

ONE HUNDRED EIGHTEENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

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November 1, 2023

Mr. Andrew D. Herman
Lawrence & Bundy LLC
1775 Pennsylvania Avenue NW, Suite 650
Washington, DC 20006

Re: As You Sow

Dear Mr. Herman:

The Committee on the Judiciary is conducting oversight of the adequacy and enforcement of U.S. antitrust laws. Pursuant to the Rules of the House of Representatives, the Committee has jurisdiction to conduct oversight of matters concerning the “[p]rotection of trade and commerce against unlawful restraints and monopolies” to inform potential legislative reforms, such as whether existing civil and criminal penalties and current antitrust law enforcement efforts are sufficient to deter anticompetitive collusion in the investment industry.¹

I. Background and Legislative Purpose of the Committee’s Oversight

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 that may violate U.S. antitrust law. To advance our oversight and inform potential legislation related to collusive ESG policies, the Committee must understand how and to what extent As You Sow may facilitate collusion to promote ESG-related goals.

As we previously explained, As You Sow is a member of Climate Action 100+, whose members collusively have agreed to “work with the companies in which [they] invest to . . . deliver[] net zero [greenhouse gas (GHG)] emissions by 2050.”² You have “disagree[d] with the [Committee’s] description of [As You Sow’s] activity and the legal theory propounded by the Committee.”³ However, you acknowledge that As You Sow is a member of Climate Action

¹ Rules of the House of Representatives R. X (2023).

² Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al. to Andrew Behar 1 (Aug. 1, 2023) [hereinafter August 1 Letter] (quoting CLIMATE ACTION 100+, THE THREE GOALS, <https://www.climateaction100.org/approach/the-three-goals/>).

³ Letter from Andrew D. Herman to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, 1 (Sept. 11, 2023) [hereinafter September 11 Letter].

100+, as well as a member of Ceres, Principles for Responsible Investment, and the Interfaith Center on Corporate Responsibility, “each of which have programs that address climate change”—implemented in similarly collusive manners.⁴ Moreover, As You Sow continues to boast that it “works with shareholders in several capacities,” including by “engag[ing]” with companies to “address shareholder concern[s],” “fil[ing] resolutions and represent[ing] shareholders,” and “act[ing] as a representative to move resolutions filed directly by shareholders.”⁵ Thus, the Committee’s concerns that As You Sow may be facilitating collusion in violation of U.S. antitrust law appear to be well-founded.

II. As You Sow’s Antitrust Arguments Lack Merit

You argue that “[t]here is no precedent or basis in law to support the assertion . . . that As You Sow[] . . . is potentially violating U.S. antitrust law.”⁶ That argument misapprehends well-established principles of antitrust law, including those set forth in the Committee’s initial letter.⁷ First, you appear to suggest that As You Sow cannot violate the antitrust laws because it “represent[s] shareholders on issues related to climate change.”⁸ However, as explained in our initial letter, the Supreme Court “has regularly refused . . . requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives The statutory policy of the Act is one of competition and it precludes inquiry into the question whether competition is good or bad.”⁹

Second, you assert that As You Sow is immune from antitrust liability because it is a “non-profit organization.”¹⁰ Again, that proposition consistently has been rejected by the Supreme Court, which recently emphasized that “the Sherman Act ha[s] already been applied to other nonprofit organizations” and rejected antitrust defendants’ argument that they “are not ‘commercial enterprises.’”¹¹

Third, you claim that “As You Sow is not the type of market actor with the power to achieve or compel such violations of the [Sherman] Act,” and that its “work is pro-competitive.”¹² That argument misapprehends the nature of section one of the Sherman Act. As we explained in our initial letter, certain conduct restraining trade is per se illegal.¹³ Thus, “[i]t makes no difference . . . whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise

⁴ *Id.* at 5.

⁵ AS YOU SOW, 2023 SHAREHOLDER IMPACT REVIEW: CHANGING CORPORATIONS FOR GOOD 4–5 (Sept. 6, 2023).

⁶ September 11 Letter at 3.

⁷ *See* August 1 Letter at 2.

⁸ September 11 Letter at 3.

⁹ *NCAA v. Alston*, 594 U.S. ___, 141 S. Ct. 2141, 2159 (2021) (cleaned up); *see also, e.g., FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411 (1990); *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).

¹⁰ September 11 Letter at 3.

¹¹ *Alston*, 141 S. Ct. at 2158–59; *see Bd. of Regents*, 468 U.S. at 100 n.22.

¹² September 11 Letter at 3.

¹³ *Bd. of Regents*, 468 U.S. at 100; *see* August 1 Letter at 2.

or to decrease prices.”¹⁴ The Supreme Court has explained that “the amount of interstate or foreign trade involved is not material, since [section one] of the Act brands as illegal the character of the restraint not the amount of commerce affected.”¹⁵ “It is the contract, combination or conspiracy, in restraint of trade or commerce which [section one] of the Act strikes down.”¹⁶ In any event, 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.¹⁷

III. The Committee’s Requests and As You Sow’s Response

As a part of the Committee’s oversight to inform potential legislative reforms, the Committee wrote on August 1, 2023, to request that As You Sow produce documents and communications related to how As You Sow advances ESG policies, in addition to other information.¹⁸ We requested that As You Sow produce responsive material by August 15.¹⁹ On the day of that deadline, As You Sow’s Chief Executive Officer, Andrew Behar, responded with a one-page letter stating that As You Sow was “reviewing” the Committee’s requests and “in the process of preparing a response,” with an anticipated response date of September 11.²⁰ As You Sow did not produce any documents with its August 15 letter.

On August 17, the Committee wrote to reiterate our outstanding requests for documents and information.²¹ In that letter, the Committee explained that not only had As You Sow failed to produce any documents whatsoever, it had not provided any indication of what steps, if any, it had pursued to identify and review potentially responsive documents.²² The Committee sought As You Sow’s voluntary compliance by August 31, and advised As You Sow that the Committee might be forced to pursue compulsory process if the requests remained outstanding.²³ At the deadline, you responded with a two-page letter stating that you had “recently been retained by As You Sow to assist . . . in addressing [y]our inquiry,” and “reiterate[d] [As You Sow’s] intent to provide a substantive response by September 11.”²⁴ As You Sow did not produce any documents with its August 31 letter.

On September 8, Committee staff contacted you via e-mail to request confirmation that “As You Sow’s intended September 11 ‘substantive response’ [would] contain documents, including e-mail communications, that are responsive to the Committee’s requests.”²⁵ Your

¹⁴ *McKesson & Robbins, Inc.*, 351 U.S. at 310.

¹⁵ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940) (cleaned up).

¹⁶ *Id.* (same).

¹⁷ DANIELLE FUGERE & ANDREW BEHAR, AS YOU SOW, 2020: A CLEAR VISION FOR PARIS COMPLIANT SHAREHOLDER ENGAGEMENT 6 (Sept. 6, 2018).

¹⁸ See August 1 Letter.

¹⁹ See *id.* at 3.

²⁰ Letter from Andrew Behar to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al. (Aug. 15, 2023).

²¹ See Letter from Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary to Andrew Behar (Aug. 17, 2023).

²² See *id.*

²³ *Id.* at 2.

²⁴ Letter from Andrew D. Herman to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, 1 (Aug. 31, 2023).

²⁵ E-mail from H. Comm. on the Judiciary Staff to Andrew D. Herman (Sept. 8, 2023).

September 8, 2023, reply again reiterated that As You Sow would “be providing a substantive response” on September 11, but refused to “provide additional details before that time.”²⁶

On September 11, you sent a letter acknowledging that “As You Sow is a member of [Climate Action 100+], Ceres, [Principles for Responsible Investment], and the Interfaith Center on Corporate Responsibility, each of which have programs that address climate change,” and boasting that “climate-related shareholder proposals supported by As You Sow have received majority votes at numerous companies, including Caterpillar, Chubb, General Electric, and The Travelers Companies, among others.”²⁷ As You Sow did not produce any documents with its September 11 letter. Instead, you questioned the Committee’s authority to conduct its oversight work to inform legislative reforms.

The Supreme Court has been clear that Congress has a “broad and indispensable” power “to secure needed information in order to legislate.”²⁸ This power “encompasses inquiries into the administration of existing laws, studies of proposed laws, and surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them” so long as the subpoena “concern[s] a subject on which legislation could be had.”²⁹ Such is the case here. The Committee’s oversight of the adequacy and enforcement of U.S. antitrust laws to inform potential legislative reforms falls squarely within its jurisdiction.³⁰

IV. As You Sow’s General Objections to the Committee’s Investigation Lack Merit

You have raised several legal objections to the Committee’s requests, each of which is inapplicable here. First, you incorrectly suggest that the Committee’s requests were made “for the purpose of ‘law enforcement.’”³¹ However, as we previously explained, the Committee “is conducting oversight of the adequacy and enforcement of U.S. antitrust laws . . . [to] inform potential legislative reforms,” such as whether existing civil and criminal penalties and current antitrust law enforcement efforts are sufficient to deter anticompetitive collusion in the investment industry.³²

Second, you argue that the Committee’s requests are not pertinent because As You Sow is not an asset manager and because As You Sow believes the Committee’s requests to be broad.³³ However, the Committee’s initial letter made clear that As You Sow is a “[s]tockholder engagement service provider[]” that “promote[s] environmental and social corporate responsibility through shareholder advocacy [and] coalition building.”³⁴ As we explained both above and in our original letter, As You Sow has entered into apparently collusive agreements

²⁶ E-mail from Andrew D. Herman to H. Comm. on the Judiciary Staff (Sept. 8, 2023).

²⁷ September 11 Letter at 3, 5 (footnotes omitted).

²⁸ *Trump v. Mazars USA, LLP*, 591 U.S. ___, 140 S. Ct. 2019, 2031 (2020) (cleaned up).

²⁹ *Id.* (cleaned up).

³⁰ See Rules of the House of Representatives R. X (2023).

³¹ September 11 Letter at 4.

³² August 1 Letter at 1.

³³ See September 11 Letter at 4–5.

³⁴ August 1 Letter at 1 (quoting AS YOU SOW, ABOUT US, <https://www.asyousow.org/about-us>).

with Climate Action 100+ and other ESG cartels.³⁵ 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. Further, the Supreme Court has been clear that Congress has a “broad and indispensable” power “to secure needed information in order to legislate,” and the Committee’s requests are well within its jurisdiction to conduct oversight of the adequacy and enforcement of U.S. antitrust laws.³⁶ 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.

Third, you broadly assert that the Committee’s requests constitute a “clear infringement upon As You Sow’s First Amendment right of association.”³⁷ However, “[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.”³⁸ Thus, for example, the Supreme Court has noted that:

it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.^[39]

Further, the *Noerr-Pennington* doctrine,⁴⁰ which exempts “conduct . . . aimed at influencing decisionmaking by the government” from antitrust liability,⁴¹ cannot immunize As You Sow’s conduct because As You Sow is not petitioning the government.⁴² Nor would the First Amendment right to free association extend to As You Sow’s “commercial relationships” and “commercial transactions” that are the subject of the Committee’s requests.⁴³ Specifically, as discussed below, our requests seek information related to As You Sow’s targets for fossil fuel production and relationships with ESG cartels and players in the investment industry.⁴⁴

Fourth, you suggest that As You Sow’s anticompetitive conduct is somehow authorized because you claim it has been “conducted in accordance with a process established by Securities

³⁵ See *id.*

³⁶ *Trump v. Mazars USA, LLP*, 591 U.S. ___, 140 S. Ct. 2019, 2031 (2020) (cleaned up).

³⁷ September 11 Letter at 6.

³⁸ *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972).

³⁹ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (cleaned up).

⁴⁰ *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

⁴¹ *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014).

⁴² See, e.g., *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005); *LaSalle Nat. Bank of Chicago v. DuPage Cnty.*, 777 F.2d 377, 384 n.6 (7th Cir. 1985).

⁴³ *Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34, 46 (D.D.C. 2018).

⁴⁴ See August 1 Letter at 2–3.

and Exchange Commission (SEC) regulations.”⁴⁵ However, there is no “plain repugnancy” or “clear[] incompatib[ility]” between the SEC’s shareholder proposal rules and the antitrust laws, so the Sherman Act continues to apply with full force and effect.⁴⁶ Further, you fail to explain how an agency rule could preempt a statute adopted by Congress and signed by the President.⁴⁷

V. As You Sow’s Specific Objections to the Committee’s Requests Lack Merit

In addition, you suggested that Committee “requests one, two, four, five, and six do not appear to be applicable to As You Sow” because of “[t]he Committee’s mistake regarding the identity of As You Sow as an asset manager.”⁴⁸ As discussed above, the Committee made no such mistake. We understand that As You Sow is a stockholder engagement service provider that may be colluding with alliances or initiatives and asset managers to advance ESG-related goals. Moreover, given its function as a stockholder engagement service provider, As You Sow may also have evidence relevant to third parties’ agreements that violate antitrust laws. In any event, the Committee has reason to believe As You Sow has non-public documents that are responsive to the Committee’s requests. For example:

- Request 1 seeks “documents and communications referring or relating to the need for As You Sow to advance decarbonization and net zero emissions goals.”⁴⁹ You argue that “As You Sow does not ‘need’ to advance decarbonization or net zero emissions goals.”⁵⁰ However, As You Sow has stated publicly that there is a “need to transition from fossil-fuel based energy to clean energy sources.”⁵¹ For example, your letter itself asserts that “there is global consensus on the reality and risks of climate change.”⁵² Similarly, As You Sow emphasizes the supposedly “catastrophic impacts of climate change” and “the importance of setting and achieving emissions reduction targets that hold global warming below 1.5 degrees C.”⁵³ It also urges that stockholders force corporations to “[p]rovide capital expenditure plans that are demonstrably in line with maintaining global temperatures well below 2°C.”⁵⁴ Further, documents produced to the Committee by other parties suggest that As You Sow has such goals.⁵⁵
- Request 2 seeks “documents and communications referring or relating to how As You Sow developed its decarbonization and net zero emissions targets and commitments.”⁵⁶ You argue that As You Sow “does not have decarbonization and net zero targets or

⁴⁵ September 11 Letter at 3 (citing 17 C.F.R. § 240.14a-8).

⁴⁶ *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 267, 285 (2007).

⁴⁷ *See, e.g., Caldera v. J.S. Alberici Const. Co.*, 153 F.3d 1381, 1383 n.** (Fed. Cir. 1998).

⁴⁸ September 11 Letter at 4.

⁴⁹ August 1 Letter at 2.

⁵⁰ September 11 Letter at 5.

⁵¹ As You Sow, *Energy Section Transition*, <https://www.asyousow.org/our-work/energy/energy-sector-transition>.

⁵² September 11 Letter at 2.

⁵³ As You Sow, *Road To Zero Emissions* (Mar. 2, 2022), <https://www.asyousow.org/report-page/2022/road-to-zero-emissions>.

⁵⁴ FUGERE & BEHAR, *supra* note 17, at 22.

⁵⁵ *See* documents on file with H. Comm. on the Judiciary.

⁵⁶ August 1 Letter at 3.

commitments.”⁵⁷ However, it is clear that You Sow has and pursues such targets and commitments. For example, your letter asserts that “climate-related shareholder proposals supported by As You Sow have received majority votes at numerous companies.”⁵⁸ Further, documents produced to the Committee by other parties suggest that As You Sow has such targets.⁵⁹

- Request 4 seeks “documents and communications referring or relating to how proxy advisors . . . can or should advance decarbonization and net zero emissions goals.”⁶⁰ You argue that “As You Sow does not hire proxy advisors and does not therefore maintain an institutional position on th[is] broad question.”⁶¹ However, documents produced to the Committee by other parties suggest that As You Sow communicates with proxy advisors about advancing such goals.⁶²
- Request 5 seeks “documents and communications referring or relating to any agreement . . . among As You Sow, asset managers . . . , proxy advisors . . . , and alliances or initiatives such as Climate Action 100+ . . . to advance decarbonization and net zero emissions goals.”⁶³ You argue that “As You Sow does not have agreements with asset managers, proxy advisors, and alliances or initiatives to advance decarbonization and net zero emissions goals.”⁶⁴ However, documents produced to the Committee by other parties suggest that As You Sow has entered into such agreements.⁶⁵
- Request 6 seeks “documents and communications referring or relating to how As You Sow’s decarbonization and net zero emissions goals, agreements, and commitments . . . affect output, price, or the choices available to consumers and investors.”⁶⁶ You argue that As You Sow “does not have decarbonization and net zero targets or commitments or agreements.”⁶⁷ However, as set forth above, documents both publicly available and produced to the Committee in this investigation by other parties undercut your contention. Indeed, As You Sow expressly has stated: “Shareholders need to unify behind a bold resolution asking companies to . . . commit to immediately ceasing capital expenditures for exploration of new sources of fossil fuels that would bring company emissions outside of” a 2°C increase.⁶⁸ An As You Sow-published report estimated that “\$1 trillion per year” in “investment must be diverted from fossil fuel-based power generation, industrial processes, transport, and land use.”⁶⁹

⁵⁷ September 11 Letter at 5.

⁵⁸ *Id.* at 3.

⁵⁹ See documents on file with H. Comm. on the Judiciary.

⁶⁰ August 1 Letter at 3.

⁶¹ September 11 Letter at 5.

⁶² See documents on file with H. Comm. on the Judiciary.

⁶³ August 1 Letter at 3.

⁶⁴ September 11 Letter at 5.

⁶⁵ See documents on file with H. Comm. on the Judiciary.

⁶⁶ August 1 Letter at 3.

⁶⁷ September 11 Letter at 5.

⁶⁸ FUGERE & ANDREW BEHAR, *supra* note 17, at 22.

⁶⁹ HEIDI WELSH & MICHAEL PASSOFF, AS YOU SOW ET AL., PROXY PREVIEW 2022 24 (Mar. 21, 2022).

You also challenged the supposed breadth and burden of the Committee’s third request.⁷⁰ Request 3 seeks “documents and communications referring or relating to how As You Sow and other stockholder engagement service providers can or should advance decarbonization and net zero emissions goals.”⁷¹ You argue, without explanation, that “[t]his request is so broad as to encompass essentially all substantive climate material.”⁷² However, Request 3 goes to the core of the Committee’s investigation as it pertains to As You Sow: determining what work stockholder engagement service providers like As You Sow do to advance ESG-related goals, such as collusively “engag[ing] . . . with companies” and “fil[ing] resolutions and represent[ing] shareholders,” and whether such collusive efforts increase prices, decrease output, or otherwise unreasonably restrain trade.⁷³ The Committee remains willing to discuss how its requests may be fulfilled as efficiently as possible—an invitation that As You Sow has declined for three months, despite indicating on August 15 that As You Sow was “in the process of preparing a response,”⁷⁴ and committing on August 31 “to provid[ing] a substantive response by September 11.”⁷⁵ Instead, As You Sow’s continued failure to produce even a single responsive document reveals its bad faith in responding to the Committee’s requests, and the need for compulsory process to issue.

Finally, As You Sow’s direction that the Committee consult As You Sow’s “publicly filed shareholder proposals and proxy memos” is an insufficient response to our requests.⁷⁶ While those public materials do raise questions about As You Sow’s compliance with section one of the Sherman Act, the scope of our investigation is not limited to public materials, and the Committee is entitled to exercise its subpoena power to obtain pertinent internal documents and communications. These internal materials are necessary to inform the Committee’s oversight of the antitrust laws and the potential legislative reforms that may be appropriate. In particular, private communications with other stockholders and non-public documents related to engagements with target companies may reveal the terms and the extent of As You Sow’s potentially collusive agreements.

* * *

As You Sow’s response without compulsory process has been inadequate. To date, three months after the Committee’s initial requests, As You Sow has not produced a single document in response to the Committee’s requests. Further, As You Sow has made clear that it does not intend to comply voluntarily with the Committee’s requests.

⁷⁰ See September 11 Letter at 5, 6.

⁷¹ August 1 Letter at 3.

⁷² September 11 Letter at 5.

⁷³ 2023 SHAREHOLDER IMPACT REVIEW, *supra* note 5, at 4–5.

⁷⁴ Letter from Andrew Behar to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, et al. (Aug. 15, 2023).

⁷⁵ Letter from Andrew D. Herman to Rep. Jim Jordan, Chairman, H. Comm. on the Judiciary, 1 (Aug. 31, 2023).

⁷⁶ September 11 Letter at 5.

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Accordingly, please find enclosed a subpoena.

Sincerely,



Jim Jordan
Chairman

cc: The Honorable Jerrold L. Nadler, Ranking Member
Mr. Andrew Behar, Chief Executive Officer, As You Sow

Enclosures