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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 letter dated February 29, 2024.[1] While the letter reiterates the Committee's previously stated position regarding *As You Sow*'s responses to its document requests and subpoena, it also asserts for the first time that "the Committee may initiate further action, including contempt of Congress proceedings." This assertion is both surprising and disappointing given *As You Sow*'s significant and on-going cooperation with the Committee's inquiry[2] and the well-founded legal rationale it has previously provided to the Committee, which the Committee has largely ignored.[3] For example, the Committee has yet to describe "the connective reasoning whereby the precise" demands made to *As You Sow* relate to its investigation.[4] As such, *As You Sow* is once again compelled to respond to the Committee's assertions.

[1] Letter from Rep. Jim Jordan, Chairman H. Comm. On the Judiciary to Andrew D. Herman (Feb. 29, 2024) [hereinafter February 29 Letter].
[2] This cooperation includes a voluntary transcribed interview with *As You Sow's* CEO scheduled for March 28, 2024, and a voluntary transcribed interview with *As You Sow's* President and Chief Counsel held on January 18, 2024.
[3] *See, e.g.,* Letter from Andrew D. Herman to Rep. Jim Jordan, Chairman H. Comm. On the Judiciary (Sept. 11, 2023) [hereinafter September 11 Letter]; Letter from Andrew D. Herman to Rep. Jim Jordan, Chairman H. Comm. On the Judiciary (Dec. 1, 2023) [hereinafter December 1 Letter]. While the Committee has not provided *As You Sow* with a copy of the transcript of *As You Sow*'s President and Chief Counsel Danielle Fugere's January 18 transcribed interview, both Ms. Fugere and *As You Sow's* counsel addressed the organization's legal position regarding the Committee's document request and subpoena during that full-day session.
[4] *Watkins v. United*, 354 U.S. 178, 215 (1957).

I. The February 29 Letter Ignores and Exacerbates the Legal Defects Identified Previously by *As You Sow*

Despite *As You* Sow's repeated efforts to engage with the Committee regarding the constitutional and other legal defects attendant to its inquiry of the organization, the Committee's February 29 Letter simply reasserts the legislative basis and rationale for its inquiry and makes no effort to address *As You Sow's* arguments, including its pertinency objections.[5]

A. Congressional Investigative Authority

As the Supreme Court established in *Watkins v. United States*, when a committee invokes the threat of contempt, and thus makes "the federal judiciary the affirmative agency for enforcing" congressional authority, the subjects are entitled to "the specific provisions of the Constitution relating to the prosecution of offenses and those implied restrictions under which courts function."[6]

Along with its significant concerns about the purported "legislative purpose" of the inquiry,[7] *As You Sow's* previous letters raised objections about the expansive nature of the Committee's letter requests and substantially identical subpoena.[8] Specifically, *As You Sow* estimates that responding to the subpoena's broad requests—even if they were deemed pertinent to the underlying legislative inquiry—would necessitate the review of tens of thousands of documents for responsiveness and privilege.

Despite *As You Sow's* statements regarding these legal flaws and the attendant burden on the organization, along with our repeated request to confer on narrowing the request to address the legal and procedural defects, the Committee has refused to engage. Rather, the Committee remains insistent that its broad requests—calling for production of nearly all of *As You Sow's* documentary material—are somehow pertinent to its legislative efforts and appropriate in scope.

This approach is not legally justified, and this flaw underlines why courts have consistently rejected congressional inquiries which resemble "law enforcement" inquiries:

> Unlike in criminal proceedings, where "[t]he very integrity of the judicial system" would be undermined without "full disclosure of all the facts," efforts to craft legislation involve predictive policy judgments that are "not hamper[ed] … in quite the same way" when every scrap of potentially relevant evidence is not available.[9]

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[5] February 29 Letter at 1 (detailing Committee's inquiry into potential violations of antitrust law by *As You Sow*).
[6] *Watkins*, 354 U.S. at 216 (Frankfurter, J., concurring).
[7] *See* Sept. 11 Letter at 4 (a committee may not issue subpoena for "purpose of law enforcement"); *see also* Dec. 1 Letter at 2-3 (same).
[8] *See* Sept. 11 Letter at 5 ("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.").
[9] *Trump v. Mazars USA, LLP*, 591 U.S. 848, 869-70 (2020) (citations omitted) (imposing obligation on Congress to "carefully assess" legislative purpose of inquiry) (citing *United States v. Nixon*, 418 U.S. 683, 709 (1974); *Cheney v. Unted States Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 384 (2004); *Senate Select Committee on Presidential*

In this matter, the Committee has received thousands of pages from *As You Sow*; conducted a full-day interview with its President and Chief Counsel (with a similar interview with its CEO scheduled for later this month); and received voluminous documents from numerous other entities subject to similar inquiry, many of which the Committee deployed in its correspondence and in Ms. Fugere's transcribed interview.[10] The Committee would be hard-pressed to argue that its efforts to craft legislation have been hampered in any way.

In any event, the requirements of constitutional Due Process place the burden of justifying its broad requests squarely on the Committee. As the Supreme Court stated in *Watkins*, "It is obvious that a person compelled to [testify or produce materials] is entitled to have knowledge of the subject to which the interrogation is deemed pertinent [and] [t]hat knowledge must be available with the same degree of explicitness that the Due Process Clause requires in the expression of any element of a criminal offense."[11] Certainly, the broad and undifferentiated demand for documents at issue here fails to meet any applicable standard of Due Process.

B. Statutory "Pertinence"

As the Committee knows, a witness before a congressional committee is entitled to a showing that the documents and testimony sought is "pertinent" to the subject under inquiry,[12] and the Committee bears the burden of demonstrating such pertinence consistent with the requirements of the Due Process Clause.[13] Moreover, in reviewing the powers of Congress to issue and enforce subpoenas, the courts have applied the "exacting standards of criminal jurisprudence . . . in order to assure that the congressional investigative power . . . [is] not . . . abused."[14] Nor does Congress possess the "general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress."[15]

As we have stated repeatedly, the subpoena issued by the Committee seeks information that cannot possibly be pertinent to the purpose of its investigation. "[T]he obvious first step in determining whether these questions asked were pertinent . . . is to ascertain what the subject was."[16] As the Supreme Court has repeatedly found, "[t]o be meaningful the [Committee] . . . must describe what the topic under inquiry is and the connective reasoning whereby the precise" demands made of a witness relate to the areas under investigation.[17]

The Committee's first letter to *As You Sow* stated the basis for its inquiry: "We write because As You Sow is potentially violating U.S. antitrust law by entering into agreements to

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Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974)).

[10] *See, e.g.,* Letter and Subpoena from Rep. Jim Jordan, Chairman H. Comm. On the Judiciary to Andrew D. Herman (Nov. 1, 2023) [hereinafter November 1 Letter or Subpoena] at 6-7 (citing "documents produced to the Committee by other parties" which relate to *As You Sow*).

[11] *Watkins,* 354 U.S. at 208-09.

[12] *See* 2 U.S.C. § 192.

[13] *Watkins*, 354 U.S. at 209.

[14] *Gojack v. United States*, 384 U.S. 702, 707 (1966).

[15] *Watkins*, 354 U.S. at 187.

[16] *Russell v. United States*, 369 U.S. 749, 758-59 (1962).

[17] *Watkins*, 354 U.S. at 215.

'decarbonize' corporate assets and reduce emissions to net zero—with potentially harmful effects on Americans' freedom and economic well-being."[18] It is hard to imagine a plainer admission of an improper law enforcement aim for a congressional inquiry.[19]

In its most recent letter, the Committee continues to assert that *As You Sow* "appears to facilitate collusion among corporations . . . potentially in violation of U.S. antitrust law."[20] But now, the Committee asserts that its legislative purpose actually concerns an examination into whether "existing civil and criminal penalties and current antitrust enforcement efforts are sufficient to deter anticompetitive collusion in the investment industry." This thin rationale—itself a pretextual law enforcement inquiry—hardly cures the Committee's continued, improper interest in undercovering the wrongdoing it imagines is occurring. An investigation into "whether existing civil and criminal penalties are sufficient to deter [antitrust violations]" is, for all practical purposes, an investigation into whether *As You Sow* is committing antitrust violations. The only way the Committee can conclude that "existing penalties" are not "sufficient to deter" antitrust violations would be to determine that *As You Sow* were committing antitrust violations. This shifting rationale simply confirms that the Committee is engaged in a law enforcement investigation which lies far outside its legislative purview.

In *Watkins*, the Supreme Court rejected a similar legislative purpose asserting that the inquiry was informed by the "need by the Congress to be informed of efforts to overthrow the Government by force and violence so that adequate legislative safeguards can be erected."[21] The Court rejected this rationale, in part, because it would permit "the Committee [to] radiate outward infinitely to any topic thought to be related in some way" and this approach would permit "investigators [to] turn their attention to the past to collect minutiae on remote topics, on the hypothesis that the past may reflect upon the present."[22]

But even if *As You Sow* could discern a legitimate purpose from the Committee's description, the subpoena's requests fail to survive any principled pertinency analysis. Despite its clear obligation under Supreme Court precedent, the Committee declines to provide any "connective reasoning" for its requests. For example, how does a demand for "[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" inform the sufficiency of the Committee's purported assessment of current law enforcement efforts?[23] Yet, a

[18] Letter from Rep. Jim Jordan, Chairman H. Comm. On the Judiciary to Andrew Behar (Aug 1, 2023) [hereinafter August 1 Letter]. The Supreme Court has held that a witness should rely on a committee's statements to determine the subject of an investigation. *See Watkins.* at 209-214.
[19] *See Mazars*, 591 U.S. at 863 ("The subpoena must 'serve a valid legislative purpose.'" (quoting *Quinn v. United States*, 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.'").
[20] February 29 Letter at 1.
[21] *Watkins*, 354 U.S. at 204.
[22] *Id.*
[23] *See* November 1 Letter.

fair reading of this broad request would require production of nearly every document in *As You Sow's* possession.

Again, the Committee has consistently declined to provide the connective reasoning required by the Supreme Court. Most fundamentally, how would the broad scope of private documents requested from *As You Sow* inform the effectiveness of the government's antitrust efforts? Certainly, such a broad and ill-defined request exceeds the pertinency boundaries endorsed by a long line of jurisprudence. Absent an explanation for this concern, or a significant narrowing of the requests, the Committee continues to fall well short of its statutory obligations.

C. The First Amendment

Finally, the Committee has made no real effort to demonstrate that its extraordinarily broad subpoena is consistent with the First Amendment. Rather than engage substantively with *As You Sow* to appropriately narrow the scope of its inquiry within constitutional bounds, the Committee's most recent letter suggests that the Committee is unwilling or unable to recognize this well-settled limit on its authority.

As *As You Sow* previously explained,[24] the Supreme Court has unambiguously held that the "Bill of Rights is applicable to [congressional] investigations as to all forms of government action."[25] Naturally, this includes the First Amendment: "Clearly, an investigation [by Congress] is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly."[26] Moreover, because "[a]buses of the investigative process" may infringe upon First Amendment freedoms, courts will not "simply assume . . . that every congressional investigation is justified by a public need that overbalances any private rights affected."[27]

As You Sow is an Internal Revenue Code 501(c)(3) nonprofit organization with a mission "to promote environmental and social corporate responsibility through shareholder advocacy, coalition building, and innovative legal strategies."[28] Like all such organizations, *As You Sow* is protected from investigative overreach into its associations and speech.[29] Yet, the Committee's inquiry, under a thin guise of an (impermissible) antitrust enforcement investigation, seeks virtually unlimited, minutely detailed, and intrusive information about *As You Sow*'s associational and advocacy activities. For example, the subpoena demands "[a]ll documents and communications referring or relating to the need for or efforts by As You Sow to advance decarbonization and net zero emissions goals."[30] If a request for a nonprofit to turn over *every* document or communication relating to its efforts to advance a core component of its mission were not repugnant enough to the First Amendment, this request clarifies that it specifically

[24] *See* September 11 Letter; December 1 Letter.
[25] *Watkins*, 354 U.S. at 188; *see also Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963).
[26] *Watkins*, 354 U.S. at 197.
[27] *Id.* at 197-98.
[28] *About Us*, *As You Sow*, https://www.asyousow.org/about-us.
[29] *See, e.g.*, *Americans for Prosperity Foundation v. Bonta*, 594 U.S. __, 141 S. Ct. 2373 (2021); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).
[30] *See* November 1 Subpoena.

applies to documents relating to "As You Sow's decisions to join" other nonprofit coalitions or groups. This request is self-evidently inconsistent with *As You Sow*'s First Amendment associational freedom. Other portions of the subpoena fare little better under even the slightest First Amendment scrutiny.

Nor has the Committee articulated a public need that might overcome *As You Sow*'s rights. Instead, the Committee has offered a range of improper justifications for this infringement on *As You Sow*'s First Amendment rights, including an admission of an impermissible law enforcement purpose[31] and an admission of impermissible viewpoint discrimination.[32]

As You Sow has explained all of this before.[33] In its first response, the Committee misunderstood *As You Sow* as asserting a First Amendment defense to an antitrust enforcement action against it, unintentionally revealing once more the Committee's understanding that it is not engaged in a legislative inquiry but rather an impermissible enforcement investigation.[34] Next, the Committee asserted that the First Amendment would not protect against a subpoena seeking information about *As You Sow*'s "commercial relationships" and "commercial transactions."[35] In response, *As You Sow* explained that despite the Committee's bald assertion otherwise, the Committee's subpoena plainly demands material that does not involve "commercial relationships" and "commercial transactions."[36] To return to the exemplary request detailed above, there could be no "commercial relationship" or "commercial transaction" involved in *As You Sow*'s purported "decisions to join Climate Action 100+, Ceres, Principles for Responsible Investment (PRI), and the Interfaith Center on Corporate Responsibility"[37] To date, the Committee has not attempted to explain how the subpoena could possibly be read to apply only to *As You Sow*'s "commercial relationships" or "commercial transactions."

The Committee's most recent letter simply reasserts each of these points without further elaboration or response to *As You Sow*'s assertion of a First Amendment defense to the overbroad scope of the Committee's inquiry. In the six months since *As You Sow* first asserted that the Committee's investigation infringed upon its First Amendment rights[38] the Committee has been unable to answer, other than citing an irrelevant district court case while mischaracterizing its own subpoena.[39]

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[31] *See supra*.
[32] *See* November 1 Letter (stating Committee's concern that *As You Sow* was promoting "left-wing" corporate action). Tellingly, the Committee's most recent letter drops this adjective. *Compare* February 29 Letter at 1 ("As You Sow appears to facilitate collusion among corporations to promote environmental, social, and governance (ESG)-related goals . . . .") *with* November 1 Letter ("Corporations are collectively adopting and imposing *left-wing* environmental, social, and governance (ESG)-related goals, and the Committee is concerned that As You Sow appears to facilitate collusion . . . ." (emphasis added)).
[33] *See* September 11 Letter; December 1 Letter.
[34] *See* November 1 Letter at 5.
[35] *Id.*
[36] *See* December 1 Letter.
[37] *See* November 1 Subpoena.
[38] *See* September 11 Letter.
[39] *See Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34, 46 (D.D.C. 2018) (holding that for-profit business could not rely on the First Amendment to shield *financial* records demonstrating "relationships with its customers"). The case the Committee cites readily distinguishes itself from the circumstances here. *See id.* at 46 (citing authority recognizing that

It is apparent that the Committee has no meaningful answer to the question of how its investigation is compatible with the First Amendment. As the Committee itself has explained, "politically motivated . . . investigation[s]" risk "infring[ing] upon the fundamental rights of donor privacy and free association."[40] This is "especially" the case "when these rights are threatened by" investigations that "target nonprofit organizations for political reasons."[41] *As You Sow* does not intend to waive its First Amendment rights where they are implicated by the Committee's current requests.

II. *As You Sow* Has Provided Substantial Responses to the Committee's Inquiry

While the Committee's letter contains a lengthy recitation of its interaction with *As You Sow*, these descriptions elide or ignore salient facts.

First, despite the Committee's failure to articulate a valid legislative purpose for its inquiry, *As You Sow* has already produced and delivered 967 documents to the Committee, consisting of over 12,500 pages that the organization determined were relevant to the Committee's interest in understanding *As You Sow's* mission and processes. Not all of these materials are publicly available or easily accessible absent the type of production and organization provided to the Committee by *As You Sow*. Second, while your letter references a voluntarily transcribed interview of *As You Sow*'s President and Chief Counsel, Danielle Fugere on January 18, 2024, it does not acknowledge that Ms. Fugere traveled from Oregon to Washington, DC, provided testimony for an entire day, and answered every substantive question posed to her by Majority counsel without objection. Third, by mutual agreement, *As You Sow*'s Chief Executive Officer, Andrew Behar, was scheduled to travel from California to attend his own voluntary transcribed interview before the Committee on March 28, 2024, in Washington, DC.

Given *As You Sow's* efforts detailed above, the assertions in the Committee's February 29 Letter regarding contempt are surprising, to say the least. *As You Sow*'s good faith engagement, despite the investigation's numerous legal defects, is certainly not the type of behavior properly subject to threats of contempt of Congress. It is particularly surprising, given that the Committee's February 29 Letter employs statements from Ms. Fugere's voluntary testimony to justify its threatened contempt of Congress action against *As You Sow*.[42]

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In light of the Committee's February 29 Letter threatening the initiation of contempt proceedings and the Committee's use of *As You Sow*'s good faith cooperation against the

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members of political associations have "First Amendment associational rights that may be implicated" by subpoena, and citing authority reasoning that First Amendment did not protect a commercial transaction only because "there has been no showing that any of the subpoenaed corporations . . . have advocated political, economic, religious or cultural beliefs through their commercial relationship") (citation omitted).

[40] Letter from Reps. Jim. Jordan, Chairman H. Comm. on the Judiciary and James Comer, Chairman H. Comm. on Oversight and Accountability to the Honorable Brian Schwalb, 2 (Oct. 30, 2023).

[41] *Id.*

[42] February 29 Letter at 3-4 (citing Ms. Fugere's January 18, 2024, testimony).

organization, *As You* Sow is compelled to impose conditions on Mr. Behar's agreement to voluntarily appear at a transcribed interview on March 28, 2024. Specifically, Mr. Behar will agree to submit to a transcribed interview consisting of no more than two hours of questioning from Majority counsel and addressing only those topics posed by Majority counsel to Ms. Fugere that she was unable to answer. Mr. Behar will not address questions relating to *As You Sow's* responses to the Committee's letters or subpoena (which are, in any case, not pertinent to the investigation's legislative purpose). Please advise *As You Sow* no later than March 21, 2024, whether these conditions are acceptable to the Committee.

Please contact me if you have additional questions or concerns.

Sincerely,

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