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March 1, 2017

The Honorable Lamar Smith
Chairman
House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith:

The New York Office of the Attorney General ("NYOAG") has received your document subpoena, dated February 16, 2017 ("Subpoena"). We had hoped that with the start of a new Congress, the Committee on Science, Space, and Technology ("Committee") would turn its attention exclusively to authorized and legitimate legislative activity. Your Subpoena does otherwise. I write to inform you that the NYOAG cannot and will not comply with the Subpoena as presently composed.

The letter accompanying the Subpoena announces that the Committee is "continuing" and "reauthorizing" its investigation of the NYOAG's law enforcement activities, as "laid out in past correspondence."[1] The Committee's investigation included a prior subpoena, dated July 13, 2016, seeking an array of confidential material regarding the NYOAG's "investigation[s] or potential prosecution[s]" of companies or individuals "related to the issue of climate change."[2] The NYOAG's detailed objections to those requests—sent on July 26, 2016—are attached to this response, incorporated by reference, and reasserted against the Subpoena, with supplemental objections set forth below.

The NYOAG is conducting an investigation into whether ExxonMobil Corp. ("Exxon") violated New York State's laws against securities fraud, business fraud, and consumer fraud through potentially false or misleading public statements and disclosures concerning the impact of climate change and the global response to climate change on the company's business operations and financial reporting. Needless to say, "the First Amendment does not shield fraud" in the form of specific and "misleading affirmative representations" or omissions. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612, 619 (2003). Actionable fraud may

[1] Feb. 16, 2017 Letter at 1.

[2] Schedule to July 13, 2016 Subpoena.

occur, for example, where a company misleadingly portrays its conclusions or beliefs on an important topic, *see, e.g.*, *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1328–29 (2015); or skews or suppresses internally available scientific data about a flagship product, *see, e.g.*, *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 46–47 (2011). Exxon has conceded to a New York court that the NYOAG has "the right to conduct" its investigation.[3] That same New York court has ordered Exxon's compliance with the NYOAG's document subpoenas to Exxon and the company's independent auditor, just as a Massachusetts court has ordered Exxon to comply with a civil investigative demand for documents sought by that State's Attorney General.[4]

Despite these developments, you have seen fit to ignore the concededly legitimate fraud investigations by sovereign States, currently under the supervision of state courts with full jurisdiction over all matters concerning the investigations, in order to issue a second unilateral and unprecedented subpoena to the NYOAG, and to the Massachusetts Attorney General. We note that you did so over the vehement objection of the Committee's Ranking Member, who has publicly called the subpoenas "misguided" and "clearly an effort to derail appropriate law enforcement actions of State Attorneys General."[5] The Ranking Member further lamented that your unilateral subpoenas "undermine *legitimate* Congressional oversight authority."[6]

A review of the Subpoena refutes your claim that its scope has been "narrowed" in comparison with the subpoena you issued last year.[7] Whereas each of the three prior requests explicitly targeted the NYOAG's investigation of Exxon, the latest Subpoena has replaced that language in two of the requests with *broader* language seeking all communications with staff from other Attorney General offices or with certain individuals in any way "referring or relating to climate change, environmental scientific research, and/or the Clean Power Plan."[8] These sweeping new requests give rise to new objections, as outlined below. In addition, the Subpoena adds a fourth request for specific categories of documents of demonstrated interest to Exxon—documents that Exxon has sought from the NYOAG in pending litigation, so far to no avail.

The Subpoena oversteps the boundaries imposed by federalism, separation of powers, Committee jurisdiction, and pertinency requirements. The Subpoena thus does not "fall within the sphere of legitimate legislative activity." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491,

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[3] Hr'g Tr. at 33, *People ex rel. Schneiderman v. PricewaterhouseCoopers LLC* ("*New York v. PwC & Exxon*"), No. 451962/16 (N.Y. Sup. Ct. Oct. 24, 2016).

[4] *See, e.g.*, Decision & Order, *New York v. PwC & Exxon* (Oct. 26, 2016); Order on Emergency Mot., *In re Civil Investigative Demand No. 2016-EPD-36* (Ma. Super. Ct. Jan. 11, 2017).

[5] Press Release, Ranking Member Johnson's Statement on Chairman's Re-Issuance of Subpoenas to NY & MA Attorneys General (Feb. 16, 2017).

[6] *Id.* (emphasis added).

[7] *See* Feb. 16, 2017 Letter at 1.

[8] *Compare* Schedule to July 13, 2016 Subpoena, Requests No. 1–3, *with* Schedule to Feb. 16, 2017 Subpoena, Requests No. 1–2.

501 (1975) (quotation marks omitted). Nor may the "committee's inquiry" in this case "fairly be deemed within its province." *Id.* at 506 (quotation marks omitted). The NYOAG nonetheless welcomes the chance to discuss the Subpoena's scope, in conversations with minority staff participation, in the hope of arriving at a mutually agreeable outcome that will end this matter short of litigation.

The NYOAG's Objections to Compliance with the Subpoena

The NYOAG's objections to the Committee's initial subpoena—set forth in the attached letter of July 26, 2016 ("Obj.")—are incorporated and reasserted as against the latest Subpoena. In light of several intervening developments, and because the Subpoena's requests are broader in scope and greater in number than the prior requests, supplemental objections are set forth below.

Settled law mandates a "clear disposition" of timely asserted objections to a Congressional subpoena. *Quinn v. United States*, 349 U.S. 155, 167 (1955); *see also United States v. Bryan*, 339 U.S. 323, 332 (1950). Any such decision regarding the NYOAG's objections here must come via properly noticed vote of a regularly constituted Committee, an especially important safeguard given the weighty issues implicated by this unprecedented Subpoena. That conclusion also follows from the Committee's own rules, which the Committee must be "meticulous in obeying." *Yellin v. United States*, 374 U.S. 109, 124 (1963).

The Committee's rules delegate to the Chairman unilateral "power to authorize and issue subpoenas," but no Committee or House rule authorizes the Chairman to resolve objections as a precursor to a contempt finding.[9] *See Shelton v. United States*, 327 F.2d 601, 606 (D.C. Cir. 1963) (refusing to construe grant of power for "issuing subpoenas" to extend also to "discretionary function" to which rule made "no reference"). The rules do give the Chairman "the discretion" to resolve common-law privilege objections asserted *at a hearing*, but even those decisions are "subject to appeal to the Committee."[10] 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 apply.[11] We expect the full Committee to convene to consider the NYOAG's objections under established procedures.

A. The Subpoena Violates New York's Sovereignty

The NYOAG objects to the Subpoena as an unlawful incursion into New York's sovereignty. *See* Obj. at. 2–4. You have previously declared that "[t]he Committee's authority to conduct this oversight is derived from Article I of the Constitution."[12] As reflected in the Tenth Amendment to the Constitution, state sovereignty acts as "a limitation on" Congress's Article I

[9] Committee Rule IX (115th Cong.).

[10] Committee Rule III(d) (115th Cong.).

[11] *See* Committee Rule II(a)–(d) (115th Cong.).

[12] July 6, 2016 Letter at 2.

power. *New York v. United States*, 505 U.S. 144, 157 (1992). Moreover, "[t]he Bill of Rights is applicable to investigations as to all forms of governmental action." *Watkins v. United States*, 354 U.S. 178, 188 (1957).

The Subpoena's novelty underscores the Tenth Amendment transgression. In a report evaluating the Committee's earlier subpoena to the NYOAG, the Congressional Research Service ("CRS") confirmed that "congressional subpoena power has rarely been employed to compel the production of state records from state officials."[13] CRS's report identified no prior instance of a Congressional subpoena directed to a State Attorney General, much less a subpoena targeting confidential material from an ongoing state law fraud investigation.

In an attempt to justify its unprecedented investigation, the Committee on September 14, 2016, held a hearing in which it nakedly grasped for testimonial support. The effort was unavailing. One of the majority's own handpicked witnesses admitted that any attempt to enforce your subpoena would raise "very difficult" issues with an "intermix" of jurisdictional and Tenth Amendment questions, among others, that are "novel" and "tough."[14] The Committee also heard from Professor Charles Tiefer—former Acting House General Counsel—that the House has "never" issued a subpoena "in two hundred years to a State Attorney General."[15] Whatever justification the Committee may have for investigating an ongoing state law fraud investigation—and the Committee has thus far identified none—is "far outweighed" by more than "two centuries of apparent congressional avoidance of the practice." *Printz v. United States*, 521 U.S. 898, 918 (1997); *see id.* at 905 (relying on "historical understanding and practice" in enforcing limits on Congressional power over state law enforcement officers).

Other federalism scholars also warned the Committee that its initial subpoena raised two overlapping constitutional concerns.[16] *First*, the "subpoena offend[ed] notions of state sovereignty" in that State Attorneys General "represent the sovereign legal interests of their respective States." *Second*, "the Committee's demand interfere[d] with ongoing enforcement efforts."[17] These scholars located "almost no precedent" for Congress's seeking such material from open *federal* investigations, rendering "doubly strong" the case for restraint in demanding information from state officials in the process of "enforcing *state* law."[18]

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[13] CRS Memorandum: Evaluation of Federalism Arguments Against the Subpoenas Issued to State Attorneys General by the House Science, Space, and Technology Committee at 12 (Sept. 14, 2016).

[14] Full Committee Hearing: Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas (Sept. 14, 2016) ("Sept. 2016 Hearing") at 40:30–40:50 (testimony of Prof. Jonathan Turley), *video at* https://science.house.gov/legislation/hearings/full-committee-hearing-affirming-congress-constitutional-oversight.

[15] *Id.* at 51:40–51:55 (testimony of Prof. Charles Tiefer).

[16] Sept. 13, 2016 Letter from Prof. Brandon L. Garrett *et al.*, to Committee at 1–2.

[17] *Id.* at 2.

[18] *Id.* at 7.

The revisions to the Subpoena only aggravate these federalism problems. As if the intent to disrupt the NYOAG's investigation of Exxon were not clear enough, the newly issued Subpoena includes an additional request, seeking five discrete categories of documents that Exxon has also demanded from the NYOAG, in pending federal litigation. The Subpoena requests these documents without regard to whether they are internal to the NYOAG, and it separately requests intra-NYOAG communications involving either of two NYOAG employees (Joan Smith and Peter Washburn). Congressional requests for a state agency's "administrative communications" and "internal memoranda" strike at the heart of the Tenth Amendment. *Tobin v. United States*, 306 F.2d 270, 275–76 (D.C. Cir. 1962).

Besides seeking internal NYOAG documents and specific material calculated to undercut the NYOAG's state law fraud investigation of Exxon, the Subpoena indiscriminately requests all communications between the NYOAG and all staff of other State Attorneys General, or between the NYOAG and certain nonprofit-sector individuals, "referring or relating to climate change, environmental scientific research, and/or the Clean Power Plan."[19] The Subpoena defines "referring or relating" as anything "pertinent to that subject in any manner."[20] The breadth of this request is staggering. Not only does it facially cover the investigative material previously sought, but it effectively requires the NYOAG to turn over years' worth of communications from NYOAG attorneys collaborating or consulting with their colleagues in other States. The Chairman of the House Science Committee is not a one-person board of federal review of New York's and other States' sovereign decisions about what environment-related legal matters to discuss or pursue. The Tenth Amendment prevents such "tyranny." *New York*, 505 U.S. at 181 (quotation marks omitted).

The newly added requests for documents and communications regarding the "Clean Power Plan" and the "AGs United for Clean Power" are especially disturbing. On their face, these requests have nothing to do with the Committee's professed goal of determining whether the NYOAG's investigation is affecting federally funded climate research. *See infra* Point B.3. The Clean Power Plan is a U.S. Environmental Protection Agency ("EPA") regulation aimed at reducing emissions of greenhouse gases from existing fossil-fuel-fired power plants. The rule's legality is the subject of pending litigation before the *en banc* U.S. Court of Appeals for the District of Columbia Circuit. New York has intervened in the litigation alongside twenty-four other States, territories, and cities to defend the rule, to advance our collective interest in reducing harmful carbon-dioxide pollution. *See generally Massachusetts v. EPA*, 549 U.S. 497, 518–19 (2007) (recognizing States' sovereign interests in promoting air quality). Most of these States have coordinated their legal efforts as the "AGs United for Clean Power."

At the same time, you and several other Committee members joined the litigation as *amici*, urging the court to strike down EPA's regulation.[21] Far from being a passive participant,

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[19] Schedule to Feb. 16, 2017 Subpoena, Requests No. 1–2.

[20] Schedule Definitions to Feb. 16, 2017 Subpoena.

[21] Brief of Lamar S. Smith *et al.*, as Amici Curiae in Support of Petitioners, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Feb. 23, 2016). Signatories to the brief include Committee Vice Chairman Frank

you personally issued a press release trumpeting this legal filing "seeking to overturn" the Clean Power Plan.[22] That you, as a de facto adversary in high-stakes litigation, are wielding unilateral subpoena power to demand all privileged communications between the NYOAG and other State Attorneys General about the Clean Power Plan is an unfathomable offense to the dignity of New York and the eighteen other States jointly defending EPA's regulation. That you make no similar request of States on the other side of the litigation, such as Texas, eviscerates "the fundamental principle" that "all the States enjoy equal sovereignty." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (quotation marks omitted). And it highlights the pretextual nature of the inquiry as a whole.

Multistate legal strategy about the Clean Power Plan is ongoing. CRS has opined that the case is "a near certainty to reach the Supreme Court, most likely in 2017 or 2018," no matter which side prevails in the D.C. Circuit.[23] Moreover, two months ago, the NYOAG sent a letter with eighteen other States and cities urging the President-Elect to maintain EPA's defense of the rule. This letter warned that New York and the other signatories "would vigorously oppose in court any attempt to remand the Clean Power Plan back to EPA so late in the litigation."[24] The Subpoena on its face would extend to any privileged communications underlying this letter and the legal steps it contemplates, an unlawful "incursion" by the Committee into vital state prerogatives. *Printz*, 521 U.S. at 920 (quotation marks omitted).

B. Specific Objections and Requests for Clarification

Apart from the fact that compliance would impair New York's sovereign integrity, the Subpoena suffers from additional defects. The initial subpoena shared many of these infirmities, which intervening developments and revisions to the Subpoena only heighten.

1. This Committee lacks jurisdiction to oversee a state law fraud investigation

Any investigative demand by the Committee requires a "chain of authority from the House" authorizing that inquiry "plainly and explicitly." *Gojack v. United States*, 384 U.S. 702, 716 (1966). No statute, resolution, or other measure of Congress or of the House of Representatives authorizes the Committee's purported continuing oversight of the NYOAG's state law fraud investigation of Exxon. Nor does the Committee's charter evidence a "clear

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Lucas and Members Brian Babin, Jim Bridenstine, Mo Brooks, Barry Loudermilk, Thomas Massie, Dana Rohrabacher, Randy Weber, and Daniel Webster.

[22] Press Release, Smith Urges Court to Block EPA Power Plant Regs (Feb. 23, 2016), https://lamarsmith.house.gov/media-center/press-releases/smith-urges-court-to-block-epa-power-plant-regs.

[23] CRS Memorandum: Clean Power Plan: Legal Background and Pending Litigation in *West Virginia v. EPA* at 31 (Jan. 10, 2017).

[24] Dec. 28, 2016 Letter from New York *et al.*, to President-Elect Trump at 1–2.

determination by the House" that the Committee may inquire into this area. *Watkins*, 354 U.S. at 205; *see also* Obj. at 4–5.

The House Rules for the 115th Congress permit the Committee to issue subpoenas only "[f]or the purpose of carrying out any of [the Committee's] functions and duties."[25] The rules similarly provide for Committee review of only those "laws and programs addressing subjects within its jurisdiction."[26] The Committee's legislative jurisdiction extends to matters of "energy research, development, and demonstration, and projects therefor"; "[e]nvironmental research and development"; and "[s]cientific research, development, and demonstration, and projects therefor."[27] The Committee also has oversight authority "on a continuing basis [over] laws, programs, and Government activities relating to nonmilitary research and development."[28]

Even an expansive construction of its authority cannot support this Committee's oversight of state law enforcement efforts to investigate securities, business, and consumer fraud. Under settled law, such a general grant of authority will be *narrowly* construed to obviate any need to resolve the grave constitutional questions presented here. For example, the Subpoena demands communications between the NYOAG and individuals who may have petitioned an elected official to pursue law enforcement matters of interest.[29] *See United States v. Rumely*, 345 U.S. 41, 46–48 (1953) (holding that committee cannot attempt to inquire into protected speech unless Congress has "inescapably" and "unequivocally" authorized specific inquiry). And as already discussed, the Subpoena raises "serious and difficult" Tenth Amendment issues that the Committee cannot force without authorization from Congress "in words more explicit than the general terms" in the House rules. *See Tobin*, 306 F.2d at 275.

The federalism problems here are serious. As mentioned above, one of the majority's own witnesses at the September 2016 hearing called it a "tough question" whether the Committee could enforce its subpoena against the NYOAG.[30] Indeed, the fact that the Committee orchestrated an entire hearing to examine its authority in this area neutralizes any claim that the Committee has clear jurisdiction to pursue this alleged oversight. As several law professors have independently noted, the Committee's attempt to interfere with a pending state law investigation "flies in the face of a large body of doctrine."[31]

Borrowing language that you have endorsed in another context, it is impermissible to "venture[ ] deep into the regulatory domain of the States without a clear indication—or, as in this

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[25] House Rule XI.2(m)(1) (115th Cong).

[26] House Rule X.2(b)(1)(A) (115th Cong).

[27] House Rule X.1(p)(1), (4), (14) (115th Cong).

[28] House Rule X.3(k) (115th Cong).

[29] Schedule to Feb. 16, 2017 Subpoena, Request No. 1.

[30] Sept. 2016 Hearing at 40:45.

[31] Sept. 13, 2016 Letter from Prof. Brandon L. Garrett *et al*., at 7.

case, *any* indication—that Congress intended that result."[32] The Committee should heed that advice and rescind the Subpoena, as Ranking Member Johnson has urged.

2. The Subpoena serves no valid legislative purpose

From the start, Committee members have offered shifting justifications for this *ad hoc* federal investigation of the NYOAG's state law fraud investigation of Exxon. The Committee's proffered purpose has ranged from monitoring the NYOAG, as if this Office were a department of the Federal Government; to inquiring into whether State Attorneys General have abused the prosecutorial discretion conferred on them by state law; to protecting state taxpayers' dollars from alleged misuse by the NYOAG; to determining whether the NYOAG has violated the First Amendment rights of companies or climate scientists; to overseeing federally funded research under the appropriations power. *See* Obj. at 7. "[I]n the absence of official authorization" for the "specific inquiry," these ever-evolving explanations breed significant "doubts as to legal validity of the Committee's purposes." *Gojack*, 384 U.S. at 709.

Even if the Committee could identify a valid legislative purpose served by its inquiry—which it so far has not—the Committee cannot avoid the import of the many prior references to other, illegitimate, and aborted purposes. *See Wilkinson v. United States*, 365 U.S. 399, 408 (1961) (holding that committee's "pattern of interrogation" will inform investigative subject).

You have suggested that the Committee might want to redirect funding to offset "any trends or effects" resulting from the NYOAG's investigation "that would skew [climate] research in one direction or another."[33] But while you have intimated that actual evidence reveals such "trends or effects," you have never provided that information to the NYOAG, to other Committee members, or to the public. "[A]n adequate foundation for inquiry must be laid" before a legislative committee may resort to compulsory process. *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963). Not only does the Committee proceed here "without any reasonable, demonstrated factual basis," *id.* at 555, but your suggestion of skewing flies in the face of a letter signed by 587 scientists, excoriating the *Committee*'s inquisitorial tactics as having a "chilling effect on federal scientists."[34] By all accounts, the Committee's hearing and investigation do not appear to have unearthed a single climate scientist who claims to have been chilled by the NYOAG's investigation of Exxon.[35]

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[32] Brief of Smith *et al.*, at 17, *West Virginia v. EPA* (quotation marks omitted).

[33] Aug. 23, 2016 Letter at 4; *see also* Feb. 16, 2017 Letter at 1 (mentioning "potential adverse effects" of state law enforcement activity "on the national scientific enterprise").

[34] Dec. 7, 2015 Letter from 587 scientists to Dr. K. Sullivan.

[35] Although one of the majority's witnesses at the September 2016 hearing testified that a Harvard University geophysicist feared political repercussions and prosecution for performing climate-related research, that scientist reportedly has called your witness's testimony a "despicable" misrepresentation and clarified that any complaints actually revolve around "climate change skeptics who respond to rigorous scientific work with dismissiveness, insults, and hostility." Am. Inst. of Physics, *Chairman Smith Asserts Subpoena Authority by Linking State Investigations to Federal R&D* (Sept. 16, 2016),

This vague contention of legislative purpose, to address a hypothetical situation that is belied by reality, fails to justify intrusive oversight of the NYOAG's law enforcement activities. Congress's investigative power "comprehends probes into departments of the *Federal* Government to expose corruption, inefficiency or waste." *Watkins*, 354 U.S. at 187 (emphasis added). This oversight authority extends to the *federal* Department of Justice, which naturally is "subject to regulation" through Congressional "appropriations." *McGrain v. Daugherty*, 273 U.S. 135, 178 (1927). It does not extend to a state law enforcement agency's investigation into a possible violation of state fraud laws, as the United States generally "is not concerned with" the sovereign activities of state officials. *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) (quotation marks omitted).

The Committee's alternative purpose of vindicating "the First Amendment rights of scientists" also cannot justify the Subpoena.[36] Such a purpose violates the separation of powers, and the NYOAG again objects to the Subpoena on this ground. *See* Obj. at 6. A committee "has exceeded the bounds of legislative power" where its work occasions "a usurpation of functions exclusively vested in the Judiciary or the Executive." *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951); *accord Kilbourn v. Thompson*, 103 U.S. 168, 193 (1880). As a group of First Amendment scholars reminded the Committee: "Investigating illegal conspiracies and ensuring that individuals are not deprived of their constitutional rights are functions of the executive and judicial branches, not Congress."[37] As those scholars continued, the "courts are open" to any fossil fuel companies claiming First Amendment violations from state action.[38] Indeed, you have been explicit that the Committee's inquiry overlaps with areas reserved to the other branches, by musing that the Committee might uncover "infraction of laws," just as "a court will find," and thereby conclude that Exxon had engaged in "free speech, not fraud."[39]

Whether or not it is the Committee's current purpose to usurp an adjudicative function, the Subpoena appears uniquely calculated to achieve that end by disrupting the orderly administration of three existing judicial proceedings.

First, a New York trial court is currently managing Exxon's compliance with the NYOAG's subpoenas for documents from Exxon and its outside auditor. In that pending action, Exxon has never objected to the NYOAG's subpoenas. Instead, Exxon has produced millions of pages in documents, while withholding a handful of specific material on a theory that disclosure would injure First Amendment freedoms or violate state law privilege. Lead counsel for Exxon even conceded to the New York court that the NYOAG has "the right to conduct" this fraud

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https://www.aip.org/fyi/2016/chairman-smith-asserts-subpoena-authority-linking-state-investigations-federal-rd.

[36] *See* June 17, 2016 Letter at 3.

[37] Sept. 12, 2016 Letter from F. Abrams *et al.*, to Chairman Smith at 4.

[38] *Id.*

[39] Press conference announcing issuance of subpoena to NYOAG (Jul. 13, 2016).

investigation under New York law.[40] Since then, a Massachusetts court has upheld the propriety of Massachusetts' investigation and directed Exxon to comply with a civil investigative demand issued by that State's Attorney General.[41]

Second, Exxon has brought an action under 42 U.S.C. § 1983 against the NYOAG and the Massachusetts Attorney General in a Texas federal court, raising the same First Amendment objection to the NYOAG's subpoena that the Committee claims here.[42] In that pending action, Exxon has served the NYOAG with extensive written discovery requests, some of which are attached for reference. Exxon's requests seek, among other things, details of all NYOAG communications with individuals such as environmental attorney Matthew Pawa, consumer attorney Sharon Eubanks, Peter Frumhoff of the Union of Concerned Scientists, and former U.S. Vice President Al Gore; all NYOAG communications with other state law enforcement officers concerning any investigation of Exxon related to climate change issues; all documents underlying a climate-change-related common interest agreement entered into by seventeen State Attorneys General; and all documents surrounding a March 2016 conference and press event held in New York by the "AGs United for Clean Power," on the day our brief defending the Clean Power Plan was filed in the D.C. Circuit. The Subpoena seeks these very same documents. Thus, the Committee's alleged investigation "to determine" whether the NYOAG's investigation has deterred constitutionally protected speech opens up yet another forum competing to adjudicate issues arising from the NYOAG's subpoena to Exxon.[43]

Third, as noted above, New York and members of this Committee are involved in pending federal litigation in the D.C. Circuit regarding the Clean Power Plan. The Clean Power Plan's legality will be resolved by the D.C. Circuit and perhaps the U.S. Supreme Court—without interference by any Congressional committee. Directing the production of privileged documents to adversaries in a lawsuit, if ever appropriate, is a court's domain. In attempting to do so, the Committee "has assumed a judicial function in violation of the principle of separation of powers." *INS v. Chadha*, 462 U.S. 919, 960 (1983) (Powell, J. concurring).

3. The requests are not pertinent to the Committee's professed subject

Even an authorized "investigation does not necessarily carry with it automatic and wholesale validation of all individual questions, subpoenas, and documentary demands." *Gibson*, 372 U.S. at 545. It is of "crucial importance" that the information sought pertain to a subject then under investigation. *Russell v. United States*, 369 U.S. 749, 758 (1962). After studying the prior

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[40] Hr'g Tr. at 33, *New York v. PwC & Exxon*.

[41] Order on Emergency Mot., *In re Civil Investigative Demand No. 2016-EPD-36*.

[42] *See* Am. Compl., *ExxonMobil Corp. v. Schneiderman & Healey*, No. 16-cv-469 (N.D. Tex. Nov. 10, 2016) (before Kinkeade, J.). Both Attorneys General have moved to dismiss this improper action on a number of grounds, including the absence of personal jurisdiction in Texas over the officials of other States sued in their official capacities for attempting to enforce their respective States' laws. The motions to dismiss are currently pending before the district court.

[43] *See* June 17, 2016 Letter at 3.

subpoena's requests, the NYOAG asked for the required explanation of how the materials sought were pertinent to the Committee's alleged investigation. *See* Obj. at 8–9; *see also, e.g.*, *Watkins*, 354 U.S. at 214–15. The NYOAG reiterates this request and raises a similar pertinency objection to the newly issued Subpoena.

In general fashion, you previously stated that the information sought would "allow the Committee to assess the effects of [the NYOAG's] investigation on the research of climate change scientists."[44] For example, you wrote, "researchers employed by Exxon have received grant awards from federal sources."[45] If these scientists felt pressured by the NYOAG's investigation, or if Exxon ceased funding its own research, then you argue that the Committee's "responsibility" would be "to identify that imbalance and correct it by directing funding elsewhere."[46]

An inquiry into the alleged effects of the NYOAG's state law fraud investigation on the research of climate scientists does not require a trove of confidential communications about ongoing law enforcement matters. If the Committee were genuinely interested in the effects of the NYOAG's investigation on scientific research, then it would have asked Exxon whether the investigation has caused a reduction in research funding or caused scientists to suppress their true findings. Alternatively, the Committee could contact the federally funded scientists whose research it professes to protect. Any of these approaches makes more sense than trying to divine whether any research has been affected by confidential communications of a sovereign state law enforcement officer—of which Exxon and its scientists *indisputably were not aware*. In an October 2016 phone discussion, majority staff told the NYOAG that the Committee had not been in contact about this matter with Exxon—a company headquartered in your home state, and the largest company in an industry that has provided you with a vast amount of financial and political support.[47] If that assertion by majority staff is true, then that fact alone would make it "not necessary now for the [Committee] to use the subpoena to obtain the information it desires." *Sanders v. McClellan*, 463 F.2d 894, 903 (D.C. Cir. 1972).

There is also no apparent relationship between privileged Clean Power Plan discussions and the Committee's purported oversight of federally funded scientific research. These materials' only relevance appears to be that you and the NYOAG have publicly adopted differing positions on the legality of EPA's rule. *See supra* Point A (describing your amicus brief filed in the D.C. Circuit litigation and accompanying press release). We remind you that "[n]o inquiry is an end in itself" and that the law prohibits "[i]nvestigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated." *Watkins*, 354 U.S. at 187.

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[44] Aug. 23, 2016 Letter at 5.

[45] *Id.* at 4.

[46] *Id.*

[47] *See* Lisa Rein, *Meet the House science chairman who's trying to put global warming research on ice*, Wash. Post (Dec. 22, 2015) (noting $600,000 in financial contributions from industry).

The Subpoena's expansiveness further complicates any pertinency evaluation. It is not evident how all multistate NYOAG communications in any manner relating to "environmental scientific research" will aid the Committee in learning how scientists might have reacted to a document subpoena issued to an energy company.[48] These materials would, however, afford the Committee a window into the NYOAG's law enforcement strategy in ongoing investigations, litigation, and other matters of public importance to New Yorkers. If the initial subpoena was "carefully defined and limited" to target investigative material, as you claim, the reissued Subpoena is far broader.[49] A Congressional demand for information cannot "pillory witnesses" or involve "indiscriminate dragnet procedures." *Barenblatt v. United States*, 360 U.S. 109, 134 (1959). The NYOAG once more requests that the Committee "describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it." *Watkins*, 354 U.S. at 215.

4. Much or all of the material sought is privileged or confidential

The Subpoena's Instructions permit assertions of evidentiary privileges.[50] The NYOAG thus objects to the Subpoena to the extent that it calls for the production of material that is shielded from disclosure by the attorney-client privilege, the attorney work-product doctrine, the law-enforcement privilege, or any other applicable protection under New York statutory or common law. *See* Obj. at 9–10 (discussing New York privilege law). These claims of evidentiary privilege emanate from the same concerns over the integrity of state law enforcement action that give rise to the Tenth Amendment and jurisdictional objections.

The Committee has requested that privileged material be logged.[51] Such an undertaking *might* be appropriate for a subpoena recipient with "ample time to perform the necessary duties of searching for, locating, identifying, and producing either responsive documents or a privilege log." *Senate Permanent Subcomm. v. Ferrer*, --- F. Supp. 3d ----, 2016 WL 4179289, at *11 (D.D.C. Aug. 5, 2016). As already established, here the Committee seeks every multistate communication by the NYOAG over a two-year period "referring or relating to climate change, environmental scientific research, or the Clean Power Plan."[52] The Subpoena also seeks all documents and communications relating to a multistate common interest agreement, a multistate coalition of Attorneys General, and a multistate conference of Attorneys General.[53]

These requests by design target a large universe of obviously privileged material, which would be unduly burdensome to catalog in the three weeks allowed. Diverting the NYOAG's "official" resources from law enforcement to "examining databases and records" to create a

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[48] Schedule to Feb. 16, 2017 Subpoena, Requests No. 1–2.

[49] Aug. 23, 2016 Letter at 6.

[50] Schedule Instructions to Feb. 16, 2017 Subpoena, No. 13.

[51] *Id.*, No. 12.

[52] Schedule to Feb. 16, 2017 Subpoena, Requests No. 1–2.

[53] *Id.*, Request No. 4.

massive privilege log for Congress itself treads on the Tenth Amendment. *Printz*, 521 U.S. at 932 n.17. And even the divulged information—such as messages' dates, senders, recipients, and subjects—would aid Exxon's avowed quest to take harassing depositions of "really everybody," including "AG people," mentioned in the documents, thereby obstructing the NYOAG's investigation.[54]

Nevertheless, by the Subpoena's extended return date, the NYOAG intends to submit a privilege log that will set forth the reasons for withholding potentially responsive documents while simultaneously preserving New York's sovereign interests, including the confidentiality of the NYOAG's ongoing law enforcement investigation.

* * *

Finally, we take issue with your assertion that the NYOAG has "obstruct[ed] legitimate congressional oversight."[55] There can be no "legitimate congressional oversight" of a state law fraud investigation. The Committee chose to pursue (and now to continue) this course, despite the lack of any precedent for such action in our Nation's recorded history, and despite the obvious constitutional problems your subpoenas have raised, as explained to you by the NYOAG, the Massachusetts Attorney General, several members of your own Committee, other sitting Senators and Representatives, the former Acting General Counsel of the House of Representatives, and a bevy of federalism and First Amendment scholars.

A recipient has no obligation to respond to a Congressional subpoena "that is part good and part bad" or "to cull the good from the bad." *United States v. Patterson*, 206 F.2d 433, 434 (D.C. Cir. 1953) (quotation marks omitted). Despite our resolute position that your subpoenas are entirely invalid, as a means of putting this matter to rest, the NYOAG remains willing to consider voluntarily providing the Committee with information that would not impair the NYOAG's sovereign interests, jeopardize any law enforcement investigation or litigation, or otherwise be privileged from disclosure under applicable law. Should you wish to resolve this matter short of litigation, we look forward to discussing this prospect with Committee staff.

Sincerely,

Leslie B. Dubeck
Counsel

[54] Hr'g Tr. at 55, *New York v. PwC & Exxon*.

[55] Feb. 16, 2017 Letter at 1.

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

Exhibit 1

NYOAG's Objections to July 13, 2016 Subpoena

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

[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,

[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,

[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).

[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

Exhibit 2

Exxon's Discovery Requests to NYOAG

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendants.	§ § § § § § § § § § § § § § §	CIVIL ACTION NO. 4:16-CV-469-K

PLAINTIFF EXXON MOBIL CORPORATION'S FIRST REQUEST TO DEFENDANT ERIC SCHNEIDERMAN FOR THE PRODUCTION OF DOCUMENTS

PLEASE TAKE NOTICE that pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and the orders entered by the United States District Court for the Northern District of Texas in the above-captioned action, (i) on October 13, 2016, ordering the parties to engage in jurisdictional discovery (Docket No. 73), and (ii) on November 10, 2016, granting Plaintiff's Motion for Leave to File a First Amended Complaint, joining Attorney General Eric Schneiderman as a Defendant (Docket No. 99), Plaintiff ExxonMobil Corporation ("ExxonMobil"), by its attorneys, Paul, Weiss, Rifkind, Wharton & Garrison LLP, hereby demands that Defendant Massachusetts Attorney General Eric Schneiderman produce for inspection and copying the documents designated below at the offices of Paul, Weiss, Rifkind, Wharton & Garrison, LLP, 1285 Avenue of the Americas, New York, New York 10019-6064, no later than thirty (30) days after service of this request.

DEFINITIONS

1. "And" and "or" shall be construed either disjunctively or conjunctively as to bring within the scope of the request all information or documents that might otherwise be construed to be outside of its scope.

2. "All" shall be construed to include "any" and "each," "any" shall be construed to include "all" and "each," and "each" shall be construed to include "all" and "any," in each case as is necessary to bring within the scope of these requests documents that might otherwise be construed as outside their scope.

3. The terms "all" and "each" shall be construed as all and each.

4. "Any" is used in its inclusive sense. For example, if a Request calls for "any communication that you had with the plaintiff," you should produce each and every communication with the plaintiff.

5. "Communication" means any conversation, discussion, letter, electronic mail ("email"), memorandum, meeting, note, or other transmittal of information or message, whether transmitted in writing, orally, electronically or by any other means, and shall include any document that abstracts, digests, transcribes, records, or reflects any of the foregoing. Except where otherwise stated, a request for "Communications" means a request for all communications.

6. "Concerning" means referring or relating to and includes without limitation analyzing, commenting on, comprising, connected with, constituting, containing, contradicting, describing, embodying, establishing, evidencing, memorializing, mentioning, pertaining to, recording, regarding, reflecting, responding to, setting forth, showing, or supporting, directly or indirectly.

7. "Custodian" means any person or entity that, as of the date of this Request for Production, maintained, possessed, or otherwise kept or controlled such document.

8. "Date" shall mean the exact date, month and year, if ascertainable or, if not, the best approximation of the date (based upon relationship with other events).

9. "Document" is used herein in the broadest sense of the term and means all records and other tangible media of expression of whatever nature however and wherever created, produced, or stored (manually, mechanically, electronically, or otherwise), including without limitation all versions whether draft or final, all annotated or nonconforming or other copies, email, instant messages, text messages, personal digital assistant or other wireless device messages, voicemail, calendars, date books, appointment books, diaries, books, papers, files, notes, confirmations, accounts statements, correspondence, memoranda, reports, records, journals, registers, analyses, plans, manuals, policies, telegrams, faxes, telexes, wires, telephone logs, telephone messages, message slips, minutes, notes, or records or transcriptions of conversations or communications or meetings, tape recordings, videotapes, disks, and other electronic media, microfilm, microfiche, storage devices, press releases, contracts, agreements, notices, and summaries. Any non-identical version of a document constitutes a separate document within this definition, including without limitation drafts or copies bearing any notation, edit, comment, marginalia, underscoring, highlighting, marking, or any other alteration of any kind resulting in any difference between two or more otherwise identical documents. In the case of documents bearing any notation or other marking made by highlighting ink, the term document means the original version bearing the highlighting ink, which original must be produced as opposed to any copy thereof. Except where otherwise stated, a request for "documents" means a request for all such documents.

10. "Entity" means without limitation any corporation, company, limited liability company or corporation, partnership, limited partnership, association, or other firm or similar body, or any unit, division, agency, department, or similar subdivision thereof.

11. "Identify" means: (a) when referring to a person or persons, to state the name and present address or, if unknown, the last known address, telephone number, e-mail address, title and employer of such person or persons; (b) when referring to a firm, partnership, corporation, association or other entity, to state the full name, address and telephone number or, if unknown, the last known address and telephone number; (c) when referring to documents, to state, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s); (d) when referring to communications, to state, to the extent known, the (i) date of the communication; (ii) identity of the parties to the communication; (iii) means of transmission of the communication; and (iv) identity of all documents memorializing all or part of the communication. To the extent any responsive communication is memorialized in a document, please produce a copy of the document for inspection and copying.

12. "Including" means "including without limitation."

13. "Information" shall be construed expansively and shall include, but not be limited to, facts, data, opinions, documents, communications, images, impressions, concepts and formulae.

14. "Person" includes any natural person, firm, partnership, joint venture, corporation, sole proprietorship, trust, union, association, federation, labor organizations, legal representatives, trustees, trustees in bankruptcy, receivers, business entities, any other form of business, governmental, public, charitable entity, or group of natural persons or such entities.

15. "Refer" means embody, refer or relate, in any manner, to the subject of the document request.

16. "Civil Investigative Demand" or "CID" means the civil investigative demand issued by the office of Defendant Attorney General Maura Healey to ExxonMobil on or about April 19, 2016.

17. "Common Interest Agreement" means the Climate Change Coalition Common Interest Agreement signed by individuals from the offices of the attorneys general for California, Connecticut, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Virginia, U.S. Virgin Islands, Vermont, Washington, and Washington, D.C., in April and May of 2016.

18. "Green 20" means the attorneys general for the States, Commonwealths, or Territories of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, the U.S. Virgin Islands, Vermont, Virginia, Washington, and Washington, D.C.; the Offices of these attorneys general; their directors, officers, employees, agents, representatives or other persons acting, or purporting to act, on their behalf, including, but not limited to, Assistant Attorneys General.

19. "Green 20 Press Conference" or "AGs United for Clean Power Press Conference" means the Press Conference attended by Defendant Attorney General Maura Healey and other members of the Green 20 on March 29, 2016.

20. "Investigation" means an actual or contemplated issuance of a subpoena, Civil Investigative Demand, or any other investigative process concerning purported violations of law related to climate change.

21. "You," "Yours," and/or "Yourself" mean Eric Schneiderman, as well as the Office of the New York State Attorney General, and its directors, officers, employees, agents, representatives or other persons acting, or purporting to act, on its behalf, including, but not limited to, Assistant Attorneys General in the Office of the New York State Attorney General.

INSTRUCTIONS

22. Any ambiguity as to any Request shall be construed so as to require the production of the greater number of documents.

23. These Requests are continuing in nature under Federal Rule of Civil Procedure 26(e). Any document created or identified after service of any response to these Requests that would have been produced in response had the document then existed or been identified shall promptly be produced whenever you find, locate, acquire, create, or become aware of such documents, up until the resolution of this lawsuit.

24. Each Request shall be responded to fully, unless it is in good faith objected to, in which event the reasons for the objection shall be stated with specificity. If an objection pertains only to a portion of a Request, or to a word, phrase, or clause contained in a Request, you shall state your objection to that portion only and respond to the remainder of the request.

25. Documents that are produced should be identified according to which request they are responsive to, or in the order in which they are kept in the ordinary course of business. All documents that are physically attached to each other when located for production shall be left so attached. Documents that are segregated or separated from other Documents,

whether by inclusion of binders, files, subfiles, or by use of dividers, tabs, clips, or any other method, shall be left so segregated or separated.

26. Where any copy of any document, the production of which is requested, is not identical to any other copy thereof, by reason of any alterations, marginal notes, comments, metadata, omissions, or material contained therein or attached thereto, or otherwise, all such non-identical copies shall be produced separately.

27. If any document responsive to these Requests has been destroyed, discarded, or lost, or is otherwise not capable of being produced, identify each such document and set forth the following information: (a) the date of the document; (b) a description of the subject matter of the document; (c) the name and address of each person who prepared, received, viewed, or had possession, custody, or control of the document; (d) the date when the document was destroyed, discarded, or lost; (e) the identity of the person who directed that the document be destroyed, who directed that the document be discarded, or who lost the document; and (f) a statement of the reasons for and circumstances under which the document was destroyed, discarded, or lost.

28. If any document responsive to these Requests is withheld under a claim of privilege or other legal doctrine (including the work-product doctrine), You shall promptly submit a document stating: (a) the document control number(s) of the document withheld or redacted; (b) the type of document; (c) the date of the document; (d) the author(s) and recipient(s) of the document, and any recipients copied as cc's or bcc's; (e) the general subject matter of the document; and (f) the legal ground for withholding or redacting the document. If the legal ground for withholding or redacting the document is attorney-client privilege, You shall indicate the name of the attorney(s) whose legal advice is sought or provided in the document.

29. You shall further certify that the document production is complete and correct in accordance with specifications of the attached Certification that Response is Complete and Correct form provided as Exhibit A.

30. Pursuant to Fed. R. Civ. P. 34(b)(1)(c), Plaintiff requests that all electronically stored information be produced in accordance with the "Requested Production Format" provided as Exhibit B.

31. Each request shall be deemed to include a request for all transmittal sheets, cover letters, exhibits, enclosures, and attachments to a document in addition to the Document itself, without abbreviation or expurgation.

32. If no documents or things exist that are responsive to a particular paragraph of these requests, so state in writing.

33. Unless otherwise stated in a specific request, these requests seek responsive information and documents authored, generated, disseminated, drafted, produced, reproduced, or otherwise created or distributed, concerning the period of January 1, 2011, through the date of production.

34. These requests call for the production of responsive documents within Your possession, custody, or control (including those on non-government email servers), regardless of whether those documents were generated and/or are maintained by the Office of the New York State Attorney General.

35. The foregoing Definitions and Instructions also apply to the Definitions and Instructions themselves.

DOCUMENTS AND THINGS TO BE PRODUCED BY
DEFENDANT ATTORNEY GENERAL ERIC TRADD SCHNEIDERMAN

1. Any and all documents, including, but not limited to, electronically maintained or paper visitor logs or sign-in sheets, sufficient to identify attendees at any meetings concerning the Green 20 Press Conference, including any meetings with and/or presentations from Peter Frumhoff and/or Matthew Pawa.

2. Any and all documents, recordings, and/or other materials discussed or presented during any meeting concerning the Green 20 Press Conference, including any meetings with and/or presentations from Peter Frumhoff and/or Matthew Pawa.

3. Any and all documents and communications concerning the following statements made by You, Attorney General Eric Schneiderman, at the Green 20 Press Conference, including any and all documents that You believe support or otherwise form the basis for, these statements:

(a) There is a "relentless assault from well-funded highly aggressive and morally vacant forces that are trying to block every step by the federal government to take meaningful action" regarding climate change.

(b) "[T]here are companies using the best climate science. They're using the best climate models so that when they spend shareholder dollars to raise their oil rigs, which they are doing, they know how fast the sea level is rising, then they are drilling in places in the Arctic where they couldn't drill 20 years ago because of the ice sheets. They know how fast the ice sheets are receding."

(c) "[W]e know that they paid millions of dollars to support organizations that put up propaganda denying that we can predict or measure the

effects of fossil fuel on our climate or even denying that climate change was happening."

4. Any and all documents sufficient to show and identify any fees or expenses paid to former Vice President Al Gore in connection with his participation in or attendance at the Green 20 Press Conference.

5. Any and all documents concerning the Common Interest Agreement, including any documents concerning the purpose of the Common Interest Agreement, the decision to enter into the Common Interest Agreement, efforts to recruit or obtain signatories to the Common Interest Agreement, and the preparation, drafting and finalizing of the text of the Common Interest Agreement.

6. Any and all documents sufficient to show and identify any communications concerning any investigation of ExxonMobil related to climate change between You, Your agents, representatives, or employees and any other member of the Green 20, including any Attorney General from another state, territory, or municipality, or his/her directors, officers, employees, agents, representatives or other persons acting, or purporting to act, on his/her behalf, including, but not limited to, Assistant Attorneys General.

7. Any and all documents, recordings, or other materials discussed or presented during any meetings regarding any investigation of ExxonMobil that You attended at which any person not employed or retained by Your Office was present or participating. This request includes, without limitation, video recordings, audio recordings, photographs, attendance logs, notes, and meeting minutes.

8. Any and all documents or communications that mention ExxonMobil and any of the following persons or organizations (a) Peter Frumhoff, (b) Matthew Pawa and/or the

Pawa Law Group, (c) the Union of Concerned Scientists, (d) Sharon Eubanks, (e) former Vice President Al Gore, and/or (f) Bill McKibben.

9. Any and all documents, including but not limited to email correspondence and visitor logs, sufficient to show and identify any communications concerning ExxonMobil between any member of the Green 20 and (a) Peter Frumhoff, (b) Matthew Pawa and/or the Pawa Law Group, (c) the Union of Concerned Scientists, (d) Sharon Eubanks, (e) former Vice President Al Gore, and/or (f) Bill McKibben.

10. Any and all documents, including, but not limited to electronically maintained or paper visitor logs or sign-in sheets, sufficient to show and identify any communications concerning ExxonMobil between any member of the Green 20 and the following persons and/or email addresses:

- Dave Johnson and/or dcjohnson@ourfuture.org;
- John Passacantando and/or j.passacantando@gmail.com;
- Kert Davis and/or kertmail@gmail.com;
- Kenny Bruno and/or Kenny.bruno@verizon.net;
- Lee Wasserman and/or lwasserman@rfffund.org;
- Dan Cantor and/or dcantor@workingfamilies.org;
- Bill Lipton and/or blipton@workingfamilies.org;

11. Any and all documents, including, but not limited to electronically maintained or paper visitor logs or sign-in sheets, sufficient to show and identify any communications concerning ExxonMobil between any member of the Green 20 and the following persons and/or email addresses:

- Jamie Henn and/or jamie@350.org;
- Robert Weissman and/or rweissman@citizen.org;
- Won Ha and/or won@ef.org;
- Irene Krarup and/or ikrarup@vkrf.org;
- Bradley Campbell and/or bcampbell@clf.org;
- Stephen Kretzman and/or steve@priceofoil.org;
- Carroll Muffett and/or cmuffett@ciel.org;
- Naomi Ages and/or Naomi.ages@greenpeace.org;

- Naomi Klein;
- Clayton Thomas-Muller;
- Peter Sarsgaard;
- Milan Loeak;
- Kathy Jetnil-Kijiner;
- Joydeep Gupta;
- Antonia Juhasz;
- Cindy Baxter;
- Jason Box;
- Bryan Parras;
- Jannie Staffansson;
- Sandra Steingraber;
- Ken Henshaw;
- Cherri Foytlin;
- Faith Gemmill.

12. Any and all documents, including but not limited to email correspondence, sufficient to show and identify any communications concerning ExxonMobil and climate change between any member of the Green 20 and third parties whose email addresses include any of the following domain names:

@350.org;
@algore.com;
@ciel.org;
@climatetruth.org;
@cohenmilstein.com;
@desmogblog.com;
@ef.org;
@greenpeace.org;
@insideclimatenews.org;
@nextgenclimate.org
@ourfuture.org;
@pawalaw.com;
@pellislaw.com;
@rbf.org;
@rffund.org;
@tellusmater.org.uk; or
@ucsusa.org.

13. Any and all documents sufficient to show and identify any communications between any member of the Green 20 and any director, officer, employee,

agent, or representative of the Conservation Law Foundation concerning ExxonMobil, including but not limited to any actual or contemplated legal action concerning ExxonMobil and the Conservation Law Foundation.

14. For the period January 1, 2012 through the present, any and all documents and communications concerning the conference entitled "Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control" held in La Jolla, California from on or about June 14, 2012 to on or about June 15, 2012.

15. For the period January 1, 2007 through the present, any and all documents and communications concerning the 2007 report issued by the Union of Concerned Scientists, titled "Smoke, Mirrors, and Hot Air: How ExxonMobil Uses Big Tobacco's Tactics to Manufacture Uncertainty on Climate Science."

16. Any and all documents concerning the actual or anticipated participation of ExxonMobil or other fossil fuel companies or trade associations in the international Paris Climate Change Conference of December 2015.

17. Any and all documents concerning any shareholder resolution relating to climate change made at ExxonMobil's annual shareholder meeting in either 2015 or 2016.

18. Any and all documents and communications concerning fundraising for candidates for political office, including fundraising for any member of the Green 20, and also concerning ExxonMobil.

19. Any and all documents and communications sufficient to show and identify any communications between any member of the Green 20 and any director, officer, employee, agent, or representative of any political party concerning ExxonMobil.

20. Any and all documents sufficient to show and identify any communications concerning ExxonMobil between any member of the Green 20 and Thomas Fahr Steyer, or any of his agents, employees, or representatives, NextGen Climate, or any other person or entity whose email address includes the domain name @nextgenclimate.org.

21. Any and all documents sufficient to show and identify any funding or fundraising provided to You or any member of the Green 20 by Thomas Fahr Steyer or NextGen Climate.

22. Any and all documents, communications, recordings, or materials of any kind concerning the "Exxon: Revelations & Opportunities" meeting held on or about January 8, 2016 at 475 Riverside Drive, New York, New York.

23. Any and all documents and communications concerning the mock trial referred to as "Exxon vs. The People," held in or around Montreuil, France on or about December 5, 2015.

24. Any and all documents and communications concerning climate change and ExxonMobil that discuss, mention, or reference the following organizations listed in the CID issued by Attorney General Healey:

- Acton Institute;
- American Enterprise Institute (AEI);
- Americans for Prosperity;
- American Legislative Exchange Council (ALEC);
- American Petroleum Institute (API);
- Beacon Hill Institute at Suffolk University;
- Competitive Enterprise Institute (CEI);
- Center for Industrial Progress (CIP);
- George C. Marshall Institute;
- Heartland Institute;
- Heritage Foundation; and
- Mercatus Center at George Mason University.

25. Any and all communications between You and any person not employed or retained by the New York Attorney General's Office concerning climate change and ExxonMobil that discuss, mention, or reference any of the following organizations listed in Request 6 of the New York CID:

- American Petroleum Institute (API);
- International Petroleum Industry Environmental Conservation Association (IPIECA);
- U.S. Oil & Gas Association;
- Petroleum Marketers Association of America; and
- Empire State Petroleum Association.

26. Any and all documents and communications sufficient to show and identify any requests received pursuant to the New York Freedom of Information Law, N.Y. Pub. Officers Law Article 6, Section 87, related to (a) ExxonMobil, (b) the Green 20 Press Conference, (c) any coalition of attorneys general comprised in whole or in part of members of the Green 20, (d) communications among or between any members of the Green 20, (e) the Common Interest Agreement, (f) climate deniers, and/or (g) climate change.

27. Any and all documents and communications sufficient to show and identify any responses to requests received pursuant to the New York Freedom of Information Law, N.Y. Pub. Officers Law Article 6, Section 87, related to ExxonMobil, the Green 20 Press Conference, any coalition of attorneys general comprised in whole or in part of members of the Green 20, communications among or between any members of the Green 20, the Common Interest Agreement, climate deniers, and/or climate change.

28. Any and all documents and communications sufficient to show and identify any communications concerning requests received pursuant to the New York Freedom of Information Law, N.Y. Pub. Officers Law Article 6, Section 87, related to ExxonMobil, the Green 20 Press Conference, any coalition of attorneys general comprised in whole or in part of

members of the Green 20, communications among or between any members of the Green 20, the Common Interest Agreement, climate deniers, and/or climate change.

29. Documents and records sufficient to identify Your document retention policy.

30. Documents and records sufficient to identify any and all documents or communications within the scope of these requests that were disposed of or destroyed since April 13, 2016.

Dated: November 16, 2016

EXXON MOBIL CORPORATION

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Counsel for Exxon Mobil Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXXON MOBIL CORPORATION, Plaintiff, v. ERIC TRADD SCHNEIDERMAN, Attorney General of New York, in his official capacity, and MAURA TRACY HEALEY, Attorney General of Massachusetts, in her official capacity, Defendants.	§ § § § § § § § § § § § § § §	CIVIL ACTION NO. 4:16-CV-469-K

PLAINTIFF EXXON MOBIL CORPORATION'S FIRST SET OF INTERROGATORIES TO DEFENDANT ERIC SCHNEIDERMAN

Pursuant to and the orders entered by the United States District Court for the Northern District of Texas in the above-captioned action on October 13, 2016 (Docket No. 73) and November 10, 2016 (Docket No. 99), and pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, and in accordance with the definitions and instructions set forth herein, Plaintiff Exxon Mobil Corporation ("ExxonMobil"), by its attorneys, Paul, Weiss, Rifkind, Wharton & Garrison LLP, requests that Defendant Eric Tradd Schneiderman, Attorney General for the State of New York, answer separately, under oath and in writing, each of the following Interrogatories, within thirty (30) days from the service of this request, or at such other time as may be agreed upon among counsel.

DEFINITIONS

1. The terms "and" and "or" shall be construed either disjunctively or

conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

2. The terms "all" and "each" shall be construed as all and each.

3. The term "any" is used in its inclusive sense. For example, if a request calls for identification of "any statement" made by the Plaintiff on a topic, You shall identify each and all such statements on that topic.

4. The term "communication" shall mean every manner or means of disclosure, transfer or exchange of oral or written information, whether in person, by telephone, mail, electronic mail, personal delivery or otherwise.

5. The term "date" shall mean the exact date, month and year, if ascertainable or, if not, the best approximation of the date (based upon relationship with other events).

6. The term "document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a), including any email or electronic or computerized data compilations. A draft or non-identical copy is a separate document within the meaning of the term.

7. The term "identify" means: (a) when referring to a person or persons, to state the name and present address or, if unknown, the last known address, telephone number, e-mail address, title and employer of such person or persons; (b) when referring to a firm, partnership, corporation, association or other entity, to state the full name, address and telephone number or, if unknown, the last known address and telephone number; (c) when referring to documents, to state, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv)

author(s), addressee(s) and recipient(s); (d) when referring to communications, to state, to the extent known, the (i) date of the communication; (ii) identity of the parties to the communication; (iii) means of transmission of the communication; and (iv) identity of all documents memorializing all or part of the communication. To the extent any responsive communication is memorialized in a document, please produce the document for inspection and copying.

8. The term "including" shall be construed without limitation.

9. The term "information" shall be construed expansively and shall include, but not be limited to, facts, data, opinions, images, impressions, concepts and formulae.

10. The term "person" includes any natural person, firm, partnership, joint venture, corporation, sole proprietorship, trust, union, association, federation, labor organizations, legal representatives, trustees, trustees in bankruptcy, receivers, business entities, any other form of business, governmental, public, charitable entity, or group of natural persons or such entities.

11. The term "CID" refers to the Civil Investigative Demand issued by the office of Defendant Attorney General Maura Healey to ExxonMobil on or about April 19, 2016.

12. The term "Subpoena" refers to the Subpoena issued by the office of Defendant Attorney General Eric Schneiderman to ExxonMobil on or about November 4, 2015.

13. The term "Common Interest Agreement" refers to the Climate Change Coalition Common Interest Agreement signed by individuals from the offices of

the Attorneys General for California, Connecticut, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Virginia, U.S. Virgin Islands, Vermont, Washington, and Washington, D.C., between April and May 2016.

14. The term "Green 20" refers to the Attorneys General for the States, Commonwealths, or Territories of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, the U.S. Virgin Islands, Vermont, Virginia, Washington, and Washington, D.C.; the Offices of these Attorneys General; their directors, officers, employees, agents, representatives or other persons acting, or purporting to act, on their behalf, including, but not limited to, Assistant Attorneys General.

15. The term "Green 20 Press Conference" or "AGs United for Clean Power Press Conference" refers to the Press Conference attended by Defendant Attorney General Eric Schneiderman and other members of the Green 20 on March 29, 2016.

16. The term "investigation" refers to an actual or contemplated issuance of a subpoena or any other investigative process concerning purported violations of law by ExxonMobil concerning or related, directly or indirectly, in whole or in part, to climate change.

17. The words "You," "Your," "Yours," and/or "Yourself" refer to Defendant Attorney General Eric Schneiderman, as well as the Office of the New York State Attorney General, and its directors, officers, employees, agents, representatives or other persons acting, or purporting to act, on its behalf, including, but not limited to, Assistant Attorneys General in the Office of the New York State Attorney General.

INSTRUCTIONS

1. These Interrogatories are continuing in nature. Any information obtained subsequent to the service of answers to these Interrogatories that would have been included in the answers had the information been known shall promptly be supplied by supplemental answers whenever You find, locate, acquire, or become aware of such information, up until the time of trial. Supplemental answers are to be served as soon as reasonably possible after receipt of such information.

2. The answers are to be signed by You under oath. Objections, if any, are to be signed by the attorney making them.

3. Each Interrogatory shall be responded to fully, unless it is in good faith objected to, in which event the reasons for the objections shall be stated with specificity. If an objection pertains to only a portion of an Interrogatory, or to a word, phrase, or clause contained therein, You shall state Your objection to that portion only and answer the remainder of the Interrogatory. If, in responding to these Interrogatories, You claim any ambiguity in an Interrogatory, or in a definition or instruction applicable thereto, such claim shall not be utilized as a basis for refusing to respond, but You shall set forth as part of Your response the language deemed to be ambiguous and the interpretation used in responding to the Interrogatory.

4. If a claim of privilege or other legal doctrine (including, but not limited to, the work product doctrine) is asserted in objecting to any means of discovery or disclosure, You shall comply with the requirements of Federal Rule of Civil Procedure 26(b)(5), and, promptly following Your response, You shall identify with respect to the information: (i) the general nature of the information withheld; and (ii) the specific

privilege or protection claimed and the basis for its assertion. This includes, but is not limited to, specifically stating that You are withholding information in purported reliance on the Common Interest Agreement.

5. Although some Interrogatories may overlap with other Interrogatories, no Interrogatory should be read as limiting any other.

6. The foregoing Definitions and Instructions also apply to the Definitions and Instructions themselves.

7. Unless otherwise specified, the time period covered by these Interrogatories is January 1, 2011, to the present.

INTERROGATORIES

1. State the name, job title and/or position of all members, employees or agents of the Office of Attorney General of the State of New York involved in Your investigation of ExxonMobil, Your issuance of the Subpoena, Your participation in the Green20 Press Conference, and/or Your participation in the Common Interest Agreement, including but not limited to those persons who provided information for answers to one or more of these Interrogatories, and identify by number each Interrogatory that he or she answered or for which he or she provided information.

2. State, identify, and describe the basis for the following statements You made at the Green 20 Press Conference. As part of Your answer, identify all persons, documents or other sources of information that You contacted, consulted, reviewed or otherwise considered in making these statements:

(a) Your statement that there is a "relentless assault from well-funded highly aggressive and morally vacant forces that are trying to

block every step by the federal government to take meaningful action" regarding climate change.

(b) Your statement that "there are companies using the best climate science. They're using the best climate models so that when they spend shareholder dollars to raise their oil rigs, which they are doing, they know how fast the sea level is rising, then they are drilling in places in the Arctic where they couldn't drill 20 years ago because of the ice sheets. They know how fast the ice sheets are receding."

(c) Your statement that "we know that they paid millions of dollars to support organizations that put up propaganda denying that we can predict or measure the effects of fossil fuel on our climate or even denying that climate change was happening."

(d) Your statement that "[w]e know what's happening to the planet. There is no dispute but there is confusion, and confusion sowed by those with an interest in profiting from the confusion and creating misperceptions in the eyes of the American public that really need to be cleared up."

3. State, identify, and describe the basis for Your statements concerning Your investigation of ExxonMobil, quoted in the *New York Times* on August 19, 2016, that "there may be massive securities fraud here" and that "[t]he older stuff really is just to establish knowledge and look for inconsistencies." As part of Your answer, identify all persons, documents or other sources of information that You contacted, consulted, reviewed or otherwise considered in making these statements.

4. State, identify, and describe the basis for Your authority to impose securities disclosure obligations on ExxonMobil that are distinct from or inconsistent with federal securities law and regulations, including those promulgated and/or administered by the Securities and Exchange Commission.

5. Identify any and all plaintiffs' attorneys, environmental attorneys, environmental organizations, current or former public officeholders and their staffs, political party officials and their staffs, or other Attorneys General, that You contacted or with whom You have communicated regarding any Investigation of ExxonMobil. As part of Your answer, identify (i) the date on which any of these communications occurred and (ii) the topics discussed in these communications.

6. State, identify, and describe the actions that Your office, including Your office's Environmental Protection Bureau, took prior to the Green 20 Press Conference to learn the status of other states' investigations and/or plans and explore avenues for coordination with these other states. As part of Your answer, identify all persons, documents or other sources of information that You contacted, consulted, reviewed or otherwise considered in taking these actions.

7. State, identify, and describe Your involvement in drafting the Common Interest Agreement. As part of Your answer, identify all persons, documents or other sources of information that You contacted, consulted, reviewed or otherwise considered in taking these actions.

8. State, identify, and describe Your relationship and any and all communications with Peter Frumhoff and/or the Union of Concerned Scientists, both before and after the Green 20 Press Conference.

9. State, identify, and describe Your relationship and any and all communications with Matthew Pawa, the Pawa Law Group. P.C., and/or the Global Warming Legal Action Project both before and after the Green 20 Press Conference.

10. State, identify, and describe Your relationship and any and all communications with former Vice President Al Gore, both before and after the Green 20 Press Conference. As part of Your answer, describe your understanding of how Al Gore became involved in the Green 20 Press Conference, including whether he was paid a fee in connection with his participation in or attendance at the Green 20 Press Conference.

11. State, identify, and describe Your relationship and any and all communications with Sharon Eubanks, both before and after the Green 20 Press Conference.

12. State, identify, and describe Your relationship and any and all communications with Bill McKibben and/or 350.org, both before and after the Green 20 Press Conference.

13. State, identify, and describe Your relationship and any and all communications with NextGen Climate or any of its directors, officers, employees, agents, or representatives, both before and after the Green 20 Press Conference.

14. State, identify, and describe Your relationship and any and all communications with the Rockefeller Brothers Fund and/or the Rockefeller Family Fund, both before and after the Green 20 Press Conference.

15. State, identify, and describe any and all political meetings, workshops, rallies, fundraising initiatives, or other events attended by persons outside the office of the New York Attorney General, at which You discussed any pending or

potential investigation of ExxonMobil by a member of the Green 20 or any subpoenas or civil investigative demands issued thereto.

16. State, identify, and describe Your participation in, attendance at, or Your relationship to the "Exxon: Revelations & Opportunities" event held on or about January 8, 2016 at 475 Riverside Drive, New York, New York. As part of Your answer, state, identify, and describe the purpose and nature of the meeting, and any known speakers, organizers, attendees, or participants at the event.

17. State, identify, and describe Your participation in, attendance at, or Your relationship to the mock trial referred to as "Exxon vs. The People" held in or around Montreuil, France on or about December 5, 2015. As part of Your answer, state, identify, and describe the purpose and nature of the mock trial, and any known speakers, organizers, attendees, or participants at the event.

18. State, identify, and describe Your policy and practice for publicly discussing or disclosing information concerning ongoing investigations.

19. State, identify. and describe the basis for Your statements on November 13, 2015, at a gathering sponsored by *Politico*, that ExxonMobil funded "aggressive climate deniers." As part of Your answer, describe what You understood to constitute a "climate denier[ ]" when You made this statement.

20. Identify and describe Your statutory authority to "limit[] climate change" and "ensur[e] the dissemination of accurate information about climate change," which are the stated objectives of the Common Interest Agreement You executed.

21. Identify and describe the basis for Your Subpoena's demand that Exxon Mobil produce documents from a time period exceeding 39 years when the

Subpoena purports to investigate violations of statutes with six-year statute of limitations periods.

22. State, identify, and describe the basis for Your belief that investigating a single energy company will help to combat or limit climate change.

23. State, identify and describe all communications You had with the *New York Times* concerning the November 5, 2015 article, "Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General," describing Your investigation of ExxonMobil.

24. Identify and describe Your document retention policies in effect between , January 1, 2011 and November 10, 2016. As part of Your answer, describe the efforts undertaken to ensure the preservation of relevant documents in connection with this litigation and the date on which such actions occurred.

Dated: November 16, 2016

EXXON MOBIL CORPORATION

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