels and "redistribution of rainfall," "accelerated growth of pests and weeds," "detrimental health effects," and "population migration."[2] Exxon's scientists counseled Exxon management that it would be possible to "avoid the problem by sharply curtailing the use of fossil fuels."[3] One Exxon scientist warned in no uncertain terms that it was "distinctly possible" that the effects of climate change over time will "indeed be catastrophic (at least for a substantial fraction of the earth's population)."[4] Despite Exxon's early understanding of the science of climate change and the threats posed by climate change to human populations and global ecosystems, other publically available documents suggest that Exxon may have participated in later self-interested efforts to mislead the public, including investors and consumers, with respect to the impacts of climate change in order to defeat governmental policy measures designed to address the threat of climate change.[5]

Exxon's shareholders are taking very seriously concerns about the nature and extent of Exxon's disclosures regarding the impacts of climate change on Exxon's business; just last week, on May 25, Exxon shareholders came close to passing resolutions that would have required Exxon to implement "stress tests" to ascertain more specifically the climate-driven risks to Exxon's business.[6] As The Wall Street Journal reported, the proposals "drew more support than any contested climate-related votes" in Exxon's history, and indicate that "more mainstream shareholders like pension funds, sovereign wealth funds, and asset managers are starting to take more seriously" the effects on Exxon of a "global weaning from fossil fuels."[7]

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[1] Shannon Hall, *Exxon Knew About Climate Change Almost 40 Years Ago: A new investigation shows the oil company understood the science before it became a public issue and spent millions to promote misinformation*, Scientific American, Oct. 26, 2015, *available at* http://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/

[2] Henry Shaw, *CO_2 Greenhouse and Climate Issues* (March 28, 1984), *available at* http://insideclimatenews.org/sites/default/files/documents/Shaw%20Climate%20Presentation%20%281984%29.pdf

[3] *Id.*

[4] Roger W. Cohen, Interoffice Memorandum to W. Glass (Aug. 18, 1981), *available at* http://insideclimatenews.org/sites/default/files/documents/%2522Catastrophic%2522%20Effects%20Letter%20%281981%29.pdf

[5] *See, e.g.*, Draft Global Climate Science Communications Action Plan (est. 1998), available at http://insideclimatenews.org/sites/default/files/documents/Global%20Climate%20Science%20Communications%20Plan%20%281998%29.pdf (noting "[v]ictory will be achieved when . . . those promoting the Kyoto treaty on the basis of extant science appear to be out of touch with reality," and "[u]nless 'climate change' becomes a non-issue, meaning that the Kyoto proposal is defeated and there are no further initiatives to thwart the threat of climate change, there may be no moment when we can declare victory for our efforts.").

[6] Bradley Olson & Nicole Friedman, *Exxon, Chevron Shareholders Narrowly Reject Climate-Change Stress Tests*, The Wall Street Journal, May 25, 2016, *available at* http://www.wsj.com/articles/exxon-chevron-shareholders-narrowly-reject-climate-change-stress-tests-1464206192

[7] *Id.*

As the Chairman and members of this Committee know, the First Amendment does not protect false and misleading statements in the marketplace. *See, e.g., United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123-24 (D.C. Cir. 2009). Because Exxon appears to have made many statements to investors and consumers about the impact of fossil fuels on climate change which appear to contradict its own internal documents, the MA AGO is entitled to investigate what Exxon knew and said to others about these issues.

The Commonwealth has a sovereign interest in the protection of its investors and consumers. As the U.S. Supreme Court has explained, the "Constitution created a Federal Government of limited powers. 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' U.S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). States, therefore, retain significant sovereign powers—"powers with which Congress does not readily interfere." *Id.* at 2401.

Further, while Congress, through committees, has power to investigate in furtherance of its power to legislate, that power is limited: Congress's power may not be used to investigate matters "unrelated to a valid legislative purpose," *Quinn v. U.S.*, 75 S. Ct. 668, 672 (1955), and must be narrowly tailored to avoid transgressing constitutional federal-state boundaries. *Tobin v. U.S.*, 306 F.2d 270, 275 (D.C. Cir. 1962), *cert denied*, 371 U.S. 902 (1962). An investigation by a state attorney general, and any related prosecution of a state law enforcement action, is not related to a valid federal legislative purpose. *See New York v. U.S.* 505 U.S. 144, 162 (1992) (Constitution does not "confer upon Congress the ability to require the States to govern according to Congress' instructions"). The Committee does not identify in its Letter any congressional authorization to undertake an investigation into the enforcement activities of this Office, and any such purported authorization would violate long-standing principles of federalism.

Moreover, most of the materials that the Committee has requested from the MA AGO, which include investigatory and deliberative process materials, attorney work product, and attorney-client and/or common interest privileged materials, would be protected from disclosure under established state and federal law.

For all of these reasons, the MA AGO respectfully declines to provide the requested materials.

Sincerely,

Richard A. Johnston
Chief Legal Counsel

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

June 17, 2016

The Honorable Maura Healey
Attorney General
One Ashburton Place
Boston, MA 02108-1518

Dear Attorney General Healey,

Thank you for your June 2, 2016, response. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[1] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[2] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] However, Congress' investigatory power is not without limits.[4] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.
[3] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[4] *Watkins v. U.S.*, 354 U.S. 178 (1957).

the "potential" for a legislative solution.[5] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[6] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[7] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[8] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[9] organizations that violate the civil rights of individuals,[10] state agencies involved in the Hurricane Katrina response,[11] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138 billion to fund research and development.[12] Of that total federal spending, approximately $40 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of the Science Committee that offices such as yours and those similarly situated should not be

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[5] *McGrain* at 177, 181-182.
[6] *See McGrain*, 273 U.S. at 177, 181-182.
[7] *Eastland* at 509.
[8] CRS Report at 26.
[9] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[10] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[11] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[12] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued by your office and contemplated by the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes,** but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[13]

This statement suggests that his office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, he is saying that if his office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.

Additionally, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[14] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions and those of your fellow attorneys general indeed are having such an effect. Investigations

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[13] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available at* http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[14] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of Massachusetts and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Massachusetts and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Massachusetts and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

The Honorable Maura Healey
June 17, 2016
Page 5

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

TEL: (617) 727-2200
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June 24, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

We have reviewed your letter of June 17, 2016, also signed by certain other members of the Committee. Your letter does not lead us to alter our conclusion that the Committee lacks authority to interfere with an investigation by the Massachusetts Attorney General's Office into possible violations of Massachusetts law by ExxonMobil Corporation, as set out in detail in our letter of June 2, 2016. Consequently, as indicated in our prior letter, we will not be providing the Committee with the documents requested in your letters to our office.

Sincerely,

Richard A. Johnston
Chief Legal Counsel

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
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July 6, 2016

The Honorable Maura Healey
Attorney General of Massachusetts
One Ashburton Place
Boston, MA 02108-1518

Dear Attorney General Healey,

The Committee on Science, Space, and Technology is in receipt of your June 24, 2016, response to its request for information related to ongoing oversight of coordinated attempts to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. This response marks the second time your office has refused to produce documents in response to oversight letters signed by 17 Members of the Committee. Further, your office has not attempted to engage the Committee in a dialogue related to our requests. This is disappointing. I urge you or your staff to engage with the Committee as soon as possible to discuss the Committee's requests.

Your office's written responses to the Committee's request thus far, as well as those of your fellow "Green 20" attorneys general, are a deliberate attempt to mask the true purpose of your investigation and mischaracterize the Committee's oversight. Characterizing your investigation as solely focused on Exxon and its statements is a misrepresentation. The publicly available subpoenas issued by members of the "Green 20" are overbroad and would, in fact, capture communications between and among scientists at universities conducting federally funded scientific research, as well as between and among numerous non-profit organizations. For example, the subpoena issued to Exxon by the Attorney General of the U.S. Virgin Islands demands:

> 6. All Documents or Communications concerning research, advocacy, strategy, reports, studies, reviews of public opinions regarding Climate Change sent or received from: [150 think tanks, non-profit groups, individual citizens, and University research groups].

Furthermore, the subpoena issued to Exxon by your office contains similar language, demanding:

> 5. Documents and Communications with any of [12 think tanks, non-profit groups, and University research groups] concerning Climate Change and/or Global Warming, Climate Risk, Climate Science, and/or communications regarding Climate Science by fossil fuel

> companies to the media and/or to investors or consumers, including Documents and Communications relating the funding by Exxon of any of those organizations.[1]

In fact, the Attorney General of the U.S. Virgin Islands went so far as to issue a subpoena directly to the Competitive Enterprise Institute. This subpoena demanded:

> 3. Documents and Communications reflecting or concerning studies, research, reviews, events, or publications funded by ExxonMobil (in whole or in part, directly or indirectly, including through Donors Trust or Donors Capital Fund or other third parties acting on behalf of ExxonMobil) concerning carbon dioxide or concerning the likelihood, certainty, uncertainty, scope, causes, or impacts of Climate Change.[2]

Demands like these will undoubtedly require the production of scientific studies conducted by researchers at universities across the country. Protecting the ability of these scientists – and all scientists – to conduct research uninhibited by the potential adverse effects of investigations by law enforcement is a goal of this Committee. As previously stated in the Committee's June 17, letter, a specific legislative outcome is not required for Congress to conduct valid oversight; however, Congress could indeed legislate on a broad range of topics related to the funding of and transparency surrounding this scientific research, including, but not limited to, issues associated with those conducting this research. The Committee's authority to conduct this oversight is derived from Article I of the Constitution.

Additionally, the Committee disputes your assertion that state sovereignty and the Tenth Amendment somehow prohibits Congress from conducting oversight of your activities. The Committee is unaware of any judicial precedent insulating state entities from legitimate demands for information from a congressional committee based on state sovereignty or the scope of the Tenth Amendment. In fact, similar arguments have been rejected by several federal courts.[3]

Accordingly, the Committee reiterates its May 18, 2016, requests, and asks that your office produce responsive documents and communications to the Committee on or before July

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[1] *Massachusetts Office of the Attorney General Civil Investigative Demand to Exxon Mobil Corp.*, Apr. 19, 2016, *available at* https://www.documentcloud.org/documents/2862196-Exxon-Subpoena-Massachusetts.html (last visited June 29, 2016).

[2] *Pl.'s Subpoena to Competitive Enterprise Institute*, Super. Ct. of the D.C., Apr. 4, 2016 *available at* https://assets.documentcloud.org/documents/2801453/CEI-Subpoena-From-USVI-AG-Claude-Walker-April-7.pdf (last visited June 29, 2016) (This subpoena was withdrawn on or about May 23, 2016).

[3] *See, e.g., In re* Special April 1977 Grand Jury, 581 F.2d 589, 592 (7th Cir. 1978) ("Appellant's first attack on the [grand jury] subpoenas is that they represent an unconstitutional federal 'excursion' into the territory of exclusive state sovereignty, apparently on the grounds that certain state functions are immune from subpoena and certain state records are privileged from subpoena. We disagree."); *United States v. Mich. Dep't of Cmty. Health*, 2011 U.S. Dist. LEXIS 59445 (2011) (finding that a confidentiality provision of the Michigan Medical Marijuana Act was preempted by a federal law giving a federal agency subpoena authority to obtain records involving a controlled substance); *Freilich v. Bd. of Dirs. of Upper Chesapeake Health, Inc.*, 142 F. Supp. 2d 679, 697 (D. Md. 2001) (finding a challenge to a federal law requiring state medical board to provide certain information to the federal National Practitioner Data Bank, based on Tenth Amendment grounds, to be "completely meritless") *aff'd sub nom. Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205 (4th Cir. 2002).

13, 2016, at 12:00 p.m. As explained in detail in the Committee's June 17, 2016, letter, this request is a legitimate exercise of the Committee's oversight duties under the Constitution and the Rules of the House. .

If you continue to refuse to provide information responsive to the Committee's requests on a voluntary basis, I will be left with no alternative but to utilize the tools delegated to the Committee by the Rules of the House of Representatives. Specifically, the Committee will consider use of compulsory process to obtain responsive documents in the possession, custody, or control of your office.

At any point, I welcome the opportunity to discuss the Committee's request with you or your staff. To arrange a meeting or discuss matters over the phone prior to July 13, 2016, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
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MAURA HEALEY
ATTORNEY GENERAL

TEL: (617) 727-2200
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July 13, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

I write in response to your July 6, 2016, letter ("July Letter"), which, like your letters of May 18 and June 17, seeks documents and information in connection with ongoing law enforcement and investigative activities of the Massachusetts Attorney General's Office ("MA AGO") regarding potential violations of Massachusetts law by ExxonMobil Corporation ("Exxon"). This letter supplements our responsive letters to you of June 2 and 24, principally to address new arguments raised in your July Letter.

As you know from our letter of June 2, the focus of MA AGO's investigation is to determine whether Exxon, in violation of Massachusetts law, misled consumers and/or investors by taking public positions regarding the impact of fossil fuel combustion on climate change and Exxon's business that contradict Exxon's own knowledge and understanding, including as documented by Exxon's own scientific research. For example, in 1981, Exxon understood that "[a]tmospheric CO_2 will double in 100 years if fossil fuels grow at 1.4%/a," and that such a doubling of CO_2 would result in a "3 [degree Celsius] global average temperature rise and 10 [degree Celsius] at poles" which would cause "major shifts in rainfall/agriculture" and melting of polar ice.[1] Despite Exxon's knowledge, and its recognition that there may need to be "an orderly transition to non-fossil fuel technologies,"[2] by 1998, Exxon's Randy Randol was nonetheless participating as a member of the "Global Climate Science Communications Team" that was engaged in a concerted effort to challenge the "scientific underpinning of the global climate change theory" in the media, and taking the position that "[i]n fact, it [sic] not known for sure

[1] Preliminary Statement on Exxon's Position on The Growth of Atmospheric Carbon Dioxide, from Henry Shaw to Dr. E. E. David, Jr., (May 15, 1981), *available at* https://insideclimatenews.org/sites/default/files/documents/Exxon%20Position%20on%20CO2%20%281981%29.pdf.
[2] *Id.*

whether (a) climate change actually is occurring, or (b) if it is, whether humans really have any influence on it."[3]

MA AGO is entitled to investigate what Exxon knew and communicated to others about these issues, since those facts are highly relevant to our prospective determination of whether Exxon violated Massachusetts law and misled consumers and/or investors. It appears, from documents such as the above-cited Draft Global Climate Science Communications Plan, that Exxon may have communicated with many entities to misrepresent facts about the impacts of climate change and climate-driven risks to its business; the fact that some of those entities may have conducted research or employed scientists does not diminish the relevance of Exxon's communications to them, nor give this Committee authority to probe into or interfere with MA AGO's investigation of potential violations by Exxon of Massachusetts law.

Neither the Rules of the House of Representatives[4] ("House Rules"), the Science, Space and Technology Committee's own rules[5] ("Committee Rules"), nor the Committee's Oversight Plan[6] ("Plan") authorize the Committee to conduct an investigation of a sovereign state's exercise of its law enforcement authority in connection with the state's consumer and investor protection statute. House Rule X establishes standing committees. Standing committee jurisdiction concerns matters related to federal agencies, application of federal law, implementation of federally-funded programs, and tax and economic implications of federal policies. The standing committees have general oversight responsibilities to assist the House in its evaluation of the application of federal laws; "conditions and circumstances" that "may indicate the necessity or desirability of enacting new or additional legislation"; formulation of federal law; and whether federal programs are being carried out consistent with Congress's intent. *See* House Rule X, Clause 2(a)-(b) (general oversight responsibilities).

Committee Rule VIII (Oversight and Investigations) provides that the Committee "shall review and study . . . the application . . . of those laws, . . . the subject matter of which is within its jurisdiction" including "all laws, programs, and Government activities relating to nonmilitary research and development" in accordance with House Rule X, and must prepare a plan of its oversight activities. *See* Committee Rule VIII (emphasis supplied); *see also* Plan at 1. In light of the capitalized term "Government" and in light of House Rule X, the term "those laws" in Committee Rule VIII refers to federal laws.

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[3] *See, e.g.*, Draft Global Climate Science Communications Action Plan (Apr. 3, 1998), *available at* http://insideclimatenews.org/sites/default/files/documents/Global%20Climate%20Science%20Communications%20Plan%20%281998%29.pdf. There are other publicly-available documents which further demonstrate this historical contradiction in positions taken by Exxon internally and externally. *See e.g.*, MA AGO Civil Investigative Demand 2016-EPD-36, issued Apr. 19, 2016, available at http://www.mass.gov/ago/docs/energy-utilities/exxon/ma-exxon-cid-.pdf

[4] Rules of the House of Representatives, 114th Cong. (Jan. 6, 2015), *available at* http://clerk.house.gov/legislative/house-rules.pdf

[5] Rules of the Science, Space, and Technology Committee, 114th Cong., *available at* https://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/Committee%20on%20Science%2C%20Space%2C%20and%20Technology%20Rules%20114th%20Congress%20v2_0.pdf

[6] Science, Space, and Technology Committee Oversight Plan for 114th Congress, *available at* https://science.house.gov/sites/republicans.science.house.gov/files/documents/SST%20Oversight%20Plan%20for%20the%20114th%20Congress.pdf

Similarly, the Plan prepared by the Committee focuses on oversight of federal agencies, with a key goal of eliminating "waste, fraud, and abuse." No provision of the Plan discusses a need or plan to investigate any state activities, and no such investigation would aid the Committee in fulfilling its charge pursuant to House Rule X. While the Plan suggests that the Committee will engage in oversight efforts in connection with "scientific integrity," it is limited to oversight of federal agencies. *See, e.g.*, Plan at 9 (the Committee will continue to "collect and examine allegations of intimidation of science specialists in federal agencies, suppression or revisions of scientific findings, and mischaracterizations of scientific findings because of political or other pressures") and id., (the Committee will develop and implement "scientific integrity principles within the Executive Branch.") Read in the context of the overall Plan, it is obvious the Committee's focus is on and limited to scientific findings made or funded by federal government agencies, not by private corporations, such as Exxon.

As we previously conveyed in our letter of June 2, Congress's power may not be used to investigate matters "unrelated to a valid legislative purpose." *Quinn v. U.S.*, 75 S. Ct. 668, 672 (1955). The MA AGO investigation is unrelated to a valid federal legislative purpose. *See New York v. U.S.* 505 U.S. 144, 162 (1992) (Constitution does not "confer upon Congress the ability to require the States to govern according to Congress' instructions") and therefore, may not be the subject of the exercise of Congress's power.

None of the cases cited in your July Letter suggests a different result with respect to MA AGO's right under Massachusetts law to investigate possible violations of a state statute protecting consumers and investors without Congressional interference. *In the Matter of the Special April 1977 Grand Jury* concerned a federal grand jury subpoena issued to a state attorney general concerning potential criminal law violations by him personally, and specifically did not involve an investigation "into the affairs of the State of Illinois." 581 F.2d 589, 592 (7th Cir. 1978). *Freilich* concerned a claim that a federal statutory reporting requirement compelled states to implement a federal regulatory program and therefore amounted to unconstitutional "commandeering" under *Hodel v. Virginia Surface Mining & Reclamation Association,* 452 U.S. 264 (1981). *See Frelilich v. Bd. of Directors of Upper Chesapeake Health, Inc.*, 142 F.Supp. 2d 679, 696-97 (D. Md. 2001) (citing *Hodel*, at 288). *Michigan Department. of Community Health* involved a federal administrative subpoena issued by the Drug Enforcement Administration to a state agency where there was a clear nexus between the federal investigation and enforcement of a federal law. *See U.S. v. Mich. Dep't of Cmty. Health,* No. 1:10-mc-109, 2011 U.S. Dist. LEXIS 59445 (W.D. Mich. June 3, 2011). Even there, the court denied the DEA's petition to enforce its subpoena with respect to certain records in the state agency's possession. *Id.* at *41. Put simply, none of the cases which you have cited provides that a Congressional committee can force a state Attorney General to disclose the substance or results of an official investigation into possible violations of state law by a private company.

We note that on June 23, 2016, Ranking Committee Member Eddie Bernice Johnson wrote you that your requests for information about state AGO investigations into Exxon "are an illegitimate exercise of Congressional oversight power," and she provided a detailed legal explanation as to why. In addition to the arguments which we have made and the authorities which we have cited in our responsive letters to you as grounds for our declination to provide documents about our investigation, we refer you again to Rep. Johnson's letter attached hereto.

Furthermore, as you know, Exxon has challenged, in Massachusetts state court and Texas federal district court, the civil investigative demand MA AGO served upon the company, and Exxon has not yet produced any documents to MA AGO. Thus the vast majority of existing documents sought by the Committee and in MA AGO's possession constitutes core attorney work product, attorney-client communications, deliberative process documents and other privileged materials that are protected from disclosure.

In response to your various letters, MA AGO continues respectfully to decline to provide the requested materials to the Committee. As we indicated in a call with your staff today, we are willing to confer by telephone with you or your staff, provided that Representative Eddie Bernice Johnson, Ranking Member of the Committee, and/or her staff, are invited and permitted to participate in any discussions between our offices.

Sincerely,

Richard A. Johnston
Chief Legal Counsel

Cc: Honorable Eddie Bernice Johnson, Ranking Member, Science, Space and Technology Committee

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
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June 23, 2016

The Honorable Lamar Smith
Chairman
Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith,

On May 18, 2016, you wrote to 17 state and territorial attorneys general and 8 non-governmental organizations (NGOs) demanding documents related to possible investigations into fossil fuel industry fraud regarding climate change.[1] On June 17, 2016, after receiving what were presumably unsatisfactory responses from these attorneys general and NGOs, you sent a second round of demands to these same groups. These demands are an illegitimate exercise of Congressional oversight power, and I urge you to immediately cease this abuse of authority.

In a Congress in which the Committee on Science, Space, and Technology's oversight powers have been repeatedly abused, this latest action stands apart. In addition to mischaracterizing innumerable facts, laws, and legal precedents surrounding this situation, the May 18 and June 17 letters have now led the Committee on Science, Space, and Technology to the precipice of a Constitutional crisis. Never in the history of this formerly esteemed Committee has oversight been carried out with such open disregard for truth, fairness, and the rule of law.

The state and territorial attorneys general, representatives for the targeted NGOs, and 43 Democratic Members of Congress[2] have already written to you to patiently explain the

[1] Attorneys General from: California, Connecticut, District of Columbia, Iowa, Illinois, Massachusetts, Maryland, Maine, Minnesota, New Mexico, New York, Oregon, Rhode Island, U.S. Virgin Islands, Virginia, Vermont, Washington. NGOs: 350.org, Climate Accountability Institute, The Climate Reality Project, Greenpeace, Pawa Law Group, P.C., The Rockefeller Brothers Fund, Rockefeller Family Fund, Union of Concerned Scientists. All Committee letters and responses are available at: http://democrats.science.house.gov/letter/document-requests-sent-state-attorneys-general-and-environmental-groups

[2] Letter from Hon. Donald S. Beyer Jr. to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. (June 2, 2016); Letter from Hon. Paul D. Tonko to Hon. Lamar Smith, Chairman, H. Comm. On

illegitimacy of your "investigation." Since you have apparently rejected their responses, I will endeavor to highlight once more the factual and legal shortcomings of your demand letters.

The Majority's Letters Mischaracterize State Attorney General Actions

Both your May 18 and June 17 letters refer to a "coordinated attempt to attack First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution..."[3] In laying out your factual case, you state:

> This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by you and other members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics taken in close coordination with certain special interest groups and trial attorneys may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.[4]

Ignoring for a moment the grossly inappropriate and unsubstantiated innuendo contained in these statements, I would like to highlight the factual deficiencies in your claims.

First of all, it is important to accurately report on the actions of the state and territorial attorneys general. As the New York Attorney General's Office noted in their response to your May 18 letter, they are investigating "whether ExxonMobil Corporation violated New York's securities, business and consumer fraud laws by making false or misleading statements to investors and consumers relating to climate change driven risks and their impact on Exxon's business."[5] In other words, these state attorneys general are investigating potential fraud under state law.

The Commonwealth of Massachusetts Office of the Attorney General laid out the factual basis for these fraud investigations in some detail in its June 2, 2016, response letter, stating:

> Publicly available Exxon documents establish that at least by July 1977, Exxon's own scientists informed Exxon management that the release of carbon dioxide from burning fossil fuels was causing global temperatures to increase, a situation that would, the scientists warned Exxon management, give rise to "the need for hard decisions regarding changes in energy strategies." Publicly available Exxon

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Science, Space, & Tech. (June 10, 2016); Letter from Hon. Ted W. Lieu to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. (June 9, 2016).

[3] Letter from Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, May 18, 2016, pg. 4.

[4] *Id.*

[5] Letter from Leslie B. Dubeck, Counsel, Office of the New York Attorney General to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., May 26, 2016, pg. 1.

> documents also confirm that Exxon's scientists were, in the early 1980s, predicting significant increases in global temperature as a result of the combustion of fossil fuels, and that a 2 to 3 degree Celsius increase could lead to melting of polar ice, rising sea levels and "redistribution of rainfall," "accelerated growth of pests and weeds," "detrimental health effects," and "population migration." Exxon's scientists counseled Exxon management that it would be possible to "avoid the problem by sharply curtailing the use of fossil fuels." One Exxon scientist warned in no uncertain terms that it was "distinctly possible" that the effects of climate change over time will "indeed be catastrophic (at least for a substantial fraction of the earth's population)." Despite Exxon's early understanding of the science of climate change and the threats posed by climate change to human populations and global ecosystems, other publically available documents suggest that Exxon may have participated in later self-interested efforts to mislead the public, including investors and consumers, with respect to the impacts of climate change in order to defeat governmental policy measures designed to address the threat of climate change.[6]

These accusations were widely reported in the press in 2015.[7] Moreover, these accusations should have come as no surprise to you or your staff as they formed the same factual basis that compelled 20 scientists to write to the U.S. Attorney General to suggest that Racketeer Influenced and Corrupt Organizations Act (RICO) investigations might be warranted against fossil fuels companies that potentially knowingly defrauded the American public. You previously instigated an investigation against one of those scientists for exercising his constitutionally protected First Amendment right to petition the government.[8] This is the first of many instances where the irony of your current accusations becomes evident.

Multiple state attorneys general also pointed out the legal fallacy of your accusations of First Amendment violations. For instance, the Oregon Attorney General's Office pointed out that:

> [y]our letter also incorrectly accuses this office of investigating entities based on their speech or beliefs concerning climate change. Please be advised this office

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[6] Letter from Richard A. Johnston, Chief Legal Counsel, Commonwealth of Massachusetts Office of the Attorney General letter to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., June 2, 2016, pgs. 1-2 (citations omitted).

[7] *See, e.g.,* Shannon Hall, *Exxon Knew About Climate Change Almost 40 Years Ago: A new investigation shows the oil company understood the science before it became a public issue and spent millions to promote misinformation*, Scientific American, Oct. 26, 2015, available at http://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/ And, Neela Banerjee, Lisa Song, and David Hasemyer, *Exxon's Own Research Confirmed Fossil Fuels' Role in Global Warming Decades Ago*, Inside Climate News, Sep. 16, 2015, available at http://insideclimatenews.org/news/15092015/Exxons-own-research-confirmed-fossil-fuels-role-in-global-warming

[8] Press Release, H. Comm. On Science, Space, and Tech., "Smith: Taxpayer-Funded Climate Org Allegedly Seeks Criminal Penalties for Skeptics," Oct. 1, 2015, available at https://science.house.gov/news/press-releases/smith-taxpayer-funded-climate-org-allegedly-seeks-criminal-penalties-skeptics

> will not be dissuaded from considering whether state laws, including consumer protections laws, may provide redress against knowingly false commercial speech concerning global warming. The First Amendment simply does not protect fraudulent speech. *Illinois v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) ("This government power [to protect people against fraud] has always been recognized in this country and is firmly established.").[9]

The notion that fraudulent speech is not protected by the U.S. Constitution would seem to be beyond dispute. Nonetheless, despite the state attorneys generals pointing very specifically to the factual and legal deficiencies of your accusations, your June 17, 2016, letters persist in leveling these baseless accusations against the attorneys general, stating:

> This statement suggests that your office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, you are saying that if your office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.[10]

Nothing in that assertion bears any relationship to the statements of the various state attorneys general. These state investigations have nothing to do with deciding "what science is valid and what science is invalid." The investigations, as multiple attorneys general pointed out, are concerned with whether certain fossil fuel companies believed or knew one set of facts, and yet publically disseminated another in order to enrich themselves at others expense. These allegations constitute textbook fraud.[11]

These investigations have a well-known precedent. In the 1990s, various state attorneys general sued tobacco companies for the state-borne healthcare costs associated with tobacco use. One of the bases for the claims was that the tobacco industry engaged in a conspiracy to conceal and misrepresent "the addictive and harmful nature of tobacco/nicotine."[12] These suits resulted in the Master Settlement Agreement in 1998, where the four largest tobacco companies settled all pending state claims related to the healthcare costs related to tobacco.[13] The Federal Government soon followed suit. In

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[9] Letter from Frederick M. Boss, Deputy Attorney General, Oregon Department of Justice letter to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., June 1, 2016, pg. 2.
[10] Letter from Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, June 17, 2016, pg. 3.
[11] Black's Law Dictionary defines fraud as: "A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." Black's Law Dictionary 670 (7th ed. 1999).
[12] Civil Action Complaint, Commonwealth of Pennsylvania, *Commonwealth of Pennsylvania v. Philip Morris, Inc.*, pg. 10, April 1997.
[13] Tobacco Control Legal Consortium, *The Master Settlement Agreement: An Overview*, available at http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-msa-overview-2015.pdf

1999 the U.S. Department of Justice brought RICO Act actions against the largest tobacco companies.[14] The parallels of that case with the current state attorneys general investigations cannot be overstated. In *U.S. v. Philip Morris*, the government alleged that the tobacco industry internally knew of the health risks of their products for decades, yet engaged in a well-financed conspiracy to deceive the American public about the health effects of tobacco. This included financing scientific studies questioning the links between tobacco and health problems and the creation of front organizations to hide links to the tobacco financing. The U.S. government won the case, and the decision was upheld on appeal.[15]

I have repeatedly criticized your tendency to rely upon former tobacco industry-funded scientists, consultants, and public relations firms in past Committee investigations and hearings.[16] Given your past reliance on such "experts", it's perhaps unsurprising that you are now questioning these legitimate state attorneys general investigations of potential fraudulent actions against the American people.

The Majority's Investigation of State Attorneys General is Unconstitutional

A Congressional document demand to a state attorney general is exceptionally unusual. Such a demand from the Science Committee is unheard of.

State attorney generals are elected officials of sovereign state governments. They are not employees of the Federal Government, nor are they subject to federal oversight or control, including by the United States Congress.

You note in your June 17 letter that Congress's oversight powers are well established and broad, citing such authorities as the "U.S. Constitution, Art. 1; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975)(U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services.)"[17] The existence of Congress's oversight powers goes without saying, and is a well-established principle of law. You go on to make an important point about the source of Congressional oversight power, stating:

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[14] U.S. Department of Justice, *Litigation Against Tobacco Companies Home*, https://www.justice.gov/civil/case-4

[15] *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095 (D.C. Cir. 2009).

[16] *See*, e.g., Letter from Hon. Eddie Bernice Johnson, Ranking Member, to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., August 6, 2013, available at http://democrats.science.house.gov/sites/democrats.science.house.gov/files/Letter.pdf
And, *Ensuring Open Science at EPA: Hearing Before the Subcomm. On the Environment of the H. Comm. On Science, Space, & Tech.*, 113th Cong. 16-17 (2014) (statement of Hon. Eddie Bernice Johnson, Ranking Member).

[17] Letter from Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, June 17, 2016, pg. 1 (note).

> Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.[18]

This analysis is particularly relevant to the "investigation" at hand. Congress's broad oversight powers are directly tied to our power to legislate. Thus, by the authority you have relied upon in your own letters, Congress has no legal oversight authority over issues or actions that fall outside Congress's legislative authority.

As nearly every state attorney general who responded to your May 18 letters indicated, state government law enforcement officials acting in their official capacities are not within Congress' legislative control. For instance, in its May 27, 2016, response to your demand letter, the California Attorney General's Office noted:

> [w]e do not believe it is within the jurisdiction of Congress to demand documents from a state law enforcement official such as the California Attorney General. Although Congress' investigative jurisdiction is broad, that is because it tracks Congress' power to legislate and appropriate concerning federal matters. But the power to investigate does not extend beyond those matters. (See, e.g. *Barenblatt v. U.S.* (1959) 360 U.S. 109, 111 ["Congress may only investigate into those areas in which it may potentially legislate or appropriate"].) Investigations and prosecutions of state law enforcement actions by state attorneys general are not federal matters. To the contrary, under the Constitution and laws of the United States, such activities partake of police powers reserved to the states, and are not subject to federal interference. (See, e.g., *New York v. U.S.* (1992) 505 U.S. 144, 162 ["the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions"].)[19]

As a reminder, the Tenth Amendment to the U.S. Constitution reads as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[20]

Implicit in the powers reserved to the states under the Tenth Amendment are state police powers. In case after case, the courts have struck down Congressional attempts to regulate state government activities, including exercise of their police powers.[21] It is clear that Congress has no legislative authority to dictate the actions of state attorneys general.

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[18] *Id.* at 1, citing *Eastland v. United States Servicemen's Fund*, 431 U.S. 491, 504 n. 15 (1975) (quoting *Barenblatt v. United States* 360 U.S. 109, 111 (1959)).

[19] Letter from Martin Goyette, Senior Assistant Attorney General, State of California Department of Justice letter to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., May 27, 2016, pg. 2.

[20] U.S. Const. amend. X.

[21] *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995) (striking down a gun-free school zone provision); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating a provision of the Violence Against Women Act); and, *United States v. Constantine*, 296 U.S. 287 (1935) (invalidating an excise tax imposed on violators of local law).

Even if Congress did have some inroad into regulation of state police powers, such a legislative authority would not rest with the Committee on Science, Space, and Technology. Our oversight jurisdiction (which is broader than our actual legislative jurisdiction) encompasses "laws, programs, and Government activities relating to nonmilitary research and development."[22] Note that the capitalization of the word "Government" gives the word the meaning "Federal Government." Nowhere in our jurisdiction - legislative or oversight - can one find justification for our Committee's oversight of state police powers. The elected officials that serve as state attorney generals are answerable to their respective constituents and the courts, but not to the U.S. Congress. As my colleagues from Virginia, the District of Columbia, and Maryland pointed out:

> States' rights long being a central pillar of conservative philosophy, the Letter's effort to meddle directly in the self-governance and prosecutorial discretion of 17 U.S. state and territories is not lacking for irony.[23]

The Majority's Investigation of NGOs' Exercise of Free Speech is Unconstitutional

The First Amendment to the U.S. Constitution reads, in whole:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[24]

While the First Amendment prohibits government interference with the free speech rights of individuals, that prohibition is not absolute. One relevant example is that fraudulent speech is not protected by the First Amendment.[25] Moreover, the First amendment does not provide an absolute shield against legitimate Congressional oversight. In that regard, you state in your June 17 letter to the various NGOs:

> In *Barenblatt v. United States*, the Supreme Court stated "where the First Amendment rights are asserted to bar government interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." Moreover, when balancing the interests of the parties in *Watkins v. United States*, the Court held "the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness." These cases are important precisely because they provide examples of congressional investigations – sustained by the Supreme Court – involving

[22] House Rule X(3)(k).
[23] Letter from Hon. Donald S. Beyer Jr., to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., June 2, 2016, pg. 2.
[24] U.S. Const. amend. I.
[25] *See, Illinois v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003).

> organizations similar to yours. The parties being investigated in the cases noted above are no different than the recipients of the Science Committee's May 18 letter.[26]

Since this is the only real legal authority you cite as justification for investigating Americans' constitutionally protected speech, I think it is worth scrutinizing.

First, I would like to point out the context of these cases. Both of these cases involved the notorious House Un-American Activities Committee (HUAC), and investigations that committee conducted into the private lives of American citizens. If ever there was an example of a "witch hunt" in the history of the United States Congress, the HUAC investigations best fit the bill. For that reason, it is more than a little disconcerting that you think those cases' fact patterns so closely resemble your own investigation.

I would also like to point to an error in your statement. You state that both of these cases are important because "they provide examples of congressional investigations – sustained by the Supreme Court – involving organizations similar to yours."[27] This statement is false. In *Watkins v. United States*, the Supreme Court overturned a conviction under 2 U.S.C. 192 against an individual who refused to provide certain testimony to HUAC.[28] The Watkins Court held that the conviction was invalid under the Due Process Clause of the Fifth Amendment.

Rather than supporting the legal grounds of your investigation, the *Watkins* decision is actually an indictment against it. The *Watkins* court noted that:

> The Court recognized the restraints of the Bill of Rights upon congressional investigations in United States v. Rumely, 345 U.S. 41... It was concluded that, when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter.[29]

The *Watkins* Court went on to state:

> Kilbourn v. Thompson teaches that such an investigation into individual affairs is invalid if unrelated to any legislative purpose. That is beyond the powers conferred upon the Congress in the Constitution. United States v. Rumely makes it plain that the mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights.[30]

As I noted earlier, it is clear that our Committee doesn't even have a semblance of a legislative purpose that would justify this investigation. It is inconceivable that our

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[26] Letter from Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. to Richard Heede, Climate Accountability Institute, June 17, 2016, pg. 4 (citations omitted).
[27] *Id.* emphasis added.
[28] *Watkins v. United States*, 354 U.S. 178 (1957).
[29] *Id.* at 198.
[30] *Id.*

Committee, based on our House Rule X jurisdiction, could legislate on any topic related to state law enforcement, private speech, private citizens exercising their First Amendment right to petition their government, or fraud. In fact, the only plausible legislative action that Congress as a whole could take in this instance would be in altering Federal fraud and RICO Act statutes to inappropriately help big oil avoid potential liability. However, even in that instance, such a bill would not come anywhere near the jurisdiction of the Committee on Science, Space, and Technology.

Your June 17 letter claims legislative jurisdiction over this "investigation" because we oversee $31.8 billion in annual federal government research expenditures. Somehow you link the Committee's specific jurisdiction to fund federal scientific research to being the science police for the United States. Even if we had such expansive jurisdiction (and we do not), it would still fall far short of having jurisdiction over state police powers or fraud laws, which are the true subject matters of this "investigation." Thus, based on the legal authorities you yourself have cited, this "investigation" violates the Constitution.

This "Investigation" is Illegitimate

In the foregoing, I have pointed out the many factual and legal shortcomings and mischaracterizations contained in your May 18 and June 17 letters. Sadly, despite having these shortcomings previously noted to you, this misguided effort is continuing. In reality, this overreach is simply the culmination of three years of "oversight" run amuck. When you assumed the Chairmanship of this Committee, Members were promised an ambitious and bipartisan legislative agenda. That did not materialize. What has taken its place is a series of increasingly disturbing "fishing expeditions" masquerading as oversight.

I noted your May and June letters contain a great deal of unintentional irony. I'll note one more example. In your June 17 letter, as a justification for your current investigation you say:

> [C]ongress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change.[31]

Here, you could just as well be referring to your own misguided investigation into eminent NOAA climate scientists last year. In that "investigation" you actually subpoenaed NOAA Administrator, former astronaut, and authentic American hero Dr. Kathy Sullivan in an attempt to obtain the email communications of world renowned NOAA climate scientists.[32] What was the purpose of this investigation? It was simply a fishing expedition against scientists who reached a scientific conclusion with which you

[31] Letter from Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. to Richard Heede, Climate Accountability Institute, June 17, 2016, pg. 3.
[32] Committee on Science, Space, and Technology Subpoena Duces Tecum issued by Hon. Lamar Smith, Chairman, to Hon. Kathyrn Sullivan, 114th Cong., October 13, 2015.

personally disagreed. In the end, your investigation, like so many recent Science Committee investigations, found nothing.

I have served on the Committee on Science for more than two decades, and during that time this Committee has accomplished great things. We've overseen the completion of the International Space Station and the sequencing of the human genome, and we've undertaken serious investigations, ranging from the Space Shuttle Challenger accident to the environmental crimes at the Rocky Flats nuclear site. However, lately the Committee on Science has seemed more like a Committee on Harassment. The Committee's prolific, aimless, and jurisdictionally questionable oversight activities have grown increasingly mean-spirited and meaningless. They frequently appear to be designed primarily to generate press releases. However, none of these recent investigations has rushed head long into a serious Constitutional crisis like we are about to face. We are moving into dangerous and uncharted territory.

At the beginning of this Congress I swore an oath to uphold the Constitution. I take that oath seriously. As evidenced by the letters you have received from Democratic Members from New York, California, Virginia, Maryland, and the District of Columbia, the Democratic Members of the Committee also take this oath seriously. We will not sit idly by while the powers of the Committee are used to trample on the Bill of Rights of the U.S. Constitution. I implore you to cease your current actions before they do lasting institutional damage to the Committee on Science, Space, and Technology and the Congress as a whole.

Thank you for your attention to this matter.

Sincerely,

Eddie Bernice

EDDIE BERNICE JOHNSON
Ranking Member
Committee on Science, Space, and Technology

Cc: Members of the Committee on Science, Space, and Technology

California, Connecticut, District of Columbia, Iowa, Illinois, Massachusetts, Maryland, Maine, Minnesota, New Mexico, New York, Oregon, Rhode Island, U.S. Virgin Islands, Virginia, Vermont, Washington Attorneys General and 350.org, Climate Accountability Institute, The Climate Reality Project, Greenpeace, Pawa Law Group, P.C., The Rockefeller Brothers Fund, Rockefeller Family Fund, Union of Concerned Scientists

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To The Honorable Maura Tracy Healey
Attorney General of Massachusetts

You are hereby commanded to be and appear before the
Committee on Science, Space, and Technology

of the House of Representatives of the United States at the place, date, and time specified below.

☑ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: 2321 Rayburn House Building, Washington, D.C. 20515

Date: July 27, 2016 Time: 12:00 noon

☐ **to testify at a deposition** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

☐ **to testify at a hearing** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

To any authorized staff member or the U.S. Marshals Service

to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, D.C. this 13th day of July, 2016.

Lamar Smith
Chairman or Authorized Member

Attest:

Karen L. Haas
Clerk

SCHEDULE

In accordance with the attached schedule instructions, you, Maura Tracy Healey, are required to produce the things described below:

1. All documents and communications between any officer or employee of the Office of the Attorney General of Massachusetts and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between any officer or employee of the Office of the Attorney General of Massachusetts and any other state attorney general office, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between any officer or employee of the Office of the Attorney General of Massachusetts and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to the Office of the Attorney General of Massachusetts' investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Schedule Instructions

1. In complying with this subpoena, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Subpoenaed records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this subpoena has been, or is also known by any other name than that herein denoted, the subpoena shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF") files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this subpoena shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the subpoena was served.

8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the subpoenaed information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the subpoena cannot be made in full by July 27, 2016, at 12:00 noon, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided no later than July 26, 2016, at 12:00 noon.

12. In the event that a document is withheld in whole or in part on any basis, provide a log containing the following information concerning any such document: (a) the basis for withholding the document; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. In complying with the subpoena, be apprised that the U.S. House of Representatives and the Committee on Science, Space, and Technology do not recognize: any of the purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections; any purported privileges or protections from disclosure under the Freedom of Information Act; or any purported contractual privileges, such as non-disclosure agreements.

14. If any document responsive to this subpoena was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

15. If a date or other descriptive detail set forth in this subpoena referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the subpoena, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.

16. The things described in the schedule shall be produced in their current condition, as of July 13, 2016.

17. This subpoena is continuing in nature and applies to any newly-discovered information as to the time period January 1, 2012 to July 27, 2016. Any responsive record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

18. All documents shall be Bates-stamped sequentially and produced sequentially.

19. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building.

20. Upon completion of the production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in

your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), text messages, Google chat communications or other instant message communications, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

8. "You" or "your" means and refers to you as a natural person and, as Attorney General of Massachusetts and any of the agencies, offices, subdivisions, entities, officials, administrators, employees, attorneys, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction in your personal capacity or at the Office of the Attorney General of Massachusetts.

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

TEL: (617) 727-2200
www.mass.gov/ago

July 26, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

I am Chief Legal Counsel for Massachusetts Attorney General Maura Healey, and I write in response to the July 13, 2016, subpoena issued to her by the House Committee on Science, Space, and Technology (the "Committee"). The subpoena is sweeping in its scope and completely unprecedented in its intended interference with an ongoing regulatory investigation by a state's attorney general. The subpoena seeks "all documents and communications between any officer or employee of the Office of the Attorney General of Massachusetts" (the "Office") and nine non-profit organizations and other groups, "any other state attorney general office," and "any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President," "referring or relating to the [Office's] investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change."[1]

Attorney General Healey hereby objects to the subpoena as an unconstitutional and unwarranted interference with a legitimate ongoing state investigation. The subpoena is a dangerous overreach by the Committee and an affront to states' rights. The Committee's majority members (the "Majority") arranged for the subpoena in disregard of the detailed letters from Attorney General Healey and the Ranking Member of the Committee setting forth why the Committee has no legal authority to tamper with a state attorney general's investigation into possible violations of state law by Exxon Mobil Corporation ("Exxon"). The Majority also disregarded Attorney General Healey's objection that most of the documents being requested are either attorney-client privileged documents or protected from disclosure as attorney work product. The Majority delivered the subpoena without even acknowledging Attorney General Healey's offers to discuss her objections in a conference call with the Chairman and/or Committee staff. This sequence of events suggests that the Majority had no intention of considering the substance of Attorney General Healey's objections.[2]

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[1] Subpoena, July 13, 2016, pg. 2.

[2] We remain willing to confer by telephone with you as Chairman and/or your staff to discuss Attorney General Healey's objections to the subpoena, as outlined in this letter, provided that the Ranking Member and/or her staff are invited and permitted to participate.

You, Mr. Chairman, yourself reportedly have conceded that the subpoena of a state attorney general is unprecedented in the history of Congress.[3] None of the cases cited by the Committee in any of its correspondence with Attorney General Healey provides authority for the proposition that a Congressional committee can subpoena a sitting state attorney general about a pending investigation by his or her office. Congressional and Committee rules provide no such explicit power, the courts have never recognized such power, and the few legal decisions that the Majority's letters mention relate to quite different situations and therefore provide no authority for the Committee's subpoena. Because the subpoena is unconstitutional and otherwise unlawful, Attorney General Healey respectfully objects to its issuance and declines to produce to the Committee documents related to the Office's ongoing investigation of Exxon.

BACKGROUND FACTS

The Attorney General Is the Chief Law Enforcement Officer in Massachusetts and Has Broad Powers of Investigation.

Attorney General Healey is an elected constitutional officer in the state of Massachusetts and is the highest ranking law enforcement official. Mass. Gen. L. c. 12 § 3. The Attorney General determines legal policy for the state and brings legal actions on behalf of the state. *Feeney v. Commonwealth*, 373 Mass. 359, 366 N.E.2d 1262 (1977); Mass. Gen. L. c. 12 § 5. Attorney General Healey also has various enumerated statutory powers, including the prevention or remedy of damage to the environment, Mass. Gen. L. c. 12 § 11D, and enforcement of the state's consumer protection law, Chapter 93A of the Massachusetts General Laws ("Chapter 93A"), which proscribes unfair and deceptive practices in the conduct of business. In Massachusetts the Attorney General is authorized to protect investors, consumers, and other persons in the state against unfair and deceptive business practices through such mechanisms as promulgating regulations, conducting investigations through civil investigative demands ("CID"), and instituting litigation.[4]

CIDs under Chapter 93A are a crucial tool for gaining information regarding whether an entity under investigation has violated the statute. Since the beginning of 2013, the Office has issued several hundred CIDs pursuant to Chapter 93A to or regarding companies or individuals suspected of committing unfair and deceptive business practices or other illegal conduct. These Chapter 93A investigations have addressed, among other things, foreclosure practices of banks, business practices in the pharmaceutical industry, and marketing of other products and services sold in the state. The Office issued some CIDs as part of joint investigations with other regulators: about 25 CIDs were issued in connection with joint investigations with other states, about 30 were issued in connection with joint investigations involving the federal government, and several involved joint investigations with other states as well as the federal government.

Attorney General Healey's office routinely issues CIDs to large publicly traded companies with business dealings in the state but with principal places of business outside of Massachusetts. Examples since 2013 which have become public through settlement with the target companies

[3] Amanda Reilly, *Smith subpoenas AGs, enviro groups in escalating fight*, Energy & Environment Daily, July 14, 2016, http://www.eenews.net/eedaily/2016/07/14/stories/1060040258.
[4] Mass. Gen. L. c. 93 §§ 8, 9; Mass. Gen. L. c. 93A §§ 4, 6.

include: a joint investigation with federal authorities (targeting Oppenheimer[5]); three investigations in which the Office worked with the U.S. government and a small group of states (Citigroup,[6] JPMorgan,[7] and Chase Bank[8]); three which the Office undertook with a large multistate enforcement group (Ocwen,[9] Moneygram,[10] and HSBC[11]); and one investigation with one other state attorney general as a partner (LPL Financial[12]). A very recent, visible example is the Office's 2016 participation in a joint multistate investigation into Volkswagen's "clean diesel" deception, which resulted in a partial settlement providing Massachusetts with nearly $100 million in Chapter 93A civil penalties and environmental mitigation payments.[13]

Nearly every other state attorney general has CID or similar investigative authority.[14]

The Office's Longstanding Efforts on Climate Change.

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[5] Press Release, Commonwealth of Massachusetts Office of the Attorney General, Oppenheimer to Pay $2.8 Million to Settle Allegations of Misrepresenting Performance of Fund to Investors (Mar. 11, 2013), http://www.mass.gov/ago/news-and-updates/press-releases/2013/2013-03-11-oppenheimer-settlement.html.

[6] Press Release, Commonwealth of Massachusetts Office of the Attorney General, CitiGroup to Pay $7 Billion in Federal-State Deal Over Mortgage Backed Securities (July 14, 2014), http://www.mass.gov/ago/news-and-updates/press-releases/2014/2014-07-14-citigroup-settlement.html.

[7] Press Release, Commonwealth of Massachusetts Office of the Attorney General, JPMorgan to Pay $13 Billion in Federal-State Deal Over Mortgage Backed Securities (Nov. 19, 2013), http://www.mass.gov/ago/news-and-updates/press-releases/2013/2013-11-19-jpmorgan-settlement.html.

[8] Press Release, Commonwealth of Massachusetts Office of the Attorney General, Chase Bank to Pay $136 Million in Nationwide Settlement Over Unlawful Credit Card Debt Collection Practices (July 8, 2015), http://www.mass.gov/ago/news-and-updates/press-releases/2015/2015-07-08-chase-settlement.html.

[9] Press Release, Commonwealth of Massachusetts Office of the Attorney General, Ocwen to Provide $2.1 Billion in Relief to Homeowners in State-Federal Settlement Over Loan Servicing Misconduct (Dec. 19, 2013), http://www.mass.gov/ago/news-and-updates/press-releases/2013/2013-12-19-ocwen-settlement.html.

[10] Press Release, Commonwealth of Massachusetts Office of the Attorney General, MoneyGram to Pay $13 Million in Multistate Settlement Over Wire Transfer Scams, AG Healey Offers Tips for Consumers (Feb. 11, 2016), http://www.mass.gov/ago/news-and-updates/press-releases/2016/2016-02-11-moneygram-settlement.html.

[11] Press Release, Commonwealth of Massachusetts Office of the Attorney General, $470 Million State-Federal Settlement Reached with HSBC Over Unlawful Foreclosures, Loan Servicing (Feb. 5, 2016), http://www.mass.gov/ago/news-and-updates/press-releases/2016/470-million-state-federal-settlement-reached-with-hsbc-over-unlawful-foreclosures-loan-servicing.html.

[12] Press Release, Commonwealth of Massachusetts Office of the Attorney General, Boston Firm to Pay $1.8 Million for Selling Unsuitable Investments to Consumers (Sept. 23, 2015), http://www.mass.gov/ago/news-and-updates/press-releases/2015/2015-09-23-lpl-financial-aod.html.

[13] Press Release, Volkswagen of America, Inc., Volkswagen Reaches Settlement Agreement with U.S. Federal Regulators, Private Plaintiffs and 44 U.S. States on TDI Diesel Engine Vehicles (June 28, 2016), http://media.vw.com/release/1214/. On July 19, 2016, Massachusetts announced the filing of an additional state suit against Volkswagen for matters not covered under the settlement. Press Release, N.Y. State Office of the Attorney General, NY A.G. Schneiderman, Massachusetts A.G. Healey, Maryland A.G. Frosh Announce Suits Against Volkswagen, Audi And Porsche Alleging They Knowingly Sold Over 53,000 Illegally Polluting Cars And SUVs, Violating State Environmental Laws (July 19, 2016), http://www.ag.ny.gov/press-release/ny-ag-schneiderman-massachusetts-ag-healey-maryland-ag-frosh-announce-suits-against.

[14] *See, e.g.*, Fla. Stat. Ann. Fla. Stat. Ann. § 542.28 (West 2016); 740 Ill. Comp. Stat. Ann. 10/7.2 (West 2016); Minn. Stat. Ann. § 8.31 (West 2016); N.Y. Exec. Law § 63 (McKinney 2016); N.Y. Gen. Bus. Law §§ 343, 352 (McKinney 2016); Ohio Rev. Code Ann §§ 1331.16, 1345.06 (West 2016); S.C. Code Ann. §39-5-70 (2016); Tex. Bus. & Com. Code Ann. §15.10 (West 2015); Wash. Rev. Code Ann. §19.86.110 (West 2016).

For years the Office has been a leader in addressing the threat of climate change, often in collaboration with other state attorneys general. The Office led the federal litigation that resulted in the United States Supreme Court's determination in *Massachusetts v. EPA* that greenhouse gases are pollutants warranting regulation under the federal Clean Air Act. *See Massachusetts v. EPA*, 549 U.S. 497 (2007). In the intervening decade, Massachusetts's injuries from climate change—and the scientific predictions of future injuries—have only grown more devastating.[15] In subsequent litigation, the Office has worked closely with other states to advocate for and defend federal findings and regulations addressing climate change under the Clean Air Act, including the EPA's Clean Power Plan regulations to reduce power plant greenhouse gas emissions and the EPA's recent regulations regarding methane emissions from oil and gas facilities. Massachusetts has itself enacted laws that require reductions in greenhouse gas emissions and encourage strategies to reduce reliance on fossil fuels, including the Global Warming Solutions Act, Mass. Gen. L. c. 21N, and the Green Communities Act, 2008 Mass. Legis. Serv. Ch. 169 (S.B. 2768) (West).

We understand, that you, Mr. Chairman, have raised questions about the causes of climate change and the extent to which human activity versus other factors such as "natural cycles" and "sun spots" contribute to this problem.[16] Nevertheless, as state and federal law recognize, the overwhelming scientific evidence indicates that human activity, and the burning of fossil fuels in particular, are key drivers of climate change. *See, e.g.*, Intergovernmental Panel on Climate Change, 2014 Synthesis Report, Summary for Policymakers at 2-5 ("Human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on humans and natural systems. . . . Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and oceans have warmed, the amounts of snow and ice have diminished, and sea level has risen. . . . Emissions of CO2 from fossil fuel combustion and industrial processes contributed about 78% of the total GHG emissions increase from 1970 to 2010, with a similar percentage contribution for the increase during the period 2000 to 2010. Globally, economic and population growth continued to be the most important drivers of increases in CO2 emissions from fossil fuel combustion.") (internal citations omitted).[17]

The Investigation into Exxon.

Exxon is the largest publicly-traded oil and gas corporation in the world.[18] In 2015, *The Los Angeles Times*, in cooperation with the Columbia University School of Journalism[19] and the news

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[15] *See, e.g.*, Jess Bigood, *At a Cape Cod Landmark, a Strategic Retreat From the Ocean*, N. Y. Times, July 6, 2016, http://www.nytimes.com/2016/07/07/us/at-a-cape-cod-landmark-a-strategic-retreat-from-the-ocean.html?_r=3 ("managed retreat" implemented on Cape Cod beaches); David Abel, *Climate change could be even worse for Boston than previously thought*, Boston Globe, June 22, 2016, https://www.bostonglobe.com/metro/2016/06/22/climate-change-could-have-even-worse-impact-boston-than-previously-expected/S6hZ4nDPeUWNyTsx6ZckuL/story.html.

[16] Bill Lambrecht, *Smith tries to take NASA out of climate research*, San Antonio Express News, May 16, 2015, http://www.expressnews.com/news/local/article/Smith-tries-to-take-NASA-out-of-climate-research-6268551.php.

[17] IPCC, 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, 151 pp.

[18] ExxonMobil, *About us*, http://corporate.exxonmobil.com/en/company/about-us (last visited July 25, 2016).

[19] Sara Jerving, Katie Jennings, Masako Melissa Hirsch, and Susanne Rust, *What Exxon knew about the Earth's melting Arctic*, Los Angeles Times, Oct. 9, 2015, http://graphics.latimes.com/exxon-arctic/.

organization InsideClimate News,[20] published a series of investigative reports and internal Exxon and other documents establishing that Exxon had a robust climate change scientific research program in the late 1970s into the 1980s that documented the serious potential for climate change, the likely contribution of fossil fuels (the company's chief product) to climate change, and the risks of climate change to the world's natural and economic systems, including Exxon's own assets and businesses.[21] By July 1977, Exxon's own scientists informed Exxon management that the release of carbon dioxide from burning fossil fuels was causing global temperatures to increase, a situation that would, the scientists warned Exxon management, give rise to "the need for hard decisions regarding changes in energy strategies."[22] Exxon's scientists were, in the early 1980s, predicting significant increases in global temperature as a result of the combustion of fossil fuels, and that a 2 to 3 degree Celsius increase could lead to melting of polar ice, rising sea levels, "redistribution of rainfall," "accelerated growth of pests and weeds," "detrimental health effects," and "population migration."[23] Exxon's scientists advised Exxon management that it would be possible to "avoid the problem by sharply curtailing the use of fossil fuels."[24] One Exxon scientist warned in no uncertain terms that it was "distinctly possible" that the effects of climate change over time will "indeed be catastrophic (at least for a substantial fraction of the earth's population)."[25]

Exxon's scientists understood that doubling of atmospheric carbon dioxide would occur "sometime in the latter half of the 21st century," and that "CO2-induced climate changes should be observable well before doubling."[26] Exxon's own scientists agreed with the scientific consensus that "a doubling of atmospheric CO2 from its pre-industrial revolution value would result in an average global temperature rise of (3.0 ± 1.5) [degrees Celsius]."[27] Exxon also knew what that would mean for humanity and ecological systems: "There is unanimous agreement in the scientific community that a temperature increase of this magnitude would bring about significant changes in the earth's climate, including rainfall distribution and alternations in the biosphere."[28] Nevertheless, even as of

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[20] https://insideclimatenews.org/content/Exxon-The-Road-Not-Taken; InsideClimate News was nominated for a Pulitzer Prize for its work on the Exxon investigation and the Road Not Taken Series. *See* https://insideclimatenews.org/news/18042016/insideclimate-news-pulitzer-prize-finalist-exxon-investigation.

[21] According to InsideClimate News, its "reporters interviewed former Exxon employees, scientists, and federal officials, and consulted hundreds of pages of internal Exxon documents, many of them written between 1977 and 1986." Neela Banerjee, et al., *Exxon: The Road Not Taken* (InsideClimate News 2015) at 2. InsideClimate News also reviewed "thousands of documents from archives including those held at the University of Texas-Austin, the Massachusetts Institute of Technology and the American Association for the Advancement of Science." *Id.*

[22] Shannon Hall, *Exxon Knew About Climate Change Almost 40 Years Ago: A new investigation shows the oil company understood the science before it became a public issue and spent millions to promote misinformation*, Scientific American, Oct. 26, 2015, http://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/.

[23] Henry Shaw, *CO2 Greenhouse and Climate Issues* (March 28, 1984), https://insideclimatenews.org/sites/default/files/documents/Shaw%20Climate%20Presentation%20%281984%29.pdf.

[24] *Id.*

[25] Roger W. Cohen, Interoffice Memorandum to W. Glass (Aug, 18, 1981), http://insideclimatenews.org/sites/default/files/documents/%2522Catastrophic%2522%20Effects%20Letter%20%281981%29.pdf.

[26] Letter from Exxon scientist Roger W. Cohen to A.M. Natkin, Exxon Office of Science and Technology (Sept. 2, 1982), https://insideclimatenews.org/sites/default/files/documents/%2522Consensus%2522%20on%20CO2%20Impacts%20%281982%29.pdf

[27] *Id.*

[28] *Id.*

this year, 2016, Exxon continues to tell its investors that "[w]e are confident that none of our hydrocarbon reserves are now or will become stranded,"[29] and maintains that, "[w]hile most scientists agree climate change poses risks related to extreme weather, sea-level rise, temperature extremes, and precipitation changes, current scientific understanding provides limited guidance on the likelihood, magnitude, or time frame of these events."[30]

Additionally, Exxon made statements in 1980 at an American Petroleum Institute AQ-9 Task Force meeting that demonstrated its knowledge of the fact that as fossil fuels continue to be burned, a "global average 2.5 C rise [is] expected by 2038," which would cause "major economic consequences."[31] They further projected that at a "3% per annum growth rate of CO2, a 2.5 C rise brings world economic growth to a halt in about 2025," and that a "5 C rise" by 2067 will have "globally catastrophic effects."[32] In a 1982 memo to Exxon management, a manager at the Exxon Research and Engineering Company Environmental Affairs Program showed concern and predicted that climate change would cause "disturbances in the existing global water distribution balance" and would have "a dramatic impact on soil moisture, and in turn, on agriculture," stating "there are some potentially catastrophic events that must be considered," including the melting of the Antarctic ice sheet causing a 5 meter sea level rise, and "flooding much of the U.S. East Coast, including the State of Florida and Washington D.C."[33] At an environmental conference presentation in 1984, another Exxon scientist stated "[w]e can either adapt our civilization to a warmer planet or avoid the problem by sharply curtailing the use of fossil fuels."[34] These statements contrast sharply to statements made by Exxon in 2014 ("[w]e are confident that none of our hydrocarbon reserves are now or will become stranded."[35]) and 2016 ("[o]il will provide one third of the world's energy in 2040, remaining the No. 1 source of fuel, and natural gas will move into second place."[36]). These recent statements fail to mention any of the previous research, projections, or concerns that were expressed by Exxon's own scientists and disseminated within the company and industry in the 1980s; they instead portray, to a public unaware of this research, a bright future for the Exxon and the oil industry.

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[29] *Energy and Carbon—Managing the Risks* (Exxon, 2014) at 1.
[30] ExxonMobil website. Meeting global needs—managing climate business risks, *available at* http://corporate.exxonmobil.com/en/current-issues/climate-policy/climate-perspectives/managing-climate-change-business-risks.
[31] Minutes of the Feb. 29, 1980 meeting of the American Petroleum Institute AQ-9 Task Force (of which Exxon is a member) (Mar. 18, 1980), *available at* https://insideclimatenews.org/sites/default/files/documents/AQ-9%20Task%20Force%20Meeting%20%281980%29.pdf.
[32] *Id.*
[33] Memorandum from M.B. Glaser, Manager, Exxon Research and Engineering Company Environmental Affairs Program, to a broad distribution list of Exxon management, attaching a summary of the CO2 "Greenhouse Effect" and CO2 Greenhouse Effect Technical Review (Nov. 12, 1982), available at https://insideclimatenews.org/sites/default/files/documents/1982%20Exxon%20Primer%20on%20CO2%20Greenhouse%20Effect.pdf.
[34] Henry Shaw, "CO2 Greenhouse and Climate Issues" (Mar. 28, 1984), *available at* https://insideclimatenews.org/sites/default/files/documents/Shaw%20Climate%20Presentation%20%281984%29.pdf
[35] Energy and Carbon—Managing the Risks (Exxon, 2014) at 1.
[36] Press Release, ExxonMobil, ExxonMobil's Energy Outlook Projects Energy Demand Increase and Decline in Carbon Intensity (Jan. 25, 2016), http://news.exxonmobil.com/press-release/exxonmobils-energy-outlook-projects-energy-demand-increase-and-decline-carbon-intensit.

Despite its research and knowledge, Exxon appears to have engaged with other fossil fuel interests in a campaign from at least the 1990s onward to prevent government action to reduce greenhouse gas emissions.[37] In 1998, Exxon's Randy Randol participated as a member of the "Global Climate Science Communications Team," which engaged in a concerted effort to challenge the "scientific underpinning of the global climate change theory" in the media, and which took the position that "[i]n fact, it [sic] not known for sure whether (a) climate change actually is occurring, or (b) if it is, whether humans really have any influence on it."[38] A draft plan prepared by that team noted that "[u]nless 'climate change' becomes a non-issue, meaning that the Kyoto proposal is defeated and there are no further initiatives to thwart the threat of climate change, there may be no moment when we can declare victory for our efforts."[39]

In addition to undertaking efforts to forestall government action on climate change that would reduce the use of fossil fuel products in the United States, Exxon seemingly failed to disclose its knowledge of climate change threats in a fully candid way to investors in its securities and to consumers to whom it continued to market and sell such products.

Concerns that Exxon has not adequately disclosed climate risk to Massachusetts investors in its securities appear to be reflected in recent actions by Exxon shareholders (including Massachusetts-based shareholders) to compel the company to more fully assess and respond to climate risks. In the past year Exxon shareholders came close to passing resolutions that would have required Exxon to implement "stress tests" to ascertain more specifically the climate-driven risks to Exxon's businesses. As the Wall Street Journal reported, the proposals "drew more support than any contested climate-related votes" in Exxon's history, and indicate that "more mainstream shareholders like pension funds, sovereign wealth funds, and asset managers are starting to take more seriously" the effects on Exxon of a "global weaning from fossil fuels."[40]

Following the publication of the investigative reports and documents by the Los Angeles Times and others, on or about November 5, 2015, New York Attorney General Eric Schneiderman issued a subpoena to Exxon under New York's Martin Act, seeking documents regarding Exxon's climate research and its communications to investors and consumers about the risks of climate change and the effect of those risks on Exxon's business.[41] According to press statements by the New York

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[37] *See, e.g.*, Draft Global Climate Science Communications Action Plan (Apr. 3, 1998), https://insideclimatenews.org/sites/default/files/documents/Global%20Climate%20Science%20Communications%20Plan%20%281998%29.pdf.
[38] *Id.*
[39] *Id.*
[40] Bradley Olson & Nicole Friedman, *Exxon, Chevron Shareholders Narrowly Reject Climate-Change Stress Tests*, The Wall Street Journal, May 25, 2016 http://www.wsj.com/articles/exxon-chevron-shareholders-narrowly-reject-climate-change-stress-tests-1464206192; *see also, e.g.*, Natasha Lamb & Bob Litterman, *Really? Exxon left the risk out of its climate risk report*, GreenBiz, Mar. 28, 2014, https://www.greenbiz.com/blog/2014/05/28/exxonmobil-left-risk-out-climate-risk-report (coauthored by executive at Massachusetts-based Exxon shareholder Arjuna Captial).
[41] Justin Gillisand Clifford Krauss, *Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. Times, Nov. 5, 2015, http://www.nytimes.com/2015/11/06/science/exxon-mobil-under-investigation-in-new-york-over-climate-statements.html.

Attorney General, Exxon is cooperating with the subpoena and has produced more than 700,000 pages of documents so far.[42]

In January 2016, at the request of members of Congress, the Department of Justice asked the Federal Bureau of Investigation to investigate whether Exxon should be prosecuted under the federal Racketeer Influenced and Corrupt Organizations Act, based on the documents released by journalists.[43] United States Attorney General Lynch recently confirmed that the investigation is ongoing.[44]

And in early July 2016, nineteen members of the Senate called for an end to fossil fuel companies', including Exxon's, climate change "misinformation campaign to mislead the public and cast doubt in order to protect their financial interest,"[45] and offered support for a resolution urging fossil fuel companies to cooperate with "active or future investigation into (A) their climate-change related activities; (B) what they knew about climate change and when they knew that information; (C) what they knew about the harmful effects of fossil fuels on the climate; and (D) any activities to mislead the public about climate change."[46]

Given the obligations of the Office to prevent damage to the state's environment and protect Massachusetts investors and consumers against unfair and deceptive business practices, the history of the Office's efforts on climate change, the press revelations about Exxon's apparent undisclosed knowledge about the impact of fossil fuel use on climate change, and the various investigations by other state and federal officials, the Office began looking into Exxon-related issues and determined that an investigation pursuant to Chapter 93A would be warranted. A critical issue under Massachusetts law is whether Exxon told investors and consumers, or led them to believe, that it was appropriate and safe for Exxon to utilize its substantial fossil fuel reserves for the manufacture and sale of petroleum products with knowledge, based on its extensive research, that such practices would cause significant climate change and harm to the world.

In March 2016 the New York Attorney General, Attorney General Healey, and several other attorneys general met in New York and discussed at a press conference their cooperation on a number of national environmental issues.[47] Attorney General Healey announced that her office also would be investigating Exxon's climate change research and public communications to investors

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[42] Phil McKenna, *Virgin Islands and Exxon Agree to Uneasy Truce Over to Climate Probe*, InsideClimate News, July 7, 2016, https://insideclimatenews.org/news/06072016/virgin-islands-exxon-agree-climate-probe-subpoena-claude-walker-schneiderman-healey.

[43] https://www.documentcloud.org/documents/2730475-DOJ-RESPONSE.html; http://www.rollingstone.com/politics/news/did-exxon-lie-about-global-warming-20160630.

[44] Amanda Reilly, *Fossil fuel backers accused of 'calculated disinformation,'* Energy and Environment Daily, June 23, 2016, http://www.eenews.net/eedaily/2016/06/23/stories/1060039264.

[45] James Osborne, *19 Senate Democrats call out Exxon, fossil fuel industry on climate change denial*, FuelFix, July 11, 2016, http://fuelfix.com/blog/2016/07/11/19-senate-democrats-call-out-exxon-fossil-fuel-industry-on-climate-change-denial/.

[46] S. Con. Res. 45, 114th Cong. (2016).

[47] Press Release, N.Y. State Office of the Attorney General, A.G. Schneiderman, Former Vice President Al Gore And A Coalition Of Attorneys General From Across The Country Announce Historic State-Based Effort To Combat Climate Change (Mar. 29, 2016), http://www.ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across.

and consumers. This press conference was not unusual; multi-state attorney general investigations, litigation, amicus briefs, and other collaborative efforts often have been accompanied by press announcements.[48]

The Office initiated an investigation of Exxon's potential liability for violations of Chapter 93A with respect to statements to investors and consumers. On April 19, 2016, the Office served Exxon's Massachusetts registered agent with its CID. The CID sought documents from Exxon on such topics as "Exxon's development, planning, implementation, review, and analysis of research efforts to study CO_2 emissions"; research on how the effects of climate change will affect Exxon's costs, marketability, and future profits; and how this information was communicated to consumers and investors.[49]

The Majority's Attempted Interference with State Investigations.

It appears that the issuance of the New York subpoena and the Massachusetts CID prompted the Committee to attempt an intervention into state attorneys' general investigations of Exxon. On May 18, 2016, Attorney General Healey received a letter from Chairman Smith and other Majority members of the Committee requesting that the Office produce "documents and communications between or among employees of the Office" and various non-profit organizations, other state attorneys general, and federal governmental bodies.[50] In its letter, the Majority attempted to justify the request on the grounds that the Office's investigation was an effort "to silence speech," coordinated through "[c]ollusion between the New York Attorney General and [e]xtremist [e]nvironmental [g]roups," and "may even amount to an abuse of prosecutorial discretion."[51] Attorney General Healey responded by letter on June 2, 2016, respectfully declining to produce the requested documents.[52] Attorney General Healey's response pointed out that the Committee mischaracterized the investigation because its true focus is on protecting consumers in the state; that under the Constitution, the Committee has no power to interfere with a state investigation because it

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[48] *See, e.g.*, Press Release, N.Y. State Office of the Attorney General, NY A.G. Schneiderman, Massachusetts A.G. Healey, Maryland A.G. Frosh Announce Suits Against Volkswagen, Audi And Porsche Alleging They Knowingly Sold Over 53,000 Illegally Polluting Cars And SUVs, Violating State Environmental Laws (July 19, 2016), http://www.ag.ny.gov/press-release/ny-ag-schneiderman-massachusetts-ag-healey-maryland-ag-frosh-announce-suits-against; Press Release, Commonwealth of Massachusetts Office of the Attorney General, AG Healey Joins Multistate Effort to Question Use of On-Call Shifts at Retail Stores (Apr. 13, 2016), http://www.mass.gov/ago/news-and-updates/press-releases/2016/2016-04-13-multistate-retail.html; Press Release, Commonwealth of Massachusetts Office of the Attorney General, AG Healey Joins Federal-State Crackdown on Four Cancer Charities Charged with Bilking $187 Million From Donors (May 19, 2016), http://www.mass.gov/ago/news-and-updates/press-releases/2015/2015-05-19-ftc-cancer-fund.html; Amici Curiae Brief in Support of Mississippi's Interlocutory Appeal, Google, Inc. v. Hood, 822 F.3d 212 (2016), 2015 WL 4094982 (C.A.5) (Appellate Brief).

[49] Civil Investigative Demand 2016-DPF-36, *ExxonMobil Corp. v. Healey*, No. 4:16-cv-469, ECF No. 1 (Apr. 29, 2016), pg. 12-20.

[50] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Hon. Massachusetts Attorney General Maura Healey, Commonwealth of Massachusetts Office of the Attorney General (May 18, 2016), http://www.mass.gov/ago/docs/energy-utilities/exxon/sst-committee-request-for-information.pdf.

[51] *Id.*

[52] Letter from Richard A. Johnston, Chief Legal Counsel, Commonwealth of Massachusetts Office of the Attorney General to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (June 2, 2016), http://www.mass.gov/ago/docs/energy-utilities/exxon/ma-letter-to-sst-committee.pdf.

is not a valid federal legislative purpose; and that the Majority had not identified any Congressional authorization to undertake an investigation into the enforcement activities of the Office.[53]

The Majority members reiterated their requests in a second letter sent on June 17, 2016.[54] This time, the Majority claimed that the Office's investigation had the potential "to chill scientific research" and referred to various House of Representatives' rules and a number of investigations that Congress had conducted in both international and domestic matters. None of the cited rules or prior investigations, however, involved Congressional investigation into the activities of a state attorney general to enforce state laws. Consequently, Attorney General Healey responded to the letter on June 24, 2016, reiterating her declination to produce documents to the Committee.[55] Ranking Committee Member Eddie Bernice Johnson wrote to you as Chairman as well, urging the cessation of "this abuse of authority" and the end of the "exceptionally unusual" document requests.[56]

The Majority members sent Attorney General Healey a third letter on July 6, 2016, threatening to use compulsory process.[57] This time the Majority referenced the importance of protecting scientific research and the similarities between Office's CID and the subpoena issued by the Attorney General of the Virgin Islands to Exxon and also cited three court decisions, none of which involved Congressional interference with a state attorney general's investigatory or enforcement powers under state law.[58] The next day, Ranking Member Johnson issued a statement condemning the "abuse of power" and "harassment" of the attorneys general and non-profit organizations to which the Majority members had issued such letters.[59] Attorney General Healey responded to this third letter in a letter sent July 13, 2016, stating that the Majority still had not furnished any valid legal authority for its requests for documents, and that she "continues respectfully to decline to provide the requested materials to the Committee." Attorney General Healey nevertheless indicated that she was "willing to confer by telephone" with Chairman Smith or his staff about objections to producing documents to the Committee, provided that Ranking Member Johnson and her staff were

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[53] *Id.*

[54] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Hon. Massachusetts Attorney General Maura Healey, Commonwealth of Massachusetts Office of the Attorney General (June 17, 2016), http://www.mass.gov/ago/docs/energy-utilities/exxon/sst-letter-to-ag-healey-06-17-2016.pdf.

[55] Letter from Richard A. Johnston, Chief Legal Counsel, Commonwealth of Massachusetts Office of the Attorney General to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (June 24, 2016), http://www.mass.gov/ago/docs/energy-utilities/exxon/letter-lamarsmith-june24.pdf.

[56] Letter from Hon. Eddie Bernice Johnson, Ranking Member, H. Comm. on Science, Space, & Tech. to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (June 23, 2016) pg. 1, 5, http://democrats.science.house.gov/sites/democrats.science.house.gov/files/documents/06.23.16%20-%20LTR%20to%20Smith%20re%20AG%20and%20Enviro%20Groups%20Oversight_0.pdf.

[57] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Hon. Massachusetts Attorney General Maura Healey, Commonwealth of Massachusetts Office of the Attorney General (July 6, 2016) pg. 3, http://www.mass.gov/ago/docs/energy-utilities/exxon/07-06-16-sst-letter-to-ma-ag.pdf.

[58] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Hon. Massachusetts Attorney General Maura Healey, Commonwealth of Massachusetts Office of the Attorney General (July 6, 2016) pg. 3.

[59] Press Release, H. Comm. on Science, Space, & Tech. Democrats, Ranking Member Johnson Response to the Chairman's Subpoena Threat (July 7, 2016), http://democrats.science.house.gov/press-release/ranking-member-johnson-response-chairman%E2%80%99s-subpoena-threat.

also invited and permitted to participate.[60] The Majority did not respond to Attorney General Healey's offer of a telephone conference.

Instead, a few hours after receiving Attorney General Healey's third letter (and a similar letter from the New York Attorney General), Committee staff sent a subpoena to Attorney General Healey,[61] and you as Chairman proceeded to hold a press conference announcing subpoenas to the New York Attorney General, Attorney General Healey, and several non-profit organizations. After the issuance of the subpoenas, Ranking Member Johnson, joined by Committee Member Congresswoman Clark and Congressmen Beyer and Tonko, issued a statement condemning the "unlawful subpoenas" issued by the Committee, which had the effect of creating the "Committee's unfortunate new reputation as a committee of witch hunts."[62]

On another front, on June 15, 2016, Exxon filed a civil complaint against Attorney General Healey in the United States District Court for the Northern District of Texas under 42 U.S.C. § 1983, alleging that the Office's investigation violated its constitutional rights, along with a motion for a preliminary injunction to enjoin Attorney General Healey from enforcing the CID issued to the company.[63] The following day, June 16, 2016, Exxon filed a petition in Massachusetts state court to set aside or modify the CID, along with an emergency motion seeking the same relief, and a request to stay the Massachusetts proceeding pending the outcome of the Texas proceeding. Those actions are still pending.[64] Exxon has not produced any documents in response to the Massachusetts CID.

LEGAL OBJECTIONS TO THE SUBPOENA

The Committee's subpoena—demanding access to privileged and protected documents relating to an on-going state investigation into a private party—is an unprecedented and unconstitutional attempt to interfere in Attorney General Healey's exercise of her authority to investigate violations of state law.

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[60] Letter from Richard A. Johnston, Chief Legal Counsel, Commonwealth of Massachusetts Office of the Attorney General to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (July 13, 2016), http://www.mass.gov/ago/docs/energy-utilities/exxon/ltr-to-congressman-lamar-smith-7-13-16.pdf.

[61] Press Release, H. Comm. on Science, Space, & Tech., Smith Subpoenas MA, NY Attorneys General (July 13, 2016), https://science.house.gov/news/press-releases/smith-subpoenas-ma-ny-attorneys-general-environmental-groups.

[62] Press Release, H. Comm. on Science, Space, & Tech. Democrats, Statement in Response to the Committee's Issuance of Subpoena (July 13, 2016), http://democrats.science.house.gov/press-release/statement-response-committee%E2%80%99s-issuance-subpoena.

[63] Complaint, *ExxonMobil Corp. v. Healey*, No. 4:16-cv-469, ECF No. 1 (June 15, 2016); Motion for Preliminary Injunction filed by Exxon Mobil Corporation, *ExxonMobil Corp. v. Healey*, No. 4:16-cv-469, ECF No. 8 (June 16, 2016).

[64] Petition of ExxonMobil Corp. to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, *In re Civil Investigative Demand No. 2016-EPD-36, Issued by the Office of the Attorney General*, No. 16-1888F (June 16, 2016); Emergency Motion of ExxonMobil Corp. to Set Aside or Modify the Civil Investigative Demand or Issue a Protective Order, *In re Civil Investigative Demand No. 2016-EPD-36, Issued by the Office of the Attorney General*, No. 16-1888F (June 16, 2016).

A. Attorney General Healey Objects to Producing Privileged and Protected Investigatory Documents, Because to Do So Would Compromise the Investigation and the Independence of Her Office.

As discussed further below, the Committee's subpoena is unconstitutional simply because it has no basis in any valid legislative purpose. But the subpoena is particularly egregious for attempting to compel production of documents that are plainly subject to a sovereign state's attorney-client privilege, work product protection, and deliberative process protection. Indeed, most of the Office's documents that would be responsive to the subpoena are covered by these or similar protections under Massachusetts law.

In her third letter in response to the Committee's demands, delivered just prior to issuance of the subpoena, Attorney General Healey advised the Majority that Exxon had filed two lawsuits in an effort to stop the investigation and had not produced any documents in response to the CID. Even if Exxon had produced documents to the Office, or in the future does, the Office is prohibited from making publicly available documents produced by a CID, except in court filings. Mass. Gen. L. c. 93A § 6(6). Consequently, as her letter stated, most of the responsive documents in her possession would be privileged as attorney-client documents or protected as attorney work product.

Moreover, Massachusetts law protects privileged documents in which attorneys within the Office discuss their bases for conducting an investigation into Exxon, as well as work product documents such as Office communications with sources of information about Exxon's business conduct.[65] And since Massachusetts law protects documents covered by the common interest doctrine, the Committee should not be permitted to see communications between the Office and federal investigators or attorneys general from other states, which are protected by a common interest privilege in the context of a potential multi-state investigation.[66]

Compliance with the subpoena would eviscerate Attorney General Healey's ability to conduct an ordinary and lawful investigation, shielded by long-established privileges and protections for its internal communications, work product, and strategic discussions with allied state attorneys general. Attorney General Healey therefore declines to produce the documents.

B. The Committee Has No Constitutional Right to Interfere with a Lawful State Investigation into Possible Violations of Massachusetts Law by Exxon.

The Committee has no right to obtain documents from Attorney General Healey—whether or not protected by recognized privileges—for several important reasons. Attorney General Healey's

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[65] Mass. R. Evid. § 502; Mass. R. Civ. P. 26.

[66] *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 449 Mass. 609, 612, 870 N.E.2d 1105, 1109 (Mass. 2007) ("Broadly stated, the common interest doctrine 'extend[s] the attorney-client privilege to any privileged communication shared with another represented party's counsel in a confidential manner for the purpose of furthering a common legal interest.'"); Restatement (Third) of the Law Governing Lawyers § 76(1) (2000) ("If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.").

investigation is an ordinary and lawful investigation under Massachusetts law. The Committee's attempted interference with that investigation is a violation of states' rights and constitutional principles of federalism. The Majority has not cited any rules of either Congress or the Committee itself that support this attempted intrusion into a sovereign state's investigation. None of the court decisions cited by the Majority even discusses Congressional subpoenas to state attorneys general, let alone authorizes them.

1. **Attorney General Healey's investigation arises out of discrepancies in Exxon documents relating to climate change and a concern that Exxon misled Massachusetts investors and consumers with its public representations and omissions about climate change.**

The Committee's subpoena is a deliberate interference with Attorney General Healey's ordinary and lawful investigation of Exxon's possible violation of Massachusetts law. As indicated above, the Office regularly investigates violations of Chapter 93A, which proscribes unfair and deceptive practices toward investors and consumers, among others. Mass. Gen. L. c. 93A. Attorney General Healey is authorized under Chapter 93A to represent the interests of the state and its citizens, as well as to investigate corporate and other wrongdoing, including violations of laws protecting investors and consumers. *See id.* Based on the Office's review of a number of publicly available Exxon documents and public statements by Exxon, Attorney General Healey determined to investigate whether Exxon made false or misleading statements, in violation of Massachusetts law, to investors and consumers regarding the risks of climate change and the effect of those risks on Exxon's products and business.[67]

The recently-published Exxon documents cited above appear to demonstrate that Exxon knew by at least July 1977 from its own scientists that the continued burning of fossil fuels was causing global temperatures to increase, that the impacts could be catastrophic, and that changes in energy strategies would be needed. Nevertheless, it appears that Exxon continued to advise investors that its business model, heavily reliant on continued burning of fossil fuels, was sound, and continued to market its fossil fuel products to consumers without adequately disclosing the climate risks to the public.

The Office is in the preliminary stages of its investigation. Exxon is the first entity or person to receive a CID. Attorney General Healey has made no determinations as to whether the Office will institute litigation against Exxon pursuant to Chapter 93A or other laws. However, given the apparent discrepancies between what Exxon knew from its own internal scientific research about impacts on global warming and what Exxon both affirmatively represented and failed to tell investors and consumers about its research, she is entitled under Massachusetts law to investigate Exxon's conduct. Given that the Office's investigation is in the ordinary course of powers vested in Attorney General Healey by state law, there is no basis whatsoever for the U.S. Congress to interfere in the investigation.

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[67] *See* Civil Investigative Demand 2016-DPF-36, *ExxonMobil Corp. v. Healey*, No. 4:16-cv-469, ECF No. 1 (Apr. 19, 2016).

2. Fundamental constitutional principles preclude a Congressional committee from interfering with a state attorney general's lawful investigation.

As far as Attorney General Healey is aware, no committee of Congress in the history of the country has issued a subpoena to a sitting state attorney general with respect to his or her exercise of official duties. We have found no such instance in our research. Nor has the Committee brought any such instance to our attention. Indeed, you as Chairman reportedly stated that "[t]his may be the first time any Congressional committee has subpoenaed state attorneys general."[68]

There is a reason that Congress has refrained: The Constitution precludes such interference. The state of Massachusetts has a sovereign interest in the protection of its residents, including in their capacities as investors and consumers. As the Supreme Court has explained, the "Constitution created a Federal Government of limited powers. 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' U.S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). And the States retain significant sovereign powers—"powers with which Congress does not readily interfere." *Id.* at 461. As already made clear to the Committee by the New York Attorney General, "[i]nvestigations and other law enforcement actions by a state Attorney General for potential violations of state law, as here, involve the exercise of police powers reserved to the States under the 10th Amendment," and thus "are not the appropriate subject of federal legislation, oversight, or interference."[69]

Further, while Congress, through committees, has power to investigate in furtherance of its power to legislate, that power may not be used to investigate matters "unrelated to a valid legislative purpose," *Quinn v. United States*, 349 U.S. 155, 161 (1955), and a broad and general authorization from Congress to a committee must, when necessary, be narrowly construed to avoid transgressing constitutional federal-state boundaries, *Tobin v. United States*, 306 F.2d 270, 274-75 (D.C. Cir. 1962). Monitoring or impeding a state attorney general's investigation or prosecution of a state-law enforcement action is not related to a valid federal legislative purpose. *See New York v. United States*, 505 U.S. 144, 162 (1992) (Constitution does not "confer upon Congress the ability to require the States to govern according to Congress' instructions.").

The *Tobin* case well illustrates the limits on a committee's subpoena power. In *Tobin*, the D.C. Circuit reversed a Port of New York Authority official's criminal conviction for contempt of Congress for refusing to comply with a subpoena in a House subcommittee's investigation into whether Congress should "alter, amend or repeal" its consent to the interstate compact between New York and New Jersey that created the Port Authority. 306 F.2d at 272-76. The subpoena sought a broad range of documents concerning the Port Authority's internal affairs, including, among other things, "[a]ll communications in [its] files . . . including correspondence, interoffice and other memoranda and reports relating to" a wide array of topics. *Id.* at 276 n.2. The Port Authority refused to comply with these demands on the two grounds that the request violated the

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[68] Amanda Reilly, *Smith subpoenas AGs, enviro groups in escalating fight*, Energy & Environment Daily, July 14, 2016, http://www.eenews.net/eedaily/2016/07/14/stories/1060040258.

[69] Letter from Leslie B. Dubeck, Counsel, Office of the New York Attorney General to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (May 26, 2016) pg. 2.

Tenth Amendment, and that the Compact Clause of the U.S. Constitution did not actually permit Congress to "alter, amend or repeal" its consent to a compact. *Id.* at 272. Although the court recognized that the committee had "jurisdiction over 'interstate compacts generally,' and the power 'to conduct full and complete investigations and studies relating to . . . the activities and operations of interstate compacts,'" the court also recognized that "when Congress authorizes a committee to conduct an investigation, the courts have adopted the policy of construing such resolutions of authority narrowly, in order to obviate the necessity of passing on serious constitutional questions." *Id.* at 274-75. And the court found that "the very fact that Congress had never before attempted such an expansive investigation of an interstate compact agency—an investigation, by its very nature, sure to provoke the serious and difficult constitutional questions involved here—leads to the conclusion that if Congress had intended the Judiciary Committee to conduct such a novel investigation it would have spelled out this intention in words more explicit than the[se] general terms[.]" *Id.* at 275. Accordingly, the court concluded that the subpoena fell outside the committee's authority. *Id.* at 276.

Here, the Majority has not identified in its three letters to Attorney General Healey in support of its own "novel" subpoena any explicit Congressional authorization to investigate this Office's enforcement activities. This lacuna is not surprising: Any such purported authorization would violate the fundamental principles of federalism that are manifest in our Constitution as a whole and are safeguarded by the Tenth Amendment. As the New York Attorney General has aptly stated, "Congress does not have jurisdiction to demand documents and communications from a state law enforcement official regarding the exercise of a State's sovereign police powers."[70]

Thus, as Attorney General Healey already has explained to the Majority in her several prior communications on this matter prior to the unlawful issuance of the subpoena, Massachusetts law empowers her office to conduct an investigation into potential unfair and deceptive business practices on the part of Exxon, and the Committee cannot interfere in the investigation without violating the fundamental federal structure of our Constitution. The subpoena constitutes an unauthorized and unconstitutional invasion of the rights of the state of Massachusetts as a sovereign state.

3. The Committee's evolving rationales for its subpoena are untenable.

The Majority's rationales for interfering with Attorney General Healey's investigation have shifted over time both legally and factually, demonstrating the unstable ground on which this unprecedented subpoena rests.[71] The bottom line is that the Majority has never provided a valid

[70] Letter from Leslie B. Dubeck, Counsel, Office of the New York Attorney General to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (May 26, 2016) pg. 2.

[71] In the Committee's first letter, on May 18, the Majority alleged that Attorney General Healey was restricting free speech, colluding with extremist groups, and abusing prosecutorial discretion. Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Hon. Massachusetts Attorney General Maura Healey, Commonwealth of Massachusetts Office of the Attorney General, May 18, 2016. In their second letter, on June 17, the Majority cited their supposedly "broad investigatory power" and charge to protect scientific research and development as justification for their document requests. Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Hon. Massachusetts Attorney General Maura Healey, Commonwealth of Massachusetts Office of the Attorney General, June 17, 2016. And their third letter, on July 6, focused on the similarities between the Virgin Islands subpoena and the Massachusetts CID, attempting to use the similar language as evidence of "a deliberate attempt to

legislative purpose for its action. Nor has the Majority cited a single Congressional rule or judicial decision that remotely suggests that the Committee has authority to interfere with an ongoing state investigation or to subpoena the files of a sitting state attorney general.

a. Congressional and Committee Rules do not provide for investigating purely state matters.

Although the Majority's letters have cited several Congressional rules in an effort to justify its request for investigatory files from Attorney General Healey, none of these provisions in fact provides any support for the Majority's effort. Neither the Rules of the House of Representatives[72] ("House Rules"), the Science, Space, and Technology Committee's own rules[73] ("Committee Rules"), nor the Committee's Oversight Plan[74] ("Plan") authorizes the Committee to conduct an investigation of a sovereign state's exercise of its law enforcement authority in connection with the state's consumer and investor protection statute.

House Rule X establishes standing committees, whose jurisdiction concerns matters related to *federal* agencies, application of *federal* law, implementation of *federally*-funded programs, and tax and economic implications of *federal* policies. The standing committees have general oversight responsibilities to assist the House in its evaluation of the application of *federal* laws; "conditions and circumstances" that "may indicate the necessity or desirability of enacting new or additional legislation"; formulation of *federal* law; and whether *federal* programs are being carried out consistent with Congress's intent. *See* House Rule X, Clause 2(a)-(b) (general oversight responsibilities).

Committee Rule VIII (Oversight and Investigations) provides that the Committee "shall review and study . . . the application . . . of *those* laws, . . . the subject matter of which is within its jurisdiction" including "all laws, programs, and Government activities relating to nonmilitary research and development" in accordance with House Rule X, and must prepare a plan of its oversight activities. *See* Committee Rule VIII (emphasis supplied); *see also* Plan at 1. In light of the capitalized term "Government" and in light of House Rule X, the term "those laws" in Committee Rule VIII refers to *federal* laws.

Similarly, the Plan prepared by the Committee focuses on oversight of *federal* agencies, with a key goal of eliminating "waste, fraud, and abuse." No provision of the Plan discusses a need or plan to investigate any state activities, and no such investigation would aid the Committee in fulfilling its charge pursuant to House Rule X. While the Plan suggests that the Committee will engage in

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mask the true purpose of [the Office's] investigation. Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Hon. Massachusetts Attorney General Maura Healey, Commonwealth of Massachusetts Office of the Attorney General, July 6, 2016.

[72] Rules of the House of Representatives, 114th Cong. (Jan. 6, 2015), http://clerk.house.gov/legislative/house-rules.pdf.

[73] Rules of the Science, Space, and Technology Committee, 114th Cong., https://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/Committee%20on%20Science%2C%20Space%2C%20and%20Technology%20Rules%20114th%20Congress%20v2_0.pdf.

[74] Science, Space, and Technology Committee Oversight Plan for 114th Congress, https://science.house.gov/sites/republicans.science.house.gov/files/documents/SST%20Oversight%20Plan%20for%20the%20114th%20Congress.pdf.

oversight efforts in connection with "scientific integrity," it is limited to oversight of *federal* agencies. *See, e.g.*, Plan at 9 (the Committee will continue to "collect and examine allegations of intimidation of science specialists in *federal agencies*, suppression or revisions of scientific findings, and mischaracterizations of scientific findings because of political or other pressures" (emphasis supplied)); *see also id.* (The Committee will develop and implement "scientific integrity principles within the *Executive Branch*." (emphasis supplied)). Read in the context of the overall Plan, it is obvious the Committee's focus is on and limited to scientific findings made or funded by federal government agencies, not by private corporations, such as Exxon.

The Committee therefore was not delegated "any oversight authority concerning the investigations of state attorneys general regarding violations of state securities, consumer, or business laws"[75] by Congress. The Ranking Member of the Committee has also recognized this lack of authority, stating that "nowhere in our jurisdiction—legislative or oversight—can one find justification for our Committee's oversight of state police powers."[76]

b. No judicial decision has sanctioned Congressional subpoenas of state attorneys general.

In addition to the lack of authority under Congressional rules, none of the judicial decisions cited in the Majority's second and third letters to Attorney General Healey (there were no decisions cited in the first such letter) suggests that the Committee may interfere with her statutory power to investigate possible violations of Massachusetts law by Exxon.

The June 17 Letter referenced several decisions in footnotes, none of which involved a Congressional investigation into enforcement activities of a state attorney general. *McGrain v. Daughtery* involved a subpoena to a private individual, 273 U.S. 135 (1927), and *Eastland v. U.S. Servicemen's Fund* involved a subpoena to a bank, 421 U.S. 491 (1975). *Barenblatt v. United States* and *Shelton v. United States* concerned subpoenas issued by the infamous House Committee on Un-American Activities to a university professor and a Klan member, respectively. 360 U.S. 109 (1959); 404 F.2d 1292 (D.C. Cir. 1968). Finally, *Hutcheson v. United States* concerned a subpoena issued to a union officer, 369 U.S. 599 (1962).

The July 6 Letter is similarly devoid of any court decisions supporting interference by a Congressional committee with a state attorney general's enforcements activities. *In the Matter of the Special April 1977 Grand Jury* concerned a *federal grand jury* subpoena issued to a state attorney general concerning potential criminal law violations by him personally, and specifically did not involve an investigation "into the affairs of the State of Illinois" or the attorney general's actions in his official capacity. 581 F.2d 589, 592 (7th Cir. 1978). *Freilich* concerned a claim that a federal *statutory* reporting requirement compelled states to implement a federal regulatory program and therefore amounted to unconstitutional "commandeering" under *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). *Frelich v. Bd. of Directors of Upper Chesapeake Health, Inc.*, 142 F.Supp. 2d 679, 696 (D. Md. 2001). *Michigan Department. of Community Health*

[75] Letter from Leslie B. Dubeck, Counsel, Office of the New York Attorney General to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (May 26, 2016) pg. 2.
[76] Letter from Hon. Eddie Bernice Johnson, Ranking Member, H. Comm. on Science, Space, & Tech., to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (June 23, 2016) pg. 7.

involved a federal *administrative* subpoena issued by the Drug Enforcement Administration to a state agency, where there was a clear nexus between the federal investigation and enforcement of a federal law. *See United States v. Michigan Dep't of Cmty. Health*, No. 1:10-MC-109, 2011 WL 2412602 (W.D. Mich. June 9, 2011). Even there, the court denied the DEA's petition to enforce its subpoena with respect to certain records in the state agency's possession. *Id.* at *14.

Put simply, none of the cases which the Committee has cited in any of its letters to Attorney General Healey provides that a Congressional committee can force a state Attorney General to disclose to the committee the substance or results of an official investigation into possible violations of state law by a private company.

c. *Attorney General Healey is not infringing on Exxon's rights of free speech, because the First Amendment does not protect false and misleading statements.*

The Majority's letters to Attorney General Healey and the Chairman's comments at a press conference announcing the subpoena suggest that the Majority is concerned that this Office's investigation threatens free speech rights. That concern is misplaced.

As the Chairman and members of this Committee know, the First Amendment does not protect false and misleading statements in the marketplace. *See, e.g., United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009) ("[I]t is well settled that the First Amendment does not protect fraud."); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357(1995) ("[The government] may, and does, punish fraud directly."); *In re R. M. J.*, 455 U.S. 191, 203 (1982) ("[W]hen the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely."); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 593 (1980) ("[F]alse and misleading commercial speech is not entitled to any First Amendment protection."); *Friedman v. Rogers*, 440 U.S. 1, 9 (1979) ("[R]estrictions on false, deceptive, and misleading commercial speech" are "permissible."); *Giboney v. Empire Storage & Ice Co.*,336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."); *Massachusetts Ass'n of Private Career Sch. v. Healey*, No. CV 14-13706-FDS, 2016 WL 308776 at *18 (D. Mass. Jan. 25, 2016) ("[T]he government may place an outright ban on speech that is misleading on its face—that is, speech that is more likely to deceive the public than to inform it.").

Just as the courts rejected claims by the tobacco industry that the First Amendment protected its knowingly false statements that cigarette smoking did not cause lung cancer, Exxon may not use the First Amendment to shield its statements and non-disclosures with respect to the relationship between fossil fuel use and climate change. Businesses are not permitted to make false statements to the public and then claim that the First Amendment protects them from the consequences of state laws prohibiting false statements in business affairs. As the Oregon Attorney General's Office wrote to you:

> Your letter also incorrectly accuses this office of investigating entities based on their speech or beliefs concerning climate change. Please be advised this office will not be dissuaded from considering whether state laws, including consumer protections laws, may provide redress against knowingly false commercial speech concerning global warming. The First Amendment simply does not protect fraudulent speech. *Illinois v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) ("This government power [to protect people against fraud] has always been recognized in this country and is firmly established.").[77]

Because Exxon appears to have made many statements to the public, including investors and consumers, about the impact of fossil fuels on climate change that appear to contradict its own internal documents, Attorney General Healey is entitled to investigate what Exxon knew and said to others about these issues—in order to determine whether a cause of action exists for violation of Massachusetts law. Attorney General Healey is not seeking to stifle Exxon's scientific research; to the contrary, the Office is looking into whether Exxon properly represented to the public, in accordance with Massachusetts law, what it knew first-hand from its detailed internal scientific research.

Furthermore, because the Office has not sent CIDs to any entities or individuals other than Exxon, the Majority's professed concern about chilling third-party research is also misplaced. To the extent that the Office's CID to Exxon seeks communications between Exxon and other entities or individuals about climate change, those documents are relevant to a determination whether Exxon was telling the public, including investors and consumers, a different story about climate change than it was discussing internally and privately with select third parties. If so, the outside communications would be relevant to potential claims that Exxon violated Chapter 93A by misleading investors and consumers.

4. **If the Committee's action goes unchallenged, it could jeopardize states' rights and, in particular, the independence of state attorneys general to conduct investigations into violations of state law.**

A substantial portion of Attorney General Healey's work is to conduct investigations into various types of illegal behavior, including unfair and deceptive business practices. As stated above, the Office has issued several hundred CIDs under Chapter 93A since 2013. Some of those investigations result in settlements or assurances of discontinuance, some result in civil enforcement actions or other litigation, and some are closed for lack of sufficient evidence of wrongdoing. Attorney General Healey, like most other state attorneys general, also participates regularly in multi-state investigations in which attorneys general collaborate on strategy, discovery, and sometimes litigation. If the Committee is permitted to obtain the privileged and otherwise protected investigatory files of the Office as well as other offices of state attorneys general, the longstanding independence of states to enforce state laws against businesses will be compromised. The states'

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[77] Letter from Hon. Eddie Bernice Johnson, Ranking Member, H. Comm. on Science, Space, & Tech. to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (June 23, 2016) pg. 3-4 (quoting Letter from Frederick M. Boss, Deputy Attorney General, Ore. Dep't of Justice to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (June 1, 2016) pg. 2).

prerogative to conduct their own investigations into violations of state law is a bedrock of states' rights.

As stated above, there has been an unbroken recognition for over 200 years that states are empowered to investigate wrongdoing against their residents, without interference by the federal government and in particular Congress. As a result, state attorneys general succeed in obtaining favorable results for their residents every day of the year, in matters ranging from fraudulent unfair and deceptive mortgage lending practices on the part of large national banks and others, to Volkswagen's fraudulent schemes with respect to environmental emissions systems. The Committee's subpoena threatens this entire fabric of independent state investigations.

Exxon has already seized for itself two different opportunities to present legal arguments to two separate courts as to why this Office's investigation should not proceed. As described above, Exxon has filed lawsuits in both federal court in Texas and state court in Massachusetts in an effort to stop Attorney General Healey's investigation. Under existing court discovery rules, Exxon would not be entitled in the course of those lawsuits to obtain most of the attorney-client, work product, and deliberative documents that the Committee has subpoenaed. Yet the Committee apparently seeks to provide Exxon with yet another, third venue to challenge the investigation and to obtain materials to which Exxon has no right.

There is simply no legitimate legislative or constitutional basis for the Committee to meddle in a state investigation of state-law violations. Attorney General Healey will not yield to this blatant attempt to chill her investigation into Exxon's conduct.

CONCLUSION

For these reasons, including those contained in the attached letters to the Majority, Attorney General Healey objects to the subpoena and respectfully declines to produce any documents. Attorney General Healey submits that the Majority should withdraw the subpoena and cease its interference with a lawful Massachusetts state investigation. In the event the Majority seeks to pursue the subpoena notwithstanding these objections, Attorney General Healey submits that the subpoena and the objections should be referred to the entire Committee for its review.

Respectfully,

Richard A. Johnston
Chief Legal Counsel

cc: Honorable Eddie Bernice Johnson, Ranking Member, House Committee on Science, Space, and Technology

Honorable Katherine Clark, Member, House Committee on Science, Space, and Technology

Enclosure

THE COMMONWEALTH OF MASSACHUSETTS
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June 2, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

I write in response to the May 18, 2016, letter ("Letter") signed by you and several other members of the House Committee on Science, Space, and Technology ("Committee") seeking certain documents and information in connection with ongoing law enforcement and investigative activities of the Massachusetts Attorney General's Office ("MA AGO") regarding potential violations of Massachusetts's consumer protection and securities laws by ExxonMobil Corporation ("Exxon").

At the outset, the Committee's characterization of MA AGO's investigative activities is inaccurate. The Committee's assertion that the MA AGO is engaged in a "coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution," is absolutely incorrect, and the Committee's intimation that the MA AGO's actions "may even amount to an abuse of prosecutorial discretion" is without basis.

The MA AGO is authorized under Massachusetts law to represent the interests of the Commonwealth and its citizens, as well as to investigate corporate and other wrongdoing, including violations of laws protecting investors and consumers. Based on MA AGO's review of a number of publicly available Exxon documents and public statements by Exxon, MA AGO determined to investigate whether Exxon made false or misleading statements, in violation of Massachusetts law, to investors and consumers regarding the risks of climate change and the effect of those risks on Exxon's business.

Publicly available Exxon documents establish that at least by July 1977, Exxon's own scientists informed Exxon management that the release of carbon dioxide from burning fossil fuels was causing global temperatures to increase, a situation that would, the scientists warned Exxon

management, give rise to "the need for hard decisions regarding changes in energy strategies."[1] Publicly available Exxon documents also confirm that Exxon's scientists were, in the early 1980s, predicting significant increases in global temperature as a result of the combustion of fossil fuels, and that a 2 to 3 degree Celsius increase could lead to melting of polar ice, rising sea levels and "redistribution of rainfall," "accelerated growth of pests and weeds," "detrimental health effects," and "population migration."[2] Exxon's scientists counseled Exxon management that it would be possible to "avoid the problem by sharply curtailing the use of fossil fuels."[3] One Exxon scientist warned in no uncertain terms that it was "distinctly possible" that the effects of climate change over time will "indeed be catastrophic (at least for a substantial fraction of the earth's population)."[4] Despite Exxon's early understanding of the science of climate change and the threats posed by climate change to human populations and global ecosystems, other publically available documents suggest that Exxon may have participated in later self-interested efforts to mislead the public, including investors and consumers, with respect to the impacts of climate change in order to defeat governmental policy measures designed to address the threat of climate change.[5]

Exxon's shareholders are taking very seriously concerns about the nature and extent of Exxon's disclosures regarding the impacts of climate change on Exxon's business; just last week, on May 25, Exxon shareholders came close to passing resolutions that would have required Exxon to implement "stress tests" to ascertain more specifically the climate-driven risks to Exxon's business.[6] As The Wall Street Journal reported, the proposals "drew more support than any contested climate-related votes" in Exxon's history, and indicate that "more mainstream shareholders like pension funds, sovereign wealth funds, and asset managers are starting to take more seriously" the effects on Exxon of a "global weaning from fossil fuels."[7]

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[1] Shannon Hall, *Exxon Knew About Climate Change Almost 40 Years Ago: A new investigation shows the oil company understood the science before it became a public issue and spent millions to promote misinformation*, Scientific American, Oct. 26, 2015, *available at* http://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/

[2] Henry Shaw, *CO_2 Greenhouse and Climate Issues* (March 28, 1984), *available at* http://insideclimatenews.org/sites/default/files/documents/Shaw%20Climate%20Presentation%20%281984%29.pdf

[3] *Id.*

[4] Roger W. Cohen, Interoffice Memorandum to W. Glass (Aug. 18, 1981), *available at* http://insideclimatenews.org/sites/default/files/documents/%2522Catastrophic%2522%20Effects%20Letter%20%281981%29.pdf

[5] *See, e.g.*, Draft Global Climate Science Communications Action Plan (est. 1998), available at http://insideclimatenews.org/sites/default/files/documents/Global%20Climate%20Science%20Communications%20Plan%20%281998%29.pdf (noting "[v]ictory will be achieved when . . . those promoting the Kyoto treaty on the basis of extant science appear to be out of touch with reality," and "[u]nless 'climate change' becomes a non-issue, meaning that the Kyoto proposal is defeated and there are no further initiatives to thwart the threat of climate change, there may be no moment when we can declare victory for our efforts.").

[6] Bradley Olson & Nicole Friedman, *Exxon, Chevron Shareholders Narrowly Reject Climate-Change Stress Tests*, The Wall Street Journal, May 25, 2016, *available at* http://www.wsj.com/articles/exxon-chevron-shareholders-narrowly-reject-climate-change-stress-tests-1464206192

[7] *Id.*

As the Chairman and members of this Committee know, the First Amendment does not protect false and misleading statements in the marketplace. *See, e.g., United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123-24 (D.C. Cir. 2009). Because Exxon appears to have made many statements to investors and consumers about the impact of fossil fuels on climate change which appear to contradict its own internal documents, the MA AGO is entitled to investigate what Exxon knew and said to others about these issues.

The Commonwealth has a sovereign interest in the protection of its investors and consumers. As the U.S. Supreme Court has explained, the "Constitution created a Federal Government of limited powers. 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' U.S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). States, therefore, retain significant sovereign powers—"powers with which Congress does not readily interfere." *Id.* at 2401.

Further, while Congress, through committees, has power to investigate in furtherance of its power to legislate, that power is limited: Congress's power may not be used to investigate matters "unrelated to a valid legislative purpose," *Quinn v. U.S.*, 75 S. Ct. 668, 672 (1955), and must be narrowly tailored to avoid transgressing constitutional federal-state boundaries. *Tobin v. U.S.*, 306 F.2d 270, 275 (D.C. Cir. 1962), *cert denied*, 371 U.S. 902 (1962). An investigation by a state attorney general, and any related prosecution of a state law enforcement action, is not related to a valid federal legislative purpose. *See New York v. U.S.* 505 U.S. 144, 162 (1992) (Constitution does not "confer upon Congress the ability to require the States to govern according to Congress' instructions"). The Committee does not identify in its Letter any congressional authorization to undertake an investigation into the enforcement activities of this Office, and any such purported authorization would violate long-standing principles of federalism.

Moreover, most of the materials that the Committee has requested from the MA AGO, which include investigatory and deliberative process materials, attorney work product, and attorney-client and/or common interest privileged materials, would be protected from disclosure under established state and federal law.

For all of these reasons, the MA AGO respectfully declines to provide the requested materials.

Sincerely,

Richard A. Johnston
Chief Legal Counsel

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June 24, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

We have reviewed your letter of June 17, 2016, also signed by certain other members of the Committee. Your letter does not lead us to alter our conclusion that the Committee lacks authority to interfere with an investigation by the Massachusetts Attorney General's Office into possible violations of Massachusetts law by ExxonMobil Corporation, as set out in detail in our letter of June 2, 2016. Consequently, as indicated in our prior letter, we will not be providing the Committee with the documents requested in your letters to our office.

Sincerely,

Richard A. Johnston
Chief Legal Counsel

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July 13, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

I write in response to your July 6, 2016, letter ("July Letter"), which, like your letters of May 18 and June 17, seeks documents and information in connection with ongoing law enforcement and investigative activities of the Massachusetts Attorney General's Office ("MA AGO") regarding potential violations of Massachusetts law by ExxonMobil Corporation ("Exxon"). This letter supplements our responsive letters to you of June 2 and 24, principally to address new arguments raised in your July Letter.

As you know from our letter of June 2, the focus of MA AGO's investigation is to determine whether Exxon, in violation of Massachusetts law, misled consumers and/or investors by taking public positions regarding the impact of fossil fuel combustion on climate change and Exxon's business that contradict Exxon's own knowledge and understanding, including as documented by Exxon's own scientific research. For example, in 1981, Exxon understood that "[a]tmospheric CO_2 will double in 100 years if fossil fuels grow at 1.4%/a," and that such a doubling of CO_2 would result in a "3 [degree Celsius] global average temperature rise and 10 [degree Celsius] at poles" which would cause "major shifts in rainfall/agriculture" and melting of polar ice.[1] Despite Exxon's knowledge, and its recognition that there may need to be "an orderly transition to non-fossil fuel technologies,"[2] by 1998, Exxon's Randy Randol was nonetheless participating as a member of the "Global Climate Science Communications Team" that was engaged in a concerted effort to challenge the "scientific underpinning of the global climate change theory" in the media, and taking the position that "[i]n fact, it [sic] not known for sure

[1] Preliminary Statement on Exxon's Position on The Growth of Atmospheric Carbon Dioxide, from Henry Shaw to Dr. E. E. David, Jr., (May 15, 1981), *available at* https://insideclimatenews.org/sites/default/files/documents/Exxon%20Position%20on%20CO2%20%281981%29.pdf.
[2] *Id.*

whether (a) climate change actually is occurring, or (b) if it is, whether humans really have any influence on it."[3]

MA AGO is entitled to investigate what Exxon knew and communicated to others about these issues, since those facts are highly relevant to our prospective determination of whether Exxon violated Massachusetts law and misled consumers and/or investors. It appears, from documents such as the above-cited Draft Global Climate Science Communications Plan, that Exxon may have communicated with many entities to misrepresent facts about the impacts of climate change and climate-driven risks to its business; the fact that some of those entities may have conducted research or employed scientists does not diminish the relevance of Exxon's communications to them, nor give this Committee authority to probe into or interfere with MA AGO's investigation of potential violations by Exxon of Massachusetts law.

Neither the Rules of the House of Representatives[4] ("House Rules"), the Science, Space and Technology Committee's own rules[5] ("Committee Rules"), nor the Committee's Oversight Plan[6] ("Plan") authorize the Committee to conduct an investigation of a sovereign state's exercise of its law enforcement authority in connection with the state's consumer and investor protection statute. House Rule X establishes standing committees. Standing committee jurisdiction concerns matters related to federal agencies, application of federal law, implementation of federally-funded programs, and tax and economic implications of federal policies. The standing committees have general oversight responsibilities to assist the House in its evaluation of the application of federal laws; "conditions and circumstances" that "may indicate the necessity or desirability of enacting new or additional legislation"; formulation of federal law; and whether federal programs are being carried out consistent with Congress's intent. *See* House Rule X, Clause 2(a)-(b) (general oversight responsibilities).

Committee Rule VIII (Oversight and Investigations) provides that the Committee "shall review and study . . . the application . . . of those laws, . . . the subject matter of which is within its jurisdiction" including "all laws, programs, and Government activities relating to nonmilitary research and development" in accordance with House Rule X, and must prepare a plan of its oversight activities. *See* Committee Rule VIII (emphasis supplied); *see also* Plan at 1. In light of the capitalized term "Government" and in light of House Rule X, the term "those laws" in Committee Rule VIII refers to federal laws.

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[3] *See, e.g.*, Draft Global Climate Science Communications Action Plan (Apr. 3, 1998), *available at* http://insideclimatenews.org/sites/default/files/documents/Global%20Climate%20Science%20Communications%20Plan%20%281998%29.pdf. There are other publicly-available documents which further demonstrate this historical contradiction in positions taken by Exxon internally and externally. *See e.g.*, MA AGO Civil Investigative Demand 2016-EPD-36, issued Apr. 19, 2016, available at http://www.mass.gov/ago/docs/energy-utilities/exxon/ma-exxon-cid-.pdf

[4] Rules of the House of Representatives, 114th Cong. (Jan. 6, 2015), *available at* http://clerk.house.gov/legislative/house-rules.pdf

[5] Rules of the Science, Space, and Technology Committee, 114th Cong., *available at* https://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/Committee%20on%20Science%2C%20Space%2C%20and%20Technology%20Rules%20114th%20Congress%20v2_0.pdf

[6] Science, Space, and Technology Committee Oversight Plan for 114th Congress, *available at* https://science.house.gov/sites/republicans.science.house.gov/files/documents/SST%20Oversight%20Plan%20for%20the%20114th%20Congress.pdf

Similarly, the Plan prepared by the Committee focuses on oversight of federal agencies, with a key goal of eliminating "waste, fraud, and abuse." No provision of the Plan discusses a need or plan to investigate any state activities, and no such investigation would aid the Committee in fulfilling its charge pursuant to House Rule X. While the Plan suggests that the Committee will engage in oversight efforts in connection with "scientific integrity," it is limited to oversight of federal agencies. *See, e.g.*, Plan at 9 (the Committee will continue to "collect and examine allegations of intimidation of science specialists in federal agencies, suppression or revisions of scientific findings, and mischaracterizations of scientific findings because of political or other pressures") and id., (the Committee will develop and implement "scientific integrity principles within the Executive Branch.") Read in the context of the overall Plan, it is obvious the Committee's focus is on and limited to scientific findings made or funded by federal government agencies, not by private corporations, such as Exxon.

As we previously conveyed in our letter of June 2, Congress's power may not be used to investigate matters "unrelated to a valid legislative purpose." *Quinn v. U.S.*, 75 S. Ct. 668, 672 (1955). The MA AGO investigation is unrelated to a valid federal legislative purpose. *See New York v. U.S.* 505 U.S. 144, 162 (1992) (Constitution does not "confer upon Congress the ability to require the States to govern according to Congress' instructions") and therefore, may not be the subject of the exercise of Congress's power.

None of the cases cited in your July Letter suggests a different result with respect to MA AGO's right under Massachusetts law to investigate possible violations of a state statute protecting consumers and investors without Congressional interference. *In the Matter of the Special April 1977 Grand Jury* concerned a federal grand jury subpoena issued to a state attorney general concerning potential criminal law violations by him personally, and specifically did not involve an investigation "into the affairs of the State of Illinois." 581 F.2d 589, 592 (7th Cir. 1978). *Freilich* concerned a claim that a federal statutory reporting requirement compelled states to implement a federal regulatory program and therefore amounted to unconstitutional "commandeering" under *Hodel v. Virginia Surface Mining & Reclamation Association,* 452 U.S. 264 (1981). *See Frelilich v. Bd. of Directors of Upper Chesapeake Health, Inc.*, 142 F.Supp. 2d 679, 696-97 (D. Md. 2001) (citing *Hodel*, at 288). *Michigan Department. of Community Health* involved a federal administrative subpoena issued by the Drug Enforcement Administration to a state agency where there was a clear nexus between the federal investigation and enforcement of a federal law. *See U.S. v. Mich. Dep't of Cmty. Health,* No. 1:10-mc-109, 2011 U.S. Dist. LEXIS 59445 (W.D. Mich. June 3, 2011). Even there, the court denied the DEA's petition to enforce its subpoena with respect to certain records in the state agency's possession. *Id.* at *41. Put simply, none of the cases which you have cited provides that a Congressional committee can force a state Attorney General to disclose the substance or results of an official investigation into possible violations of state law by a private company.

We note that on June 23, 2016, Ranking Committee Member Eddie Bernice Johnson wrote you that your requests for information about state AGO investigations into Exxon "are an illegitimate exercise of Congressional oversight power," and she provided a detailed legal explanation as to why. In addition to the arguments which we have made and the authorities which we have cited in our responsive letters to you as grounds for our declination to provide documents about our investigation, we refer you again to Rep. Johnson's letter attached hereto.

Furthermore, as you know, Exxon has challenged, in Massachusetts state court and Texas federal district court, the civil investigative demand MA AGO served upon the company, and Exxon has not yet produced any documents to MA AGO. Thus the vast majority of existing documents sought by the Committee and in MA AGO's possession constitutes core attorney work product, attorney-client communications, deliberative process documents and other privileged materials that are protected from disclosure.

In response to your various letters, MA AGO continues respectfully to decline to provide the requested materials to the Committee. As we indicated in a call with your staff today, we are willing to confer by telephone with you or your staff, provided that Representative Eddie Bernice Johnson, Ranking Member of the Committee, and/or her staff, are invited and permitted to participate in any discussions between our offices.

Sincerely,

Richard A. Johnston
Chief Legal Counsel

Cc: Honorable Eddie Bernice Johnson, Ranking Member, Science, Space and Technology Committee

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
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June 23, 2016

The Honorable Lamar Smith
Chairman
Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith,

On May 18, 2016, you wrote to 17 state and territorial attorneys general and 8 non-governmental organizations (NGOs) demanding documents related to possible investigations into fossil fuel industry fraud regarding climate change.[1] On June 17, 2016, after receiving what were presumably unsatisfactory responses from these attorneys general and NGOs, you sent a second round of demands to these same groups. These demands are an illegitimate exercise of Congressional oversight power, and I urge you to immediately cease this abuse of authority.

In a Congress in which the Committee on Science, Space, and Technology's oversight powers have been repeatedly abused, this latest action stands apart. In addition to mischaracterizing innumerable facts, laws, and legal precedents surrounding this situation, the May 18 and June 17 letters have now led the Committee on Science, Space, and Technology to the precipice of a Constitutional crisis. Never in the history of this formerly esteemed Committee has oversight been carried out with such open disregard for truth, fairness, and the rule of law.

The state and territorial attorneys general, representatives for the targeted NGOs, and 43 Democratic Members of Congress[2] have already written to you to patiently explain the

[1] Attorneys General from: California, Connecticut, District of Columbia, Iowa, Illinois, Massachusetts, Maryland, Maine, Minnesota, New Mexico, New York, Oregon, Rhode Island, U.S. Virgin Islands, Virginia, Vermont, Washington. NGOs: 350.org, Climate Accountability Institute, The Climate Reality Project, Greenpeace, Pawa Law Group, P.C., The Rockefeller Brothers Fund, Rockefeller Family Fund, Union of Concerned Scientists. All Committee letters and responses are available at: http://democrats.science.house.gov/letter/document-requests-sent-state-attorneys-general-and-environmental-groups

[2] Letter from Hon. Donald S. Beyer Jr. to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. (June 2, 2016); Letter from Hon. Paul D. Tonko to Hon. Lamar Smith, Chairman, H. Comm. On

illegitimacy of your "investigation." Since you have apparently rejected their responses, I will endeavor to highlight once more the factual and legal shortcomings of your demand letters.

The Majority's Letters Mischaracterize State Attorney General Actions

Both your May 18 and June 17 letters refer to a "coordinated attempt to attack First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution..."[3] In laying out your factual case, you state:

> This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by you and other members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics taken in close coordination with certain special interest groups and trial attorneys may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.[4]

Ignoring for a moment the grossly inappropriate and unsubstantiated innuendo contained in these statements, I would like to highlight the factual deficiencies in your claims.

First of all, it is important to accurately report on the actions of the state and territorial attorneys general. As the New York Attorney General's Office noted in their response to your May 18 letter, they are investigating "whether ExxonMobil Corporation violated New York's securities, business and consumer fraud laws by making false or misleading statements to investors and consumers relating to climate change driven risks and their impact on Exxon's business."[5] In other words, these state attorneys general are investigating potential fraud under state law.

The Commonwealth of Massachusetts Office of the Attorney General laid out the factual basis for these fraud investigations in some detail in its June 2, 2016, response letter, stating:

> Publicly available Exxon documents establish that at least by July 1977, Exxon's own scientists informed Exxon management that the release of carbon dioxide from burning fossil fuels was causing global temperatures to increase, a situation that would, the scientists warned Exxon management, give rise to "the need for hard decisions regarding changes in energy strategies." Publicly available Exxon

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Science, Space, & Tech. (June 10, 2016); Letter from Hon. Ted W. Lieu to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. (June 9, 2016).

[3] Letter from Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, May 18, 2016, pg. 4.

[4] *Id.*

[5] Letter from Leslie B. Dubeck, Counsel, Office of the New York Attorney General to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., May 26, 2016, pg. 1.

> documents also confirm that Exxon's scientists were, in the early 1980s, predicting significant increases in global temperature as a result of the combustion of fossil fuels, and that a 2 to 3 degree Celsius increase could lead to melting of polar ice, rising sea levels and "redistribution of rainfall," "accelerated growth of pests and weeds," "detrimental health effects," and "population migration." Exxon's scientists counseled Exxon management that it would be possible to "avoid the problem by sharply curtailing the use of fossil fuels." One Exxon scientist warned in no uncertain terms that it was "distinctly possible" that the effects of climate change over time will "indeed be catastrophic (at least for a substantial fraction of the earth's population)." Despite Exxon's early understanding of the science of climate change and the threats posed by climate change to human populations and global ecosystems, other publically available documents suggest that Exxon may have participated in later self-interested efforts to mislead the public, including investors and consumers, with respect to the impacts of climate change in order to defeat governmental policy measures designed to address the threat of climate change.[6]

These accusations were widely reported in the press in 2015.[7] Moreover, these accusations should have come as no surprise to you or your staff as they formed the same factual basis that compelled 20 scientists to write to the U.S. Attorney General to suggest that Racketeer Influenced and Corrupt Organizations Act (RICO) investigations might be warranted against fossil fuels companies that potentially knowingly defrauded the American public. You previously instigated an investigation against one of those scientists for exercising his constitutionally protected First Amendment right to petition the government.[8] This is the first of many instances where the irony of your current accusations becomes evident.

Multiple state attorneys general also pointed out the legal fallacy of your accusations of First Amendment violations. For instance, the Oregon Attorney General's Office pointed out that:

> [y]our letter also incorrectly accuses this office of investigating entities based on their speech or beliefs concerning climate change. Please be advised this office

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[6] Letter from Richard A. Johnston, Chief Legal Counsel, Commonwealth of Massachusetts Office of the Attorney General letter to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., June 2, 2016, pgs. 1-2 (citations omitted).

[7] *See, e.g.*, Shannon Hall, *Exxon Knew About Climate Change Almost 40 Years Ago: A new investigation shows the oil company understood the science before it became a public issue and spent millions to promote misinformation*, Scientific American, Oct. 26, 2015, available at http://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/ And, Neela Banerjee, Lisa Song, and David Hasemyer, *Exxon's Own Research Confirmed Fossil Fuels' Role in Global Warming Decades Ago*, Inside Climate News, Sep. 16, 2015, available at http://insideclimatenews.org/news/15092015/Exxons-own-research-confirmed-fossil-fuels-role-in-global-warming

[8] Press Release, H. Comm. On Science, Space, and Tech., "Smith: Taxpayer-Funded Climate Org Allegedly Seeks Criminal Penalties for Skeptics," Oct. 1, 2015, available at https://science.house.gov/news/press-releases/smith-taxpayer-funded-climate-org-allegedly-seeks-criminal-penalties-skeptics

> will not be dissuaded from considering whether state laws, including consumer protections laws, may provide redress against knowingly false commercial speech concerning global warming. The First Amendment simply does not protect fraudulent speech. *Illinois v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) ("This government power [to protect people against fraud] has always been recognized in this country and is firmly established.").[9]

The notion that fraudulent speech is not protected by the U.S. Constitution would seem to be beyond dispute. Nonetheless, despite the state attorneys generals pointing very specifically to the factual and legal deficiencies of your accusations, your June 17, 2016, letters persist in leveling these baseless accusations against the attorneys general, stating:

> This statement suggests that your office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, you are saying that if your office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.[10]

Nothing in that assertion bears any relationship to the statements of the various state attorneys general. These state investigations have nothing to do with deciding "what science is valid and what science is invalid." The investigations, as multiple attorneys general pointed out, are concerned with whether certain fossil fuel companies believed or knew one set of facts, and yet publically disseminated another in order to enrich themselves at others expense. These allegations constitute textbook fraud.[11]

These investigations have a well-known precedent. In the 1990s, various state attorneys general sued tobacco companies for the state-borne healthcare costs associated with tobacco use. One of the bases for the claims was that the tobacco industry engaged in a conspiracy to conceal and misrepresent "the addictive and harmful nature of tobacco/nicotine."[12] These suits resulted in the Master Settlement Agreement in 1998, where the four largest tobacco companies settled all pending state claims related to the healthcare costs related to tobacco.[13] The Federal Government soon followed suit. In

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[9] Letter from Frederick M. Boss, Deputy Attorney General, Oregon Department of Justice letter to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., June 1, 2016, pg. 2.
[10] Letter from Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, June 17, 2016, pg. 3.
[11] Black's Law Dictionary defines fraud as: "A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." Black's Law Dictionary 670 (7th ed. 1999).
[12] Civil Action Complaint, Commonwealth of Pennsylvania, *Commonwealth of Pennsylvania v. Philip Morris, Inc.*, pg. 10, April 1997.
[13] Tobacco Control Legal Consortium, *The Master Settlement Agreement: An Overview*, available at http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-msa-overview-2015.pdf

1999 the U.S. Department of Justice brought RICO Act actions against the largest tobacco companies.[14] The parallels of that case with the current state attorneys general investigations cannot be overstated. In *U.S. v. Philip Morris*, the government alleged that the tobacco industry internally knew of the health risks of their products for decades, yet engaged in a well-financed conspiracy to deceive the American public about the health effects of tobacco. This included financing scientific studies questioning the links between tobacco and health problems and the creation of front organizations to hide links to the tobacco financing. The U.S. government won the case, and the decision was upheld on appeal.[15]

I have repeatedly criticized your tendency to rely upon former tobacco industry-funded scientists, consultants, and public relations firms in past Committee investigations and hearings.[16] Given your past reliance on such "experts", it's perhaps unsurprising that you are now questioning these legitimate state attorneys general investigations of potential fraudulent actions against the American people.

The Majority's Investigation of State Attorneys General is Unconstitutional

A Congressional document demand to a state attorney general is exceptionally unusual. Such a demand from the Science Committee is unheard of.

State attorney generals are elected officials of sovereign state governments. They are not employees of the Federal Government, nor are they subject to federal oversight or control, including by the United States Congress.

You note in your June 17 letter that Congress's oversight powers are well established and broad, citing such authorities as the "U.S. Constitution, Art. 1; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975)(U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services.)"[17] The existence of Congress's oversight powers goes without saying, and is a well-established principle of law. You go on to make an important point about the source of Congressional oversight power, stating:

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[14] U.S. Department of Justice, *Litigation Against Tobacco Companies Home*, https://www.justice.gov/civil/case-d

[15] *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095 (D.C. Cir. 2009).

[16] *See*, e.g., Letter from Hon. Eddie Bernice Johnson, Ranking Member, to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., August 6, 2013, available at http://democrats.science.house.gov/sites/democrats.science.house.gov/files/Letter.pdf
And, *Ensuring Open Science at EPA: Hearing Before the Subcomm. On the Environment of the H. Comm. On Science, Space, & Tech.*, 113th Cong. 16-17 (2014) (statement of Hon. Eddie Bernice Johnson, Ranking Member).

[17] Letter from Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, June 17, 2016, pg. 1 (note).

> Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.[18]

This analysis is particularly relevant to the "investigation" at hand. Congress's broad oversight powers are directly tied to our power to legislate. Thus, by the authority you have relied upon in your own letters, Congress has no legal oversight authority over issues or actions that fall outside Congress's legislative authority.

As nearly every state attorney general who responded to your May 18 letters indicated, state government law enforcement officials acting in their official capacities are not within Congress' legislative control. For instance, in its May 27, 2016, response to your demand letter, the California Attorney General's Office noted:

> [w]e do not believe it is within the jurisdiction of Congress to demand documents from a state law enforcement official such as the California Attorney General. Although Congress' investigative jurisdiction is broad, that is because it tracks Congress' power to legislate and appropriate concerning federal matters. But the power to investigate does not extend beyond those matters. (See, e.g. *Barenblatt v. U.S.* (1959) 360 U.S. 109, 111 ["Congress may only investigate into those areas in which it may potentially legislate or appropriate"].) Investigations and prosecutions of state law enforcement actions by state attorneys general are not federal matters. To the contrary, under the Constitution and laws of the United States, such activities partake of police powers reserved to the states, and are not subject to federal interference. (See, e.g., *New York v. U.S.* (1992) 505 U.S. 144, 162 ["the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions"].)[19]

As a reminder, the Tenth Amendment to the U.S. Constitution reads as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[20]

Implicit in the powers reserved to the states under the Tenth Amendment are state police powers. In case after case, the courts have struck down Congressional attempts to regulate state government activities, including exercise of their police powers.[21] It is clear that Congress has no legislative authority to dictate the actions of state attorneys general.

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[18] *Id.* at 1, citing *Eastland v. United States Servicemen's Fund*, 431 U.S. 491, 504 n. 15 (1975) (quoting *Barenblatt v. United States* 360 U.S. 109, 111 (1959)).

[19] Letter from Martin Goyette, Senior Assistant Attorney General, State of California Department of Justice letter to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., May 27, 2016, pg. 2.

[20] U.S. Const. amend. X.

[21] *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995) (striking down a gun-free school zone provision); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating a provision of the Violence Against Women Act); and, *United States v. Constantine*, 296 U.S. 287 (1935) (invalidating an excise tax imposed on violators of local law).

Even if Congress did have some inroad into regulation of state police powers, such a legislative authority would not rest with the Committee on Science, Space, and Technology. Our oversight jurisdiction (which is broader than our actual legislative jurisdiction) encompasses "laws, programs, and Government activities relating to nonmilitary research and development."[22] Note that the capitalization of the word "Government" gives the word the meaning "Federal Government." Nowhere in our jurisdiction - legislative or oversight - can one find justification for our Committee's oversight of state police powers. The elected officials that serve as state attorney generals are answerable to their respective constituents and the courts, but not to the U.S. Congress. As my colleagues from Virginia, the District of Columbia, and Maryland pointed out:

> States' rights long being a central pillar of conservative philosophy, the Letter's effort to meddle directly in the self-governance and prosecutorial discretion of 17 U.S. state and territories is not lacking for irony.[23]

The Majority's Investigation of NGOs' Exercise of Free Speech is Unconstitutional

The First Amendment to the U.S. Constitution reads, in whole:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[24]

While the First Amendment prohibits government interference with the free speech rights of individuals, that prohibition is not absolute. One relevant example is that fraudulent speech is not protected by the First Amendment.[25] Moreover, the First amendment does not provide an absolute shield against legitimate Congressional oversight. In that regard, you state in your June 17 letter to the various NGOs:

> In *Barenblatt v. United States*, the Supreme Court stated "where the First Amendment rights are asserted to bar government interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." Moreover, when balancing the interests of the parties in *Watkins v. United States*, the Court held "the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness." These cases are important precisely because they provide examples of congressional investigations – sustained by the Supreme Court – involving

[22] House Rule X(3)(k).
[23] Letter from Hon. Donald S. Beyer Jr., to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech., June 2, 2016, pg. 2.
[24] U.S. Const. amend. I.
[25] *See, Illinois v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003).

> organizations similar to yours. The parties being investigated in the cases noted above are no different than the recipients of the Science Committee's May 18 letter.[26]

Since this is the only real legal authority you cite as justification for investigating Americans' constitutionally protected speech, I think it is worth scrutinizing.

First, I would like to point out the context of these cases. Both of these cases involved the notorious House Un-American Activities Committee (HUAC), and investigations that committee conducted into the private lives of American citizens. If ever there was an example of a "witch hunt" in the history of the United States Congress, the HUAC investigations best fit the bill. For that reason, it is more than a little disconcerting that you think those cases' fact patterns so closely resemble your own investigation.

I would also like to point to an error in your statement. You state that both of these cases are important because "they provide examples of congressional investigations – sustained by the Supreme Court – involving organizations similar to yours."[27] This statement is false. In *Watkins v. United States*, the Supreme Court overturned a conviction under 2 U.S.C. 192 against an individual who refused to provide certain testimony to HUAC.[28] The Watkins Court held that the conviction was invalid under the Due Process Clause of the Fifth Amendment.

Rather than supporting the legal grounds of your investigation, the *Watkins* decision is actually an indictment against it. The *Watkins* court noted that:

> The Court recognized the restraints of the Bill of Rights upon congressional investigations in United States v. Rumely, 345 U.S. 41... It was concluded that, when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter.[29]

The *Watkins* Court went on to state:

> Kilbourn v. Thompson teaches that such an investigation into individual affairs is invalid if unrelated to any legislative purpose. That is beyond the powers conferred upon the Congress in the Constitution. United States v. Rumely makes it plain that the mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights.[30]

As I noted earlier, it is clear that our Committee doesn't even have a semblance of a legislative purpose that would justify this investigation. It is inconceivable that our

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[26] Letter from Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. to Richard Heede, Climate Accountability Institute, June 17, 2016, pg. 4 (citations omitted).
[27] *Id.* emphasis added.
[28] *Watkins v. United States*, 354 U.S. 178 (1957).
[29] *Id.* at 198.
[30] *Id.*

Committee, based on our House Rule X jurisdiction, could legislate on any topic related to state law enforcement, private speech, private citizens exercising their First Amendment right to petition their government, or fraud. In fact, the only plausible legislative action that Congress as a whole could take in this instance would be in altering Federal fraud and RICO Act statutes to inappropriately help big oil avoid potential liability. However, even in that instance, such a bill would not come anywhere near the jurisdiction of the Committee on Science, Space, and Technology.

Your June 17 letter claims legislative jurisdiction over this "investigation" because we oversee $31.8 billion in annual federal government research expenditures. Somehow you link the Committee's specific jurisdiction to fund federal scientific research to being the science police for the United States. Even if we had such expansive jurisdiction (and we do not), it would still fall far short of having jurisdiction over state police powers or fraud laws, which are the true subject matters of this "investigation." Thus, based on the legal authorities you yourself have cited, this "investigation" violates the Constitution.

This "Investigation" is Illegitimate

In the foregoing, I have pointed out the many factual and legal shortcomings and mischaracterizations contained in your May 18 and June 17 letters. Sadly, despite having these shortcomings previously noted to you, this misguided effort is continuing. In reality, this overreach is simply the culmination of three years of "oversight" run amuck. When you assumed the Chairmanship of this Committee, Members were promised an ambitious and bipartisan legislative agenda. That did not materialize. What has taken its place is a series of increasingly disturbing "fishing expeditions" masquerading as oversight.

I noted your May and June letters contain a great deal of unintentional irony. I'll note one more example. In your June 17 letter, as a justification for your current investigation you say:

> [C]ongress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change.[31]

Here, you could just as well be referring to your own misguided investigation into eminent NOAA climate scientists last year. In that "investigation" you actually subpoenaed NOAA Administrator, former astronaut, and authentic American hero Dr. Kathy Sullivan in an attempt to obtain the email communications of world renowned NOAA climate scientists.[32] What was the purpose of this investigation? It was simply a fishing expedition against scientists who reached a scientific conclusion with which you

[31] Letter from Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. to Richard Heede, Climate Accountability Institute, June 17, 2016, pg. 3.
[32] Committee on Science, Space, and Technology Subpoena Duces Tecum issued by Hon. Lamar Smith, Chairman, to Hon. Kathym Sullivan, 114th Cong., October 13, 2015.

personally disagreed. In the end, your investigation, like so many recent Science Committee investigations, found nothing.

I have served on the Committee on Science for more than two decades, and during that time this Committee has accomplished great things. We've overseen the completion of the International Space Station and the sequencing of the human genome, and we've undertaken serious investigations, ranging from the Space Shuttle Challenger accident to the environmental crimes at the Rocky Flats nuclear site. However, lately the Committee on Science has seemed more like a Committee on Harassment. The Committee's prolific, aimless, and jurisdictionally questionable oversight activities have grown increasingly mean-spirited and meaningless. They frequently appear to be designed primarily to generate press releases. However, none of these recent investigations has rushed head long into a serious Constitutional crisis like we are about to face. We are moving into dangerous and uncharted territory.

At the beginning of this Congress I swore an oath to uphold the Constitution. I take that oath seriously. As evidenced by the letters you have received from Democratic Members from New York, California, Virginia, Maryland, and the District of Columbia, the Democratic Members of the Committee also take this oath seriously. We will not sit idly by while the powers of the Committee are used to trample on the Bill of Rights of the U.S. Constitution. I implore you to cease your current actions before they do lasting institutional damage to the Committee on Science, Space, and Technology and the Congress as a whole.

Thank you for your attention to this matter.

Sincerely,

Eddie Bernice

EDDIE BERNICE JOHNSON
Ranking Member
Committee on Science, Space, and Technology

Cc: Members of the Committee on Science, Space, and Technology

California, Connecticut, District of Columbia, Iowa, Illinois, Massachusetts, Maryland, Maine, Minnesota, New Mexico, New York, Oregon, Rhode Island, U.S. Virgin Islands, Virginia, Vermont, Washington Attorneys General and 350.org, Climate Accountability Institute, The Climate Reality Project, Greenpeace, Pawa Law Group, P.C., The Rockefeller Brothers Fund, Rockefeller Family Fund, Union of Concerned Scientists

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
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August 24, 2016

The Honorable Maura Healey
Attorney General of Massachusetts
One Ashburton Place
Boston, MA 02108-1518

Dear Attorney General Healey,

The Science, Space, and Technology Committee ("Committee") is in receipt of your July 26, 2016, letter refusing to produce documents and information pursuant to a validly-issued congressional subpoena on July 13, 2016, and accepted on July 14, 2016. Your office's objections to the July 13 subpoena include issues related to the Committee's authority, jurisdiction, and pertinence, as well as concerns regarding the Tenth Amendment of the Constitution. In addition, you have raised several common law and statutory privileges as a purported basis for your non-compliance. As explained in more detail below, the Committee finds these objections without merit and rejects your claims of privilege.

I. The Committee's Investigation Is Legally Sufficient.

The Committee is conducting an investigation to determine whether the actions of your office are having an adverse impact on federally-funded scientific research. If such an adverse impact is discovered, the Committee may consider changes to federal law and/or the amount and allocation of federal funding for scientific research. The Committee's goal is to maximize the efficient and effective use of federal tax dollars intended to advance the progress of science without regard to non-scientific considerations such as a fear that certain types of scientifically justified research may lead to costly state investigations and adverse political pressure.

Your office, after reading numerous press reports,[1] is investigating alleged fraud by Exxon and others, and to that end has issued subpoenas demanding the production of documents and communications between, among others, Exxon and scientists, both internal and external, who conducted research relevant to the issue of climate change. This research is funded by a variety of public and private sources, including the federal government. Although you have not made your subpoena to Exxon publically available, it is likely that your demands will include the work product of federally funded researchers. Why won't you make your subpoena public? What are you hiding?

[1] Letter from Richard A. Johnston to Hon. Lamar Smith 14 (July 26, 2016) [hereinafter July 26 Response].

The Supreme Court, in *Wilkinson v. United States*,[2] established a three prong test for determining the legal sufficiency of a congressional subpoena. First, the Committee's investigation of the broad subject matter must be authorized by Congress.[3] Second, *Wilkinson* requires that the Committee have a "valid legislative purpose." Finally, *Wilkinson* requires that the demand – in this case, the subpoena – be pertinent to a subject matter authorized by Congress.[4] As we now explain, the Committee clearly satisfies all three of the *Wilkinson* parameters for a legitimate and constitutionally authorized legislative investigation.

A. The Committee's Investigation Is Authorized.

First, with respect to authorization, this Committee is charged by the House with ensuring that the United States remains the world leader in scientific discovery, research, and innovation. The Committee furthers this goal by authorizing the use of federal funds, adopting legislation establishing federal policy regarding science and scientific research and conducting of its oversight and investigative activities. In the Committee's view, ensuring that scientists are free to pursue research and intellectual inquiry in accordance with scientific principles without fear of reprisal, harassment, or undue burden is necessary for the American scientific enterprise to remain successful and for federal funding of scientific research to be most effective. Accordingly, the Committee has an interest in ensuring that scientific research is not stifled by legal inquiries such as the investigation launched by your office.

As the House's chief authorizing body for research and development activities, the Committee's interest in the U.S. scientific enterprise is well established. Pursuant to House Rule X, the Committee has legislative and oversight responsibility over "[a]ll energy research, development, and demonstration, and projects therefor, and all federally owned or operated nonmilitary energy labs; Environmental research and development; Marine research; Commercial application of energy technology; and Scientific research, development, and demonstration, and projects therefor."[5] House Rule X is explicit in stating that "all bills, resolutions, and other matters relating to subjects within the jurisdiction of the standing committees . . . shall be referred to those committees."[6]

The Committee has a long history of exercising both legislative and oversight functions within its research and development ("R&D") jurisdiction. In the 114th Congress, the Committee reported, and the House passed H.R. 1806, the America COMPETES Reauthorization Act of 2015, which authorized funds for research and development at the Department of Energy ("DOE"), National Science Foundation ("NSF"), and the National Institute of Standards and Technology ("NIST").[7] The Committee was the source of similar legislation in 2007 and 2010.[8]

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[3] *Id.*
[4] *Id.* at 409.
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This Congress, the Committee has been referred legislation on topics including low-dose radiation research, harmful algal blooms, the Environmental Protection Agency's ("EPA") Science Advisory Board, DOE labs, ocean acidification, and marine hydrokinetic renewable energy. To date, 163 bills or resolutions have been referred to the Committee.

Similarly, the Committee's oversight history is equally robust, with recent oversight inquiries and investigations into subjects ranging from NSF and DOE research grant-making procedures to EPA permitting processes. Two recent examples of the Committee's oversight work related to protecting scientists and researchers involve two cases in which a DOE scientist and a Food and Drug Administration scientist were separately targeted for communicating with Congress. Cases such as these are extremely troubling, and the Committee has a duty to ensure that *all* scientists are able to conduct research free from interference and intimidation and without having the conduct of their scientific inquiries affected by political or ideological pressures or fear of reprisal.

B. The Committee Has a "Valid Legislative Purpose."

Second, the Committee clearly satisfies *Wilkinson*'s requirement that a "valid legislative purpose" exists. For instance, under Rule X, this Committee authorizes all federal research and development funding that is not military or medical. Accordingly, should your investigative actions cause or threaten to cause an imbalance in scientific inquiry for non-scientific reasons, the Committee could seek to correct such an imbalance through its authorization power by (i) directing certain research be federally funded, (ii) redirecting current federal scientific research, or (iii) authorizing federal funds for more targeted research at the agencies under the Committee's jurisdiction. The documents and information compelled by the July 13 subpoena directly bear on whether such corrective action by the Committee is necessary.

In addition, the Committee has a responsibility to ensure that taxpayer dollars authorized and appropriated by Congress are not being misspent. The Committee has had a longstanding interest in grants funded by NSF, including those awarded to universities and private companies. Given the Committee's jurisdiction over NSF, the Committee also has an interest in the research funded by NSF grants. Most research is funded by a combination of private and government sources.[9] Like many other large energy companies, researchers employed by Exxon have received grant awards from federal sources. Additionally, NSF and Exxon jointly fund projects and programs such as Research Experiences in Solid Earth Science for Students, and the American Mathematical Society Task Force on Excellence. Furthermore, Exxon partners with universities, themselves recipients of millions of dollars in federal funds, to conduct research. If, as a result of your investigation, the private sector feels pressure to make research funding decisions based in part on a desire to avoid burdensome state investigations and political or ideological coercion rather than on the basis of pure scientific merit, it is this Committee's responsibility to identify that imbalance and correct it by directing funding elsewhere. The

[9] Science & Engineering Indicators 2016 Report, Chapter 4, https://nsf.gov/statistics/2016/nsb20161/#/report/front-matter (last visited Aug. 16, 2016).

documents and information being sought by the Committee subpoena will help determine whether any such imbalance or chilling has occurred.

The NSF's *Science & Engineering Indicators 2016* delineates total U.S. R&D expenditures by source of funds: Business: 65.2%; Federal government: 26.7%; Universities and colleges: 3.3%; Nonfederal government 0.9%; Other nonprofit organizations: 3.9%. Any disincentive to industry maintaining its position as the dominant source of funding for R&D will have a detrimental impact on the nation's scientific enterprise. If businesses believe that the research they fund can be mischaracterized for political or ideological reasons and used to build cases of fraud against the company, they will have a powerful incentive to cease funding that research and instead to direct their funds elsewhere. This, in fact, may be your goal. Similarly, if scientists believe that their industry-sponsored research, or discussions with industry about research funded by other sources, will be subpoenaed if it is in disagreement with the beliefs and preferences of state officials or advocacy groups, they will have a powerful incentive to cease conducting that research or disseminating the results of their research to all interested parties. Maybe this is your goal, too. This Committee has an interest in informing itself of these trends and effects and potentially offsetting any trends or effects that would skew research in one direction or another on the basis of non-scientific considerations like these.

Either of these scenarios could result in dramatic cuts to or misdirection of research funding by non-federal sources. If that occurs, the Committee may be forced to take a host of legislative actions, including authorizing increases in federal funding for scientific research to make up for the reduction in or misdirection of funding from other sources. The documents and information demanded in the July 13 subpoena will help inform the Committee if such actions are warranted and necessary.

C. The Committee's Inquiry Is Pertinent.

Finally, The Committee's inquiry satisfies *Wilkinson*'s pertinence requirement. Federal courts have interpreted pertinence broadly, requiring "only that the specific inquiries be reasonably related to the subject matter under investigation."[10] The documents and information requested in the subpoena served on July 13, 2016, will allow the Committee to assess the effects of your investigation on the research of climate change scientists. Since the Committee has sole jurisdiction over research and development ("R&D") authorizations or funding measures with the exception of military and medical, this Committee could most certainly prepare legislation as noted above that would direct or divert funding to offset or correct any harmful effects your investigation may have on the overall funding and progress of our nation's scientific R&D enterprise.

The Committee's inquiry plainly satisfies the requirements of *Wilkinson*: it is authorized, has a valid legislative purpose, and is pertinent. As such, the Committee's investigation is

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lawful, and the Committee has the authority and jurisdiction to issue the July 13 subpoena and enforce its compliance.

II. The Committee's Inquiry Is Faithful to and Consistent with the Tenth Amendment and Longstanding Federalism Principles.

As you note, the Tenth Amendment limits federal powers to those delegated through the Constitution, but the Committee's inquiry is well within those limits and, as discussed above, is duly authorized pursuant to its core legislative function.[11] Contrary to your assertions, the Committee's inquiry infringes on no sovereign state "right" because it commandeers no state regulatory or legislative function on its behalf. Unlike attempts to conscript state executive branch officials[12] or commandeer state legislative processes,[13] the Committee here seeks only information pertaining to the *effects* of a state investigation – information that bears directly on subject matters within the Committee's jurisdiction. The Committee is not, as you suggest, attempting to "[m]onitor[] or imped[e] a state attorney general's investigation or prosecution of a state-law enforcement action."[14] There is no attempt to commandeer or otherwise compel or forbid the execution of state law enforcement functions; the Committee seeks neither to regulate or direct the Attorney General's investigation, nor to influence its conclusion. As noted above, far from imposing congressional prerogatives on state law enforcement functions, the Committee's investigation exists separate of the Attorney General's.

Federal courts have spoken directly to the application of federalism principles to state compliance with federal subpoenas. In denying a state attorney general's motion to quash a federal subpoena on the grounds that it violated the Tenth Amendment, a federal appeals court announced that "the impact of a subpoena on state functions is markedly different from... [a] direct system of regulation that requires a reallocation of state resources."[15] And where, for example, "the [federal] government is asking the states to provide information" regarding state programs, such action "has never been held to violate the Tenth Amendment."[16] Case law has time-and-again vindicated the federal government's ability to issue subpoenas to state officials as consistent with federalism principles; that your office is of the opinion that "no committee of Congress in the history of the country has issued a subpoena to a sitting state attorney general"[17] has no bearing on the Committee's valid power to issue such a subpoena pursuant to its jurisdictional authority under House rules and the Constitution.

Your July 26, 2016, letter cites *Tobin v. United States* as an example of a court requiring that Congress' inquiries be "narrowly construed to avoid transgressing constitutional federal-

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[11] The Supreme Court announced as much by describing the Tenth Amendment's corollary: "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States..." *New York v. United States*, 505 U.S. 144, 156 (1992).
[12] *Printz v. United States*, 521 U.S. 898 (1997).
[13] 505 U.S. 144 (1992).
[14] July 26 Response at 14.
[15] *In re Special April 1977 Grand Jury*, 581 F.2d 589, 592 (7th Cir. 1978).
[16] *Freilich v. Bd. of Dirs. Of Upper Chesapeake Health, Inc.*, 142 F. Supp. 2d 679, 697 (D. Md. 2001), *aff'd sub nom.*, *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205 (4th Cir. 2002).
[17] July 26 Response at 14.

state boundaries."[18] *Tobin*, however, is clearly not relevant. It involved a criminal prosecution for contempt for failure to respond to portions of a subpoena seeking documents that, the court concluded, were not within the scope of the committee's investigative authorization and related to a subject that the House may well have lacked constitutional authority to address legislatively.[19] None of those concerns is applicable here. Moreover, the state agency in *Tobin* actually did produce documents in response to the congressional subpoena, which your office has unlawfully refused to do.[20]

III. Congress Has No Obligation to Accept Assertions of Common Law and State Statutory Privileges.

To support your refusal to comply with the Committee's subpoena, you assert that "most of the Office's documents that would be responsive to the subpoena are covered by [privileges] under Massachusetts law,"[21] including attorney-client privilege, work product protection, deliberative process protection, and the common interest privilege.[22] Your failure to identify with particularity those documents and communications you claim are covered by each privilege means that you are making a blanket assertion of privilege in an attempt to shield all responsive documents from disclosure to Congress. You make this blanket assertion even though, by your own admission, only "most" of the responsive documents would be covered by these privileges even if they were applicable. In addition, you fail to acknowledge that even on their own terms some of these privileges are not absolute bars to disclosure and, therefore, may not preclude disclosure of some responsive documents and communications. For example, the work-product privilege has been held to be a qualified privilege that can be overcome by demonstrating sufficient need.[23] Since the burden of establishing the existence of a privilege rests with the party asserting the privilege,[24] such an assertion, on the information provided in your letter, would utterly fail in any event.

More importantly, however, Congress has a constitutional prerogative to deny claims of state law and common law privilege typically recognized in courts of law. While Congress recognizes constitutional claims of privilege in all of its investigations, it is not required to acknowledge common law or state statutory privileges. In fact, acceptance or rejection of claims such as attorney-client privilege has been the longstanding prerogative of each committee[25] and, as the Supreme Court has recognized, since 1960, "only infrequently have witnesses appearing before congressional committees been afforded procedural rights normally associated with an adjudicative proceeding."[26] Indeed, separation of powers principles require that Congress

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[18] *Id.* at 14.
[19] *Tobin v. United States*, 306 F.2d 270, 276 (D.C. Cir. 1962).
[20] *Id.*
[21] July 26 Response at 12.
[22] *Id.*
[23] *See, e.g., United States v. Nobles*, 422 U.S. 225, 239 (1975); *Hickman v. Taylor*, 329 U.S. 495, 511 (1974); *City of Philadelphia v. Westinghouse Corp.*, 210 F.Supp. 483, 485 (E.D. Pa. 1962).
[24] *See, e.g., United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982); *Weil v. Investment/Indicators, Research & Mgmt.*, 647 F.2d 18, 25 (9th Cir. 1981).
[25] *See* S. Rept. No. 2, 84th Cong., 1st Sess. 27-28 (1954).
[26] *Hannah v. Larche*, 363 U.S. 420, 425 (1960).

remain unrestrained by judicially-developed common law privileges, and the Supremacy Clause deprives state-law privileges of any binding force as a basis for resisting a House Committee's request for information pursuant to the powers vested in the House by Article I of the Constitution.[27] Accordingly, recognition of your claims of privilege is not a matter of right, but is at the sole discretion of the Committee. Absent a significantly more robust showing of a good faith basis for the invocation of privilege, including identifying with particularity the responsive documents that could implicate attorney-client, work product, or deliberative process sensitivities, the Committee rejects your privilege assertions in full.

In conclusion, the Committee rejects your insinuation that we are "provid[ing] Exxon with yet another, third venue to challenge the investigation and to obtain materials to which Exxon has no right."[28] Please be assured that this Committee and its Members act independently and with the primary purpose of ensuring the stability of America's scientific enterprise.

As always, the Committee welcomes the opportunity to discuss the scope of the subpoena with you or your staff. To arrange a meeting or discuss matters over the phone, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

[27] *See* U.S. Const. art. VI, cl. 2.
[28] July 26 Response at 20.

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

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August 30, 2016

The Honorable Maura Healey
Attorney General of Massachusetts
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Boston, MA 02108-1518

Dear Attorney General Healey,

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The Supreme Court, in *Wilkinson v. United States*,[2] established a three prong test for determining the legal sufficiency of a congressional subpoena. First, the Committee's

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investigation of the broad subject matter must be authorized by Congress.[3] Second, *Wilkinson* requires that the Committee have a "valid legislative purpose." Finally, *Wilkinson* requires that the demand – in this case, the subpoena – be pertinent to a subject matter authorized by Congress.[4] As we now explain, the Committee clearly satisfies all three of the *Wilkinson* parameters for a legitimate and constitutionally authorized legislative investigation.

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The Committee has a long history of exercising both legislative and oversight functions within its research and development ("R&D") jurisdiction. In the 114th Congress, the Committee reported, and the House passed H.R. 1806, the America COMPETES Reauthorization Act of 2015, which authorized funds for research and development at the Department of Energy ("DOE"), National Science Foundation ("NSF"), and the National Institute of Standards and Technology ("NIST").[7] The Committee was the source of similar legislation in 2007 and 2010.[8] This Congress, the Committee has been referred legislation on topics including low-dose radiation research, harmful algal blooms, the Environmental Protection Agency's ("EPA")

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Similarly, the Committee's oversight history is equally robust, with recent oversight inquiries and investigations into subjects ranging from NSF and DOE research grant-making procedures to EPA permitting processes. Two recent examples of the Committee's oversight work related to protecting scientists and researchers involve two cases in which a DOE scientist and a Food and Drug Administration scientist were separately targeted for communicating with Congress. Cases such as these are extremely troubling, and the Committee has a duty to ensure that *all* scientists are able to conduct research free from interference and intimidation and without having the conduct of their scientific inquiries affected by political or ideological pressures or fear of reprisal.

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concluded, were not within the scope of the committee's investigative authorization and related to a subject that the House may well have lacked constitutional authority to address legislatively.[19] None of those concerns is applicable here. Moreover, the state agency in *Tobin* actually did produce documents in response to the congressional subpoena, which your office has unlawfully refused to do.[20]

III. Congress Has No Obligation to Accept Assertions of Common Law and State Statutory Privileges.

To support your refusal to comply with the Committee's subpoena, you assert that "most of the Office's documents that would be responsive to the subpoena are covered by [privileges] under Massachusetts law,"[21] including attorney-client privilege, work product protection, deliberative process protection, and the common interest privilege.[22] Your failure to identify with particularity those documents and communications you claim are covered by each privilege means that you are making a blanket assertion of privilege in an attempt to shield all responsive documents from disclosure to Congress. You make this blanket assertion even though, by your own admission, only "most" of the responsive documents would be covered by these privileges even if they were applicable. In addition, you fail to acknowledge that even on their own terms some of these privileges are not absolute bars to disclosure and, therefore, may not preclude disclosure of some responsive documents and communications. For example, the work-product privilege has been held to be a qualified privilege that can be overcome by demonstrating sufficient need.[23] Since the burden of establishing the existence of a privilege rests with the party asserting the privilege,[24] such an assertion, on the information provided in your letter, would utterly fail in any event.

More importantly, however, Congress has a constitutional prerogative to deny claims of state law and common law privilege typically recognized in courts of law. While Congress recognizes constitutional claims of privilege in all of its investigations, it is not required to acknowledge common law or state statutory privileges. In fact, acceptance or rejection of claims such as attorney-client privilege has been the longstanding prerogative of each committee[25] and, as the Supreme Court has recognized, since 1960, "only infrequently have witnesses appearing before congressional committees been afforded procedural rights normally associated with an adjudicative proceeding."[26] Indeed, separation of powers principles require that Congress remain unrestrained by judicially-developed common law privileges, and the Supremacy Clause deprives state-law privileges of any binding force as a basis for resisting a House Committee's request for information pursuant to the powers vested in the House by Article I of the

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[19] *Tobin v. United States*, 306 F.2d 270, 276 (D.C. Cir. 1962).
[20] *Id.*
[21] July 26 Response at 12.
[22] *Id.*
[23] *See, e.g., United States v. Nobles*, 422 U.S. 225, 239 (1975); *Hickman v. Taylor*, 329 U.S. 495, 511 (1974); *City of Philadelphia v. Westinghouse Corp.*, 210 F.Supp. 483, 485 (E.D. Pa. 1962).
[24] *See, e.g., United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982); *Weil v. Investment/Indicators, Research & Mgmt.*, 647 F.2d 18, 25 (9th Cir. 1981).
[25] *See* S. Rept. No. 2, 84th Cong., 1st Sess. 27-28 (1954).
[26] *Hannah v. Larche*, 363 U.S. 420, 425 (1960).

Constitution.[27] Accordingly, recognition of your claims of privilege is not a matter of right, but is at the sole discretion of the Committee. Absent a significantly more robust showing of a good faith basis for the invocation of privilege, including identifying with particularity the responsive documents that could implicate attorney-client, work product, or deliberative process sensitivities, the Committee rejects your privilege assertions in full.

In conclusion, the Committee rejects your insinuation that we are "provid[ing] Exxon with yet another, third venue to challenge the investigation and to obtain materials to which Exxon has no right."[28] Please be assured that this Committee and its Members act independently and with the primary purpose of ensuring the stability of America's scientific enterprise.

As always, the Committee welcomes the opportunity to discuss the scope of the subpoena with you or your staff. To arrange a meeting or discuss matters over the phone, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

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[27] *See* U.S. Const. art. VI, cl. 2.
[28] July 26 Response at 20.

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

The Honorable Brian E. Frosh
Attorney General of Maryland
200 St. Paul Place
Baltimore, MD 21202

Dear Mr. Attorney General,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced cooperation on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve "as the guardian of the legal rights of the citizens" and to "assert, protect, and defend the rights of the people."[2] These legal actions may even amount to an abuse of prosecutorial discretion. To assist in the Committee's oversight of this matter, we are writing to request information related to your office's role in this investigation.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[3] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[2] Bureaus of Attorney General, New York, May 12, 2016, *available at http://www.ag.ny.gov/bureaus*; Office of the Attorney General, U.S. Virgin Islands, Dept. of Justice, May 12,2016, *available at* http://usvidoj.codemeta.com/DivisionContent_1.php?divId=84.

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Jolla, California.[4] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff and activist trial attorney Matthew Pawa, founder of the Global Warming Legal Action Project.[5]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[6] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[7] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[8]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[9]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between the New York Attorney General and Extremist Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists, including 2012 workshop participant Matthew Pawa, as well as representatives from groups such as

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350.org and Greenpeace, met at the Manhattan offices of the Rockefeller Family Fund.[10] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[11] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[12] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[13]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference announcing cooperation on investigations against those who question the causes, magnitude, or best ways to address climate change, members of the group were briefed by 2012 workshop attendees Matthew Pawa of the Global Warming Legal Action Project and UCS's Peter Frumhoff. It has since come to light that the New York Attorney General's office willfully concealed the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[14] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[15]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[16]

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The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics in close coordination with certain special interest groups and trial attorneys that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.

To assist the Committee in its oversight of a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but by no later than noon on May 30, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of Maryland and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Maryland and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Maryland and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

The Honorable Brian E. Frosh
May 18, 2016
Page 5

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If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

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Rep. Frank D. Lucas
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Rep. Dana Rohrabacher
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Rep. Randy Neugebauer
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Rep. Bill Posey
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Rep. Jim Bridenstine
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Rep. John Moolenaar
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cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

LAMAR S. SMITH, Texas
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The Honorable Brian E. Frosh
May 18, 2016
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cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

BRIAN E. FROSH
Attorney General

ELIZABETH F. HARRIS
Chief Deputy Attorney General

THIRUVENDRAN VIGNARAJAH
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO. 410-576-7036

WRITER'S DIRECT DIAL NO. 410-576-6311

May 31, 2016

The Honorable Lamar Smith
Chairman
Committee on Science, Space, and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

We are in receipt of your May 18, 2016 letter requesting that the Maryland Office of the Attorney General produce certain records and information relating to the involvement of this office in the investigation of matters related to climate change.

You state, without any foundation, that the actions of this office "may even amount to an abuse of prosecutorial discretion." If you have any basis whatsoever for that assertion, please let us know what it is. Absent such explanation, your letter looks like an attempt to intimidate this office or to thwart it from performing its constitutional functions.

The media reports and public discourse to which you refer in your letter are, of course, constitutionally protected activities. Communications between our office and scientists ought to be cause for praise from the "Science" Committee, not suspicion. And, in any event, when we undertake an investigation, civil or criminal, it is based upon facts and solid principles of law. To suggest otherwise is irresponsible and wrong.

We understand that you made similar requests for information from the offices of other attorneys general, and that many of those offices have already responded by declining to fulfill your request. From those letters, it should by now be abundantly clear that your Committee does not have jurisdiction to intrude upon the law enforcement actions of the chief legal officer of a sovereign state, much less scrutinize the privileged, internal deliberations that underlie those actions. *Tobin v. United States*, 306 F.2d 270, 276 (D.C. Cir. 1962). We thus decline to provide the information requested in your May 18th letter.

You requested a response on May 30, 2016. Our office was closed in observance of Memorial Day. We hope that you joined us yesterday in honoring sacrifices made by the brave men and women of the Armed Forces who protect and preserve freedom around the world.

Sincerely,

Brian E. Frosh
Attorney General

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
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www.science.house.gov

June 17, 2016

The Honorable Brian E. Frosh
Attorney General
State of Maryland
200 St. Paul Place
Baltimore, MD 21202

Dear Attorney General Frosh,

Thank you for your May 31, 2016, response. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[1] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[2] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] However, Congress' investigatory power is not without limits.[4] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.
[3] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[4] *Watkins v. U.S.*, 354 U.S. 178 (1957).

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[5] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[6] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[7] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[8] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[9] organizations that violate the civil rights of individuals,[10] state agencies involved in the Hurricane Katrina response,[11] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138 billion to fund research and development.[12] Of that total federal spending, approximately $40 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of

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[5] *McGrain* at 177, 181-182.
[6] *See McGrain*, 273 U.S. at 177, 181-182.
[7] *Eastland* at 509.
[8] CRS Report at 26.
[9] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[10] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[11] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[12] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

the Science Committee that offices such as yours and those similarly situated should not be taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued and contemplated by members the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes**, but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[13]

This statement suggests that his office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, he is saying that if his office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.

Additionally, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[14] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions

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[13] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available at* http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[14] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

and those of your fellow attorneys general indeed are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of Maryland and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Maryland and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Maryland and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Rep. Lamar Smith
Chairman

Frank D. Lucas
Rep. Frank D. Lucas
Vice Chairman

The Honorable Brian E. Frosh
June 17, 2016
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Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

BRIAN E. FROSH
Attorney General

ELIZABETH F. HARRIS
Chief Deputy Attorney General

THIRUVENDRAN VIGNARAJAH
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO. 410-576-7036

WRITER'S DIRECT DIAL NO. 410-576-6311

June 24, 2016

The Honorable Lamar Smith
Chairman
Committee on Science, Space, and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

I have received your letter of June 17.

In my letter of May 31, I invited you to identify any basis whatsoever for your assertion that the actions of our office "may even amount to an abuse of prosecutorial discretion." Your response is devoid of any support for your charge.

Your second letter charged, again without any foundation, that we have engaged in a strategy "to use prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms."

Both of your letters are baseless.

You rely on the general authority of Congressional Committees, but conspicuously omit the most pertinent language in Rule X of the Rules of the House of Representatives, which states in full: "The Committee on Science, Space, and Technology shall review and study on a continuing basis laws, programs, and Government activities ***relating to nonmilitary research and development***." (Emphasis added.) Your authority to "investigate … investigations" of state attorneys general is questioned even by members of your own committee. *See* June 2 Letter from the Honorable Don Beyer and the Honorable Donna Edwards *et al.*; June 23 Letter from the Honorable Eddie Bernice Johnson.

Your failure (or refusal) to offer support for your charge of abuse of prosecutorial discretion makes your so-called investigation look much more like an attempt to interfere with the constitutional functions of this office and those of other attorneys general. Accordingly, we decline your requests.

Sincerely,

Brian E. Frosh

Brian E. Frosh
Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO.
410-576-7036

WRITER'S DIRECT DIAL NO.
410-576-6311

August 11, 2016

The Honorable Lamar Smith
Chairman
Committee on Science, Space and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

We write to express our profound concern with the subpoenas issued on July 13, 2016 to our colleagues, the attorneys general of Massachusetts and New York. Through these subpoenas, which we understand you issued without a vote of the Committee, you seek the production of materials developed by the attorneys general in the course of their ongoing respective investigations of potential violations by the ExxonMobil Corporation of state securities and consumer protection laws. You have framed this intervention as "vigorous oversight" of state attorneys general and their investigative work. Such oversight would exceed Congress' constitutional authority, and the July 13 subpoenas should therefore be withdrawn.

Your interference in our colleagues' work ignores a "vital consideration" under our constitutional system of dual sovereignty: the preservation of comity between the federal government and the states. *See Younger v. Harris*, 401 U.S. 37, 44-45 (1971). "Comity," Justice Black wrote for the Supreme Court in *Younger*, means "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* Any claim of a congressional right to "oversee" the work of state constitutional law enforcement officers in fulfilling their core responsibilities under state law disrupts this comity and tears at the essential fabric of our national Constitution.

As attorneys general, we each hold offices established in our states' constitutions or statutes. Our offices are critical to the functioning of our states' governments, and they have deep historical roots. Some of us, like the attorneys general of Massachusetts and New York, hold offices whose origins precede the founding of our country. The state attorney general has been described by the Florida courts, for example, as "the attorney and legal guardian of the people. . . . His duties pertain to the Executive Department of the State, and it is his duty to use means most effectual to the enforcement of the laws, and the protection of the people, whenever directed by the proper authority, or when occasion arises." *State of Florida v. Exxon Corp.*, 526 F.2d 266, 270 (5th Cir. 1976) (quoting *Attorney General v. Gleason*, 12 Fla. 190, 212 (Fla. 1868)) (holding that Attorney General of Florida had legal authority to pursue federal antitrust action against Exxon and other oil companies without authorization of government agencies allegedly injured by conduct at issue). Several state supreme courts, recognizing the broad discretion conferred on state attorneys general by state constitutions, have aptly described the office of attorney general as a "public trust." *See, e.g.*, *Gleason*, 12 Fla. at 214; *Attorney General v. Morita*, 41 Haw. 1, 15 (Haw. Terr. 1955); *Commonwealth v. Burrell*, 7 Pa. 34, 39 (1847).

In fulfilling this public trust, we are each accountable in multiple ways to the people of our states. Most of us were elected directly to our offices by the people we serve. State legislatures write and enact most of the laws that our offices enforce, including securities and consumer protection laws like the ones that give rise to the investigations in New York and Massachusetts that you have proposed to "oversee." Moreover, we are accountable to the courts of our states, which, on innumerable occasions over the course of our states' histories, have ruled both for and against us and our predecessors on issues of federal and state constitutional law, on issues of statutory interpretation, and on other issues.

"[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Under that system, the federal government is one of limited powers, and, under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It is fundamental to our system of dual sovereignty that, as the Supreme Court has said, "States are not mere political subdivisions of the United States." *New York v. United States*, 505 U.S. 144, 188 (1992). Indeed, "State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead 'leaves to the several States a residuary and inviolable sovereignty.'" *Id.* (quoting The Federalist No. 39).

In light of our nation's commitment to the preservation of a system of dual sovereignty, it is not surprising that, despite centuries of investigative and prosecutorial activity by state attorneys general in which constitutional objections have been raised, you have not identified a single valid precedent, from any period of our country's history, for the "vigorous oversight" of state attorneys general that you are now proposing to undertake. Difficult enough are cases where Congress proposes to regulate *subject matters* arguably reserved to the states, and where there may be some analytical difficulty entailed in drawing "distinction[s] between what is truly national, and what is truly local." *United States v. Morrison*, 529 U.S. 598, 617 (2000). Your investigation, though, would go further. The stated purpose of your investigation is to oversee *state constitutional officers themselves* and the manner in which they fulfill their responsibilities under *state* law. Who oversees state officials is a matter "of the most fundamental sort for a sovereign entity," because it is "through the structure of its government" that "a State defines itself as sovereign." *Gregory v. Ashcroft*, 501 U.S. at 460 (holding that Congress could not, through laws prohibiting age discrimination, regulate the retirement age for state judges). Our national Constitution and our respective states' constitutions neither anticipate nor tolerate a structure under which Congress arrogates to itself the authority to oversee investigations conducted by state attorneys general.

Your proposed "vigorous oversight" does not merely interfere with our work and the work of our colleagues. You also purport to supplant the role of state legislatures and state courts. We cannot understand on what basis you seem to assume, for example, that state courts in Massachusetts will be unable to resolve the constitutional objections that ExxonMobil, through skilled counsel, has already lodged there. State courts, not Congress, are the appropriate arbiters of any state law claims brought by the attorneys general of Massachusetts and New York against ExxonMobil and of any constitutional objections that ExxonMobil might assert.

The Constitution establishes "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger*, 401 U.S. at 44. Your proposed oversight of state constitutional officers cannot be squared with these essential principles of federalism, nor can your attempt to oversee the resolution of alleged constitutional issues arising from the ongoing investigative activities

of state attorneys general undertaken under state law. We therefore urge you to withdraw your subpoenas, refrain from attempting to exercise further oversight, and allow state attorneys general and state courts to perform their constitutionally prescribed roles.

Sincerely,

Brian E. Frosh
Maryland Attorney General

Kamala D. Harris
California Attorney General

George Jepsen
Connecticut Attorney General

Karl A. Racine
District of Columbia Attorney General

Douglas Chin
Hawaii Attorney General

Janet T. Mills
Maine Attorney General

Jim Hood
Mississippi Attorney General

Ellen F. Rosenblum
Oregon Attorney General

Peter F. Kilmartin
Rhode Island Attorney General

William H. Sorrell
Vermont Attorney General

Mark R. Herring
Virginia Attorney General

Bob Ferguson
Washington Attorney General

cc: The Honorable Eddie Bernice Johnson
Ranking Member, Committee on Science, Space, and Technology

Majority Staff, Committee on Science, Space, and Technology
Rayburn House Office Building, Room 2321

Minority Staff, Committee on Science, Space, and Technology
Ford House Office Building, Room 392

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

The Honorable Janet T. Mills
Attorney General of Maine
6 State House Station
Augusta, ME 04333

Dear Ms. Attorney General,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced cooperation on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve "as the guardian of the legal rights of the citizens" and to "assert, protect, and defend the rights of the people."[2] These legal actions may even amount to an abuse of prosecutorial discretion. To assist in the Committee's oversight of this matter, we are writing to request information related to your office's role in this investigation.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[3] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Bureaus of Attorney General, New York, May 12, 2016, *available at http://www.ag.ny.gov/bureaus*; Office of the Attorney General, U.S. Virgin Islands, Dept. of Justice, May 12, 2016, *available at* http://usvidoj.codemeta.com/DivisionContent_1.php?divId=84.

[3] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[4] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff and activist trial attorney Matthew Pawa, founder of the Global Warming Legal Action Project.[5]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[6] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[7] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents may exist):"[8]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[9]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between the New York Attorney General and Extremist Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists, including 2012 workshop participant Matthew Pawa, as well as representatives from groups such as

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[4] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[5] *Id.*
[6] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages*, Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[7] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[8] *Id.* [emphasis added]
[9] *Id.* [emphasis added]

350.org and Greenpeace, met at the Manhattan offices of the Rockefeller Family Fund.[10] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[11] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[12] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[13]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference announcing cooperation on investigations against those who question the causes, magnitude, or best ways to address climate change, members of the group were briefed by 2012 workshop attendees Matthew Pawa of the Global Warming Legal Action Project and UCS's Peter Frumhoff. It has since come to light that the New York Attorney General's office willfully concealed the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[14] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[15]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[16]

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[10] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe*, WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.

[11] *Id.*

[12] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund*, Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*

[13] *Id.*

[14] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show*, WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

[15] *Id.*

[16] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions*, WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics in close coordination with certain special interest groups and trial attorneys that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.

To assist the Committee in its oversight of a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but by no later than noon on May 30, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of Maine and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Maine and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Maine and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

JANET T. MILLS
ATTORNEY GENERAL

TEL: (207) 626-8800
TTY USERS CALL MAINE RELAY 711

STATE OF MAINE
OFFICE OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

REGIONAL OFFICES
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BANGOR, MAINE 04401
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415 CONGRESS ST., STE. 301
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14 ACCESS HIGHWAY, STE. 1
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May 31, 2016

The Honorable Lamar Smith
Chairman, House Committee on Science, Space and Technology
2321 Rayburn House Office Building
Washington, DC 20515-6301

Dear Chairman Smith:

I am responding to a letter of May 18, 2016 from you and several other members of Congress to Maine Attorney General Janet Mills in which you express concern that this Office may be engaged in an inappropriate investigation into the activities of the fossil fuel industry. Consistent with its longstanding practice, this Office neither confirms nor denies the existence of any pending investigation.

Your letter requests that this Office immediately produce certain documents and information. We object to this request for several reasons. As an initial matter, your letter provides no factual support for the proposition that this Office has acted inappropriately in any way. In the absence of some evidence of wrong-doing specific to the Maine Attorney General, there is no factual justification for a Congressional demand for records. More fundamentally, we are unaware of any jurisdictional basis upon which Congress may demand records from a state prosecutorial authority regarding pending investigations into violations of state law. *See, e.g., New York v. U.S.*, 505 U.S. 144, 162 (1992) (describing the constitutional limitations on the authority of Congress to compel states to govern according to Congressional wishes). We also note that much of the material you request would, to the extent it exists, be protected by several well-established privileges recognized under both Maine and federal law. For all of these reasons, we respectfully deny your request.

Sincerely,

Linda Pistner
Chief Deputy Attorney General

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

June 17, 2016

The Honorable Janet T. Mills
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

Dear Attorney General Mills,

Thank you for your May 31, 2016, response. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[1] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[2] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] However, Congress' investigatory power is not without limits.[4] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.
[3] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[4] *Watkins v. U.S.*, 354 U.S. 178 (1957).

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[5] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[6] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[7] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[8] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[9] organizations that violate the civil rights of individuals,[10] state agencies involved in the Hurricane Katrina response,[11] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138 billion to fund research and development.[12] Of that total federal spending, approximately $40 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of

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[5] *McGrain* at 177, 181-182.
[6] *See McGrain*, 273 U.S. at 177, 181-182.
[7] *Eastland* at 509.
[8] CRS Report at 26.
[9] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[10] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[11] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[12] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

the Science Committee that offices such as yours and those similarly situated should not be taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued and contemplated by members the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes,** but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[13]

This statement suggests that his office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, he is saying that if his office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.

Additionally, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[14] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions

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[13] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available at* http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[14] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

and those of your fellow attorneys general indeed are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of Maine and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Maine and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Maine and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Rep. Lamar Smith
Chairman

Frank D Lucas
Rep. Frank D. Lucas
Vice Chairman

The Honorable Janet T. Mills
June 17, 2016
Page 5

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

JANET T. MILLS
ATTORNEY GENERAL

TEL: (207) 626-8800
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June 24, 2016

The Honorable Lamar Smith
Chairman, House Committee on Science, Space and Technology
2321 Rayburn House Office Building
Washington, DC 20515-6301

Dear Chairman Smith:

On May 23, 2016, we received from you a copy of a letter – identical in its substance to letters received by many other state attorneys general – suggesting this Office is engaging in prosecutorial misconduct and requesting that we immediately produce documents to your Committee. I responded by questioning your authority to make such a request, and pointing out that your letter provides no information to support the proposition that this Office has acted inappropriately in any way.

We have now received a second form letter from you, dated June 17, 2016, requesting that this Office produce several categories of documents to your Committee within one week. I note that neither of your letters shows the signatures of a majority of the Committee's members. Like the first, this more recent letter demonstrates no familiarity with the actual work of the Maine Attorney General's Office, and instead sets forth a legal argument intended to justify your demand for records. Having reviewed that argument and the citations accompanying it, we are all the more convinced that no jurisdictional basis exists upon which Congress may demand records from a state prosecutorial authority regarding pending investigations into violations of state law, if any exist. We therefore deny your request.

Sincerely,

Janet T. Mills
Attorney General

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

The Honorable Lori Swanson
Attorney General of Minnesota
445 Minnesota Street, Suite 1400
St. Paul, MN 55101

Dear Ms. Attorney General,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced cooperation on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve "as the guardian of the legal rights of the citizens" and to "assert, protect, and defend the rights of the people."[2] These legal actions may even amount to an abuse of prosecutorial discretion. To assist in the Committee's oversight of this matter, we are writing to request information related to your office's role in this investigation.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[3] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Bureaus of Attorney General, New York, May 12, 2016, *available at http://www.ag.ny.gov/bureaus*; Office of the Attorney General, U.S. Virgin Islands, Dept. of Justice, May 12, 2016, *available at* http://usvidoj.codemeta.com/DivisionContent_1.php?divId=84.

[3] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[4] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff and activist trial attorney Matthew Pawa, founder of the Global Warming Legal Action Project.[5]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[6] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[7] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents may exist):"[8]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[9]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between the New York Attorney General and Extremist Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists, including 2012 workshop participant Matthew Pawa, as well as representatives from groups such as

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[4] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[5] *Id.*
[6] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages*, Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[7] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[8] *Id.* [emphasis added]
[9] *Id.* [emphasis added]

350.org and Greenpeace, met at the Manhattan offices of the Rockefeller Family Fund.[10] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[11] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[12] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[13]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference announcing cooperation on investigations against those who question the causes, magnitude, or best ways to address climate change, members of the group were briefed by 2012 workshop attendees Matthew Pawa of the Global Warming Legal Action Project and UCS's Peter Frumhoff. It has since come to light that the New York Attorney General's office willfully concealed the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[14] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[15]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[16]

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[10] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe*, WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.

[11] *Id.*

[12] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund*, Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*

[13] *Id.*

[14] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show*, WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

[15] *Id.*

[16] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions*, WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics in close coordination with certain special interest groups and trial attorneys that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.

To assist the Committee in its oversight of a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but by no later than noon on May 30, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of Minnesota and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Minnesota and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Minnesota and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

The Honorable Lori Swanson
May 18, 2016
Page 5

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

The Honorable Lori Swanson
May 18, 2016
Page 6

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

TO:	The Honorable Lamar Smith Chairman Committee on Science, Space and Technology	DATE: PHONE: FAX:	May 31, 2016 (202) 225-8628
	The Honorable Eddie Bernice Johnson Ranking Member Committee on Science, Space and Technology	FAX:	(202) 226-1477
FROM:	KAREN D. OLSON Deputy Attorney General 445 Minnesota St., #900 St. Paul, MN 55101-2127	PHONE: FAX: TTY:	(651) 757-1370 (651) 297-4139 (651) 296-1410

SUBJECT:

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NUMBER OF PAGES (including cover page): 3

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FOR TRANSMISSION PROBLEMS, PLEASE CALL ANGELA BRINDAMOUR AT (651) 757-1418, IF I AM NOT AVAILABLE THE NUMBER FOR OUR RECEPTIONIST IS (651) 297-1075.

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05/31/2016 TUE 12:56 FAX 651 297 4139 ATTY GENERAL 002/003

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

May 31, 2016

LORI SWANSON
ATTORNEY GENERAL

102 STATE CAPITOL
ST. PAUL, MN 55155
TELEPHONE: (651) 296-6196

The Honorable Lamar Smith
Chairman
Committee on Science, Space and Technology
United States House of Representatives
2321 Rayburn House Office Building
Washington, DC 20515-6301

Dear Chairman Smith:

I thank you for your correspondence dated May 18, 2016.

You request that this Office provide the following documents for the period of January 1, 2012 to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of Minnesota and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

   Response: This Office has no such documents.

2. All documents and communications between or among employees of the Office of the Attorney General of Minnesota and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

   Response: In any given year, staff attorneys in this Office are involved in thousands of communications with their counterparts in attorneys general offices in other states. Cooperation and dialogue among staff attorneys in legal matters has long been a common practice and consistent with principles of efficiency, federalism, professionalism, and state's rights. Moreover, this Office provides legal representation to the Minnesota Pollution Control Agency in a number of legal matters relating to the issue of climate change, such as the federal litigation involving the Clean Power Plan, making it prudent and necessary for our staff attorneys to communicate on such legal matters with their counterparts in other states.

   This Office's communications as it relates to such legal matters are subject to a number of legal privileges, including the attorney work product, the attorney-client, and the deliberative process privileges. *See, e.g.*, Minn. Stat. § 595.02, subd. 1(b) & Minn. R. Evid. 501. Such communications are further subject to the common interest

doctrine, which provides an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997) (if two or more entities with a common interest, whether it be legal, factual or strategic, are represented by counsel and agree to share information in a matter, privileged matters will retain that privilege as to outside parties); *see also, e.g., Cohen v. Beachside Two-I Homeowners' Ass'n*, No. CIV. 05-706 ADM/JS, 2006 WL 1795140, at *5-6 (D. Minn. June 29, 2006); *cf. State ex rel. Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676, 682 n.2 (Minn. Ct. App. 2000).

Principles of federalism and state's rights also support the conclusion that the actions of a state attorney general's office in its exercise of its legal authority are not subject to federal supervision. *See, e.g., New York v. U.S.*, 505 U.S. 144, 162 (1992) ("the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.") (citation omitted); *Hutcheson v. U.S.*, 369 U.S. 599, 624 (1962) ("the congressional power of inquiry . . . must be related to, and in furtherance of, a legitimate task of the Congress . . . .") (citation and quotation omitted); *Watkins v. U.S.*, 354 U.S. 178, 187 (1957) (noting that the congressional power of investigation is "not unlimited" and "comprehends probes into departments of the Federal Government . . . ."); *F.E.R.C. v. Mississippi*, 456 U.S. 742, 777-78 (1982) (relying on the Tenth Amendment for proposition that "each state is sovereign within its own domain . . . .").

3. All documents and communications between or among employees of the Office of the Attorney General of Minnesota and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

   Response: This Office has no such documents.

I thank you again for your letter. If you or your staff have any questions, please do not hesitate to contact me.

Sincerely,

KAREN D. OLSON
Deputy Attorney General

cc: The Honorable Eddie Bernice Johnson, Ranking Member

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

June 17, 2016

The Honorable Lori Swanson
Attorney General
State of Minnesota
445 Minnesota Street, Suite 1400
St. Paul, MN 55101

Dear Attorney General Swanson,

Thank you for your May 31, 2016, response. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[1] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[2] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] However, Congress' investigatory power is not without limits.[4] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.
[3] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[4] *Watkins v. U.S.*, 354 U.S. 178 (1957).

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[5] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[6] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[7] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[8] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[9] organizations that violate the civil rights of individuals,[10] state agencies involved in the Hurricane Katrina response,[11] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138 billion to fund research and development.[12] Of that total federal spending, approximately $40 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of

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[5] *McGrain* at 177, 181-182.
[6] *See McGrain*, 273 U.S. at 177, 181-182.
[7] *Eastland* at 509.
[8] CRS Report at 26.
[9] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[10] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[11] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[12] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

the Science Committee that offices such as yours and those similarly situated should not be taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued and contemplated by members the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes,** but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[13]

This statement suggests that his office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, he is saying that if his office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.

Additionally, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[14] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions

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[13] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available at* http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[14] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

and those of your fellow attorneys general indeed are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of Minnesota and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Minnesota and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Minnesota and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Rep. Lamar Smith
Chairman

Frank D Lucas
Rep. Frank D. Lucas
Vice Chairman

The Honorable Lori Swanson
June 17, 2016
Page 5

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

TO:	The Honorable Lamar Smith Chairman Committee on Science, Space and Technology	DATE: PHONE: FAX:	June 24, 2016 (202) 225-8628
	The Honorable Eddie Bernice Johnson Ranking Member Committee on Science, Space and Technology	FAX:	(202) 226-1477
FROM:	KAREN D. OLSON Deputy Attorney General 445 Minnesota St., #900 St. Paul, MN 55101-2127	PHONE: FAX: TTY:	(651) 757-1370 (651) 297-4139 (651) 296-1410
SUBJECT:			

TRANSMISSION BY FACSIMILE

NUMBER OF PAGES (including cover page): 2

COMMENTS:

FOR TRANSMISSION PROBLEMS, PLEASE CALL ANGELA BRINDAMOUR AT (651) 757-1418, IF I AM NOT AVAILABLE THE NUMBER FOR OUR RECEPTIONIST IS (651) 297-1075.

The information contained in this Fax is intended only for the use of the individual or entity named above. If the reader of this Fax is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are requested to (a) refrain from examining the materials, (b) immediately notify the sending person of the mistake, and (c) abide by any instructions of the sending person regarding the return of the document(s).

06/24/2016 FRI 17:05 FAX 651 297 4139 ATTY GENERAL 002/002

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

June 24, 2016

SUITE 900
445 MINNESOTA STREET
ST. PAUL, MN 55101-2127
TELEPHONE: (651) 297-1075

The Honorable Lamar Smith
Chairman
Committee on Science, Space and Technology
United States House of Representatives
2321 Rayburn House Office Building
Washington, DC 20515-6301

Dear Chairman Smith:

I thank you for your correspondence dated June 17, 2016.

You previously wrote to this Office on May 18, 2016 requesting certain documents from the period of January 1, 2012 to the present. On May 31, 2016 I advised you that this Office has no documents responsive to the first and third requests in your May 18 letter and that whatever documents this Office may have in response to your second request were subject to the attorney-client and attorney work product privileges. I also noted that the principles of federalism and state's rights support the conclusion that the actions of a state attorney general's office in its exercise of its legal authority are not subject to federal supervision.

Without acknowledging that this Office previously advised you that it has no documents responsive to two of your three requests, you ask again for the same three categories of documents. Once again, please be advised that this Office has no documents responsive to your first and third requests contained in your May 18 and June 17 letters. With regard to your second request, as I indicated in my May 31 letter, any documents that this Office has are subject to the attorney-client and attorney work product privileges. These privileges are among the oldest privileges to protect confidential communications and have existed at common law for hundreds of years. *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1957) (acknowledging that "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.") (citation omitted). I respectfully request that the Committee consider, honor, and respect these longstanding privileges, as well as the previously described principles of federalism.

If you have any questions, please feel free to give me a call.

Sincerely,

KAREN D. OLSON
Deputy Attorney General

cc: The Honorable Eddie Bernice Johnson, Ranking Member

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

The Honorable Hector Balderas
Attorney General of New Mexico
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501

Dear Mr. Attorney General,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced cooperation on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve "as the guardian of the legal rights of the citizens" and to "assert, protect, and defend the rights of the people."[2] These legal actions may even amount to an abuse of prosecutorial discretion. To assist in the Committee's oversight of this matter, we are writing to request information related to your office's role in this investigation.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[3] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies*, N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Bureaus of Attorney General, New York, May 12, 2016, *available at http://www.ag.ny.gov/bureaus*; Office of the Attorney General, U.S. Virgin Islands, Dept. of Justice, May 12, 2016, *available at* http://usvidoj.codemeta.com/DivisionContent_1.php?divId=84.

[3] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[4] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff and activist trial attorney Matthew Pawa, founder of the Global Warming Legal Action Project.[5]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[6] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[7] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[8]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[9]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between the New York Attorney General and Extremist Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists, including 2012 workshop participant Matthew Pawa, as well as representatives from groups such as

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[4] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[5] *Id.*
[6] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages*, Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[7] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[8] *Id.* [emphasis added]
[9] *Id.* [emphasis added]

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics in close coordination with certain special interest groups and trial attorneys that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.

To assist the Committee in its oversight of a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but by no later than noon on May 30, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of New Mexico and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of New Mexico and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of New Mexico and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

The Honorable Hector Balderas
May 18, 2016
Page 5

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

TANIA MAESTAS
Deputy of Civil Affairs

SHARON PINO
Deputy of Criminal Affairs

CARLA MARTINEZ
Chief of Staff for Operations

SONYA CARRASCO-TRUJILLO
Chief of Staff for Policy & Public Affairs

May 30, 2016

The Honorable Lamar Smith
Chairman, Committee on Science, Space & Technology
2321 Raburn House Office Building
Washington, DC 20515-6301

Dear Chairman Smith:

I am writing in response to your letter dated May 18, 2016 to Attorney General Balderas. In that letter, you made several requests for documents relating to what you assert is a first amendment issue stemming from several state Attorneys General exercising their authority to protect the health, safety, and welfare of their citizens from the effects of climate change. The Office of the New Mexico Attorney objects to your request and respectfully denies the allegations within your request.

The Office of the New Mexico Attorney General objects to your request on the grounds that the committee lacks jurisdiction to request this information from a state law enforcement agency. Your request is an infringement on the sovereign authority of this office and is improper. In addition, your assertions about this office's involvement in this issue are factually misguided. The Office of the New Mexico Attorney General has not issued any subpoena, civil investigative demand, or any other demand. Further, and to that end, this office has not been involved in a year's long "working group", nor is this office party to any other body that has, as you suggest, been mounting an investigation into fossil fuel companies or related research entities. You suggest that such conspiracy began as early as 2012. This is simply incorrect. The Office of the New Mexico Attorney General has only recently engaged with our sister states in an effort to knowledge share and better understand how the issue of climate change is impacting the citizens of their states, as well as ours. This office is not, nor has it ever been, been part of a systematic investigative scheme.

TELEPHONE: (505) 827-6000 • FAX: (505) 827-5826 • www.nmag.gov
MAILING ADDRESS: P.O. BOX 1508 • SANTA FE, NEW MEXICO 87504-1508
STREET ADDRESS: 408 GALISTEO STREET • SANTA FE, NEW MEXICO 87501

Our mission is to protect New Mexican families in order to make our communities safer and more prosperous. All actions taken on behalf of the Office of New Mexico Attorney General are taken with integrity and in furtherance of such mission. Please feel free to contact me if you have any additional concerns that I may answer.

Sincerely,

Tania Maestas

Tania Maestas
Deputy Attorney General

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

June 17, 2016

The Honorable Hector Balderas
Attorney General
State of New Mexico
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501

Dear Attorney General Balderas,

Thank you for your May 30, 2016, response. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[1] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[2] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] However, Congress' investigatory power is not without limits.[4] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.
[3] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[4] *Watkins v. U.S.*, 354 U.S. 178 (1957).

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[5] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[6] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[7] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[8] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[9] organizations that violate the civil rights of individuals,[10] state agencies involved in the Hurricane Katrina response,[11] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138 billion to fund research and development.[12] Of that total federal spending, approximately $40 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of

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[5] *McGrain* at 177, 181-182.
[6] *See McGrain*, 273 U.S. at 177, 181-182.
[7] *Eastland* at 509.
[8] CRS Report at 26.
[9] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[10] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[11] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[12] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

the Science Committee that offices such as yours and those similarly situated should not be taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued and contemplated by members the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes**, but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[13]

This statement suggests that his office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, he is saying that if his office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.

Additionally, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[14] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions

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[13] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available at* http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[14] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

and those of your fellow attorneys general indeed are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of New Mexico and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of New Mexico and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of New Mexico and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

The Honorable Hector Balderas
June 17, 2016
Page 5

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

The Honorable Eric Schneiderman
Attorney General of New York
Office of the Attorney General
The Capitol
Albany, NY 12224-0341

Dear Mr. Attorney General,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, you and other state attorneys general – the self-proclaimed "Green 20" – announced that you were cooperating on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve "as the guardian of the legal rights of the citizens" and to "assert, protect, and defend the rights of the people."[2] These legal actions may even amount to an abuse of prosecutorial discretion. To assist in the Committee's oversight of this matter, I am writing to request information related to your office's role in this investigation.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[3] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies*, N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Bureaus of Attorney General, New York, May 12, 2016, *available at http://www.ag.ny.gov/bureaus*; Office of the Attorney General, U.S. Virgin Islands, Dept. of Justice, May 12 ,2016, *available at* http://usvidoj.codemeta.com/DivisionContent_1.php?divId=84.

[3] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[4] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff and activist trial attorney Matthew Pawa, founder of the Global Warming Legal Action Project.[5]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[6] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[7] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[8]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[9]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between Your Office and Extremist Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists, including 2012 workshop participant Matthew Pawa, as well as representatives from groups such as

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[4] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[5] *Id.*
[6] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages,* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[7] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[8] *Id.* [emphasis added]
[9] *Id.* [emphasis added]

350.org and Greenpeace, met at the Manhattan offices of the Rockefeller Family Fund.[10] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[11] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[12] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[13]

Finally, on March 29, 2016, in the hours before you and other members of the Green 20, joined by former Vice President Al Gore, held your widely-publicized press conference announcing your cooperation on investigations against those who question the causes, magnitude, or best ways to address climate change, members of your group were briefed by 2012 workshop attendees Matthew Pawa of the Global Warming Legal Action Project and UCS's Peter Frumhoff. It has since come to light that your office willfully concealed the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa wrote to an attorney in your office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked an attorney in your office, "What should I say if she asks if I attended?"[14] Your attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[15]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[16]

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[10] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe,* WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.

[11] *Id.*

[12] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund,* Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*

[13] *Id.*

[14] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show,* WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

[15] *Id.*

[16] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions,* WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by you and other members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics taken in close coordination with certain special interest groups and trial attorneys may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.

To assist the Committee in its oversight of a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but by no later than noon on May 30, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of New York and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, and the Climate Reality Project, referring or relating to your office's investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of New York and any other state attorney general office referring or relating to your office's investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of New York and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all

documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
120 BROADWAY
NEW YORK, NY 10271

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

LESLIE B. DUBECK
COUNSEL

May 26, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

I write in response to the May 18, 2016 letter (the "Letter") signed by you and several other Republican members of the House Committee on Science, Space, and Technology (the "Committee") requesting that my office provide various documents and communications referring or relating to law enforcement and investigative activities of the Office of the Attorney General of New York ("NYOAG") concerning climate change.

NYOAG has a long, very proud history of aggressively protecting investors and consumers from corporate fraud. The matter that appears to be the focus of your attention is our ongoing investigation into whether ExxonMobil Corporation violated New York's securities, business and consumer fraud laws by making false or misleading statements to investors and consumers relating to climate change driven risks and their impact on Exxon's business. This investigation comes on the heels of an investigation NYOAG concluded last year into Peabody Energy Corporation, then the largest publicly traded coal company in the world, which found that Peabody made false and misleading statements to the public and investors regarding financial risks associated with climate change and the effects of potential regulatory responses on the market for coal.[1]

For the reasons set forth below, the NYOAG respectfully declines to provide the materials requested by the Letter. The Letter is premised on a series of incorrect statements and assumptions regarding the actions of the NYOAG and raises serious constitutional concerns,

[1] Under the agreement concluding the NYOAG investigation, Peabody committed to revising its disclosures to investors regarding the company's financial risks related to climate change. Assurance of Discontinuance at pp. 9-10, *In the Matter of Investigation by Eric T. Schneiderman, Attorney General of the State of New York, of Peabody Energy Corporation*, Assurance No. 15-242 (Nov. 8, 2015), http://ag.ny.gov/pdfs/Peabody-Energy-Assurance-signed.pdf.

including the lack of congressional jurisdiction over state law enforcement activities and the Committee's intrusion into sovereign state actions protected by the 10th Amendment to the U.S. Constitution.

First, the Letter makes unfounded claims about the NYOAG's motives. Our investigation seeks to ensure that investors and consumers were and are provided with complete and accurate information that is indispensable to the just and effective functioning of our free market. There is no basis for your suggestion that the NYOAG has been engaged in a "coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution." As I am sure you are aware, "the First Amendment does not shield fraud." *Illinois v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003) (allowing fraud claim and rejecting argument that fraudulent charitable solicitations are protected by the First Amendment); *People v. Coalition Against Breast Cancer, Inc.*, 22 N.Y.S.3d 562, 565 (2d Dep't 2015) (same); *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009) (holding that false and misleading statements about the health effects and addictiveness of smoking cigarettes were not protected by the First Amendment); *SEC v. Pirate Investor LLC*, 580 F.3d 233, 255 (2009) ("Punishing fraud, whether it be common law fraud or securities fraud, simply does not violate the First Amendment.").

Second, Congress does not have jurisdiction to demand documents and communications from a state law enforcement official regarding the exercise of a State's sovereign police powers, such as the NYOAG's investigation of ExxonMobil. Congress' powers are limited by the 10th Amendment to those granted by the U.S. Constitution, and its investigative jurisdiction is derived from and limited by its power to legislate concerning federal matters. *See, e.g., Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959); *Kilbourn v. Thompson*, 103 U.S. 168, 195-96 (1880). Thus, Congress' oversight authority does not extend to investigations by a state Attorney General. *See, e.g., Watkins v. United States*, 354 U.S. 178, 187 (1957) ("The power of the Congress to conduct investigations . . . comprehends probes into departments of the Federal Government . . . .").

Investigations and other law enforcement actions by a state Attorney General for potential violations of state law, as here, involve the exercise of police powers reserved to the States under the 10th Amendment, and are not the appropriate subject of federal legislation, oversight or interference. *See, e.g., New York v. United States*, 505 U.S. 144, 162 (1992) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.") Our federal system contemplates a crucial role for state law enforcement. *See* The Federalist No. 45 at 357 (James Madison) (Robert Scigliano ed., 2010) (the powers delegated "to the federal government are few and defined. . . . The powers reserved to the several states will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and property of the people, and the internal order, improvement, and prosperity of the state").

Third, we are not aware of any precedent supporting a Congressional investigation or oversight of a state Attorney General, as contemplated by the Letter. Indeed, absent an explicit authorization, a committee's investigative power is narrowly construed to avoid serious constitutional concerns, such as the state sovereignty issues that are implicated here. *See Tobin v. United States,* 306 F.2d 270, 275 (D.C. Cir.), *cert denied,* 371 U.S. 902 (1962) (overturning contempt conviction involving House Judiciary Subcommittee subpoena of Port of New York Authority records pursuant to "expansive investigation of an interstate compact agency" by Congress that had "never before [been] attempted"). The Letter does not identify any congressional authorization to engage in this inquiry; nor could it, given the constitutional principles discussed above. Under House Rule X, cited in the Letter, Congress has authorized the Committee on Science, Space, and Technology, to "review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development." Rule X(3)(k). Congress has not delegated this committee with any oversight authority concerning the investigations of state attorneys general regarding violations of state securities, consumer or business laws, nor could it. Moreover, throughout the Rules of the House of Representatives, context demands that "Government" with a capital "G" be understood as a proper noun to describe a specific government—the Federal Government—and not *all* governments. *See, e.g.*, Rule X(4)(c)(1)(B) (Committee on Oversight and Government Reform shall "evaluate the effects of laws enacted to reorganize the legislative and executive branches of the Government"). *See also* Gov't Printing Office Style Manual, Rule 3.19. The governments of the several states are distinct entities from the entity that is the Government of the United States. *United States v. Cruikshank*, 92 U.S. 542, 549 (1876) ("We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others . . . .").

We trust that you and the other signatory Committee members appreciate the importance of our federal system, state law enforcement activities, and the critical need to maintain their integrity and independence from federal interference.

Sincerely,

Leslie B. Dubeck
Counsel

cc: Honorable Eddie Bernice Johnson
Ranking Member, Committee on Science, Space, and Technology

Majority Staff, Committee on Science, Space, and Technology
Rayburn House Office Building, Room 2321

Minority Staff, Committee on Science, Space, and Technology
Ford House Office Building, Room 394

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

June 17, 2016

The Honorable Eric T. Schneiderman
Attorney General
State of New York
120 Broadway
New York, NY 10271

Dear Attorney General Schneiderman,

Thank you for your May 26, 2016, response. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[1] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[2] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] However, Congress' investigatory power is not without limits.[4] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.
[3] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[4] *Watkins v. U.S.*, 354 U.S. 178 (1957).

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[5] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[6] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[7] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[8] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[9] organizations that violate the civil rights of individuals,[10] state agencies involved in the Hurricane Katrina response,[11] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138 billion to fund research and development.[12] Of that total federal spending, approximately $40 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of

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[5] *McGrain* at 177, 181-182.
[6] *See McGrain*, 273 U.S. at 177, 181-182.
[7] *Eastland* at 509.
[8] CRS Report at 26.
[9] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[10] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[11] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[12] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

the Science Committee that offices such as yours and those similarly situated should not be taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued by your office and contemplated by the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff you stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes**, but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[13]

This statement suggests that your office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, you are saying that if your office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.

Additionally, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[14] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions

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[13] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available at* http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[14] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

and those of your fellow attorneys general indeed are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of New York and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of New York and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of New York and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Rep. Lamar Smith
Chairman

Frank D. Lucas
Rep. Frank D. Lucas
Vice Chairman

The Honorable Eric T. Schneiderman
June 17, 2016
Page 5

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
120 BROADWAY
NEW YORK, NY 10271

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

LESLIE B. DUBECK
COUNSEL

June 24, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

I am in receipt of your June 17, 2016 letter, which reiterates the request in your May 18, 2016 letter that the Office of the Attorney General of New York (NYOAG) provide certain materials to the House Committee on Science, Space and Technology. By letter dated May 26, 2016, we explained that the Committee does not have jurisdiction over a state Attorney General's investigation of potential violations of state laws and declined to provide the materials requested.

Your June 17 letter entirely ignores the important state sovereignty issues articulated in the NYOAG's response. Moreover, the letter's attempt to establish the Committee's jurisdiction remains unsupported. The letter (p. 3) claims jurisdiction based on an assertion that the NYOAG's investigation of ExxonMobil seeks to hold that company liable for fraud if the NYOAG "disagrees" with its scientists, which your letter hypothesizes "could have a chilling effect on scientists performing federally funded research." This reflects a fundamental misapprehension of the NYOAG's on-going investigation. As reflected by Attorney General Schneiderman's statement quoted in the June 17 letter, the NYOAG is solely investigating whether ExxonMobil made false or misleading statements to investors or consumers about the impacts of climate change on ExxonMobil's business in violation of New York's securities, business, and consumer fraud laws.

Accordingly, the NYOAG continues to decline to provide the materials requested.

Sincerely,

Leslie B. Dubeck
Counsel

cc: Honorable Eddie Bernice Johnson
Ranking Member, Committee on Science, Space, and Technology

Majority Staff, Committee on Science, Space, and Technology
Rayburn House Office Building, Room 2321

Minority Staff, Committee on Science, Space, and Technology
Ford House Office Building, Room 394

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
120 BROADWAY
NEW YORK, NY 10271

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

LESLIE B. DUBECK
COUNSEL

July 13, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

We have received your July 6, 2016 letter, which reiterates the requests made in prior letters that the Office of the Attorney General of New York (NYOAG) provide certain materials to the House Committee on Science, Space and Technology. We respectfully continue to decline these requests.

Your latest letter (at p. 1) accuses NYOAG of "attempt[ing] to mask the true purpose of [the NYOAG] investigation and mischaracterize the Committee's oversight." This accusation is demonstrably false.

As we have explained previously, NYOAG is investigating ExxonMobil for false or misleading statements to investors and consumers in violation of New York's laws—to wit, New York State General Business Law, Article 22-A § 349 & Article 23-A § 352, and New York State Executive Law § 63(12). Notwithstanding any speculation to the contrary, this is our investigation's true—and only—purpose.

Furthermore, for the reasons set forth in my previous letters, it is clear that your Committee does not have the authority that it has claimed—i.e., to conduct oversight to address the Committee's concern that a duly elected, constitutional officer of a separate sovereign government may be taking actions that "run counter" to his duties under State law (May 18, 2016 Letter at 1 & 3 (claiming jurisdiction based on oversight authority over "Government activities")). Your current explanation that the Committee has jurisdiction based on a concern for federally-funded scientists is inconsistent with your initial letter and equally unpersuasive, as it too turns on the false premise that the NYOAG is somehow investigating scientists' research or views.

Your July 6 letter suggests that we engage with the Committee staff to discuss your requests. As I conveyed to Mr. Brazauskas earlier, NYOAG staff are available to speak to

Committee staff, but request that minority staff be included in the conversation. Ranking Member Johnson, in her letter to you dated June 23, 2016, has expressed serious concerns as to the unprecedented nature of the oversight you are attempting to exercise. We sincerely hope that a conversation with majority and minority staff will lead to a better understanding of the NYOAG's constitutional role and the need to insulate its investigations from unconstitutional interference by a House committee.

Finally, we urge you to heed Ranking Member Johnson's request and provide an opportunity for all Committee members to express their views before issuing a subpoena and courting constitutional conflict. Certainly a due respect for federalism would at least demand that a representative from Texas, acting on his own, not be allowed to compel action from a constitutional officer of a sovereign state.

Sincerely,

Leslie B. Dubeck
Counsel

cc: Honorable Eddie Bernice Johnson
Ranking Member, Committee on Science, Space, and Technology

Majority Staff, Committee on Science, Space, and Technology
Rayburn House Office Building, Room 2321

Minority Staff, Committee on Science, Space, and Technology
Ford House Office Building, Room 394

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To The Honorable Eric Tradd Schneiderman
Attorney General of New York

You are hereby commanded to be and appear before the
Committee on Science, Space, and Technology

of the House of Representatives of the United States at the place, date, and time specified below.

☑ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: 2321 Rayburn House Office Building, Washington, D.C. 20515

Date: July 27, 2016 Time: 12:00 noon

☐ **to testify at a deposition** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

☐ **to testify at a hearing** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: _____

Date: _____ Time: _____

To any authorized staff member or the U.S. Marshals Service

to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, D.C. this 13th day of July, 2016

Lamar Smith
Chairman or Authorized Member

Attest:
Karen L. Haas
Clerk

SCHEDULE

In accordance with the attached schedule instructions, you, Eric Tradd Schneiderman, are required to produce the things described below:

1. All documents and communications between any officer or employee of the Office of the Attorney General of New York and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between any officer or employee of the Office of the Attorney General of New York and any officer or employee of any other state attorney general office, referring or relating to the Office of the Attorney General of New York's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between any officer or employee of the Office of the Attorney General of New York and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President, referring or relating to the Office of the Attorney General of New York's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Schedule Instructions

1. In complying with this subpoena, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Subpoenaed records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this subpoena has been, or is also known by any other name than that herein denoted, the subpoena shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF") files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this subpoena shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the subpoena was served.

8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the subpoenaed information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the subpoena cannot be made in full by July 27, 2016, at 12:00 noon, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided no later than July 26, 2016, at 12:00 noon.

12. In the event that a document is withheld in whole or in part on any basis, provide a log containing the following information concerning any such document: (a) the basis for withholding the document; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. In complying with the subpoena, be apprised that the U.S. House of Representatives and the Committee on Science, Space, and Technology do not recognize: any of the purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections; any purported privileges or protections from disclosure under the Freedom of Information Act; or any purported contractual privileges, such as non-disclosure agreements.

14. If any document responsive to this subpoena was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

15. If a date or other descriptive detail set forth in this subpoena referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the subpoena, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.

16. The things described in the schedule shall be produced in their current condition, as of July 13, 2016.

17. This subpoena is continuing in nature and applies to any newly-discovered information as to the time period January 1, 2012 to July 27, 2016. Any responsive record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

18. All documents shall be Bates-stamped sequentially and produced sequentially.

19. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building.

20. Upon completion of the production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in

your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), text messages, Google chat communications or other instant message communications, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

8. "You" or "your" means and refers to you as a natural person and as Attorney General of New York and any of the agencies, offices, subdivisions, entities, officials, administrators, employees, attorneys, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction in your personal capacity or at the Office of the New York Attorney General.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
120 BROADWAY
NEW YORK, NY 10271

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

LESLIE B. DUBECK
COUNSEL

July 26, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

This letter responds to the Subpoena issued on July 13, 2016, by you, as Chair of the House Committee on Science, Space, and Technology, to the New York State Office of the Attorney General (NYOAG).

The Subpoena is an unprecedented effort to target ongoing state law enforcement "investigation[s] or potential prosecution[s]." If enforced, the Subpoena will have the obvious consequence of interfering with the NYOAG's investigation into whether ExxonMobil made false or misleading statements in violation of New York's business, consumer, and securities fraud laws. Although the Committee purports to be acting out of First Amendment concerns, those concerns cannot be anything but pretense as "the First Amendment does not shield fraud." *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003).

The Subpoena brings us one step closer to a protracted, unnecessary legal confrontation, which will only distract and detract from the work of our respective offices. Accordingly, we continue to hope that the Committee Staff will be in touch, as they said they would be, to schedule a time to speak, with minority participation, about the Committee's requests. While the NYOAG will not allow a Congressional investigation to impede the sovereign interests of the State of New York, this Office remains willing to explore whether the Committee has any legitimate legislative purpose in the requested materials that could be accommodated without impeding those sovereign interests. Unfortunately, our attempts to initiate such a discussion—by telephone call to Committee Staff and in our written response to you on July 13—were met with a subpoena.

The Committee's demand for documents and communications from the office of a duly elected State Attorney General regarding an ongoing investigation of potential state law violations raises grave federalism concerns. *See, e.g.*, *FERC v. Mississippi,* 456 U.S. 742, 761

(1982) ("[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature."). Indeed, we have found no precedent for the issuance of such a subpoena.

These problems are compounded by the inability to ascertain the subject under inquiry (due in part to the Chair's and certain members' vague and shifting statements), how the Subpoena's requests are pertinent to that subject, or even the Committee's source of authority for the putative investigation. *See Watkins v. United States*, 354 U.S. 178, 214–15 (1957).

Subject to further supplementation, the NYOAG presents the following objections to the Subpoena. These objections challenge the Subpoena's validity and explain why compliance is not currently possible.[1] Again, the NYOAG stands ready to discuss these issues and your concerns with staff, and to explore whether we can come to a mutually beneficial understanding of the roles of our respective offices.

Should you choose to pursue compliance with the Subpoena, the NYOAG requests—consistent with Ranking Member Johnson's request for Committee involvement (July 7, 2016 Press Release)—the opportunity to be heard by the full Committee on these objections and to have the whole Committee resolve all objections to compliance with the Subpoena. While the Committee Rules may authorize the Chair to issue a subpoena, neither those Rules nor the House Rules provide for resolution of objections by less than the whole Committee. Moreover, because the Subpoena appears to be utterly unprecedented in seeking information from a State Attorney General about an ongoing investigation of potential violations of state law, resolution of these objections by less than the whole Committee would show a profound disrespect for the important constitutional interests at stake.

A. The Subpoena Violates New York's Sovereignty and Interferes with a State Law Enforcement Investigation

To be valid, the exercise of a committee's investigative power must be "related to and in furtherance of a legitimate task of Congress." *Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 505 (1975). Congress's authority ends where States' sovereign rights begin. That inherent sovereignty is reflected in the U.S. Constitution's Tenth Amendment, which "confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. 144, 157 (1992). And it is generally understood that a Congressional committee may not "inquire into matters which are . . . reserved to the States." Brown *et al.*, House Practice: A Guide to the Rules, Precedents and Procedures of the House 249 (GPO 2011).

On its face, the Subpoena transgresses limits on Federal power by installing individual members of Congress as overseers of New York's local law enforcement decisions. Federal

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[1] The recipient of a subpoena is entitled to have objections resolved before a demand for compliance. *See, e.g.*, *McPhaul v. United States*, 364 U.S. 372, 378–79 (1960); *Quinn v. United States*, 349 U.S. 155, 167 (1955). A recipient is not required to comply with any portion of a partially invalid subpoena. *See United States v. Patterson*, 206 F.2d 433, 434 (D.C. Cir. 1953) (citing *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221 (1951)).

interference with state law enforcement "is peculiarly inconsistent with our federal framework." *Cameron v. Johnson*, 390 U.S. 611, 618 (1968) (quotation marks omitted). As several Democratic members of the Committee have observed, the Committee's request "is not lacking for irony" given that States' rights have long been "a central pillar of conservative philosophy." June 23, 2016 Letter from Ranking Member Johnson at 7 (quoting June 2, 2016 Letter from Hon. Donald S. Beyer, Jr. *et al.*, at 2).

Further, compelling State Attorneys General to report to a Congressional committee regarding a pending state investigation "could not do otherwise than seriously prejudice law enforcement." Position of the Executive Department Regarding Investigative Reports, 40 U.S. Op. Att'y Gen. 45, 46 (1941) (explaining basis for U.S. Attorney General's decision not to produce FBI and DOJ records in Congressional investigation).

That the Subpoena targets the NYOAG's communications with other entities—rather than purely internal communications—does not lessen the constitutional harm. As the Chair noted in the correspondence preceding the Subpoena, New York and other States are working together to investigate possible state law violations arising from what certain companies disclosed (or failed to disclose) to investors and consumers. Other States—and their Attorneys General—have the same sovereign interests as New York does, and any communications with those States were made in furtherance of a common law enforcement interest.

In addition, the nongovernmental entities named in the Subpoena have First Amendment rights of free speech and "to express their ideas, hopes, and concerns to their government and their elected representatives," rights that are "integral to the democratic process." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011) (Kennedy, J.). "In representing the People," New York's Attorney General has gathered facts from various individuals and entities and may take these into account in "decid[ing] upon the remedies which he wishes to employ." *People v. Bunge Corp.*, 25 N.Y.2d 91, 100 (1969). Disclosure of these communications to the Committee would stymie the NYOAG's law enforcement functions and chill communications between third parties and the NYOAG, along with other exercises of valued First Amendment rights.

This Office is not aware of any prior Congressional subpoena directed at a State Attorney General, let alone a subpoena seeking to compel an Attorney General to turn over confidential law enforcement material relating to the ongoing "investigation or potential prosecution of" state law violations. *See* Schedule to Subpoena. This precedential vacuum bars any "assumption that the Federal Government may command the States' executive power" in this fashion. *Printz v. United States*, 521 U.S. 898, 909 (1997) (Scalia, J.). We are aware of only one somewhat analogous subpoena ever issued by Congress, and it was held unenforceable by the D.C. Circuit to the extent it purported to authorize "such a novel investigation" into state-level matters—power not inferable from the general language setting forth the committee's jurisdiction. *Tobin v. United States*, 306 F.2d 270, 276 (1962). The court went on to warn that even an express authorization by the House to conduct such a "deep and penetrating" inquiry into the operations

of a state-level agency (there, the Port Authority of New York and New Jersey[2]) "would of course present constitutional issues" regarding the division of power in our federal system. *Id.* at 276. That system "requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999) (Kennedy, J.).

Just as Congress may not pass legislation "that is destructive of state sovereignty," *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985), the Committee may not destroy state sovereignty by intruding into an ongoing state law enforcement investigation by an elected state official through use of a Congressional subpoena.[3] "[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *New York*, 505 U.S. at 166.

B. Specific Objections and Requests for Clarification

Apart from the objection that compliance with the Subpoena would impair New York's sovereign integrity, as well as the NYOAG's ability to conduct law enforcement investigations of potential violations of state law, the Subpoena is invalid for other reasons.

1. The Committee has not been authorized to request documents relating to a State's investigation or potential prosecution of state law violations

To investigate a topic, a Congressional committee must have "a clear delegation" of authority to do so. *Gojack v. United States*, 384 U.S. 702, 716 (1966). A committee cannot compel someone "to make disclosures on matters outside that area." *Watkins*, 354 U.S. at 206. Similarly, a House committee may issue subpoenas only "[f]or the purpose of carrying out any of its functions and duties." House Rule XI.2(m)(1).

The May 18, 2016 letter from the Chair and certain Committee members professed no legislative purpose, invoked no express oversight authority, and purported to exert jurisdiction as if the NYOAG were a mere department of the Federal Government amenable to oversight by Congress. While the later June 17, 2016 letter continued to rest on oversight jurisdiction over the Federal Government, it also asserted a new claim of jurisdiction: the Committee's special oversight function to "review and study on a continuing basis laws, programs, and Government

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[2] The federalism concerns raised by the Subpoena are significantly greater than those that led to the D.C. Circuit's warning in *Tobin*. There, the Congressional subpoena was issued to a bistate entity created with the consent of Congress; the Court of Appeals still upheld the entity's refusal to produce internal documents to avoid constitutional problems. Here, Congress seeks to compel the production of documents in an open investigative file maintained by a State Attorney General.

[3] *See In re Special April 1977 Grand Jury*, 581 F.2d 589, 592 (7th Cir. 1978) (recognizing possibility that a *grand jury* subpoena might impermissibly impair a State's integrity or ability to function effectively in a federal system, but rejecting the argument because the grand jury there "ha[d] not embarked on a 'grandiose, brazen fishing expedition . . . into the affairs of the State of Illinois'"). Neither that decision, nor any of the other decisions cited in the July 6, 2016 letter (at n.3), supports the invasive subpoena issued here. Indeed, the other decisions cited did not involve a state official's invocation of state sovereignty at all.

activities relating to nonmilitary research and development," House Rule X.3(k), that fall within the Committee's authority over legislation for "[s]cientific research, development, and demonstration, and projects therefor" and for "[e]nvironmental research and development," House Rule X.1(p)(4), (14). Any "right to exact testimony and to call for the production of documents must be found in this language." *United States v. Rumely*, 345 U.S. 41, 44 (1953). None is apparent.

The above-quoted provisions of the House Rules do not contemplate the Committee's exercising oversight by collecting materials relating to a state law enforcement official's pursuit of possible violations of state law. Although Committee oversight extends to "Government activities," House Rule X.3(k), the word "Government" plainly refers to the Federal Government, *see, e.g.*, House Rule X.1(n)(11) (mentioning "[r]elationship of the Federal Government to the States and municipalities generally"). Indeed, several other Committee members agree that this investigation "patently exceeds" the Committee's jurisdiction by "squarely represent[ing] an attempt to oversee state prosecutorial conduct." June 2, 2016 Letter from Beyer *et al.*, at 2; *see also* June 23, 2016 Letter from Ranking Member Johnson at 9 (stating the Committee "fall[s] far short of having jurisdiction over state police powers or fraud laws").

Here, again, the Committee appears to ignore the "critically important" presumption "that Congress does not normally intrude upon the police power of the States." *Bond v. United States*, 134 S. Ct. 2077, 2092 (2014) (Roberts, C.J.). Few features of our constitutional system are more valuable than "the exercise of state officials' prosecutorial discretion," which "involves carefully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State." *Id.* at 2092–93. The Committee can point to no evidence that the NYOAG's fraud investigation is anything other than an appropriate exercise of state police power. Nevertheless, even if some committee members disagree with the purpose of the NYOAG's investigation, the Committee has no jurisdiction to investigate the use of state police power. After all, the Committee's jurisdiction (House Rule X) does not, and could not, include language evidencing a "clear intent" to usurp such state-level decision making. *See Bond*, 134 S. Ct. at 2093.

Moreover, it is not enough that some creative attorney might find a way theoretically to connect this inquiry to the Committee's generally stated authority. The Committee's authorizing language will be read narrowly "to obviate the necessity of passing on serious constitutional questions," especially given that the Committee's investigation is "novel." *See Tobin*, 306 F.2d at 274–75. For example, even an express grant of subpoena power over interstate compacts will not validate a "sweeping investigation" into the inner workings of a multistate agency created by such a compact. *Id.* at 271, 275. Likewise, the courts require Congress to be more "explicit" if it "wishe[s] to authorize so extensive an investigation of the influences that form public opinion" as by subjecting communications between various private and governmental entities to disclosure and review. *Rumely*, 345 U.S. at 47.

2. The Committee has not identified any specific oversight function or existing or prospective legislation to which the Subpoena relates

The June 17, 2016 letter (at 3) accuses States of violating unnamed "scientists' First Amendment rights" and cites "a duty to investigate" these purported violations.[4] "[T]he power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn v. United States*, 349 U.S. 155, 161 (1955). "Nor is the Congress a law enforcement or trial agency." *Watkins*, 354 U.S. at 187.

In issuing the Subpoena, the Chair and certain Committee members appear to have ignored these important separation-of-powers distinctions. At the recent press conference announcing the Subpoena, Chairman Smith stated: "In my view it's scientific opinion and free speech, not fraud. And as I said I'm 100% confident that a court will find that." That is ultimately a question for a state court to decide in the event litigation is commenced. Well-settled limitations on legislative power demand that Congress leave such a question—*i.e.*, whether "particular actions [have] violated the" law—"for judicial determination." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1325–26 (2016). As members of your own Committee acknowledge, "Judges, rather than Members of Congress, have both the jurisdiction and the legal training to determine the merits of legal arguments." June 2, 2016 Letter from Beyer *et al.*, at 4.

Nor is it apparent how the Subpoena is "intended to inform Congress in an area where legislation may be had." *Eastland*, 421 U.S. at 506. The Committee has mentioned a vague "intent of providing a legislative remedy, if warranted," for the alleged chilling of speech. June 17, 2016 Letter at 4. However, Congress's power is limited in this area. Congress has no power to "decree the substance of" the Bill of Rights or "to determine what constitutes a constitutional violation." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (quotation marks omitted). The Framers of our Constitution rejected "a system of intermingled legislative and judicial powers," along with the "factional strife and partisan oppression" that such a system inevitably produces. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (Scalia, J.).

3. The inquiry's subject matter otherwise remains uncertain

The recipient of a Congressional subpoena has the right to be "adequately apprised" of the inquiry's subject matter and the pertinency thereto of the questions before responding. *Barenblatt v. United States*, 360 U.S. 109, 116–17 (1959); *see also Wilkinson v. United States*, 365 U.S. 399, 409 (1961). Assessing the legal sufficiency of a Congressional demand for information requires determining the subject matter of the underlying inquiry. *See, e.g.*, *Wilkinson*, 365 U.S. at 407. An "authorizing resolution, the remarks of the chairman or members of the committee, or even the nature of the proceedings themselves, might sometimes make the topic clear." *Watkins*, 354 U.S. at 209. In the absence of a specifically expressed legislative goal,

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[4] The letter (at 2) also cites "approximately $40 billion" in federal research spending that "is allocated by departments and agencies under the Science Committee's jurisdiction," without tying any of that money to research relating to the NYOAG's investigation of securities fraud, business fraud, or consumer fraud.

the vague and shifting statements of purpose by the Chair and Committee members "leave the matter in grave doubt." *See id.* at 206.

The Subpoena does not describe the investigation's subject matter or how the material sought might further the Committee's inquiry. Nor has the Committee pointed to any specific authorizing resolution. Other sources shed minimal light on the inquiry's true goal:

- The May 18, 2016 letter professed (at 1) that the Committee was "conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution." The letter went on to question the state investigators' "impartiality and independence" and their use of state "taxpayer dollars" (at 4), and whether the investigations "run counter to an attorney general's duty to serve" the public interest or "amount to an abuse of prosecutorial discretion" (at 1).

- The letter of June 17, 2016 (at 2) shifted the focus from state to federal taxpayers, relaying a new purpose of "ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry." The letter concluded (at 3–4) by stating that "[t]he Committee's investigation is intended to determine whether" the various state investigations were "chill[ing] scientific research, including research that is federally-funded."

- The letter of July 6, 2016 (at 2) goes farther, calling it "a goal of this Committee" to protect the ability of all scientists "to conduct research uninhibited by the potential adverse effects of investigations by law enforcement"—now apparently without regard for whether the investigation is lawful or chills *protected* speech, as distinguished from unprotected speech, including speech used to perpetrate fraud.

- Finally, at a press conference about the Subpoena, the Chair and several Committee members returned to the premise that state officials were abusing their discretion. According to Rep. Darin LaHood (R-IL), "[p]rosecutors shouldn't be in this business. It really is an abuse of power." To Rep. Randy Weber (R-TX), the Attorneys General are acting "way beyond the scope of their job duties." According to Rep. Warren Davidson (R-OH), the Attorneys General "are using taxpayer dollars from their states to manufacture charges to send a political message," which "demonstrates a clear deviation from the legal duties of an Attorney General and the possible abuse of their judgment." Chairman Smith likened the investigations "to a form of extortion" to prod settlements, so that the Attorneys General "can obtain funds for their own purposes."[5]

As the Supreme Court has held, "an authoritative specification" of the investigation's subject matter is "necessary for the determination of pertinency." *Gojack*, 384 U.S. at 717. Here,

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[5] There is no basis for such speculation. New York law narrowly limits the uses to which settlement moneys can be put, and generally requires that settlement funds not for the benefit of individually harmed parties be deposited in the State's general fund for appropriation by the Legislature. *See* N.Y. Exec. Law § 63(16).

"the broad and conflicting statements of the committee members" make that determination all but impossible. *Id.* at 709 n.7. Indeed, the "vague" and "general" statements thus far suggest that "there [is] no subject." *United States v. Peck*, 154 F. Supp. 603, 611 (D.D.C. 1957). Given the dearth of clarity, the Committee must "state for the record the subject under inquiry" before any response to the Subpoena may be required. *Watkins*, 354 U.S. at 214–15.

4. The requested items are not pertinent to any arguably legitimate topic of the Committee's investigation

Where the declarations of purpose are "as uncertain and wavering as" here, divining what may be pertinent to a committee's inquiry "becomes extremely difficult." *Watkins*, 354 U.S. at 206. As already shown, however, alleged abuse of state discretion over state law enforcement is categorically not a proper matter of Committee inquiry. *See supra* A & B.1. Even if uncovering alleged First Amendment violations were a proper inquiry (and it is not, *supra* B.2), the materials the Subpoena seeks bear scant connection to that objective.

The Committee asserts that the NYOAG's investigative efforts "have the potential to chill scientific research," and it desires to know whether the investigations "are having such an effect." June 17, 2016 Letter at 3–4. As stated in each of the three letters sent in response to the Chair's letters, the NYOAG's relevant investigation (that of ExxonMobil) solely concerns potentially misleading factual statements made to investors and consumers, which would violate New York State law, to wit, New York's General Business Law, Article 22-A § 349 & Article 23-A § 352, and New York's Executive Law § 63(12). As the Supreme Court has unequivocally held: "[T]he First Amendment does not shield fraud." *Telemarketing Assocs.*, 538 U.S. at 612; *see also United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (Kennedy, J.) (reaffirming that First Amendment erects no bar to restricting factual misstatements made for monetary gain).[6] Several members of your own Committee correctly describe New York's activities as an "appropriate exercise of state police power" regarding potential violations of state law (June 10, 2016 Letter from Hon. Paul D. Tonko *et al.*, at 1), and a "proper investigation" into possibly actionable "fraudulent activity" (June 2, 2016 Letter from Beyer *et al.*, at 4).

In any event, the Committee has yet to suggest how the subpoenaed documents would be pertinent to such a professed inquiry. The Subpoena demands "[a]ll documents and communications" between anyone at the NYOAG and anyone at other federal and state agencies or private organizations, in any way "referring or relating to" ongoing investigations. *See* Schedule to Subpoena. This "dragnet seizure" appears "unrelated to [any] legislative business in hand." *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936); *see also Tobin*, 306 F.2d at 276 (holding documents "related only to the why" of state-level public administration to fall outside legitimate scope of Congressional inquiry).

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[6] Similarly, under federal law, a company may face liability for skewing or suppressing information the release of which could pose "a significant risk to its leading revenue-generating product." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 46–47 (2011). That the false statements happen to touch on evolving scientific concepts presents no First Amendment problem. *See id.* The Committee's approach simply ignores this well-established law.

Indeed, the relevance of the requested materials appears to be a mystery even to the Chair who unilaterally issued the Subpoena. At the press conference announcing its issuance, Chairman Smith confessed: "I don't know what we will find. It's possible that we might find an intent to intimidate or possible infraction of laws. We don't know. That's why we're asking for this information." Such an invasive request for confidential law enforcement material under hazy authorization and without the slightest inkling of what the material may contain exposes the lack of a valid legislative purpose, and suggests that the Committee's inquiry is nothing more than a fishing expedition.

5. The Subpoena calls for the production of documents that are privileged, confidential, or otherwise protected from disclosure

In New York, the State enjoys the same privileges against disclosure of protected information as do private parties. *See* N.Y. C.P.L.R. § 3102(f). Attorney-client privileged materials and attorney work product are absolutely immune from discovery, whereas trial preparation materials have a qualified privilege from release. *See id.* § 3101(b)–(c). New York legislation also shields from disclosure materials "compiled for law enforcement purposes," if publication would "interfere with law enforcement investigations." Public Officers Law § 87(2)(e). These provisions cover civil as well as criminal enforcement activities. *See James, Hoyer, Newcomer, Smiljanich & Yanchunis, P.A. v. State Office of Att'y Gen.*, 2010 WL 1949120, at *8 (Sup. Ct. N.Y. County 2010). And their protection extends to communications with third parties—such as confidential sources, tipsters, whistleblowers, or others—so long as disclosure would interfere with a law enforcement investigation.

These privileges and protections from disclosure apply to certain communications with others outside the State, if in furtherance of a common interest of the parties and pursuant to an understanding that the parties will maintain the confidence of the communications. *See Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 2016 WL 3188989, at *1 (N.Y. Ct. App. June 9, 2016); *R.F.M.A.S., Inc. v. So*, 2008 WL 465113, at *1 n.2 (S.D.N.Y. 2008) (citing *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 581 (9th Cir. 1987)).

The ability to maintain the confidentiality of communications is critical in an ongoing law enforcement investigation. "Counsel for a defendant or prospective defendant could have no greater help than to know how much or how little information the Government has." 40 U.S. Op. Att'y Gen. at 46 (opinion of U.S. Attorney General Robert H. Jackson). To justify such an incursion into an ongoing state investigation, the Committee must articulate a need for any confidential information sufficient to override New York's policy choices to shield the material from disclosure. Anything less would invalidate the usual presumption "that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties." *Exxon Corp. v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978).

The Subpoena here provides that neither the House nor the Committee recognizes "any of the purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections; . . . or any purported contractual privileges, such as non-disclosure

agreements." Schedule Instructions ¶ 13. The Committee has delegated subpoena power to the Chair, *see* Committee Rule IX, pursuant to a House Rule authorizing such delegation, House Rule XI.2(m)(3)(A)(i). There is no Committee rule delegating the authority to overrule claims of privilege to the Chair. In contrast, the Committee Rules do permit the Chair to decide "claims of common-law privileges made by witnesses in hearings"; even then, the delegated authority is subject to appeal to the Committee. Committee Rule III(d). Because the Chair has no delegated authority to determine privilege claims unilaterally, and because the requests are an unprecedented incursion into an ongoing state investigation, the NYOAG expects that claims of privilege will be decided by the whole Committee on Science, Space, and Technology.

* * *

For the foregoing reasons, the NYOAG objects to the Subpoena and cannot, and will not, comply with it. In addition to the obvious Tenth Amendment concerns, the target of a Congressional inquiry cannot be compelled to make disclosures "with so little guidance." *Watkins*, 354 U.S. at 214.

While the Committee considers these objections, the NYOAG will continue to explore whether the Committee has any legitimate legislative purpose in the requested materials that could be provided without impairing the sovereign interests of the State of New York. We look forward to the opportunity to be heard by the Committee as a whole on these objections.

Sincerely,

Leslie B. Dubeck
Counsel

cc: Honorable Eddie Bernice Johnson
Ranking Member, Committee on Science, Space, and Technology

Majority Staff, Committee on Science, Space, and Technology
Rayburn House Office Building, Room 2321

Minority Staff, Committee on Science, Space, and Technology
Ford House Office Building, Room 392

Honorable Paul Tonko
Member, Committee on Science, Space, and Technology

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ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

LESLIE B. DUBECK
COUNSEL

August 18, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

I write on behalf of the New York Office of the Attorney General ("NYOAG") to state our deep concerns about how the staff of the House Committee on Science, Space, and Technology is handling communications with the NYOAG regarding the Subpoena issued to our Office on July 13, 2016.

As you know, by letter dated July 26, 2016, the NYOAG objected on a number of grounds to your Subpoena's requests for documents from an ongoing, confidential state fraud investigation. For the reasons set forth in that letter, the requests violate New York's sovereignty and fundamental principles of federalism. As the U.S. Supreme Court has clearly and repeatedly reaffirmed, "States retain broad autonomy in structuring their governments and pursuing legislative objectives" within a federal system that "preserves the integrity, dignity, and residual sovereignty of the States." *Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013) (Roberts, C.J.) (quotation marks omitted). The NYOAG's objections to the Subpoena remain outstanding, as do its requests for more information on the source of the Committee's authority, the investigation's actual subject matter, its legislative object (if any), and the relationship between the Subpoena's requests and that legislative object.

Nonetheless, NYOAG has stated an interest in having a staff-level discussion regarding whether the Committee has any legitimate legislative purpose that could be accommodated without impeding New York's sovereign interests. The NYOAG stated its willingness to have such a conversation both before the Subpoena was issued and in our July 26 letter response to the Subpoena. Majority Staff followed up to schedule such a discussion, but stated that it would not allow Minority Staff to participate in it. According to Majority Staff, the Minority has decided not to join in the oversight in this matter and, under "long-standing" Committee practice, will be excluded from any discussion regarding the Subpoena.

Your staff's explanation is categorically false. Contrary to Majority Staff's recent claims, the Committee's "long-standing practice"—from its creation until January 2015—had been to require a full Committee vote or consent of the Ranking Member prior to the issuance of a subpoena, ensuring bipartisan participation in Committee business. Nor can *any* Congressional committee lay claim to a long-standing practice of subpoenaing the open investigative file of a State Attorney General. "[T]he Congressional Research Service has identified no other example—in over 240 years of United States history"—of a Congressional committee issuing such a subpoena. Aug. 3, 2006 ltr. from the Hon. Elizabeth Warren *et al.* to Chairman Smith.

It is also inaccurate to describe the Committee's Minority Members as not participating in this matter. Before the Chair's unilateral issuance of the Subpoena, the Ranking Member called for a Committee meeting and stated that "Committee Members should not be disenfranchised from voting on [the] matter." July 7, 2106 Statement. Having ignored the Ranking Member's concerns and issued the Subpoena anyway, your staff cannot now rely upon the Minority's alleged non-participation to justify continued exclusion.

Other than invoking a so-called "long-standing" practice, the Majority Staff have not articulated any reason that staff for the Democratic Members of the Committee should be excluded from discussions about a Committee subpoena. The NYOAG can only conclude that the decision to exclude the minority is nothing more than partisan gamesmanship, which the NYOAG will not participate in or condone.

Accordingly, the NYOAG requests that Minority Staff be included on all correspondence from and substantive communication with the Committee and its staff. The NYOAG remains available to speak with Committee Staff, so long as Minority Staff is not excluded from such discussions.[1]

Sincerely,

Leslie B. Dubeck
Counsel

cc: Honorable Eddie Bernice Johnson
Ranking Member, Committee on Science, Space, and Technology

[1] Although the Chair now has unilateral Subpoena authority, quorum requirements in the Committee's rules prohibit any individual member from conducting all other official Committee business (besides issuing subpoenas). It is, of course, a "reasonable expectation" of the NYOAG that the Committee will "adhere to its own rules." *Yellin v. United States*, 374 U.S. 109, 124 (1963). A conversation with Majority Staff—whether or not the Minority is excluded—is thus insufficient to resolve the NYOAG's outstanding objections.

cc (cont'd):

Majority Staff, Committee on Science, Space, and Technology
Rayburn House Office Building, Room 2321

Minority Staff, Committee on Science, Space, and Technology
Ford House Office Building, Room 392

Honorable Paul Tonko
Member, Committee on Science, Space, and Technology

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

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August 23, 2016

The Honorable Eric T. Schneiderman
Attorney General
State of New York
120 Broadway
New York, NY 10271

Dear Attorney General Schneiderman,

The Science, Space, and Technology Committee ("Committee") is in receipt of your July 26, 2016, letter refusing to produce documents and information pursuant to a validly-issued congressional subpoena served and accepted on July 13, 2016. Your office's objections to the July 13 subpoena include issues related to the Committee's authority, jurisdiction, and pertinence, as well as concerns regarding both the Tenth and First Amendments of the Constitution. As explained in more detail below, the Committee finds these objections without merit.

I. The Committee's Investigation Is Legally Sufficient.

The Committee is conducting an investigation to determine whether the actions of your office are having an adverse impact on federally-funded scientific research. If such an adverse impact is discovered, the Committee may consider changes to federal law and/or the amount and allocation of federal funding for scientific research. The Committee's goal is to maximize the efficient and effective use of federal tax dollars intended to advance the progress of science without regard to non-scientific considerations such as a fear that certain types of scientifically justified research may lead to costly state investigations and adverse political pressure.

Your office, at the behest of various environmental groups, is investigating alleged fraud by Exxon and others, and to that end has issued subpoenas demanding the production of documents and communications between, among others, Exxon and scientists, both internal and external, who conducted research relevant to the issue of climate change. This research is funded by a variety of public and private sources, including the federal government. Although you have not made your subpoena to Exxon publically available, it is likely that your demands will include the work product of federally funded researchers. Why won't you make your subpoena public? What are you hiding?

The Supreme Court, in *Wilkinson v. United States*,[1] established a three prong test for determining the legal sufficiency of a congressional subpoena. First, the Committee's investigation of the broad subject matter must be authorized by Congress.[2] Second, *Wilkinson* requires that the Committee have a "valid legislative purpose." Finally, *Wilkinson* requires that the demand – in this case, the subpoena – be pertinent to a subject matter authorized by Congress.[3] As we now explain, the Committee clearly satisfies all three of the *Wilkinson* parameters for a legitimate and constitutionally authorized legislative investigation.

A. The Committee's Investigation Is Authorized.

First, with respect to authorization, this Committee is charged by the House with ensuring that the United States remains the world leader in scientific discovery, research, and innovation. The Committee furthers this goal by authorizing the use of federal funds, adopting legislation establishing federal policy regarding science and scientific research, and conducting oversight and investigative activities. In the Committee's view, ensuring that scientists are free to pursue research and intellectual inquiry in accordance with scientific principles without fear of reprisal, harassment, or undue burden is necessary for the American scientific enterprise to remain successful and for federal funding of scientific research to be most effective. Accordingly, the Committee has an interest in ensuring that scientific research is not stifled by legal inquiries such as the investigation launched by your office.

As the House's chief authorizing body for research and development activities, the Committee's interest in the U.S. scientific enterprise is well established. Pursuant to House Rule X, the Committee has legislative and oversight responsibility over "[a]ll energy research, development, and demonstration, and projects therefor, and all federally owned or operated nonmilitary energy labs; Environmental research and development; Marine research; Commercial application of energy technology; and Scientific research, development, and demonstration, and projects therefor."[4] House Rule X is explicit in stating that "all bills, resolutions, and other matters relating to subjects within the jurisdiction of the standing committees . . . shall be referred to those committees."[5]

The Committee has a long history of exercising both legislative and oversight functions within its research and development jurisdiction. In the 114th Congress, the Committee reported, and the House passed H.R. 1806, the America COMPETES Reauthorization Act of 2015, which authorized funds for research and development enterprise at the Department of Energy ("DOE"), National Science Foundation ("NSF"), and the National Institute of Standards and Technology ("NIST").[6] The Committee was the source of similar legislation in 2007 and 2010.[7] This

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[1] *Wilkinson v. United States*, 365 U.S. 399, 408-09 (1961).
[2] *Id.*
[3] *Id.* at 409.
[4] Clause 1(p) of Rule X.
[5] Clause 1 of Rule X.
[6] H.R. 1806, America COMPETES Reauthorization Act of 2015 (introduced Apr. 15, 2015, passed by the U.S. House of Representatives on May 20, 2015) (emphasis added).
[7] H.R. 2272, America COMPETES Act (P.L. 110-69) 2007; H.R. 5116, America COMPETES Reauthorization Act of 2010 (P.L. 111-358) 2011.

Congress, the Committee has been referred legislation on topics including low-dose radiation research, harmful algal blooms, the Environmental Protection Agency's ("EPA") Science Advisory Board, DOE labs, ocean acidification, and marine hydrokinetic renewable energy. To date, 163 bills or resolutions have been referred to the Committee.

Similarly, the Committee's oversight history is equally robust, with recent oversight inquiries and investigations into subjects ranging from NSF and DOE research grant-making procedures to EPA permitting processes. Two recent examples of the Committee's oversight work related to protecting scientists and researchers involve two cases in which a DOE scientist and a Food and Drug Administration scientist were separately targeted for communicating with Congress. Cases such as these are extremely troubling, and the Committee has a duty to ensure that *all* scientists are able to conduct research free from interference and intimidation and without having the conduct of their scientific inquiries affected by political or ideological pressures or fear of reprisal.

Part and parcel of the Committee's oversight power is the ability of the Chairman to issue subpoenas and negotiate subpoena compliance without minority participation. Your August 18, 2016, letter accusing my staff of "partisan gamesmanship" reveals a profound misunderstanding of Committee and House rules.[8] Specifically, Rule IX of the Science Committee rules delegates the power to authorize and issue subpoenas to the Chair of the Committee, as provided under clause 2(m)(3)(A)(i) of House Rule XI, which gives the Committee the option to do so.[9] The Committee and my staff have therefore followed all applicable rules in negotiating your compliance with the subpoena. Before you further accuse my staff of "categorically false" explanations, I suggest you familiarize yourself with these rules and procedures. Staff remain happy to assist you with any questions you may have on these points.

B. The Committee Has a "Valid Legislative Purpose."

Second, the Committee clearly satisfies *Wilkinson*'s requirement that a "valid legislative purpose" exists. For instance, under Rule X, this Committee authorizes all federal research and development funding that is not military or medical. Accordingly, should your investigative actions cause or threaten to cause an imbalance in scientific inquiry for non-scientific reasons, the Committee could seek to correct such an imbalance through its authorization power by (i) directing certain research be federally funded, (ii) redirecting current federal scientific research, or (iii) authorizing federal funds for more targeted research at the agencies under the Committee's jurisdiction. The documents and information compelled by the July 13 subpoena directly bear on whether such corrective action by the Committee is necessary.

In addition, the Committee has a responsibility to ensure that taxpayer dollars authorized and appropriated by Congress are not being misspent. The Committee has had a longstanding interest in grants funded by NSF, including those awarded to universities and private companies.

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[8] Letter from Leslie B. Dubeck to Hon. Lamar Smith (Aug. 18, 2016).

[9] Rule IX of the Rules of the H. Comm. on Science, Space, & Tech. (114th Cong.), *available at* https://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/Committee%20on%20Science%2C%20Space%2C%20and%20Technology%20Rules%20114th%20Congress%20v2_0.pdf.

Given the Committee's jurisdiction over NSF, the Committee also has an interest in the research funded by NSF grants. Most research is funded by a combination of private and government sources.[10] Like many other large energy companies, researchers employed by Exxon have received grant awards from federal sources. Additionally, NSF and Exxon jointly fund projects and programs such as Research Experiences in Solid Earth Science for Students, and the American Mathematical Society Task Force on Excellence. Furthermore, Exxon partners with universities, themselves recipients of millions of dollars in federal funds, to conduct research. If, as a result of your investigation, the private sector feels pressure to make research funding decisions based in part on a desire to avoid burdensome state investigations and political or ideological coercion rather than on the basis of pure scientific merit, it is this Committee's responsibility to identify that imbalance and correct it by directing funding elsewhere. The documents and information being sought by the Committee subpoena will help determine whether any such imbalance or chilling has occurred.

The NSF's *Science & Engineering Indicators 2016* delineates total U.S. R&D expenditures by source of funds: Business: 65.2%; Federal government: 26.7%; Universities and colleges: 3.3%; Nonfederal government 0.9%; Other nonprofit organizations: 3.9%. Any disincentive to industry maintaining its position as the dominant source of funding for R&D will have a detrimental impact on the nation's scientific enterprise. If businesses believe that the research they fund can be mischaracterized for political or ideological reasons and used to build cases of fraud against the company, they will have a powerful incentive to cease funding that research and instead to direct their funds elsewhere. This, in fact, may be your goal. Similarly, if scientists believe that their industry-sponsored research, or discussions with industry about research funded by other sources, will be subpoenaed if it is in disagreement with the beliefs and preferences of state officials or advocacy groups, they will have a powerful incentive to cease conducting that research or disseminating the results of their research to all interested parties. Maybe this is your goal, too. This Committee has an interest in informing itself of these trends and effects and potentially offsetting any trends or effects that would skew research in one direction or another on the basis of non-scientific considerations like these.

Either of these scenarios could result in dramatic cuts to or misdirection of research funding by non-federal sources. If that occurs, the Committee may be forced to take a host of legislative actions, including authorizing increases in federal funding for scientific research to make up for the reduction in or misdirection of funding from other sources. The documents and information demanded in the July 13 subpoena will help inform the Committee if such actions are warranted and necessary.

C. The Committee's Inquiry Is Pertinent.

Finally, The Committee's inquiry satisfies *Wilkinson*'s pertinence requirement. Federal courts have interpreted pertinence broadly, requiring "only that the specific inquiries be

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[10] Science & Engineering Indicators 2016 Report, Chapter 4, https://nsf.gov/statistics/2016/nsb20161/#/report/front-matter (last visited Aug. 16, 2016).

reasonably related to the subject matter under investigation."[11] The documents and information requested in the subpoena served on July 13, 2016, will allow the Committee to assess the effects of your investigation on the research of climate change scientists. Since the Committee has sole jurisdiction over research and development ("R&D") authorizations or funding measures with the exception of military and medical, this Committee could most certainly prepare legislation as noted above that would direct or divert funding to offset or correct any harmful effects your investigation may have on the overall funding and progress of our nation's scientific R&D enterprise.

The Committee's inquiry plainly satisfies the requirements of *Wilkinson*: it is authorized, has a valid legislative purpose, and is pertinent. As such, the Committee's investigation is lawful, and the Committee has the authority and jurisdiction to issue the July 13 subpoena and enforce its compliance.

II. The Committee's Inquiry Is Faithful to and Consistent with the Tenth Amendment and Longstanding Federalism Principles.

As you note, the Tenth Amendment "confirms that the power of the Federal Government is subject to limits,"[12] but the Committee acts well within those limits through its inquiry, which, as discussed above, is duly authorized pursuant to its core legislative function.[13] Contrary to your assertions, the Committee's inquiry infringes on no sovereign state "right" because it commandeers no state regulatory or legislative function on its behalf. Unlike attempts to conscript state executive branch officials[14] or commandeer state legislative processes,[15] the Committee here seeks only information pertaining to the *effects* of a state investigation – information that bears directly on subject matters within the Committee's jurisdiction. The Committee is not, as you suggest, attempting to "install[] individual members of Congress as overseers of New York's local law enforcement decisions."[16] There is no attempt to commandeer or otherwise compel or forbid the execution of state law enforcement functions; the Committee seeks neither to regulate or direct the Attorney General's investigation, nor to influence its conclusion. Far from imposing congressional prerogatives on state law enforcement functions, the Committee's investigation exists separate of the Attorney General's.

Federal courts have spoken directly to the application of federalism principles to state compliance with federal subpoenas. In denying a state attorney general's motion to quash a federal subpoena on the grounds that it violated the Tenth Amendment, a federal appeals court announced that "the impact of a subpoena on state functions is markedly different from… [a]

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[11] Morton Rosenberg, *When Congress Comes Calling: A Primer on the Principles, Practices, & Pragmatics of Legislative Inquiry*, The Constitution Project, http://www.constitutionproject.org/wp-content/uploads/2009/07/WhenCongressComesCalling.pdf (last visited Aug. 15, 2016).
[12] Letter from Leslie B. Dubeck to Hon. Lamar Smith 2 (July 26, 2016) [hereinafter July 26 Response].
[13] The Supreme Court announced as much by describing the Tenth Amendment's corollary: "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States..." *New York v. United States*, 505 U.S. 144, 156 (1992).
[14] *Printz v. United States*, 521 U.S. 898 (1997).
[15] 505 U.S. 144 (1992).
[16] July 26 Response at 2.

direct system of regulation that requires a reallocation of state resources."[17] And where, for example, "the [federal] government is asking the states to provide information" regarding state programs, such action "has never been held to violate the Tenth Amendment."[18] Case law has time-and-again vindicated the federal government's ability to issue subpoenas to state officials as consistent with federalism principles; that your office could not find "any prior Congressional subpoena directed at a State Attorney General"[19] has no bearing on the Committee's valid power to issue such a subpoena pursuant to its jurisdictional authority under House rules and the Constitution.

Your July 26, 2016, letter cites *Tobin v. United States*, and attempts to characterize this Committee's inquiry as a "sweeping investigation."[20] *Tobin*, however, is clearly not relevant. It involved a criminal prosecution for contempt for failure to respond to portions of a subpoena seeking documents that, the court concluded, were not within the scope of the committee's investigative authorization and related to a subject that the House may well have lacked constitutional authority to address legislatively.[21] None of those concerns is applicable here. Moreover, the state agency in *Tobin* actually did produce documents in response to the congressional subpoena, which your office has unlawfully refused to do.[22]

Finally, your letter also includes language from *Hearst v. Black* and attempts to liken the pending subpoena to a "dragnet seizure."[23] The Committee disagrees with this characterization, which clearly is meant to alarm readers. In fact, *Hearst* bears no relationship to the Committee's investigation. In *Hearst*, a Senate committee had coerced the Federal Communications Commission to violate the Communications Act by unlawfully seizing and turning over to the Committee all of a newspaper publisher's private telegrams, including those pertaining to "matters unrelated to the legislative business in hand."[24] Here, the Committee's subpoena is a narrowly tailored request for three categories of documents and communications, one of which involves communications between your office and federal officials. The Committee is plainly entitled to this carefully defined and limited set of documents.

III. The Committee's Request for Documents from the Attorney General Does Not Imperil First Amendment Rights.

You argue that "[d]isclosure of [] communications" between the Attorney General's office and named environmental groups would "chill communications between third parties and [your office], along with other exercises of valued First Amendment rights,"[25] and as such, all communications between the Attorney General and various environmental groups must be

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[17] *In re Special April 1977 Grand Jury*, 581 F.2d 589, 592 (7th Cir. 1978).
[18] *Freilich v. Bd. of Dirs. Of Upper Chesapeake Health, Inc.*, 142 F. Supp. 2d 679, 697 (D. Md. 2001), *aff'd sub nom.*, *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205 (4th Cir. 2002).
[19] July 26 Response at 3.
[20] *Tobin v. United States*, 306 F.2d 270 (D.C. Cir. 1962).
[21] *See id.* at 276.
[22] *Id.*
[23] *Hearst v. Black*, 87 F.2d 68 (1936).
[24] *Id.* at 315-16. In addition, and any event, the court denied relief to the publisher. *See id.* at 317.
[25] July 26 Response at 3.

shielded from the Committee's inquiry. This reflects a misunderstanding of the application of First Amendment protections to congressional investigations.[26]

As a threshold matter, by arguing that "the nongovernmental entities named in the Subpoena have First Amendment rights of free speech and 'to express their ideas... to their government...'", you appear to be invoking purported First Amendment claims (namely, of speech and petition) of the various environmental groups, which you have no standing to raise.[27] Claims of free speech protection in the realm of congressional inquiry are properly raised by the speaker who wishes to protect his speech. To the extent you wish to shield the environmental groups' speech from subpoena, your argument more fairly resembles a privilege claim belonging exclusively to those groups. If the documents the Committee requests implicate any First Amendment rights of environmental groups, that objection must be raised by those groups themselves, not by you.

As always, the Committee welcomes the opportunity to discuss the scope of the subpoena with you or your staff. To arrange a meeting or discuss matters over the phone, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Chairman

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

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[26] *See, e.g.*, *Senate Permanent Subcomm. on Investigations v. Ferrer*, 2016 U.S. Dist. LEXIS 103143, *30, *32-33 (D.D.C. Aug. 5, 2016).
[27] *Id.*

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
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ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

LESLIE B. DUBECK
COUNSEL

September 13, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

I write on behalf of the New York Office of the Attorney General ("NYOAG") regarding your letter of August 23, 2016, and the hearing of the full House Committee on Science, Space, and Technology, scheduled for September 14, 2016, both of which relate to the Subpoena previously issued by you, as Chairman, to the NYOAG.

The August 23 letter (at 1) purports to clarify the topic of the Committee's inquiry: to determine whether the ongoing investigations into possible state securities and consumer law violations by ExxonMobil is "having an adverse impact on federally-funded scientific research." As the letter then alleges (*e.g.*, at 3), if the Committee uncovers such an adverse effect, the Committee may consider funding proposals to counteract any perceived "imbalance in scientific inquiry."

These statements carry the odd suggestion that the Science Committee might allocate public resources to scientific research with a predetermined outcome to offset a so-called "imbalance." That issue aside, the NYOAG's objections to the Subpoena—for lack of jurisdiction, a valid legislative object, or pertinence of the requests—remain outstanding, as do the NYOAG's claims of privilege and confidentiality over the materials sought.

While the August 23 letter purports to overrule the NYOAG's objections on behalf of the Committee, the Committee has never met and considered our objections and there is no Committee or House rule delegating authority to the Chairman to resolve objections to a subpoena unilaterally. To the contrary, the rules delegate to the Chairman only the limited authority to make an initial determination on privilege claims asserted at a hearing, subject to an "appeal to the Committee" as a whole. Committee Rule III(d). For all other objections, where no authority has been delegated to the Chairman, the rules prescribing quorum and notice requirements for the rest of the Committee's official business must apply. *See* Committee Rule II(a)–(d). Where a subpoena is as unusual and the objections as weighty as here, consideration

and resolution by anything other than the full body would be inappropriate. I note that official announcements for the upcoming hearing contain no such agenda item.

The hearing will do nothing to buttress a claim of authority to issue the unprecedented Subpoena. The Committee's "right to exact testimony and to call for the production of documents must be found" not in the testimony of three professors, but rather in "the controlling charter of the committee's powers." *United States v. Rumely*, 345 U.S. 41, 44 (1953). Nowhere in the Committee's grant of oversight authority over "nonmilitary research and development," House Rule X.3(k), is a delegation of power to intrude on a pending state law enforcement investigation by a State Attorney General. No committee can even purport to conduct "such a novel investigation" into state affairs without, at a minimum, "more explicit" Congressional authorization than that here. *See Tobin v. United States*, 306 F.2d 270, 275 (D.C. Cir. 1962) (construing subcommittee's authority narrowly to avoid "serious" Tenth Amendment question raised by subpoena). As a September 8, 2016 memorandum of the Congressional Research Service concludes, *Tobin* represents the *only* known instance prior to this "in which a congressional committee has issued a subpoena to a state government official."[1] Thus, the very need for a hearing to establish jurisdiction to issue the Subpoena underscores the absence of any such enforceable authority.

As stated in our prior objections, the Subpoena raises serious federalism concerns. Nothing in the Committee's "long history" of research oversight (Aug. 23, 2016 Letter at 2) supports the idea that the Committee can wield oversight over state law enforcement officials in such an unrestrained fashion. The question is whether the exercise of oversight authority, which you have confirmed "is derived from Article I of the Constitution" (July 6, 2016 Letter at 2), "violate[s] the principles of federalism contained in the Tenth Amendment," *Reno v. Condon*, 528 U.S. 141, 149 (2000). The Committee's "directive" to the New York Attorney General to produce investigative materials in his official capacity is no less than an attempt to "control the State." *Printz v. United States*, 521 U.S. 898, 931 (1997). That directive flies in the face of more than "two centuries of apparent congressional avoidance of the practice," *id.* at 918, a point recently confirmed by Congress's own research arm. Aggravating the violation, the Subpoena directly and expressly targets state enforcement activities, disrupting possible "suits by the State in its sovereign capacity." *Trainor v. Hernandez*, 431 U.S. 434, 446 (1977).

Moreover, if the Committee seeks only "information pertaining to the *effects* of a state investigation" (Aug. 23, 2016 Letter at 5), a subpoena targeting privileged and confidential state law enforcement communications seems a poor choice to serve that goal. For such information, the Chair can simply contact ExxonMobil and talk to some of its scientists. In contrast, the documents sought by the Subpoena would surely be of interest to ExxonMobil, which has made the alleged motivations behind the state investigations the crux of its defense to investigative compliance.[2] The abject mismatch between the Subpoena's requests and the *Committee's*

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[1] Cong. Research Serv., Evaluation of Federalism Arguments Against the Subpoenas Issued to State Attorneys General by the House Science, Space, and Technology Committee at 6 (Sept. 8, 2016).

[2] Mem. of Law in Supp. of Plaintiff Exxon Mobil Corp.'s Mot. for Prelim. Inj. at 12, *Exxon Mobil Corp. v. Healey*, No. 16-cv-469 (N.D. Tex. June 15, 2016).

professed object has led many observers, including a U.S. Senator, to wonder whether the Committee is engaged in an improper fishing expedition for the benefit of a private party.[3]

The inability to justify the unprecedented Subpoena—or the Committee's power to issue such a subpoena—has become increasingly clear, and the NYOAG hopes that the draining of state and federal taxpayer resources on this endeavor will come to an end without bringing a wholly unnecessary constitutional conflict to a head.

Sincerely,

Leslie B. Dubeck
Counsel

cc: Honorable Eddie Bernice Johnson
Ranking Member, Committee on Science, Space, and Technology

Honorable Paul Tonko
Member, Committee on Science, Space, and Technology

Majority Staff, Committee on Science, Space, and Technology
Rayburn House Office Building, Room 2321

Minority Staff, Committee on Science, Space, and Technology
Ford House Office Building, Room 392

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[3] Sen. Sheldon Whitehouse, *Standoff Over a House Panel's Subpoenas Raises Key Issue*, Nat'l L.J. (Aug. 29, 2016).

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
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May 18, 2016

The Honorable Ellen F. Rosenblum
Attorney General of Oregon
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096

Dear Ms. Attorney General,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced cooperation on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve "as the guardian of the legal rights of the citizens" and to "assert, protect, and defend the rights of the people."[2] These legal actions may even amount to an abuse of prosecutorial discretion. To assist in the Committee's oversight of this matter, we are writing to request information related to your office's role in this investigation.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[3] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Bureaus of Attorney General, New York, May 12, 2016, *available at http://www.ag.ny.gov/bureaus*; Office of the Attorney General, U.S. Virgin Islands, Dept. of Justice, May 12, 2016, *available at* http://usvidoj.codemeta.com/DivisionContent_1.php?divId=84.

[3] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[4] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff and activist trial attorney Matthew Pawa, founder of the Global Warming Legal Action Project.[5]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[6] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[7] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[8]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[9]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between the New York Attorney General and Extremist Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists, including 2012 workshop participant Matthew Pawa, as well as representatives from groups such as

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[4] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[5] *Id.*
[6] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages*, Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[7] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[8] *Id.* [emphasis added]
[9] *Id.* [emphasis added]

350.org and Greenpeace, met at the Manhattan offices of the Rockefeller Family Fund.[10] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[11] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[12] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[13]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference announcing cooperation on investigations against those who question the causes, magnitude, or best ways to address climate change, members of the group were briefed by 2012 workshop attendees Matthew Pawa of the Global Warming Legal Action Project and UCS's Peter Frumhoff. It has since come to light that the New York Attorney General's office willfully concealed the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[14] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[15]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[16]

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[10] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe,* WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.

[11] *Id.*

[12] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund,* Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*

[13] *Id.*

[14] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show,* WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

[15] *Id.*

[16] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions,* WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics in close coordination with certain special interest groups and trial attorneys that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.

To assist the Committee in its oversight of a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but by no later than noon on May 30, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of Oregon and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Oregon and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Oregon and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

ELLEN F. ROSENBLUM
ATTORNEY GENERAL

FREDERICK M. BOSS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
Justice Building
1162 Court Street NE
Salem, OR 97301-4096
Telephone: (503) 378-4400

June 1, 2016

Via USPS and email to curtis.philp@mail.house.gov

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, & Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

I write in response to the May 18, 2016, letter signed by you and several other Republican members of the House Committee on Science, Space, and Technology requesting various documents and communications related to this office's purported "investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change." Your letter not only requests these records, but also attacks this office's integrity and conduct without basis to do so. For the reasons set forth below, this office respectfully declines to provide the requested records.

Congress does not have jurisdiction to demand records from a state law enforcement official such as the Oregon Attorney General. Congress' investigative jurisdiction tracks its power to legislate and appropriate concerning federal matters, and does not extend any further. *See, e.g.*, *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959) ("Congress may only investigate into those areas in which it may potentially legislate or appropriate."). Investigations and other law enforcement actions by a state attorney general are not federal matters. Rather, they involve the exercise of police powers reserved to the States under the Tenth Amendment, and are not the appropriate subject of federal legislation, oversight, or interference. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 162 (1992) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.").

Apart from erroneously attempting to assert authority over a purely state matter, your letter also incorrectly accuses this office of investigating entities based on their speech or beliefs concerning climate change. Please be advised this office will not be dissuaded from considering whether state laws, including consumer protections laws, may provide redress against knowingly false commercial speech concerning global warming. The First Amendment simply does not protect fraudulent speech. *Illinois v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) ("This governmental power [to protect people against fraud] has always been recognized in this country and is firmly established.").

In sum, the Oregon Attorney General intends to continue to look into possible violations of state law, and she will continue to work, when appropriate, with other states' law enforcement officials. We trust that you appreciate the importance of maintaining the independence of these state law enforcement activities from federal interference.

Thank you for your courtesies.

Sincerely,

Frederick M. Boss
Deputy Attorney General

7417164

cc: Honorable Eddie Bernice Johnson
Ranking Member, Committee on Science, Space, & Technology

Majority Staff, Committee on Science, Space, & Technology
Rayburn House Office Building, Room 2321

Minority Staff, Committee on Science, Space, & Technology
Ford House Office Building, Room 394

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

June 17, 2016

The Honorable Ellen F. Rosenblum
Attorney General
State of Oregon
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096

Dear Attorney General Rosenblum,

Thank you for your June 1, 2016, response. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[1] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[2] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] However, Congress' investigatory power is not without limits.[4] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.
[3] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[4] *Watkins v. U.S.*, 354 U.S. 178 (1957).

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[5] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[6] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[7] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[8] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[9] organizations that violate the civil rights of individuals,[10] state agencies involved in the Hurricane Katrina response,[11] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138 billion to fund research and development.[12] Of that total federal spending, approximately $40 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of

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[5] *McGrain* at 177, 181-182.
[6] *See McGrain*, 273 U.S. at 177, 181-182.
[7] *Eastland* at 509.
[8] CRS Report at 26.
[9] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[10] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[11] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[12] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

the Science Committee that offices such as yours and those similarly situated should not be taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued and contemplated by members the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes,** but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[13]

This statement suggests that his office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, he is saying that if his office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.

Additionally, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[14] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions

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[13] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available at* http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[14] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

and those of your fellow attorneys general indeed are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of Oregon and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Oregon and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Oregon and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Rep. Lamar Smith
Chairman

Frank D Lucas
Rep. Frank D. Lucas
Vice Chairman

The Honorable Ellen F. Rosenblum
June 17, 2016
Page 5

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
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(202) 225-6371
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May 18, 2016

The Honorable Peter F Kilmartin
Attorney General of Rhode Island
150 South Main Street
Providence, Rhode Island 02903

Dear Mr. Attorney General,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced cooperation on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve "as the guardian of the legal rights of the citizens" and to "assert, protect, and defend the rights of the people."[2] These legal actions may even amount to an abuse of prosecutorial discretion. To assist in the Committee's oversight of this matter, we are writing to request information related to your office's role in this investigation.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[3] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, Ney York State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Bureaus of Attorney General, New York, May 12, 2016, *available at http://www.ag.ny.gov/bureaus*; Office of the Attorney General, U.S. Virgin Islands, Dept. of Justice, May 12,2016, *available at* http://usvidoj.codemeta.com/DivisionContent_1.php?divId=84.

[3] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[4] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff and activist trial attorney Matthew Pawa, founder of the Global Warming Legal Action Project.[5]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[6] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[7] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[8]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[9]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between the New York Attorney General and Extremist Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists, including 2012 workshop participant Matthew Pawa, as well as representatives from groups such as

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[4] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[5] *Id.*
[6] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[7] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[8] *Id.* [emphasis added]
[9] *Id.* [emphasis added]

350.org and Greenpeace, met at the Manhattan offices of the Rockefeller Family Fund.[10] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[11] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[12] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[13]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference announcing cooperation on investigations against those who question the causes, magnitude, or best ways to address climate change, members of the group were briefed by 2012 workshop attendees Matthew Pawa of the Global Warming Legal Action Project and UCS's Peter Frumhoff. It has since come to light that the New York Attorney General's office willfully concealed the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[14] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[15]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[16]

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[10] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe,* WALL ST. J., Apr. 13, 2016 *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.

[11] *Id.*

[12] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund,* Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*

[13] *Id.*

[14] ValerieRichardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show,* WASH. TIMES, Ap. 17, 26, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

[15] *Id.*

[16] ValerieRichardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions* WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics in close coordination with certain special interest groups and trial attorneys that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.

To assist the Committee in its oversight of a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but by no later than noon on May 30, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of Rhode Island and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Rhode Island and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Rhode Island and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

The Honorable Peter F Kilmartin
May 18, 2016
Page 5

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

The Honorable Peter F Kilmartin
May 18, 2016
Page 6

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL
150 South Main Street • Providence, RI 02903
(401) 274-4400 - TDD (401) 453-0410

Peter F. Kilmartin, Attorney General

RECEIVED
JUN 16 2016
COMMITTEE ON SCIENCE
& TECHNOLOGY

June 3, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

I write in response to the May 18, 2016 letter (the "Letter") signed by you and several other members of the House Committee on Science, Space, and Technology (the "Committee") requesting that my office provide various documents and communications referring or relating to law enforcement and investigative activities of the Rhode Island Department of Attorney General concerning climate change.

The Rhode Island Department of Attorney General objects to this request. The Letter is premised upon a series of incorrect, unfounded, and misleading statements regarding the actions of my office, as well as other states' Attorneys General, and raises serious constitutional concerns, including the lack of congressional jurisdiction over state law enforcement activities and the Committee's intrusion into sovereign state actions protected by the 10th Amendment to the United States Constitution.

Congress does not have jurisdiction to demand documents and communications from a state law enforcement official regarding the exercise of a state's sovereign police powers. Investigations and other law enforcement actions by a state Attorney General for potential violations of state law, as here, involve the exercise of police powers reserved to the states under the 10th Amendment, and are not the appropriate subject of federal legislation, oversight or interference. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 162 (1992) ("the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions").

The Committee has further overstepped its congressionally delegated authority in making this request. Under House Rule X, cited in the Letter, the Committee on Science, Space, and Technology is authorized to "review and study on a continuing basis laws, programs, and [federal] Government activities relating to nonmilitary research and development." Rule X(3)(k). Your request falls well outside of this delegated authority.

The Honorable Lamar Smith
June 3, 2016

The Rhode Island Department of Attorney General is and has been committed to addressing the causes of global climate change. My office has participated in many multi-state and multi-party efforts to limit emissions of pollutants that cause global warming, including pressing the Environmental Protection Agency ("EPA") to initially regulate carbon dioxide and other greenhouse gases, defending EPA in its promulgation of subsequent climate change regulations, and pushing for further federal regulation of the potent greenhouse gas methane from the oil and gas industry.

My office will also continue its efforts to investigate and prosecute any unlawful false or misleading statements to Rhode Island's consumers and/or investors related to climate change. For these reasons, the Rhode Island Department of Attorney General declines your request.

Sincerely,

Peter F. Kilmartin
Attorney General of Rhode Island

cc: Honorable Eddie Bernice Johnson
Ranking Member, Committee on Science, Space, and Technology

Majority Staff, Committee on Science, Space, and Technology
Rayburn House Office Building, Room 2321

Minority Staff, Committee on Science, Space, and Technology
Ford House Office Building, Room 394

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives
COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

June 17, 2016

The Honorable Peter F Kilmartin
Attorney General
State of Rhode Island
150 South Main Street
Providence, Rhode Island 02903

Dear Attorney General Kilmartin,

Thank you for your June 16, 2016, response. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[1] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[2] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] However, Congress' investigatory power is not without limits.[4] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.
[3] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[4] *Watkins v. U.S.*, 354 U.S. 178 (1957).

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[5] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[6] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[7] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[8] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[9] organizations that violate the civil rights of individuals,[10] state agencies involved in the Hurricane Katrina response,[11] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138 billion to fund research and development.[12] Of that total federal spending, approximately $40 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of

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[5] *McGrain* at 177, 181-182.
[6] *See McGrain*, 273 U.S. at 177, 181-182.
[7] *Eastland* at 509.
[8] CRS Report at 26.
[9] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[10] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[11] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[12] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

the Science Committee that offices such as yours and those similarly situated should not be taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued and contemplated by members the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes,** but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[13]

This statement suggests that his office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, he is saying that if his office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.

Additionally, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[14] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions

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[13] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available at* http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[14] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

and those of your fellow attorneys general indeed are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of Rhode Island and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Rhode Island and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Rhode Island and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Rep. Lamar Smith
Chairman

Frank D. Lucas
Rep. Frank D. Lucas
Vice Chairman

The Honorable Peter F Kilmartin
June 17, 2016
Page 5

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

The Honorable Claude E. Walker
Attorney General of the United States Virgin Islands
34-38 Kronprindsens Gade
GERS Building, 2nd Floor
St. Thomas, Virgin Islands 00802

Dear Mr. Attorney General,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, you and other state attorneys general – the self-proclaimed "Green 20" – announced that you were cooperating on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve "as the guardian of the legal rights of the citizens" and to "assert, protect, and defend the rights of the people."[2] These legal actions may even amount to an abuse of prosecutorial discretion. To assist in the Committee's oversight of this matter, I am writing to request information related to your office's role in this investigation.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[3] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies*, N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Bureaus of Attorney General, New York, May 12, 2016, *available at http://www.ag.ny.gov/bureaus*; Office of the Attorney General, U.S. Virgin Islands, Dept. of Justice, May 12,2016, *available at* http://usvidoj.codemeta.com/DivisionContent_1.php?divId=84.

[3] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[4] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff and activist trial attorney Matthew Pawa, founder of the Global Warming Legal Action Project.[5]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[6] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[7] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[8]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[9]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between the New York Attorney General and Extremist Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists, including 2012 workshop participant Matthew Pawa, as well as representatives from groups such as

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[4] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[5] *Id.*
[6] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages,* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[7] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[8] *Id.* [emphasis added]
[9] *Id.* [emphasis added]

350.org and Greenpeace, met at the Manhattan offices of the Rockefeller Family Fund.[10] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[11] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[12] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[13]

Finally, on March 29, 2016, in the hours before you and other members of the Green 20, joined by former Vice President Al Gore, held your widely-publicized press conference announcing your cooperation on investigations against those who question the causes, magnitude, or best ways to address climate change, members of your group were briefed by 2012 workshop attendees Matthew Pawa of the Global Warming Legal Action Project and UCS's Peter Frumhoff. It has since come to light that the New York Attorney General's office willfully concealed the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[14] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[15]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[16]

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[10] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe*, WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.

[11] *Id.*

[12] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund*, Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*

[13] *Id.*

[14] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show*, WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

[15] *Id.*

[16] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions*, WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by you and other members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics in close coordination with certain special interest groups and trial attorneys that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.

To assist the Committee in its oversight of a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but by no later than noon on May 30, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of the U.S. Virgin Islands and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of the U.S. Virgin Islands and any other state attorney general office referring or relating to your office's investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of the U.S. Virgin Islands and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all

documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

THE UNITED STATES VIRGIN ISLANDS
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

CLAUDE EARL WALKER, ESQUIRE
ATTORNEY GENERAL

May 27, 2016

The Honorable Lamar S. Smith, Chairman
Congress of the United States
House of Representatives
Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515-6371

Dear Chairman Smith:

I write in response to your letter of May 18, 2016, regarding the investigations by numerous states and territories of potential fraud by ExxonMobil.

I would like to correct, respectfully, your mistaken impression of the nature of the investigation. This investigation stems from well-documented statements ExxonMobil made in both internal and public documents that may have misrepresented its knowledge of climate change, and is intended to determine whether the company violated the law. It does not infringe upon any party's First Amendment rights because, as you know, the First Amendment does not shelter fraud, particularly in the kinds of commercial speech in which ExxonMobil has engaged. My responsibility, under the laws of the Virgin Islands, is to ensure an honest marketplace for consumers and investors, and it is solely pursuant to, and guided by, that duty that I have undertaken this inquiry.

Without speaking or consenting to this Committee's jurisdiction to undertake oversight of a matter of local law enforcement, I will address your specific questions. The Virgin Islands has no documents responsive to your first and third requests. For the reasons laid out below, I cannot provide documents in response to the second question, seeking communications with other state attorneys general, which would require us to disclose confidential law enforcement communications.

The Virgin Islands Department of Justice and other enforcement agencies in the Virgin Islands regularly coordinate with federal and state enforcement agencies on a variety of investigations, which, in the interests of the government, witnesses, and targets, require confidentiality. Disclosing documents obtained and created in the course of this investigation would compromise our ability to gather, analyze, and act upon sensitive information in cooperation with other law enforcement partners in this and other important matters.

The materials you have requested are privileged and confidential under the laws of the Virgin Islands. The requested records are confidential attorney work product and attorney-client

34-38 KRONPRINDSENS GADE • GERS BLDG., 2ND FLOOR • ST. THOMAS, U.S. VIRGIN ISLANDS 00802 • (340) 774-5666 • FAX (340) 774-9710
6040 CASTLE COAKLEY • DESIGN CENTER BLDG. • CHRISTIANSTED, ST. CROIX, U.S. VIRGIN ISLANDS 00820 • (340) 773-0295 • FAX (340) 773-1425

privileged pursuant to Title 5, Virgin Islands Code § 852, and also are protected by the deliberative process privilege, *Vento v. IRS*, No. 08-159, 2010 WL 1375279, at *5 (D.V.I. Mar. 31, 2010). Finally, the V.I. Department of Justice's communications with other state attorneys general in this matter are protected against disclosure under the common interest doctrine. *Giovan v. St. Thomas Diving Club, Inc.*, 37 V.I. 176, 183-84 (V.I. Terr. Ct. 1997).

If you have any further questions regarding this matter, please contact me.

Sincerely,

Claude Earl Walker, Esq.
Attorney General

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
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www.science.house.gov

June 17, 2016

The Honorable Claude E. Walker
Attorney General
Virgin Islands
34-38 Kronprindsens Gade
GERS Building, 2nd Floor
St. Thomas, Virgin Islands 00802

Dear Attorney General Walker,

Thank you for your May 27, 2016, response. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[1] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[2] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] However, Congress' investigatory power is not without limits.[4] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.
[3] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
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While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[5] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[6] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[7] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[8] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[9] organizations that violate the civil rights of individuals,[10] state agencies involved in the Hurricane Katrina response,[11] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138 billion to fund research and development.[12] Of that total federal spending, approximately $40 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of

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[9] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[10] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[11] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[12] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

the Science Committee that offices such as yours and those similarly situated should not be taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued by your office and contemplated by the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes,** but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[13]

This statement suggests that his office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, he is saying that if his office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.

Additionally, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[14] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions

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[13] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available at* http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[14] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

and those of your fellow attorneys general indeed are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of the U. S. Virgin Islands and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of the U. S. Virgin Islands and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of the U. S. Virgin Islands and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

The Honorable Claude E. Walker
June 17, 2016
Page 5

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Michael T. McCaul
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

THE UNITED STATES VIRGIN ISLANDS
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

CLAUDE EARL WALKER, ESQUIRE
ATTORNEY GENERAL

June 23, 2016

The Honorable Lamar S. Smith, Chairman
Congress of the United States
House of Representatives
Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515-6371

Re: *ExxonMobil Investigation*

Dear Chairman Smith:

I write in response to your letter of June 17, 2016, regarding the investigations by numerous states and territories of ExxonMobil.

Again, I would like to correct, respectfully, any mistaken impression of the nature of the investigation. The only target of my office's investigation is ExxonMobil, and references to other entities or individuals in any subpoenas are intended to provide information relevant to whether ExxonMobil misrepresented its knowledge about climate change. If ExxonMobil did make such misrepresentations, it could constitute fraud, which is not protected by the First Amendment. In fact, in the context of commercial speech such as ExxonMobil's, the primary purpose of the First Amendment is to protect the public's interest in receiving full and accurate information in order to safeguard an honest marketplace for consumers and investors. My investigation seeks to protect, not chill, these critical constitutional values.

Without speaking or consenting to this Committee's jurisdiction to undertake oversight of a matter of local law enforcement, I reiterate that the Virgin Islands has no documents responsive to your first and third requests and only a handful of documents responsive to the second request. This request covers confidential communications with other state attorneys general in a common law enforcement investigation, which are protected from disclosure. *Giovan v. St. Thomas Diving Club, Inc.*, 37 V.I. 176, 183-84 (V.I. Terr. Ct. 1997). However, in the interest of satisfying the Committee's concerns, the Virgin Islands will provide these documents subject to a confidentiality agreement, as is customary when sharing confidential information with other government entities relating to an open law enforcement investigation.

34-38 KRONPRINDSENS GADE • GERS BLDG., 2ND FLOOR • ST. THOMAS, U.S. VIRGIN ISLANDS 00802 • (340) 774-5666 • FAX (340) 774-0710
6040 CASTLE COAKLEY • DENIGH CENTER BLDG. • CHRISTIANSTED, ST. CROIX, U.S. VIRGIN ISLANDS 00820 • (340) 773-0295 • FAX (340) 773-1425

Please ask your staff to reach out to Carol Jacobs of my office so that we can arrange to provide these materials promptly. She may be reached at either (340) 774-5666 or carol.jacobs@doj.vi.gov.

Sincerely,

Claude Earl Walker, Esq.
Attorney General

cc: Honorable Eddie Bernice Johnson, Ranking Member

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

The Honorable Mark R. Herring
Attorney General of Virginia
900 East Main Street
Richmond, VA 23219

Dear Mr. Attorney General,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced cooperation on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve "as the guardian of the legal rights of the citizens" and to "assert, protect, and defend the rights of the people."[2] These legal actions may even amount to an abuse of prosecutorial discretion. To assist in the Committee's oversight of this matter, we are writing to request information related to your office's role in this investigation.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[3] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Bureaus of Attorney General, New York, May 12, 2016, *available at http://www.ag.ny.gov/bureaus*; Office of the Attorney General, U.S. Virgin Islands, Dept. of Justice, May 12, 2016, *available at* http://usvidoj.codemeta.com/DivisionContent_1.php?divId=84.

[3] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[4] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff and activist trial attorney Matthew Pawa, founder of the Global Warming Legal Action Project.[5]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[6] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[7] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents may exist):"[8]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[9]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between the New York Attorney General and Extremist Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists, including 2012 workshop participant Matthew Pawa, as well as representatives from groups such as

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[4] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[5] *Id.*
[6] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages*, Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[7] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[8] *Id.* [emphasis added]
[9] *Id.* [emphasis added]

350.org and Greenpeace, met at the Manhattan offices of the Rockefeller Family Fund.[10] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[11] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[12] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[13]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference announcing cooperation on investigations against those who question the causes, magnitude, or best ways to address climate change, members of the group were briefed by 2012 workshop attendees Matthew Pawa of the Global Warming Legal Action Project and UCS's Peter Frumhoff. It has since come to light that the New York Attorney General's office willfully concealed the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[14] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[15]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[16]

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[10] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe*, WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.

[11] *Id.*

[12] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund*, Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*

[13] *Id.*

[14] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show*, WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

[15] *Id.*

[16] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions*, WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics in close coordination with certain special interest groups and trial attorneys that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.

To assist the Committee in its oversight of a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but by no later than noon on May 30, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of Virginia and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Virginia and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Virginia and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

The Honorable Mark R. Herring
May 18, 2016
Page 5

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

May 27, 2016

The Honorable Lamar Smith, Chairman
Congress of the United States
House of Representatives
Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515-6301

Dear Mr. Chairman:

I am responding on behalf of Virginia Attorney General Mark R. Herring to your letter of May 18, 2016 regarding the very important and pressing issue of climate change. This office has considered your request for information under the state's Freedom of Information Act. As you likely know, the Commonwealth has responded to similar FOIA requests by other entities following a thorough and comprehensive review of our files and electronic records. The results of that review and the associated production have been posted to numerous websites and I am confident your committee staff has acquired a copy or can easily do so.

With respect to your specific request, please be advised that non-residents of Virginia are not entitled to avail themselves of the benefits of the Virginia Freedom Of Information Act, Virginia Code §2.2-3700 et seq., and we will not be providing additional information at this time. Please be further advised that the Supreme Court of the United States in McBurney v. Young, 133 S.Ct. 1709 (2013) determined that declining to respond to out of state interests did not violate the federal Constitution.

It is important for you and your Committee to know and appreciate certain concerns raised by your request. Fundamentally, we question whether it is within the jurisdiction of the Committee on Science, Space, and Technology to make such a demand of a state law enforcement official such as the Virginia Attorney General.

With respect to the specific claims and allegations in your letter, I appreciate the challenge of drafting blast correspondence to numerous parties. However, the correspondence received by this office, first by press release then by mail several days later, contains numerous false claims that cannot go unaddressed. As an example, your correspondence goes into great detail regarding a "2012 Workshop to Explore Legal Avenues to Demonize the Fossil fuel Industry." The current Attorney General of Virginia was elected in 2013 and sworn into office on January 11, 2014, making participation in the event which you suggest as fundamental to your investigation an

impossibility. Further, by implication, your broad representations and accusations suggest that the Virginia Attorney General participated in an alleged January, 2016 Rockefeller Family Fund meeting in Manhattan. That too is false and inaccurate.

Attorney General Herring did participate, on March 29, 2016, in a meeting in New York to discuss climate change with colleagues. He makes no apologies for that as it was an opportunity to share and receive information on an important and timely issue. As you may know, the Commonwealth of Virginia is uniquely vulnerable to the effects of climate change and associated sea level rise. The Hampton Roads region is Virginia's second most populated region, its second largest regional economy, and the country's second most vulnerable area as sea levels rise. The area has the tenth most valuable assets in the world threatened by sea level rise, including billions of dollars of military assets, most notably the largest concentration of naval power in the world.

In just the last 85 years, the relative sea level in Hampton Roads has risen by fourteen inches, resulting in regular nuisance and occasionally severe flooding. The federal government has been a key ally to the region as the Navy, the Commonwealth of Virginia, and the communities of Hampton Roads continue to address resiliency issues and plan for our new reality of rising waters. We greatly appreciate the investment and partnership to date, and hope the partnership will continue to be a productive one. But ultimately, such efforts are treating the symptom and not the disease.

As I hope you can understand, we feel strongly about climate change in Virginia because it is not a theoretical idea to us. We are already feeling its effects. To interfere with this office as we explore ways to mitigate the negative effects of climate change is an inappropriate intrusion into this Commonwealth's prerogatives. To use untrue and inapplicable claims to accuse the duly elected Attorney General of Virginia of activity that "may rise to a level of an abuse of prosecutorial discretion" is offensive, not based in fact, and flat-out irresponsible.

The productive partnership between the federal, state, and local governments of Hampton Roads has shown the most promising path forward to mitigate the effects of climate change while work continues to reduce the carbon emissions that contribute to it. On behalf of Attorney General Herring, I suggest a continuation of this collaborative approach rather than the one represented by your Committee's letter. Such an approach only makes it more difficult to build consensus and make progress on a pressing issue of concern to this Commonwealth and our nation.

Sincerely yours,

Cynthia E. Hudson
Chief Deputy Attorney General

Cc: Rep. Frank Lucas, Rep. F. James Sensenbrenner, Rep. Dana Rohrabacher, Rep. Randy Neugebauer, Rep. Mo Brooks, Rep. Ralph Lee Abraham, Rep. Bill Posey, Rep. Jim Bridenstine, Rep. Randy Weber, Rep John Moolenaar, Rep. Brian Babin, Rep. Barry Loudermilk

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

June 17, 2016

The Honorable Mark R. Herring
Attorney General
State of Virginia
900 East Main Street
Richmond, VA 23219

Dear Attorney General Herring,

Thank you for your May 27, 2016, response. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[1] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[2] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] However, Congress' investigatory power is not without limits.[4] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.
[3] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[4] *Watkins v. U.S.*, 354 U.S. 178 (1957).

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[5] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[6] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[7] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[8] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[9] organizations that violate the civil rights of individuals,[10] state agencies involved in the Hurricane Katrina response,[11] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138 billion to fund research and development.[12] Of that total federal spending, approximately $40 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of

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[5] *McGrain* at 177, 181-182.
[6] *See McGrain*, 273 U.S. at 177, 181-182.
[7] *Eastland* at 509.
[8] CRS Report at 26.
[9] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[10] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[11] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[12] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

the Science Committee that offices such as yours and those similarly situated should not be taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued and contemplated by members the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes**, but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[13]

This statement suggests that his office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, he is saying that if his office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.

Additionally, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[14] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions

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[13] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available at* http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[14] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

and those of your fellow attorneys general indeed are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of Virginia and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Virginia and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Virginia and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Rep. Lamar Smith
Chairman

Frank D. Lucas
Rep. Frank D. Lucas
Vice Chairman

The Honorable Mark R. Herring
June 17, 2016
Page 5

Rep. Dana Rohrabacher
Member of Congress

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Rep. Ralph Lee Abraham
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Rep. Darin LaHood
Member of Congress

Rep. Warren Davidson
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

The Honorable William H. Sorrell
Attorney General of Vermont
109 State Street
Montpelier, VT 05609-1001

Dear Mr. Attorney General,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced cooperation on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve "as the guardian of the legal rights of the citizens" and to "assert, protect, and defend the rights of the people."[2] These legal actions may even amount to an abuse of prosecutorial discretion. To assist in the Committee's oversight of this matter, we are writing to request information related to your office's role in this investigation.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[3] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Bureaus of Attorney General, New York, May 12, 2016, *available at http://www.ag.ny.gov/bureaus*; Office of the Attorney General, U.S. Virgin Islands, Dept. of Justice, May 12, 2016, *available at* http://usvidoj.codemeta.com/DivisionContent_1.php?divId=84.

[3] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[4] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff and activist trial attorney Matthew Pawa, founder of the Global Warming Legal Action Project.[5]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[6] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[7] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents **may** exist):"[8]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[9]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between the New York Attorney General and Extremist Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists, including 2012 workshop participant Matthew Pawa, as well as representatives from groups such as

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[4] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[5] *Id.*
[6] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages*, Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[7] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[8] *Id.* [emphasis added]
[9] *Id.* [emphasis added]

350.org and Greenpeace, met at the Manhattan offices of the Rockefeller Family Fund.[10] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[11] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[12] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[13]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference announcing cooperation on investigations against those who question the causes, magnitude, or best ways to address climate change, members of the group were briefed by 2012 workshop attendees Matthew Pawa of the Global Warming Legal Action Project and UCS's Peter Frumhoff. It has since come to light that the New York Attorney General's office willfully concealed the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[14] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[15]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[16]

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[10] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe*, WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.

[11] *Id.*

[12] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund*, Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*

[13] *Id.*

[14] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show*, WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

[15] *Id.*

[16] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions*, WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics in close coordination with certain special interest groups and trial attorneys that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.

To assist the Committee in its oversight of a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but by no later than noon on May 30, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of Vermont and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Vermont and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Vermont and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

The Honorable William H. Sorrell
May 18, 2016
Page 5

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
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Rep. Jim Bridenstine
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Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

WILLIAM H. SORRELL
ATTORNEY GENERAL

SUSANNE R. YOUNG
DEPUTY ATTORNEY GENERAL

WILLIAM E. GRIFFIN
CHIEF ASST. ATTORNEY GENERAL

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
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http://www.ago.vermont.gov

May 31, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

I write to respond to the May 18, 2016 letter from you and several other Majority members of the House Committee on Science, Space and Technology. The letter requests documents regarding alleged investigatory and prosecutorial efforts by the State of Vermont, Office of Attorney General ("VTAG") related to climate change.

The VTAG is committed to a vital role in addressing climate change. For years, the office has participated in multi-state coalition efforts toward this end, including pressing the federal Environmental Protection Agency to limit climate change pollution from fossil-fueled electric power plants, defending federal rules controlling climate change emissions from large industrial facilities, and pushing for federal controls on the emissions of the potent greenhouse gas methane from the oil and gas industry.

Your letter makes ungrounded assertions as to the motivation of this office. Should this office deem it appropriate, it would not hesitate to seek redress for unlawful false or misleading statements to the State's consumers or investors related to climate change. Such efforts would not implicate First Amendment rights.

Assuming that there were documents in the VTAG's possession, custody or control within the scope of your requests, the VTAG declines to produce them. Your requests for documents violate fundamental Constitutional principles. Any investigation or prosecution undertaken by the VTAG would involve exercise of the State's sovereign police powers. As is discussed more fully in the Office of the

Attorney General of New York's May 26, 2016 letter to you, Congress does not have jurisdiction to demand documents from a state law enforcement official regarding the official's exercise of the state's sovereign police powers. Those powers are reserved to the states and protected from federal oversight or interference by the 10th Amendment. Congress' investigative and oversight jurisdiction is derived from and limited by its power to legislate concerning federal matters.

Further, as is also discussed more fully in the Office of the Attorney General of New York's May 26, 2016 letter to you, we are not aware of any precedent supporting a Congressional investigation or Congressional oversight of a state Attorney General. We think that is for good reason.

For these reasons, respectfully, the VTAG is not producing any documents in response your letter.

Sincerely,

Susanne R. Young
Deputy Attorney General

cc: Honorable Eddie Bernice Johnson
Ranking Member, Committee on Science, Space, and Technology

Majority Staff, Committee on Science, Space, and Technology Rayburn House Office Building, Room 2321

Minority Staff, Committee on Science, Space, and Technology Ford House Office Building, Room 394

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

June 17, 2016

The Honorable William H. Sorrell
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609-1001
Augusta, ME 04333

Dear Attorney General Sorrell,

Thank you for your May 31, 2016, response. The House Science Committee's authority to investigate the concerns raised in our prior letter are grounded in the Constitution and reflected in the rules of the House of Representatives. The Committee strongly disagrees with your contentions. The Committee intends to continue its vigorous oversight of the coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. For the reasons set forth below, the Committee requests that you provide the documents and information previously requested in our May 18, 2016, letter.

Congress' Broad Investigatory Power

Congress' oversight powers are derived from the Constitution and have been repeatedly affirmed by case law.[1] The Supreme Court has "firmly established that such power is essential to the legislative function as to be implied from the general vesting of legislative powers in Congress."[2] Hand in hand with Congress' legislative power is its power to investigate. Indeed, in 1975, when commenting on Congress' investigative power, the Supreme Court stated that the "scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] However, Congress' investigatory power is not without limits.[4] Over the years, high profile investigations such as Iran-Contra, Whitewater, Fast and Furious, and Benghazi continue to refine and augment Congress' prerogatives in the area of oversight.

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[1] *See generally* U.S. Constitution, Art. I; *McGrain v. Daugherty*, 273 U.S. 135 (1927) (Congress was investigating the U.S. Dep't of Justice's handling of the Teapot Dome scandal); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975) (U.S. Senate committee investigating the activities of U.S. Servicemen's Fund and their effect on the morale of members of the Armed Services).
[2] Alissa Dolan et al., *Congressional Oversight Manual*, Cong. Research Serv., RL30240 (Dec. 19, 2014) at 23.
[3] *Eastland* 421 U.S. at 504, n. 15 (quoting *Barenblatt*, 360 U.S. at 111).
[4] *Watkins v. U.S.*, 354 U.S. 178 (1957).

While Congress often must conduct investigations to aid its execution of its legislative function, this requirement is flexible. To form a basis for its investigations, Congress needs only the "potential" for a legislative solution.[5] According to the Supreme Court, the mere possibility that Congress can enact related legislation is sufficient to justify proceeding with an investigation.[6] In *Eastland*, the Supreme Court went even further, holding that "[t]o be a valid legislative inquiry there need be no predictable end result."[7] The legislative activity that may arise is broad. Courts have allowed congressional investigations for a broad range of purposes: the primary function of legislating and appropriating, the execution of law by the executive branch, and "the essential function of informing itself in matters of national concern."[8] Likewise, the subjects and targets of congressional investigations are varied and have included foreign and domestic national security matters, labor union corruption,[9] organizations that violate the civil rights of individuals,[10] state agencies involved in the Hurricane Katrina response,[11] and Major League Baseball.

Specific Basis for the Committee's Investigation

Pursuant to Rule X of the Rules of the House of Representatives, the Committee on Science, Space, and Technology is a standing Committee with delegated "jurisdiction and related functions" including "general oversight responsibilities," to aid the House in "its formulation, consideration, and enactment of changes in Federal laws." Specifically, and pertinent to this investigation, the Science Committee has legislative and oversight jurisdiction over: "Environmental research and development" as well as "Scientific research, development, and demonstrations, and projects therefor." In addition, House Rule X states that the Science Committee, "shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development."

In fiscal year 2015, the federal government spent approximately $138 billion to fund research and development.[12] Of that total federal spending, approximately $40 billion is allocated by departments and agencies under the Science Committee's jurisdiction. This Committee has a vested interest in ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry, including those that may be in conflict with and/or rebut the findings proposed by various institutions. Ultimately, the science relied upon by the federal government must be sound, reproducible, and transparent—in other words, beyond reproach and unimpeachable. In the area of climate change, we simply are not at the unimpeachable level. Therefore, it is the position of

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[5] *McGrain* at 177, 181-182.
[6] *See McGrain*, 273 U.S. at 177, 181-182.
[7] *Eastland* at 509.
[8] CRS Report at 26.
[9] *Hutcheson v. U.S.*, 369 U.S. 599 (1962).
[10] *Shelton v. U.S.*, 404 F.2d 1292 (D.C. Cir. 1968, cert denied, 393 U.S. 1024 (1969).
[11] The Select Bipartisan Comm. to Investigate the Preparation for & the Response to Hurricane Katrina [the Select Comm.], *A Failure of Initiative: Final Report of the Select Comm.*, 109th Cong., Report 109-377 (Feb. 15, 2006).
[12] John F. Sargent Jr., et al., *Federal Research & Development Funding FY2016*, Cong. Research Serv., R43944, Feb. 17, 2016.

the Science Committee that offices such as yours and those similarly situated should not be taking legal action based on debatable science to undermine the First Amendment of the Constitution.

The subpoenas issued and contemplated by members the Green 20 are far-reaching and, in some cases, demand scientific work product going back decades. In a recent interview with Judy Woodruff, Attorney General Schneiderman stated:

> **So we're very interested in seeing what science Exxon has been using** for its own purposes, because they're tremendously active in offshore oil drilling in the Arctic ... **Were they using the best science and the most competent models for their own purposes,** but then telling the public, the regulators and the shareholders that no competent models existed? ... We're interested in what they were using internally ...[13]

This statement suggests that his office, as an arm of state government, will decide what science is valid and what science is invalid. In essence, he is saying that if his office disagrees with whether fossil fuel companies' scientists were conducting and using the "best science," the corporation could be held liable for fraud. Not only does the possibility exist that such action could have a chilling effect on scientists performing federally funded research, but it also could infringe on the civil rights of scientists who become targets of these inquiries. Your actions violate the scientists' First Amendment rights. Congress has a duty to investigate your efforts to criminalize scientific dissent.

Additionally, Congress has a responsibility to investigate whether such investigations are having a chilling effect on the free flow of scientific inquiry and debate regarding climate change. Much of the scientific research under scrutiny by the attorneys general has been conducted with taxpayer dollars. These are the exact areas contemplated in the Committee's May 18, 2016, request letter and squarely within the Committee's investigatory authority. Not only can Congress investigate the potential chilling effect of your investigations on the First Amendment rights of scientists, but also Congress can investigate the effects your work may have on the allocation and expenditure of taxpayer funds.

As articulated in our original request letter to your office, the Committee takes seriously its duty to protect scientists' ability to "fund and conduct scientific research free from intimidation and threats of prosecution."[14] In fact, given the Committee's jurisdiction, it has an obligation to investigate to ensure that scientific endeavors are free from threats and intimidation when entities attempt to suppress the flow of ideas and information at the very core of the scientific process. Based on the information available, your investigative efforts and those of the so called "Green 20" have the potential to chill scientific research, including research that is federally-funded. The Committee's investigation is intended to determine whether your actions

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[13] *Has Exxon Mobil Misled the Public About Climate Change Research*, Nov. 10, 2015, *available at* http://www.pbs.org/newshour/bb/exxon-mobil-mislead-public-climate-change-research (last visited June 7, 2016).
[14] Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. to Hon. Eric Schneiderman, Attorney General, et. al., May 18, 2016.

and those of your fellow attorneys general indeed are having such an effect. Investigations relating to scientific research are precisely what this Committee is charged with conducting and it does so with the intent of providing a legislative remedy, if warranted.

The Committee's Document Request

The Committee believes the requests in our May 18, 2016, letter are all valid and legally sustainable. Therefore, we reiterate the following requests for documents and information:

1. All documents and communications between or among employees of the Office of the Attorney General of Vermont and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Vermont and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Vermont and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

Please provide documents responsive to this request on or before close of business on June 24, 2016. Instructions for responding to the Committee are enclosed. If you have any questions about this request, please contact the Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith
Rep. Lamar Smith
Chairman

Frank D. Lucas
Rep. Frank D. Lucas
Vice Chairman

The Honorable William H. Sorrell
June 17, 2016
Page 5

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Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

WILLIAM H. SORRELL
ATTORNEY GENERAL

SUSANNE R. YOUNG
DEPUTY ATTORNEY GENERAL

WILLIAM E. GRIFFIN
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June 24, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

I write to respond to the June 17, 2016 letter from the Majority members of the House Committee on Science, Space and Technology. The letter restates the requests set forth in your letter dated May 18, 2016 for documents regarding alleged investigatory and prosecutorial efforts by the State of Vermont Office of Attorney General related to climate change.

By letter dated May 31, 2016, our office has already explained that it will not produce any documents and the reasons for this decision. The House Committee's most recent letter does not address these reasons and our position accordingly remains unchanged.

Sincerely,

Susanne R. Young
Deputy Attorney General

cc: Honorable Eddie Bernice Johnson
Ranking Member, Committee on Science, Space, and Technology

Majority Staff, Committee on Science, Space, and Technology Rayburn House Office Building, Room 2321

Minority Staff, Committee on Science, Space, and Technology Ford House Office Building, Room 394

LAMAR S. SMITH, Texas
CHAIRMAN

EDDIE BERNICE JOHNSON, Texas
RANKING MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
2321 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6301
(202) 225-6371
www.science.house.gov

May 18, 2016

The Honorable Robert W. Ferguson
Attorney General of Washington
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100

Dear Mr. Attorney General,

The Committee on Science, Space, and Technology is conducting oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution. On March 29, 2016, a number of state attorneys general – the self-proclaimed "Green 20" – announced cooperation on an unprecedented effort against those who have questioned the causes, magnitude, or best ways to address climate change.[1] The Committee is concerned that these efforts to silence speech are based on political theater rather than legal or scientific arguments, and that they run counter to an attorney general's duty to serve "as the guardian of the legal rights of the citizens" and to "assert, protect, and defend the rights of the people."[2] These legal actions may even amount to an abuse of prosecutorial discretion. To assist in the Committee's oversight of this matter, we are writing to request information related to your office's role in this investigation.

The 2012 Workshop to Explore Legal Avenues to Demonize the Fossil Fuel Industry

According to media reports, efforts to instigate an investigation such as the one announced by the Green 20 on March 29 date back to at least 2012 and are the result of a "four-year, coordinated strategy by environmental organizations and trial attorneys."[3] In June 2012, the Climate Accountability Institute (CAI) and the Union of Concerned Scientists (UCS) convened a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" in La

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[1] Video Press Conference with Eric Schneiderman, Attorney General, N.Y. State (Mar. 29, 2016); John Schwartz, *Exxon Mobil Climate Change Inquiry in New York Gains Allies,* N.Y. TIMES, Mar. 29, 2016, *available at* http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html?_r=2.

[2] Bureaus of Attorney General, New York, May 12, 2016, *available at http://www.ag.ny.gov/bureaus*; Office of the Attorney General, U.S. Virgin Islands, Dept. of Justice, May 12, 2016, *available at* http://usvidoj.codemeta.com/DivisionContent_1.php?divId=84.

[3] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages* Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman.

Jolla, California.[4] The workshop's attendees included UCS Director of Science and Policy Peter Frumhoff and activist trial attorney Matthew Pawa, founder of the Global Warming Legal Action Project.[5]

The goal of the 2012 workshop was to develop a "strategy to fight industry in the courts," as well as to find ways to address what workshop attendees believed to be a "network of public relations firms and nonprofit 'front groups' that have been actively sowing disinformation about global warming for years."[6] According to the workshop's report, a necessary component of their strategy was to bring "internal industry documents to light."[7] Workshop attendees then proceeded to identify ways to procure documents that they admittedly did not know existed (e.g., "many participants suggested that incriminating documents may exist):"[8]

> Having attested to the importance of seeking internal documents ... lawyers at the workshop emphasized that there are many effective avenues for gaining access to such documents. First, lawsuits are not the only way to win the release of documents ... **State attorneys general can also subpoena documents, raising the possibility that a single sympathetic state attorney general might have substantial success in bringing key internal documents to light.** In addition, lawyers at the workshop noted that even grand juries convened by a district attorney could result in significant document discovery.[9]

The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial powers to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.

The 2016 Rockefeller Family Fund Meeting and the Attempt to Conceal Collusion between the New York Attorney General and Extremist Environmental Groups and Trial Lawyers

In January 2016, nearly four years later, a group of environmental activists, including 2012 workshop participant Matthew Pawa, as well as representatives from groups such as

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[4] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[5] *Id.*
[6] Phil McKenna, *Activists Step Up Long-Running Campaign to Hold Oil Industry Accountable for Climate Damages*, Inside Climate News, Apr. 27, 2016, *available at* http://insideclimatenews.org/news/26042016/environmental-activists-campaign-exxon-climate-change-investigation-attorney-general-schneiderman; Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[7] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.
[8] *Id.* [emphasis added]
[9] *Id.* [emphasis added]

350.org and Greenpeace, met at the Manhattan offices of the Rockefeller Family Fund.[10] The meeting was held to develop a strategy "to establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm," and "[t]o drive Exxon & climate into [the] center of [the] 2016 election cycle."[11] According to media reports, the meeting also included a discussion of state attorneys general, the Department of Justice, and "the main avenues for legal actions & related campaigns."[12] Specifically, meeting attendees were to focus on determining "the best prospects for successful action? For getting discovery? For creating scandal?"[13]

Finally, on March 29, 2016, in the hours before members of the Green 20, joined by former Vice President Al Gore, held a widely-publicized press conference announcing cooperation on investigations against those who question the causes, magnitude, or best ways to address climate change, members of the group were briefed by 2012 workshop attendees Matthew Pawa of the Global Warming Legal Action Project and UCS's Peter Frumhoff. It has since come to light that the New York Attorney General's office willfully concealed the fact that this briefing took place. According to emails discovered and posted online by a watchdog group, on March 30, Matthew Pawa wrote to an attorney in the New York Attorney General's office stating that a *Wall Street Journal* reporter wanted to talk with Pawa about the pre-conference briefing. Pawa asked the attorney, "What should I say if she asks if I attended?"[14] The attorney replied, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."[15]

In the weeks since the March 29 press conference, legal actions against those who question climate change orthodoxy by members of the Green 20 have rapidly expanded to include subpoenas for documents, communications, and research that would capture the work of more than 100 academic institutions, scientists, and nonprofit organizations. According to press reports, most of those targeted were identified from lists published on an environmental activist organization's website.[16]

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[10] Amy Harder, Devlin Barret, and Bradley Olson, *Exxon Fires Back at Climate-Change Probe*, WALL ST. J., Apr. 13, 2016, *available at* http://www.wsj.com/articles/exxon-fires-back-at-climate-change-probe-1460574535?cb=logged0.4458549134086849.
[11] *Id.*
[12] Alana Goodman, *Memo Shows Secret Coordination Effort Against ExxonMobil by Climate Activists, Rockefeller Fund*, Wash. Free Beacon, Apr. 14, 2016, *available at http://freebeacon.com/issues/memo-shows-secret-coordination-effort-exxonmobil-climate-activists-rockefeller-fund.*
[13] *Id.*
[14] Valerie Richardson, *Democratic AGs, Climate Change Groups Collude on Prosecuting Dissenters, Emails Show*, WASH. TIMES, Apr. 17, 2016, *available at* http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.
[15] *Id.*
[16] Valerie Richardson, *Exxon Climate Change Dissent Subpoena Sweeps Up More than 100 U.S. Institutions*, WASH. TIMES, May 3, 2016, *available at* http://m.washingtontimes.com/news/2016/may/3/virgin-islands-ag-subpoenas-exxon-communications/.

The Committee's Request for Transparency

This sequence of events – from the 2012 workshop to develop strategies to enlist the help of attorneys general to secure documents, to the 2016 subpoenas issued by members of the Green 20 – raises serious questions about the impartiality and independence of current investigations by the attorneys general. Your office – funded with taxpayer dollars – is using legal actions and investigative tactics in close coordination with certain special interest groups and trial attorneys that may rise to the level of an abuse of prosecutorial discretion. Further, such actions call into question the integrity of your office.

To assist the Committee in its oversight of a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and threats of prosecution, we request the following documents and information as soon as possible, but by no later than noon on May 30, 2016. Please provide the requested information for the time frame from January 1, 2012, to the present:

1. All documents and communications between or among employees of the Office of the Attorney General of Washington and any officer or employee of the Climate Accountability Institute, the Union of Concerned Scientists, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project, referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between or among employees of the Office of the Attorney General of Washington and any other state attorney general office referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

3. All documents and communications between or among employees of the Office of the Attorney General of Washington and any official or employee of the U.S. Department of Justice, U.S. Environmental Protection Agency, or the Executive Office of the U.S. President referring or relating to your office's investigation or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2321 of the Rayburn House Office Building and the Minority Staff in Room 394 of the Ford House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment provides information regarding producing documents to the Committee.

If you have any questions about this request, please contact Committee Staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank D. Lucas
Vice Chairman

Rep. F. James Sensenbrenner, Jr.
Member of Congress

Rep. Dana Rohrabacher
Member of Congress

Rep. Randy Neugebauer
Member of Congress

Rep. Mo Brooks
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

Rep. John Moolenaar
Member of Congress

Rep. Brian Babin
Chairman
Subcommittee on Space

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

Enclosure

ARTICLE SUBMITTED BY REPRESENTATIVE FRANK D. LUCAS

INVESTOR'S BUSINESS DAILY

The 'Green 20' Attorneys General Try End-Run Around Congress

The House committee chaired by Lamar Smith seeks to determine whether investigations by state attorneys general, who are known as the "Green 20," are collusive shams. (AP)

C. BOYDEN GRAY8/15/2016

Many on the left seem to have few qualms about deploying the state's immense coercive powers to trample upon constitutional rights in the name of progress. But turn the tables, and it is astonishing how quickly they seek to wrap themselves in constitutional garb.

The latest example arises out of investigations launched by state attorneys general -- originally dubbed the "Green 20" -- into climate change-related conduct by businesses like ExxonMobil and nonprofit entities like the Competitive Enterprise Institute. The House Committee on Science, Space and Technology, chaired by Lamar Smith, R-Texas, is seeking communications between the AGs and various special interest groups to determine whether the investigations are collusive

shams -- unconstitutional actions intended to harass and intimidate rather than uncover wrongdoing.

The publicly available evidence indicates that the Green 20 investigations were concocted by and initiated at the behest of special interest groups, designed to suppress climate change dissent and scientific research. To summarize: In 2012, several climate change-focused special interest groups gathered to devise a "strategy to fight the oil industry in the courts."

Their hope was to enlist the coercive subpoena power of at least one "sympathetic" state attorney general to bring "internal industry documents to light." Participants hoped to uncover "incriminating documents," though they admitted to each other that they had no idea whether such documents even existed.

Representatives of special interest groups later met with representatives of the Green 20 in secret. And shortly thereafter, the Green 20 issued a set of subpoenas to entities long-targeted by the special interest groups with which the AGs had met.

The requested documents would aid the House committee in evaluating the legality of the Green 20 investigations. If they support the collusion implicit in the public record, the state AG investigations would seem to be constitutionally invalid -- interest group-driven fishing expeditions carried out by some of the country's most powerful law enforcement officials designed to squelch disfavored speech. If the requested documents do not exist or tell a different story, the investigations could proceed without further federal oversight.

Instead of responding on the merits, however, the Green 20 and their allies have deployed several tricks from their familiar diversionary playbook.

Just a few months ago, some of the Green 20's allies contended that a committee request for National Oceanic and Atmospheric Administration

climate change-related documents was not legitimate congressional oversight but rather a fishing expedition in contravention of constitutional limits. The recipients of the committee's latest requests are trotting out those same tired arguments.

One group, 350.org -- in a letter penned by a leading law firm -- contends that the committee's new inquiry has no "legitimate basis" and "strikes at the heart of the rights to 'speak,' 'associate,' and 'petition (the government).' " The letter also claims that the inquiry illegally interferes "with state autonomy." Other recipients of the committee's letters, including New York's AG, lodged similar protests.

These arguments are simultaneously ironic and specious. The committee has good reason to believe there are fishing expeditions afoot, not the other way around. The committee has evidence suggesting collusion between the AGs and special interest groups. By contrast, the Green 20 and their affiliated special interest groups, by their own admission, do not know if the targets of their investigations possess incriminating documents.

The committee's inquiry also does not run afoul of any constitutional rights. It does not impair speech rights, as it seeks neither to punish speech nor to inquire into editorial decisions about what to say. It does not violate associational rights, since it does not inquire into entities' organizational decisions or the identities of entities' members or donors. And it has no effect on the right to petition the government for the redress of grievances. The special interest groups may petition all they want, but no constitutional provision enables them to do so in secret.

Finally, it would be remiss to ignore the irony of the Green 20 and their affiliated interest groups invoking federalism as a defense against the committee's inquiry. Many -- if not all -- of these groups and AGs have consistently urged the federal government to nationalize environmental regulation. Now facing a federal inquiry into their own conduct, they

breathlessly appeal to federalism to shield their possibly unconstitutional conduct from inquiry.

Nonsense. None of the venerable principles that define federalism preclude the committee from investigating violations of constitutional rights, especially those committed by state government officials.

Of course, the recipients of the committee's letters -- and their highly competent lawyers -- know all of this. They know that the citations to various Supreme Court decisions that litter their responses to the committee do not justify their failure to produce the requested documents.

But, then again, their responses are not about the law. They are about power politics. Their self-evident aim is not to discover truth or defend justice but to obfuscate and intimidate the committee into submission, undaunted by and unashamed of the palpable irony and weakness of their legal arguments.

The public has a right to know if the Green 20 investigations are based on evidence that legal violations have occurred or if they are ideological crusades ginned up by well-funded special interest groups. One hopes that a few strongly worded letters embellished with legalese will not deter the committee from determining who is telling the truth.

Gray is the founder of Boyden Gray & Associates. He served as chief White House counsel to President George H.W. Bush and as ambassador to the European Union under President George W. Bush.

NEWS EXCLUSIVE

Schneiderman tried to contact eco-tycoon amid Exxon probe

By Isabel Vincent

September 11, 2016 | 6:10am

Tom Steyer and New York State Attorney General Eric Schneiderman

Photo: Getty Images (2)

When state Attorney General Eric Schneiderman took on ExxonMobil over climate change last year, it seemed like an odd global crusade for a local politician.

Perhaps he was drilling for campaign cash, critics now contend after The Post obtained an e-mail that appears to show the state's top cop was seeking a tree-hugging billionaire's help to finance a run for governor in 2018.

In March 2015, four months after announcing the Exxon probe, the Democratic AG tried to arrange a phone meeting with hedge-fund mogul Tom Steyer, an environmental activist and Exxon enemy.

"Eric Schneiderman would like to have a call with Tom regarding support for his race for governor . . . regarding Exxon case," reads the March 10 e-mail.

The note was sent by Steyer lawyer Ted White to Erin Suhr, Steyer's director of strategic planning at Fahr LLC, which oversees Steyer's political and philanthropic efforts. White, a Colorado lawyer, is Fahr's managing partner.

"Anyone have any flags on this call before I add to Tom's call sheet for Monday?" Suhr replied the next day in an e-mail.

A spokeswoman for Steyer and the two Fahr execs confirmed the e-mail exchange but said the phone meeting never happened.

She also said White has not donated to the AG's campaign.

Steyer is a heavyweight Dem donor who has poured cash into Hillary Clinton's coffers, organized a fund-raiser for President Obama and helped bankroll Clinton acolyte Terry McAuliffe's successful 2013 gubernatorial bid in Virginia. Steyer's NextGen Climate Action PAC spent nearly $70 million on elections in 2014.

Steyer had accused Exxon of misleading investors on climate change for nearly 30 years. In January, as Schneiderman rallied attorneys general in other states to the cause, Steyer urged California's attorney general to join the investigation.

But with AGs deserting the case, many wonder why Schneiderman took on an issue so far afield.

"It all smacks of politics," said former New York AG Dennis Vacco. "What's unsettling to me about this probe is that many of Attorney General Schneiderman's supporters are investors in alternative-energy companies and enemies of Exxon."

The March e-mail alludes to a run for governor, but Schneiderman had denied any such ambition months earlier, telling Politico on Nov. 12, "I am not running for governor in 2018."

His spokesman, Eric Soufer, called the e-mails "nonsense" and said neither the AG nor his staff communicated with White or Steyer about a run for governor.

"If anything, Mr. White may be referring to Mr. Steyer's reported interest in a run for governor of California," Soufer said.

But a source close to White told The Post, "That's not our interpretation of the e-mail."

FILED UNDER: ATTORNEY GENERAL, CLIMATE CHANGE, ERIC SCHNEIDERMAN, EXXON, INVESTIGATIONS, TOM STEYER

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Human Events

Green hypocrisy: billionaire Democrat donor made his bones on coal

John Hayward | *Monday Jul 7, 2014 1:00 PM*

It's interesting to see the *New York Times* finally getting around to telling a story that conservative bloggers have been left alone to tell, notablyPowerLine, which is not credited by the *Times,* but broke the exact same story several months ago. This is a story that makes Democrat sugar daddy Tom Steyer – who bought the Party and its President lock, stock, and barrel this year, with a promise of $100 million in campaign contributions – look very bad. It also makes the Koch-obsessed left wing media look

very bad, because they've been politely ignoring the incandescently obvious fact that Steyer *is* what they've been accusing the Koch Brothers of being: a self-interested moneybags looking to purchase control over the American political system for his own ends.

The *New York Times* begins its report by describing a 4,000-acre mine in New South Wales that's going to spew eeeeeeeevil carbon dioxide – the Glenfidditch of greenhouse gases – into the atmosphere for decades to come. The project was opposed by some local environmentalists, but that doesn't matter, because it's been bankrolled by the biggest environmentalist of them all:

But the project had an unlikely financial backer in the United States, whose infusion of cash helped set it in motion: Tom Steyer, the most influential environmentalist in American politics, who has vowed to spend $100 million this year to defeat candidates who oppose policies to combat climate change.

Mr. Steyer, a billionaire former hedge fund manager, emerged this election season as the green-minded answer to Charles G. and David H. Koch, the patrons of conservative Republican politics, after vowing that he would sell off his investments in companies that generate fossil fuels like coal.

Times readers can thank them for cushioning the blow of this article with some comforting liberal spin. In reality, the Koch Brothers are not remotely comparable to Steyer in either their political bankroll or ideological focus. Also, from a media and public-relations standpoint, it's ridiculous to describe griping about Steyer as a right-wing "answer" to left-wing neurosis about the Koch Brothers. The latter are major demon figures of liberal mythology, and have been for years; Senate Majority Leader Harry Reid *denounces them from the Senate floor by name,* almost daily, because that lets him nourish this politically useful mythology without having to worry that the Kochs will sue him for slander.

By contrast, not all that many conservatives know about Steyer, and virtually no one outside the conservative media sphere has a clue who he is. He's kept safely offstage by the media, in much the same way as George Soros or George Kaiser. Steyer would be even less well-known if not for the splashy headline-grabbing offer to put $100 million behind the political arm of the Church of Global Warming.

But an examination of those investments shows that even after his highly public divestment, the coal-related projects his firm bankrolled will generate tens of millions of tons of carbon pollution for years, if not decades, to come.

Over the past 15 years, Mr. Steyer's fund, Farallon Capital Management, has pumped hundreds of millions of dollars into companies that operate coal mines and coal-fired power plants from Indonesia to China, records and interviews show.

The expected life span of those facilities, some of which may run through 2030, could cloud Mr. Steyer's image as an environmental savior and the credibility of his clean-energy message, which has won him access to the highest levels of American government. A few weeks ago, Mr. Steyer, 56, joined President Obama for an intimate group dinner at the White House that ran into the early morning hours, according to people told of the event.

Well, yes, you'd think that would all be a tad... *difficult* for faithful environmentalists to swallow. But it won't be, because the Church of Global Warming is a *religion,* not a scientific movement. It dovetails neatly with totalitarian socialist ideology, which is why the towering mountain of evidence that *there is no "climate change"* has barely produced a ripple among the faithful. The climate-change scam is too useful to allow piddly little "reality" and its columns of actual data to get in the way. The people who find it useful are very well-accustomed to permitting indulgences for their divinely-ordained leaders. Ends justify means, the great and powerful leaders of the Left deserve their luxuries, and if Tom Steyer had to shovel a few million tons of coal to make the money he's putting behind Democrat candidates, well, you gotta break some carbon-dioxide-filled eggs to make an omelette. The same hedge-fund haze that provides zero protection for people the Left doesn't like will be considered good enough to forgive

Steyer for his eco-sins, just as his ideological commitments are pure enough to keep anyone from asking what his personal "carbon footprint" looks like.

At least, it will be good enough for American liberals. Australians, not so much:

Given Mr. Steyer's reputation as an active environmentalist, Australian opponents of the mine were startled to learn of his firm's role as an early investor.

"It's gobsmacking," Philip Spark, president of the Northern Inland Council for the Environment, a nonprofit trying to stop construction of the mine, said in a telephone interview. "It's amazing that such a person could have been involved in this project."

Mark Carnegie, an investment banker in Australia who was involved in the Maules Creek deal, said he could sense even then that Mr. Steyer was struggling to reconcile his motivations as a profit-seeking investor with his growing anxieties about the environment.

But the investment was financially irresistible. "It was a hard thing to turn down," Mr. Carnegie said. "It was a huge winning bet for Farallon."

The PowerLine article that our friends at the *New York Times* are playing catch-up with went so far as to speculate, "It stands to reason that few people in American history have made more money from investment in thermal coal than Mr. Steyer."

A great deal of "climate change" political theater in the United States (and the United Kingdom) depends on keeping a curtain over what the rest of the world is doing and saying. Politicians pretend that imposing draconian regulations on American industry can somehow overwhelm the greenhouse-gas emissions of the rest of the world – a laughable proposition even if you accept the potential dangers *theorized* about these emissions, with precious little in the way of hard scientific evidence, to say nothing of the aforementioned mountain of evidence about a two-decade "climate change pause" none of the computer models saw coming. A man who made megabucks by investing in

a carbon-spewing Australian mine, putting his money into a massive political effort to cripple American industry? It's almost beyond satire.

This little story is also an intriguing example of how much left-wing ideology really boils down to a super-rich aristocracy using the power of government to keep anyone else from joining the billionaire's club. Ambitious politicians make a tidy sum by selling *anti-competition,* a highly radioactive economic element that only the State can produce. Once you've made your billions, it makes sense to create a regulatory maze that will prevent others from following you. Sometimes this is as blunt as protected unions or corporations lobbying the State to freeze markets and lock out competition, as with the current brouhaha over theUber and Lyft transportation services. Other times, it's a subtle as big insurance companies supporting a massive chunk of legislation – the Affordable Care Act – that has the little-remarked effect of keeping upstart new players out of the insurance market. And then you've got a man who made a fortune off coal supporting policies that will make it virtually impossible for anyone else to make a fortune that way...

Personally, I've got no problem with anyone spending his millions to support whatever candidates he likes. I reserve the right to strenuously *disagree* with those choices, but I'm not interested in using government power to lock either Tom Steyer or the Koch Brothers out of politics. But we've heard *years* of caterwauling from Democrats about how the Kochs are pure evil, how their money is an acid that dissolves the very fabric of democracy, and how they're really just a couple of greedy capitalists looking to buy some pet politicians. One man's selfish special interest is another man's noble socially-conscious activist.

ARTICLE SUBMITTED BY REPRESENTATIVE MO BROOKS

VERDICT

Chilling Scientific Inquiry

19 APR 2016

RONALD D. ROTUNDA

In 2009, there was a massive email leak from the Climatic Research Unit (CRU) at the University of East Anglia. Supporters of global warming claimed the disclosures were out of context while opponents claimed they showed efforts to manipulate data. One of the quoted emails, Professor Phil Jones, while discussing paleo-data used to reconstruct past temperatures, says, "I've just completed Mike's Nature trick of adding in the real temps to each series for the last 20 years (ie from 1981 onwards) and from 1961 for Keith's to *hide*the decline." (Emphasis added.) The House of Commons investigated and concluded, "insofar as we have been able to consider accusations of dishonesty—for example, Professor Jones's alleged attempt to 'hide the decline'—we consider that there is no case to answer."

In the 1970s, scientists told us to fear global cooling and warned about the coming ice age. In 1970 alone, the *New York Times*, the *Washington Post*, the*Boston Globe*, and the *LA Times* all published stories with headlines like"Scientists See Ice Age in the Future." Time Magazine's cover story on Jan. 31, 1973, (still posted on the Magazine's website) was all about "The Big Freeze." Two years later, Newsweek reported, "There are ominous signs that the earth's weather patterns have begun to change dramatically and that these changes may portend a drastic decline in food production—with serious political implications." The problem—warming? No, cooling! The story concluded, "Meteorologists disagree about the cause and extent of the cooling trend," but "they are almost unanimous in the view that the trend will reduce agricultural productivity for the rest of the century."

For whatever reasons, polls consistently indicate that many Americans are skeptical that global warming is a serious problem. If it is a problem, many question whether it is a man-made

problem. Change is, after all, what the climate does. Americans share their skepticism with most of the rest of the world. One recent poll found *only* 9.2 percent of Americans rate global warming as their top concern.

What should *the government* do about this general disbelief about global warming? Normally, one should think that if the government should do anything, it would be to encourage further scientific research and publish the results of that research. If others embrace an incorrect view of the facts, the remedy is more speech (not less) so that all the speech can be tested in the market place of ideas.

Justice Oliver Wendell Holmes, Jr. told us nearly a century ago that the "ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." [*Abrams v. United States*, 250 U.S. 616,630 (1919) (Holmes, J., dissenting).] Even if the other fellow says something you think is impossible (he claims to have squared the circle), just allow more speech, and others will eventually understand that he is wrong if we protect the free marketplace of ideas.

Or, maybe this free marketplace will allow us to discover that the other fellow is right. It was not until 1985 that scientists discovered physical evidence of the Big Bang. Georges Lemaître, a physicist at the Catholic University of Leuven and a Belgian priest, first proposed the Big Bang in 1927. Einstein rejected Lemaître's theory, saying, "Your calculations are correct, but your physics is atrocious."

Although Einstein knew Lemaître was wrong, Einstein did not seek to silence him. In modern times, Lemaître's theory might bring in some major grant money. Still, in the prior century, no government would sue Lemaître for fraud in propounding his theory—even though the government's expert witness would be none other than Albert Einstein himself, winner of the Nobel Prize in Physics in 1921.

For most of human history, scientists and philosophes going back to Aristotle believed the universe just is—it was always here. After Lemaître, scientists, and those who funded them, tried to find proof, and the answer they got surprised them: Lemaître was right. Now, most scientists believe that our universe had a beginning, and they debate whether it will have an end.

So, what should we do about those people who are trying to show that global warming is not man-made, that it is not coming as soon as others claim, or that the benefits of warming outweigh the burdens? We could emulate the open debate between Lemaître and Einstein.

Ah, that's so twentieth century. If the people do not believe something, the government should sue. Litigation is the American way. The Attorney General of California, Kamala D. Harris, is

using her power to investigate those who sell fossil fuels. Presidential candidates Hillary Clinton and Bernie Sanders are also calling for criminal investigations.

Attorney General Harris—who is supposed to use her office to protect constitutional rights—is investigating whether companies like Exxon Mobil Corp. *lied* to the public about global warming, whether that amounts tosecurities fraud and violations of environmental laws.

Not to be outdone, the New York Attorney General is also investigating.Eighteen other state attorneys general are also exploring alleged crimes. That will teach those who question global warming that the government is not fooling around. Investigations will cost the companies and the scientists a lot of money to answer subpoenas and interrogatories. That is the point of chilling scientific inquiry.

Things could go well beyond that. Search warrants executed at night may be the next step for Harris's investigation. That's what she did when whistleblowers released video evidence of Planned Parenthood officials discussing the sale of body parts. The Attorney General's investigators burst into the home of David Daleiden, the man behind the video release, as if he were a Mexican drug lord kingpin. They seized his laptop and other material and tried to seize his phone while he was using it to talk to his lawyers. However, they "ignored" evidence "in his home that showed an illegal agreement between StemExpress, a tissue procurement company, and Planned Parenthood."

Meanwhile, Exxon has "unequivocally" rejected the allegations that it "suppressed climate change research," given "Exxon Mobil's nearly 40-year history of climate research that was conducted publicly in conjunction with the Department of Energy, academics and the UN Intergovernmental Panel on Climate Change."

Let us put to one side an inconvenient truth—Exxon could hardly "suppress" any research given the fact that research warning about global warming has been published continually for many decades.

Another inconvenient truth is that there are still many open questions about global warming that need answers—why has the rate of global warming not followed what most scientific models predicted; are the oceans absorbing substantially more carbon dioxide that anyone expects; should there have been more global warming during WWI and WWII, when the massive bombings unleashed a deluge of carbon dioxide?

We are allowed to dispute other scientific theories. Scientists argue whether man will ever be able to travel faster than light, although Einstein said that is the universal speed limit. Scientists argue whether our universe is the only one or merely one of an infinite number. Some scientists believe that the universe is in a steady state, with the spontaneous creation of matter and energy out of a vacuum.

We develop human knowledge by testing competing theories, not outlawing them. The thought that government authority would investigate those who advocate one position instead of the other is baffling. This is, after all, not the Middle Ages, when people were punished if they did not believe that the earth was the center of the solar system.

Kamala Harris does not use her prosecutorial powers to chill expression about global warming in any principled way. Consider marijuana. For many decades, the government told us that marijuana is a drug, with no legitimate use. During that time, it was not unusual for the federal government to fund research on why marijuana is detrimental. Should the State Attorney General investigate those who received these federal grants and prosecute them for lying about marijuana because they engaged in advocacy research?

The federal government will soon reschedule marijuana. That change will allow researchers to study whether marijuana can be beneficial. Once the federal government reschedules marijuana, will Harris now be investigating those who engage in advocacy research to show the beneficial effects of marijuana?

In 1970 and for years after that, the government urged us to avoid red meat, egg yolks, and whole milk (too much fat). We complied with the food pyramid. From 1970 to 2005, the Department of Agriculture reported, proudly, that consumption of eggs and red meat fell by 17 percent, and whole milk by 73 percent.

We should be glad that there was no ambitious Attorney General Kamala D. Harris around, because she would have tried to prosecute food industry companies if they funded research into the *benefits* of eggs, meat, and milk. You see, during the same period (1970-2005) where the public followed the Federal Food Pyramid, the incidence of diabetes doubled! Studies now show that people eating dairy products like whole milk have less of a problem with heart disease than those who do not.

In *United States v. Alvarez* (2012) (6 to 3), the Supreme Court told us that we have a constitutional right to *lie* about receiving the Congressional Medal of Honor. The Court was not recommending lying, but it recognized that if the government can punish that, we go down a steep slippery slope. Justice Kennedy said that the government cannot "compile a list of subjects about which false statements are punishable." Justice Breyer defended lying, "even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth."

Even the three dissenters in *Alvarez* would protect lying in matters of science: "Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern" would "present a grave and unacceptable danger of suppressing truthful speech." Harris and the other Attorneys General should read *Alvarez*.

The marketplace of ideas, not the subpoena power of government, should decide what is true or false.

ARTICLE SUBMITTED BY REPRESENTATIVE DONALD S. BEYER

The Washington Post

The Post's View

2015: A year of progress and buffoonery on climate change

Skiers ski on a thin layer of snow in Villard-de-Lans, central-eastern France, on Dec. 27. (Jean Pierre Clatot/Agence France-Presse via Getty Images)

By Editorial Board January 2, 2016

LAST WINTER, bitter cold on the East Coast prompted Sen. James M. Inhofe (R-Okla.) to take a snowball onto the Senate floor in mockery of climate scientists. This winter, the weather is so warm that there are not two snowflakes in the Washington area for Mr. Inhofe to scrape together.

unprecedented global agreement the measure helped to produce. Sen. Ted Cruz (Tex.) went further, holding a hearing on climate science with a witness list that was a funhouse-mirror image of the scientific community: short on those who accept mainstream climate science, packed with climate critics. Mr. Cruz insisted that there has been a "pause" in global warming since 1998, a date critics choose as their starting point because it was another El Niño year marked by very high temperatures. Like Mr. Inhofe and his snowball, Mr. Cruz's point ignored the long-term nature of the warming trend. It also might be flatly wrong: A June paper in the top-flight journal Science found that the warming "pause" reflected biases in temperature data rather than a significant plateau in real temperature rise.

Alas, this finding also led to a nasty GOP reaction. House Science, Space and Technology Committee Chairman Lamar Smith (Tex.) subpoenaed emails relating to the study, which came from the National Oceanic and Atmospheric Administration. Congressional oversight of federal spending is important. That's no excuse to conduct fishing expeditions designed to personally discredit scientists and undermine peer-reviewed research with lines from informal emails.

With the events of the past year in mind, the presidential candidates — and American voters — must ask themselves: Do they want to build on 2015's climate progress, or do they want more of last year's climate buffoonery?

https://www.washingtonpost.com/opinions/2015-a-year-of-progress-and-buffoonery-on-climate-change/2016/01/02/9ad6955c-af33-11e5-9ab0-884d1cc4b33e_story.html?utm_term=.0ab1b4307c65

Congress of the United States
Washington, DC 20515

June 2, 2016

The Honorable Lamar Smith
Chairman of the Committee on Science,
Space, and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

We write to express our concerns regarding the letter (Letter) you sent on May 18, 2016 to the attorneys general of seventeen U.S. states and territories, including Virginia, Maryland, and the District of Columbia, which we represent, and to other organizations. The stated purpose of the Letter was to request information as part of an effort, ostensibly, to conduct "oversight of a coordinated attempt to deprive companies, nonprofit organization, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution."

After constructing a narrative of shadowy collusion, and pausing to expressly "question the integrity of [each AG's] office," the Letter requests records it hopes will validate its "investigation." The inquiry amounts to a fishing expedition and is a continuation of the House Science, Space, and Technology Committee's transparent and baseless attempts to impugn the integrity of individuals who seek to advance climate science over climate denial. It also demonstrates a fundamental misunderstanding of the Committee's jurisdiction and the role of states' attorneys general, as outlined below. Indeed, the extraordinary nature of the Letter, and lack of focused oversight, may explain why over 40 percent of the Committee's Republican Members (9 out of 21) chose not to sign it. Or perhaps Republican Members abstained because the Letter is ideologically inconsistent with conservative positions on states' rights and federal overreach.

Because it represents a misuse of authority, we, the undersigned, hereby request that the Letter and all corresponding requests be withdrawn. The Science, Space, and Technology Committee should return its focus to science, space, and technology.

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The Committee on Science, Space, and Technology Lacks Appropriate Jurisdiction to Conduct the Oversight Sought

Regardless of the merits of the Letter's accusations, which appear extraordinarily weak, the House Committee on Science, Space, and Technology lacks jurisdiction to oversee the matter at issue. The Letter justifies its requests by suggesting the "oversight" would address: "serious concerns about the impartiality and independence of current investigations by the attorneys general;" "abuse of prosecutorial discretion;" and "a coordinated attempt to attack the First Amendment rights of American citizens and their ability to fund and conduct scientific research free from intimidation and prosecution."

The Letter asserts jurisdictional propriety by stating that the Committee "has jurisdiction over environmental and scientific programs and 'shall review and study on a continuing basis laws, programs, and Government activities' as set forth in House Rule X." Remarkably, the Letter fails to include the broader contextual language of the Rule X authority it cites. In reality, House Rule X provides, "The Committee on Science, Space, and Technology shall review and study on a continuing basis laws, programs, and Government activities *relating to nonmilitary research and development*."[1] (Emphasis added). House Rule X also implies jurisdiction over *federal* R&D, not state criminal investigative authority. Despite the Letter's attempt to shoehorn jurisdiction by referencing scientific research, the Letter squarely represents an attempt to oversee state prosecutorial conduct, not environmental or scientific programs nor nonmilitary research and development. Any connection to climate science is incidental and immaterial to the alleged misconduct. The investigation therefore patently exceeds the jurisdictional scope of the Science, Space, and Technology Committee.

Ultimately, the behavior of state attorneys general vis-à-vis state law is a matter for state courts and state legislatures. States' rights long being a central pillar of conservative philosophy, the Letter's effort to meddle directly in the self-governance and prosecutorial discretion of 17 U.S. states and territories is not lacking for irony.

Role of States' Attorneys General

The Letter asserts that the Committee is "concerned" about cooperation between states' attorneys general and contends that "efforts to silence speech . . . run counter to an attorney general's dut[ies] . . . ." As a refresher, states' attorneys general represent the interests of the people of their states and have the duty and power to investigate criminal activities, such as organized criminal enterprises and fraud against taxpayers. They also play an important role in the areas of environmental policy and ensuring consumers are treated fairly. If it is in fact true, as has been alleged, that certain extractive industry corporations knew about the dangerous impact of climate

[1] Rules of the House Of Representatives, 114th Congress, at Rule X(3)(k). Available at http://clerk.house.gov/legislative/house-rules.pdf

change since as far back as the 1970s and knowingly misled investors and consumers, the alleged actions amount to fraud committed against the public, and it is well within an AG's scope of jurisdiction to investigate.

Further, communication between AG offices and outside groups or subject matter experts is not evidence of collusion, nor is it uncommon. The free exchange of ideas is one of the foundations of the First Amendment and should be encouraged. The Letter erroneously equates benign communication to collusion, ignoring the fact that AGs "routinely seek input from outside organizations but pursue cases based only on the merits."[2]

A comparison to Big Tobacco is useful here. The scientific connection between smoking and deadly diseases had been accepted by the scientific community and disputed almost exclusively by industry and the "scientists" on its payroll. It was states' attorneys general who first exposed the withholding of knowledge related to the health effects of smoking by tobacco companies, which ultimately led to the Tobacco Master Settlement Agreement between the four largest U.S. tobacco companies and the attorneys general of 46 states.

Were the tobacco fight to take place today, on which side would the drafters of the Letter find themselves? On the side of unambiguous scientific evidence? Or on the side of those working to manufacture and inject ambiguity into the public's understanding of the science, even though they knew better? On the side of those who cried First-Amendment foul when, at long last, prosecutors asserted that the tobacco industry had no constitutional right to commit fraud against the entire American public? If profit-induced ideology were to have won out over science in that battle, we would still have smoking on planes, kid-friendly cigarette brand ambassadors, and smoking near children, along with all the public health expenses attendant thereto. Thousands of additional lives would have been lost to lung cancer and other tobacco-related health ailments. Fortunately, history played out differently, owing in no small part to the ability of independent attorneys general to try their best legal arguments in the courts.

The Letter claims transparency as its goal. Yet, its true purpose is clear: to keep the public in the dark about whether Exxon lied to its investors and the public. Apparently it is not enough for Republican Members of the House Science Committee to deny the overwhelming weight of climate science. Apparently it is not enough for them to refuse to take action on the harmful human contributions to climate change. Apparently it is not enough to have transformed the House Committee on Science, Space, and Technology into a perpetual witch-hunt mob to drum up false narratives about climate science and climate scientists. Instead, the Letter's authors now see fit to take the unprecedented step of harassing and questioning the integrity of top law

[2] See http://www.washingtontimes.com/news/2016/apr/17/democratic-ags-climate-change-groups-colluded-on-p/?page=all.

enforcement officials from seventeen U.S. states and territories—all to prevent proper investigation into potentially criminally fraudulent activity.

Conclusion

For the reasons stated, we hereby request that the Letter and all corresponding requests be withdrawn. We respectfully request that the drafters of the Letter let the cases at issue play out in the courts. Judges, rather than Members of Congress, have both the jurisdiction and the legal training to determine the merits of legal arguments. We look forward to working with you and other Members of the House Committee on Science, Space, and Technology to reach resolution on this matter.

Sincerely,

Donald S. Beyer Jr.
8th District, Virginia

Donna F. Edwards
4th District, Maryland

Eleanor Holmes Norton
At-large, District of Columbia

Robert "Bobby" C. Scott
3rd District, Virginia

Chris Van Hollen
8th District, Maryland

Gerald E. Connolly
11th District, Virginia

cc: The Hon. Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology
The Hon. Frank D. Lucas, Vice Chairman, Committee on Science, Space, and Technology
The Hon. Lee Abraham, Member of Congress
The Hon. Brian Babin, Chairman, Subcommittee Space

The Hon. Jim Bridenstine, Chairman, Subcommittee on Environment
The Hon. Mo Brooks, Member of Congress
The Hon. Barry Loudermilk, Chairman, Subcommittee on Oversight
The Hon. John Moolenaar, Member of Congress
The Hon. Randy Neugebauer, Member of Congress
The Hon. Bill Posey, Member of Congress
The Hon. Dana Rohrabacher, Member of Congress
The Hon. F. James Sensenbrenner, Jr., Member of Congress
The Hon. Randy Weber, Chairman, Subcommittee on Energy
The Hon. Ben Cardin, U.S. Senator
The Hon. Barbara Mikulski, U.S. Senator
The Hon. Tim Kaine, U.S. Senator
The Hon. Mark Warner, U.S. Senator
The Hon. Brian Frosh, Attorney General, Maryland
The Hon. Mark Herring, Attorney General, Virginia
The Hon. Karl Racine, Attorney General, Washington, DC

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September 13, 2016

House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515

Dear Committee:

We are law professors who study administrative law, federalism, and criminal and civil law and procedure. We write to express our views on the Committee's issuance of a subpoena to state attorneys general concerning pending civil investigations under state law. Brandon L. Garrett is the Justice Thurgood Marshall Distinguished Professor of Law at the University of Virginia School of Law. Margaret H. Lemos is the Robert G. Seaks LL.B. '34 Professor of Law at the Duke University School of Law. William P. Marshall is the William Rand Kenan, Jr. Distinguished Professor of Law at the University of North Carolina School of Law.

Congress's power to investigate plays an essential role in the democratic process.[1] Properly executed, the power allows Congress to obtain information necessary to pass legislation, inform the public about the key issues facing the Nation, and oversee the workings of the other federal branches.[2]

The States, as well, form an essential part of our constitutional structure. The Constitution itself is based upon principles of dual sovereignty, and respect for the States is deeply ingrained in our law.[3] Preserving state sovereignty also furthers important constitutional and democratic values. As the courts have long recognized, protecting the sovereignty of the States brings political decision-making closer to the citizenry, allows for experimentation in social policies, diffuses power throughout the system, and provides a check on federal power.[4]

For over two hundred years, Congress's investigative power and the States' sovereign authority have co-existed without substantial conflict. We are aware of only one instance in which Congress has attempted to subpoena a state government official in his official capacity.[5] To our knowledge, Congress has *never* before attempted to use its investigatory authority to interfere with an ongoing state investigation.

Congress's traditional reluctance to use its investigatory authority to subpoena state government officials concerning ongoing efforts to enforce state law is well justified. As this letter explains, the

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[1] McGrain v. Daugherty, 273 U.S. 135 (1927).

[2] *See generally* William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 799.

[3] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

[4] *Id.* at 458-59.

[5] Tobin v. United States, 306 F.2d 270 (D.C. Cir. 1962).

current investigation raises two sets of overlapping concerns. First, the Committee's subpoena offends notions of state sovereignty: State attorneys general are the chief legal officers of States and represent the sovereign legal interests of their respective States. Second, the Committee's demand interferes with ongoing enforcement efforts, triggering concerns expressed in the *Younger v. Harris* doctrine in the federal courts, and in Congress's own practice with respect to the federal Department of Justice. We therefore respectfully urge the Committee to reconsider its investigative demand and subpoena.

1. Subpoenaing a State Attorney General is an Unprecedented and Ill-Advised Use of Congress's Power to Investigate

Although no provision of the Constitution expressly authorizes Congressional investigations, the Supreme Court has recognized that the power to investigate is implied by the general vesting of legislative powers in Congress.[6] As the Court explained in *Eastland v. United States Serviceman's Fund*, the "scope of [Congress's] power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[7]

Though Congress's investigative authority is "broad," it "is not unlimited."[8] Any investigation must be within the bounds of a legitimate legislative purpose,[9] and may not involve matters exclusively within the province of another branch.[10] As the Supreme Court noted in *Watkins v. United States*, "Congress [is not] a law enforcement or trial agency. These are functions of the executive and judicial departments of government."[11] In addition, Congressional investigations must not transgress external limitations grounded in the rights of individuals or separation of powers. Thus, Congress's power to investigate may be constrained by the First Amendment,[12] the Fifth Amendment's protection against self-incrimination,[13] and executive privilege.[14] When in doubt, the courts have construed the power to investigate narrowly to avoid such constitutional concerns.[15]

In contrast to the developed body of doctrine concerning Congressional investigations generally, there is virtually no case law addressing Congressional investigations of *state* government.[16] The absence of precedent is telling, as it suggests that Congress itself has recognized the seriousness of the constitutional issues involved. As the Court recently explained in *Noel Canning v. NLRB*, "the longstanding 'practice of the government' can inform our determination of 'what the law is.'"[17] In the

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[6] *See, e.g.*, Nixon v. Administrator of General Services, 433 U.S. 435 (1977); Barenblatt v. United States, 360 U.S. 109 (1959); McGrain v. Daugherty, 273 U.S. 135 (1927).

[7] 421 U.S. 491, 504 n.15 (internal quotation marks omitted).

[8] Watkins v. United States, 354 U.S. 178, 187 (1957).

[9] *Id.*; *see also McGrain*, 273 U.S. at 177.

[10] Killbourn v. Thompson, 103 U.S. 168, 192 (1880).

[11] *Watkins*, 354 U.S. at 187.

[12] *Id.* at 197

[13] Hutcheson v. United States, 369 U.S. 599, 610 (1962).

[14] United States v. Nixon, 418 U.S. 683 (1974).

[15] *Watkins*, 354 U.S. at 197.

[16] Our research has disclosed one case, *Tobin v. United States*, 306 F.2d 270 (D.C. Cir. 1962), concerning a Congressional investigation of state officials. As described in more detail in the text below, the *Tobin* decision highlights the need for restraint in this delicate area.

[17] 134 S. Ct. 2550, 2560 (2014) ("[T]his Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.");

context of Congressional investigations, Congress's traditional restraint in matters directly involving state government reflects a valuable normative convention, grounded in respect for federalism and for the unique needs of law enforcement.

We describe the federalism and law-enforcement concerns in more detail below. It bears emphasis at the outset, however, that the Committee's investigation not only represents a break from tradition, but threatens to set a particularly dangerous precedent.

Drawing on powers vested in them by state law, state attorneys general play critical roles in state government. As the Fifth Circuit has put it:

> [T]he attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires.[18]

Each state attorney general represents the sovereign legal interests of his or her State. Indeed, the office of the attorney general is often the primary vehicle for enforcing state policy initiatives. Those enforcement decisions entail all the delicate and discretionary judgments that the Court has recognized in the context of federal law enforcement—and that generally bar judicial review of enforcement decisions.[19]

Allowing Congress to interfere with the ability of state attorneys general to pursue these enforcement obligations is risky business. If one Congressional Committee can use its investigative powers to interfere with a State's investigation regarding fraud with respect to the risks of climate change, another Committee could use that power to interfere with state enforcement actions on such politically sensitive matters as political corruption or voter fraud, as well as a host of other criminal and civil enforcement matters. The potential would exist for Congress and the States to be in constant conflict over the manner in which state officials are enforcing state law.

Importantly, state attorneys general also provide the first line of defense for the States against unwarranted federal government intrusion. For example, then-Texas Attorney General Greg Abbott made news a few years ago by telling supporters that his job description was simple: "I go into the office," he said. "I sue the federal government and I go home."[20] Abbott was true to his words. According to news

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see also Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1 (2015); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

[18] Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 268-69 (5th Cir. 1976).

[19] *See* Heckler v. Cheney, 470 U.S. 821, 831-32 (1985) (reasoning that judicial review of enforcement decisions would be inappropriate because such decisions "often involve[] a complicated balancing of a number of factors which are peculiarly within [an enforcement agency's] expertise," including "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and . . . whether the agency has enough resource to undertake the action at all").

[20] Sue Owen, *Greg Abbott Says He Has Sued Obama Administration 25 Times*, AUSTIN AM.-STATESMAN (May 10, 2013, 5:14 PM), http://www.politifact.com/texas/statements/2013/may/10/greg-abbott/greg-abbott-says-he-has-sued-obama-administration-/. Other attorneys general describe their jobs in similar terms of "stand[ing] up . . . to Washington and say[ing] 'enough,'" "assert[ing] those [10th Amendment] rights," and so on. Republican Att'ys

reports, he sued the Obama Administration at least twenty-seven times in five years.[21] Abbott is hardly alone in this regard. State attorneys general led the charge in constitutional challenges to the Affordable Care Act,[22] and—more recently—in challenges to President Obama's "deferred action" policies for enforcement of federal immigration law.[23]

If unconstrained by federalism considerations, Congressional investigative power could be used to impede such state efforts to check federal government misfeasance or overreaching. As such, unbridled Congressional investigations of the States could serve to undermine legitimate state authority while simultaneously facilitating the ability of the federal Executive Branch to exceed its own constitutional limitations. Congress's traditional reluctance to subpoena state officials regarding pending enforcement matters should not be upset absent highly extraordinary circumstances.

2. The Subpoena Violates Principles of Federalism and Respect for State Sovereignty

The Constitution "establishes a system of dual sovereignty between the States and the Federal Government."[24] In that system, Congress's powers are limited to those enumerated in the Constitution, and the States "retain[] 'a residuary and inviolable sovereignty.'"[25] Thus, the Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Generally, the protection of state sovereignty can be found in the structure of the federal government itself.[26] The fact that members of Congress are elected by the people of the States according to the States' own rules for electoral qualification means that they can be assumed to act on behalf of state sovereign interests.[27] Moreover, any proposed federal statute must survive multiple procedural hurdles—or "vetogates"—that enable members to block measures that infringe on their States' interests, even if the legislation might otherwise enjoy majority support in Congress. None of these "political safeguards" of federalism exists with respect to Congressional investigations. In that context, a single Member of Congress can institute an investigation—even issue a subpoena—on his own, without vetogates and without the guarantee of any participation from the representatives of the targeted State. The reasons that

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Gen. Assoc., *Republican Attorneys General: States' Rights*, YOUTUBE (Jan. 22, 2014), http://www.youtube.com/watch?v=WCgh-tbG4S4; *see also* Michael D. Shear, *G.O.P. Turns to the Courts to Aid Agenda*, N.Y. TIMES, Jan. 4, 2015, at A1 (noting the role of attorneys general in various State-led suits against Obama-Administration initiatives).

[21] Catalina Camia, *GOP Attorneys General Push Back on Obama's Executive Actions*, USA TODAY: ON POLITICS (Jan. 28, 2014, 12:09 PM), http://onpolitics.usatoday.com/2014/01/28/gop-attorneys-general-push-back-on-obamas-executive-actions/.

[22] Pete Williams, *State Attorneys General Sue over Health Bill*, NBC News (Mar. 23, 2010, 7:44 PM), http://www.nbcnews.com/id/36001783/ns/politics-health_care_reform/#.VkqviktjoWw ("The ink is still drying on the health care overhaul bill signed into law Tuesday by President Barack Obama, but attorneys general from at least 14 states have filed lawsuits to challenge the legislation.").

[23] United States v. Texas, 579 U.S. __ (2016).

[24] Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

[25] Printz v. United States, 521 U.S. 898, 919 (1997) (quoting The Federalist No. 39, at 245 (J. Madison)).

[26] *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 550 (1985) ("Apart from the limitation on federal authority inherent in the delegated nature of Congress's Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.")

[27] *Id.* at 550-51.

lead to a presumption of constitutionality when Congress acts as a whole, therefore, do not apply to the actions of Congressional committees.

Further, even when Congress is acting as a full body and within its enumerated powers, the Tenth Amendment imposes limits on the manner in which those powers are deployed. For example, Congress may not use federal law to compel—or "commandeer"—state officials to serve federal ends. In *New York v. United States*, the Court invoked the anti-commandeering principle to invalidate a federal statute that forced States to legislate in a specified manner.[28] *Printz v. United States* applied the same principle to a statute that commanded state law enforcement officers to participate in the administration of federal law.[29] In the course of its opinion, the Court explicitly rejected the notion that Congress has the authority "to impress the state executive into its service."[30] On the contrary, the Court emphasized, "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. The great innovation of this design was that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other . . . . The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens."[31]

The Court's emphasis on accountability in *New York* and *Printz* is directly relevant to the Committee's investigation. The Attorneys General of Massachusetts and New York—like their counterparts in most other States—are independently elected, and must face the citizens in the polls if they wish to remain in office. As the Court has explained, Congress undermines these relationships of accountability when it interposes itself between state officials and the people they serve.[32]

Given these well-established principles, it is no surprise that federalism concerns were front and center in *Tobin v. United States*, the only case that has addressed the constitutionality of subpoenaing state officials.[33] In *Tobin*, the Executive Director of the Port of New York Authority refused to turn over documents subpoenaed by a House Subcommittee, and on that basis was tried and convicted for criminal contempt of Congress. In reversing the conviction, the D.C. Circuit recognized that the Tenth Amendment stood as a potential obstacle to enforcement of the subpoena. In order to avoid reaching the constitutional issues at stake,[34] the court read the Subcommittee's authorization narrowly, concluding that the document subpoena was outside the Subcommittee's jurisdiction.[35] The D.C. Circuit's approach is wise. Although the court did not expressly reach the constitutional issue, it imparted an important lesson: Every effort should be made on all sides to avoid constitutional conflicts of this type.[36]

3. Ongoing State Enforcement Actions Receive a Special Constitutional Presumption from Non-Interference Absent Extraordinary Circumstances

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[28] 505 U.S. 144 (1992).

[29] 521 U.S. 898, 907 (1997).

[30] *Id.* at 907.

[31] *Id.* at 920 (internal quotation marks omitted).

[32] *Id.* at 924; *New York*, 505 U.S. at 168.

[33] 306 F. 2d. 270 (D.C. Cir. 1962)

[34] In addition to a possible Tenth Amendment problem, the defendant in *Tobin* also raised an independent constitutional challenge to Congress's authority to alter, amend, or repeal its consent to an interstate compact. *Id.* at 272.

[35] *Id.* at 276.

[36] *Id.*

The Committee's investigation also raises distinctive concerns related to the need for caution when dealing with pending investigations and enforcement actions. In one of the most important cases on federal-state relations ever decided, the Supreme Court ruled in *Younger v. Harris* that principles of comity, equity, and federalism require that federal courts may not enjoin pending state criminal prosecutions absent extraordinary circumstances.[37]

As the Court has explained, *Younger* abstention rests on

> the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. . . . What the concept does represent is a system in which there is sensitivity to the legitimate interest of both State and National governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[38]

Although *Younger* itself was a state criminal proceeding, the principles announced in the case have been held to apply in far broader contexts. Thus, *Younger* has been extended to non-criminal cases,[39] including state civil fraud actions,[40] and even to state administrative proceedings.[41]

Further, the Court has also made clear that *Younger* principles apply even when there is not a formal state enforcement proceeding pending before a court or administrative tribunal. In *O'Shea v Littleton*, for example, the Court refused to allow federal jurisdiction to constrain an alleged pattern of discriminatory law enforcement.[42] Similarly, in *Rizzo v. Goode* the Court refused to exercise jurisdiction to enjoin an alleged pattern of discriminatory state police practices.[43] As the *Rizzo* Court explained, "the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments . . . ."[44]

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[37] Younger v. Harris, 401 U.S. 37 (1971).

[38] *Id.* at 44.

[39] Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987).

[40] Trainor v. Hernandez, 431 U.S. 434 (1977).

[41] Ohio Civil Rights Commission v. Dayton Christian Schools, 477 U.S. 619 (1986).

[42] 414 U. S. 488 (1974).

[43] 423 U.S. 362 (1976).

[44] Rizzo v. Goode, 423 U.S. 362, 380 (1976); *see also id.* at 378 ("Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law. (internal quotation marks

The notion that a federal body can freely interfere with a pending state investigation thus flies in the face of a large body of doctrine. As *Younger* and its progeny recognize, any federal interference with ongoing state enforcement proceedings should at least require a showing of "extraordinary circumstances."[45] No such showing has or could be made here. If the States' investigation does result in litigation, state courts stand ready and able to address any federal defenses. Indeed, two courts (one state, one federal) are already addressing questions concerning the validity of the States' investigations in this matter.[46] Federal courts also can play a role in overseeing state litigation once a judgment becomes final—through Supreme Court review on appeal and, in criminal cases, through federal habeas corpus. Detailed doctrine assures that the federal courts review only federal questions and permit exhaustion of state procedures. For Congress to pass over those systems, adopted in order to ensure non-interference by the federal courts in situations in which there has been no final judgment in the state courts, would represent an unwarranted break from existing law.

Notably, Congress's own practice with respect to the federal Department of Justice reflects a restraint similar to that adopted by the federal courts. After studying the history of Congressional investigations of the Department of Justice, Professor Todd David Peterson reports that "Congress seems generally to have been respectful of the need to protect material contained in open criminal investigative files. There is almost no precedent for Congress attempting to subpoena such material, and even fewer examples of the DOJ actually producing such documents."[47] Independent research by the Congressional Research Service confirms that conclusion. A 2012 CRS report states that, in contrast to closed-case investigations, "the Department rarely releases—and committees rarely subpoena—material relevant to open criminal investigations."[48] The CRS report also emphasizes that committees "normally have been restrained by prudential considerations that involve a pragmatic assessment of the costs and benefits of demanding disclosure of information."[49]

State attorneys general are, at the very least, entitled to the same level of respect. As we described above, States are coequal sovereigns in our federal system. Moreover, as Congress itself has recognized, state attorneys general serve crucial purposes in our justice system. In various statutes, Congress has explicitly authorized state attorneys general to participate in the enforcement of federal law.[50]

Here, of course, the Attorneys General of Massachusetts and New York are enforcing *state* law. The case for Congressional restraint is therefore doubly strong in this context, combining the law enforcement-related concerns that Congress has acknowledged in its investigations of the Department of

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omitted)). Congress itself has imposed similar limitations on the ability of federal courts to intervene in state proceedings. 28 U.S.C. § 2254(b), for example, prohibits a federal court from intervening in habeas cases until state appeals and post-conviction proceedings have been exhausted, even if an inmate claims constitutional violations or outright innocence. Rose v. Lundy, 455 U.S. 509, 518 (1982).

[45] *Younger*, 401 U.S. at 53.

[46] *See, e.g.*, John Schwartz, *Exxon Mobil Fights Back at State Inquiries Into Climate Change Research*, N.Y. TIMES (June 16, 2016).

[47] Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 NOTRE DAME L. REV. 1373, 1410 (2002).

[48] Alissa M. Dolan & Todd Garvey, *CRS Report for Congress: Congressional Investigations of the Department of Justice, 1920-2012: History, Law, and Practice*, 2 (Nov. 5, 2012).

[49] *Id.*

[50] *See* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698 (2011).

Justice with the federalism-related concerns that the Court has emphasized in cases like *New York v. United* States, *Gregory v. Ashcroft, Younger v. Harris*, and countless others. Taken together, these considerations compel the conclusion that Congress should exercise great caution before interfering with ongoing state investigations or enforcement actions, particularly when state attorneys general are enforcing state law.

To date, the Committee has not articulated a persuasive reason for overcoming that presumption of restraint. Certainly no showing has been made of the sort of "extraordinary circumstances" that would justify intrusion into an ongoing state enforcement effort.

Thank you for considering our views on this subject.

Sincerely yours,

Brandon L. Garrett

Margaret H. Lemos

William P. Marshall

Cc: Majority Staff, Committee on Science, Space, and Technology
Rayburn House Office Building, Room 2321

Minority Staff, Committee on Science, Space, and Technology
Ford House Office Building, Room 392

ARTICLE SUBMITTED BY REPRESENTATIVE WARREN DAVIDSON

The Washington Post

Opinions

As an attorney general, I sued the tobacco companies. ExxonMobil is nothing like them.

By Dennis C. Vacco July 14

Dennis C. Vacco, a Republican, was attorney general of New York from 1995 to 1999.

I was one of 46 state attorneys general who signed the tobacco Master Settlement Agreement in November 1998. On behalf of New York's taxpayers, I filed one of the suits that eventually pushed the cigarette makers to settle. I can tell you from experience that our fight against the tobacco industry has almost nothing in common with today's campaign by several state attorneys general against ExxonMobil — despite what supporters of the effort would like you to believe.

In the case of tobacco, we made a powerful argument that decades of lying by the companies had led to intractable addiction of millions of Americans who suffered devastating illnesses and death, all of which cost the states billions every year in Medicaid expenses. In the current action, a group of Democratic attorneys general, acting as part of a campaign launched by well-heeled special interest groups and financial backers of alternative energy companies, have a different goal: using the power of state attorneys general to curb honest debate. (Disclosure: My law firm is representing two New York state municipalities that are challenging the siting of wind turbine projects on the shore of Lake Ontario.)

The tobacco campaign was highly successful. The settlement agreement included not only direct payments to the states (currently $9 billion a year) but also imposed severe marketing restrictions to limit outreach to young smokers. Largely as a result, the proportion of high school student smokers dropped from 36 percent in 1997 to just 16 percent in 2013; adult smokers, from 25 to 17 percent. I was proud to play a major role in holding tobacco companies responsible for the damage they caused and in setting America on a healthier path. We had a clear, convincing legal case and a noble cause. The same cannot be said for attorneys general involved in the current crusade. It's unlikely they will be successful in their legal actions, and their actions may have already chilled free speech in this country.

ExxonMobil was subpoenaed last fall by New York Attorney General Eric Schneiderman (D) in an effort to find out whether the company misled investors and the public on the impact of climate change. Massachusetts joined in. Then, in March, the Virgin

Islands, a U.S. territory, started investigating ExxonMobil, as well as think tanks and other institutions that received the company's support, under an anti-racketeering law. Later that month, 16 state attorneys general, all Democrats, held a news conference under the banner, "AGs United for Clean Power," to announce they too will pursue energy companies that challenge the global-warming orthodoxy.

But increasingly, Schneiderman appears to be on his own. Last week, Claude Walker, the attorney general for the Virgin Islands who opened a racketeering probe of ExxonMobil, withdrew his subpoena. And Maura Healey, attorney general for Massachusetts, delayed action on her own subpoena of ExxonMobil, meaning that case has paused.

It is important to note that the fight against the tobacco industry was bipartisan and that never, during our battle to require the tobacco companies to meet their obligations, did we align ourselves with the industry's business competitors. In the current campaign, the attorneys general have linked up with investors in renewable energy in an unseemly alliance that presents serious conflicts of interest. As a June 15 letter signed by 13 AGs critical of their colleagues noted, "The media event [in March] featured a senior partner of a venture capital firm that invests in renewable energy companies. If the [AGs'] focus is fraud, such alignment by law enforcement sends the dangerous sigual that companies in certain segments of the energy market need not worry about their misrepresentations."

Attorney General Schneiderman's theory is apparently that ExxonMobil pulled the wool over America's eyes by manipulating public opinion. "There is confusion," he said, "sowed by those with an interest in profiting from the confusion and creating misperceptions in the eyes of the American public." One could argue that the same confusion and misperception has been caused by alternative energy proponents. Causing confusion — if that's what happened — is hardly a crime, but to hold one party to a national debate to a higher standard tilts the debate unfairly in the other direction.

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Notably, the attorney general is pursuing his investigation under the Martin Act, a sweeping New York law that I know well. It gives the attorney general broad subpoena power, and it allows charges to be filed even without evidence that the defendant intended to commit fraud. It is a powerful tool to protect investors but can have unintended negative implications to the very investors it seeks to protect.

In the case of tobacco, we found that the companies knew about the life-threatening, addictive nature of smoking but covered up that knowledge. In the case of global warming, ExxonMobil began research as early as the 1970s and was open about what it found in more than 50 papers published in scientific journals between 1983 and 2014, according to company documents. ExxonMobil's scientists have participated in the U.N. Intergovernmental Panel on Climate Change since its inception and were involved in the National Academy of Sciences review of the third U.S. National Climate Assessment Report.

In its news pages, even the New York Times, a forceful environmental advocate, has drawn a clear line between the tobacco and energy industries. Reporters Justin Gillis and Clifford Krauss wrote in a Nov. 5 article, "In the 1950s and '60s, tobacco companies financed internal research showing tobacco to be harmful and addictive, but mounted a public campaign that said

otherwise. . . . The history at ExxonMobil appears to differ, in that the company published extensive research over decades that largely lined up with mainstream climatology."

The tobacco companies were deceivers. ExxonMobil has been open. But that doesn't seem to matter to the politicized attorneys general pursuing the company. A chilling impact on public debate is not in our collective interest.

Read more here:

Robert Post: Exxon-Mobil is abusing the first amendment

Jonathan H. Adler: No peace for Greenpeace

Sam Kazman and Kent Lassman: The environmental campaign that punishes free speech

Fred Hiatt: Even ExxonMobil says climate change is real. So why won't the GOP?

Robert Brulle: America has been duped on climate change

DOCUMENTS SUBMITTED BY REPRESENTATIVE PAUL TONKO

Congress of the United States
Washington, DC 20515

September 13, 2016

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

We are writing to express our disappointment in your decision to issue unilateral and unprecedented subpoenas to New York Attorney General Eric Schneiderman and Massachusetts Attorney General Maura Healey. We are deeply concerned that these subpoenas will interfere with the legitimate fraud investigations of ExxonMobil undertaken by these independently elected law enforcement officials.

As the Congressional Research Service recently found, the unilateral subpoenas issued by your office represent the first time that any House Committee has subpoenaed a state attorney general for records related to an ongoing state law enforcement investigation. We are disappointed that instead of using a subpoena as a last resort, it is being used in an effort to plow ahead in haste without first addressing legitimate concerns.

The subpoenas were issued on July 13 to New York Attorney General Eric Schneiderman and Massachusetts Attorney General Maura Healey, and to nine environmental organizations. You have claimed that a number of the state attorneys general are engaged in a "coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution." This allegation is patently false. It is well established that the First Amendment does not confer a right to commit fraud. On the other hand, demanding the disclosure of routine communications between law enforcement and outside scientific experts, which occurred in the course of an ongoing investigation, could have a chilling effect on the free exchange of ideas between state authorities and the scientific community.

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Investigation by state attorneys general into potential violations of state law, specifically into potential securities, business, and consumer fraud violations by ExxonMobil, is an appropriate exercise of state police power as reserved to the States under the U.S. Constitution, which grants states substantial sovereign authority over matters that are not expressly delegated to the federal government. Nothing could be more obvious or vital to states' rights than preserving the ability of state law enforcement officials to investigate potential violations of state laws. As Attorney General Schneiderman and Attorney General Healey have made clear, they are investigating ExxonMobil for potential violations of state securities, business, and consumer fraud laws, and seeking to expose potentially criminal acts that involved intentionally misleading the public and public officials, and defrauding shareholders. This type of state-wide law enforcement investigation is a quintessential state right. Additionally, the purpose of your inquiry is clearly outside the House Committee on Science, Space, and Technology's purview.

Finally, we have serious concerns about the subpoenas issued by your office to nine environmental advocacy organizations. These subpoenas fly in the face of these organization's First Amendment rights, and in doing so, deeply damage the credibility of both the Committee and Congress.

We urge you to drop these subpoenas immediately and to end this unprecedented interference into these vital fraud investigations by states attorneys general.

Sincerely,

Paul D. Tonko

Brian Higgins

Jerrold Nadler

Sean Patrick Maloney

Eliot L. Engel

Steve Israel

Carolyn B. Maloney

Joe Crowley

Grace Meng

Charles Rangel

José E. Serrano

Kathleen M. Rice

Gregory W. Meeks

Yvette D. Clarke

Hakeem Jeffries

Nydia M. Velázquez

Louise M. Slaughter

Nita Lowey

The New York Times | http://nyti.ms/2aensrR

The Opinion Pages | OP-ED CONTRIBUTOR

When Subpoenas Threaten Climate Science

By KEN KIMMELL JULY 19, 2016

Last week, my organization — the Union of Concerned Scientists — received a subpoena signed by Lamar S. Smith of Texas, the Republican chairman of the House Committee on Science, Space and Technology. The subpoena orders me to hand over correspondence between my staff members and state attorneys general, and between my staff members and environmental organizations and funders. This demand impinges on our group's constitutional rights, and it would set a terrible precedent affecting many other advocacy groups were we to comply with it.

The subpoena concerns our efforts to inform state attorneys general of our research into Exxon Mobil. Our research details, among other things, how much Exxon Mobil knew about the dangers posed to the planet from carbon emissions from its products at the same time it was spending millions to misinform the public about the science of climate change.

Mr. Smith makes no claim that our organization violated any law or regulation; he simply demands to see our correspondence. This is a deeply troubling request. It is, in effect, a bullying tactic that threatens the work that advocacy groups like mine do under the protection of the First Amendment when we "petition the government for a redress of grievances." Are we to expect a subpoena every time we have a conversation with a public official if some committee chairman dislikes or disagrees with us?

Mr. Smith's demand also interferes with continuing law enforcement proceedings by New York and Massachusetts state attorneys general who — acting under their own state laws — have commenced investigations into Exxon Mobil's potentially fraudulent actions. (Mr. Smith has sent similar subpoenas to the other environmental organizations and funders as well as the offices of the attorneys general of New York and Massachusetts.)

The controversy began last summer, when our organization published a report documenting deception about climate science by Exxon Mobil, other leading fossil fuel companies and industry trade groups. Since that time, two teams of investigative reporters have uncovered further corroborating evidence that for decades, Exxon Mobil's own scientists warned the company of the dangers of carbon emissions at the same time the company was aggressively promoting a very different message in public and to its investors about climate science. As a result of these revelations, the state attorneys general in New York and Massachusetts commenced their investigations into Exxon Mobil.

Mr. Smith, joined by members of Congress, claims that our organization, the other groups and the state attorneys general have engaged in a conspiracy to deprive Exxon Mobil of its First Amendment right to debate the science of climate change and to chill the work of scientists. This is simply nonsense. Exxon Mobil's scientists are not being targeted for investigation, and no one is intimidating them to keep them from performing their work. Instead, the investigations center on whether Exxon Mobil misled the public and its own investors when it publicly disparaged, played down or even dismissed outright the growing evidence (from its own scientists and others) that burning fossil fuels causes irrevocable harm to the planet.

Disseminating false information to help sell a product finds no protection in the First Amendment. Imagine if it did: Tobacco companies could get away with saying cigarettes are safe; car companies could deny manufacturing defects that endanger drivers; and pharmaceutical companies could mislead consumers about the efficacy of drugs — all by cloaking themselves in the First Amendment. Fortunately, courts have repeatedly rejected such arguments.

Beyond its lack of a factual or legal basis, Mr. Smith's subpoena sets a dangerous precedent because it violates our constitutional rights. Mr. Smith's demand is directed exclusively at the fact that our organization shared information about climate science and Exxon Mobil's public statements with state attorneys general. But bringing this information to the attention of government officials and urging them to take action is explicitly protected by the First Amendment. The subpoena also infringes on our rights of association, in that it demands that we divulge our private communications with other advocacy groups and funders.

The threat posed by this subpoena is perhaps best demonstrated by its purported legal justification. In a response letter to our organization, Mr. Smith cited the work of the House Un-American Activities Committee in the 1950s as valid legal precedent for the investigation of our organization today. Thus, he has explicitly equated his investigation with a dark time in our history when Congress trampled on civil liberties.

We do not believe it is the business of the members of the House Committee on Science, Space and Technology to investigate our lawful work of sharing scientific information with other public officials. And we do not intend to cross this constitutional boundary with them.

Ken Kimmell is the president of the Union of Concerned Scientists.

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The Opinion Pages | EDITORIAL

The Latest Attack on Climate Science

By THE EDITORIAL BOARD DEC. 4, 2015

Earlier this year, scientists at the National Oceanic and Atmospheric Administration published research contradicting earlier reports that global warming had slowed in the past decade. But Representative Lamar Smith, Republican of Texas and chairman of the House Committee on Science, Space and Technology, is accusing the agency of rushing data to publication, and is demanding access to the internal communications of its employees.

The paper, published in June in the journal Science, states that a change in the method of measuring ocean temperatures made the rate of warming in the period between 1998 and 2012 look smaller than it was. After correcting for this change and making other updates, the authors found that warming had not in fact slowed down during that period.

Mr. Smith, who has called himself a "semi-skeptic" on climate change and has criticized President Obama's climate policies, accused NOAA of changing climate data "to get the politically correct results they want." In October, he subpoenaed the group's internal communications regarding the study methodology.

Then, in November, he claimed that information from whistle-blowers within the agency suggested the study had been rushed to publication over internal

objections, and that "the timing of its release raises concerns that it was expedited to fit the administration's aggressive climate agenda."

This week, after eight scientific groups argued that demanding NOAA researchers' emails could discourage other government scientists from studying anything politically controversial, Mr. Smith told NOAA he would first seek the communications of the agency's nonscientific staff. He did not, however, rule out the possibility of requesting scientists' emails in the future.

Attacks on climate science are nothing new — Republicans in Congress have been trying to cut funding for climate research for years. What's especially disturbing about this attack is that it appears based on a fundamental misunderstanding of how science operates: The re-examination of previous conclusions, which Mr. Smith casts as nefarious, is merely an example of the scientific method at work.

NOAA says there is no truth to the allegations that the study's conclusions were politically influenced, or that the paper was rushed, noting that it was subjected to strict peer review before publication. The decision of when to publish the paper rested with Science, not with NOAA.

The authors of the paper have made their data publicly available. If Mr. Smith or anyone else wishes to critique the quality of their science, they do not need a subpoena to do so.

The congressman's focus on a single study threatens to obscure a larger issue: The overwhelming majority of scientific evidence shows that the world climate is changing because of human activity. The rate of temperature change may fluctuate — and even if future analysis shows that warming did slow between 1998 and 2012, this would not change the fact that temperatures have been rising steadily for the last century. Last year was the warmest year on record, and 2015 is likely to be warmer still.

What is needed is action to mitigate climate change, not baseless criticisms of the scientific process.

ARTICLE SUBMITTED BY REPRESENTATIVE DONNA EDWARDS

THE BALTIMORE SUN

Frosh's temperature rise

Who carries water for Big Oil? Not Maryland's top lawyer.

June 1, 2016

Two weeks ago, the science-averse Texas Republican who chairs the House Committee on Science, Space and Technology sent out letters clearly meant to scare off the 17 state attorneys general investigating potential climate fraud perpetrated by the fossil fuel industry. This week, Maryland Attorney General Brian Frosh struck back with a withering reply that should make his constituents proud.

"You state, without any foundation, that the actions of this office 'may even amount to an abuse of prosecutorial discretion,'" Mr. Frosh writes in the letter to Rep. Lamar Smith dated Tuesday. "If you have any basis whatsoever for that assertion, please let us know what it is. Absent such explanation, your letter looks like an attempt to intimidate this office or to thwart it from performing its constitutional functions."

Bravo, Mr. Frosh. In his letter, Maryland's top prosecutor also reminded the chairman that his office investigates based on "facts and solid principles of law" and declined to hand over to him the records and other privileged communications from that investigation. He also took a shot at Mr. Smith's deadline of May 30 for a response, which was Memorial Day when state offices are closed, and expressed "hope that you joined us" in honoring the sacrifices made by active duty members of the U.S. military.

At the heart of this urinating contest is a serious matter: What the attorneys general are looking into is whether energy companies like ExxonMobil have

still deny that greenhouse gases have a warming effect on the planet? Objectively, not that much.

This isn't the first time Representative Smith has tried to use his position to bully public servants. He has famously subpoened climate scientists and held witch hunt hearings to intimidate the real experts in what's happening to the planet. Indeed, it's been noted that he's already issued more subpoenas in the last three years than the committee had produced in the previous half-century. That's someone who deserves to be called out. Kudos to Mr. Frosh for standing up to this windbag and protecting Maryland's interests.

http://www.baltimoresun.com/news/opinion/editorial/bs-ed-climate-letter-20160601-story.html

ARTICLE SUBMITTED BY REPRESENTATIVE BARRY LOUDERMILK

THE WALL STREET JOURNAL.

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OPINION | COLUMNISTS | BUSINESS WORLD

How the Exxon Case Unraveled

It becomes clear that investigators simply don't know what a climate model is.

New York Attorney General Eric Schneiderman. *PHOTO: GETTY IMAGES*

By **HOLMAN W. JENKINS, JR.**
Aug. 30, 2016 7:07 p.m. ET

New York Attorney General Eric Schneiderman's investigation of Exxon Mobil for climate sins has collapsed due to its own willful dishonesty. The posse of state AGs he pretended to assemble never really materialized. Now his few allies are melting away: Massachusetts has suspended its investigation. California apparently never opened one.

The U.S. Virgin Islands has withdrawn its sweeping, widely criticized subpoena of research groups and think tanks. In an email exposed by a private lawsuit, one staffer of the Iowa AG's office tells another that Mr. Schneiderman himself was "the wild card."

His initial claim, flounced to the world by outside campaigners under the hashtag "exxonknew," fell apart under scrutiny. This was the idea that, through its own research in the 1970s, Exxon knew one thing about climate science but told the public something else.

In an Aug. 19 interview with the New York Times, Mr. Schneiderman now admits this approach has come a cropper. He reveals that he's no longer focusing on what Exxon knew/said but instead on how it goes about valuing its current oil reserves. In essence, Mr. Schneiderman here is hiding his retreat behind a recent passing fad in the blogosphere for discussing the likelihood that such reserves will become "stranded assets" under some imaginary future climate regime.

His crusade was always paradoxical. The oil industry reliably ranks last in Gallup's annual survey of public credibility. The $16 million that Exxon spent between 1998 and 2005 to support organizations that criticized speculative climate models is a minuscule fraction of the propaganda budgets of the U.S. Energy Department, NASA, NOAA, EPA, not to mention the United Nations' climate panel, etc. etc.

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The episode ends happily, though, if Mr. Schneiderman's hoped-for political career now goes into eclipse. But we haven't finished unless we also mention the press's role.

The "Exxon knew" claim, recall, began with investigative reports by InsideClimate News and the Los Angeles Times, both suffering from the characteristic flaw of American journalism—diligently ascertaining and confirming the facts, then shoving them into an off-the-shelf narrative they don't support.

We have since learned that both the L.A. Times (via a collaboration with the Columbia School of Journalism) and InsideClimate News efforts were partly underwritten by a Rockefeller family charity while Rockefeller and other nonprofit groups were simultaneously stoking Mr. Schneiderman's investigation.

When caught with your hand in the cookie jar in this way, there's only one thing to do, and last week the Columbia School of Journalism did it, awarding a prize to InsideClimate News.

For this columnist, however, the deeper mystery was cleared up last year when I appeared on the NPR show "To the Point" to discuss the subject "Did Exxon Cover Up Climate Change?" (Google those phrases) with ICN's "energy and climate" reporter Neela Banerjee.

Ms. Banerjee has been collecting plaudits all year for her work. The work itself involved revisiting Exxon's climate modeling efforts of the 1970s. Yet, at 16:28, see how

thoroughly she bollixes up what a climate model is. She apparently believes the uncertainty in such models stems from uncertainty about how much CO2 in the future will be released.

"The uncertainties that people talk about . . . are predicated on the policy choices we make," namely the "inputs" of future CO2.

No, they aren't. The whole purpose of a climate model is to estimate warming from a *given* input of CO2. In its most recent report, issued in 2013, the U.N.'s Intergovernmental Panel on Climate Change assumes a doubling of atmospheric CO2 and predicts warming of 1.5 to 4.5 degrees Celsius—i.e., an uncertainty of output, not input.

What's more, this represents an *increase* in uncertainty over its 2007 report (when the range was 2.0 to 4.5 degrees). In fact, the IPCC's new estimate is now identical to Exxon's 1977 estimate and the 1979 estimate of the U.S. National Research Council.

In other words, on the crucial question, the help we're getting from climate models has not improved in 40 years and has been going backward of late.

For bonus insight, ask yourself why we still rely on computer simulations at all, rather than empirical study of climate—even though we've been burning fossil fuels for 200 years and recording temperatures even longer.

OK, many climate reporters have accepted a role as enforcers of orthodoxy, not questioners of it. But this colossal error not only falsifies the work of the IPCC over the past 28 years, it falsifies the entire climate modeling enterprise of the past half-century.

But it also explains the non sequitur at the heart of the InsideClimate News and L.A. Times exposés as well as Mr. Schneiderman's unraveling investigation. There simply never was any self-evident contradiction between Exxon's private and public statements. In emphasizing the uncertainty inherent in climate models, Exxon was telling a truth whose only remarkable feature is that it continues to elude so many climate reporters.

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The Climate Prosecutors Can't Dodge Congress Forever

The state officials who subpoenaed Exxon face questions from the House—and they have to answer.

By **ELIZABETH PRICE FOLEY**
Aug. 21, 2016 6:30 p.m. ET

For a sense of how far the left will go to enforce climate-change orthodoxy, read the recently released "Common Interest Agreement" signed this spring by 17 Democratic state attorneys general. The officials pledged to investigate and take legal action against those committing climate wrongthink. Beginning late last year, the attorneys general of Massachusetts, New York and the U.S. Virgin Islands, all signatories to the agreement, issued broad-ranging subpoenas against Exxon Mobil and conservative think tanks. They sought documents and communications related to research and advocacy on climate change.

Concerned that these investigations were designed to chill First Amendment rights, the House Committee on Science, Space and Technology issued its own subpoenas. In mid-July the committee, led by Rep. Lamar Smith (R., Texas), asked the attorneys general to produce their communications with environmental groups and the Obama administration about their investigations.

They have indignantly refused to comply. New York Attorney General Eric Schneiderman claimed, in a July 13 letter to Mr. Smith, that the committee was "courting constitutional conflict" by failing to show "a due respect for federalism." Massachusetts Attorney General Maura Healey, in a similar letter dated July 26, asserted that the subpoenas are "unconstitutional" because they are "an affront to states' rights."

This view is utterly wrong. Federalism is a critical component of the constitutional architecture. The federal government exercises only limited and enumerated powers, and the states, under the Tenth Amendment, possess all other powers "not delegated to the United States." But when the federal government acts within its delegated powers, it is entitled to supremacy over the states.

The Supreme Court has long recognized Congress's power to investigate any matter within its legislative or oversight competence. With that comes a corresponding power to enforce its inquiries. The justices wrote in *Barenblatt v. U.S.* (1959) that the scope of Congress's power of inquiry "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."

Similarly, in *McGrain v. Daugherty* (1927), the court held that "the power of inquiry—with the process to enforce it—is an essential and appropriate auxiliary to the legislative function." That's why lawmakers passed a law to make contempt of a congressional subpoena a crime, punishing anyone who willfully refuses to answer "any question pertinent to the question under inquiry." The subpoenas to state attorneys general regarding their climate crusade easily fall within Congress's legislative and oversight competence. The House Science Committee has jurisdiction over matters relating to scientific research. Its rules authorize the chairman to issue subpoenas on behalf of the committee.

Further, Congress has ample authority to investigate and sanction violations of First Amendment rights that are committed by state officials. For instance, the Ku Klux Klan Act of 1871 includes a provision—lawyers often call it simply "section 1983," referring to its place in Title 42 of the U.S. Code—authorizing monetary damages against state officials who infringe a constitutional right.

Congress's broad investigatory power clearly extends to state officials. In February, the House Oversight Committee compelledDarnell Earley, the emergency manager of Flint, Mich., to testify on the contamination of that city's drinking water. Mr. Earley initially refused to appear, but he quickly acceded to its subpoena after the committee's chairman, Rep. Jason Chaffetz (R., Utah), threatened to call the U.S. Marshals to "hunt him down."

Under the Supremacy Clause of the Constitution, privileges grounded in state law—such as the attorney-client privilege or work-product privilege—are not binding on the federal government. The letter to Rep. Smith from the Massachusetts attorney general, for example, argued that the committee's subpoena seeks documents that are "either attorney-client privileged" or "protected from disclosure as attorney work product." Congress is obligated to honor neither of those state-law privileges.

When Congress subpoenas the White House or agencies in the executive branch, there is a delicate balancing of competing constitutional interests. This is because the executive often refuses to comply by invoking a presidential privilege grounded in Article II of the Constitution.

But there is no such difficult constitutional balancing required here. When Congress subpoenas state attorneys general in the rightful exercise of its legislative and investigative power, all assertions of state authority give way because of the Supremacy Clause. No state official—whether judicial, legislative or executive—may resist a legitimate federal command.

Throughout the Obama administration, congressional powers have been increasingly usurped by the executive. The White House has unilaterally rewritten statutes, ignored congressional subpoenas and arrogated to itself the power of the purse. These actions have too often received the blessing of congressional Democrats, who have allowed partisanship to override their fidelity to the Constitution and their institutional self-interest.

To begin restoring Congress's constitutional authority, the House of Representatives should push back against these state attorneys general and vigorously litigate to enforce the Science Committee's subpoenas.

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TENTH AMENDMENT

RESERVED POWERS

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RESERVED POWERS

TENTH AMENDMENT

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

RESERVED POWERS

Scope and Purpose

"The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified." [1] "The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." [2] That this provision was not conceived to be a yardstick for measuring the powers granted to the Federal Government or reserved to the States was firmly settled by the refusal of both Houses of Congress to insert the word "expressly" before the word "delegated," [3] and was confirmed by Madison's remarks in the course of the debate which took place while the proposed amendment was pending concerning Hamilton's plan to establish a national bank. "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not

[1] United States v. Sprague, 282 U.S. 716, 733 (1931).

[2] United States v. Darby, 312 U.S. 100, 124 (1941). "While the Tenth Amendment has been characterized as a 'truism," stating merely that 'all is retained which has not been surrendered,' [citing *Darby*], it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Fry v. United States, 421 U.S. 542, 547 n.7 (1975). This policy was effectuated, at least for a time, in National League of Cities v. Usery, 426 U.S. 833 (1976).

[3] ANNALS OF CONGRESS 767–68 (1789) (defeated in House 17 to 32); 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1150–51 (1971) (defeated in Senate by unrecorded vote).

given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitutions of the States."[4] Nevertheless, for approximately a century, from the death of Marshall until 1937, the Tenth Amendment was frequently invoked to curtail powers expressly granted to Congress, notably the powers to regulate commerce, to enforce the Fourteenth Amendment, and to lay and collect taxes.

In *McCulloch v. Maryland*,[5] Marshall rejected the proffer of a Tenth Amendment objection and offered instead an expansive interpretation of the necessary and proper clause[6] to counter the argument. The counsel for the State of Maryland cited fears of opponents of ratification of the Constitution about the possible swallowing up of states' rights and referred to the Tenth Amendment to allay these apprehensions, all in support of his claim that the power to create corporations was reserved by that Amendment to the States.[7] Stressing the fact that the Amendment, unlike the cognate section of the Articles of Confederation, omitted the word "expressly" as a qualification of granted powers, Marshall declared that its effect was to leave the question "whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend upon a fair construction of the whole instrument."[8]

Effect of Provision on Federal Powers

Federal Taxing Power.—Not until after the Civil War was the idea that the reserved powers of the States comprise an independent qualification of otherwise constitutional acts of the Federal Government actually applied to nullify, in part, an act of Congress. This result was first reached in a tax case—*Collector v. Day.*[9] Holding that a national income tax, in itself valid, could not be constitutionally levied upon the official salaries of state officers, Justice Nelson made the sweeping statement that "the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of

[4] 2 ANNALS OF CONGRESS 1897 (1791).

[5] 17 U.S. (4 Wheat.) 316 (1819).

[6] Supra, pp. 339–44.

[7] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 372 (1819) (argument of counsel).

[8] Id. at 406. "From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." United States v. Darby, 312 U.S. 100, 124 (1941).

[9] 78 U.S. (11 Wall.) 113 (1871).

the States."[10] In 1939, *Collector v. Day* was expressly overruled.[11] Nevertheless, the problem of reconciling state and national interest still confronts the Court occasionally, and was elaborately considered in *New York v. United States*,[12] where, by a vote of six-to-two, the Court upheld the right of the United States to tax the sale of mineral waters taken from property owned by a State. Speaking for four members of the Court, Chief Justice Stone justified the tax on the ground that "[t]he national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it."[13] Justices Frankfurter and Rutledge found in the Tenth Amendment "no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter."[14] Justices Douglas and Black dissented, saying: "If the power of the federal government to tax the States is conceded, the reserved power of the States guaranteed by the Tenth Amendment does not give them the independence which they have always been assumed to have."[15]

Federal Police Power.—A year before *Collector v. Day* was decided, the Court held invalid, except as applied in the District of Columbia and other areas over which Congress has exclusive authority, a federal statute penalizing the sale of dangerous illuminating oils.[16] The Court did not refer to the Tenth Amendment. Instead, it asserted that the "express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested."[17] Similarly, in the *Employers' Liability Cases*,[18] an act of Congress making every carrier engaged in interstate commerce liable to "any" employee, including those whose activities related solely to intrastate activities, for injuries caused by negligence, was held unconstitutional by a

[10] Id. at 124.

[11] Graves v. New York ex rel. O'Keefe, 306 U.S 466 (1939). The Internal Revenue Service is authorized to sue a state auditor personally and recover from him an amount equal to the accrued salaries which, after having been served with notice of levy, he paid to state employees delinquent in their federal income tax. Sims v. United States, 359 U.S. 108 (1959).

[12] 326 U.S. 572 (1946).

[13] Id. at 589.

[14] Id. at 584.

[15] Id. at 595. Most recently, the issue was canvassed, but inconclusively, in Massachusetts v. United States, 435 U.S. 444 (1978).

[16] United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1870).

[17] Id. at 44.

[18] 207 U.S. 463 (1908). *See also* Keller v. United States, 213 U.S. 138 (1909).

closely divided Court, without explicit reliance on the Tenth Amendment. Not until it was confronted with the Child Labor Law, which prohibited the transportation in interstate commerce of goods produced in establishments in which child labor was employed, did the Court hold that the state police power was an obstacle to adoption of a measure which operated directly and immediately upon interstate commerce. In *Hammer v. Dagenhart*,[19] five members of the Court found in the Tenth Amendment a mandate to nullify this law as an unwarranted invasion of the reserved powers of the States. This decision was expressly overruled in *United States v. Darby*.[20]

During the twenty years following *Hammer v. Dagenhart*, a variety of measures designed to regulate economic activities, directly or indirectly, were held void on similar grounds. Excise taxes on the profits of factories in which child labor was employed,[21] on the sale of grain futures on markets which failed to comply with federal regulations,[22] on the sale of coal produced by nonmembers of a coal code established as a part of a federal regulatory scheme,[23] and a tax on the processing of agricultural products, the proceeds of which were paid to farmers who complied with production limitations imposed by the Federal Government,[24] were all found to invade the reserved powers of the States. In *Schechter Corp. v. United States*,[25] the Court, after holding that the commerce power did not extend to local sales of poultry, cited the Tenth Amendment to refute the argument that the existence of an economic emergency justified the exercise of what Chief Justice Hughes called "extraconstitutional authority."[26]

In 1941, the Court came full circle in its exposition of this Amendment. Having returned four years earlier to the position of John Marshall when it sustained the Social Security Act[27] and National Labor Relations Act,[28] it explicitly restated Marshall's thesis in upholding the Fair Labor Standards Act in *United States v. Darby*.[29] Speaking for a unanimous Court, Chief Justice Stone

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[19] 247 U.S. 251 (1918).

[20] 312 U.S. 100 (1941).

[21] Child Labor Tax Case, 259 U.S. 20, 26, 38 (1922).

[22] Hill v. Wallace, 259 U.S. 44 (1922). *See also* Trusler v. Crooks, 269 U.S. 475 (1926).

[23] Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[24] United States v. Butler, 297 U.S. 1 (1936).

[25] 295 U.S. 495 (1935).

[26] Id. at 529.

[27] Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).

[28] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[29] 312 U.S. 100 (1941). *See also* United States v. Carolene Products Co., 304 U.S. 144, 147 (1938); Case v. Bowles, 327 U.S. 92, 101 (1946).

wrote: "The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' . . . That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. . . . It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attended the exercise of the police power of the states. . . . Our conclusion is unaffected by the Tenth Amendment which . . . states but a truism that all is retained which has not been surrendered."[30]

But even prior to 1937 not all measures taken to promote objectives which had traditionally been regarded as the responsibilities of the States had been held invalid. In *Hamilton v. Kentucky Distilleries Co.*,[31] a unanimous Court, speaking by Justice Brandeis, upheld "War Prohibition," saying: "That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is nonetheless true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power."[32] And in a series of cases, which today seem irreconcilable with *Hammer v. Dagenhart*, it sustained federal laws penalizing the interstate transportation of lottery tickets,[33] of women for immoral purposes,[34] of stolen automobiles,[35] and of tick-infected cattle,[36] as well as a statute prohibiting the mailing of obscene matter.[37] It affirmed the power of Congress to punish the forgery of bills of lading purporting to cover interstate shipments of merchandise,[38] to subject prison-made goods moved from one State to another to the laws of the receiving State,[39] to regulate prescriptions for the medicinal use of liquor as an appropriate measure for the enforcement of the Eighteenth Amendment,[40] and to control extortionate means of collecting and attempting to collect payments on loans, even when all aspects of the credit transaction took place within one

[30] 312 U.S. 100, 114, 123, 124 (1941). *See also* Fernandez v. Wiener, 326 U.S. 340, 362 (1945).
[31] 251 U.S. 146 (1919).
[32] Id. at 156.
[33] Lottery Case (Champion v. Ames), 188 U.S. 321 (1903).
[34] Hoke v. United States, 227 U.S. 308 (1913).
[35] Brooks v. United States, 267 U.S. 432 (1925).
[36] Thornton v. United States, 271 U.S. 414 (1926).
[37] Roth v. United States, 354 U.S. 476 (1957).
[38] United States v. Ferger, 250 U.S. 199 (1919).
[39] Kentucky Whip & Collar Co. v. Illinois C. R.R., 299 U.S. 334 (1937).
[40] Everard's Breweries v. Day, 265 U.S. 545 (1924).

State's boundaries.[41] More recently, the Court upheld provisions of federal surface mining law that could be characterized as "land use regulation" traditionally subject to state police power regulation.[42]

Notwithstanding these federal inroads into powers otherwise reserved to the States, the Court has held that Congress could not itself undertake to punish a violation of state law; in *United States v. Constantine*,[43] a grossly disproportionate excise tax imposed on retail liquor dealers carrying on business in violation of local law was held unconstitutional. However, Congress does not contravene reserved state police powers when it levies an occupation tax on all persons engaged in the business of accepting wagers regardless of whether those persons are violating state law, and imposes severe penalties for failure to register and pay the tax.[44]

Federal Regulations Affecting State Activities and Instrumentalities.—Since the mid-1970s, the Court has been closely divided over whether the Tenth Amendment or related constitutional doctrine constrains congressional authority to subject state activities and instrumentalities to generally applicable requirements enacted pursuant to the commerce power.[45] Under *Garcia v. San Antonio Metropolitan Transit Authority*,[46] the Court's most recent ruling directly on point, the Tenth Amendment imposes practically no judicially enforceable limit on generally applicable federal legislation, and states must look to the political process for redress. *Garcia*, however, like *National League of Cities v. Usery*,[47] the case it overruled, was a 5–4 decision, and there are recent indications that the Court may be ready to resurrect some form of Tenth Amendment constraint on Congress.

In *National League of Cities v. Usery*, the Court conceded that the legislation under attack, which regulated the wages and hours

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[41] Perez v. United States, 402 U.S. 146 (1971).

[42] Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264 (1981).

[43] 296 U.S. 287 (1935). The Civil Rights Act of 1875, which made it a crime for one person to deprive another of equal accommodations at inns, theaters or public conveyances was found to exceed the powers conferred on Congress by the Thirteenth and Fourteenth Amendments and hence to be an unlawful invasion of the powers reserved to the States by the Tenth Amendment. Civil Rights Cases, 109 U.S. 3, 15 (1883). Congress has now accomplished this end under its commerce powers, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964), but it is clear that the rationale of the *Civil Rights Cases* has been greatly modified if not severely impaired. *Cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (13th Amendment); Griffin v. Breckenridge, 403 U.S. 88 (1971) (13th Amendment); United States v. Guest, 383 U.S. 745 (1966) (14th Amendment).

[44] United States v. Kahriger, 345 U.S. 22, 25–26 (1953); Lewis v. United States, 348 U.S. 419 (1955).

[45] The matter is discussed more fully supra, pp. 922–30.

[46] 469 U.S. 528 (1985).

[47] 426 U.S. 833 (1976).

of certain state and local governmental employees, was "undoubtedly within the scope of the Commerce Clause,"[48] but it cautioned that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[49] The Court approached but did not reach the conclusion that the Tenth Amendment was the prohibition here, not that it directly interdicted federal power because power which is delegated is *not* reserved, but that it implicitly embodied a policy against impairing the States' integrity or ability to function.[50] But, in the end, the Court held that the legislation was invalid, not because it violated a prohibition found in the Tenth Amendment or elsewhere, but because the law was "not within the authority granted Congress."[51] In subsequent cases applying or distinguishing *National League of Cities*, the Court and dissenters wrote as if the Tenth Amendment was the prohibition.[52] Whatever the source of the constraint, it was held not to limit the exercise of power under the Reconstruction Amendments.[53]

The Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Auth.*[54] Justice Blackmun's opinion for the Court in *Garcia* concluded that the *National League of Cities* test for "integral operations in areas of traditional governmental functions" had proven "both impractical and doctrinally barren," and that the Court in 1976 had "tried to repair what did not need repair."[55] With only passing reference to the Tenth Amendment the Court nonetheless clearly reverted to the Madisonian view of the Amendment reflected in *Unites States v. Darby*.[56] States retain a significant amount of sovereign authority

[48] Id. at 841.
[49] Id. at 845.
[50] Id. at 843.
[51] Id. at 852.
[52] E.g., FERC v. Mississippi, 456 U.S. 742, 771 (1982) (Justice Powell dissenting); id. at 775 (Justice O'Connor dissenting); EEOC v. Wyoming, 460 U.S. 226 (1983). The *EEOC* Court distinguished *National League of Cities*, holding that application of the Age Discrimination in Employment Act to state fish and game wardens did not directly impair the state's ability to structure integral operations in areas of traditional governmental function, since the state remained free to assess each warden's fitness on an individualized basis and retire those found unfit for the job.
[53] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); City of Rome v. United States, 446 U.S. 156 (1980); Fullilove v. Klutznick, 448 U.S. 448, 476–78 (1980) (plurality opinion of Chief Justice Burger).
[54] 469 U.S. 528 (1985). The issue was again decided by a 5 to 4 vote, Justice Blackmun's qualified acceptance of the *National League of Cities* approach having changed to complete rejection.
[55] Id. at 557.
[56] 312 U.S. 100, 124 (1941), supra p. 1509; Madison's views were quoted by the Court in *Garcia*, 469 U.S. at 549.

"only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[57] The principal restraints on congressional exercise of the Commerce power are to be found not in the Tenth Amendment or in the Commerce Clause itself, but in the structure of the Federal Government and in the political processes.[58] "Freestanding conceptions of state sovereignty" such as the *National League of Cities* test subvert the federal system by "invit[ing] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."[59] While continuing to recognize that "Congress' authority under the Commerce Clause must reflect [the] position . . . that the States occupy a special and specific position in our constitutional system," the Court held that application of Fair Labor Standards Act minimum wage and overtime provisions to state employment does not require identification of these "affirmative limits."[60] In sum, the Court in *Garcia* seems to have said that most but not necessarily all disputes over the effects on state sovereignty of federal commerce power legislation are to be considered political questions. What it would take for legislation to so threaten the "special and specific position" that states occupy in the constitutional system as to require judicial rather than political resolution was not delineated.

The first indication was that it would take a very unusual case indeed. In *South Carolina v. Baker* the Court expansively interpreted *Garcia* as meaning that there must be an allegation of "some extraordinary defects in the national political process" before the Court will apply substantive judicial review standards to claims that Congress has regulated state activities in violation of the Tenth Amendment.[61] A claim that Congress acted on incomplete information would not suffice, the Court noting that South Carolina had "not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless."[62] Thus, the general rule was that "limits on Congress' authority to regulate

[57] 469 U.S. at 549.

[58] "Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." 469 U.S. at 550. The Court cited the role of states in selecting the President, and the equal representation of states in the Senate. Id. at 551.

[59] 469 U.S. at 550, 546.

[60] 469 U.S. at 556.

[61] 485 U.S. 505, 512 (1988). Justice Scalia, in a separate concurring opinion, objected to this language as departing from the Court's assertion in *Garcia* that the "constitutional structure" imposes some affirmative limits on congressional action. Id. at 528.

[62] Id. at 513.

state activities . . . are structural, not substantive—i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."[63]

Later indications are that the Court may be looking for ways to back off from *Garcia*. One device is to apply a "clear statement" rule requiring unambiguous statement of congressional intent to displace state authority. After noting the serious constitutional issues that would be raised by interpreting the Age Discrimination in Employment Act to apply to appointed state judges, the Court in *Gregory v. Ashcroft*[64] explained that, because *Garcia* "constrained" consideration of "the limits that the state-federal balance places on Congress' powers," a plain statement rule was all the more necessary. "[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."

The Court's 1992 decision in *New York v. United States*,[65] may portend a more direct retreat from *Garcia*. The holding in *New York*, that Congress may not "commandeer" state regulatory processes by ordering states to enact or administer a federal regulatory program, applied a limitation on congressional power previously recognized in dictum[66] and in no way inconsistent with the holding in *Garcia*. Language in the opinion, however, sounds more reminiscent of *National League of Cities* than of *Garcia*. First, the Court's opinion by Justice O'Connor declares that it makes no difference whether federalism constraints derive from limitations inherent in the Tenth Amendment, or instead from the absence of power delegated to Congress under Article I; "the Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power."[67] Second, the

[63] Id. at 512.

[64] 501 U.S. 452, 464 (1991). The Court left no doubt that it considered the constitutional issue serious. "[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . is an authority that lies at 'the heart of representative government' [and] is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guarantee Clause]." Id. at 463. In the latter context the Court's opinion by Justice O'Connor cited Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988). *See also* McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (also cited by the Court); and Van Alystyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

[65] 112 S. Ct. 2408 (1992).

[66] *See, e.g.*, Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264, 288 (1981); FERC v. Mississippi, 456 U.S. 742, 765 (1982); South Carolina v. Baker, 485 U.S. 505, 513–15 (1988).

[67] 112 S. Ct. at 2418.

Court, without reference to *Garcia*, thoroughly repudiated *Garcia's* "structural" approach requiring states to look primarily to the political processes for protection. In rejecting arguments that New York's sovereignty could not have been infringed because its representatives had participated in developing the compromise legislation and had consented to its enactment, the Court declared that "[t]he Constitution does not protect the sovereignty of States for the benefit of the States or State governments, [but instead] for the protection of individuals." Consequently, "State officials cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution."[68] The stage appears to be set, therefore, for some relaxation of *Garcia's* obstacles to federalism-based challenges to legislation enacted pursuant to the commerce power.

[68] Id. at 2431–32.

DOCUMENTS SUBMITTED BY REPRESENTATIVE ED PERLMUTTER

The Honorable Lamar Smith
Chair, House Committee on Science, Space, and Technology
United States House of Representatives
2318 Rayburn House Office Building
Washington, D.C. 20515

September 13, 2016

Dear Chairman Smith:

As scientists committed to principles of scientific freedom, we write to urge you to cease your investigation of private civil society organizations that are working to hold ExxonMobil accountable for misrepresenting the work of the company's own climate change scientists.

Your actions risk disrupting the ability of private citizens and organizations to blow the whistle on the politicization of science. Further, while you claim an interest in guarding against "a chilling effect" on scientists, you are inappropriately interfering in investigations that will determine whether ExxonMobil created such a chilling effect by suppressing its own scientists' findings.

ExxonMobil scientists have long been involved in climate research. In fact, evidence recently emerged that ExxonMobil scientists warned the company about climate change risks as early as the 1970s. As a result, a number of state attorneys general are investigating whether ExxonMobil committed fraud by downplaying the work of its on scientists on the risks posed to the company by climate change to their shareholders and the public.

Several private civil society organizations have provided information to guide the attorneys general investigations. In response, you have repeatedly demanded access to their correspondence, claiming an interest in "ensuring that all scientists...have the freedom to pursue any and all legitimate avenues of inquiry." Yet by shining a light on ExxonMobil's disregard for the work of its own scientists, this freedom is precisely what these organizations are striving to protect. It is ExxonMobil's decision to misrepresent climate science to shareholders and the public, including the work of their own scientists, not the ability of its scientists to pursue research, which is being questioned.

Free speech for scientists does not mean freedom for their employers to misrepresent that science. For example, pharmaceutical companies should not be allowed to lie to their investors or their customers about the safety and efficacy of drugs when their own tests show them to be dangerous or ineffective.

Further, you write that Congress has the responsibility to "ensure that scientific endeavors are free from threats and intimidation." However, when National Oceanic and Atmospheric Administration (NOAA) climate scientists published research showing the rate of climate change has not decreased in recent years, you made repeated demands on NOAA for the scientists'

deliberations. In response, eight leading scientific societies expressed "grave concern" about your actions, suggesting that "science cannot thrive when policy makers...use policy disagreements as a pretext to attack scientific conclusions without public evidence." Your most recent actions suggest that you are willing to misuse your power to shield companies that suppress science and attack researchers who report such conduct.

We agree that scientists must have protections to pursue cutting-edge scientific research regardless of the results of that research. One way to accomplish this is to increase consequences for the deliberate misrepresentation of scientific evidence. Ceasing your investigation of those who are working to hold companies accountable for misrepresenting science is a good first step.

Sincerely,

The undersigned (2,143 signatories)

CC: Ranking Member Eddie Bernice Johnson

To see signatures for this letter, please visit:

http://democrats.science.house.gov/sites/democrats.science.house.gov/files/documents/2143%20scientists-letter-to-smith-9-13-16.pdf

Democratic AGs ignore polls, press case against climate skeptics

New York Attorney General Eric T. Schneiderman continued his crusade against energy giant Exxon, saying that no company, "no matter how rich or powerful," is above the law. (Associated Press) more >

By Valerie Richardson - *The Washington Times - Tuesday, August 9, 2016*

Democratic attorneys general mounted a dogged defense Tuesday of their effort to prosecute climate skeptics amid signs that the 4-month-old campaign is deteriorating into a legal and public relations flop.

With a newly released poll showing an overwhelming majority of voters — including Democrats — oppose the investigation, the coalition of attorneys general pressed on, urging a federal court in Texas to uphold a subpoena filed by Massachusetts Attorney General Maura Healey against Exxon Mobil.

"No company — no matter how rich or powerful — is above the law," New York Attorney General Eric T. Schneiderman said in a statement. "Exxon's lawsuit in Texas is nothing more than an attempt to put its practices beyond the reach of state prosecutors."

SEE ALSO: Democratic prosecutors invited to help Obama, join pursuit against climate change skeptics

The amicus brief filed in support of the Massachusetts investigation comes with the coalition showing signs of fraying after suffering a series of setbacks.

So far only three of the 17 attorneys general — those in Massachusetts, New York and the Virgin Islands — have acknowledged starting investigations into Exxon or other entities since unveiling AGs United for Clean Power at a March 29 press conference.

Even those probes have run into problems. In June, Ms. Healey placed her investigation on hold, saying she would not enforce the subpoena until the court battle with Exxon was resolved, which could take years, according to a document obtained by E&E Daily.

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The Virgin Islands probe all but collapsed in June after Attorney General Claude E. Walker agreed to drop a subpoena issued against Exxon, a month after he said he would withdraw subpoenas of the free market Competitive Enterprise Institute. Both Exxon and the institute had fought the subpoenas.

Meanwhile, Iowa Attorney General Tom Miller has so far refused to sign a common interest agreement allowing the prosecutors to communicate on their probes without disclosing the details to the public.

A January report in the Los Angeles Times said that California Attorney General Kamala Harris is investigating Exxon, but since then, her office has refused to provide details or even confirm that the probe is taking place.

While prosecutors typically refuse to comment on ongoing investigations, the coalition's critics say the subsequent silence comes as an indication that some Democrats are having second thoughts about their March commitment in the face of fierce opposition.

"This is wrong, and, in the end, will be fully exposed," said E&E Legal Institute senior fellow Chris Horner after the release of emails last week exposing the common interest agreement. "Perhaps that is why so many of the AGs have already walked away from this abusive campaign. It's certainly why they are trying to keep it all secret."

Republicans and free market groups have accused the attorneys general of abusing their prosecutorial authority in order to chill debate and advance an ideological agenda, while a Rasmussen Reports poll released Tuesday showed that 69 percent of likely voters oppose targeting climate skeptics.

"These AGs look very partisan, and I think they're in a very controversial area here," said political analyst Floyd Ciruli.

The attorneys general often compare their effort to the state and federal tobacco lawsuits that resulted in enormous settlements against the industry, but Mr. Ciruli said that "we're nowhere near that, in my opinion, on climate change, either the urgency or necessarily the certainty."

"You need to have, as with cigarettes, this sense of people dying today, this visceral sense of the connection between something scientifically declared and public policy, and that simply doesn't exist," Mr. Ciruli said. "This mainly looks like a witch-hunt to suppress countering views, and that is always very controversial in America."

At the same time, the Democrat attorneys general have scored some victories. The party agreed in July to add a provision in its platform calling for the Justice Department to investigate "alleged corporate fraud on the part of fossil fuel companies who have reportedly misled shareholders and the public on the scientific reality of climate change."

New Hampshire Attorney General Joseph Foster signed in April a common interest agreement indicating his decision to join the coalition even though he did not participate in the March press conference, which featured Vice President Al Gore Jr.

In that sense, the attorneys general may be better aligned with the party's ascendant progressive wing than with Democratic voters as a whole. Only 21 percent of Democrats polled by Rasmussen said they supported prosecuting climate skeptics, while 28 percent said the debate over global warming is not settled.

Exxon is cooperating with the subpoena issued in New York, which has powers exceeding those of other states to investigate financial and shareholder fraud under the Martin Act, according to the motion filed Tuesday.

In Massachusetts, Ms. Healey is investigating whether Exxon and its supporters violated the state's Consumer Protection Act.

"Like all state attorneys general, Attorney General Healey has the power to investigate potential fraud taking place in Massachusetts, just as I am investigating whether Exxon defrauded New York consumers and investors," said Mr. Schneiderman.

In their 34-page brief, the attorneys general urged U.S. District Court Judge Ed Kinkeade for the Northern District of Texas to reject Exxon's effort to block the subpoena, arguing that the company is attempting to use the federal courts to bypass state sovereignty.

"Protecting a state's citizens from fraud, deception and other improper conduct is a principal and critical state law responsibility of state Attorneys General," said the brief.

Missing from the amicus brief were three of the original 17 coalition prosecutors: Ms. Harris, Connecticut Attorney General George Jepsen and Virginia Attorney General Mark R. Herring.

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DOCUMENTS SUBMITTED BY REPRESENTATIVE KATHERINE M. CLARK

BY FIRST-CLASS MAIL

September 12, 2016

The Honorable Lamar Smith, Chair
Committee on Science, Space, and Technology
United States House of Representatives
2321 Rayburn House Office Building
Washington, DC 20515

Re: Subpoena dated July 13, 2016 Issued to Union of Concerned Scientists

Dear Chairman Smith:

The undersigned constitutional law scholars, civil liberties advocates, and First Amendment litigators write to express their grave concerns about the lawfulness of the subpoenas you issued as Chairman of the House Committee on Science, Space & Technology to the Union of Concerned Scientists, 350.org, Greenpeace, Global Warming Legal Action Project, and four other non-profit organizations on July 13, 2016 (the "Subpoenas").[1] Those Subpoenas make wholesale demands for the communications between and among the organizations and state law enforcement officials concerning any potential investigation or prosecution "related to the issue of climate change," and do so out of a purported concern over a possible conspiracy to deprive fossil fuel companies of their First Amendment rights. But the Subpoenas, and the threat of future sanctions, themselves threaten the First Amendment—directly inhibiting the rights of their recipients to speak, to associate and to petition state officials without interference from Congress.

As demonstrated below, these Subpoenas violate the separation of powers, exceed the committee's delegated authority, abridge the First Amendment, and undermine fundamental principles of federalism. The Subpoenas should not have been issued and should not be enforced. We urge you to withdraw voluntarily these misguided demands for information your committee has no legitimate right to inspect.

Background

The nine organizations you subpoenaed each have a public track record of contributing to a critical international effort to understand global climate change and to combat its causes. The Union of Concerned Scientists ("UCS"), for example, was founded more than four decades ago by M.I.T. faculty and students who sought "[t]o initiate a critical and continuing examination of governmental policy in areas where science and technology are of actual or potential significance."[2] In the 1990s, UCS led a delegation of U.S. organizations during negotiations that resulted in the Kyoto Protocol. In the early 2000s, its climate experts played a key role in crafting the Regional Greenhouse Gas Initiative, the first multi-state effort to combat global warming. Over the past fifteen years, UCS has worked to defend scientists from political interference in their work and harassment by public officials and private industry. Today, UCS collaborates with over 17,000 scientists and technical experts to develop and advocate for the

adoption of solutions to the world's most pressing problems. The other organizations targeted with subpoenas have similar records of research and advocacy to promote informed environmental policy-making based on independent science.

In July 2015, UCS released a report documenting what it believed to be a coordinated, decades-long campaign by some fossil fuel companies to distort climate science findings and confuse the public about the risks of climate change.[3] According to that report, ExxonMobil and other companies learned of the serious risks of climate change no later than 1977. The report concluded that instead of sounding an alarm and addressing those risks, the fossil fuel companies publicly denied or minimized the risks and secretly funded purportedly independent, contrarian climate research. Around the same time as the UCS report, InsideClimate News and other news organizations published reports independently reaching identical conclusions.[4]

State and federal officials quickly responded to the published reports. In November 2015, New York Attorney General Eric Schneiderman opened an investigation into whether ExxonMobil misled its investors about the risks of climate change. On December 7, 2015, forty-five members of the United States House of Representatives sent a letter to the CEOs of ExxonMobil and other fossil fuel companies asking when their companies learned of climate change and whether their companies had actively misinformed the public about its risks.[5]

On March 29, 2016, Vermont Attorney General William Sorrell and New York Attorney General Schneiderman convened a conference to coordinate state-led efforts to combat climate change. UCS's Director of Science and Policy, Dr. Peter Frumhoff, briefed the conference on climate science and UCS's view that fossil fuel companies should be held accountable for any deception. At the conclusion of the conference, the states in attendance formed a coalition dedicated to combatting climate change, and Massachusetts Attorney General Maura Healy and Virgin Islands Attorney General Claude Walker announced that they would join New York's on-going investigation into ExxonMobil.

On May 18, 2016, you and twelve Republican members of your committee sent letters to seventeen attorneys general participating in the coalition to combat climate change and the heads of nine non-profit organizations.[6] The letters expressed concern that the state investigations amounted to "political theater," and indicated that the committee intends to "conduct[] oversight of a coordinated attempt to deprive companies, nonprofit organizations, and scientists of their First Amendment rights and ability to fund and conduct scientific research free from intimidation and threats of prosecution."[7] To assist in this "oversight," the committee members requested the environmental organizations to produce two sets of documents, dating back to January 1, 2012:

> 1. All documents and communications between any officer or employee of the Union of Concerned Scientists and any officer or employee of the office of a state attorney general, referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

> 2. All documents and communications between any officer or employee of the Union of Concerned Scientists and any officer or employee of the Climate Accountability Institute, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.[8]

The majority committee members sent similar letters to the attorneys general requesting their climate-change related communications with the environmental organizations, other attorneys general offices, and the federal government. The environmental organizations and the state attorneys general each refused to comply with the committee members' requests.

You responded by issuing *subpoenas duces tecum* to the heads of the nine organizations and to the attorneys general for Massachusetts and New York, demanding production of the same documents requested in the earlier letters from the committee members.[9] Once again, the recipients declined to produce their records.

To date the committee has taken no action to enforce your Subpoenas. On August 30, 2016, you scheduled a full committee hearing for September 14, 2016, entitled "Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas."[10] We write in advance of that hearing to explain why the Subpoenas issued to the nine organizations cannot be enforced without violating the dictates of the Constitution in multiple respects.

The Subpoenas Violate the Separation of Powers, Exceed
The Committee's Authority And Abridge The First Amendment

When UCS and other organizations discussed their concerns about what they viewed as the apparently intentional distortion of climate science with state attorneys general and with each other, they were exercising their constitutional rights. The First Amendment guarantees, among other rights, the rights to speak freely, to petition the government, and to associate with others for the advancement of beliefs and ideas.[11] The right to petition entitles citizens to communicate with their government bodies and officials to express ideas, hopes, and concerns.[12] It incorporates the right to associate with others in a joint effort to convince the government to take particular actions.[13] The right to associate, in turn, permits groups to associate freely and in private, so long as they are not engaged in subversive or illegal activity.[14]

Your Subpoenas infringe the organizations' exercise of these First Amendment rights. The rights of association and petition are as fundamental and precious to our society as they are delicate and vulnerable.[15] "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action."[16] Likewise, subjecting individuals to onerous legal process for petitioning the government impermissibly penalizes and restrains the

exercise of that right.[17] Your Subpoenas do just that. They require UCS and other organizations to disclose not only the fact of their affiliation with other environmental organizations to promote government action, but also the nature of those relationships. They also impose onerous burdens on these organizations specifically for having petitioned state officials to act, including by requiring them to disclose nearly four years of communications.

Congress, however, may no more infringe the exercise of First Amendment rights by subpoena than by law.[18] It is well established that a congressional subpoena that intrudes on the exercise of First Amendment rights can only properly be enforced if it meets three conditions. *First*, the subpoena must fall within Congress's general investigatory authority. *Second*, the subpoena must be issued by a committee with specific, unequivocal authorization to conduct an investigation that intrudes on First Amendment rights. *Third*, there must be a substantial relation between the information sought and a subject of overriding and compelling government interest. Your committee's Subpoenas to UCS and the other organizations meet none of these conditions and are patently improper.

a. The Subpoenas exceed Congress' authority and violate the separation of powers.

It is axiomatic that Congress's authority to issue subpoenas must be tied to the exercise of legislative authority granted to it by Article I of the Constitution. Stated differently, Congress may only exercise its investigatory power when doing so is "related to, and in furtherance of, a legitimate task of Congress."[19] Congress, however, possesses no power to investigate in order to enforce laws and punish lawbreakers.[20] Separation of powers dictates that "[t]hese are functions of the executive and judicial departments of government," not the legislative department.[21]

Under this basic principle, your Subpoenas to the nine organizations should not have been issued, and Congress lacks the authority to enforce them. While there may be occasions where Congress could appropriately authorize an investigation into apparent systemic violations of constitutional rights that require a legislative response, Congress is not a prosecutor and may not properly use its subpoena power simply to pursue perceived First Amendment violations. This is particularly so where, as here, the asserted constitutional violations by the environmental organizations are themselves self-evidently protected First Amendment activity.

If the executive is concerned about a possible conspiracy, the Department of Justice can investigate and file suit where appropriate. If state attorneys general are seeking to deprive fossil fuel companies of their First Amendment rights, the federal courts are open to those companies, armed with the appropriate authority to rebuff any unconstitutional encroachment.[22] Investigating illegal conspiracies and ensuring that individuals are not deprived of their constitutional rights are functions of the executive and judicial branches, not Congress. As the Supreme Court reminded us decades ago, "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."[23]

b. Your Committee lacks specific authority to issue the Subpoenas.

Even if Congress possessed general authority to investigate the actions of the attorneys general here, your committee lacks the specific authority necessary to issue the Subpoenas

demanding disclosure of the First Amendment activities of private organizations. Before a committee may issue subpoenas that so directly intrude upon First Amendment rights, Congress must "demonstrate[] its full awareness of what is at stake" by "unequivocally" authorizing an inquiry that "raises doubts of constitutionality in view of the prohibition of the First Amendment."[24] As the Supreme Court has explained, that means the delegation of that power to the committee must be clearly revealed in its charter.[25]

For example, in *United States v. Rumely*, 345 U.S. 41 (1953), the Supreme Court held that the House Select Committee on Lobbying Activities lacked authority to compel a witness to disclose the names of those who purchased books espousing particular political views.[26] That committee's charter specified that it was "authorized and directed to conduct a study and investigation of . . . all lobbying activities intended to influence, encourage, promote, or retard legislation."[27] The committee's Chair contended that the committee's authority to investigate "lobbying activities" permitted it to compel testimony in order to investigate "attempts to saturate the thinking of the community."[28] The Supreme Court disagreed. It held that Congress had not "inescapably" delegated the committee with power to conduct an inquiry of dubious constitutionality.[29] Invoking the canon of constitutional avoidance, the Court narrowly construed the authority to investigate "lobbying activities" as authorizing only investigations of traditional lobbying activities which did not intrude on First Amendment rights.[30]

So also here, Congress has not "inescapably" delegated to your committee the authority to issue subpoenas that directly impinge First Amendment rights. Your Committee's charter reads as follows:

> (k) The Committee on Science, Space, and Technology shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development.[31]

No fair reading of this charter unequivocally demonstrates that the House of Representatives specifically intended to authorize the committee to issue subpoenas that intrude on their recipients' First Amendment rights. Nor do the House Rules delegate to the committee any special investigatory power. Those rules grant your committee only the same generic investigatory authority allotted all standing committees: to "conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities under rule X."[32]

c. The Subpoenas are unenforceable under controlling Supreme Court precedent.

Even if the committee possessed the specific authority it needed, the Subpoenas issued to UCS and the other organizations would still be constitutionally impermissible. When Congress does inescapably delegate authority to conduct an investigation that intrudes on First Amendment rights, courts must determine whether any subpoena issued pursuant to that authority is permissible under the Constitution.[33] In *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963), the Supreme Court laid out the test to be applied: A legislative subpoena intruding on First Amendment rights is permissible only when the legislature "convincingly show[s] a substantial relation between the information sought and a subject of

overriding and compelling [government] interest."[34] As the Court explained, "to impose a lesser standard . . . would be inconsistent with the maintenance of those essential conditions basic to the preservation of our democracy."[35]

To meet *Gibson*'s strict test, Congress must first lay an adequate factual foundation for inquiry by producing a "reasonable, demonstrated factual basis to believe" that a subpoena's recipient is either engaged in unlawful activity or meaningfully associated with such activity.[36] Indirect or unsubstantiated evidence of illegal activity is insufficient.[37] The Court's imposition of such a high evidentiary threshold stems directly from the lessons of the McCarthy era, which taught us that suspicions of illegal activity can too easily provide a basis to use the subpoena power improperly to investigate political opponents and suppress First Amendment rights. To guard against such abuse, *Gibson* requires any congressional subpoena that impinges on First Amendment rights to be supported by a factually substantiated connection between known unlawful conduct and a highly significant government interest.

For example, in *Barenblatt v. United States*, 360 U.S. 109 (1959), the Supreme Court permitted a House subcommittee to compel a witness to disclose his association with the Communist Party.[38] The Court explained that the intrusion into the witness's First Amendment rights was justified based on society's interest in "self-preservation" and "the close nexus between the Communist Party and violent overthrow of government."[39] But the Court took pains to note that even the government's interest in preventing its own violent demise will not always override individuals' First Amendment rights. It explained that "indication[s] . . . that the Subcommittee was attempting to pillory witnesses," that the witness's appearance "follow[ed] from indiscriminate dragnet procedures[] lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee," or that the questions posed were irrelevant could "lead to the conclusion that the individual interests at stake [are] not subordinate to those of the state."[40]

Likewise, Congress cannot meet *Gibson*'s test with mere suspicions of possibly unlawful conduct. Indeed, that is the key lesson from *Gibson* itself. In that case, the Florida legislature had issued a subpoena to the Miami branch of the N.A.A.C.P. demanding its membership list. The subpoena was purportedly issued in support of the legislature's inquiry into the infiltration of Communists into domestic organizations, and the legislature defended its propriety based on an investigator's testimony that fourteen persons with Communist affiliations were either members of the NAACP branch or participated in its meetings.[41] The Supreme Court found this evidence entirely insufficient, because "[m]ere presence at a public meeting or bare membership—without more—is not infiltration of the sponsoring organization."[42] The Court held that the legislature's subpoena power must yield to the NAACP's First Amendment rights because the Florida legislature "neither demonstrated nor pointed out any threat to the State by virtue of the existence of the N.A.A.C.P. or the pursuit of its activities or the minimal associational ties of the 14 asserted Communists."[43]

The lesson from *Gibson* is that legislatures cannot issue subpoenas that infringe upon First Amendment rights on the basis of unsubstantiated accusations or suspicions of unlawful conduct. The committee ignores that teaching. It has made *no* claim that the organizations have engaged in any unlawful activity. To the contrary, the letter written to UCS by the majority

committee members on May 18, 2016, contends that UCS's wrongful conduct consists of associating with other organizations to persuade state attorneys general to prosecute fossil fuel companies.[44] But associating with others to petition state attorneys general to redress grievances is *not* unlawful; it is explicitly protected by the First Amendment.

Nor has the committee identified the sort of compelling government interest necessary to override the organizations' associational rights under *Gibson*. While bad faith investigations undertaken by prosecutors for a wrongful purpose might give rise to constitutional concerns, we have no evidence of that here. Rather, we have an investigation into whether or not companies violated state "securities, business and consumer fraud laws."[45] This kind of investigation cannot be compared to those into the existential threats posed by Communist infiltration of domestic organizations at the height of the Cold War. It cannot plausibly be stated that the ambitions of the environmental organizations "include the ultimate overthrow of the Government of the United States by force and violence."[46]

You have expressed concern about the good faith of the decisions of the state attorneys general to proceed as they have. Of course, that is a topic you are fully protected by the First Amendment in raising, both on and off the floor of Congress. That very issue has been raised in various courts by recipients of the subpoenas issued by the state attorneys general. What you may not do, however, is to use your power to issue compulsory process to require production of the internal files of organizations that are in the process of exercising their First Amendment rights where there is no basis, let alone any compelling one, for you to do so.

In the absence of any compelling government interest, it goes without saying that there is no "substantial relation between the information sought and a subject of overriding and compelling [government] interest."[47] Your Subpoenas plainly fail to satisfy *Gibson*'s requirements and should be withdrawn.

The Subpoenas Violate Fundamental Principles of Federalism

The constitutions of many states also independently guarantee to the nine organizations a *state* right to associate and petition, apart from their corresponding federal rights.[48] For example, New York's constitution guarantees individuals the "right of association"[49] and the right "to petition the government, or any department thereof."[50] State rights to petition state governments are particularly fundamental to states' sovereignty. They lie at the very heart of representative government, defining one of the basic aspects of individuals' relationships with states.[51] Your Subpoenas equally infringe upon these state-guaranteed rights.

Even if these state constitutional rights are not insurmountable, there is a strong presumption that Congress does not override state law lightly.[52] Courts generally will infer a congressional intent to authorize the overriding of state law only when doing so is "the clear and manifest purpose of Congress."[53] For the reasons explained above, nothing in the charter of your committee indicates that Congress has clearly and manifestly authorized it to issue subpoenas that infringe state-law rights.[54] Moreover, Congress could not have authorized the Subpoenas for the further reason that they effectively deprive UCS and the organizations of their right to petition state governments in violation of the federal Constitution's Guarantee Clause.[55]

* * *

For all of these reasons, your June 13, 2016, subpoenas to the nine organizations are invalid and constitutionally impermissible. We urge you to withdraw them promptly. Should Congress seek to enforce them, we are confident that a federal court will take seriously the lessons this country learned from McCarthyism and refuse to do so.

Very truly yours,

Abrams Institute for Freedom of Expression
Yale Law School*

Floyd Abrams
Partner, Cahill Gordon & Reindel LLP*

Jack Balkin
Knight Professor of Constitutional Law, Yale Law School*

Bill of Rights Defense Committee & Defending Dissent Foundation

Mark Bartholomew
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Georgetown Law*

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Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, University of California, Irvine School of Law*

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cc: Honorable Eddie Bernice Johnson
Ranking Member, Committee on Science, Space and Technology

Majority Staff, Committee on Science, Space, and Technology
Rayburn House Office Building, Room 2321

Minority Staff, Committee on Science, Space, and Technology
Ford House Office Building, Room 394

* Affiliation provided for identification purposes only.

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[1] The environmental organizations subpoenaed are 350.org; Climate Accountability Institute; Climate Reality Project; Global Warming Legal Action Project; Greenpeace, Pawa Law Group, P.C.; The Rockefeller Brothers Fund; Rockefeller Family Fund; and UCS. The Subpoenas to those organizations are available at http://democrats.science.house.gov/letter/document-requests-sent-state-attorneys-general-and-environmental-groups.

[2] *Founding Document: 1968 MIT Faculty Statement*, Union of Concerned Scientists, http://www.ucsusa.org/about/founding-document-1968.html#.V6jSMWX9_04 (last visited Aug. 8, 2016).

[3] Kathy Mulvey et al., *The Climate Deception Dossiers: Internal Fossil Fuel Industry Memos Reveal Decades of Corporate Disinformation*, Union of Concerned Scientists (July 2015), http://www.ucsusa.org/sites/default/files/attach/2015/07/The-Climate-Deception-Dossiers.pdf.

[4] *See, e.g.*, Katie Jennings et al., *How Exxon Went From Leader to Skeptic On Climate Change Research*, L.A. TIMES (Oct. 23, 2015), http://graphics.latimes.com/exxon-research/; Sara Jerving et al., *What Exxon Knew About The Earth's Melting Arctic*, L.A. TIMES (Oct. 9, 2015), http://graphics.latimes.com/exxon-arctic/; Neela Banerjee et al., *Exxon Believed Deep Dive Into Climate Research Would Protect Its Business*, INSIDE CLIMATE NEWS (Sept. 17, 2015), https://insideclimatenews.org/news/16092015/exxon-believed-deep-dive-into-climate-research-would-protect-its-business; Neela Banerjee et al., *Exxon's Own Research Confirmed Fossil Fuels' Role in Global Warming Decades Ago*, INSIDE CLIMATE NEWS (Sept. 16, 2015), https://insideclimatenews.org/news/15092015/Exxons-own-research-confirmed-fossil-fuels-role-in-global-warming.

[5] Letter from Members of Congress to Fossil Fuel CEOs (Dec. 7, 2015), https://lieu.house.gov/sites/lieu.house.gov/files/documents/1214_001.pdf.

[6] *See State Attorneys General and Environmental Groups Document Requests and Responses*, H. COMM. ON SCI., SPACE, & TECH. (June 3, 2016), http://democrats.science.house.gov/letter/document-requests-sent-state-attorneys-general-and-environmental-groups.

[7] Letter from U.S. House, Committee on Science, Space, and Technology, to Kenneth Kimmell, President, Union of Concerned Scientists (May 18, 2016), https://science.house.gov/sites/republicans.science.house.gov/files/documents/05.18.16%20SST%20Letter%20to%20UCS.pdf.

[8] *Id.*

[9] *See, e.g.*, Subpoena from U.S. House, Committee on Science, Space, and Technology to Kenneth Kimmell, President, Union of Concerned Scientists (July 13, 2016), http://democrats.science.house.gov/sites/democrats.science.house.gov/files/documents/UCS%20Subpoena.pdf.

[10] *Full Committee Hearing - Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas*, COMM. ON SCI., SPACE & TECH., https://science.house.gov/legislation/hearings/full-committee-hearing-affirming-congress-constitutional-oversight (last visited Aug. 31, 2016).

[11] U.S. CONST. amend. I; *Nat'l Ass'n for Advancement of Colored People v. State of Ala.* ex rel. *Patterson* ("*Patterson*"), 357 U.S. 449, 460 (1958).

[12] *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388–89 (2011).

[13] *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 525 (2002) (quoting *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 131 (1961)) (internal alterations omitted).

[14] *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557–58 (1963).

[15] *Gibson*, 372 U.S. at 544; *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963).

[16] *Patterson*, 357 U.S. at 462.

[17] *See Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1757 (2014) ("We crafted the *Noerr–Pennington* doctrine . . . to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances."); *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137–38 (1961); *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983).

[18] *Watkins v. United States*, 354 U.S. 178, 197 (1957).

[19] *Id.* at 187.

[20] *See id.* at 200 (observing that there is no congressional power "to expose for the sake of exposure," or to investigate in order "to 'punish' those investigated").

[21] *Id.*

[22] 28 U.S.C. § 2201(a).

[23] *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983).

[24] *United States v. Rumely*, 345 U.S. 41, 46 (1953).

[25] *Watkins*, 354 U.S. at 198.

[26] *United States v. Rumely*, 345 U.S. 41, 44 (1953).

[27] *Id.*

[28] *Id.* at 47 (internal quotation marks omitted).

[29] *Id.* at 46, 48.

[30] *Id.* at 46, 48.

[31] H.R. Rule X(3)(m).

[32] H.R. Rule XI(1)(b)(1).

[33] *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 545-46 (1963).

[34] *Id.* at 546.

[35] *Id.* at 558.

[36] *Id.* at 551, 555.

[37] *Id.* at 555.

[38] *Barenblatt v. United States*, 360 U.S. 109, 127-28 (1959).

[39] *Id.* at 128.

[40] *Id.* at 134.

[41] *Gibson*, 372 U.S. at 551.

[42] *Id.* at 552.

[43] *Id.* at 555.

[44] Letter from U.S. House, Committee on Science, Space, and Technology, to Kenneth Kimmell, President, Union of Concerned Scientists (May 18, 2016), https://science.house.gov/sites/republicans.science.house.gov/files/documents/05.18.16%20SST%20Letter%20to%20UCS.pdf.

[45] Letter from Leslie B. Dubeck, Counsel, New York Office of the Attorney General, to Lamar Smith, Chairman, House Comm. On Science, Space & Tech. (May 26, 2016), http://democrats.science.house.gov/sites/democrats.science.house.gov/files/documents/NY_in_05.26.16.pdf.

[46] *Barenblatt v. United States*, 360 U.S. 109, 128 (1959).

[47] *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963).

[48] *See, e.g.*, CAL. CONST., art. 1, § 3(a) ("The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good."); MASS. CONST., art. XIX ("The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.").

[49] *Golden v. Clark*, 564 N.E.2d 611, 613 (N.Y. 1990).

[50] N.Y. CONST., art. I, § 9.

[51] *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991).

[52] *Cf. Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

[53] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

[54] *See supra* at p. 5.

[55] *Compare* U.S. CONST., art. IV, § 4 (guaranteeing "every state in this union a republican form of government"), *with BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 524–25 (2002) (explaining that the right to petition the government "is implied by 'the very idea of a government, republican in form'" (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)); *cf. Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1757 (2014) ("We crafted the

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Noerr–Pennington doctrine . . . to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances."); *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137–38 (1961); *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983).

The Honorable Lamar Smith
Chair, House Committee on Science, Space, and Technology
United States House of Representatives
2318 Rayburn House Office Building
Washington, D.C. 20515

September 13, 2016

Dear Chairman Smith:

We are writing to halt your baseless and unprecedented interference in an effort by state prosecutors to determine whether ExxonMobil suppressed and misrepresented the work of its scientists. Your actions undermine the ability of private citizens and organizations to expose fraud and abuse of science.

Decades ago, ExxonMobil scientists developed climate science research and shared their assessment of climate change risks to the oil industry with company leaders. ExxonMobil subsequently downplayed these risks in communications with shareholders and the public for years. It is entirely appropriate for state prosecutors to investigate whether this misrepresentation of science constitutes fraud.

Several nonprofit organizations have provided information to guide the attorneys general in their investigations. In response, you have repeatedly demanded access to their correspondence, claiming an interest in "ensuring that all scientists...have the freedom to pursue any and all legitimate avenues of inquiry." The scientists and their research are not under question, but rather ExxonMobil's decision to misrepresent climate science to shareholders and the public, including the work of their own scientists.

Last fall, you launched a similar investigation into the work of National Oceanic and Atmospheric Administration climate scientists when they came to a conclusion with which you did not agree. Your actions were widely repudiated by the scientific community and seen as harassment. Your most recent actions constitute a bald attempt to cast further doubt on climate science and intimidate attorneys general from fully investigating whether ExxonMobil defrauded its shareholders.

By attacking both state attorneys general and the nonprofit organizations that are informing their work, you are making it easier for companies to suppress science and damage public health and the environment. We urge you to withdraw your demands for correspondence from public interest organizations and to use your power to put the interests of the scientific community above those of ExxonMobil.

Sincerely,

The undersigned (32,783 signatories)

CC: Ranking Member Eddie Bernice Johnson

To see signatures for this letter, please visit :

http://democrats.science.house.gov/sites/democrats.science.house.gov/files/documents/32783%20citizens-letter-to-chairman-smith-9-7-16.pdf

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EDITORIAL

Congressional bullying on behalf of Big Oil

CHARLES DHARAPAK/ASSOCIATED PRESS/FILE 2012

Rep. Lamar Smith, R-Texas.

SEPTEMBER 12, 2016

CONGRESSMAN LAMAR SMITH of Texas spent most of the summer unsuccessfully trying to scuttle an ongoing investigation by Attorney General Maura Healey of Massachusetts into whether Exxon Mobil Corp. withheld damning information about global warming that its own scientists uncovered decades ago. As chairman of the House Committee on Science, Space, and Technology, Smith is actually investigating the investigation itself -- which he

calls a "form of extortion" — as well as a separate inquiry launched by New York's attorney general, Eric Schneiderman.

Why is Smith so bent on interfering with the work of elected state officials over whom he has no authority? It might have something to do with thehundreds of thousands of dollars he's received from Big Oil over the years, and the fact that Exxon Mobil calls Texas home. Or maybe it's just because the Republican representative doubts climate change is real.

In any case, Smith has subpoenaed e-mails and other documents from Healey that he seems convinced will prove she's in cahoots with environmental activists out to destroy the oil business — a view that mirrors Exxon Mobil's stance. Healey says she's simply seeking to determine whether the oil giant perpetrated fraud against consumers and investors by keeping secret the truth about climate change — even as it publicly campaigned to cast doubt on the legitimacy of global warming. She's stood up to the political bullying by refusing to comply with Smith's demands. Her chief legal counsel, Richard Johnston, called the subpoena "completely unprecedented in its intended interference with an ongoing regulatory investigation by a state's attorney general."

The wrangling over Exxon Mobil's alleged complicity in furthering what now is an unfolding worldwide environmental disaster began last year. That's when the website InsideClimate News published an alarming series showing that, as far back as the 1970s, company scientists worried about warming caused by increased carbon emissions. The stories hinged on this crucial question: Instead of doubling down on fossil fuel development, what if Exxon had acknowledged the threat, and then —as one of its own managers wrote in a 1978 memo — tackled the problem as "a project aimed at benefitting mankind"? Exxon Mobil condemned the series, and similar reporting from other news organizations, as environmentalist propaganda that portrayed robust internal discourse about global warming as a sinister activity.

Comments

Before Smith got involved as an oil industry surrogate, Exxon Mobil went to court in Massachusetts and Texas in hopes of derailing the state investigations. In a June federal filing, the company called Healey's requests for information "nothing more than a weak pretext for an unlawful exercise of government power to further political objectives."

Even those who might question the need for Healey to investigate Exxon Mobil should be able to agree that she has the right to conduct an inquiry — it's the kind of thing attorneys general routinely do. Smith's attempts to intimidate her have generated a chorus of criticism that has grown louder in recent weeks, calling more attention to his tactics. Ten attorneys general signed a letter demanding that he back off. The 11-member Massachusetts Congressional delegation labeled his actions "damaging and pointless," and Senator Elizabeth Warren tweeted: "You picked a fight with the wrong state & the wrong AG."

Smith, however, remains unfazed. He's scheduled a Sept. 14 oversight hearing at which he plans to reiterate his contention that the subpoenas are part of a "legitimate and constitutionally authorized legislative investigation." As a House committee chairman, he does indeed have the power to issue subpoenas — no matter how frivolous or punitive — and, in rejecting one, Healey risks being held in contempt. But Smith isn't empowered to have any say in who or what attorneys general choose to look into on behalf of constituents. Allowing him to do so would set a dangerous precedent.

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Dangerous Double Standards On Climate Change And Free Speech

Posted By Ronald D. Rotunda On 1:04 PM 09/02/2016 In | No Comments

Fewer than 10% of Americans believe that human activity is causing the globe to warm, a position contrary to what many politicians embrace. (Perhaps that is why some people now use the term "climate change," because the climate is always changing.) Because so few Americans believing in Anthropogenic Global Warming (man-caused climate change), several state attorneys general have chosen to investigate what they call "climate change deniers," to build a criminal case of fraud. Apparently, if people do not believe that human activity is warming the globe, it must be because industry uses secret funds to mislead us.

Last spring, New York Attorney General Eric T. Schneiderman, and 16 other attorneys general (15 Democrats and one independent) announced that they're investigating energy companies and scientists who do not embrace global warming with the certainty of Euclidian geometry.

At the press conference, Schneiderman said, "The bottom line is simple: Climate change is real; it is a threat to all the people we represent." Other attorneys general echoed his certainty. "Climate change has real and lasting impacts on our environment, public health, and the economy," said California Attorney General Kamala D. Harris. Money must be behind refusing to believe in global warming. Shortly after that, Senator Sheldon Whitehorse (D. R.I.) warned us, "Fossil fuel companies and their allies are funding a massive and sophisticated campaign to mislead the American people about the environmental harm caused by carbon pollution," so he urged the Department of Justice to prosecute all those involved.

We learned in August that Mr. Schneiderman is demanding "extensive emails, financial records and other documents," which imposes an extensive undertaking on all those subject to these demands. These prosecutorial tools — extensive discovery, interrogatories, depositions, document turnover, and the threat of fraud prosecutions —make scientific dissent riskier, more expensive, and career-ending. If Newton's rivals had such tools, we'd still be studying Aristotelian physics, which reigned supreme for nearly 2,000 years.

The prosecutors are chilling free speech. The marketplace of ideas, not prosecutorial power, should decide what is true or false. In *United States v. Alvarez* (2012) (6 to 3), the Supreme Court told us that we have a constitutional right to lie about receiving the Congressional Medal of Honor. The Court was not recommending lying, but it recognized that if the government can punish that, we go down a slippery slope with a steep incline. Justice Kennedy said that the government cannot "compile a list of subjects about which false statements are punishable." Justice Breyer defended lying, "even in technical, philosophical, and *scientific* contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth."

Even the three dissenters in *Alvarez* would protect lying in matters of science: "Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern" would "present a grave and unacceptable danger of suppressing truthful speech."

Here's the irony in the case of General Schneiderman: When Republicans in Congress issued a subpoena asking him to produce communications between climate change activists, the Obama Administration and his fellow Attorneys General, he suddenly becomes a born again Federalist concerned about separation of powers and liberty limiting the actions of state sovereigns. He doesn't seem to understand that his subpoenas squelch the "free speech" interests of climate change critics. He should comply with congressional subpoenas, because federalism does not trump the First Amendment.

These prosecutors are not investigating people who believe in global warming, only those who think that there is more to investigate. Al Gore was standing next to Schneiderman at his press conference. Recently *leaked documents show thatGeorge Soros is a major funder ($30 million) of Al Gore* and his climate agenda. No wonder Schneiderman is ducking the Congressional subpoenas, while depriving his adversaries of the very speech the Founders' thought sacrosanct.

Ron Rotunda is the Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence at the Chapman University Dale E. Fowler School of Law.

ARTICLE SUBMITTED BY REPRESENTATIVE BRUCE WESTERMAN

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Supreme Court refuses to block Backpage subpoenas in sex trafficking investigation

by Jackie Wattles @jackiewattles
September 13, 2016: 4:18 PM ET

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Sex, Drugs & Silicon Valley

The Supreme Court declined Tuesday to block subpoenas issued to Backpage.com by a Senate committee that is investigating its alleged role in facilitating child sex trafficking.

The Center for Missing and Exploited Children has identified Backpage as a primary online marketplace for child sex trafficking ads on the internet.

The website was subpoenaed nearly a year ago by the Senate Permanent Subcommittee on Investigations. When the subpoena -- which was issued in October 2015 -- went unanswered, the Senate took a rare move and held Backpage in contempt of Congress, which hadn't been done since 1995.

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But Backpage and its CEO, Carl Ferrer, have refused to comply with the subpoena, arguing that the First Amendment protects the company from complying with the Senate's demands.

But on Tuesday, the nation's highest court denied Backstage's request to block the subpoena. Justice

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Samuel Alito recused himself.

Related: Senate holds Backpage.com in contempt, sparking likely free speech fight

Backpage declined to comment on the court's action.

Lawyers for Ferrer had argued in court papers, "This case highlights a disturbing -- and growing -- trend of government actors issuing blunderbuss demands for documents to online publishers of content created by third parties (such as classified ads) in a manner that chills First Amendment rights."

Stephen Vladeck a CNN contributor and law professor at the University of Texas called the case "an absolute quagmire in First Amendment doctrine."

"The whole fight is about whether and to what extent the First Amendment protects online publishers of third-party content (like Backpage)," Vladeck said.

Related: A lurid journey through Backpage.com

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15-yr fixed	2.50%
5/1 ARM	3.13%

Loan Purpose	Loan Amount
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Backpage.com is under investigation for facilitating child sex traffickers.

Backpage functions much like Craigslist, but it's been known to be more permissive for adult content.

It was the target of CNN investigations in 2011 and 2012. Numerous lawmakers and regulators have been after the company in recent years, attempting to shut down the site's adult content section where much of the suspected child sex trafficking activity occurs.

American Express (AXP), Mastercard (MA) and Visa (V) stopped allowing cardholders to make payments on the site in 2015.

Mastercard and Visa acted after an Illinois sheriff estimated Backpage was making about $100 million per year from adult advertising, and he lobbied the credit card companies to take action.

Senators Rob Portman and Claire McCaskill are heading up the Senate investigation. The lawmakers have called Backpage "the most important player" in the commercial sex advertising market.

Backpage claims to combat human trafficking, saying that it screens posts for illegal activities. But a subcommittee investigation says Backpage actually aids sex traffickers by helping to shield them from detection.

For instance, the Senate investigators found Backpage screens posts before they appear online, and the site removes key words from ads that could tip off law enforcement officials to illegal activity.

Editor's note: This article has been updated to clarify the Supreme Court's action and to correct the spelling of Stephen Vladeck's last name.

CNNMoney (New York)
First published September 13, 2016: 1:02 PM ET

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