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July 26, 2016

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

Dear Chairman Smith:

This letter responds to the Subpoena issued on July 13, 2016, by you, as Chair of the House Committee on Science, Space, and Technology, to the New York State Office of the Attorney General (NYOAG).

The Subpoena is an unprecedented effort to target ongoing state law enforcement "investigation[s] or potential prosecution[s]." If enforced, the Subpoena will have the obvious consequence of interfering with the NYOAG's investigation into whether ExxonMobil made false or misleading statements in violation of New York's business, consumer, and securities fraud laws. Although the Committee purports to be acting out of First Amendment concerns, those concerns cannot be anything but pretense as "the First Amendment does not shield fraud." *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003).

The Subpoena brings us one step closer to a protracted, unnecessary legal confrontation, which will only distract and detract from the work of our respective offices. Accordingly, we continue to hope that the Committee Staff will be in touch, as they said they would be, to schedule a time to speak, with minority participation, about the Committee's requests. While the NYOAG will not allow a Congressional investigation to impede the sovereign interests of the State of New York, this Office remains willing to explore whether the Committee has any legitimate legislative purpose in the requested materials that could be accommodated without impeding those sovereign interests. Unfortunately, our attempts to initiate such a discussion—by telephone call to Committee Staff and in our written response to you on July 13—were met with a subpoena.

The Committee's demand for documents and communications from the office of a duly elected State Attorney General regarding an ongoing investigation of potential state law violations raises grave federalism concerns. *See, e.g.*, *FERC v. Mississippi*, 456 U.S. 742, 761

(1982) ("[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature."). Indeed, we have found no precedent for the issuance of such a subpoena.

These problems are compounded by the inability to ascertain the subject under inquiry (due in part to the Chair's and certain members' vague and shifting statements), how the Subpoena's requests are pertinent to that subject, or even the Committee's source of authority for the putative investigation. *See Watkins v. United States*, 354 U.S. 178, 214–15 (1957).

Subject to further supplementation, the NYOAG presents the following objections to the Subpoena. These objections challenge the Subpoena's validity and explain why compliance is not currently possible.[1] Again, the NYOAG stands ready to discuss these issues and your concerns with staff, and to explore whether we can come to a mutually beneficial understanding of the roles of our respective offices.

Should you choose to pursue compliance with the Subpoena, the NYOAG requests—consistent with Ranking Member Johnson's request for Committee involvement (July 7, 2016 Press Release)—the opportunity to be heard by the full Committee on these objections and to have the whole Committee resolve all objections to compliance with the Subpoena. While the Committee Rules may authorize the Chair to issue a subpoena, neither those Rules nor the House Rules provide for resolution of objections by less than the whole Committee. Moreover, because the Subpoena appears to be utterly unprecedented in seeking information from a State Attorney General about an ongoing investigation of potential violations of state law, resolution of these objections by less than the whole Committee would show a profound disrespect for the important constitutional interests at stake.

A. The Subpoena Violates New York's Sovereignty and Interferes with a State Law Enforcement Investigation

To be valid, the exercise of a committee's investigative power must be "related to and in furtherance of a legitimate task of Congress." *Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 505 (1975). Congress's authority ends where States' sovereign rights begin. That inherent sovereignty is reflected in the U.S. Constitution's Tenth Amendment, which "confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. 144, 157 (1992). And it is generally understood that a Congressional committee may not "inquire into matters which are . . . reserved to the States." Brown *et al.*, House Practice: A Guide to the Rules, Precedents and Procedures of the House 249 (GPO 2011).

On its face, the Subpoena transgresses limits on Federal power by installing individual members of Congress as overseers of New York's local law enforcement decisions. Federal

[1] The recipient of a subpoena is entitled to have objections resolved before a demand for compliance. *See, e.g.*, *McPhaul v. United States*, 364 U.S. 372, 378–79 (1960); *Quinn v. United States*, 349 U.S. 155, 167 (1955). A recipient is not required to comply with any portion of a partially invalid subpoena. *See United States v. Patterson*, 206 F.2d 433, 434 (D.C. Cir. 1953) (citing *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221 (1951)).

interference with state law enforcement "is peculiarly inconsistent with our federal framework." *Cameron v. Johnson*, 390 U.S. 611, 618 (1968) (quotation marks omitted). As several Democratic members of the Committee have observed, the Committee's request "is not lacking for irony" given that States' rights have long been "a central pillar of conservative philosophy." June 23, 2016 Letter from Ranking Member Johnson at 7 (quoting June 2, 2016 Letter from Hon. Donald S. Beyer, Jr. *et al.*, at 2).

Further, compelling State Attorneys General to report to a Congressional committee regarding a pending state investigation "could not do otherwise than seriously prejudice law enforcement." Position of the Executive Department Regarding Investigative Reports, 40 U.S. Op. Att'y Gen. 45, 46 (1941) (explaining basis for U.S. Attorney General's decision not to produce FBI and DOJ records in Congressional investigation).

That the Subpoena targets the NYOAG's communications with other entities—rather than purely internal communications—does not lessen the constitutional harm. As the Chair noted in the correspondence preceding the Subpoena, New York and other States are working together to investigate possible state law violations arising from what certain companies disclosed (or failed to disclose) to investors and consumers. Other States—and their Attorneys General—have the same sovereign interests as New York does, and any communications with those States were made in furtherance of a common law enforcement interest.

In addition, the nongovernmental entities named in the Subpoena have First Amendment rights of free speech and "to express their ideas, hopes, and concerns to their government and their elected representatives," rights that are "integral to the democratic process." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011) (Kennedy, J.). "In representing the People," New York's Attorney General has gathered facts from various individuals and entities and may take these into account in "decid[ing] upon the remedies which he wishes to employ." *People v. Bunge Corp.*, 25 N.Y.2d 91, 100 (1969). Disclosure of these communications to the Committee would stymie the NYOAG's law enforcement functions and chill communications between third parties and the NYOAG, along with other exercises of valued First Amendment rights.

This Office is not aware of any prior Congressional subpoena directed at a State Attorney General, let alone a subpoena seeking to compel an Attorney General to turn over confidential law enforcement material relating to the ongoing "investigation or potential prosecution of" state law violations. *See* Schedule to Subpoena. This precedential vacuum bars any "assumption that the Federal Government may command the States' executive power" in this fashion. *Printz v. United States*, 521 U.S. 898, 909 (1997) (Scalia, J.). We are aware of only one somewhat analogous subpoena ever issued by Congress, and it was held unenforceable by the D.C. Circuit to the extent it purported to authorize "such a novel investigation" into state-level matters—power not inferable from the general language setting forth the committee's jurisdiction. *Tobin v. United States*, 306 F.2d 270, 276 (1962). The court went on to warn that even an express authorization by the House to conduct such a "deep and penetrating" inquiry into the operations

of a state-level agency (there, the Port Authority of New York and New Jersey[2]) "would of course present constitutional issues" regarding the division of power in our federal system. *Id.* at 276. That system "requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999) (Kennedy, J.).

Just as Congress may not pass legislation "that is destructive of state sovereignty," *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985), the Committee may not destroy state sovereignty by intruding into an ongoing state law enforcement investigation by an elected state official through use of a Congressional subpoena.[3] "[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *New York*, 505 U.S. at 166.

B. Specific Objections and Requests for Clarification

Apart from the objection that compliance with the Subpoena would impair New York's sovereign integrity, as well as the NYOAG's ability to conduct law enforcement investigations of potential violations of state law, the Subpoena is invalid for other reasons.

1. The Committee has not been authorized to request documents relating to a State's investigation or potential prosecution of state law violations

To investigate a topic, a Congressional committee must have "a clear delegation" of authority to do so. *Gojack v. United States*, 384 U.S. 702, 716 (1966). A committee cannot compel someone "to make disclosures on matters outside that area." *Watkins*, 354 U.S. at 206. Similarly, a House committee may issue subpoenas only "[f]or the purpose of carrying out any of its functions and duties." House Rule XI.2(m)(1).

The May 18, 2016 letter from the Chair and certain Committee members professed no legislative purpose, invoked no express oversight authority, and purported to exert jurisdiction as if the NYOAG were a mere department of the Federal Government amenable to oversight by Congress. While the later June 17, 2016 letter continued to rest on oversight jurisdiction over the Federal Government, it also asserted a new claim of jurisdiction: the Committee's special oversight function to "review and study on a continuing basis laws, programs, and Government

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[2] The federalism concerns raised by the Subpoena are significantly greater than those that led to the D.C. Circuit's warning in *Tobin*. There, the Congressional subpoena was issued to a bistate entity created with the consent of Congress; the Court of Appeals still upheld the entity's refusal to produce internal documents to avoid constitutional problems. Here, Congress seeks to compel the production of documents in an open investigative file maintained by a State Attorney General.

[3] *See In re Special April 1977 Grand Jury*, 581 F.2d 589, 592 (7th Cir. 1978) (recognizing possibility that a *grand jury* subpoena might impermissibly impair a State's integrity or ability to function effectively in a federal system, but rejecting the argument because the grand jury there "ha[d] not embarked on a 'grandiose, brazen fishing expedition . . . into the affairs of the State of Illinois'"). Neither that decision, nor any of the other decisions cited in the July 6, 2016 letter (at n.3), supports the invasive subpoena issued here. Indeed, the other decisions cited did not involve a state official's invocation of state sovereignty at all.

activities relating to nonmilitary research and development," House Rule X.3(k), that fall within the Committee's authority over legislation for "[s]cientific research, development, and demonstration, and projects therefor" and for "[e]nvironmental research and development," House Rule X.1(p)(4), (14). Any "right to exact testimony and to call for the production of documents must be found in this language." *United States v. Rumely*, 345 U.S. 41, 44 (1953). None is apparent.

The above-quoted provisions of the House Rules do not contemplate the Committee's exercising oversight by collecting materials relating to a state law enforcement official's pursuit of possible violations of state law. Although Committee oversight extends to "Government activities," House Rule X.3(k), the word "Government" plainly refers to the Federal Government, *see, e.g.*, House Rule X.1(n)(11) (mentioning "[r]elationship of the Federal Government to the States and municipalities generally"). Indeed, several other Committee members agree that this investigation "patently exceeds" the Committee's jurisdiction by "squarely represent[ing] an attempt to oversee state prosecutorial conduct." June 2, 2016 Letter from Beyer *et al.*, at 2; *see also* June 23, 2016 Letter from Ranking Member Johnson at 9 (stating the Committee "fall[s] far short of having jurisdiction over state police powers or fraud laws").

Here, again, the Committee appears to ignore the "critically important" presumption "that Congress does not normally intrude upon the police power of the States." *Bond v. United States*, 134 S. Ct. 2077, 2092 (2014) (Roberts, C.J.). Few features of our constitutional system are more valuable than "the exercise of state officials' prosecutorial discretion," which "involves carefully weighing the benefits of a prosecution against the evidence needed to convict, the resources of the public fisc, and the public policy of the State." *Id.* at 2092–93. The Committee can point to no evidence that the NYOAG's fraud investigation is anything other than an appropriate exercise of state police power. Nevertheless, even if some committee members disagree with the purpose of the NYOAG's investigation, the Committee has no jurisdiction to investigate the use of state police power. After all, the Committee's jurisdiction (House Rule X) does not, and could not, include language evidencing a "clear intent" to usurp such state-level decision making. *See Bond*, 134 S. Ct. at 2093.

Moreover, it is not enough that some creative attorney might find a way theoretically to connect this inquiry to the Committee's generally stated authority. The Committee's authorizing language will be read narrowly "to obviate the necessity of passing on serious constitutional questions," especially given that the Committee's investigation is "novel." *See Tobin*, 306 F.2d at 274–75. For example, even an express grant of subpoena power over interstate compacts will not validate a "sweeping investigation" into the inner workings of a multistate agency created by such a compact. *Id.* at 271, 275. Likewise, the courts require Congress to be more "explicit" if it "wishe[s] to authorize so extensive an investigation of the influences that form public opinion" as by subjecting communications between various private and governmental entities to disclosure and review. *Rumely*, 345 U.S. at 47.

2. The Committee has not identified any specific oversight function or existing or prospective legislation to which the Subpoena relates

The June 17, 2016 letter (at 3) accuses States of violating unnamed "scientists' First Amendment rights" and cites "a duty to investigate" these purported violations.[4] "[T]he power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn v. United States*, 349 U.S. 155, 161 (1955). "Nor is the Congress a law enforcement or trial agency." *Watkins*, 354 U.S. at 187.

In issuing the Subpoena, the Chair and certain Committee members appear to have ignored these important separation-of-powers distinctions. At the recent press conference announcing the Subpoena, Chairman Smith stated: "In my view it's scientific opinion and free speech, not fraud. And as I said I'm 100% confident that a court will find that." That is ultimately a question for a state court to decide in the event litigation is commenced. Well-settled limitations on legislative power demand that Congress leave such a question—*i.e.*, whether "particular actions [have] violated the" law—"for judicial determination." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1325–26 (2016). As members of your own Committee acknowledge, "Judges, rather than Members of Congress, have both the jurisdiction and the legal training to determine the merits of legal arguments." June 2, 2016 Letter from Beyer *et al.*, at 4.

Nor is it apparent how the Subpoena is "intended to inform Congress in an area where legislation may be had." *Eastland*, 421 U.S. at 506. The Committee has mentioned a vague "intent of providing a legislative remedy, if warranted," for the alleged chilling of speech. June 17, 2016 Letter at 4. However, Congress's power is limited in this area. Congress has no power to "decree the substance of" the Bill of Rights or "to determine what constitutes a constitutional violation." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (quotation marks omitted). The Framers of our Constitution rejected "a system of intermingled legislative and judicial powers," along with the "factional strife and partisan oppression" that such a system inevitably produces. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (Scalia, J.).

3. The inquiry's subject matter otherwise remains uncertain

The recipient of a Congressional subpoena has the right to be "adequately apprised" of the inquiry's subject matter and the pertinency thereto of the questions before responding. *Barenblatt v. United States*, 360 U.S. 109, 116–17 (1959); *see also Wilkinson v. United States*, 365 U.S. 399, 409 (1961). Assessing the legal sufficiency of a Congressional demand for information requires determining the subject matter of the underlying inquiry. *See, e.g.*, *Wilkinson*, 365 U.S. at 407. An "authorizing resolution, the remarks of the chairman or members of the committee, or even the nature of the proceedings themselves, might sometimes make the topic clear." *Watkins*, 354 U.S. at 209. In the absence of a specifically expressed legislative goal,

[4] The letter (at 2) also cites "approximately $40 billion" in federal research spending that "is allocated by departments and agencies under the Science Committee's jurisdiction," without tying any of that money to research relating to the NYOAG's investigation of securities fraud, business fraud, or consumer fraud.

the vague and shifting statements of purpose by the Chair and Committee members "leave the matter in grave doubt." *See id.* at 206.

The Subpoena does not describe the investigation's subject matter or how the material sought might further the Committee's inquiry. Nor has the Committee pointed to any specific authorizing resolution. Other sources shed minimal light on the inquiry's true goal:

- The May 18, 2016 letter professed (at 1) that the Committee was "conducting 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." The letter went on to question the state investigators' "impartiality and independence" and their use of state "taxpayer dollars" (at 4), and whether the investigations "run counter to an attorney general's duty to serve" the public interest or "amount to an abuse of prosecutorial discretion" (at 1).

- The letter of June 17, 2016 (at 2) shifted the focus from state to federal taxpayers, relaying a new purpose of "ensuring that all scientists, especially those conducting taxpayer-funded research, have the freedom to pursue any and all legitimate avenues of inquiry." The letter concluded (at 3–4) by stating that "[t]he Committee's investigation is intended to determine whether" the various state investigations were "chill[ing] scientific research, including research that is federally-funded."

- The letter of July 6, 2016 (at 2) goes farther, calling it "a goal of this Committee" to protect the ability of all scientists "to conduct research uninhibited by the potential adverse effects of investigations by law enforcement"—now apparently without regard for whether the investigation is lawful or chills *protected* speech, as distinguished from unprotected speech, including speech used to perpetrate fraud.

- Finally, at a press conference about the Subpoena, the Chair and several Committee members returned to the premise that state officials were abusing their discretion. According to Rep. Darin LaHood (R-IL), "[p]rosecutors shouldn't be in this business. It really is an abuse of power." To Rep. Randy Weber (R-TX), the Attorneys General are acting "way beyond the scope of their job duties." According to Rep. Warren Davidson (R-OH), the Attorneys General "are using taxpayer dollars from their states to manufacture charges to send a political message," which "demonstrates a clear deviation from the legal duties of an Attorney General and the possible abuse of their judgment." Chairman Smith likened the investigations "to a form of extortion" to prod settlements, so that the Attorneys General "can obtain funds for their own purposes."[5]

As the Supreme Court has held, "an authoritative specification" of the investigation's subject matter is "necessary for the determination of pertinency." *Gojack*, 384 U.S. at 717. Here,

[5] There is no basis for such speculation. New York law narrowly limits the uses to which settlement moneys can be put, and generally requires that settlement funds not for the benefit of individually harmed parties be deposited in the State's general fund for appropriation by the Legislature. *See* N.Y. Exec. Law § 63(16).

"the broad and conflicting statements of the committee members" make that determination all but impossible. *Id.* at 709 n.7. Indeed, the "vague" and "general" statements thus far suggest that "there [is] no subject." *United States v. Peck*, 154 F. Supp. 603, 611 (D.D.C. 1957). Given the dearth of clarity, the Committee must "state for the record the subject under inquiry" before any response to the Subpoena may be required. *Watkins*, 354 U.S. at 214–15.

4. The requested items are not pertinent to any arguably legitimate topic of the Committee's investigation

Where the declarations of purpose are "as uncertain and wavering as" here, divining what may be pertinent to a committee's inquiry "becomes extremely difficult." *Watkins*, 354 U.S. at 206. As already shown, however, alleged abuse of state discretion over state law enforcement is categorically not a proper matter of Committee inquiry. *See supra* A & B.1. Even if uncovering alleged First Amendment violations were a proper inquiry (and it is not, *supra* B.2), the materials the Subpoena seeks bear scant connection to that objective.

The Committee asserts that the NYOAG's investigative efforts "have the potential to chill scientific research," and it desires to know whether the investigations "are having such an effect." June 17, 2016 Letter at 3–4. As stated in each of the three letters sent in response to the Chair's letters, the NYOAG's relevant investigation (that of ExxonMobil) solely concerns potentially misleading factual statements made to investors and consumers, which would violate New York State law, to wit, New York's General Business Law, Article 22-A § 349 & Article 23-A § 352, and New York's Executive Law § 63(12). As the Supreme Court has unequivocally held: "[T]he First Amendment does not shield fraud." *Telemarketing Assocs.*, 538 U.S. at 612; *see also United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (Kennedy, J.) (reaffirming that First Amendment erects no bar to restricting factual misstatements made for monetary gain).[6] Several members of your own Committee correctly describe New York's activities as an "appropriate exercise of state police power" regarding potential violations of state law (June 10, 2016 Letter from Hon. Paul D. Tonko *et al.*, at 1), and a "proper investigation" into possibly actionable "fraudulent activity" (June 2, 2016 Letter from Beyer *et al.*, at 4).

In any event, the Committee has yet to suggest how the subpoenaed documents would be pertinent to such a professed inquiry. The Subpoena demands "[a]ll documents and communications" between anyone at the NYOAG and anyone at other federal and state agencies or private organizations, in any way "referring or relating to" ongoing investigations. *See* Schedule to Subpoena. This "dragnet seizure" appears "unrelated to [any] legislative business in hand." *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936); *see also Tobin*, 306 F.2d at 276 (holding documents "related only to the why" of state-level public administration to fall outside legitimate scope of Congressional inquiry).

[6] Similarly, under federal law, a company may face liability for skewing or suppressing information the release of which could pose "a significant risk to its leading revenue-generating product." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 46–47 (2011). That the false statements happen to touch on evolving scientific concepts presents no First Amendment problem. *See id.* The Committee's approach simply ignores this well-established law.

Indeed, the relevance of the requested materials appears to be a mystery even to the Chair who unilaterally issued the Subpoena. At the press conference announcing its issuance, Chairman Smith confessed: "I don't know what we will find. It's possible that we might find an intent to intimidate or possible infraction of laws. We don't know. That's why we're asking for this information." Such an invasive request for confidential law enforcement material under hazy authorization and without the slightest inkling of what the material may contain exposes the lack of a valid legislative purpose, and suggests that the Committee's inquiry is nothing more than a fishing expedition.

5. The Subpoena calls for the production of documents that are privileged, confidential, or otherwise protected from disclosure

In New York, the State enjoys the same privileges against disclosure of protected information as do private parties. *See* N.Y. C.P.L.R. § 3102(f). Attorney-client privileged materials and attorney work product are absolutely immune from discovery, whereas trial preparation materials have a qualified privilege from release. *See id.* § 3101(b)–(c). New York legislation also shields from disclosure materials "compiled for law enforcement purposes," if publication would "interfere with law enforcement investigations." Public Officers Law § 87(2)(e). These provisions cover civil as well as criminal enforcement activities. *See James, Hoyer, Newcomer, Smiljanich & Yanchunis, P.A. v. State Office of Att'y Gen.*, 2010 WL 1949120, at *8 (Sup. Ct. N.Y. County 2010). And their protection extends to communications with third parties—such as confidential sources, tipsters, whistleblowers, or others—so long as disclosure would interfere with a law enforcement investigation.

These privileges and protections from disclosure apply to certain communications with others outside the State, if in furtherance of a common interest of the parties and pursuant to an understanding that the parties will maintain the confidence of the communications. *See Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 2016 WL 3188989, at *1 (N.Y. Ct. App. June 9, 2016); *R.F.M.A.S., Inc. v. So*, 2008 WL 465113, at *1 n.2 (S.D.N.Y. 2008) (citing *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 581 (9th Cir. 1987)).

The ability to maintain the confidentiality of communications is critical in an ongoing law enforcement investigation. "Counsel for a defendant or prospective defendant could have no greater help than to know how much or how little information the Government has." 40 U.S. Op. Att'y Gen. at 46 (opinion of U.S. Attorney General Robert H. Jackson). To justify such an incursion into an ongoing state investigation, the Committee must articulate a need for any confidential information sufficient to override New York's policy choices to shield the material from disclosure. Anything less would invalidate the usual presumption "that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties." *Exxon Corp. v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978).

The Subpoena here provides that neither the House nor the Committee recognizes "any of the purported non-disclosure privileges associated with the common law including, but not limited to, the deliberative process privilege, the attorney-client privilege, and attorney work product protections; . . . or any purported contractual privileges, such as non-disclosure

agreements." Schedule Instructions ¶ 13. The Committee has delegated subpoena power to the Chair, *see* Committee Rule IX, pursuant to a House Rule authorizing such delegation, House Rule XI.2(m)(3)(A)(i). There is no Committee rule delegating the authority to overrule claims of privilege to the Chair. In contrast, the Committee Rules do permit the Chair to decide "claims of common-law privileges made by witnesses in hearings"; even then, the delegated authority is subject to appeal to the Committee. Committee Rule III(d). Because the Chair has no delegated authority to determine privilege claims unilaterally, and because the requests are an unprecedented incursion into an ongoing state investigation, the NYOAG expects that claims of privilege will be decided by the whole Committee on Science, Space, and Technology.

* * *

For the foregoing reasons, the NYOAG objects to the Subpoena and cannot, and will not, comply with it. In addition to the obvious Tenth Amendment concerns, the target of a Congressional inquiry cannot be compelled to make disclosures "with so little guidance." *Watkins*, 354 U.S. at 214.

While the Committee considers these objections, the NYOAG will continue to explore whether the Committee has any legitimate legislative purpose in the requested materials that could be provided without impairing the sovereign interests of the State of New York. We look forward to the opportunity to be heard by the Committee as a whole on these objections.

Sincerely,

Leslie B. Dubeck
Counsel

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

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Honorable Paul Tonko
Member, Committee on Science, Space, and Technology