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CONFIDENTIAL

February 29, 2024

VIA ELECTRONIC MAIL

The Honorable Ron Wyden, Chairman
United States Senate Committee on Finance
221 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Response to February 6, 2024, Letter to Harlan R. Crow

Dear Chairman Wyden:

We write on behalf of Harlan Crow in response to your letter of February 6, 2024, which requests an extensive range of documents and information about Mr. Crow's compliance with the Internal Revenue Code, the maritime laws of the United States and the United Kingdom, and trademark laws. To put it mildly, it is deeply concerning that a committee with broad and important jurisdiction—over taxation, health care, trade, and Social Security—should concern itself for the better part of a year with attacking an American citizen, businessman, and philanthropist, first for his friendship with a Supreme Court Justice, and now for such things as how a boat was registered under the maritime laws of a foreign jurisdiction. While we appreciate the important role of the Senate Finance Committee, we do not believe the Committee's inquiries in this matter further the legislative functions in which the Committee is authorized to engage.

In three crucial respects, the Committee's inquiries are objectionable and exceed the bounds of its investigative authority. First, the Committee has requested an immense amount of information about the tax treatment of a company affiliated with Mr. Crow, Rochelle Charter Inc. ("Rochelle Charter"). But the Committee's tax-related questions about Rochelle Charter are rooted in serious misunderstandings of the relevant facts and how the law applies to those facts. As a result, much of what the Committee requests is irrelevant to the Committee's purported goal of better understanding how taxpayers use pass-through losses to offset income.

Second, the Committee has extended its investigation to areas far outside its jurisdiction by asking questions about Rochelle Charter's compliance with maritime and trademark laws, evidently in an attempt to investigate whether Mr. Crow or Rochelle Charter have committed any violations of those laws. That is an inappropriate use of the Committee's investigative authority in excess of its jurisdiction, and, in any event, the Committee's accusations of misconduct are without merit.

Finally, the Committee lacks a valid legislative purpose for its investigation because—contrary to the Committee's assertion that it is seeking to better understand the tax treatment of assets owned by wealthy taxpayers—it is clear that the Committee is in fact acting for the sole purpose of harassing and casting aspersions on Mr. Crow because of his friendship with Justice Thomas. A more inappropriate and unlawful use of the Committee's investigative powers is difficult to imagine, and Mr. Crow is therefore under no obligation to acquiesce to the Committee's inquiry.

* * * * *

The Committee Seeks Information Irrelevant to the Purported Purpose of Its Investigation

The Committee's inquiry—and its baseless accusations of impropriety against Mr. Crow—are rooted in distortions of the relevant facts and misapplications of the Internal Revenue Code. The Committee says that it is "interest[ed] in understanding weakness in the tax law and tax enforcement regime as it applies to the idiosyncratic world of the ultra-wealthy." To improve its understanding of this issue, the Committee claims that it needs information about tax deductions "related to the personal recreational use" of a yacht owned and chartered by Rochelle Charter. However, the information the Committee seeks in connection with this inquiry is irrelevant to the Committee's purported objective.

In the first place, Rochelle Charter has filed taxes as a Subchapter C corporation since 2015. Accordingly, if any losses were incurred by Rochelle Charter from that date forward, they would have remained within the corporation, and would not have passed through to or been reported on the personal income tax returns filed by Mr. Crow or any other individuals. The hobby loss rule codified at 26 U.S.C. § 183—which is allegedly the focus of the Committee's inquiry—does not apply to Subchapter C corporations like Rochelle Charter, and could not have applied to the company for nearly a decade. *See* 26 U.S.C. § 183 ("In the case of an activity engaged in by an individual or an S corporation . . ."); *Potter v. Comm'r*, 116 T.C.M. (CCH) 296 (2018) ("[S]ection 183 does not apply to C corporations.").

Thus, much of the information that the Committee has requested from Mr. Crow is wholly irrelevant to the supposed purpose of the Committee's investigation. Given the Committee's stated rationale, it plainly has no basis for requesting information concerning the years in which Rochelle Charter was a C corporation. *See Sinclair v. United States*, 279 U.S. 263, 292 (1929) ("[A] witness rightfully may refuse to answer where . . . the questions asked are not pertinent to the matter under inquiry."), *overruled on other grounds by United States v. Gaudin*, 515 U.S. 506 (1995).

The remaining information the Committee seeks from the earlier years during which Rochelle Charter filed as a Subchapter S corporation is, for different reasons, also irrelevant

to the Committee's inquiry. In particular, the Committee's apparent assumption that Rochelle Charter has allowed the *Michaela Rose* to be used improperly for personal or other non-business purposes is based on a misunderstanding of the facts. For the nearly four decades since it was incorporated, Rochelle Charter has operated a yacht charter business with the primary purpose of making a profit, consistent with the established definition of a trade or business set forth by the Supreme Court in *Commissioner v. Groestzinger*, 480 U.S. 23, 35 (1987). Rochelle Charter's business has historically involved chartering the *Michaela Rose* to the extensive network of entities affiliated with the Crow family, as well as to members of the Crow family on occasions when they choose to charter the boat for personal or other non-business purposes. In all cases—whether the yacht is chartered to a Crow-affiliated business or by a Crow family member—Rochelle Charter charges and receives an appropriate market rate for yacht charters, which is calculated to cover and exceed the anticipated costs of operating the yacht. Further, Rochelle Charter regularly updates the rates it charges to ensure that they are consistent with market rates, and the arm's-length nature of the rates has never been questioned by the Internal Revenue Service ("IRS") under 26 U.S.C. § 482 or otherwise. And when Mr. Crow charters the yacht for personal or other non-business purposes, he does not claim or report any deductions on his personal income tax returns for the charter rate paid to and included in income by Rochelle Charter, consistent with applicable tax law.

Rochelle Charter's charging of market rates for its charter services, coupled with its maintenance of the same kinds of business records that any commercial business would typically keep, among other factors, establishes that Rochelle Charter has always been engaged in a for-profit activity. Accordingly, even for tax years prior to its conversion to a C corporation, the company has not been subject to the loss disallowance provisions of the hobby loss rule. *See, e.g.*, 26 C.F.R. § 1.183-2(b)(1) ("The fact that the taxpayer carries on the activity in a businesslike manner and maintains complete and accurate books and records may indicate that the activity is engaged in for profit. Similarly, where an activity is carried on in a manner substantially similar to other activities of the same nature which are profitable, a profit motive may be indicated."). The Committee has no basis to suggest otherwise, and its insinuations that Rochelle Charter may have violated the hobby loss rule are at odds with the relevant facts.

Simply put, because market-based charter rates have always been paid for the use of the *Michaela Rose*, there is no issue with deductions by Rochelle Charter for personal or recreational use of the boat. The Committee is thus demanding information from Mr. Crow that has no connection to the subject that the Committee claims it is investigating.[1]

[1] The information the Committee seeks from when Rochelle Charter filed as an S corporation is also irrelevant because that information is from many years ago, meaning that, even if it were available, the information would, because of the passage of time, almost certainly be "plainly incompetent or irrelevant" to the Committee's inquiry. *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17, 21 (D.D.C. 1994). The quality and informational

The Committee's Inquiry Exceeds Its Jurisdiction

Many of the Committee's requests for information are also objectionable and lack a valid legislative purpose because they concern matters that are entirely unrelated to any subject that falls within the Committee's jurisdiction. Mr. Crow is under no obligation to satisfy the Committee's extra-jurisdictional requests—including its questions pertaining to maritime law, both foreign and domestic, and trademark law. Further, the Committee's understanding of these laws is misinformed. As a result, any suggestion that these laws are in any way relevant to the Committee's inquiry is mistaken.

A committee's "right to exact testimony and to call for the production of documents must be found in" "the controlling charter of the committee's powers." *United States v. Rumely*, 345 U.S. 41, 44 (1953). Thus, "committees are restricted to the missions delegated to them," and "[n]o witness can be compelled to make disclosures on matters outside that area." *Watkins v. United States*, 354 U.S. 178, 206 (1957). Under Senate Rules, the Senate Finance Committee is restricted to legislating on and investigating a carefully delimited set of subject areas, most of which can be broadly characterized as relating to healthcare, trade, tariffs, and taxes. *See* Senate Rule XXV(1)(i). None of the subjects that falls within the Committee's jurisdiction can reasonably be said to include the Passenger Vessel Services Act ("PVSA"), the maritime law and regulations of the United Kingdom, or trademark law. Indeed, bills to amend the PVSA or trademark laws are routinely referred to committees other than the Senate Finance Committee. *See* Alaska Tourism Restoration Act, S. 593, 117th Cong. (2021) (bill to amend the PVSA, referred to the Senate Commerce Committee); Trademark Licensing Protection Act of 2023, S. 2173, 118th Cong. (2023) (bill to amend the Trademark Act of 1946, referred to the Senate Judiciary Committee). And the Committee obviously lacks any authority to amend U.K. maritime law. The Committee is thus engaged in a fishing expedition in waters in which it is not authorized to troll.

For example, the Committee's attempt to equate the criteria that determine whether a corporation is engaged in a for-profit activity for purposes of the hobby loss rule with the various requirements and restrictions of maritime law demonstrates misunderstandings of both areas of law. The Committee cites guidance from the U.S. Coast Guard that describes when a vessel is subject to certain kinds of inspections when travelling in U.S. waters, in an attempt

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value of documentary records necessarily degrades with age, and the benefits of retaining such materials for extended periods are limited. *See Hardin v. Straub*, 490 U.S. 536, 543 (1989) (recognizing that "memories may dim, witnesses depart, and evidence disappears" with the "passage of time"). For that reason, the Internal Revenue Code establishes a general three-year period during which the IRS may audit and make adjustments to tax returns and taxpayers may submit amended returns. *See* 26 U.S.C. §§ 6501(a), 6511(a). The Committee's request for information far exceeds that statutory limitation, and is a clear example of congressional investigators impermissibly "turn[ing] their attention to the past to collect minutiae on remote topics." *Watkins v. United States*, 354 U.S. 178, 204 (1957).

to support the Committee's claim that the *Michaela Rose* is subject to the PVSA's navigation prohibitions. *See* Feb. 6, 2024 Ltr. at 6 n.22. However, that guidance, and its discussion of the number of passengers that a vessel carries and whether the passengers pay for the transportation, concern maritime inspection laws found at 46 U.S.C. § 3301, a statute that applies in circumstances very different from those that trigger the application of the PVSA's navigation restrictions, found at 46 U.S.C. § 55103, that the Committee claims Rochelle Charter may be violating.

In particular, unlike the inspection laws discussed in the Coast Guard's guidance, which, as the Committee notes, apply based on the number of passengers a vessel carries and whether any passenger pays for the transportation, the PVSA's navigation restrictions apply only when a foreign vessel carries passengers between U.S. ports. *See* 19 C.F.R. § 4.50. And whether a person qualifies as a passenger, and thus triggers application of the PVSA, does not turn on whether the passenger pays for the transportation. *See id*. ("A passenger within the meaning of this part is any person carried on a vessel who is not connected with the operation of such vessel, her navigation, ownership, or business."). Guidance from U.S. Customs and Border Protection makes clear that a vessel is subject to the PVSA if it transports any passenger "not 'directly and substantially' connected with the operation, navigation, ownership or business of the vessel" between U.S. ports, regardless of whether money changes hands in connection with the transportation. U.S. Customs and Border Protection, The Passenger Vessel Services Act 13 (Sept. 2019).

Thus, the Committee errs in assuming that the circumstances triggering application of the PVSA are in some way relevant to determining whether an S corporation is engaged in a for-profit activity, or is instead subject to the loss disallowance provisions of the hobby loss rule. Application of the two laws turns on completely different criteria, and compliance or noncompliance with one is not determinative of compliance with the other.

The Committee's foray into U.K. maritime law is equally inapposite. The laws of a foreign jurisdiction that have nothing to do with Rochelle Charter's U.S. tax obligations are of vanishingly limited relevance to the issue the Committee claims it is investigating; namely, whether Mr. Crow improperly deducted any Rochelle Charter losses on his personal income tax returns. As with provisions of U.S. maritime law, the standard for determining whether a yacht is a pleasure vessel under U.K. law is fundamentally different from the test for whether the hobby loss rule applies under the Internal Revenue Code. Attempting to compare the two—or to claim that compliance with U.K. law is somehow relevant to application of the hobby loss rule—is at best mistaken, and indicates that the Committee is engaged in an effort to insinuate every conceivable kind of wrongdoing on the part of Mr. Crow.

Finally, the Committee's interest in Rochelle Charter's application to trademark the name of the *Michaela Rose* (an application that the U.S. Patent and Trademark Office granted)

is baffling. As the Committee notes, Rochelle Charter did not apply for the trademark until 2019, long after the company began filing as a C corporation and the hobby loss rule ceased to apply the company's activities. The trademark application is for that reason entirely unrelated to the supposed focus of the Committee's inquiry. Indeed, the Committee's letter does not even attempt to draw a meaningful connection between Rochelle Charter's trademark application and the company's compliance with the tax code. Instead, the Committee's discussion of trademark law seems largely designed to smear Mr. Crow with baseless suggestions that Rochelle Charter's executives may have violated criminal statutes, and that Rochelle Charter's trademark application "merit[s] further investigation." But a congressional committee—and certainly the Senate Finance Committee, which has no jurisdiction over or expertise regarding trademark laws—is not in any way authorized to conduct such an investigation, and the Committee's attempt to do so far exceeds any legitimate exercise of the Committee's investigative powers. *See Watkins*, 354 U.S. at 187 ("Congress [is not] a law enforcement or trial agency.").

In any event, there is no basis in fact for the Committee's uninformed and reckless attempt to suggest criminal misconduct in connection with Rochelle Charter's trademark application for the MICHAELA ROSE trademark. As an initial matter, the description of the prosecution history for the MICHAELA ROSE trademark in the Committee's letter is highly misleading. Although the Committee's letter refers to a "deni[al]" that needed to be "appealed," U.S. Patent and Trademark Office ("PTO") "office actions" relating to such trademark applications are a routine and customary part of the trademark application process. Indeed, the PTO's website states that an "office action" is merely a "letter sent by the USPTO" in which "an examining attorney lists any legal problems with" an application and invites the applicant to "resolve all legal problems in the office action before we can register your trademark."[2] In the case of the MICHAELA ROSE trademark, the examining attorney issued an initial office action on July 14, 2020, considered the initial response submitted by Rochelle Charter's trademark counsel, issued a second office action on August 10 that inquired about the specimens of use that were submitted in support of the application, and specifically invited Rochelle Charter "to file a request for reconsideration . . . that fully resolves all outstanding requirements." Rochelle Charter did so on February 10, 2021, and weeks later, the PTO approved the mark for publication on the principal register, where it remains validly registered and active today. Not only is there nothing sinister about any of this, this process will strike anyone who practices before the PTO as entirely ordinary.

More substantively, the PTO decision to register a trademark for a business that provides services to related customers was clearly correct as a matter of law. Under the Lanham Act, "use in commerce" occurs when a service mark "is used or displayed in the sale or advertising of services and the services are rendered in commerce." 15 U.S.C. § 1127. The

[2] *See* https://www.uspto.gov/trademarks/maintain/responding-office-actions.

Committee's letter acknowledges that the mark was being used in advertising and, as discussed above, Rochelle Charter is actively engaged in chartering the *Michaela Rose* to various parties for profit, so there is no doubt that "the services are rendered in commerce." As discussed above, Rochelle Charter offers chartering services at fair market rates to both members of the Crow family and to various affiliated businesses for use by them and their employees. That provides a valid basis on which Rochelle Charter could seek in good faith to register a trademark for the *Michaela Rose*. *See Am. Int'l Reinsurance Co. v. Airco, Inc.*, 570 F.2d 941, 944 (C.C.P.A. 1978) ("The fact that the services in question are offered only to applicant's employees (and the employees of its subsidiaries and affiliates) is of no moment; the Act does not preclude registration simply because the services are offered only to a limited segment of the public."). As a result, the suggestion in the Committee's letter that the prosecution history for the MICHAELA ROSE trademark is somehow indicative of criminal wrongdoing is both baseless and offensive.

Moreover, as is the case with U.S. and U.K. maritime laws, trademark law's relationship to the tax code is essentially non-existent. Whether a trademark is used in commerce, and therefore eligible to be registered, is a fundamentally different question from whether a corporation is engaged in profit-seeking activities. *See United We Stand Am., Inc. v. United We Stand, Am. New York, Inc.*, 128 F.3d 86, 92–93 (2d Cir. 1997) ("It appears that 'use in commerce' [in the Lanham Act] denotes Congress's authority under the Commerce Clause rather than an intent to limit the Act's application to profitmaking activity."). Indeed, numerous non-profit entities like the American Red Cross, the American Cancer Society, and the United Way have been granted trademarks. Conflating trademark and tax laws makes no sense, and the Committee has no plausible basis to claim that the USPTO's initial examination and ultimate registration of the trademark provides any evidence that Rochelle Charter was, prior to converting to a C corporation, not engaged in profit-seeking activities for purposes of the hobby loss rule.

The Committee's Investigation Lacks a Valid Legislative Purpose Because It Is Being Pursued for the Purpose of Harassing and Embarrassing Mr. Crow

Ultimately, the Committee's flawed application of the tax code, its incorrect factual assumptions and assertions, and its troubling focus on matters outside its jurisdiction serve only to illustrate and confirm the more fundamental problem with the Committee's investigation: the Committee lacks a valid legislative purpose for pursuing its inquiries into Mr. Crow's affairs, because the true aim of its inquiries clearly is to harass and malign Mr. Crow on account of his close personal friendship with Justice Clarence Thomas. It is settled that "[i]nvestigations conducted solely . . . to 'punish' those investigated are indefensible." *Watkins*, 354 U.S. at 187. Yet that is precisely what the Committee is attempting to do.

The Committee's claim that it is interested in understanding how the "ultra-wealthy" supposedly exploit "weaknesses in the tax law and tax enforcement regime" is belied by the Committee's own letter, Chairman Wyden's public statements, and the manner in which this investigation has been conducted. But in its April 24, 2023 letter to Mr. Crow, the Committee said that the purpose of its inquiries was to "better understand any federal tax considerations arising from [Mr. Crow's] gifts to Justice Thomas" and to provide the American public with a "full accounting" of those gifts. The record is clear that Mr. Crow has been targeted by the Committee solely because of his friendship with Justice Thomas. In our response to the April 24 letter, we objected to the Committee's inquiry on the grounds that it lacked a valid legislative purpose to target Mr. Crow and Justice Thomas in this way. In its latest correspondence, the Committee ignored our objection.

Instead, the Committee has now invented a new justification for its inquiries, stating that it is concerned with how taxpayers who own S corporations make use of pass-through losses to take deductions from their personal income. But this purported new justification for the investigation cannot hide the Committee's true goal of attacking Mr. Crow with reckless accusations of impropriety.

For starters, the question whether an S corporation is engaged in profit-seeking activities requires a fact-intensive, case-by-case assessment of a given corporation's operations. *See Higgins v. Comm'r*, 312 U.S. 212, 217 (1941) ("To determine whether the activities of a taxpayer are 'carrying on a business' requires an examination of the facts in each case."). Yet, to our knowledge, the Committee has not made inquiries of any other taxpayers concerning their deductions of pass-through losses. The Committee is instead focused on a single, isolated case that is almost certainly not representative of how many other taxpayers deduct pass-through losses. The Committee's supposed effort to better understand this fact-bound issue by focusing on a single taxpayer—who just happens to be a friend of Justice Thomas—shows a lack of seriousness behind the Committee's pursuit of its stated goal. Moreover, the Committee does not have the authority to conduct a tax audit of an individual taxpayer's compliance with the tax code. *See, e.g.*, *See Trump v. Mazars*, 140 S. Ct. 2019, 2032 (2020) ("Congress may not issue a subpoena for the purpose of 'law enforcement,' because 'those powers are assigned under our Constitution to the Executive and the Judiciary.'" (citation omitted)); *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1881) (stating that neither the House nor Senate "possesses the general power of making inquiry into the private affairs of the citizen").

Additionally, the February 6 letter's numerous, gratuitous references to Justice Thomas also show that the Committee is not actually interested in the subject it now claims it is investigating. Why the particular identities of Mr. Crow's guests on the *Michaela Rose* are at all relevant to whether pass-through losses were properly deducted from Mr. Crow's personal income is never explained. And that is because they are completely irrelevant to the inquiry the Committee says it is pursuing. Rather, the true reason for the Committee's continued

efforts to target and harass Mr. Crow and Justice Thomas is shown in the public statements Chairman Wyden has made about this investigation.

For example, in a recent speech on the Senate floor, Chairman Wyden stated that the Committee has been "trying to get straight answers from . . . Justice [Thomas] and his wealthy friends"—presumably a reference to Mr. Crow—"about the . . . handouts . . . lavished on the Justice" in order to promote "transparency and accountability" at the Supreme Court. Senator Ronald Wyden, Remarks on the Floor of the U.S. Senate (Feb. 1, 2024). That objective of course has nothing to do with the Internal Revenue Code or any other matter that could properly be the focus of a Senate Finance Committee investigation.

The Committee's attempts to pry into the private affairs of Mr. Crow lack any semblance of a valid legislative purpose and are nothing short of abuse. "[T]here is no congressional power to expose for the sake of exposure." *Watkins*, 354 U.S. at 200. Moreover, the Committee's requests for personal information about a sitting Supreme Court Justice "implicate weighty concerns regarding the separation of powers." *Mazars*, 140 S. Ct. at 2035. The Committee's inquiries therefore must be "no broader than reasonably necessary to support Congress's legislative objective." *Id*. at 2036. Further, the Committee may only obtain the information it requests "if other sources could [not] reasonably provide Congress the information it needs." *Id*. at 2035–36. Using Mr. Crow and Justice Thomas as a "case study" to guide the Committee's legislative efforts is not an adequate justification to authorize the Committee's investigation. *Id*. at 2036.

Thus, the Committee has no legitimate legislative purpose to continue its attacks on Mr. Crow and investigate him based on contrived accusations of impropriety. And even if the Committee were actually investigating how American taxpayers deduct pass-through losses from their personal income, it would still lack a valid legislative purpose here because it has asked for information about a sitting Supreme Court Justice, and must instead seek the information that could inform its understanding of the hobby loss rule from other sources, of which there are many.

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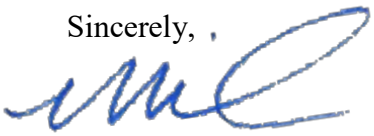
It is difficult, if not impossible, to see the Committee's requests for information as anything other than a brazen attempt to harass and malign Mr. Crow and Justice Thomas for partisan reasons. Every aspect of the Committee's investigation displays a complete disregard for the proper scope of the Committee's investigative powers, and the errors that abound in the Committee's letter undermine any notion that the Committee is conducting a serious inquiry about possible amendments to the tax code.

We have explained clearly why the Committee's accusations of misconduct are false, and why Mr. Crow is not a proper target of this investigation. We do hope that the Committee

finds helpful the information we have provided in this response, and the clarifications we have made. We hope as well that the Committee will now turn back to its important business.

Sincerely,



Michael D. Bopp

cc: The Honorable Mike Crapo, Ranking Member