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Congress of the United States
House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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October 13, 2016

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Dear Mr. Quinter,

The Committee on Science, Space, and Technology is conducting oversight of your client's role in developing and coordinating the investigative actions of "sympathetic" state attorneys general[1] who comprise the so-called "Green 20" — actions which are likely to deprive companies, nonprofit organizations, and scientists of the ability to fund and conduct scientific research free from intimidation and threat of prosecution. These state attorneys general, perhaps at the behest of your client, have alleged that Exxon Mobil Corporation has committed fraud and have issued subpoenas demanding the production of documents and communications between, among others, Exxon and scientists, both internal and external, who have conducted research related to climate change. This research is funded by a variety of sources, including the federal government and private industry. It is likely that the demands of the "Green 20" implicate the work product of both federally funded and private researchers.

This letter comes after multiple overtures from Committee staff to you on behalf of your client, the Union of Concerned Scientists (UCS), in an effort to initiate compliance with the Committee's July 13, 2016, subpoena. On behalf of UCS, you have questioned the Committee's jurisdiction and the validity of the subpoena, and have asserted various defenses including the First Amendment in support your client's refusal to comply. After careful consideration of these objections, I have concluded that they do not provide adequate, legitimate legal bases to categorically reject complying with a congressional subpoena. Accordingly, for the reasons detailed below, UCS's objections are overruled.

This letter also serves to memorialize Committee staff's numerous attempts to engage in reasonable negotiation and accommodation with UCS concerning its compliance with the Committee's subpoena. Unfortunately, these discussions have been extremely one-sided; even when offered generous accommodations by the Committee, UCS has failed to make a good-faith

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[1] Establishing Accountability for Climate Change Damages: Lessons from Tobacco Control, Climate Accountability Institute, and Union of Concerned Scientists, Oct. 2012, *available at* http://www.climateaccountability.org/pdf/Climate%20Accountability%20Rpt%20Oct12.pdf.

effort to comply with the July 13 subpoena. As your client has shown no inclination to comply with the Committee's subpoena, I find myself with no choice but to pursue the tools at my disposal to enforce the subpoena and induce your client's compliance. **This letter serves to formally notify your client of an October 27, 2016, deadline by which to produce documents, after which the Committee will consider holding UCS in contempt.**

I. *The Legal Arguments Raised by UCS Do Not Provide Adequate Legal Bases on Which to Reject Complying with the Committee's Subpoena*

a. This Committee's investigation is properly authorized by the Rules of the House, has "a valid legislative purpose," and is pertinent to a subject matter within the Committee's jurisdiction

In refusing to comply with the Committee's July 13 subpoena, you state, "Rule X of the Rules of the House of Representatives does not confer jurisdiction over this matter to the Committee."[2] This claim is plainly false; the Committee's jurisdiction is expansive and well-defined by the House of Representatives, and includes oversight of research and development (R&D) activities.[3] Moreover, the Committee's subpoena serves a legitimate legislative interest and meets the standards set forth by the Supreme Court. Prominent constitutional law scholars have concluded that the Committee is authorized to issue and enforce its subpoenas in connection with the "Green 20" inquiry.[4]

Wilkinson v. United States lays out a three-pronged test regarding the legal sufficiency of a congressional subpoena.[5] First, the Committee's investigation of the broad subject matter must be authorized by Congress.[6] This Committee is charged with ensuring that the United States remains the world leader in scientific discovery, research, and innovation. The Committee furthers this goal through legislation, both funding and policy oriented legislation, as well as oversight activities. Ensuring that every scientist is free to engage in research advancing the theories they find most promising in light of objective scientific principles is necessary for the American scientific enterprise to remain successful. In doing so, the Committee has an interest in ensuring that scientific research is not chilled and distorted by overzealous advocates who seek to punish or criminalize scientific debate.

The Committee's interest in the U.S. scientific enterprise is well-established. The Committee is the House's chief authorizing body for R&D activities, and the Committee's jurisdiction is broad in this respect. Under the Rules of the House, the Committee has legislative and oversight responsibilities for "All energy research, development, and demonstration, and projects therefor, and all federally owned or operated nonmilitary energy labs; Environmental

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[2] Letter from Mr. Neil Quinter to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. 1 (July 27, 2016).
[3] Clause 3(k) of Rule X.
[4] *Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoena's: Hearing Before the H. of Reps. Comm. on Science, Space, & Tech.*, 114th Cong. (Sept. 14, 2016).
[5] *Wilkinson v. United States*, 365 U.S. 399, 408-09 (1961).
[6] *Id.*

research and development; Marine research; Commercial application of energy technology; and Scientific research, development, and demonstration, and projects therefor."[7] Essentially, under Rule X, this Committee authorizes all federal R&D funding that is not military or medical. Also, House Rule X is explicit in stating that "all bills, resolutions, and other matters relating to subjects within the jurisdiction of the standing committees . . . shall be referred to those committees."[8]

Your client's communications with the "Green 20" directly affect the research activities that are funded, in whole or in part, by the federal government and the private sector. Depending on the effects of actions taken by the "Green 20," perhaps at your client's suggestion, this Committee could direct federal funding to certain research, redirect current research, or authorize funds for more targeted research at agencies under the Committee's jurisdiction. Should your client's coordination with the "Green 20" investigation or advocacy cause an imbalance in scientific inquiry, the Committee could correct such an imbalance through its authorization power delegated by Rule X. The documents and information compelled by the July 13 subpoena bear directly on whether such corrective action is necessary, and if so, the scope of any such potential legislation and funding.

You have called into question the extent to which your client's actions could chill scientific research, arguing that such claims are unsubstantiated. Although the Committee maintains that showing the existence of an actual effect is unnecessary in order to conduct a lawful legislative inquiry, the Committee is aware of a demonstrable chilling effect as a result of zealous advocacy – the sort in which your client routinely engages. For example, Committee staff has gathered information from the scientific community, including from a professor of science at a major research university in Florida, whose work has been negatively affected by overzealous advocates. The scientist told Committee staff that overzealous advocacy by nonprofit groups has demonized his research by cherry-picking data. Moreover, the scientist told Committee staff that scientific findings and data on controversial topics are repeatedly mischaracterized in an effort to delegitimize certain research. As a result, private industry has distanced itself from not only funding but from any communication or collaboration with scientists at many research universities. The scientist singled out public-private partnerships as so chilled as to become "frozen" as a result of investigations and advocacy like those supported by your client, and many similarly situated scientists feel chilled by the actions of zealous advocacy groups like UCS. The Committee is therefore concerned about the effect of such advocacy, especially when coordinated with state investigations, on the nation's scientific enterprise.

b. <u>This Committee's prior legislative and oversight efforts related to scientists and R&D are robust and provide a valid legislative purpose</u>

The Committee has a long history of exercising both legislative and oversight functions within its research and development jurisdiction. In the 114th Congress, the Committee reported, and the House passed H.R. 1806, the America COMPETES Reauthorization Act of 2015, which

[7] Clause 1(p) of Rule X.
[8] Clause 1 of Rule X.

authorized funds across the research and development enterprise, including for the Department of Energy (DOE), National Science Foundation (NSF), and the National Institute of Standards and Technology (NIST).[9] The Committee was the source of similar legislation in 2007 and 2010.[10] In this Congress, the Committee has been referred legislation on topics including low-dose radiation research, harmful algal blooms, the Environmental Protection Agency's (EPA) Science Advisory Board, DOE labs, ocean acidification, and marine hydrokinetic renewable energy. To date, 163 bills or resolutions have been referred to the Committee.

The Committee's oversight history is equally robust, with recent oversight inquiries and investigations into subjects ranging from NSF and DOE research grant-making procedures to EPA permitting processes. Two recent examples of the Committee's oversight work related to protecting scientists and researchers involve two cases in which a DOE scientist[11] and a Food and Drug Administration scientist were separately targeted for communicating with Congress. Cases such as these are extremely troubling, and the Committee has a duty to ensure that *all* scientists are able to conduct research free from interference and intimidation.

The Committee also has a responsibility to ensure that taxpayer dollars authorized and appropriated by Congress are not being misspent. The Committee has had a longstanding interest in grants funded by the NSF, including those awarded to universities and private companies. Given the Committee's jurisdiction over NSF, the Committee has a strong interest in the research funded by NSF grants. Most research is funded by a combination of private and government sources.[12] Like many other large energy companies, researchers employed by Exxon have received grant awards from federal sources. Additionally, NSF and Exxon jointly fund projects and programs such as Research Experiences in Solid Earth Science for Students (RESSESS), and the American Mathematical Society Task Force on Excellence. Further, Exxon partners with universities, themselves recipients of millions of dollars in federal funds, to conduct research. If the private sector, as a result of your client's coordination with the "Green 20" investigations, begins funding one-sided research, it is this Committee's responsibility to identify that imbalance and correct it by directing funding elsewhere. The documents and information being sought by the Committee subpoena will help the Committee assess the existence and magnitude of the threat that your client's conduct poses to the unbiased and objective determination of research priorities.

The second prong of the *Wilkinson* test involves a "valid legislative purpose." Since the Committee has sole jurisdiction over R&D authorizations or funding measures with the exception of military and medical, this Committee could most certainly pass legislation as noted above that would direct or divert funding to offset or correct any effects your client's involvement with the "Green 20" investigative efforts may have on the overall funding of our

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[9] H.R. 1806, America COMPETES Reauthorization Act of 2015 (introduced Apr. 15, 2015, passed by the U.S. House of Representatives on May 20, 2015) (emphasis added).
[10] H.R. 2272, America COMPETES Act (P.L. 110-69) 2007; H.R. 5116, America COMPETES Reauthorization Act of 2010 (P.L. 111-358) 2011.
[11] *"Examining Misconduct and Intimidation of Scientists by Senior DOE Officials": Hearing Before the H. of Reps. Comm. on Science, Space, & Tech., Subcommittees on Oversight & Energy*, 114th Cong. (Sept. 21, 2016).
[12] Science & Engineering Indicators 2016 Report, Chapter 4, https://nsf.gov/statistics/2016/nsb20161/#/report/front-matter (last visited Aug. 16, 2016).

nation's scientific R&D enterprise. This is discussed more thoroughly in the following paragraphs.

In the NSF's *Science & Engineering Indicators 2016*, total U.S. R&D expenditures are broken down by source of funds: Business: 65.2%; Federal government: 26.7%; Universities and colleges: 3.3%; Nonfederal government 0.9%; Other nonprofit organizations: 3.9%. Any disincentive to industry maintaining its position as the dominant source of funding for R&D will have a detrimental impact on the nation's scientific enterprise. If businesses believe that the research they fund can be mischaracterized and used to build cases of fraud against the company, they will have a powerful incentive to cease funding that research. If scientists believe that their industry-sponsored research, or discussions with industry about research funded by other sources, will be subpoenaed if it is in disagreement with the beliefs of state officials or advocacy groups, they will have a powerful incentive to cease conducting that research or disseminating the results of their research to all interested parties. As part of the Committee's investigation, and noted above, it has come to our attention that this may already be occurring in the scientific community. Congress, and more specifically this Committee, has an interest in informing itself of these risks, trends and effects and potentially offsetting any trends or effects that would skew research in one direction or another.

Either of these scenarios could result in dramatic cuts to research funding by non-federal sources. If that is the case, the Committee may be forced to take a host of legislative actions, including authorizing increases in funding for scientific research to make up for the reduction in funding from other sources. The documents and information demanded in the July 13 subpoena will help inform the Committee if such action is warranted and necessary.

Finally, *Wilkinson* requires that the demand, or subpoena in this case, be pertinent to a subject matter authorized by Congress.[13] Courts have interpreted this requirement very broadly, requiring "only that the specific inquiries be reasonably related to the subject matter under investigation."[14] The documents and information requested in the subpoena served on July 13, 2016, will allow the Committee to assess the effects of your client's coordination with the "Green 20" investigation on climate change scientists and their research. As discussed above, this Committee has jurisdiction over the bulk of federally funded R&D and has a lengthy track record of oversight in this area. During this Congress, the Committee has received referrals of related legislation and held hearings on a broad number of weather and climate related subjects. Most recently, on July 7, 2016, the Committee examined the nation's current and next generation weather satellite programs, which are key research components for compiling weather and climate data. Further bolstering the Committee's jurisdiction is the ongoing grant-making and funding oversight conducted during my chairmanship, including hearings examining Innovation Corps, the NSF's program to leverage research investments, and the NSF's budget and research funding priorities. The Committee's inquiry easily satisfies the requirements of the *Wilkinson*

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[13] *Wilkinson*, 365 U.S. at 409.

[14] MORTON ROSENBERG, WHEN CONGRESS COMES CALLING: A PRIMER ON THE PRINCIPLES, PRACTICES, & PRAGMATICS OF LEGISLATIVE INQUIRY 10 (The Constitution Project, 2009), *available at* http://www.constitutionproject.org/wp-content/uploads/2009/07/WhenCongressComesCalling.pdf (last visited Aug. 15, 2016) [hereinafter WHEN CONGRESS COMES CALLING].

test. Once this threshold matter is established, courts then determine whether a party refusing to comply with a valid subpoena has any applicable constitutional privileges.

c. The Committee's request for documents from UCS does not imperil First Amendment rights

Your client has argued that the Committee's subpoena infringes on "activities protected by the First Amendment,"[15] and as such, *all* communications between the Union of Concerned Scientists and the "Green 20" must be shielded from the Committee's inquiry. This reflects a continued— and perhaps deliberate— misapplication of the protections afforded by the First Amendment in the realm of congressional investigations. The First Amendment has never been regarded to confer blanket protection against compliance with a congressional inquiry. Instead, the Supreme Court has repeatedly applied a balancing test to determine whether groups' First Amendment rights were infringed as to specific congressional demands.[16]

Although a constitutional protection, courts have been extremely critical of refusals to comply with congressional subpoenas based on generalized First Amendment objections, and the Supreme Court has never relied on the First Amendment as grounds for reversing a criminal contempt of Congress conviction.[17] In a series of cases decided between 1953 and 1963, the Supreme Court placed few restrictions on Congress's ability to investigate in cases implicating First Amendment concerns. In 1953, the Court decided *Rumely v. United States*, which involved Mr. Edward Rumely, the secretary of an organization known as the Committee for Constitutional Government. This group's activities included selling books "of a particular political tendentiousness."[18] In this case Congress sought the names of individuals who purchased books from the organization, and the Court held that Congress was not authorized to seek these identities.[19] In 1957, the Court decided *Watkins v. United States*. Mr. John Thomas Watkins, a private citizen, was a leader in several labor organizations.[20] *Watkins* is important for a few reasons. At the outset, the *Watkins* Court proclaimed:

> It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation. This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress....[21]

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[15] Letter from Mr. Neil Quinter to Hon. Lamar Smith, Chairman, H. Comm. On Science, Space, & Tech. 2 (July 27, 2016).
[16] *Barenblatt v. United States*, 360 U.S. 109, 126 (1959).
[17] WHEN CONGRESS COMES CALLING at 35.
[18] *U.S. v. Rumely*, 345 U.S. 41, 42 (1953).
[19] *Id.* at 42-48.
[20] *U.S. v. Watkins*, 354 U.S. 178, 181 (1957).
[21] *Id.* at 187-188.

As Professor Jonathan Turley pointed out during the Committee's September 14, 2016 hearing,[22] *Watkins* underscored that motives of the Members of the House or Senate Committee do not bear on the legality of the investigation being undertaken.[23]

Following *Watkins*, the Court decided a case involving a graduate teaching fellow at the University of Michigan, Mr. Lloyd Barenblatt, who refused to answer certain questions posed by Congress claiming these questions imperiled his First Amendment rights.[24] The Court ruled:

> However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where the First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.[25]

The Court considered whether the governmental interest was compelling and whether there was a valid legislative purpose. On balance, in the *Barenblatt* case, the Court ruled that Congress's need to investigate possible overthrow of the United States federal government by the threat of communism outweighed Mr. Barenblatt's First Amendment privileges.[26] Here, with regard to the actions of the "Green 20" and your client, the Committee has a compelling interest in correcting, through legislation, any imbalance in our nation's scientific enterprise, which could diminish the United States' position as the world leader in scientific discovery, research, and innovation.

In 1961, the Court in *Wilkinson v. United States* reviewed the case of Mr. Frank Wilkinson, an activist private citizen who refused to answer a question posed by Congress regarding his affiliation with the Communist party.[27] The Court upheld its holding in *Barenblatt*. Going even further, the Court stated "we cannot say that, simply because the petitioner at the moment may have engaged in lawful conduct, his Communist activities in connection therewith could not be investigated."[28] Here, the Supreme Court expressly declined to require a criminal predicate or an allegation of wrongdoing in order for Congress to investigate. Consequently, your July 26, 2016, criticism that our subpoena "makes no allegation of wrongdoing on the part of UCS" is not a valid legal argument and has no bearing on the validity of the Science Committee's ability to subpoena documents from your client. Although your July 27, 2016, letter is critical of the body of Supreme Court precedent, the Committee has no reason to believe these

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[22] *Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoena's: Hearing Before the H. of Reps. Comm. on Science, Space, & Tech.*, 114th Cong. 48 (Sept. 14, 2016) (citing *Wilkinson v. U.S.* 365 U.S. 399, 412 (1961); *Watkins v. U.S.*, 354 U.S. 178, 200 (1957)).
[23] *Watkins*, 354 U.S. at 200.
[24] *Barenblatt v. United States*, 360 U.S. 109, 116 (1959).
[25] *Id.* at 126.
[26] *Id.* at 134.
[27] *Wilkinson v. United States*, 365 U.S. 399, 402 (1961).
[28] *Id.* at 413.

cases would be overturned. In fact, just last month the U.S. District Court relied upon these very cases in deciding *Senate Permanent Subcommittee on Investigations v. Ferrer*.

Lastly, your correspondence repeatedly cites *Gibson v. Florida Legislative Investigation Committee*[29] for the proposition that "the Supreme Court has recognized the First Amendment as a bar to a legislative inquiry."[30] This is a gross mischaracterization of *Gibson*'s holding, which is in fact inapposite to the facts underlying the Committee's inquiry. In *Gibson*, the Supreme Court ruled that the Florida State legislature's investigation into the Miami branch of the National Association for the Advancement of Colored People (NAACP) for connections to Communism could not compel the production of its membership lists without infringing on core constitutional rights of speech and association. During the course of the investigation, the president of the Miami NAACP branch appeared before the legislature to testify, and was forthcoming enough with the committee to specify details including the size of the organization and that individual membership in the organization was renewed annually.[31] The president also "volunteer[ed] to answer such questions on the basis of his own personal knowledge," but refused to produce "records of the association which were in his possession or custody and which pertained to the identity of members of, and contributors to, the Miami and state NAACP organizations."[32]

The Court's legal analysis in *Gibson* weighed the state legislature's substantial interest in investigation ("the State has power to adequately inform itself—through legislative investigation, if it so desires—in order to act and protect its legitimate and vital interests"[33]) with the NAACP's interest in associational freedoms as it pertained to the production of the organization's membership lists ("it is [not] permissible to demand or require from such other [non-Communist affiliated] groups disclosure of their membership by inquiry into their records when such disclosure will seriously inhibit or impair the exercise of constitutional rights and had not itself been demonstrated to bear a crucial relation to a proper governmental interest or to be essential to fulfillment of a proper governmental purpose"[34]). But the Committee here does not seek the documents at issue in *Gibson*; the Committee is not demanding from UCS any membership lists or similar documents that would implicate the organization's core associational rights.

By misconstruing the law announced in the aforementioned cases, you attempt to analogize your client's nebulous concerns for its associational rights in response to the narrow demands found in the Committee's subpoena with the objections of Mr. Rumely, Mr. Watkins, Mr. Barenblatt, Mr. Wilkson, and Mr. Gibson. Yet, putting aside the wisdom underlying each of those congressional inquiries, each of these men, as subjects of congressional investigations, took steps to comply with the congressional demands they faced. Each gave at least some testimony or documentation in an effort to comply with congressional inquiries; each ultimately objected to *specific* testimonial or documentary requests they found to be particularly obtrusive, which were then properly challenged on their merits. UCS, in contrast, has made no attempt to

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[29] 372 U.S. 539 (1963).
[30] Letter from Neil Quinter to Hon. Lamar Smith 2 (Jun. 1, 2016).
[31] *Gibson*, 372 U.S. at 542.
[32] *Id.*
[33] *Id.* at 544.
[34] *Id.* at 549.

answer any of the Committee's questions, and has failed to produce to the Committee even publicly available documents in their possession—documents that could not possibly infringe on associational or speech rights – after committing repeatedly to do so.[35] Blatantly failing to attempt to work with the Committee only serves to distinguish UCS from the line of case law that you purport shields your client from complying with the Committee's subpoena.

On August 5, 2016, in granting a Senate subcommittee's application to enforce its subpoena *duces tecum* against the subject of its inquiry, the U.S. District Court for the District of Columbia relied in part on *Barenblatt* and "reject[ed]" the respondent's invocations of sweeping First Amendment blanket protections stating: "the Constitution [] tells us that [the respondent] cannot use the First Amendment as an omnipotent and unbreakable shield to prevent Congress from properly exercising its constitutional authority."[36] The court continued, holding that the respondent "does not possess an absolute right to be free from government investigation when there are valid justifications for the inquiry."[37] The court found this especially to be the case where there was no good-faith effort made to collect responsive documents and file a privilege log.[38]

Because the First Amendment does not "afford a witness the right to resist inquiry in all circumstances,"[39] when an individual invokes its protections in the course of a congressional inquiry, the Supreme Court has found that "resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[40] The Court announced that "the critical element" in such a balancing test includes "the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness."[41] The strength of Congress' interests, in turn, relies on its authorization over the subject matter of the investigation, delegation of the power to investigate to the committee involved, and the existence of a legislative purpose[42]—or, in other words, the same considerations at play in determining whether a congressional inquiry is validly authorized, as discussed in detail above.

Generalized concerns over the effects of non-particularized First Amendment rights supposedly imperiled by a legitimate congressional inquiry are not enough to overcome a congressional subpoena. Put another way, the balancing analysis on which you continually rely to protect alleged political, petition, and associational speech is properly applied only with respect to *specific documents or categories of documents* as identified and described in a

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[35] It should be noted that the legislative body and subject matter of the investigation in *Gibson* differ from the United States Congress' constitutional prerogatives and the authorities delegated to the Committee here; it would reasonable to suggest, however, that these differences, if applied to the Committee's inquiry, would weigh in the Committee's favor. U.S. Const., Art. I, § 8; Art. VI, Cl. 2.

[36] *S. Permanent Subcomm. on Investigations v. Ferrer*, 2016 U.S. Dist. LEXIS 103143, *30, *32-33 (D.D.C. Aug. 5, 2016).

[37] *Id.* at 31.

[38] "There is simply no legal or factual support for the proposition that being required to search for responsive documents would abridge [the respondent's] protected freedoms of speech or press." *Id.*

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

[40] *Id.* at 126.

[41] *Id.*

[42] *See Barenblatt*, 360 U.S. 109 (1959); *Watkins*, 354 U.S. 178 (1957); *United States v. Rumely*, 345 U.S. 41 (1953).

privilege log; not, as you assert, with respect to an undefined universe of documents that you may or may not have collected on behalf of your client, and then may only be applied to legitimate assertions of a constitutional privilege. During discussions with Committee staff, you have continued to misapply case law in an attempt to hide behind legally indefensible positions, such as attempting to categorically assert free speech rights without demonstrating which responsive documents properly fall within the First Amendment's protection, and in lieu of any efforts to comply with the subpoena.

To approach compliance, Committee staff has repeatedly asked you to gather the universe of responsive documents and produce any documents you do not deem covered by the First Amendment; for those documents over which your client asserts First Amendment protections, Committee staff has repeatedly asked that you create a privilege log itemizing such objections. In response, on numerous occasions, you have offered to provide publicly available documents and have directed Committee staff to your client's website. The burden is not on Committee staff to find documents on your client's website; to the contrary, if the documents are responsive, as counsel, you have an obligation to provide them forthwith. Yet, you have failed to produce even these documents to the Committee. You have also attempted to distinguish *Ferrer* from your client on the basis that the petitioner in that case may have been engaged in criminal activity. As Committee staff has repeatedly advised, there has been no finding of criminal activity and the District Court declined to require a criminal predicate for Congress to investigate. Were a court to require criminal conduct, Congress would be prohibited from informing itself on many important matters of national concern.[43]

II. *Committee Staff Has Made Repeated, Reasonable Efforts to Induce Compliance With the Subpoena; UCS Has Been Defiant in Its Refusal to Comply With the Committee's Subpoena, Rejecting Numerous Offers for Accommodation*

Committee staff has made numerous attempts to secure UCS's compliance with the July 13, 2016 subpoena. This includes in-person meetings with you on July 15 and July 29; phone conversations on August 30, September 1, September 13, and September 23; and email correspondence throughout this time period. Repeatedly, after explaining the validity of the subpoena, Committee staff has endeavored, as a matter of grace, to extend accommodations to your client, including the option to produce documents with identities redacted; including minority staff in conversations; and discussing extended time frames where a rolling production could take place. Accommodations such as these are indicative of the Committee's reasonable efforts to bring your client into compliance with the subpoena. Other similarly situated organizations receiving Committee subpoenas in this investigation have not engaged in such obstructive behavior. Rather, they have engaged in good faith negotiations with the Committee and have committed to provide the Committee documents. Based on your client's statements to

[43] *Rumely,* 345 U.S. at 43-45; *see also Watkins*, 354 U.S. at 200.

the media,[44] Committee staff questions whether you have engaged in good faith negotiations. In public statements, your client belligerently refuses to comply with the Committee's subpoena.

Unfortunately, your client has failed to take advantage of the Committee's reasonable negotiating posture. Failure to provide any semblance of a privilege log, or to otherwise negotiate in any meaningful way with Committee staff, leaves me no choice but to consider pursuing enforcement proceedings against your client. This may take the form of initiating proceedings to find your client in contempt of Congress,[45] or compelling compliance through a civil enforcement action in federal court.[46] **This letter serves to formally notify your client that the Committee will seek to take such action if you do not make at least a partial production before 5 p.m. on October 27, 2016.** In addition, to better understand through testimony what your client refuses to provide through documentation, the Committee requests that you provide availabilities for transcribed interviews with Kenneth Kimmell, President of UCS, and Peter Frumhoff, Director of Science and Policy at UCS, **no later than 5 p.m. on October 20, 2016**.

As always, the Committee welcomes the opportunity to discuss any new proposals to approach compliance with the subpoena. To arrange a meeting or discuss matters over the phone, please contact Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Lamar Smith

Rep. Lamar Smith
Chairman

cc: The Honorable Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology

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[44] Amanda Reilly, *Group Promises to Hold Line Against GOP Document Requests*, E&E (July 12, 2016); Leon Kaye, *Cong. Climate Science Witch Hunt to Start Hearings*, TRIPLEPUNDIT (Sept. 1, 2016) *available at* http://www.triplepundit.com/2016/09/congressional-climate-science-witch-hunt-start-hearings/; David Hasemyer, *Lamar Smith Seeks to Affirm Exxon Climate Subpoenas With Hearing*, INSIDE CLIMATE NEWS (Aug. 31, 2016).

[45] 2 U.S.C. §§ 192, 194.

[46] *See, e.g.,* H.R. Res. 706, 112th Cong. (Jun. 28, 2012); H.R. Res. 980, 110th Cong. (Feb. 14, 2008).