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VIA U.S. MAIL and E-MAIL

Congressman Lamar Smith, Chairman
U.S. House Committee on Science, Space, and Technology
2321 Rayburn House Office Building
Washington, DC 20515-6301

Dear Chairman Smith:

I write on behalf of the Pawa Law Group, P.C. and the Global Warming Legal Action Project to respond to your letter of October 13, 2016, in which you threatened to hold my clients in contempt and dismissed the concerns regarding your investigation and subpoenas that we and others have expressed on multiple calls with your staff and in correspondence.[1] You and my clients have a history of disagreement regarding Exxon and its effects on the environment,[2] but this use of direct congressional pressure to silence them constitutes unlawful targeting and a significant escalation.

As a good faith attempt to cooperate and reach an accommodation, my clients decided to produce the enclosed materials (PLG-HSC00001 through PLG-HSC00471). Based on conversations with your staff, we believe these may relate to your inquiry regarding climate change. To be clear, however, we stand by all of our earlier objections and reiterate the following non-exclusive summary of our concerns.

When a congressional investigation's real purpose is to "inhibit further speech" by targets of investigation and "others whose political persuasion is not in accord with that of members of the Committee," it is improper. *See Hentoff v. Ichord*, 318 F. Supp. 1175, 1181-82 (D.D.C. 1970). The First Amendment protects citizens' rights to petition their government – including Attorneys General; to discuss corporate contributions to climate change and potentially fraudulent conduct by such corporations relating to climate change; and to communicate freely

[1] *See, e.g.*, letters from Catherine Duval to Hon. Lamar Smith of June 1, June 24, July 13, and July 26, 2016.

[2] E.g., Amicus Brief of Lamar Smith in *Native Village of Kivalina, et al. v. ExxonMobil Corporation, et al.* on behalf of fossil fuel companies, in which Pawa Law Group represented a village seeking monetary damages from, among others, Exxon, for the corporations' contributions to global warming that were destroying the Inupiat Eskimo tribe and Alaska municipality.

with fellow citizens and attorneys on legal matters of common interest. We will resist attempts, including the intrusive, overbroad subpoena of July 13, to chill such political speech by collecting communications with which you have a political disagreement, by intimidation tactics or by attempts to interrogate the senders and recipients.

The Supreme Court has held that "when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter," *Watkins*, 354 U.S. 178, 198 (1957), yet the legislative purpose and jurisdictional basis for your investigation remain unclear. Under *Watkins*, the Committee must describe the topic under inquiry with "undisputable clarity," provide "the connective reasoning" linking the topic to the Committee's "precise questions," and show that its inquiry relates to "coping with a problem that falls within [the Committee's] legislative sphere." *Id.* at 206, 215.

Far from meeting that standard, your October 13 letter attempts to legitimize your subpoena using speculation and irrelevant anecdotes. Specifically, it suggests that "depending on the effects" of actions by certain Attorneys General which were "perhaps at [my] clients' suggestion," "an imbalance in scientific inquiry" might be caused. If that were shown to be the case, the Committee apparently would like to consider whether to fund viewpoint-specific research to "correct such an imbalance."[3] As evidence that the problem exists, the letter cites "a professor of science at a major research university in Florida, whose work has been negatively affected by overzealous advocates." However, your staff admitted in an October 26 call with me that the referenced Florida professor *does not study climate change*. Moreover, your staff knows of *no nexus between the professor and my clients*.[4] In other words, based on your letter, there is no actual evidence to believe that the hypothetical "imbalance" of climate research exists, that my clients have any causal role in the theoretical unproven imbalance, or that any jurisdictional hook for these subpoenas exists.[5]

My clients are a law firm and a legal action project. Not surprisingly, many of their documents are legally protected attorney-client confidential communications, work product, or common interest materials. Without acceding to the legitimacy of your subpoena, we have

[3] Letter from Hon. Lamar Smith to Catherine Duval (October 13, 2016), page 3.

[4] Telephone call with Congressional staff, October 26, 2016.

[5] This does not address the dubious proposition that mandating federal funding for viewpoint-specific scientific research is permissible.

undertaken to identify documents that could be potentially responsive. Here is a log of the document types and applicable privileges we have identified at this time:

a. Communications with Offices of Attorneys General: My clients have worked as co-counsel with OAGs in a number of cases and has represented States on environmental cases. Contrary to your letter, my clients do indeed render professional legal services on behalf of OAGs. Thus, their communications with OAGs include privileged legal analysis, matters of common interest, and confidential communications regarding potential legal representation. **The applicable doctrines protecting the materials from disclosure include: attorney client-communications, attorney work product, and the common interest doctrine.**

b. Communications with other subpoena recipients: My clients work with some of the other subpoenaed groups on litigation activities, sometimes representing a group as counsel or co-counsel; other times, a group or individual from one of the groups serves as a consulting expert on matters that are in anticipation of litigation. Some of the groups have in-house counsel who communicate on confidential legal matters with my clients. Those communications are privileged and work product. Moreover, the groups share litigation goals and common legal defenses with my clients that protect their communications from disclosure. **The applicable doctrines protecting the materials from disclosure include: attorney client-communications, attorney work product, and the common interest doctrine.**

c. Subpoenaed materials generally: The July 13, 2016 subpoena calls only for communications by and among entities involved in political speech with which the Chairman disagrees. **This speech and citizens or entities that engage in it are protected from government harassment by the First Amendment.**

Because of the multiple litigations related to issues covered in the protected documents sought by the Committee, my clients cannot risk privilege waivers by producing them.

Regarding your request for a transcribed interview, on our recent call, your staff described the interview topics as all matters covered in the October 13 letter, all prior correspondence, anything related in public sphere, and any documents [we] provide the Committee, as well as all documents cited in prior correspondence. Despite our privilege and

First Amendment concerns, your staff said they saw "no reason to limit the scope" of the interview. Without a more tailored description of the interview topics, including an agreement regarding privileged matters, we cannot agree to an interview; please let me know if you are willing to discuss this matter further. Alternatively, would you have any interest in my clients providing a briefing instead?

Finally, there is no legitimate reason that my clients should be singled out and held in contempt or saddled with enforcement proceedings. I take issue with your characterization of our cooperation as making "no attempt to answer any of the Committee's questions" in view of the numerous calls and emails with your staff, my several letters addressing your inquiries, and today's production. When I spoke with your staff on October 26, they confirmed that as of that date, your Committee had not yet received a single document from any of the July 13 subpoena recipients. Nor had any group or individual agreed to a transcribed interview. Simply put, my clients are hardly outliers.

With respect to your contention that I or my clients engaged in "obstructive behavior" while you attempted good faith negotiations, I will not engage in a detailed back and forth recitation of who was unavailable or uncommunicative when, except to note that your account contains several inaccuracies, one of which is that the email purportedly cited in footnote 44 of your letter does not exist. I remain happy to meet with you or your staff to discuss any of the above issues.

Sincerely,

Catherine S. Duval

cc: Congresswoman Eddie Bernice Johnson, Ranking Member