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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 must 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.

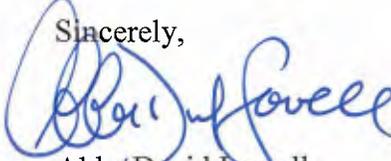
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Greenpeace and 350.org remain committed to cooperating with any authorized and legitimate inquiry of Congress into climate change, one of the most pressing issues of our time. The Committee’s requests, however, violate the First Amendment, fall outside the

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