quinn emanuel trial lawyers | new york
51 Madison Avenue, 22nd Floor, New York, New York 10010-1601 | TEL (212) 849-7000 FAX (212) 849-7100

WRITER'S DIRECT DIAL NO.
(212) 849-7220

WRITER'S EMAIL ADDRESS
faithgay@quinnemanuel.com

June 1, 2016

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

Dear Chairman Smith:

We write on behalf of 350.org in response to your letter of May 18, 2016, signed by certain members of the House Committee on Science, Space and Technology ("HCSST"). The letter selectively describes some of the background relating to investigations by a number of states, through their Attorneys General, into potential securities violations and fraud (the "State Investigations") by companies that may have intentionally misled the markets, the public, and state governments regarding the causes of climate change and the risks upon business. The letter requests that 350.org provide to HCSST "[a]ll documents and communications" referring or relating to the State Investigations (1) between its employees and any office of a state attorney general, and (2) between its employees and listed non-profit organizations.

350.org is a non-profit organization founded in 2008 with the express purpose of building awareness about the urgency of climate change, based on sound science and principles of equity. Since that time, it has been engaged in efforts to educate, mobilize, and connect people all over the world who are concerned about the issue. This outreach and advocacy includes engaging with government to encourage the enforcement of laws and working with other advocacy groups when that will increase the effectiveness of its advocacy.

Your request that 350.org disclose all communications with the highest state law enforcement officials and with other individuals and organizations about its advocacy on climate change strikes at the heart of the protections of the First Amendment of the U.S. Constitution. 350.org has a constitutional right to speak out on issues, to associate with others in order to advocate more effectively, and to petition federal and state government. We appreciate that the views and positions of 350.org on climate change, informed by the overwhelming consensus of scientists, may differ from that of the members of the HCSST who signed the letter. Yet the right to petition government and to disagree with certain government officials is a core value protected by the First Amendment. Because your letter does not and cannot provide any legitimate justification for this infringement upon First Amendment rights, our client respectfully

declines to provide documents in response.

350.org has nothing to hide from the HCSST or any congressional committee. In many ways, it would be easier simply to produce documents than to object. But in a democracy built on principles and the rule of law, 350.org cannot in good faith comply with an illegitimate government request that encroaches so fundamentally on its and its colleagues' protected constitutional rights. Committee staff were gracious enough to meet with us briefly as an introduction, and we would appreciate the opportunity to discuss more fully the basis of our good-faith position that your request falls outside the scope of permissible inquiry. To facilitate such a discussion, we outline below the legal grounds of our response.

First, freedom of speech, freedom of association, and the right to petition the government constitute the very foundations of our democracy. As the Supreme Court of the United States has held: "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (internal quotation marks omitted). The same is true for freedom of association: "the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed." *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012). Moreover, the "right to petition [the government is] one of the most precious of the liberties safeguarded by the Bill of Rights" because "the right is implied by the very idea of a government, republican in form." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (internal quotation marks omitted).

As you are aware, there is a long and well-established history of courts protecting First Amendment rights against unjustified congressional inquiry. "[T]he constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. . . . Nor can the First Amendment freedoms of speech, press, religion or political belief and association be abridged." *Watkins v. United States*, 354 U.S. 178, 188 (1957); *see also United States v. Rumely*, 345 U.S. 41, 46 (1953). Courts have balanced First Amendment rights with the needs of discovery by holding that the First Amendment creates a qualified privilege from disclosure of certain information. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958). If there is a reasonable probability that the disclosure will chill First Amendment rights, then it can be justified only by a compelling need for the requested information. *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1161 (9th Cir. 2010).

In applying this balancing test, the Supreme Court has held that required disclosure of membership lists infringes the First Amendment freedom of association. *See NAACP*, 357 U.S. at 466. Courts have consistently applied the same principle to disclosure of the communications of advocacy groups. "Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private. Compelling disclosure of internal campaign communications can chill the exercise of these rights." *Perry*, 591 F.3d at 1162-63 (footnote omitted). Where the government "compels public disclosure of an association's confidential internal materials, it intrudes on the privacy of association and belief guaranteed by the First Amendment, as well as seriously interferes with internal group operations and effectiveness." *AFL-CIO v. FEC*, 333 F.3d 168, 177-78 (D.C. Cir. 2003) (internal quotation marks and citation omitted).

These fundamental rights, central to the Bill of Rights and repeatedly affirmed by the Supreme Court, are squarely implicated by your letter, which self-evidently seeks to chill and suppress the expression of views on climate change and corporate action, and related petitions for government action, that are inconsistent with those of the signatories of the letter. There is also no question of the public importance of the issues at stake, which implicate national security, public health, poverty, pollution, extreme weather events, and rising sea levels, among others. Further, the chilling effect on First Amendment rights extends beyond 350.org to that of other associations and individuals who are less able to resist similar demands.

Second, the letter does not and cannot express a legitimate basis for the requested information, let alone the compelling need that would be required to justify the infringement of First Amendment rights. As the Supreme Court has stated, "[t]here is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress." *Watkins*, 354 U.S. at 187.

The principal rationale that your letter puts forward is that the speech and petitions of 350.org somehow threaten the First Amendment rights of unnamed "companies, nonprofit organizations, and scientists" who hold contrary views. But communications made by employees of a *private* organization cannot violate anyone's First Amendment rights under the well-established "state action" doctrine. *See, e.g.*, *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."). The exercise of freedom of speech, freedom of association, and the right to petition states' attorneys general is an affirmation of First Amendment rights, not an abridgment. 350.org exercises core First Amendment rights when it expresses its positions and opinions about climate change and corporate conduct to public officials and other individuals and organizations, including views as to the securities fraud or other misconduct by corporate actors.

The request also constitutes a legally impermissible interference with state autonomy. According to your letter, the rationale behind the request is a disagreement with state investigations and prosecutions by sovereign states, through their Attorneys General. Here we agree with the Office of the Attorney General of the State of New York, for the reasons stated in its letter dated May 26, 2016, that your committee cannot interfere with state investigations and prosecutions. As the Supreme Court has long recognized, "[f]ederal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework." *Cameron v. Johnson*, 390 U.S. 611, 618 (1968) (internal quotation marks omitted); *see also Younger v. Harris*, 401 U.S. 37 (1971) (creating abstention rule for federal courts where state criminal prosecution is ongoing); *Printz v. United States*, 521 U.S. 898, 924 (1997) ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts . . . .") (internal quotation marks and citation omitted). Because you cannot interfere directly with state investigations and prosecutions, you cannot do so indirectly by requesting communications from private organizations with state attorneys general or others about state investigations and prosecutions.

Finally, the request is unreasonably onerous, as it concerns "[a]ll documents and communications" over a period of many years, regardless as to form. Given the enormous scope of the request, it would essentially function as a punishment for 350.org's exercise of its First Amendment rights, without any legitimate governmental interest to justify it.

In light of the extraordinary scope of your request and the vital constitutional rights that would be imperiled by compliance, 350.org respectfully refuses to comply with the request. We would appreciate the opportunity to discuss these legal issues with you at your convenience.

Very truly yours,

Faith E. Gay

Faith E. Gay
Philippe Z. Selendy
Jennifer M. Selendy
David M. Cooper

51 Madison Avenue, 22nd Floor
New York, New York 10010

Jenny A. Durkan

776 6th Street NW, 11th Floor
Washington D.C. 20001

Quinn Emanuel Urquhart & Sullivan, LLP

cc: Honorable Eddie Bernice Johnson Counsel
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 394