SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

IN RE INVESTIGATIONS OF VIOLATIONS OF THE CRIMINALLY INFLUENCED AND CORRUPT ORGANIZATIONS ACT	No. 16-2469 (Before the United States Virgin Islands Department of Justice)

Objections of Competitive Enterprise Institute to Subpoena
Issued by United States Virgin Islands Office of Attorney General

Pursuant to D.C. Superior Court Rule of Civil Procedure 45(c), the Competitive Enterprise Institute ("CEI") hereby objects to the Subpoena to Produce Documents that was served on CEI on April 7, 2016, for the following reasons:

1. The subpoena is defective on its face. The Uniform Interstate Depositions and Discovery Act ("UIDDA"), D.C. Code §§ 13-441–48, permits only the domestication of subpoenas "issued under authority of a court of record," *id.* at § 13-442(5), and the subpoena here was issued by an Attorney General, not "a court of record." *See also* 14 V.I.C. § 612(d) (distinguishing subpoenas issued by the Attorney General of the Virgin Islands from ones "issued by a court in this Territory"). This is a fatal jurisdictional defect. As the Drafters' Comments to the Model UIDDA note, "[t]he term 'Court of Record' was chosen to exclude non-court of record proceedings from the ambit of the Act." Model UIDDA § 3 Comment; *see also Chase Plaza Condo. Ass'n v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 175 (D.C. 2014) (stating that "the official comments by the drafters of…uniform acts provide important guidance in construing our provision").

2. The subpoena is also defective because "the UIDDA applies only to 'discovery' in pending judicial actions," and we know of no pending judicial action between the Attorney General and ExxonMobil. *Colorado ex rel. Suthers v. Tulips Invs., LLC*, 343 P.3d 977, 982–83 (Co. Ct. App. 2012), *aff'd*, 340 P.3d 1126 (Co. 2015); *see also In re Foreign Court Subpoena*, 2012 WL 2126960, at *2 (Tenn. Ct. App. June 12, 2012) ("Defendants followed the appropriate protocol and filed a foreign court subpoena, *which had been issued by the Santa Clara County California Superior Court*, in the Circuit Court of Williamson County, pursuant

to the Uniform Depositions and Discovery Act.") (emphasis added). The UIDDA itself instructs that "[i]n applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it," making these decisions from other UIDDA jurisdictions highly persuasive. D.C. Code § 13-447; *see also Wilson v. Holt Graphic Arts, Inc.*, 981 A.2d 616, 618–19 (D.C. 2009) (looking to other states' interpretations of Uniform Enforcement of Foreign Judgments Act to inform interpretation of D.C.'s version of that Act).

3. The subpoena demands materials in violation of CEI's First Amendment privilege. "[C]ompelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation." *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) (citing *Buckley v. Valeo*, 424 U.S. 1, 64–68 (1976) (disclosure of campaign contributions); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462–63 (1958) (disclosure of membership lists)). CEI's allies and supporters, internal communications, internal work product in support of its expressive and petitioning activities, expressive associations, and communications with allies and supporters are shielded from compelled disclosure by its First Amendment privilege. *See AFL-CIO*, 333 F.3d at 176–78; *Perry v. Schwarzenegger*, 591 F.3d 1126, 1162–63, 1165 & n.12 (9th Cir. 2009); *Wyoming v. USDA*, 208 F.R.D. 449, 454 (D.D.C. 2002) (citing cases).

4. The subpoena violates the First Amendment because it constitutes an attempt to silence and intimidate, as well as retaliate against, speech espousing a particular viewpoint with which the Attorney General disagrees, certain speech content, and certain expressive association, and is therefore invalid. *See, e.g.*, *Lacey v. Maricopa Cty.*, 693 F.3d 896, 917 (9th Cir. 2012) (finding "invalid" under First Amendment "subpoenas demanding that [a] paper…disclose its reporters' notes[] and reveal information about anyone who visited the *New Times*'s [sic] website" because subpoenas would "chill speech"); *Pebble Ltd. P'ship v. EPA*, 310 F.R.D. 575, 582 (D. Alaska 2015) (holding third-party subpoenas invalid because

they had "the tendency to chill the free exercise of political speech and association which is protected by the First Amendment").

5. The subpoena is invalid because the underlying investigation is pretextual, is being undertaken in bad faith, is intended as a fishing expedition, and is in support of an investigation of charges that have no likelihood of success. *See, e.g.*, *Cooper v. United States*, 353 A.2d 696 (D.C. 1975) (noting that court will quash subpoena if application is not "made in good faith" or is "intended as a fishing expedition") (quotation marks omitted); *Turner v. United States*, 443 A.2d 542, 548 (D.C. 1982) (affirming trial court's quashing subpoena because it "was intended as a 'fishing expedition'"). Among other things, the statute of limitations for the Criminally Influenced and Corrupt Organizations Act ("CICO"), 14 V.I.C. §§ 600 *et seq.*, is *five years*. 14 V.I.C. § 604(j)(2)(B). It is public knowledge, and the Attorney General has actual knowledge, that ExxonMobil discontinued association with the Competitive Enterprise Institute in 2006 and stopped funding groups skeptical of anthropogenic climate change in 2008. *See, e.g.*, *Exxon Cuts Ties to Global Warming Skeptics*, NBCNews.com, Jan. 12, 2007, *available at* http://www.nbcnews.com/id/16593606/ns/us_news-environment/t/exxon-cuts-ties-global-warming-skeptics/ (reporting that spokesman for Exxon "said Exxon in 2006 stopped funding the Competitive Enterprise Institute"); Michael Erman, *Exxon Again Cuts Funds for Climate Change Skeptics*, Reuters, May 23, 2008, *available at* http://www.reuters.com/article/us-exxon-funding-idUSN2328446120080523 (reporting ExxonMobil cutting funding to groups whose "position on climate change could divert attention from the important discussion…[of] secur[ing] the energy required for economic growth in an environmentally responsible manner") (quotation marks omitted). In addition, even a for-profit corporation's speech and associational activities are protected by the First Amendment. *Pfizer Inc. v. Giles (In re School Asbestos Litigation),* 46 F.3d 1284 (3d Cir. 1994)). As such, the Attorney General has no good-faith basis under CICO for investigating

ExxonMobil, much less a good faith basis to inquire into the company's relationship with CEI.

6. The subpoena is invalid because it constitutes an abuse of process under common law. Seeing as the statutes of limitations have long run on the alleged CICO offenses, the Attorney General has committed an abuse of process by: (i) issuing and mailing the subpoena without reasonable suspicion in what amounts to a fishing expedition; (ii) having an ulterior motive for issuing and mailing the subpoena, namely an intent to prevent CEI from exercising its rights to express views disfavored by the Attorney General; and (iii) causing injury to CEI's reputation and ability to exercise its First Amendment rights.

7. The subpoena is invalid because it violates CEI's Fifth and Fourteenth Amendment due process rights by delegating investigative and prosecutorial authority to private parties. The subpoena is in furtherance of an investigation that could result in penalties available only to government prosecutors. The Attorney General's delegation of investigative and prosecutorial authority to a private attorney, Ms. Linda Singer, and private law firm, Cohen Milstein Sellers & Toll PLLC, that are most likely being compensated on a contingency-fee basis, violates due process of law.

8. The subpoena is unduly burdensome, in that it appears to demand all documents and communications relating to climate change or ExxonMobil over a ten-year period. Where the requesting party's need for production is outweighed by the burden imposed on the producing party, courts will not enforce the request. *See, e.g.*, *N.C. Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 51 (D.D.C. 2005) (listing factors and quashing subpoena). For CEI to attempt to search for, identify, collate, and transmit the scope of documents requested would require approximately 30 person-weeks of labor. Weighed against the substantial burden on CEI, the Attorney General has no cognizable need for CEI to produce the information demanded, in light of the nullity of the Attorney General's underlying legal

theory, the pretextual nature of the investigation, statute-of-limitations concerns, and the ability to obtain the information demanded from other parties.

9. The subpoena is unduly burdensome because it demands documents—including "public statements" and "published" communications—that are public records and thus already available to the Attorney General.

10. The subpoena is unduly burdensome because it demands that CEI review ten years of electronic and hard-copy documents from myriad platforms, including "writings," "documents," "email; SMS, MMS, or other 'text' messages; messages on 'social networking' platforms (including but not limited to Facebook, Google+, MySpace, and Twitter); shared applications from cell phones, 'smartphones,' netbooks, and laptops, sound, radio, or video signals; telecommunications; telephone; teletype; facsimile; telegram; microfilm," and "press, publicity or trade releases."

11. The subpoena is unduly burdensome because it orders CEI to extract and provide metadata, as well as OCR the documents.

12. The subpoena is unduly burdensome because it provides CEI less than four weeks to comply with its massive demands.

13. The subpoena is overbroad because it demands documents between at least January 1, 1997 and January 1, 2007 (and additionally demands production of any "document in effect during the relevant time period [that] was created before the relevant time period"), and the statutes of limitations ran in 2011 for the offenses ExxonMobil allegedly committed. *See* 14 V.I.C. § 604(j)(2)(B).

14. The subpoena is overbroad and unduly burdensome because it appears to demand any and all documents that refer, even obliquely, to the "climate." Given the extent of CEI's interest in, research on, and advocacy about the issue of climate change, this demand potentially encompasses substantially every document and communication CEI has ever produced or received.

15. The subpoena is vague and ambiguous because it inadequately defines "climate change" as "changes in global or regional climates that persist over time, whether due to natural variability or as a result of human activity." It is not clear what "regional climate[]" or "over time" mean. This definition could, for example, encompass five-day weather forecasts for the Washington, D.C. region.

16. The subpoena is vague and ambiguous because it does not define what it means for a person to "act[] in whole or in part on behalf of" ExxonMobil.

17. The subpoena demands information predicated on facts that CEI does not possess, such as the identities of any "third parties" acting on behalf of ExxonMobil.

18. The subpoena demands materials that are protected pursuant to the attorney-client privilege, and materials that are subject to attorney work-product protections. *See Kreuzer v. George Washington Univ.*, 896 A.2d 238, 249 (D.C. 2006) (affirming assertion of "the attorney-client privilege to shield communications" from discovery request).

19. The subpoena is invalid because it was not issued with proper judicial oversight.

20. The subpoena is invalid because the accompanying "Certificate of Custodian of Records" that the subpoena states CEI's custodian must sign and notarize requires that the deponent represents "Exxon Mobil Corporation," rendering CEI's compliance with the subpoena impossible.

21. The subpoena violates the Bill of Rights of the Revised Organic Act of the Virgin Islands, 48 U.S.C. § 1561, which guarantees "the freedom of speech [and] of the press" in the Virgin Islands. *See also Gov't of Virgin Islands v. Brodhurst*, 285 F. Supp. 831, 836 (D.V.I. 1968) (noting that the Bill of Rights in the Revised Organic Act of the Virgin Islands provides "the same safeguards as are embodied in the First and Fourteenth Amendments").

22. The persons responsible for this subpoena are subject to sanctions for violating Superior Court Rule of Civil Procedure 45(c). That Rule obligates the Attorney General, Ms. Linda Singer, and the Cohen Milstein law firm to "take reasonable steps to

avoid imposing undue burden or expense" on CEI. The subpoena plainly violates that duty, given its facial invalidity, astonishing overbreadth, and evident purpose of imposing unwarranted and illegitimate burdens on CEI and CEI's exercise of its constitutional rights. In light of this violation, the Attorney General, Ms. Linda Singer, and the Cohen Milstein law firm are subject to sanctions, "which may include lost earnings and reasonable attorney's fees."

23. The Attorney General, Ms. Linda Singer, and the Cohen Milstein law firm have violated their ethical obligations in issuing the subpoena. District of Columbia Bar Rule 4.4(a) prohibits an attorney from "knowingly us[ing] methods of obtaining evidence that violate the legal rights of" a third party. (Substantially the same prohibition is contained in Virgin Islands Rule of Professional Conduct 211.4.4(a).) The subpoena plainly violates that prohibition, given its evident purpose of retaliating against and chilling CEI's exercise of its rights. Having knowingly used a subpoena to violate CEI's rights, the Attorney General, Ms. Linda Singer, and the Cohen Milstein law firm have violated their ethical obligations.

In light of the foregoing, I request that you immediately withdraw the subpoena and notify me that you have done so. CEI reserves the right to reassert or amend its Objections at any time.

DATED: April 20, 2016

By: 

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Certificate of Service

I hereby certify that, on April 20, 2016, I caused a true and correct copy of the foregoing Objections to be served by first-class mail, postage prepaid, and by hand on:

Linda Singer
Cohen Milstein Sellers and Toll, PLLC
1100 New York Ave., N.W., Suite 500
Washington, D.C. 20005

Subpoena Designee

I further hereby certify that, on April 20, 2016, I caused a true and correct courtesy copy of the foregoing Objections to be sent by first-class mail, postage prepaid, signed receipt required on:

Claude Earl Walker, Esq.
Attorney General
3438 Kronprindsens Gade
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St. Thomas, U.S. Virgin Island 00802

By sending this courtesy copy to Attorney General Walker, my client does not consent to personal jurisdiction in the Virgin Islands, does not waive any of the objections proffered in the herein attached document, and reserves all rights it may otherwise have.

By: 
Andrew M. Grossman