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By Fax and E-mail

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

Dear Chairman Smith:

We represent the Rockefeller Brothers Fund ("RBF"), and along with David Angeli, Esq., we are now co-counsel to the Rockefeller Family Fund ("RFF"). We write in response to the June 17, 2016 letter (the "June Letter") sent by the House Committee on Science, Space, and Technology (the "Committee") to both the RBF and RFF (together, the "Funds"). The June Letter asks the Funds to produce documents in connection with oversight being conducted by the Committee. We have reviewed the June Letter and for the reasons discussed below, we must respectfully decline the Committee's request to produce documents.

Background

As you know, the June Letter represents the Committee's second request to the Funds seeking the production of internal documents related to the Funds' communications with other entities concerning investigations being conducted by state attorneys general. The initial request was made in identical letters to the Funds dated May 18, 2016 (the "May Letter"). The Funds responded to the May Letter in separate letters dated June 1, 2016, in which the Funds explained their concerns that the Committee's request imperiled the Funds' First Amendment rights and that the scope of the request was unduly burdensome.

Congress's Investigatory Power Is Not Unlimited

We have three principal concerns about the June Letter. First, the Committee does not appear to acknowledge the boundaries of its investigatory power. Second, the Committee makes no effort to balance the Committee's prerogatives with the fundamental rights guaranteed to the Funds under our Constitution. Third, even apart from those defects, the June Letter restates without modification the burdensome document requests set forth in the May Letter. We address each of these issues in turn.

The June Letter states that the Committee's investigatory power is derived from the legislative function assigned to Congress in the Constitution: "While Congress often must

conduct investigations to aid its execution of its legislative function, this requirement is flexible." (June Letter, at 2). We agree that Congress's investigatory power is intertwined with its execution of its legislative function, but we disagree that this requirement is flexible enough to encompass the pending request for documents. The absence of any possible legitimate legislative end restrains the Committee's ability to press its document request.

Several of the cases in the June Letter do not support the Committee's assertion of authority to press forward with these requests. The Committee cites to *Watkins v. United States*, 354 U.S. 178, 187 (1957), in which the Supreme Court held that "[t]here is no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress." *Watkins* stands for the proposition that while Congress has broad investigatory powers, those powers are not without bounds. The Court explained that "[n]o inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress." 354 U.S. 178, 187 (1957). Indeed, in *Watkins* the Supreme Court rejected the efforts of the House Un-American Affairs Committee to compel witness testimony when it vacated a conviction for criminal contempt. *Watkins* undercuts, rather than supports, the Committee's request for documents.

The June Letter also cites *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), for the proposition that a legislative inquiry can be valid even if there is "no predictable end result." (June Letter, at 2). While the Court in *Eastland* allowed the subpoena to be enforced, *Eastland* does not give *carte blanche* to an unbounded Congressional investigation. *Eastland* itself notes that Congress's power to investigate is "not unlimited," and that "[t]he subject of any inquiry always must be one on which legislation could be had." 421 U.S. at 504 n. 15 (internal quotation omitted). Anticipating the issues presented here, the *Eastland* Court held that "Congress is not invested with a 'general' power to inquire into private affairs." *Id.*

Here, the June Letter never suggests what possible legislation might relate to this inquiry, or how the documents held by the Funds are related to such legislation. Even accepting that there need not be a "predictable end result" for Congress to conduct an investigation, it must be possible to contemplate an end result consisting of constitutionally permitted legislation. At one point, the June Letter states that Congress finances scientific research and that the ongoing state attorneys general investigations might somehow deter such scientific research, but the June Letter fails to identify such funded research (when was such research conducted and by whom?) or to explain the relationship between the government's funding of scientific work and an investigation into the conduct of two private philanthropies.[1]

The June Letter expresses concern about the investigation conducted by the New York Attorney General but we do not see how his investigation into state law securities fraud

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[1] Please refer to the letters RBF and RFF previously sent to the Committee, in response to the Committee's May Letter for more background information on the Funds and their activities.

could deter scientific research or how this state regulatory investigation is within the Committee's purview. The June Letter quotes a statement made by Attorney General Schneiderman in which he asks whether Exxon-Mobil conducted scientific research that produced results that were inconsistent with Exxon-Mobil's required disclosures to shareholders. Attorney General Schneiderman suggests that false or misleading statements to shareholders might be actionable under New York law.[2] The June Letter states that the New York Attorney General's statement reflects an effort to pass judgment on the civil rights of scientists and the validity of their scientific work, but all that the quoted passage concerns is whether Exxon-Mobil violated securities law by providing an account of climate change to its shareholders that it knew—by virtue of its own internal scientific research—to be untrue. None of this, in any event, points towards a role for the Committee in proposing possible federal legislation, and the Committee does not demonstrate otherwise.

In short, the Committee does not have unlimited authority and the absence of a connection between the investigations being conducted by state attorneys general and any conceivable federal legislation is fatal to the Committee's request.

The Funds' First Amendment Interests Outweigh Any Interest the Committee May Have

We agree with the Committee that "the First Amendment is not an impermeable shield to Congressional investigations." (June Letter, at 4). The First Amendment does, however, subject Congressional investigations to the "closest scrutiny" if those investigations have the potential to chill the rights protected by the First Amendment. *See NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (applying this principle in the context of a state civil contempt prosecution). The propriety of a Congressional inquiry like this one—which interferes with the Funds' First Amendment rights to freedom of speech and freedom of association—can therefore be justified "only by demonstrating that [the compelled disclosure] directly serves a compelling state interest." *AFL-CIO v. FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003). On Page 4 of the June Letter, the Committee recognizes the applicability of this rights-balancing framework, yet the Letter never discusses or addresses the requisite balancing.[3]

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[2] In New York, the Martin Act grants the Attorney General "broad regulatory and remedial powers to prevent fraudulent securities practices." *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*, 906 N.E.2d 1049, 1054 (N.Y. 2009).

[3] The Supreme Court has narrowly construed the congressional power to investigate when necessary to avoid deciding an issue of constitutional law. *See United States v. Rumely*, 345 U.S. 41, 46-47 (1953) ("Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits.").

As we explained in our prior letters to the Committee, compliance with the Committee's document request would chill the Funds' First Amendment rights. (June 1, 2016 Letter from RFF to the Committee, at 2-3; June 1, 2016 Letter from RBF to the Committee, at 2-3). Advocacy on matters of public policy is exactly the type of internal associational activity and past political activity that the First Amendment was designed to protect. *See AFL-CIO*, 333 F.3d at 176-77; *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 U.S. Dist. LEXIS 19475 (D. Kan. Mar. 16, 2007). The Committee itself recognizes the importance of First Amendment rights; it expresses a concern that "inciting legal action based on debatable science" could "undermine the First Amendment of the Constitution" by interfering with Exxon-Mobil's free speech rights. (June Letter, at 3) (citing to *Barenblatt v. United States*, 360 U.S. 109, 126 (1959)). The Committee shows solicitude for Exxon-Mobil's rights while simultaneously overlooking the fact that those same rights belong to the Funds and the other non-governmental recipients of the subpoenas.

Weighed against the Funds' rights is the Committee's interest in conducting an investigation into the actions of certain state attorneys general. Whether or not this is a proper investigative function, it is unrelated to the Funds or its documents. The Funds did not issue the subpoenas about which the Committee is concerned. Any concern that the Committee may have about the relative merits of the state attorney general actions is a matter between the Committee and the state attorneys general; it cannot be addressed or resolved by seeking documents from the Funds. To the extent that the Funds or their grant recipients—which are independent of the Funds—engaged in advocacy with government officials, this is their right under our Constitution.

In discussing the Committee's authority to obtain information protected by the First Amendment, the June Letter relies heavily on *Barenblatt v. United States*, 360 U.S. 109 (1959), a case in which the Supreme Court sustained the conviction of an individual who declined to answer questions posed by the House Un-American Affairs Committee. Even this opinion, which dates from a sad episode in our nation's history, makes clear that "Congress may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation to [a valid legislative] purpose." *Id.* at 127. *Barenblatt* was decided against the defendant only because the Court held that special rules applied to an investigation into the operations and goals of the Communist Party, which sought "the ultimate overthrow of the Government of the United States by force and violence." *Id.* at 128. Justice Harlan explained that "in a different context," the congressional inquiry "would certainly have raised constitutional issues of the gravest character." The June Letter alleges no plot against America, and in the very different factual context presented here, *Barenblatt* supports the position taken by the Funds, not the position taken by the Committee.[4] *See also Gibson v. Florida Legislative*

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[4] In his dissent, Justice Black warned of the dangers of applying *Barenblatt* outside of its narrow context of preventing the spread of communism. *See Barenblatt*, 360 U.S. at 152 ("It is, sadly, no answer to say that this Court will not allow the trend to overwhelm us; that today's holding

Investigation Commission, 372 U.S. 539, 549 (1963) (holding that an attempt to compel the NAACP to disclose its membership is "wholly different from compelling the Communist Party to disclose its own membership").

In short, given the potential chilling effect that can arise from a decision to "incit[e] legal action" without justification, and the absence of any valid government interest—notwithstanding that the Committee must prove a *compelling* government interest—the balance of interests weighs against compelling disclosure and in favor of protecting the Funds' First Amendment rights.

The Investigations Cited As Precedent Are Distinguishable

In support of the document request, the June Letter refers to a number of other Congressional investigations, but those investigations are distinguishable. For example, the investigation conducted by the House Committee on Oversight and Government Reform into the misuse of money by veterans' charities was a bipartisan effort to look at whether those charities, which solicited money through direct mailers to the public, were committing fraud by donating little of the funds they raised to veterans. The investigation was conducted with an eye towards possible legislation that would require greater transparency from charitable organizations in order to make sure that the public was not misled when solicited to provide assistance to our nation's veterans. *See* Philip Rucker, *Chief of Veterans Charities Grilled on Groups' Spending*, WASH POST, Jan. 18, 2008. There is no analogy between that investigation and this one. The Committee has not—nor could it—assert that members of the public were defrauded in any way by the Funds' use of their endowments to make grants to organizations that engaged in independent public advocacy protected by the First Amendment.

Other investigations identified by the Committee have a clear and direct relationship to subjects that are without question within the scope of federal legislative activity: Iran-Contra (whether the President violated federal law by selling weapons to Iran and using the proceeds to fund one side in a civil war in Nicaragua); Whitewater (investigating conduct by a federally regulated savings and loan and later exercising the legislative function of impeachment); Fast and Furious (whether a federal agency conducted an investigation deemed not to be in the public interest); and Benghazi (whether the State Department security laws and procedures were sufficient to protect United States personnel in Libya). An investigation into the legitimacy of state regulatory action bears no resemblance to these prior investigations.

The June Letter also makes a reference to an investigation conducted by former Virginia Attorney General Ken Cuccinelli that used the state government subpoena power to chill speech related to the dangers of climate change. The June Letter attempts to draw an

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will be strictly confined to 'Communists,' as the Court's language implies.") (Black, J., dissenting).

analogy between that state action and the conduct of the Funds, which are non-governmental entities. A campaign of harassment conducted by a state prosecutor against a scientist at the University of Virginia bears no relation to private foundations making grants to organizations engaged in public advocacy. There is no comparison. In any event, the subpoenas issued by Mr. Cuccinelli were ultimately quashed. *See Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 722 S.E.2d 626 (Va. 2012).

The Committee's Document Request is Unduly Burdensome

Finally, even if the Committee's actions were in furtherance of a compelling government interest, the June Letter is not narrowly tailored to achieve such an interest. The June Letter seeks "[a]ll documents and communications" of all personnel of the Funds over a four-and-one-half year time period, with myriad other individuals and institutions, about a broad subject—climate change advocacy involving state regulators—that relates to a program area for the Funds. Due to its breadth, compliance with the June Letter, even if a compelling government purpose had been articulated, would itself burden the First Amendment rights of the Funds. Despite the Funds' objections to the May Letter, the June Letter restated the request in the May Letter without modification. Even where the legislature is entitled to conduct an investigation, it does not follow that "the investigatory body is free to inquire into or demand all forms of information." *Gibson*, 372 U.S. at 545.

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We are available to discuss the June Letter and the serious concerns expressed in this response. Given the essential constitutional rights endangered by the June Letter's request and the extraordinary breadth of the request, the Funds respectfully decline to comply with the request.

Respectfully submitted,

Harry Sandick