SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

UNITED STATES VIRGIN ISLANDS OFFICE OF THE ATTORNEY GENERAL, Plaintiff, v. EXXONMOBIL OIL CORP., Defendant.	Case No. 2016 CA 2469 Judge ___________________

Memorandum of Points and Authorities in Support of Nonparty Competitive Enterprise Institute's Special Motion To Dismiss Under D.C. Anti-SLAPP Act and Motion for Sanctions

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Introduction

At a March 29, 2016 press conference, U.S. Virgin Islands Attorney General Claude Walker announced his participation in a coalition of attorneys general organized to "creatively" and "aggressively" use the powers of their offices to target "organizations that put out propaganda" opposing the coalition's preferred policy responses to climate change. Attorney General Walker stated that he would use his powers to target such organizations so as to "make it clear to our residents as well as the American people that we have to do something transformational" about climate change and to prod them "to look at renewable energy." Ex. A at 2–3, 16.[1]

Six days later, Attorney General Walker commenced a civil action in this Court to request the issuance of a kitchen-sink subpoena demanding that the Competitive Enterprise Institute ("CEI"), long prominent for its advocacy opposing climate change alarmism, turn over all of its documents and communications on the subject, as well as donor records and reams of other materials, from a ten-year period from 1997 to 2007. Ex. B. Among policy and legal commentators, the subpoena was almost unanimously recognized for what it is: an attempt "to silence debate by hounding one side," in which "the process itself can be the punishment, as victims are forced to spend immense amounts on legal fees, and immense time and money on complying with investigations."[2]

That is the evil the D.C. Council confronted when it enacted the D.C. Anti-SLAPP Act to provide remedies for parties targeted with legal action "filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." Ex. C, D.C. Council Comm. on Public Safety and the Judiciary Report on Bill 18-893 (Nov. 18, 2010). Under the Act, the Attorney General's action must be dismissed, and the subpoena thereby invalidated, because it arises from CEI's "right of advocacy on issues

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[1] All exhibits referenced herein are exhibits to the Declaration of Andrew M. Grossman.

[2] Ex. D, Megan McArdle, Subpoenaed Into Silence on Global Warming, Bloomberg News, April 8, 2016.

of public interest" and the Attorney General has no possibility of showing that his demand on CEI, intended as pure legal harassment, "is likely to succeed on the merits." D.C. Code § 16-5502(b). As shown below, the subpoena is facially invalid and, in addition, unenforceable because it was obtained in bad faith and violates CEI's First Amendment rights.

Moreover, the subpoena—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—violates the "duty" of the Attorney General and his counsel under Rule 45(c)(1) to "take reasonable steps to avoid imposing undue burden or expense on a person subject to [a] subpoena." This Court therefore "must enforce this duty and impose an appropriate sanction" on them, one commensurate with their cynical abuse of legal process in this case. *Id*. Sanctions are also warranted under the Court's "inherent authority to impose sanctions upon a showing of bad faith." *In re M.L.P.*, 936 A.2d 316, 322 (D.C. 2007).

The Court should not allow itself to be used to carry out the Attorney General's attempt to muzzle opposing points of view through the chill of abusive legal process. Instead, it should dismiss this action, and thereby invalidate the subpoena, pursuant to the D.C. Anti-SLAPP Act and sanction Attorney General Walker and his counsel pursuant to Rule 45 and its inherent authority.

Factual Background

A. CEI Exercises Its Right of Advocacy by Participating in the Climate Policy Debate

CEI was founded in 1984 as a non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty. As such, it focuses on issues of overregulation and supports market-based approaches to matters of public policy. Like other think tanks, CEI produces original research and analysis, which is published on its website and in other media. It also participates more

directly in policy development, by engaging in advocacy through media (including op-eds, blog posts, media appearances, public events, and videos), grassroots education, and litigation. Its office is located in Washington, D.C. Kazman Decl. ¶¶ 2–7.

CEI devotes substantial resources to research and advocacy in its Center for Energy and Environment, which it describes as follows:

> CEI's largest program takes on all the hard energy and climate issues. CEI questions global warming alarmism, makes the case for access to affordable energy, and opposes energy-rationing policies, including the Kyoto Protocol, cap-and-trade legislation, and EPA regulation of greenhouse gas emissions. CEI also opposes all government mandates and subsidies for conventional and alternative energy technologies.[3]

CEI also organizes the "Cooler Heads Coalition," a group of policy organizations that coordinate their work on climate change. The Coalition is "focused on dispelling the myths of global warming by exposing flawed economic, scientific, and risk analysis."[4]

As a result of its work on climate science and policy, CEI has been at the forefront of the political and scientific debate over global warming for over 25 years. Kazman Decl. ¶ 5. Even those who oppose its policy views have recognized the success of its advocacy; for example, climate scientist and activist Michael Mann attributed policymakers' resistance to aggressive action on climate change specifically to CEI's efforts. Ex. E; Kazman Decl. ¶¶ 8–9.

CEI's mission is funded by individual and corporate contributors, foundations, and sales of tickets to its annual dinner. Kazman Decl. ¶ 15. As has been widely reported, CEI received some funding from ExxonMobil until 2006, when the company discontinued its association with the Competitive Enterprise Institute and cut off funding to it.[5]

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[3] CEI, Energy and Environment, https://cei.org/issues/energy-and-environment. *See also* Kazman Decl. ¶ 5.

[4] Globalwarming.org, About, http://www.globalwarming.org/about/. *See also* Kazman Decl. ¶¶ 10–12.

[5] *See, e.g.*, Ex. E; Ex. F, Exxon Cuts Ties to Global Warming Skeptics, NBCNews.com, Jan. 12, 2007 (reporting that Exxon spokesman "said Exxon in 2006 stopped funding the Competitive Enterprise Institute").

B. U.S. Virgin Islands Attorney General Walker Publicly Announces His Plans to Retaliate Against and Chill the Advocacy of Organizations Like CEI

On March 29, 2016, U.S. Virgin Islands Attorney General Claude Walker joined with New York Attorney General Eric Schneiderman and representatives of other state attorneys general's offices, as well as former Vice President Al Gore, to announce the formation of a new coalition, "AGs United for Clean Power."[6] Schneiderman explained that the coalition would "step into [the] breach" left by "gridlock in Washington" over climate change by targeting what he called "well-funded, highly aggressive and morally vacant forces that are trying to block every step by the federal government to take meaningful action." Ex. A at 3–4. In particular, he stated that the participating attorneys general would wield their powers "creatively" and "aggressively" to "clear[] up" confusion among the public concerning climate change "sowed by those with an interest in profiting from the confusion and creating misperceptions in the eyes of the American public." *Id*. at 2. Schneiderman stated that the coalition members would take action against these parties under a "variety of theories," including "consumer protection law, some securities fraud laws, there are other issues related to defending taxpayers and pension funds." *Id*. at 16.

Several weeks earlier, Attorney General Walker's office had contrived its own creative legal theory to target persons and individuals that he believed mislead the public on climate change. On his own authority, the Attorney General opened an investigation under the territory's RICO analogue, the Criminally Influenced and Corrupt Organizations Act, into whether ExxonMobil had "engaged…in conduct misrepresenting its knowledge of the likelihood that its products and activities have contributed and are continuing to contribute to Climate Change." Ex. B, Att. A at 1. On March 22, ExxonMobil received a subpoena demanding, among many other things, all of its documents and communications with or

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[6] Ex. G, Press Release, A.G. Schneiderman, Former Vice President Al Gore And A Coalition Of Attorneys General From Across The Country Announce Historic State-Based Effort To Combat Climate Change, Mar. 29, 2016.

concerning approximately 90 policy organizations, including CEI, and approximately 40 individuals, including a number employed by or associated with CEI. Ex. H.

Attorney General Walker commented on that investigation at the March 29 press conference, stating that the goal of his investigation was to "make it clear to our residents as well as the American people that we have to do something transformational" on climate change to encourage the public "to look at renewable energy," which he said was "the only solution." Ex. A at 16. Those who disagreed, he stated, were "selfish" and acting "[t]o destroy the planet." *Id*. In communications with other attorneys general offices prior to the press conference, Attorney General Walker expressed his "interest[] in identifying other potential litigation targets" and in using "litigation to increase our leverage." Ex. I.

In the days following the press conference, CEI analysts were outspoken in their criticism of the "AGs United for Clean Power" agenda. Myron Ebell, Director of CEI's Center for Energy and Environment criticized the AGs' strategy as a "shake down" of the energy industry, and CEI Senior Attorney Hans Bader was quoted describing it as an effort to "intimidate people who take issue with the most alarming and maximal projections of global warming" and thereby "skew" the public debate. Ex. J, K. Bader also published an article arguing that the AGs' announced investigations were driven by "contempt for the First Amendment." Ex. L.

C. U.S. Virgin Islands Attorney General Walker Acts To Retaliate Against and Chill CEI's Advocacy Through a Pretextual "Racketeering" Investigation and Abuse of This Court's Power

Less than a week after publicly announcing his plans at the press conference, Attorney General Walker opened a civil action in this Court to issue a subpoena on CEI pursuant to the Uniform Interstate Depositions and Discovery Act, D.C. Code §§ 13-441 *et seq.* ("UIDDA"). Although the UIDDA request purported to request that the Court domesticate and reissue a subpoena in a case titled "United States Virgin Islands Office of Attorney General v. ExxonMobil Oil Corp.," the underlying subpoena had in fact been

issued by Attorney General Walker on his own authority pursuant to 14 V.I.C. § 612, not by any court. Nonetheless, the Court granted the request and issued the subpoena, which the Attorney General's counsel, Linda Singer of the Cohen Milstein law firm, served on CEI on April 7, 2016. Ex. B.

The subpoena demanded that, by 5 pm on April 30, CEI produce a decade's worth of its documents and internal and external communications regarding climate change and ExxonMobil to Ms. Singer. *Id*. at 1. It demanded, among other things, all of CEI's documents and communications from January 1, 1997, to January 1, 2007, concerning climate change, its causes, and its impacts; CEI's "public statements" on climate change; documents and communications concerning CEI's meetings with third parties concerning climate change, documents and communications concerning meetings discussing "strategies, plans, or activities to impact public views on Climate Change," "the accuracy or credibility of research or researchers examining Climate Change," and "the accuracy or credibility of models or assessments of the likelihood, certainty, uncertainty, scope, causes, or impacts of Climate Change." *Id*., Att. A at 12–13. In short, the subpoena requires CEI to produce all of its internal and external communications and other documents that have anything to do with its advocacy in the climate change debate, including internal communications and communications with donors and its allies in advocacy.

The subpoena states that failure to comply "may result in an enforcement action being brought against you pursuant to 14 V.I.C. § 612(k)" and also threatens unnamed "sanctions and penalties." *Id*., Att. A at 1, 14.

CEI retained the undersigned counsel to represent it in responding to the subpoena and, on April 20, 2016, served objections on Ms. Singer and Attorney General Walker. Ex. M. Its objections explained—and Attorney General Walker has never disputed—that the subpoena is invalid under the UIDDA because the underlying subpoena was not issued by a court, but under the Attorney General's own authority. *Id*. ¶¶ 1–2. The objections also explained that the subpoena was unenforceable because it constituted an attempt to retaliate

against and chill CEI's advocacy and associations, violated CEI's First Amendment privileges, was obtained in bad faith as a fishing expedition, constituted an abuse of process, and was unduly burdensome, among other defects. *Id*. ¶¶ 3–21. CEI specifically requested that the subpoena be withdrawn immediately and CEI be notified that it had been withdrawn. *Id*. at 7. Neither Attorney General Walker nor Ms. Singer responded.

D. U.S. Virgin Islands Attorney General Walker Attempts To Curtail CEI's Ability To Obtain Sanctions Under the Anti-SLAPP Act

To vindicate its rights and obtain a declaration of its obligations under law, CEI determined to seek relief under the D.C. Anti-SLAPP Act. To satisfy the Act's 45-day statute of limitations, D.C. Code § 16-5502(a), and out of concern that Attorney General Walker might take the position that his filing of this action triggered the running of the limitations period, CEI planned to file the motion on or before May 19, 2016. To comply with this Court's meet-and-confer requirement, on May 10 CEI's counsel wrote Ms. Singer to inquire: (1) whether Attorney General Walker had acted on CEI's request to withdraw the subpoena; (2) whether Attorney General Walker consented to termination of this action and revocation of the subpoena issued by this Court; and (3) whether Attorney General Walker and Ms. Singer consented to compensating CEI's costs and attorneys' fees. Ex. N.

Ms. Singer's letter in response indicated that Attorney General Walker would not withdraw the subpoena but would take steps to attempt to evade this Court's ability to consider the propriety of his and Ms. Singer's conduct under the Anti-SLAPP Act. *See* Ex. O. Specifically, the letter states that Attorney General Walker "has not made a decision on whether to move to compel or to withdraw or amend [his] subpoena to CEI." It flatly denies that the subpoena violates CEI's First Amendment rights, without addressing any of the case law or arguments raised in CEI's objections, much less its other objections. Finally, the letter states that Attorney General Walker will "revoke the issuance of the subpoena by the District of Columbia Superior Court and terminate the Superior Court action." But it continues: "Those are steps that the [Office of Attorney General] agrees to take within the

next 5 court days, with the understanding that [the Attorney General] will reissue the subpoena…if OAG intends to move to compel [CEI's] compliance with the subpoena in its current form."

Following Singer's letter, CEI faced the risk that its substantive rights under the Anti-SLAPP Act might permanently expire prior to the Attorney General taking any action to terminate this proceeding. It continued to be injured by the ongoing chill to its rights caused by the Attorney General's refusal to withdraw the subpoena he had issued and his new threat to commence another proceeding in this Court at any time to enforce that subpoena. Accordingly, CEI files the instant motion seeking relief under the Anti-SLAPP Act and sanctions.

Argument

To intimidate an outspoken opponent of his preferred policy response to climate change, Attorney General Walker obtained a harassing and abusive subpoena from this Court directing CEI to turn over a decade's worth of its internal communications, communications with allies, and other materials concerning its advocacy on that issue. Because Attorney General Walker's professed "objective is to use litigation as a weapon to chill or silence speech," *Burke v. Doe*, 91 A.3d 1031, 1033 (D.C. 2014), this action must be dismissed under the Anti-SLAPP Act and the subpoena thereby terminated. In addition, the manifest bad faith of Attorney General Walker and his counsel, Ms. Singer, in attempting to wield this Court's power to harass and punish his policy opponents warrants sanction under both Rule 45 and this Court's inherent authority. Attorney General Walker's and Ms. Singer's cynical offer to terminate this action, while still holding the retaliatory subpoena that he issued over CEI's head and threatening to enforce it at any time, only underscores their bad faith and the necessity of sanctions to deter the future violations of CEI's rights that they are apparently contemplating.

I. The Anti-SLAPP Act Requires Dismissal of This Action

A. The Act Provides Broad Protection Against the "Attempted Muzzling of Opposing Points of View" Through Abuse of Legal Process

A "SLAPP" is a "strategic lawsuit against public participation"—in other words, the abuse of legal process with the "intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights." Ex. C at 1. The D.C. Council enacted the D.C. Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.*, to provide the target of a SLAPP "with substantive rights to expeditiously and economically dispense of litigation aimed at preventing their engaging in constitutionally protected actions on matters of public interest." *Id.* at 4. In this way, the Act "ensures that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates" and thereby "prevent[s] the attempted muzzling of opposing points of view." *Id.*

To achieve that overriding purpose, the Act provides for early and efficient dismissal of likely SLAPPs, imposing only the most minimal burden on the movant:

> (a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.
>
> (b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

D.C. Code § 16-5502.

Thus, the movant's burden is only to make a *prima facie* showing that the plaintiff's claim arises out of the type of advocacy protected by the Anti-SLAPP Act—i.e., "an act in furtherance of the right of advocacy on issues of public interest," a term the Act defines with great breadth. *See* D.C. Code § 16-5501(1).[7] Once the movant has made that showing, the

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[7] An "[a]ct in furtherance of the right of advocacy on issues of public interest" includes "[a]ny written or oral statement made: (i) In connection with an issue under consideration

opposing party can avoid dismissal only if it can show that its claim is "likely to succeed on the merits." That standard, drawn from equity jurisprudence, imposes a heavy burden on the opponent at the very outset of litigation. *See, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam); *Ortberg v. Goldman Sachs Grp.*, 64 A.3d 158, 162 (D.C. 2013). The result is that a party seeking to wield the power of the D.C. Superior Court to impair another party's exercise of speech rights must arrive in court with a viable, well-developed entitlement to relief or face dismissal and the obligation to pay the other side's attorney's fees. *See Doe v. Burke*, 133 A.2d 569, 573–75 (D.C. 2016).

B. CEI Is Entitled to the Act's Protections Because Attorney General Walker Has Sought To Wield This Court's Power Against CEI's Exercise of Its Right of Advocacy

The Act applies here. As an initial matter, Attorney General Walker's request that this Court issue a subpoena constitutes a "claim" subject to the Act. Consistent with the Act's purpose of protecting citizens from abuse of legal process and associated burdens, the Act defines "claim" as broadly as possible to "include[] any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief." D.C. Code § 16-5501(2). Attorney General Walker commenced this action and obtained the subpoena pursuant to the Uniform Interstate Depositions and Discovery Act, D.C. Code §§ 13-441 *et seq.* ("UIDDA"), which establishes a procedure for a party to "request issuance of a subpoena" by the Court through a filing with the Court. D.C. Code § 13-443(a). Because Attorney General Walker's filing pursuant to the UIDDA was

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or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or (ii) In a place open to the public or a public forum in connection with an issue of public interest…." D.C. Code § 16-5501(1)(A). A catch-all provision reaches "[a]ny other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5502(1)(B). An "issue of public interest," in turn, is any "issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place." D.C. Code § 16-5502(3).

was a "filing requesting relief" from the Court—that the Court issue a subpoena imbued with its authority—it constitutes a "claim" subject to the Anti-SLAPP Act.

And there can be no dispute that this claim is one "arising from an act in furtherance of the right of advocacy on issues of public interest." The subpoena arises from CEI's advocacy on climate change and climate policy. Attorney General Walker asserts that his investigation concerns whether ExxonMobil participated in a racketeering enterprise to mislead the government and public through advocacy regarding the causes and effects of climate change. Ex. B, Att. A at 1. The subpoena demands a broad swath of materials from CEI—a think tank engaged in educating the public and advocating its policy views—including all of its documents and communications concerning climate change, with a focus on materials aimed at influencing "public policies responding to Climate Change (including any legislation or regulation concerning Climate Change)" and "public perceptions of Climate Change." *Id.* at 12–13. Indeed, every single demand contained in the subpoena concerns CEI's public advocacy regarding climate change or climate policy. *Id.* Moreover, less than a week before seeking issuance of the subpoena, Attorney General Walker publicly announced that the purpose of his investigation was to "make it clear to our residents as well as the American people that we have to do something transformational" on climate change by targeting those who advocate against his policy prescriptions. Ex. A at 15–16. Accordingly, the subpoena arises from CEI's "expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest," climate change. D.C. Code § 16-5501(1)(B).[8]

In sum, CEI is entitled to the protections of the D.C. Anti-SLAPP Act.

[8] In addition, CEI's advocacy also qualifies for protection under D.C. Code § 16-5501(1)(A).

C. Attorney General Walker Cannot Meet His Burden of Showing that His Action To Wield This Court's Power To Punish and Chill CEI's Speech Is "Likely To Succeed on the Merits"

Because the Anti-SLAPP Act applies, CEI is entitled to dismissal of Attorney General Walker's action unless he is able to carry the heavy burden imposed on him by the Act: successfully demonstrating that the action is "likely to succeed on the merits." D.C. Code § 16-5502(b). Although the Act does not require CEI to demonstrate that Attorney General Walker cannot meet his burden to show that he is "likely to succeed on the merits," even a cursory review of the defects of this action suffices to prove the point and to underscore his motive of harassing and threatening CEI because of its advocacy.

1. The Subpoena Is Defective Under the Uniform Interstate Depositions and Discovery Act Because It Was Issued by Attorney General Walker, Not a Court

The Uniform Interstate Depositions and Discovery Act ("UIDDA"), D.C. Code §§ 13-441 *et seq.*, permits the domestication only of subpoenas "issued under authority of a court of record," *id.* at § 13-442(5), but the subpoena here was issued by a prosecutor, not any court. *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 defect. As the Drafters' Comments to the Model UIDDA state, "[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"). A subpoena issued outside of judicial proceedings is therefore not enforceable under UIDDA. *See, e.g.*, *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). Accordingly, the subpoena here, issued on the Attorney General's own authority and not that of any court, is defective.

2. The Subpoena Violates CEI's First Amendment Rights

The subpoena is invalid because it constitutes an unlawful attempt in violation of the First Amendment to retaliate against and chill CEI's speech with which the Attorney General disagrees, as well as its expressive associations. *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"). The Attorney General's participation in the AGs United for Clean Power coalition and his remarks at its press conference make clear that his purpose in pursuing this investigation and in serving the subpoena on CEI is to retaliate against and chill speech that stands opposed to his policy view that a "transformational" adoption of renewable energy sources is "the only solution." Ex. A at 16. The pretextual nature of his investigation, enormous overbreadth of his subpoena, and stunning disregard for CEI's associational rights—all discussed further below, *see infra* §§ I.C.3–5—confirm as much: the subpoena has nothing to do with any legitimate investigation, but is a straightforward attempt to harass and punish an organization that disagrees with his preferred policies and that he (like Mann and others) blames for those policies' lack of success in Congress.

3. The Subpoena Was Obtained in Bad Faith

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'"). As discussed further below, *see infra* § I.C.5, it is a fishing expedition.

In addition, it was obtained in furtherance of an investigation with no likelihood of success. 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 that ExxonMobil discontinued association with the Competitive Enterprise Institute in 2006. Moreover, there is no indication that the U.S. Virgin Islands even has jurisdiction over ExxonMobil or CEI. With respect to ExxonMobil, even if the Virgin Islands did have jurisdiction, the law is clear that 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)). And advocacy, opinion, and expression of policy views do not lose their character as such or their constitutional protection even should they later turn out to be incorrect or should they omit some contrary fact or consideration that a government official believes ought to have been noted. *N.Y. Times v. Sullivan*, 376 U.S. 254, 271–73 (1964); *Guilford Transp. Indus. v. Guilford Transp. Indus. v. Wilner*, 760 A.2d 580, 588 (D.C. 2000) ("[I]f it is plain that a speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise,…the statement is not actionable.") (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)); *Moldea v. New York Times Co.*, 22 F.3d 310, 315 (D.C. Cir. 1994) (*Moldea II*). *See also Omnicare v. Laborers Dist. Council Const.*, 135 S. Ct. 1318 (2015). Finally, at the end of the day, "a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power," which must be interpreted and applied consistent with constitutional imperatives. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

As such, Attorney General Walker 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.

4. The Subpoena Violates CEI's First Amendment Privilege

The subpoena is unenforceable because it constitutes an attempt to violate CEI's First Amendment privilege by requiring it to disclose to the government the details of its expressive association with ExxonMobil, as well as other materials concerning its internal operations, strategies, and donors. "The Supreme Court has long recognized that compelled 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)). Thus courts have long recognized a First Amendment privilege against disclosures that "will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2009) (quoting *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349–50 (9th Cir. 1988)).

On that basis, the D.C. Circuit in *AFL-CIO v. FEC* blocked public disclosure of a labor union's and political party's internal documents and communications contained in a Federal Election Commission investigatory file because it would "intrude[] on the 'privacy of association and belief guaranteed by the First Amendment,' as well as seriously interfere[] with internal group operations and effectiveness." 333 F.3d at 177–78 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)). Releasing the names of their employees and associates, the court found, would "make it more difficult for the organizations to recruit future personnel." *Id*. at 176. And public disclosure of "internal planning documents" would "frustrate those groups' decisions as to 'how to organize themselves, conduct their affairs, and select their leaders,' as well as their selection of a 'message and the best means to promote that message.'" *Id*. at 177 (quoting *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 230–31 & n. 21 (1989)) (alterations omitted). It would also "directly

frustrate the organizations' ability to pursue their political goals effectively by revealing to their opponents activities, strategies and tactics that [they] have pursued in [the past] and will likely follow in the future." *Id*. at 177 (quotation marks omitted). These consequences, the court concluded, constituted "extensive interference with political groups' internal operations and with their effectiveness" and therefore "implicate[d] significant First Amendment interests in associational autonomy." *Id*.

Those are the very same consequences Attorney General Walker seeks to impose on CEI by forcing it to disclose its allies and supporters, internal communications concerning strategies and tactics, internal work product in support of its expressive and petitioning activities, expressive associations, and communications with allies and supporters. Disclosure of these things would directly undermine CEI's ability to pursue its policy goals, undermine its expressive associations with allies and supporters, threaten its donor relationships and coalition activities, and interfere with its internal operations. *See* Kazman Decl. ¶¶ 18–22. As a public official subject to the First Amendment, Attorney General Walker is barred from using his authority to interfere with CEI's organization and advocacy in this manner.

5. The Subpoena Is Astonishingly Burdensome and Overbroad

The subpoena is unduly burdensome, in that it appears to demand all documents and communications relating to climate change, energy, or ExxonMobil over a ten-year period ending in 2007. 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). In short: "An undue burden is identified by looking at factors such as relevance, the need for the documents, the breadth of the document request, the time period covered by such request, the particularity with which the documents are described, and the burden imposed." *Wyoming v. U.S. Dep't of Agriculture*, 208 F.R.D. 449, 452, 452–53 (D.D.C. 2002)

(citations omitted). "Non-party status is one of the factors the court uses in weighing the burden of imposing discovery." *Id*. at 452.

Attorney General Walker's massive and intrusive demands on CEI are not justified by any legitimate need. For CEI to attempt to search for, identify, collate, and transmit the scope of documents requested would require at least an estimated 30 person-weeks of labor, imposing substantial expenses on CEI, diverting CEI personnel from carrying out the organization's mission, and (as explained above) interfering with CEI's internal operations and undermining its ability to operate effectively. Kazman Decl. at ¶¶ 18–27. Weighed against this substantial burden on CEI, the Attorney General has no cognizable need for CEI to produce the information demanded, in light of the ability to obtain any relevant information from other parties, such as ExxonMobil, or (in the case of CEI's publications and public statements) from public sources, the pretextual nature of the investigation, the nullity of the Attorney General's underlying legal theory and retaliatory investigation, and statute-of-limitations concerns. By all indications, the only purpose of the subpoena was to harass and burden CEI, not to satisfy any legitimate litigation need, and for that reason it is unenforceable in its entirety.

D. CEI Would Still Be Entitled To Attorneys' Fees Under the Anti-SLAPP Act Were Attorney General Walker To Withdraw the Subpoena

This motion is timely because Attorney General Walker has not, at the time of its filing, taken the minimal steps required to dismiss this action, and CEI files it to preserve its substantive rights under the Act against their possible expiration. In addition, even were Attorney General Walker to act to terminate this action, CEI would still be entitled to its costs, including reasonable attorney's fees.

The Court of Appeals has made clear that requests for dismissal under the Act and requests for fees present separate issues. *Doe v. Burke*, 133 A.3d 569, 572 n.4 (D.C. 2016). On that basis, it denied the argument that it lacked jurisdiction to review denial of a fee award when the underlying action that prompted an anti-SLAPP motion had been voluntarily

dismissed. *Id*. The same approach prevails under the similar fee provision in California's anti-SLAPP act, Cal. C.C.P. § 425.16(c)(1), which California courts have interpreted as permitting fee awards when an offending action is voluntarily dismissed after the filing of an anti-SLAPP motion. *See S.B. Beach Properties v. Berti*, 138 P.3d 713, 717 n.2 (Cal. 2006) (citing cases). As those courts have recognized, denying fees in such circumstances "works a nullification of an important provision" of the anti-SLAPP statute by allowing procedural chicanery to trump substantive rights. *Liu v. Moore*, 69 Cal. App. 4th 745, 751, 81 Cal. Rptr. 2d 807 (1999). "[T]he critical issue is the merits of the defendant's motion to strike. This is as it should be. Persons who threaten the exercise of another's constitutional rights to speak freely and petition for the redress of grievances should be adjudicated to have done so, not permitted to avoid the consequences of their actions by dismissal of the SLAPP suit when a defendant challenges it." *Id*. at 752. Adjudication of fee requests in those circumstances "provides both financial relief in the form of fees and costs, as well as a vindication of society's constitutional interests." *Id*. The same approach prevails under Texas's and Illinois's anti-SLAPP Acts. *See Rauhauser v. McGibney*, -- S.W.3d --, 2014 WL 6996819, at *3 (Tex. App.–Ft. Worth 2014); *Wright Development Group, LLC v. Walsh*, 939 N.E.2d 389, 396–97 (Ill. 2010).

Accordingly, the substantive rights conferred by the D.C. Anti-SLAPP Act, including the right to attorney's fees, cannot be extinguished by a SLAPP violator's decision to withdraw his offending action after it has been challenged under the Act.

II. Attorney General Walker and His Counsel Are Subject to Sanctions for Violation of Rule 45 and Bad Faith Abuse of Legal Process

Pursuant to Rule 45, CEI is entitled to at least its attorneys' fees and expenses incurred in responding to a subpoena that was calculated to impose undue burden and expense on CEI. The Attorney General's bad faith and improper purpose are the hallmarks of sanctionable conduct under Rule 45, and sanctions are required to vindicate the policies of Rule 45(c), deter further abuse of legal process, and redress CEI's injuries.

Rule 45(c)(1) requires attorneys seeking the issuance of a subpoena to take affirmative steps to avoid unnecessary burdens and expenses on the recipient and provides that the Court must enforce that duty:

> *Avoiding Undue Burden or Expense; Sanctions*. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

Courts applying the identical provision of the Federal Rules of Civil Procedure have held that sanctions are particularly appropriate when "the subpoena was issued in bad faith or for some improper purpose." *Goldberg v. Amgen*, 123 F. Supp. 3d 9, 22–23 (D.D.C. 2015). *See also Alberts v. HCA Inc.*, 405 B.R. 498, 503 (D.D.C. 2009) (observing that "blatant abuse of the subpoena power is a common thread running through decisions in which sanctions have been awarded under Rule 45(c)(1)"); *Tiberi v. CIGNA Ins. Co.*, 40 F.3d 110, 112 (5th Cir. 1994) (stating that Rule 45(c) provides for sanctions against "one issuing a vexatiously overbroad subpoena"); *Legal Voice v. Stormans Inc.*, 738 F.3d 1178, 1185 (9th Cir. 2013) (stating that a court may impose sanctions under Rule 45(d)(1) "when a party issues a subpoena in bad faith, for an improper purpose, or in a manner inconsistent with existing law"); *Molefi v. Qppenheimer Trust*, No. 03 Civ. 5631, 2007 U.S. Dist. LEXIS 10554, at *6–8, 2007 WL 538547 (E.D.N.Y. Feb. 15, 2007) (awarding sanctions because the subpoena was burdensome and had no proper purpose); *Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792, 814 (9th Cir. 2003) (affirming district court's award of sanctions based on finding that subpoena was "overly burdensome and served for an improper purpose").

In this instance, the bad faith and improper purpose of Attorney General Walker and his counsel in obtaining the subpoena are manifest. As described above, the Attorney General announced that he would use the powers of his office to harass those who disagree with his policy agenda and then, almost immediately thereafter, did so by targeting CEI with an absurdly overbroad subpoena calculated to interfere with its exercise of its First

Amendment rights, nominally in furtherance of a pretextual, retaliatory investigation with no possibility of success. Moreover, Attorney General Walker and his counsel obtained the subpoena and served it on CEI in violation of UIDDA and, even upon notification of that fact, declined to withdraw it. Only upon being notified that they could face sanctions did they grudgingly agree to terminate this proceeding and yet still refused to withdraw the original subpoena issued by Attorney General Walker, despite that it cannot be lawfully domesticated under UIDDA and therefore cannot be enforced against CEI. The only possible explanation for these unusual actions is the one conceded by Attorney General Walker himself at the press conference: the point of his investigation and the subpoena is to intimidate and harass those who disagree with his policy views.

That bad faith purpose in wielding this Court's power to subpoena also warrants sanctions under the Court's inherent authority. *See In re M.L.P.*, 936 A.2d 316, 322 (D.C. 2007) (stating that this Court "has inherent authority to impose sanctions upon a showing of bad faith"); *Chevalier v. Moon*, 576 A.2d 722, 724 (D.C. 1990) ("[A]ttorney's fees will be allowed if a party has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'"). Given Attorney General Walker's and Ms. Singer's refusal to withdraw the subpoena issued by the Attorney General and their threat to act to enforce it at any time, sanctions are necessary here "to punish abuses of the judicial process and to deter future abuses." *Id*. (citing *General Federation of Women's Clubs v. Iron Gate Inn, Inc.*, 537 A.2d 1123, 1128 (D.C. 1988)).

Conclusion

For the foregoing reasons, the Court should grant CEI's Special Motion To Dismiss, enter judgment in CEI's favor dismissing this action and thereby invalidating the subpoena issued by this Court, grant CEI's Motion for Sanctions, find that CEI is entitled to its costs and reasonable attorneys' fees in responding to the subpoena in an amount to be proven, as well as all other appropriate relief.

Dated: May 16, 2016

Respectfully submitted,

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