

BY FIRST-CLASS MAIL

September 12, 2016

The Honorable Lamar Smith, Chair
Committee on Science, Space, and Technology
United States House of Representatives
2321 Rayburn House Office Building
Washington, DC 20515

Re: Subpoena dated July 13, 2016 Issued to Union of Concerned Scientists

Dear Chairman Smith:

The undersigned constitutional law scholars, civil liberties advocates, and First Amendment litigators write to express their grave concerns about the lawfulness of the subpoenas you issued as Chairman of the House Committee on Science, Space & Technology to the Union of Concerned Scientists, 350.org, Greenpeace, Global Warming Legal Action Project, and four other non-profit organizations on July 13, 2016 (the “Subpoenas”).¹ Those Subpoenas make wholesale demands for the communications between and among the organizations and state law enforcement officials concerning any potential investigation or prosecution “related to the issue of climate change,” and do so out of a purported concern over a possible conspiracy to deprive fossil fuel companies of their First Amendment rights. But the Subpoenas, and the threat of future sanctions, themselves threaten the First Amendment—directly inhibiting the rights of their recipients to speak, to associate and to petition state officials without interference from Congress.

As demonstrated below, these Subpoenas violate the separation of powers, exceed the committee’s delegated authority, abridge the First Amendment, and undermine fundamental principles of federalism. The Subpoenas should not have been issued and should not be enforced. We urge you to withdraw voluntarily these misguided demands for information your committee has no legitimate right to inspect.

Background

The nine organizations you subpoenaed each have a public track record of contributing to a critical international effort to understand global climate change and to combat its causes. The Union of Concerned Scientists (“UCS”), for example, was founded more than four decades ago by M.I.T. faculty and students who sought “[t]o initiate a critical and continuing examination of governmental policy in areas where science and technology are of actual or potential significance.”² In the 1990s, UCS led a delegation of U.S. organizations during negotiations that resulted in the Kyoto Protocol. In the early 2000s, its climate experts played a key role in crafting the Regional Greenhouse Gas Initiative, the first multi-state effort to combat global warming. Over the past fifteen years, UCS has worked to defend scientists from political interference in their work and harassment by public officials and private industry. Today, UCS collaborates with over 17,000 scientists and technical experts to develop and advocate for the

adoption of solutions to the world's most pressing problems. The other organizations targeted with subpoenas have similar records of research and advocacy to promote informed environmental policy-making based on independent science.

In July 2015, UCS released a report documenting what it believed to be a coordinated, decades-long campaign by some fossil fuel companies to distort climate science findings and confuse the public about the risks of climate change.³ According to that report, ExxonMobil and other companies learned of the serious risks of climate change no later than 1977. The report concluded that instead of sounding an alarm and addressing those risks, the fossil fuel companies publicly denied or minimized the risks and secretly funded purportedly independent, contrarian climate research. Around the same time as the UCS report, InsideClimate News and other news organizations published reports independently reaching identical conclusions.⁴

State and federal officials quickly responded to the published reports. In November 2015, New York Attorney General Eric Schneiderman opened an investigation into whether ExxonMobil misled its investors about the risks of climate change. On December 7, 2015, forty-five members of the United States House of Representatives sent a letter to the CEOs of ExxonMobil and other fossil fuel companies asking when their companies learned of climate change and whether their companies had actively misinformed the public about its risks.⁵

On March 29, 2016, Vermont Attorney General William Sorrell and New York Attorney General Schneiderman convened a conference to coordinate state-led efforts to combat climate change. UCS's Director of Science and Policy, Dr. Peter Frumhoff, briefed the conference on climate science and UCS's view that fossil fuel companies should be held accountable for any deception. At the conclusion of the conference, the states in attendance formed a coalition dedicated to combatting climate change, and Massachusetts Attorney General Maura Healy and Virgin Islands Attorney General Claude Walker announced that they would join New York's ongoing investigation into ExxonMobil.

On May 18, 2016, you and twelve Republican members of your committee sent letters to seventeen attorneys general participating in the coalition to combat climate change and the heads of nine non-profit organizations.⁶ The letters expressed concern that the state investigations amounted to "political theater," and indicated that the committee intends to "conduct[] 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."⁷ To assist in this "oversight," the committee members requested the environmental organizations to produce two sets of documents, dating back to January 1, 2012:

1. All documents and communications between any officer or employee of the Union of Concerned Scientists and any officer or employee of the office of a state attorney general, referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.

2. All documents and communications between any officer or employee of the Union of Concerned Scientists and any officer or employee of the Climate Accountability Institute, Greenpeace, 350.org, the Rockefeller Brothers Fund, the Rockefeller Family Fund, the Global Warming Legal Action Project, the Pawa Law Group, or the Climate Reality Project referring or relating to the investigation, *subpoenas duces tecum*, or potential prosecution of companies, nonprofit organizations, scientists, or other individuals related to the issue of climate change.⁸

The majority committee members sent similar letters to the attorneys general requesting their climate-change related communications with the environmental organizations, other attorneys general offices, and the federal government. The environmental organizations and the state attorneys general each refused to comply with the committee members' requests.

You responded by issuing *subpoenas duces tecum* to the heads of the nine organizations and to the attorneys general for Massachusetts and New York, demanding production of the same documents requested in the earlier letters from the committee members.⁹ Once again, the recipients declined to produce their records.

To date the committee has taken no action to enforce your Subpoenas. On August 30, 2016, you scheduled a full committee hearing for September 14, 2016, entitled "Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas."¹⁰ We write in advance of that hearing to explain why the Subpoenas issued to the nine organizations cannot be enforced without violating the dictates of the Constitution in multiple respects.

The Subpoenas Violate the Separation of Powers, Exceed The Committee's Authority And Abridge The First Amendment

When UCS and other organizations discussed their concerns about what they viewed as the apparently intentional distortion of climate science with state attorneys general and with each other, they were exercising their constitutional rights. The First Amendment guarantees, among other rights, the rights to speak freely, to petition the government, and to associate with others for the advancement of beliefs and ideas.¹¹ The right to petition entitles citizens to communicate with their government bodies and officials to express ideas, hopes, and concerns.¹² It incorporates the right to associate with others in a joint effort to convince the government to take particular actions.¹³ The right to associate, in turn, permits groups to associate freely and in private, so long as they are not engaged in subversive or illegal activity.¹⁴

Your Subpoenas infringe the organizations' exercise of these First Amendment rights. The rights of association and petition are as fundamental and precious to our society as they are delicate and vulnerable.¹⁵ "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action."¹⁶ Likewise, subjecting individuals to onerous legal process for petitioning the government impermissibly penalizes and restrains the

exercise of that right.¹⁷ Your Subpoenas do just that. They require UCS and other organizations to disclose not only the fact of their affiliation with other environmental organizations to promote government action, but also the nature of those relationships. They also impose onerous burdens on these organizations specifically for having petitioned state officials to act, including by requiring them to disclose nearly four years of communications.

Congress, however, may no more infringe the exercise of First Amendment rights by subpoena than by law.¹⁸ It is well established that a congressional subpoena that intrudes on the exercise of First Amendment rights can only properly be enforced if it meets three conditions. *First*, the subpoena must fall within Congress's general investigatory authority. *Second*, the subpoena must be issued by a committee with specific, unequivocal authorization to conduct an investigation that intrudes on First Amendment rights. *Third*, there must be a substantial relation between the information sought and a subject of overriding and compelling government interest. Your committee's Subpoenas to UCS and the other organizations meet none of these conditions and are patently improper.

a. The Subpoenas exceed Congress' authority and violate the separation of powers.

It is axiomatic that Congress's authority to issue subpoenas must be tied to the exercise of legislative authority granted to it by Article I of the Constitution. Stated differently, Congress may only exercise its investigatory power when doing so is "related to, and in furtherance of, a legitimate task of Congress."¹⁹ Congress, however, possesses no power to investigate in order to enforce laws and punish lawbreakers.²⁰ Separation of powers dictates that "[t]hese are functions of the executive and judicial departments of government," not the legislative department.²¹

Under this basic principle, your Subpoenas to the nine organizations should not have been issued, and Congress lacks the authority to enforce them. While there may be occasions where Congress could appropriately authorize an investigation into apparent systemic violations of constitutional rights that require a legislative response, Congress is not a prosecutor and may not properly use its subpoena power simply to pursue perceived First Amendment violations. This is particularly so where, as here, the asserted constitutional violations by the environmental organizations are themselves self-evidently protected First Amendment activity.

If the executive is concerned about a possible conspiracy, the Department of Justice can investigate and file suit where appropriate. If state attorneys general are seeking to deprive fossil fuel companies of their First Amendment rights, the federal courts are open to those companies, armed with the appropriate authority to rebuff any unconstitutional encroachment.²² Investigating illegal conspiracies and ensuring that individuals are not deprived of their constitutional rights are functions of the executive and judicial branches, not Congress. As the Supreme Court reminded us decades ago, "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."²³

b. Your Committee lacks specific authority to issue the Subpoenas.

Even if Congress possessed general authority to investigate the actions of the attorneys general here, your committee lacks the specific authority necessary to issue the Subpoenas

demanding disclosure of the First Amendment activities of private organizations. Before a committee may issue subpoenas that so directly intrude upon First Amendment rights, Congress must “demonstrate[] its full awareness of what is at stake” by “unequivocally” authorizing an inquiry that “raises doubts of constitutionality in view of the prohibition of the First Amendment.”²⁴ As the Supreme Court has explained, that means the delegation of that power to the committee must be clearly revealed in its charter.²⁵

For example, in *United States v. Rumely*, 345 U.S. 41 (1953), the Supreme Court held that the House Select Committee on Lobbying Activities lacked authority to compel a witness to disclose the names of those who purchased books espousing particular political views.²⁶ That committee’s charter specified that it was “authorized and directed to conduct a study and investigation of . . . all lobbying activities intended to influence, encourage, promote, or retard legislation.”²⁷ The committee’s Chair contended that the committee’s authority to investigate “lobbying activities” permitted it to compel testimony in order to investigate “attempts to saturate the thinking of the community.”²⁸ The Supreme Court disagreed. It held that Congress had not “inescapably” delegated the committee with power to conduct an inquiry of dubious constitutionality.²⁹ Invoking the canon of constitutional avoidance, the Court narrowly construed the authority to investigate “lobbying activities” as authorizing only investigations of traditional lobbying activities which did not intrude on First Amendment rights.³⁰

So also here, Congress has not “inescapably” delegated to your committee the authority to issue subpoenas that directly impinge First Amendment rights. Your Committee’s charter reads as follows:

(k) The Committee on Science, Space, and Technology shall review and study on a continuing basis laws, programs, and Government activities relating to nonmilitary research and development.³¹

No fair reading of this charter unequivocally demonstrates that the House of Representatives specifically intended to authorize the committee to issue subpoenas that intrude on their recipients’ First Amendment rights. Nor do the House Rules delegate to the committee any special investigatory power. Those rules grant your committee only the same generic investigatory authority allotted all standing committees: to “conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities under rule X.”³²

c. The Subpoenas are unenforceable under controlling Supreme Court precedent.

Even if the committee possessed the specific authority it needed, the Subpoenas issued to UCS and the other organizations would still be constitutionally impermissible. When Congress does inescapably delegate authority to conduct an investigation that intrudes on First Amendment rights, courts must determine whether any subpoena issued pursuant to that authority is permissible under the Constitution.³³ In *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963), the Supreme Court laid out the test to be applied: A legislative subpoena intruding on First Amendment rights is permissible only when the legislature “convincingly show[s] a substantial relation between the information sought and a subject of

overriding and compelling [government] interest.”³⁴ As the Court explained, “to impose a lesser standard . . . would be inconsistent with the maintenance of those essential conditions basic to the preservation of our democracy.”³⁵

To meet *Gibson*’s strict test, Congress must first lay an adequate factual foundation for inquiry by producing a “reasonable, demonstrated factual basis to believe” that a subpoena’s recipient is either engaged in unlawful activity or meaningfully associated with such activity.³⁶ Indirect or unsubstantiated evidence of illegal activity is insufficient.³⁷ The Court’s imposition of such a high evidentiary threshold stems directly from the lessons of the McCarthy era, which taught us that suspicions of illegal activity can too easily provide a basis to use the subpoena power improperly to investigate political opponents and suppress First Amendment rights. To guard against such abuse, *Gibson* requires any congressional subpoena that impinges on First Amendment rights to be supported by a factually substantiated connection between known unlawful conduct and a highly significant government interest.

For example, in *Barenblatt v. United States*, 360 U.S. 109 (1959), the Supreme Court permitted a House subcommittee to compel a witness to disclose his association with the Communist Party.³⁸ The Court explained that the intrusion into the witness’s First Amendment rights was justified based on society’s interest in “self-preservation” and “the close nexus between the Communist Party and violent overthrow of government.”³⁹ But the Court took pains to note that even the government’s interest in preventing its own violent demise will not always override individuals’ First Amendment rights. It explained that “indication[s] . . . that the Subcommittee was attempting to pillory witnesses,” that the witness’s appearance “follow[ed] from indiscriminate dragnet procedures[] lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee,” or that the questions posed were irrelevant could “lead to the conclusion that the individual interests at stake [are] not subordinate to those of the state.”⁴⁰

Likewise, Congress cannot meet *Gibson*’s test with mere suspicions of possibly unlawful conduct. Indeed, that is the key lesson from *Gibson* itself. In that case, the Florida legislature had issued a subpoena to the Miami branch of the N.A.A.C.P. demanding its membership list. The subpoena was purportedly issued in support of the legislature’s inquiry into the infiltration of Communists into domestic organizations, and the legislature defended its propriety based on an investigator’s testimony that fourteen persons with Communist affiliations were either members of the NAACP branch or participated in its meetings.⁴¹ The Supreme Court found this evidence entirely insufficient, because “[m]ere presence at a public meeting or bare membership—without more—is not infiltration of the sponsoring organization.”⁴² The Court held that the legislature’s subpoena power must yield to the NAACP’s First Amendment rights because the Florida legislature “neither demonstrated nor pointed out any threat to the State by virtue of the existence of the N.A.A.C.P. or the pursuit of its activities or the minimal associational ties of the 14 asserted Communists.”⁴³

The lesson from *Gibson* is that legislatures cannot issue subpoenas that infringe upon First Amendment rights on the basis of unsubstantiated accusations or suspicions of unlawful conduct. The committee ignores that teaching. It has made *no* claim that the organizations have engaged in any unlawful activity. To the contrary, the letter written to UCS by the majority

committee members on May 18, 2016, contends that UCS's wrongful conduct consists of associating with other organizations to persuade state attorneys general to prosecute fossil fuel companies.⁴⁴ But associating with others to petition state attorneys general to redress grievances is *not* unlawful; it is explicitly protected by the First Amendment.

Nor has the committee identified the sort of compelling government interest necessary to override the organizations' associational rights under *Gibson*. While bad faith investigations undertaken by prosecutors for a wrongful purpose might give rise to constitutional concerns, we have no evidence of that here. Rather, we have an investigation into whether or not companies violated state "securities, business and consumer fraud laws."⁴⁵ This kind of investigation cannot be compared to those into the existential threats posed by Communist infiltration of domestic organizations at the height of the Cold War. It cannot plausibly be stated that the ambitions of the environmental organizations "include the ultimate overthrow of the Government of the United States by force and violence."⁴⁶

You have expressed concern about the good faith of the decisions of the state attorneys general to proceed as they have. Of course, that is a topic you are fully protected by the First Amendment in raising, both on and off the floor of Congress. That very issue has been raised in various courts by recipients of the subpoenas issued by the state attorneys general. What you may not do, however, is to use your power to issue compulsory process to require production of the internal files of organizations that are in the process of exercising their First Amendment rights where there is no basis, let alone any compelling one, for you to do so.

In the absence of any compelling government interest, it goes without saying that there is no "substantial relation between the information sought and a subject of overriding and compelling [government] interest."⁴⁷ Your Subpoenas plainly fail to satisfy *Gibson*'s requirements and should be withdrawn.

The Subpoenas Violate Fundamental Principles of Federalism

The constitutions of many states also independently guarantee to the nine organizations a *state* right to associate and petition, apart from their corresponding federal rights.⁴⁸ For example, New York's constitution guarantees individuals the "right of association"⁴⁹ and the right "to petition the government, or any department thereof."⁵⁰ State rights to petition state governments are particularly fundamental to states' sovereignty. They lie at the very heart of representative government, defining one of the basic aspects of individuals' relationships with states.⁵¹ Your Subpoenas equally infringe upon these state-guaranteed rights.

Even if these state constitutional rights are not insurmountable, there is a strong presumption that Congress does not override state law lightly.⁵² Courts generally will infer a congressional intent to authorize the overriding of state law only when doing so is "the clear and manifest purpose of Congress."⁵³ For the reasons explained above, nothing in the charter of your committee indicates that Congress has clearly and manifestly authorized it to issue subpoenas that infringe state-law rights.⁵⁴ Moreover, Congress could not have authorized the Subpoenas for the further reason that they effectively deprive UCS and the organizations of their right to petition state governments in violation of the federal Constitution's Guarantee Clause.⁵⁵

* * *

For all of these reasons, your June 13, 2016, subpoenas to the nine organizations are invalid and constitutionally impermissible. We urge you to withdraw them promptly. Should Congress seek to enforce them, we are confident that a federal court will take seriously the lessons this country learned from McCarthyism and refuse to do so.

Very truly yours,

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¹ The environmental organizations subpoenaed are 350.org; Climate Accountability Institute; Climate Reality Project; Global Warming Legal Action Project; Greenpeace, Pawa Law Group, P.C.; The Rockefeller Brothers Fund; Rockefeller Family Fund; and UCS. The Subpoenas to those organizations are available at <http://democrats.science.house.gov/letter/document-requests-sent-state-attorneys-general-and-environmental-groups>.

² *Founding Document: 1968 MIT Faculty Statement*, Union of Concerned Scientists, http://www.ucsusa.org/about/founding-document-1968.html#.V6jSMWX9_04 (last visited Aug. 8, 2016).

³ Kathy Mulvey et al., *The Climate Deception Dossiers: Internal Fossil Fuel Industry Memos Reveal Decades of Corporate Disinformation*, Union of Concerned Scientists (July 2015), <http://www.ucsusa.org/sites/default/files/attach/2015/07/The-Climate-Deception-Dossiers.pdf>.

⁴ See, e.g., Katie Jennings et al., *How Exxon Went From Leader to Skeptic On Climate Change Research*, L.A. TIMES (Oct. 23, 2015), <http://graphics.latimes.com/exxon-research/>; Sara Jerving et al., *What Exxon Knew About The Earth's Melting Arctic*, L.A. TIMES (Oct. 9, 2015), <http://graphics.latimes.com/exxon-arctic/>; Neela Banerjee et al., *Exxon Believed Deep Dive Into Climate Research Would Protect Its Business*, INSIDE CLIMATE NEWS (Sept. 17, 2015), <https://insideclimatenews.org/news/16092015/exxon-believed-deep-dive-into-climate-research-would-protect-its-business>; Neela Banerjee et al., *Exxon's Own Research Confirmed Fossil Fuels' Role in Global Warming Decades Ago*, INSIDE CLIMATE NEWS (Sept. 16, 2015), <https://insideclimatenews.org/news/15092015/Exxons-own-research-confirmed-fossil-fuels-role-in-global-warming>.

⁵ Letter from Members of Congress to Fossil Fuel CEOs (Dec. 7, 2015), https://lieu.house.gov/sites/lieu.house.gov/files/documents/1214_001.pdf.

⁶ See *State Attorneys General and Environmental Groups Document Requests and Responses*, H. COMM. ON SCI., SPACE, & TECH. (June 3, 2016), <http://democrats.science.house.gov/letter/document-requests-sent-state-attorneys-general-and-environmental-groups>.

⁷ Letter from U.S. House, Committee on Science, Space, and Technology, to Kenneth Kimmell, President, Union of Concerned Scientists (May 18, 2016), <https://science.house.gov/sites/republicans.science.house.gov/files/documents/05.18.16%20SST%20Letter%20to%20UCS.pdf>.

⁸ *Id.*

⁹ See, e.g., Subpoena from U.S. House, Committee on Science, Space, and Technology to Kenneth Kimmell, President, Union of Concerned Scientists (July 13, 2016), <http://democrats.science.house.gov/sites/democrats.science.house.gov/files/documents/UCS%20Subpoena.pdf>.

¹⁰ *Full Committee Hearing - Affirming Congress' Constitutional Oversight Responsibilities: Subpoena Authority and Recourse for Failure to Comply with Lawfully Issued Subpoenas*, COMM. ON SCI., SPACE & TECH., <https://science.house.gov/legislation/hearings/full-committee-hearing-affirming-congress-constitutional-oversight> (last visited Aug. 31, 2016).

¹¹ U.S. CONST. amend. I; *Nat'l Ass'n for Advancement of Colored People v. State of Ala.* ex rel. *Patterson* (“*Patterson*”), 357 U.S. 449, 460 (1958).

¹² *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388–89 (2011).

¹³ *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 525 (2002) (quoting *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 131 (1961)) (internal alterations omitted).

¹⁴ *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557–58 (1963).

¹⁵ *Gibson*, 372 U.S. at 544; *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963).

¹⁶ *Patterson*, 357 U.S. at 462.

¹⁷ *See Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1757 (2014) (“We crafted the *Noerr–Pennington* doctrine . . . to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances.”); *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137–38 (1961); *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983).

¹⁸ *Watkins v. United States*, 354 U.S. 178, 197 (1957).

¹⁹ *Id.* at 187.

²⁰ *See id.* at 200 (observing that there is no congressional power “to expose for the sake of exposure,” or to investigate in order “to ‘punish’ those investigated”).

²¹ *Id.*

²² 28 U.S.C. § 2201(a).

²³ *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983).

²⁴ *United States v. Rumely*, 345 U.S. 41, 46 (1953).

²⁵ *Watkins*, 354 U.S. at 198.

²⁶ *United States v. Rumely*, 345 U.S. 41, 44 (1953).

²⁷ *Id.*

²⁸ *Id.* at 47 (internal quotation marks omitted).

²⁹ *Id.* at 46, 48.

³⁰ *Id.* at 46, 48.

³¹ H.R. Rule X(3)(m).

³² H.R. Rule XI(1)(b)(1).

³³ *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 545–46 (1963).

³⁴ *Id.* at 546.

³⁵ *Id.* at 558.

³⁶ *Id.* at 551, 555.

³⁷ *Id.* at 555.

³⁸ *Barenblatt v. United States*, 360 U.S. 109, 127-28 (1959).

³⁹ *Id.* at 128.

⁴⁰ *Id.* at 134.

⁴¹ *Gibson*, 372 U.S. at 551.

⁴² *Id.* at 552.

⁴³ *Id.* at 555.

⁴⁴ Letter from U.S. House, Committee on Science, Space, and Technology, to Kenneth Kimmell, President, Union of Concerned Scientists (May 18, 2016), <https://science.house.gov/sites/republicans.science.house.gov/files/documents/05.18.16%20SST%20Letter%20to%20UCS.pdf>.

⁴⁵ Letter from Leslie B. Dubeck, Counsel, New York Office of the Attorney General, to Lamar Smith, Chairman, House Comm. On Science, Space & Tech. (May 26, 2016), http://democrats.science.house.gov/sites/democrats.science.house.gov/files/documents/NY_in_05.26.16.pdf.

⁴⁶ *Barenblatt v. United States*, 360 U.S. 109, 128 (1959).

⁴⁷ *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963).

⁴⁸ *See, e.g.*, CAL. CONST., art. 1, § 3(a) (“The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.”); MASS. CONST., art. XIX (“The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.”).

⁴⁹ *Golden v. Clark*, 564 N.E.2d 611, 613 (N.Y. 1990).

⁵⁰ N.Y. CONST., art. I, § 9.

⁵¹ *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991).

⁵² *Cf. Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

⁵³ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

⁵⁴ *See supra* at p. 5.

⁵⁵ *Compare* U.S. CONST., art. IV, § 4 (guaranteeing “every state in this union a republican form of government”), *with* *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 524–25 (2002) (explaining that the right to petition the government “is implied by ‘the very idea of a government, republican in form’” (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876))); *cf. Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1757 (2014) (“We crafted the

Noerr–Pennington doctrine . . . to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances.”); *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137–38 (1961); *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983).