



LAWRENCE & BUNDY

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Andrew D. Herman
Direct Line: (202) 441-5144
andrew.herman@lawrencebundy.com

VIA ELECTRONIC MAIL

The Honorable Jim Jordan
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515-6216

Re: As You Sow

Dear Chairman Jordan:

On behalf of my client, *As You Sow*, I am responding to the House Judiciary Committee's August 1 and August 17, 2023 letters requesting both unreasonably voluminous information relating to the organization's promotion of environmental and social corporate responsibility and a broad range of documents that are irrelevant to *As You Sow*'s activities. The August 1 letter describes the Committee's "matter of inquiry" as the following: "We write because *As You Sow* is potentially violating U.S. antitrust law by entering into agreements to 'decarbonize' corporate assets and reduce emissions to net zero—with potentially harmful effects on Americans' freedom and economic well-being." The August 17 letter further states that the "Committee must understand how and to what extent *As You Sow* facilitates collusion to promote ESG-related goals." Taken together, the letters propound a legal theory that *As You Sow*'s promotion of environmental and social corporate responsibility efforts violates federal antitrust law, specifically "the Sherman Act." According to the Committee's letters, this theory provides the rationale for its oversight and legislative inquiry.

As You Sow respectfully disagrees with the description of its activity and the legal theory propounded by the Committee and therefore the organization is compelled to respond briefly to the Committee's assertions. Founded in 1992, *As You Sow* is an Internal Revenue Code § 501(c)(3) nonprofit entity. The organization describes its work as follows: "As shareholder advocates, we directly engage corporate CEOs, senior management, and institutional investors to take the actions necessary to provide transparency and reduce (material) risk to companies, retirement plans, and the economy."¹

¹ <https://www.asyousow.org/our-work>

As You Sow is a shareholder representative that works to protect the long-term value of shareholder investments. *As You Sow* engages in dialogues with companies on behalf of shareholders on a range of environmental, social, and governance issues, with the goal of reducing risk, benefitting brand reputation, and increasing corporate bottom lines. In addition to engaging with companies, *As You Sow* files advisory shareholder proposals where necessary, and has developed a range of tools to assist shareholders, primarily by providing greater transparency and information to shareholders.

Climate change is an increasingly important source of long-term business risk and opportunity. The federal government’s Fourth National Climate Assessment states that “without substantial and sustained reductions in global greenhouse gas emissions,” the country should expect “substantial net damage to the U.S. economy,” with “annual losses in some economic sectors . . . projected to reach hundreds of billions of dollars by the end of the century—more than the current gross domestic product (GDP) of many U.S. states.”² 93% of S&P 100 companies acknowledge in their 10-Ks that climate change poses a material risk to their enterprises.³ Because there is global consensus on the reality and risks of climate change, the transition to a decarbonized global economy is already underway. As just one example, the International Energy Agency forecasts that renewable energy will account for “almost 95% of the increase in global power capacity through 2026.”⁴

Given these growing risks and opportunities, it should be unsurprising that there is substantial interest among investors in ensuring that the companies they own are addressing climate related risks and opportunity. “Early-mover companies can seize significant advantage by doing so.”⁵ They can “attract and retain better talent, realize higher growth, save costs, avoid regulatory risk, access cheaper capital, and create new sources of value for customers. Done well, this will translate to higher shareholder returns and a sustainable source of competitive advantage.”⁶

² U.S. Global Change Research Program, Fourth National Climate Assessment, Vol. II, at 26 (2018).

³ Yamika Ketu & Todd Miller, *How Companies Are — And Aren’t — Leading on Climate Policy*, Harv. L. Sch. F. on Corp. Gov. (Dec. 12, 2022), <https://corpgov.law.harvard.edu/2022/12/12/how-companies-are-and-arent-leading-on-climate-policy/>.

⁴ Press Release, *Renewable electricity growth is accelerating faster than ever worldwide, supporting the emergence of the new global energy economy*, Int’l Energy Agency (Dec. 1, 2021), <https://www.iea.org/news/renewable-electricity-growth-is-accelerating-faster-than-ever-worldwide-supporting-the-emergence-of-the-new-global-energy-economy>.

⁵ Press Release, *Global Climate Action is Accelerating and Early-Mover Companies Can Seize Significant Advantage*, Boston Consulting Grp. (Jan. 17, 2022), <https://www.bcg.com/press/17january2022-climate-action-accelerating-early-mover-companies-seize-advantage>.

⁶ World Econ. Forum, *Winning the Race to Net Zero: The CEO Guide to Climate Advantage* 4 (2022).

As a result of these trends, climate-related shareholder proposals supported by *As You Sow* have received majority votes at numerous companies, including Caterpillar,⁷ Chubb,⁸ General Electric,⁹ and The Travelers Companies,¹⁰ among others.¹¹

In addition to the flawed depiction of *As You Sow*'s mission and activities, the Committee's letters contain two significant legal defects:

Anti-Trust. There is no precedent or basis in law to support the assertion in your letter that *As You Sow*'s shareholder work "is potentially violating U.S. antitrust law." The Sherman Act's anti-trust provisions prohibit unreasonable restraints on trade such as price fixing, bid rigging, anti-competitive market allocation, and competitor boycotts. The Committee's suggestion that *As You Sow*, a small non-profit organization representing shareholders on issues related to climate change, can somehow unreasonably restrict competition in a global oil and gas market, for instance, is unfounded. *As You Sow* is not the type of market actor with the power to achieve or compel such violations of the Act. In fact, *As You Sow*'s work is pro-competitive and conducted in accordance with a process established by Securities and Exchange Commission (SEC) regulations.¹²

The focus of the Committee's letters raising anti-trust claims appears to be alleged agreements between *As You Sow* and companies to "decarbonize corporate assets." To the extent the market might be impacted if *As You Sow*'s actions encourage companies to address the risks and opportunities of climate change, the impact would likely improve competition by increasing the diversity of energy sources available to companies and consumers and reducing market destabilizing climate change impacts. *As You Sow*'s work to decarbonize companies is publicly available to the Committee as discussed below.

A key tenet of the global marketplace is that market actors making informed decisions will direct capital to its best use. The market transition to a lower carbon economy is well underway and driven by the growing concern about climate change and the real and growing price advantage of renewable energy over fossil fuels. The oil and gas industry and other high carbon companies certainly may be impacted by thousands of individual shareholders, banks, companies, and consumers moving toward lower carbon companies and lower cost energy

⁷ Press Release, *96% of Caterpillar Shareholders Vote in Support of Climate Action — A Critical Development in Decarbonizing U.S. Industrials Sector*, *As You Sow* (June 8, 2022), <https://www.asyousow.org/press-releases/2022/6/8/caterpillar-shareholders-vote-climate-action-decarbonizing-industrials-sector>.

⁸ Press Release, *Majority of Chubb Shareholders Support 1.5°C Emissions Reduction Proposal*, *As You Sow* (May 19, 2022), <https://www.asyousow.org/press-releases/2022/5/19/shareholders-support-climate-change-emissions-reduction-chubb>.

⁹ Press Release, *98% of Shareholders Want GE to Take Climate Action*, *As You Sow* (May 4, 2021), <https://www.asyousow.org/press-releases/2021/5/4/shareholders-want-ge-take-climate-action>.

¹⁰ Press Release, *Investors Send Greenhouse Gas Reduction Message to National Insurance Companies*, *As You Sow* (June 1, 2022), <https://www.asyousow.org/press-releases/2022/6/1/investors-greenhouse-gas-reduction-message-insurance-companies>.

¹¹ See Resolutions Tracker, *As You Sow*, <https://www.asyousow.org/resolutions-tracker>.

¹² See 17 C.F.R. § 240.14a-8.

sources. However, this is a constant of the marketplace – companies, industries, and products change. Using congressional investigatory powers to retain capital in increasingly outdated and harmful industries and products does not serve shareholders or the public. It is far more likely to reduce competition and innovation, impede the stable functioning of the market, and harm Americans’ freedom and economic well-being than the actions of a group like *As You Sow* working to address climate change.

Procedural and substantive legal concerns. In addition to the above, *As You Sow* has significant concern about the Committee’s stated rationale for issuing its letters of inquiry. Congress’s investigatory authority is subject to constitutional and jurisprudential limits, most fundamentally the requirement that any informational inquiry be made only for a “valid legislative purpose.”¹³ In addressing the acceptable bases for a valid legislative inquiry, the Supreme Court’s recent decision in *Trump v. Mazars* reinforced the long-standing principle that “Congress may not issue a subpoena for the purpose of ‘law enforcement,’ because ‘those powers are assigned under our Constitution to the Executive and the Judiciary.’”¹⁴ As described above, both letters sent to *As You Sow* by the Committee expressly state that the Committee launched this inquiry to investigate *As You Sow*’s alleged “collusive” activities in violation of federal law. Accordingly, the Committee fails to state a proper subject for a legislative investigative committee.¹⁵

Additionally, parties subject to inquiry by a congressional committee are entitled to a showing that documents sought are “pertinent” to the matter under inquiry.¹⁶ While the legal defects in the inquiry make that an impossibility, *As You Sow* has carefully reviewed the Committee’s informational requests to ascertain whether it can voluntarily provide information that might help the Committee understand how and why *As You Sow*’s promotion of environmental and social corporate responsibility initiatives do not constitute illegal activities of any kind. To that end, *As You Sow* responds as follows.

First, an appropriate response is made difficult by the fact that the Committee’s inquiries appear to be primarily directed toward activities associated with asset managers, as evidenced by the fact that they are substantively identical to the requests sent to numerous asset managers at the same time this request was sent to *As You Sow*. The Committee’s mistake regarding the identity of *As You Sow* as an asset manager is demonstrated by the fact that the group of letters, including the request to *As You Sow*, is collectively referred to on the Committee’s website as being sent “to Asset Managers.” As a result of this misapprehension of *As You Sow*’s purpose and structure, requests one, two, four, five, and six do not appear to be applicable to *As You Sow*:

¹³ *Trump v. Mazars*, 140 S. Ct. 2019, 2031 (2020) (“a congressional subpoena is valid only if it is ‘related to, and in furtherance of, a legitimate task of the Congress’”) (quoting *Watkins v. United States*, 354 U.S. 178, 187 (1957)).

¹⁴ *Mazars*, 140 S. Ct. at 2032 (quoting *Quinn*, 349 U.S. 155, 161 (1955)). The Court’s *Mazars* opinion expands on this bedrock principle, also quoting *Watkins*, 354 U.S. at 200 (“there is no congressional power to expose for the sake of exposure”) and *McGrain v. Daugherty*, 273 U. S. 135, 179 (1927) (“Congress may not use subpoenas to ‘try’ someone ‘before [a] committee for any crime or wrongdoing.’”).

¹⁵ See *Quinn*, 349 U.S. 161; *United States v. Icardi*, 140 F. Supp. 383, 388 (D.D.C. 1958).

¹⁶ 2 U.S.C. § 192.

- Request one demands documents and communications “referring or relating to the need for As You Sow to advance decarbonization and net zero emissions goals.” *As You Sow* does not “need” to advance decarbonization or net zero emissions goals. Unlike asset managers, it is not subject to regulatory requirements such as the need to reduce climate risk on behalf of clients to whom it owes a fiduciary duty, nor is it obligated to meet client goals for low carbon investments.
- Request two demands documents and communications “referring or relating to how *As You Sow* developed its decarbonization and net zero emissions targets and commitments.” *As You Sow*, which is not an asset manager, does not have decarbonization and net zero targets or commitments.
- Request four demands documents and communications “referring or relating to how proxy advisors . . . can or should advance decarbonization and net zero emissions goals.” *As You Sow* does not hire proxy advisors and does not therefore maintain an institutional position on the broad question of how proxy advisors “should advance decarbonization and net zero emissions goals.” *As You Sow* primarily encourages proxy advisors to support its resolutions through publicly filed proxy memos, as discussed below.
- Request five seeks documents and communications “referring or relating to any agreement or commitment, or any effort to reach such an agreement or commitment, between or among *As You Sow*, asset managers . . . , proxy advisors . . . , and alliances or initiatives . . . to advance decarbonization and net zero emissions goals.” As a nonprofit organization, *As You Sow*’s coalitional activities, which are noncommercial, are outside the scope of antitrust law and protected by the First Amendment, including from legislative scrutiny. Further, *As You Sow* does not have agreements with asset managers, proxy advisors, and alliances or initiatives to advance decarbonization and net zero emissions goals. *As You Sow* is a member of the CA100+, Ceres, PRI, and the Interfaith Center on Corporate Responsibility, each of which have programs that address climate change.
- Request six demands documents and communications “referring or relating to how *As You Sow*’s decarbonization and net zero emissions goals, agreements, and commitments . . . affect output, price, or the choices available to consumers and investors.” As discussed previously, *As You Sow*, which is not an asset manager, does not have decarbonization and net zero targets or commitments or agreements.

Second, Request Three demands “[a]ll documents and communications referring or relating to how *As You Sow* and other stockholder engagement providers can or should advance decarbonization and net zero emissions goals.” This request is so broad as to encompass essentially all substantive climate material. Nonetheless, *As You Sow* directs the Committee to its publicly filed shareholder proposals and proxy memos, which represent *As You Sow*’s real-world answer to the Committee’s question of how *As You Sow* believes it can advance its goal of promoting corporate environmental responsibility. Resolutions filed by *As You Sow* on behalf of shareholders are available on its website¹⁷ and proxy memos arguing in support of the resolution

¹⁷ <https://www.asyousow.org/resolutions-tracker>.

are available via the SEC's EDGAR website by proceeding to <https://www.sec.gov/edgar/search/> and searching for "As You Sow".

Finally, even if these requests had been made for a valid legislative purpose, the Committee's request for production of the latter category would be subject to several legal objections including clear infringement upon *As You Sow*'s First Amendment right of association,¹⁸ failure to establish "pertinency" to a valid legislative inquiry,¹⁹ and imposition of an undue burden on an organization asked to provide virtually all materials in its possession. Nonetheless, *As You Sow* wishes to respond to the Committee to the extent that it can do so without compromising its constitutional and other legal rights. As such, *As You Sow* seeks further guidance from the Committee on how any remaining requests not satisfied by this correspondence can be appropriately narrowed. In the interim, *As You Sow* has taken appropriate steps to identify and preserve potentially responsive documents.

We hope that the above information assists the Committee in its understanding of *As You Sow*'s promotion of environmental and social corporate responsibility. In providing this response, *As You Sow* reserves all constitutional and other legal rights which may apply to the Committee's inquiry.

Please contact me if you have any questions.

Very truly yours,



Andrew D. Herman

cc: The Honorable Jerrold L. Nadler, Ranking Member
The Honorable Thomas Massie, Chairman, Subcommittee on the Administrative State,
Regulatory Reform and Antitrust
The Honorable Lou Correa, Ranking Member, Subcommittee on the Administrative State,
Regulatory Reform and Antitrust
The Honorable Dan Bishop

¹⁸ "Of course, a legislative investigation—as any investigation—must proceed 'step by step,' *Barenblatt v. United States* [360 U.S., 109, 130 (1959)], but step by step or in totality, an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights." *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963). See also *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that state's effort to obtain NAACP member list violated First Amendment right to freedom of association).

¹⁹ 2 U.S.C. § 192.