

LAW OFFICE OF ANDREW D. HERMAN

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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 and attached subpoena dated November 1, 2023.¹ As noted in that letter, the Committee's most recent correspondence marks the latest in a series of exchanges since August between the Committee and *As You Sow*. Despite *As You Sow*'s good faith attempts to engage with the Committee to provide information pertinent to its inquiry, the Committee remains insistent in demanding a wide range of materials far outside its valid legislative purview, among other defects. As detailed below, *As You Sow* today provides additional material responsive to the requests set forth in Schedule A of the Subpoena. In doing so, however, we are compelled to address significant, on-going legal and factual concerns implicated by the Committee's most recent letter and preceding requests.²

I. *As You Sow* Has Engaged in Good Faith Dialogue with the Committee

Most vitally—and contrary to the Committee's assertion in its most recent letter that *As You Sow* "has declined to . . . discuss how [the Committee's] requests may be fulfilled as efficiently as possible"—*As You Sow* has engaged in a good faith exchange with the Committee with the aim of satisfying the valid aspects of the Committee's requests. To this end, *As You Sow* restates its request from its September 11, 2023, six-page response to the Committee: "*As You Sow* seeks further guidance from the Committee on how any remaining requests not satisfied by this correspondence can be appropriately narrowed." As detailed below, however, rather than responding productively to *As You Sow*'s detailed legal and practical objections, the Committee has opted to issue significantly more expansive requests; these requests simply serve to exacerbate the defects identified in *As You Sow*'s first correspondence.

¹ 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].

² Given the Committee's decision to reissue and expand its original requests, *As You Sow* also incorporates by reference the contents of its most recent response to the Committee. Letter from Andrew D. Herman to Rep. Jim Jordan, Chairman H. Comm. on the Judiciary (Sept. 11, 2023) [hereinafter September 11 Letter].

Specifically, as part of its September 11 response, *As You Sow* addressed each of the Committee's six requests from its August 1, 2023 letter.³ As a general concern, *As You Sow* noted that "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" and thus, "requests one, two, four, five, and six do not appear to be applicable."⁴ Our response then addressed each of these five defective requests in turn, explaining their flaws in detail.⁵ *As You Sow* provided a partial response to request three, while also identifying the untenable breadth of materials potentially responsive to the request.⁶ Finally, we requested "further guidance" from the Committee on narrowing the request pursuant to *As You Sow*'s well-founded objections.⁷ We direct you to these original objections in our September 11 Letter, which the Committee's Subpoena has disregarded by reissuing and expanding upon its original requests.

II. The November 1 Letter and Subpoena Exacerbate the Defects with the Committee's Inquiry that *As You Sow* Previously Identified

In response to *As You Sow*'s comprehensive September 11 Letter, the Committee has doubled down, expanding the breadth of its requests to include, *inter alia*, additional types of documents and activities.⁸ The new requests also add numerous specified entities with which the Committee alleges "*As You Sow* has entered into apparently collusive agreements" or otherwise interacted with during the course of its activities.⁹

In the September 11 Letter, *As You Sow* cited the Committee's express language in pointing out that this line of inquiry constituted an improper law enforcement investigation.¹⁰ As our initial letter detailed, long-standing Supreme Court jurisprudence has held 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 Judiciary.'"¹¹ Similarly, "there is no congressional power to expose for the sake of exposure."¹²

While the Committee acknowledges *As You Sow*'s argument and attempts to proffer a valid legislative purpose relating to antitrust law,¹³ both the language of the November 1 Letter and the restatement of the Subpoena requests belie the Committee's perfunctory assertions of legislative authority. First, even while attempting to articulate a legislative purpose, the Committee cannot help but reveal its interests in purported antitrust violations by *As You Sow* and others:

³ Letter and subpoena from Rep. Jim Jordan, Chairman H. Comm. on the Judiciary, et al. to Andrew D. Herman, 4-6 (Aug. 1, 2023) [hereinafter August 1 Letter].

⁴ September 11 Letter at 4.

⁵ *See id.* at 5 (enumerating *As You Sow*'s specific issues with the applicability of Committee requests one, two, four, five, and six).

⁶ *Id.* at 5-6.

⁷ *Id.* at 6.

⁸ November 1 Letter at 4-5.

⁹ *Id.*

¹⁰ September 11 Letter at 4 & November 1 Letter at 4.

¹¹ *Mazars*, 140 S. Ct. at 2032 (quoting *Quinn*, 349 U.S. 155, 161 (1955)). The Court's *Mazars* opinion expands on this bedrock principle, quoting *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.'"). *Mazars*, 140 S. Ct. at 2032.

¹² *Watkins*, 354 U.S. at 200.

¹³ November 1 Letter at 4 ("[T]he Committee 'is conducting oversight of the adequacy and enforcement of U.S. antitrust laws . . . [to] inform potential legislative reforms. . . .'" (quoting August 1 Letter at 1).

- “[T]he Committee is concerned that *As You Sow* appears to facilitate collusion that may violate U.S. antitrust law.”¹⁴
- “*As You Sow* has admitted that its objective is to reduce investment and output by forcing energy companies to ‘curb new investments in fossil fuel production assets’—a potential violation of the Sherman Act.”¹⁵
- “*As You Sow* also may have entered into agreements with asset managers, proxy advisors, and other third parties in violation of section one of the Sherman Act.”¹⁶
- “Indeed, even if *As You Sow* did not itself violate the antitrust laws, it is likely to have evidence relevant to others’ collusive ESG-related agreements that is necessary to inform the Committee’s oversight.”¹⁷
- “*As You Sow* may also have evidence relevant to third parties’ agreements that violate antitrust laws.”¹⁸

The Committee’s refusal to restructure its document requests further demonstrates its improper focus on exposing alleged wrongdoing; the November 1 Letter repeatedly expresses concern with *As You Sow*’s internal operations and demands information on specific transactions.¹⁹ Even if, as the Committee claims, these inquiries could somehow inform potential legislative reforms, the Supreme Court has rejected this type of focused scrutiny on a private party’s activities. Simply put, a congressional inquiry has no authority to “collect minutiae on remote topics, on the hypothesis that the past may reflect upon the present.”²⁰

If there were any question about the Committee’s improper focus, the November 11 Letter dispels such doubts with its repeated references to “documents produced to the Committee by other parties suggest[ing] that *As You Sow*” engages in the alleged conduct under investigation.²¹ If this inquiry were truly being conducted to inform the Committee’s legislative process, there would be no need for the Committee to demand cumulative or duplicative material from *As You Sow* to confirm documents already “on file” with the Committee.”²² Yet, the Committee has not only reiterated the previous requests, it has expanded them to include specified entities about which, and from which, it admits it has already accumulated copious material.

Nor has the Committee addressed *As You Sow*’s valid assertions of its First Amendment rights. Indeed, in *expanding* its inquiry into *As You Sow*’s relationships with other non-profit organizations, the Committee has instead emphasized the unconstitutional reach of its inquiry. This is troublesome. As the Committee itself recently explained, “politically motivated . . . investigation[s]” — like this Committee’s express concern that *As You Sow* is promoting “left wing” corporate action²³ — risk “infring[ing] upon the fundamental rights of donor privacy and free association.”²⁴ This, the Committee noted, is “especially” the case “when these rights are

¹⁴ *Id.* at 1.

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 6.

¹⁹ *See id.* at 6-7.

²⁰ *Watkins*, 354 U.S. at 187.

²¹ *See* November 1 Letter at 6-7 (repeated language used in offering justifications for requests one, two, four, five, and six).

²² *See id.* at 6-7 (footnotes 55, 60, 62, and 65).

²³ *Id.* at 1.

²⁴ 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) [hereinafter October 30 DCAG Letter].

threatened by” investigations that “target nonprofit organizations for political reasons.”²⁵

In its September 11 Letter, *As You Sow* asserted that the Committee’s requests constituted a “clear infringement upon *As You Sow*’s First Amendment right of association.”²⁶ The Supreme Court has held that the Bill of Rights “is applicable to [congressional] investigations as to all forms of governmental action,” and thus that “an investigation is subject to the command that Congress shall make no law abridging freedom of speech.”²⁷ Moreover, the “mere semblance of legislative purpose [does] not justify an inquiry in the face of the Bill of Rights,” and the Congress is not entitled to any assumption that “every congressional investigation is justified by a public need that overbalances any private rights affected.”²⁸

Here, the incompatibility of the Committee’s requests with the First Amendment is manifest, as illustrated by the Committee’s demands:

- Request one demands “all documents and communications referring or relating to . . . efforts by *As You Sow* to advance decarbonization and net zero emissions goals.”²⁹ The request for *all* documents “referring or relating to” efforts by a nonprofit organization to advance a core mission is plainly overbroad and repugnant to the First Amendment.³⁰
- Requests two, three, four, five, and six each demand documents and communications that probe any relationships *As You Sow* may have with other organizations, particularly nonprofits, to advance its mission, including shared “goals,” “entering into . . . participation with alliances or initiatives,” and entering into “commitment[s] . . . to advance” shared goals.³¹ Once more, the facial unconstitutionality of these requests under controlling law is obvious.³²

The Committee has offered no pertinent response to *As You Sow*. Rather, the Committee has asserted that the First Amendment would not protect *As You Sow* from antitrust liability, offering the black-letter-law observation that “First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute,” and arguing that antitrust law’s *Noerr-Pennington* doctrine would not apply to *As You Sow*’s conduct.³³ But — in large part because the Committee’s antitrust theory is conceptually incoherent under antitrust law,³⁴ and because the Committee is not a law enforcement body tasked with enforcing the antitrust laws — *As You Sow* has not deemed it necessary to assert a First Amendment defense to the Committee’s antitrust theory. Rather, *As You Sow* has asserted that significant swaths of the requests posed by the Committee’s investigation itself, as established by Supreme Court precedent and as acknowledged by the Committee in other contexts, violate *As You Sow*’s First Amendment

²⁵ *Id.*

²⁶ September 11 Letter at 6.

²⁷ *Watkins*, 354 U.S. at 188.

²⁸ *Id.* at 198.

²⁹ Subpoena Schedule A.

³⁰ See, e.g., *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). See also October 30 DCAG Letter at 2-3 (noting that investigation of nonprofit threatened to “chill association of American citizens”).

³¹ See Subpoena Schedule A.

³² See *Bonta*, 131 S. Ct. at 2384 (noting that “broad and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution); *NAACP*, 357 U.S. at 460 (holding that freedom of association is a fundamental right).

³³ November 1 Letter at 5.

³⁴ See September 11 Letter at 3-4.

rights. The Committee has failed to defend itself on this point—nor could it.³⁵

III. *As You Sow* Will Respond to Pertinent Requests, Made Pursuant to a Valid Legislative Purpose, and Which Do Not Infringe on its First Amendment Rights

As the Committee well knows, a congressional committee may only issue a subpoena where the information sought “is related to, and in furtherance of, a legitimate task of Congress”³⁶ and the subpoena serves a “valid legislative purpose.”³⁷ Moreover, legislative committees maintain a constitutional obligation to demonstrate the pertinence of all requests posed to its subjects with the “explicitness and clarity that the Due Process clause [of the Constitution] requires.”³⁸ Finally, the Committee’s inquiry must not violate *As You Sow*’s First Amendment rights.³⁹ As described above, the Committee’s requests set out in its August 1 Letter and its November 1 Letter and Subpoena fail to satisfy any of these criteria.

We note that during its investigation into this subject the Committee has issued 14 investigative letters and 3 subpoenas. The level of detail sought in those requests, the sheer volume of documents it has already received, and the desire to seek additional information on specific parties involved in alleged “antitrust violations” make clear that the Committee has far exceeded its legislative purview and strayed into a prohibited law enforcement posture.

Nonetheless, *As You Sow* is cognizant of its legal obligations, where they exist. As such, *As You Sow* is actively engaging in a review of its documents to determine which are subject to lawful requests by the Committee. *As You Sow* is a small organization with limited resources and the Committee’s request arrives during its busiest season and therefore represents a significant burden on the organization. *As You Sow* is triaging its effort in the interest of turning over as many documents to the Committee as quickly as possible.

Concurrent with this letter, today *As You Sow* is producing an initial tranche of documents, which should inform the Committee’s valid legislative interests as to the scope of *As You Sow*’s activities, its efforts to advance decarbonization and net zero emissions, and the actions it takes as a nonprofit organization to do so. These documents, totaling over 3,000 pages, are Bates numbered AYS000001 to AYS003625. *As You Sow* has focused its production process on the areas that its initial search indicated contained the most documents. While *As You Sow* will continue its efforts to identify and produce responsive documents within the next two weeks, subject to its constitutional and other legal rights, it also reiterates its offer to work with the Committee to better understand the scope of its legislative inquiry and narrow it appropriately.

We remain hopeful that the above material and information will assist the Committee in its understanding of *As You Sow*’s promotion of environmental and social corporate responsibility. We stand ready to cooperate with the Committee in any good faith attempt to understand this effort. *As You Sow* reserves all constitutional and other legal rights which may apply to the Committee’s inquiry.

³⁵ The closest the Committee comes to a pertinent response is in claiming that the First Amendment right of free association would not “extend to *As You Sow*’s ‘commercial relationships’ and ‘commercial transactions’ that are the subject of the Committee’s requests.” November 1 Letter at 5. This description of the scope of the Committee’s inquiry is utterly belied by the plain text of the subpoena’s demands, as described above.

³⁶ *Watkins*, 354 U.S. at 187.

³⁷ *Quinn v. United States*, 349 U.S. 155, 161 (1955).

³⁸ *Watkins*, 354 U.S. at 209.

³⁹ *Id.* at 188, 198.

Chairman Jim Jordan

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Please contact me if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "ADH", with a long horizontal flourish extending to the right.

Andrew D. Herman

cc: The Honorable Jerrold L. Nadler, Ranking Member