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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

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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.

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 CO₂ 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>.

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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 members⁴ 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

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>.