Dr. Michael Lovell, President, Marquette University
Marquette University Board of Trustees
P.O. Box 1881
Milwaukee, WI 53201-1881

Dear President Lovell and the Board of Trustees —

We write to you as concerned members of the Marquette University community and the general public. We wish to bring to your attention violations of fiduciary duties caused by the University's continued investments in fossil fuels. We hope that this letter and the attached documentation will lead you to the moral and practical — and legally required — decision to divest the University's endowment from oil, gas, and coal.

The Marquette University Board of Trustees, as fiduciary of a non-profit educational institution, is bound by the laws of Wisconsin to promote the well-being of Marquette's students and community and to further the University's commitment to "the search for truth, the discovery and sharing of knowledge, the fostering of personal and professional excellence, the promotion of a life of faith, and the development of leadership expressed in service to others." Under the Wisconsin Uniform Prudent Management of Institutional Funds Act, the Board of Trustees has a fiduciary duty to invest with consideration for the University's "charitable purposes" — a duty that distinguishes non-profit institutions from other investors. Instead, the Board of Trustees has invested a portion of the University's $929.1 million endowment in the fossil fuel industry, thereby damaging the world's natural systems, disproportionately harming youth, low-income people, and communities of color, and imperiling the University's financial and physical condition. In the midst of the climate crisis, powerful institutions must take responsibility for their contributions to global warming. We ask that you immediately cease this conduct and divest all endowment assets from fossil fuel companies.

Wisconsin law provides rules that charitable managers and investors must follow in managing institutional funds. As stewards of the Marquette endowment, the Board of Trustees is required to act in good faith and with loyalty, taking care that its investments further the purposes of the University. The Board of Trustees may not simply seek profit at any cost: the privileges that Marquette enjoys as a non-profit institution come with the responsibility to ensure that its resources are put to socially beneficial ends. By investing an estimated $9 to $18 million in fossil fuel stocks, the Board of Trustees has violated these duties to Marquette and the public.

The values that should guide the Board of Trustees' investments are clear. According to the Marquette mission statement, the University is established for the purpose of "the greater glory of God and the common benefit of the human community." The Board recognizes its duty to promote "sustainability and environmental justice" and to "protect environmental welfare and ecosystem resilience." The 2018 Marquette sustainability plan aims at "meeting the social, environmental and financial/economic needs of the present without compromising the ability of future generations to meet their own needs." The St. Francis Pledge, which President Lovell signed in 2015, commits the University to "[a]ssess how we, as an institution, contribute to climate change by our own energy use, consumption and waste [and to] [a]ct to change our choices and behaviors to reduce the ways we contribute to climate change." As a Catholic and Jesuit institution, Marquette commits itself to upholding and promoting the Catholic Church's teachings on and guidelines for care of the environment. But, despite Pope Francis's recent directive to Catholic institutions to divest from fossil fuels — and despite the successful divestment efforts of hundreds of Catholic entities— the Trustees have remained steadfast in their support of an industry whose business model is based on environmental destruction and social injustice.

Climate change is an existential threat to humanity and our environment. In addition to drought, extreme weather events, and species die-off, climate change causes injuries to all members of society, and particularly to the most vulnerable. Pollution from the combustion of fossil fuels results in an estimated 10,000 premature deaths daily. Communities of color disproportionately suffer pollution and health detriments from fossil fuel extraction and combustion. Low-income people bear the brunt of climate-based economic disruption, as illustrated by the plight of climate migrants and refugees already forced from their homes by drought, flooding, and social conflict. Indigenous communities are regularly invaded and harmed by the spread of fossil fuel infrastructure. As a result of the economic precarity and increased burden of care work that results from climate disruptions, women suffer more serious injuries from unabated climate change. All of these effects are already being felt in Wisconsin and especially by vulnerable populations in Milwaukee communities immediately surrounding the University.

The need to refrain from promoting such outcomes is obvious for any institution that calls itself a charity. Yet the Board of Trustees has repeatedly refused to apply Marquette's values to its investment activity. This conduct is especially galling for managers of an institution of higher education. Fossil fuel companies have long engaged in a well-documented campaign to undermine climate science and distort public debate about how to deal with the climate crisis. The industry's spread of scientific misinformation undermines the work of Marquette faculty and students who are researching and designing solutions for a sustainable future. Likewise, the flow of fossil fuel money to politicians and think tanks has diverted or delayed serious government action to address the climate crisis, placing a special burden on young people whose futures will be most impacted by these investments. Even as it recognizes its "[s]ocial and environmental responsibility, including care for creation and climate justice," the Board of Trustees channels funds to an industry dedicated to winning short-term profits at the expense of the public good.

The Board of Trustees is bound by an additional legal duty: the requirement to manage Marquette's assets with prudence. Prudent investment practice simply cannot be squared with the ownership of fossil fuel assets. Investment in the oil, gas, and coal sectors has become excessively risky thanks to increased government regulation and the fossil fuel industry's own failure to diversify its operations and to avoid capital-intensive extraction. Fossil fuel stocks have performed significantly worse than market averages in recent years. In the last several months, the oil industry has begun to crumble, with the COVID-19 pandemic adding to already historic losses. The domestic coal sector has nearly collapsed, and natural gas likewise stands to lose much of its value as cheaper, more sustainable energy sources become more readily available. For any prudent investor, these signs clearly indicate that continued investment in fossil fuels is a losing proposition.

Exacerbating the industry's poor financial performance is a well-documented pattern of alleged fraud. Fossil fuel companies such as ExxonMobil have allegedly misled investors by concealing the anticipated impact of climate change and energy regulation on the value of assets such as untapped oil reserves. The Board of Trustees continues to invest in the sector despite its legal duty to exercise care and prudence in avoiding dangerous securities.

The Board of Trustees cannot plead ignorance of its duty to divest. For years, Marquette students and faculty have pushed for investment practices that align with the University's mission. In 2019, President Lovell was presented with a petition calling for divestment and signed by 300 people. In March 2021, the Marquette University Student Government Senate unanimously passed a resolution calling on the University "to be transparent about fossil fuel investments, update investment policy in line with Jesuit values of ecological justice, commit to full divestiture (with plan to fully divest from fossil fuels within five years) and utilize shareholder engagement to promote decarbonization until fully divested." On April 22, 2021, 87% of Marquette University undergraduates voting in a student referendum supported fossil fuel divestment. Repeated rallies, reports, and requests for negotiation have alerted the Board of Trustees to its fiduciary responsibility.

It is too late for the Board of Trustees to deny the relation between its investments and climate change. Its obligations under Wisconsin law and its own governing documents are clear, and fossil fuel investment is incompatible with those obligations.

We have included below a fuller description of the Board of Trustees' violations, along with documents and reports supporting the claims made in this letter. We ask that you begin the process of divesting Marquette's endowment from fossil fuels immediately. We would welcome the opportunity to meet with you to discuss the most viable path toward this goal.

Sincerely,

Leaders Igniting Transformation (LIT) Marquette
Marquette University College Democrats
Catholic Divestment Network (CDN)
Climate Justice at Boston College
DivestEd
Divest Princeton
Divest Vanderbilt
Fossil Fuel Divest Harvard
University of Wisconsin Divestment Coalition (UWDC)
350 Milwaukee

Prepared with assistance from attorneys at Climate Defense Project.

cc:

Dr. Michael Lovell
President, Marquette University

Steven Frieder
Corporate Secretary, Marquette University

Sean Gissal
Chief Financial Officer, Marquette University Endowment Office

Dr. Xavier Cole
Vice President for Student Affairs, Marquette University

Robert J. Eck
Chair, Marquette University Board of Trustees

Marquette University Board of Trustees

SUPPORTING DOCUMENTATION

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I. The Trustees' violation of Wisconsin law

Marquette University is a 501(c)(3) charitable corporation organized under Chapter 202, subchapter I and II and Chapter 180 of the Wisconsin Statutes. According to the 1864 act chartering the University and the University's Articles of Corporation, the Board of Trustees "shall have control of all funds and property that have heretofore or may hereafter be conveyed to said institution, and shall faithfully apply the same to the best of their judgment for the benefit of the institution."[1] The Board "has fiduciary responsibility and is the principal governance authority for Marquette University. The board is responsible for preserving and enhancing Marquette's mission and ensuring that long-term planning and goals are defined and executed by the University community."[2]

- Continued investment in fossil fuels by the Board of Trustees ***violates the fiduciary duties spelled out in the Wisconsin Uniform Prudent Management of Institutional Funds Act (WUPMIFA)*** and in Wisconsin common law.
    - WUPMIFA states that, "[s]ubject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund."[3] The model UPMIFA drafting committee describes consideration of "charitable purposes" as a "fundamental duty,"[4] and this requirement distinguishes charitable investors like the Board from other entities such as pension funds.
        - WUPMIFA further requires that, "[i]n addition to complying with the duty of loyalty imposed by law other than this chapter, each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care that an ordinarily prudent person in a like position would exercise under similar circumstances."[5]
        - WUPMIFA lists several factors that must be considered in managing and investing an institutional fund, including: "general economic conditions . . . the role that each investment or course of action plays within the overall investment portfolio of the fund . . . the expected total return from income and the appreciation of investments . . . [and] an asset's special relationship or special value, if any, to the charitable purposes of the institution."[6]
        - Although the directors of charitable institutions may delegate investment authority to an external agent, such delegation does not suspend the duty of each director to act "in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar

[1] Amended Articles of Incorporation, Art. I, s. 2, Marquette University (2013).
[2] Leadership: Board of Trustees, Marquette University (2021).
[3] Wisc. Stat. c. 112.11(3)(a).
[4] National Conference of Commissioners on Uniform State Laws, Uniform Prudent Management of Institutional Funds Act, with Prefatory Notes and Comments at 15 (2006).
[5] Wisc. Stat. c. 112.11(3)(b).
[6] Wisc. Stat. c. 112.11(3)(e)(1).

circumstances,"[7] and the directors must ensure that this delegation is "consistent with the purposes of the institution and the institutional fund."[8] Furthermore, "[i]n performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation."[9]

- The Board of Trustees has ***failed to consider the charitable purposes of the institution and the purposes of the institutional fund*** by financially supporting the degradation of the climate, widespread damage to ecological and human health, and massive injuries to environmental and social equity. The duty to consider the charitable purposes for which Marquette University was established distinguishes the Board from other investors, imposing a special legal responsibility to screen assets for their possible interference with the University's goals. Yet the outcomes of the Board's fossil fuel investments are directly contrary to Marquette's mission to promote "sustainability and environmental justice" and to "protect environmental welfare and ecosystem resilience."[10] The well-known scientific misinformation campaigns of the fossil fuel industry likewise contravene the University's commitment to "the search for truth, the discovery and sharing of knowledge"[11] As such, continued investment in fossil fuel holdings ***violates the Board's duty to consider an asset's special relationship or special value, if any, to the charitable purposes of the institution.***
- The Board has ***violated its duty of loyalty*** to the Marquette community by funding activity that directly imperils the lives and prospects of young people and that poses a physical threat to the community around the University, thus failing to act in the best interests of the institution.
- The Board has ***violated its duty to act in good faith*** by refusing to abide by their previous commitments to socially responsible investing; by ignoring the warnings of students, faculty, alumni, and legal experts that investments in fossil fuel companies are immoral, financially risky, and based on fraudulent information; and by spurning efforts by campus groups to push the University's investment practices toward a more consistent and sustainable approach.
- The Board has ***violated its duty of care*** by investing the University's endowment in financially risky fossil fuel stocks, which have underperformed for years and are currently at risk of a general collapse in value. This violation is exacerbated by the Board's failure to follow the lead of peer institutions who, in a like position under similar circumstances, have recognized the prudence of divestment.
- The Governor's Task Force on Climate Change Report, published in 2020, advises divestment in order to meet the state's climate goals.
    - The report notes that "[i]f Wisconsin aims to achieve 100 percent carbon-free energy by 2050, we need to invest in clean energy research, development, and deployment. Divestment from fossil fuels opens up resources for investment in these areas, particularly if at least some of the divested resources are invested in Wisconsin-based carbon-free energy research, development, and deployment."[12]

[7] Wisc. Stat. c. 112.11(5)(a).
[8] Wisc. Stat. c. 112.11(5)(a)(2).
[9] Wisc. Stat. c. 112.11(5)(b).
[10] Marquette Sustainability, Marquette University (2021).
[11] Leadership: Guiding Values, Marquette University (2021).
[12] Governor's Task Force on Climate Change Report at 94, State of Wisconsin (Dec. 2020).

    - The report states that continued investment in fossil fuels is financially imprudent: "As climate change accelerates and renewable energy continues to become increasingly cost competitive, a growing number of financial analysts argue that fossil fuels will prove to be a bad investment. Over the past few years, coal and oil stocks have shown great vulnerability . . . If this trend continues, especially as Americans continue to travel less due to the pandemic, removing fossil fuels from a stock portfolio becomes a more mainstream option. Enacting divestment legislation could accelerate this shift and move us further from economic reliance on fossil fuels. Multiple studies have demonstrated that divesting from fossil fuels does not have a statistically significant impact on overall portfolio performance and has only a marginal impact on the utility derived from such portfolios."[13]
    - The report also recognizes that divestment can help to mitigate the climate change harms suffered by marginalized communities: "The fossil fuel divestment movement has long pointed out the disparate impacts on marginalized communities of burning fossil fuels and highlighted how decision-makers are not centering these people's lived experiences, health, and well-being. Divesting from fossil fuels and investing in clean energy will have financial implications for the viability of these companies and will be a public demonstration of our values. Furthermore, divestment would have positive downstream impacts on environmental health for marginalized communities affected by GHG emissions and fossil fuel use. Those impacts could be expanded with targeted reinvestment of divested resources in projects benefiting marginalized communities."[14]
- Former Securities and Exchange commissioner Bevis Longstreth, whose scholarship on non-profit investment helped inform the drafting of the model UPMIFA, has called for the application of the prudence standard to the threats of climate change. As Longstreth writes, the risks posed by fossil fuel investments are so serious that institutional investors will be hard-pressed to justify continued holdings in the industry: "The prudence standard of the Act can easily support a decision not to continue to hold or invest in fossil fuel companies. The risks and rewards now offered by such securities are asymmetric, in the sense that the foreseeable rewards are not likely to be equal to the foreseeable risks. The risk that, at some unknown and unknowable, yet highly likely, point in the future, markets will begin to adjust the equity price of fossil fuel company securities downward to reflect the swiftly changing future prospects of those companies, is as serious as it is immense. Moreover, the possibility of that adjustment being a swift one is also a serious risk. A decision to linger in an investment with such an overhanging risk, and expect to time one's exit before the danger is recognized in the market, is a strategy hard to fit within the concept of prudence."[15]
- In a report analyzing fiduciary duties owed by public pension funds, the Center for International Environmental Law concludes that "climate change should be considered an independent risk variable when making investment decisions, and it will trigger the obligations of pension fund fiduciaries . . . If pension fund fiduciaries do not take the financial risks posed by climate change seriously, they may be subject to liability. A

[13] *Id.*
[14] *Id.*
[15] Bevis Longstreth, Outline of Possible Interpretative Release by States' Attorneys General Under The Uniform Prudent Management of Institutional Funds Act (Jan. 26, 2016).

failure to properly consider climate change as a risk factor could result in lawsuits under various theories of liability for breaches of fiduciary duties."[16]

  - The report identifies four categories of risk to the value of fossil fuel assets: 1) impact risk (the risk of loss due to the physical effects of global warming, such as sea level rise and wildfires); 2) carbon asset risk (the risk that fossil fuel reserves will never be exploited and remain unprofitable; 3) transition risk (the risk that regulation and the growth of renewable energy will render fossil fuel products too expensive for or unappealing to consumers); and 4) litigation risk (the risk of financial penalties from lawsuits and other legal actions, such as the Attorney General's action against ExxonMobil).
  - As a result of these risks, the report concludes that fossil fuel investments may violate the fiduciary duties of inquiry, monitoring, loyalty, diversification, impartiality, and acting with reasonable care. The report concludes that "[t]he cleanest and simplest way to avoid climate vulnerability in a portfolio is to divest or, at minimum, dramatically reduce exposure to fossil fuel and other highly climate-vulnerable holdings."[17]

- The public benefit purpose of non-profits like Marquette distinguishes charitable corporations from private trusts and makes the fiduciary duties of loyalty and care more tailored and specific. As the Restatement of the Law for Charitable Nonprofit Organizations states: ". . . in the case of a private trust, property is devoted to the use of specified or described persons who are designated as beneficiaries of the trust, whereas in the case of a charitable trust, property is devoted to purposes the law deems appropriately beneficial to the public . . . unlike in the case of a private trust in which fiduciary duties are owed to the beneficiaries, *in the case of a charity, fiduciary duties are owed to the charity's purposes rather than to a specific person or persons* . . . the fiduciaries of a charity owe the duty of loyalty to the charity's purposes rather than the entity."[18]
- In the context of investment, the standard prudent investor rule carries the additional burden of considering charitable purposes. "[T]he test of prudence evaluates the care, diligence, and skill demonstrated by the actor considering the relevant circumstances, as well as whether the person acted in good faith . . . *In the case of charities, however, the most relevant circumstance is the purpose to which the funds must be devoted*."[19]
- Approximately $9 to $18 million of Marquette University's endowment is invested in oil and gas companies, with $5 million in direct investments.[20]

II. Marquette's social and environmental commitments

[16] Trillion Dollar Transformation at 1-2, Center for International Environmental Law (Dec. 2016).
[17] *Id.* at 5-7, 12-17, 19
[18] Restatement of the Law for Charitable Nonprofit Organizations, § 2.02, cmt. (2021) (emphasis added).
[19] Id. at § 2.04 ("Management, Investment, and Expenditure of a Charity's Assets), cmt. (emphasis added).
[20] Megan Woolard, University agrees on fossil fuel divestment, not on timeline, Marquette Wire (May 4, 2021); the most recent information puts Marquette's total endowment at $929.1 million. Marquette University, Endowment Performance Summary (2021).

In addition to their general duties to the public as managers of a charity, the Board of Trustees is legally bound to uphold the particular *charitable purposes* and values of Marquette University, which include commitments to social justice and environmental well-being.

- Marquette University's mission "is the search for truth, the discovery and sharing of knowledge, the fostering of personal and professional excellence, the promotion of a life of faith, and the development of leadership expressed in service to others. All this we pursue for the greater glory of God and the common benefit of the human community."[21]
- Marquette states that it is "committed to sustainability and environmental justice. Our Jesuit mission and Catholic social teachings compel us to care for others and the environment through sustainability."[22]
    - The University's Sustainability webpage identities "[f]our fundamental actions or behaviors will inspire and guide sustainability at Marquette: Care - Social and environmental responsibility, including care for creation and climate justice; Enhance - Health and well-being of students, employees, communities and ecosystems; Protect - Environmental welfare and ecosystem resilience; Secure - Economic security and resource conversation."[23]
- The 2018 Marquette sustainability plan notes that "[s]ustainability means meeting the social, environmental and financial/economic needs of the present without compromising the ability of future generations to meet their own needs. Sustainability includes conserving energy, water and other resources; protecting and improving air, water and habitat quality; preventing waste and pollution; and doing these activities in a manner that promotes social justice, health, environmental welfare and economic security."[24]
    - The plan goes on to state that "Marquette in the future is a world-class eco-university in the eco-city of Milwaukee, reaching beyond boundaries to transform our social, environmental and economic influence — today and for future generations. We embrace sustainability as a social responsibility, and the community admires our sustainability leadership."[25]
    - The plan includes a section on Funding, emphasizing the need to "[f]ind the necessary capital to invest in achieving our sustainability vision and goals, and develop strategies for funding and incentivizing campus sustainability efforts of various types and scales. These strategies could include program or project budget allocations, green revolving loan funds, green fees, green grants, and gifts. Some are better suited to support academic or cocurricular efforts, while others are better for supporting capital or infrastructure projects, smaller-scale sustainability projects and ideas, engagement programs/projects, or general operating. Like other institutional priorities, sustainability requires financial support to be successful and resilient. Fortunately, investments in sustainability generate savings, benefits and value over time."[26]
- In 2015, Marquette University President Michael R. Lovell signed the St. Francis Pledge, which affirms that Marquette will "Pray and reflect on the duty to care for God's

[21] Leadership: Guiding Values, Marquette University (2021).
[22] Marquette Sustainability, Marquette University (2021).
[23] *Id.*
[24] Getting to Green: Campus Sustainability Plan v. 1.0, Marquette University (April 2018).
[25] *Id.*
[26] *Id.*

Creation and protect the poor and vulnerable; Learn about and educate others on the causes and moral dimensions of climate change; Assess how we, as an institution, contribute to climate change by our own energy use, consumption and waste; Act to change our choices and behaviors to reduce the ways we contribute to climate change; Advocate for Catholic principles and priorities in climate change discussions, especially as they impact those who are poor and vulnerable."[27]

- Marquette University also touts its membership in the Association for the Advancement of Sustainability in Higher Education.[28]
- In Marquette's official Land and Water Acknowledgement — which recognizes its campus sits on the homelands of the Menominee, Potawatomi, Ho-Chunk, Fox, Mascouten, Sauk and Ojibwe nations — the University states: "We affirm our commitment to practice ongoing good relations with the land and water and with sovereign Indigenous Nations that caretake them. In acknowledging the long-held relationships fostered by these lands and waters, we seek to strengthen and recommit ourselves to ongoing and future kinship responsibilities with each other and the Earth."[29]

III. Marquette's Catholic and Jesuit values

The charitable purposes that the Trustees are bound to uphold include Catholic and Jesuit values. As has been made clear in recent statements by the Pope, these values require protection of the environment, low-income people, and racial minorities, all of which are harmed by the Trustees' investments in fossil fuels.

- Marquette University distinctly notes its Catholic and Jesuit influences in its mission. It states that "Marquette's focus on the four core university values of excellence, faith, leadership and service challenges students to integrate knowledge, faith and real-life choices in ways that will shape their lives. Faith and spirituality affect the way teaching, learning, research and living take place on campus. Students, faculty and staff of every religious tradition are invited to engage in conversations about faith, God, social justice, the search for truth, the desire for peace, global issues, ethics and the dignity of humanity. A Catholic and Jesuit education at Marquette is marked by the active intersection of the Gospel with culture and the intellect, as well as a deep commitment to the well-being of the whole human family."[30]
- The University's "Guiding Values" webpage states that "[a]s a Catholic university, we are committed to the unfettered pursuit of truth under the mutually illuminating powers of human intelligence and Christian faith. Our Catholic identity is expressed in our choices of curricula, our sponsorship of programs and activities devoted to the cultivation of our religious character, our ecumenical outlook, and our support of Catholic beliefs and values . . . Marquette strives to develop men and women who will dedicate their lives to the service of others, actively entering into the struggle for a more just society. We expect

[27] Marquette Sustainability, Marquette University (2021).
[28] Marquette Sustainability, Marquette University (2021).
[29] Land and Water Acknowledgment, Marquette University (2021).
[30] About Marquette: Catholic and Jesuit, Marquette University (2021)

all members of the Marquette community, whatever their faith traditions, to give concrete expression to their beliefs by giving of themselves in service to those in need."[31]

- In 2015, Pope Francis released the *Laudato Si'* encyclical, which called for action to protect the natural environment and those most exposed to the dangers of climate change and pollution.[32]
    - Pope Francis opened his plea by noting that "our common home is like a sister with whom we share our life and a beautiful mother who opens her arms to embrace us . . This sister now cries out to us because of the harm we have inflicted on her by our irresponsible use and abuse of the goods with which God has endowed her. We have come to see ourselves as her lords and masters, entitled to plunder her at will. The violence present in our hearts, wounded by sin, is also reflected in the symptoms of sickness evident in the soil, in the water, in the air and in all forms of life."[33]
    - The encyclical focused on the problem of global warming: "The climate is a common good, belonging to all and meant for all. At the global level, it is a complex system linked to many of the essential conditions for human life. A very solid scientific consensus indicates that we are presently witnessing a disturbing warming of the climatic system. In recent decades this warming has been accompanied by a constant rise in the sea level and, it would appear, by an increase of extreme weather events, even if a scientifically determinable cause cannot be assigned to each particular phenomenon. Humanity is called to recognize the need for changes of lifestyle, production and consumption, in order to combat this warming or at least the human causes which produce or aggravate it."[34]
    - Pope Francis continued: "Climate change is a global problem with grave implications: environmental, social, economic, political and for the distribution of goods. It represents one of the principal challenges facing humanity in our day . . . Many of those who possess more resources and economic or political power seem mostly to be concerned with masking the problems or concealing their symptoms, simply making efforts to reduce some of the negative impacts of climate change. However, many of these symptoms indicate that such effects will continue to worsen if we continue with current models of production and consumption. There is an urgent need to develop policies so that, in the next few years, the emission of carbon dioxide and other highly polluting gases can be drastically reduced, for example, substituting for fossil fuels and developing sources of renewable energy."[35]
    - The Pope was explicit in naming investment and financial practices as a source of inaction on climate change: "economic powers continue to justify the current global system where priority tends to be given to speculation and the pursuit of financial gain, which fail to take the context into account, let alone the effects on human dignity and the natural environment. Here we see how environmental

[31] Leadership: Guiding Values, Marquette University (2021).
[32] Pope Francis, *Encyclical Letter Laudato Si' of the Holy Father Francis on Care for Our Common Home* (Libreria Editrice Vaticana, 2015).
[33] *Id.* at ¶¶ 1, 2.
[34] *Id.* at ¶ 23.
[35] *Id.* at ¶ 25, 26.

deterioration and human and ethical degradation are closely linked. Many people will deny doing anything wrong because distractions constantly dull our consciousness of just how limited and finite our world really is." He went on to ask: "What would induce anyone, at this stage, to hold on to power only to be remembered for their inability to take action when it was urgent and necessary to do so?"[36]
    - Speaking specifically of investment practices, Pope Francis noted that "[t]o stop investing in people, in order to gain greater short-term financial gain, is bad business for society" and that "[e]fforts to promote a sustainable use of natural resources are not a waste of money, but rather an investment capable of providing other economic benefits in the medium term. If we look at the larger picture, we can see that more diversified and innovative forms of production which impact less on the environment can prove very profitable."[37]
    - Finally, Pope Francis stated that "[i]f everything is related, then the health of a society's institutions has consequences for the environment and the quality of human life. 'Every violation of solidarity and civic friendship harms the environment.'"[38]
- Marquette is a member of the Association of Catholic Colleges and Universities and the Association of Jesuit Colleges and Universities. These associates signed a 2015 letter from Catholic higher education leaders in support of the *Laudato Si'* encyclical. It read, in part: "we commit ourselves as leaders in Catholic Higher Education globally to integrate care for the planet, integral human development, and concern for the poor within our research projects, our educational curricula and public programming, our institutional infrastructures, policies and practices, and our political and social involvements as colleges and universities."[39]
- In 2020, the Vatican released "Journey Towards Care for Our Common Home: Five Years After *Laudato Si'*," a set of guidelines for implementing the vision of the 2015 encyclical. The document included a call to divest from companies that harm the environment.
    - The guidelines on financial practice note that "[i]nvestors can encourage positive changes in various sectors of the economy. This is the case when they decide not to invest in companies that fail to meet certain standards (human rights, child labour, environmental and so forth) . . . Those who wish to make ethical investments consonant with their religious beliefs can have recourse to filters and consulting, even though they may at times have to accept a lower profit."
    - The document specifically calls on Catholic institutions to "[p]romote ethical, responsible, and integral criteria for invesment decision making, taking care not to support companies that harm human or social ecology (for example, through abortion or the arms trade), or environmental ecology (for example, through the use of fossil fuels)," and, "through networks and universities, [to] raise awareness

[36] *Id.* at ¶¶ 56, 57.
[37] *Id.* at ¶¶ 128, 191
[38] *Id.* at ¶ 142 (quoting Pope Benedict XVI, *Encyclical Letter Caritas in Veritate* (2009), 51: AAS 101 at 687 (2009).
[39] "Laudato Si: On Care for Our Common Home: Statement of Leaders in Catholic Education Globally", Ignatian Solidarity Network (2015).

about ethics, the common good and responsibility in banking and the financial intermediation sector." The document stated that Catholic institutions should "[p]romote responsible investments in social and environmental sectors, for example by evaluating progressive disinvestment from the fossil-fuel sector."[40]

- In October 2020, Pope Francis reiterated his commitment to divestment from fossil fuels, explicitly calling on investors to pull their money from companies that damage the environment.[41]
- The United States Conference of Catholic Bishops' Socially Responsible Investment Guidelines states that "[s]ocially responsible investment involves investment strategies based on Catholic moral principles. These strategies are based on the moral demands posed by the virtues of prudence and justice." The Guidelines specifically state that the Conference will divest from those companies whose policies are found to be discriminatory against people of varied ethnic and racial backgrounds that have been historically disadvantaged."[42] As described more fully in the section below, fossil fuel companies fall into this category, as the environmental effects of their business activity disproportionately harm Indigenous, non-white, and poor communities.

IV. The scientific reality and risks of climate change

The current and future effects of climate change jeopardize the Marquette community and the greater Wisconsin community, undermining the Trustees' *charitable purposes*. By investing in companies disproportionately responsible for the climate crisis, the Trustees expose these communities and society at large to severe injury, thus failing to act in the best interests of the institution and violating their *duty of loyalty*.

- Climate change is a result of global warming, produced primarily by increased anthropogenic releases of carbon dioxide, methane, and other greenhouse gases. The primary contributor to these releases is the combustion of fossil fuels.[43]
- According to the Intergovernmental Panel on Climate Change (IPCC), the leading global authority on climate science, human-caused emissions of greenhouse gases have unequivocally warmed the climate at a rate that is unprecedented in at least the last 2,000 years.[44] In 2019, atmospheric carbon dioxide concentrations were higher than at any time in at least 2 million years, and concentrations of methane and nitrous oxide were higher than at any time in at least 800,000 years.[45]

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[40] Interdicasterial Working Group of the Holy See on Integral Ecology, "Journey Towards Care for Our Common Home: Five Years After *Laudato Si'*" at 177-9 (2020).
[41] Philip Pullella, "Pull investments from companies not committed to environment, pope says," Reuters (Oct. 10, 2020).
[42] Socially Responsible Investment Guidelines, United States Conference of Catholic Bishops (Nov. 12, 2003).
[43] D.R. Reidmiller, *et al.*, eds., Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States at 73, U.S. Global Change Research Program (2018).
[44] IPCC, Summary for Policymakers at 7. In: Climate Change 2021: The Physical Science Basis, Working Group I Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (Aug. 2021).
[45] *Id*. at 9.

    - A small number of fossil fuel producers have been disproportionately responsible for greenhouse gas emissions since the Industrial Revolution — for instance, just twenty companies account for nearly thirty percent of all emissions between 1751 and 2010.[46] A 2017 report by the Carbon Disclosure Project found that seventy-one percent of all global greenhouse gas emissions since 1988 "can be traced to just 100 fossil fuel producers."[47]
    - There is a very nearly one-to-one linear relationship between the cumulative amount of carbon dioxide emitted and the amount of global warming it causes.[48] Every one-half degree Celsius of global warming in models results in "clearly discernible increases in the intensity and frequency of hot extremes, including heat waves . . . and heavy precipitation . . . as well as agricultural and ecological droughts in some regions."[49]
- As a result of human-caused warming, climate change is already affecting every inhabited region across the globe, leading to observed changes in weather and climate extremes.[50]
- The Fourth National Climate Assessment, released in 2018 by thirteen federal agencies comprising the U.S. Global Change Research Program (USGCRP), noted that "[t]he impacts of climate change are already being felt in communities across the country. More frequent and intense extreme weather and climate-related events, as well as changes in average climate conditions, are expected to continue to damage infrastructure, ecosystems, and social systems that provide essential benefits to communities. Future climate change is expected to further disrupt many areas of life, exacerbating existing challenges to prosperity posed by aging and deteriorating infrastructure, stressed ecosystems, and economic inequality."[51] The USGRCP report concluded that, as a result of climate change, "annual losses in some economic sectors are projected to reach hundreds of billions of dollars by the end of the century — more than the current gross domestic product (GDP) of many U.S. states."[52]
- Continued global warming is projected to further intensify the global water cycle, including the severity of wet and dry events.[53] Many changes due to past and future greenhouse gas emissions are irreversible for centuries to millennia, especially changes in the ocean, ice sheets, and global sea level.[54]
- Global warming will exceed two degrees Celsius by the end of this century unless drastic reductions in carbon dioxide and other greenhouse gas emissions occur in the coming

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[46] Richard Heede, Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010, 122 Climatic Change 229, 234 (2014). These companies include Chevron, ExxonMobil, BP, Shell, ConocoPhillips, and Peabody. *Id.* at 237.
[47] Carbon Disclosure Project, New report shows just 100 companies are source of over 70% of emissions (July 2017).
[48] IPCC, Summary for Policymakers, *supra* note 44, at 37.
[49] *Id.* at 19.
[50] *Id.* at 10.
[51] U.S. Global Change Research Program, Fourth National Climate Assessment, Volume II at 25 (2018).
[52] *Id.* at 26.
[53] *Id.* at 25.
[54] *Id*. at 28.

decades.[55] To limit warming, cumulative carbon dioxide emissions must reach net zero, along with strong reductions in other greenhouse gases.[56]

- The global mean water level in the ocean rose by 0.14 inches (3.6 millimeters) per year from 2006–2015, which was 2.5 times the average rate of 0.06 inches (1.4 millimeters) per year throughout most of the twentieth century. By the end of the century, global mean sea level is likely to rise at least one foot (0.3 meters) above 2000 levels, even if greenhouse gas emissions follow a relatively low pathway in coming decades.[57]
- Climate change has already negatively impacted Wisconsin, and these impacts are projected to worsen in the coming decades. According to the Environmental Protection Agency, current and future effects of climate change in Wisconsin include increased temperatures, increased heavy precipitation events and flooding, reduced water quality in the the Great Lakes, changing composition and disruptions to ecosystems and wildlife, disruptions to agriculture, and reduced air quality and human health, including through an increase in disease-carrying insects.[58]
    - The Governor's Task Force on Climate Change Report notes that, "[s]ince the 1950s, Wisconsin has warmed 2.1°F and its annual precipitation has increased by 15 percent (4.5 inches). While winters have warmed faster than summers, the number of extremely hot days (days with temperatures exceeding 90°F) and hot nights is expected to triple and quadruple, respectively, by 2050, assuming GHG emissions continue to rise. These broader increases in precipitation and warming are likely to drive more extreme weather events, such as floods and heatwaves, which will affect Wisconsin's communities and industries in unequal ways."[59]
    - The report goes on to describe other effects of warming, including decreased snowpack and warmer winters, which may "threaten[] Wisconsin's iconic coldwater fisheries by shifting the range of temperature tolerance beyond many species' survivability," and extreme heat, which is already causing "harmful algal blooms in lakes, the proliferation of infectious diseases and pests, and increased storm surge along beaches and marinas."[60]
    - A report by the Wisconsin Initiative on Climate Change Impacts details a wide array of effects, noting that extreme precipitation will have "immense impacts . . . especially to agricultural communities."[61]
        - "[Since 2011], all nine of Wisconsin's climate divisions have reported their wettest decade in recorded history. Since 1950, Wisconsin's annual precipitation has increased by about 4.5 inches, or about 15%. Winter precipitation has increased by over 20% since 1950, which is consistent with statistically significant increases in snowfall over the state since 1950."[62]

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[55] *Id*.
[56] *Id.* at 36.
[57] Rebecca Lindsey, Climate Change: Global Sea Level, Climate.gov (Jan. 25, 2021).
[58] What Climate Change Means for Wisconsin, Environmental Protection Agency (Aug. 2016).
[59] Governor's Task Force on Climate Change Report at 14, State of Wisconsin (Dec. 2020).
[60] *Id.* at 16.
[61] *Id.* at 9-10.
[62] Report to the Governor's Task Force on Climate Change: Strategies to Improve Wisconsin's Climate Resilience and Readiness at 5, Wisconsin Initiative on Climate Change Impacts (July 31, 2020).

        - The report also notes that "[s]pecies extinction rates are accelerating and more species may be added to Wisconsin's list of threatened and endangered species, potentially increasing regulatory burdens. Certain iconic and biologically important tree species such as oak and pine will continue to suffer, impacting both the large number of wildlife species that use them and the timber industry. Sustainable harvests of culturally important species, such as wild rice, ginseng, and blueberries, will become limited. Pollinators will diminish, which can have untold impacts on our native habitats, agricultural production, forestry, and food systems. Finally, hunting, fishing, hiking, bird watching, and other outdoor recreational opportunities will diminish as habitats degrade.[63]
    - Governor Evers recently declared a state of emergency in response to 320 wildfires that had burned 1,400 acres across the state. Caused by drought and earlier snowmelt dates, wildfires are expected to increase in intensity and frequency in the state as climate change worsens.[64]

V. The societal effects of climate change and fossil fuel extraction

Mounting evidence demonstrates that fossil fuel investments create disproportionate burdens on people of color, Indigenous communities, and low-income communities. Such investments also harm the public health and property of Wisconsin residents, including those in the Marquette community, violating the Trustees' duties to *consider the charitable purposes* of Marquette and to act with *loyalty* toward their community and property.

- In general, those who have contributed the least to the climate crisis by virtue of their economic position stand to suffer the most from increased warming. Climate change creates heavy burdens on so-called frontline communities, including communities of color and Indigenous communities, which disproportionately experience the effects of air pollution, sea level rise, drought, and other consequences of climate change.[65] These inequities are likely to be felt in Marquette's own community: nearly forty percent of Milwaukee residents are African American.[66]
    - Climate change exacerbates racial inequality by focusing health and economic injuries on people of color, who tend to have fewer economic resources to adjust to rising temperature, are more likely to live in flood-prone and high-heat areas, and tend to receive less government assistance to deal with emergencies.[67]
    - According to a study from the Program for Environmental and Regional Equity at the University of Southern California, racial minorities will disproportionately

[63] *Id.* at 43.
[64] Emily Beyer, Wisconsin governor declares state of emergency due to high risk of wildfires, The Badger Herald (Apr. 12, 2021).
[65] The Geography of Climate Justice, Mary Robinson Foundation (last visited Feb. 10, 2021).
[66] QuickFacts: Milwaukee, Wisconsin, United States Census Bureau (last visited Oct. 24, 2021).
[67] Steven Hiseh, People of Color Are Already Getting Hit the Hardest by Climate Change, The Nation *(*Apr. 22, 2014); Racism Increases Vulnerability to Health Impacts of Climate Change, Office of Health Equity's Climate Change and Health Equity Program, California Department of Public Health (Aug. 17, 2020).

suffer from an inability to pay for basic necessities and from decreased job prospects in sectors such as agriculture and tourism as the climate crisis accelerates.[68]

- The spread of fossil fuel infrastructure has had a particularly harmful effect on Indigenous peoples. According to the United Nations, "[c]limate change exacerbates the difficulties already faced by Indigenous communities, including political and economic marginalization, loss of land and resources, human rights violations, discrimination and unemployment."[69] Indigenous communities are also vulnerable to climate change impacts because of the enduring legacy of colonialism, forced relocations, the loss of cultural practices, and other harms, which create health burdens.[70]
- Throughout the world, migration due to climate change has increased in recent years and is anticipated to increase further as areas of the globe become inhospitable to human habitation, leading to political and social instability.[71] However, migration for tribes is often difficult: "[i]n the past, tribes could move more freely and even relocate in response to changes in climate. However, the historic aboriginal land base of tribes has, through treaties and other means, shrunk to a loose patchwork of scattered reservation boundaries that now represent a fraction of those aboriginal lands, making relocation a difficult or entirely infeasible adaptation strategy."[72]

- In Wisconsin, the unequally distributed burdens of climate change are no less pronounced. The Governor's Task Force on Climate Change Report describes several harms related to climate change that disproportionately affect Wisconsin's marginalized communities. The Report notes that, "[w]hile study after study has proven that [Black, Indigenous, and other communities of color] and low-income communities have been adversely affected by environmental policies, the stories and voices of these communities

[68] Rachel Morello Frosch, Manuel Pastor, Jim Sadd, & Seth Shonkoff, The Climate Gap: Inequalities in How Climate Change Hurts Americans & How to Close the Gap, University of Southern California Program on Environmental and Regional Equity (May 2009).

[69] United Nations Department of Economic and Social Affairs — Indigenous Peoples, Climate Change (last visited Oct. 5, 2021).

[70] Jantarasami, L.C., *et al.*, Chapter 15: Tribes and Indigenous Peoples at 582. In Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II, U.S. Global Change Research Program (2018) ("A number of health risks are higher among Indigenous populations due in part to historic and contemporary social, political, and economic factors that can affect conditions of daily life and limit resources and opportunities for leading a healthy life. Many Indigenous peoples still experience historical trauma associated with colonization, removal from their homelands, and loss of their traditional ways of life, and this has been identified as a contributor to contemporary physical and mental health impacts. Other factors include institutional racism, living and working circumstances that increase exposure to health threats, and limited access to healthcare services. Though local trends may differ across the country, in general, Indigenous peoples have disproportionately higher rates of asthma, cardiovascular disease, Alzheimer's disease or dementia, diabetes, and obesity. These health disparities have direct linkages to increased vulnerability to climate change impacts, including changes in the pollen season and allergenicity, air quality, and extreme weather events. For example, diabetes prevalence within federally recognized tribes is about twice that of the general U.S. population. People with diabetes are more sensitive to extreme heat and air pollution, and physical health impacts can also influence mental health.").

[71] Michael Werz & Laura Conley, Climate Change, Migration, and Conflict: Addressing complex crisis scenarios in the 21st century at 3-5, 12-14, Center for American Progress (Jan. 2012).

[72] Susan Wotkyns & Cristina González-Maddux, Climate Change Adaptation Planning: Training, Assistance, and Resources for Tribes at 4, Institute for Tribal Environmental Professionals, Northern Arizona University (May 2014).

have also affirmed that environmental racism exists and is harming their communities."[73] The Report's findings include:

  - "In the case of extreme heat, southern Wisconsin will be hit particularly hard if it experiences 80 to 90 extremely hot days per year, as is currently projected for mid-century. In this scenario, communities of color, the elderly, individuals with existing health conditions, and economically disadvantaged communities who lack sufficient cooling capabilities will face disproportionate impacts."[74]
  - "Black, Indigenous, other communities of color, and low-income communities within Wisconsin are already disproportionately impacted by air pollution and flooding. Wisconsin is home to 11 federally recognized Native Nations and one non-state or federally recognized Nation, which hold strong cultural, spiritual, health, and economic ties to fisheries, native habitats, and wild species and cultivars that are strained by increased warming and precipitation. Some under-represented coastal communities may have lower tax bases, so they are less able to respond to and rebuild from extreme storm and contamination events. Increased global warming will further exacerbate these socio-economic inequities and potentially bring others to light without ambitious, state-led climate action."[75]

- The Governor's Task Force Report also describes harms to Wisconsin's families, economy, and public infrastructure that are expected to worsen if climate change is not aggressively mitigated:
  - "According to new research, areas with growing numbers of hot school days demonstrate decreased student learning rates and teaching quality, impacts that are disproportionately borne by lower-income school districts and students of color."[76]
  - "In economic costs, Wisconsin communities have already suffered tens to hundreds of millions of dollars of damage over the past decade due to extreme precipitation. Increased precipitation is leading to increased flooding and storm surge, which impact communities and industries along the Mississippi River and the Great Lakes as well as tourism along Wisconsin's waterways and beachfronts. A wetter, warmer climate also increases precipitation and temperature variability. These swings in extremes are already negatively impacting Wisconsin's agriculture and livestock sectors, which depend on predictable weather patterns."[77]
  - "Transportation infrastructure (e.g., roads, highways, bridges, railways) are susceptible to climate impacts such as rising temperatures and more frequent and intense rainfall."[78]
  - "Climate change has negatively affected agricultural producers through increased frequency and severity of extreme weather events, and these events are projected to intensify in the future. Farmers are experiencing first-hand these negative impacts. For example, unpredictable weather patterns and extreme weather events continue to create challenging growing seasons and negatively impact crop

[73] Governor's Task Force on Climate Change Report, *supra* note 59, at 12.
[74] *Id.* at 14-16.
[75] *Id.* at 16.
[76] *Id.* at 76.
[77] *Id.* at 14.
[78] *Id.* at 46.

production and animal health, further contributing to financial stress already persistent throughout agricultural communities due to low commodity markets."[79]

- The Wisconsin Initiative on Climate Change Impacts has documented many of the social effects of climate change in the state, including harms to marginalized communities:
    - "In communities across the Midwest, climate change is harming our health now. These harms include heat-related illness, worsening chronic illnesses, injuries and deaths from dangerous weather events, infectious diseases spread by mosquitoes and ticks, illnesses from contaminated food and water, and mental health problems. As flooding is becoming more common in our state, our communities are at risk from contaminated drinking water that can trigger outbreaks of water-borne illnesses. When houses flood, there are also serious concerns of respiratory health risks, including asthma,which can be irritated by mold growth. Wisconsinites who rely on well water are some of the most likely to be harmed by water contamination due to flooding. Unless we take concerted action, these harms to our health are going to get much worse . . . The health of anyone can be harmed by climate change, but some of us face greater risk than others. Children, student athletes, pregnant women, the elderly, people with chronic illnesses and allergies, and the poor are more likely to be harmed. Low-income families are especially vulnerable. They spend more of their income on transportation, have more exposure to vehicle pollution, and are at higher risk of injury and death due to collisions. Low-income families are also the most vulnerable to heat related illness worsened by urban heat island effects and may not have access to cool places or air conditioning."[80]
    - "Increases in extreme precipitation since the 2011 report have taken a significant toll on Wisconsin communities, inflicting tens to hundreds of millions of dollars of damage over the last decade . . . [N]umerous communities have experienced 100 year or greater rainfall events over the last decade and [] the 2010s was Wisconsin's wettest decade in recorded history. Flooding related to these events has led to significant damage to business and residential infrastructure, agricultural communities, and human health and well-being."[81]
    - "The impact of these changes will increase vulnerabilities of our roads and rail systems in Wisconsin, create public and environmental safety risks due to flooding, cause a higher likelihood of bridge and dam failure, and result in damage to and inaccessibility of commercial ports and other coastal facilities. More roadway damage may lead to a reduction in commerce as communities face the possibilities of more weight limit restrictions on non-arterial roadways for a greater fraction of the year, difficulty completing construction projects, and impacts to the traveling public and emergency vehicles.[82]
- According to the City of Milwaukee, climate change "presents serious threats" not only to our environment and biodiversity but to human health, the economy, economic equality, and national security.[83] For instance, densely populated areas of Milwaukee

[79] *Id.* at 50.
[80] *Id.* at 25.
[81] Report to the Governor's Task Force on Climate Change, *supra* note 62, at 6.
[82] *Id.* at 14.
[83] Why Climate Change Matters to Milwaukee, City of Milwaukee (last visited Oct. 24, 2021).

suffer from the "urban heat island" effect, in which the city's urban areas experience temperatures up to 12.2 degrees Celsius warmer than surrounding suburbs.[84]

- Climate change causes an increase in the frequency of pandemics such as COVID-19: according to the Intergovernmental Platform on Biodiversity and Ecosystem Services, climate change "will likely cause substantial future pandemic risk by driving movement of people, wildlife, reservoirs, and vectors, and spread of their pathogens . . . ."[85] A recent paper published in The New England Journal of Medicine concludes that the climate crisis exacerbates the effects of COVID-19, as heat, wildfire smoke, and high pollen counts worsen underlying health conditions such as pulmonary disease, and as emergency responses to events such as hurricanes and fires reduce the ability to mitigate COVID-19 spread. These effects are felt particularly by underserved communities.[86]
- Finally, fossil fuel infrastructure and fossil fuel combustion pose separate, distinct risks to the health and safety of Wisconsin residents, not only contributing to climate change but also causing air and water pollution.
    - Enbridge, Inc., a Canadian energy company, is currently seeking to update its Line 5 oil pipeline, which runs from Canada through Wisconsin to Michigan. Line 5 has repeatedly malfunctioned, spilling 1.1 million gallons of oil in Wisconsin and Michigan, and current work on the pipeline threatens the sensitive waters in and around the Straits of Mackinac.[87] In response to plans to rebuild the pipeline in northern Wisconsin, members of the Anishinaabe people have pointed to the severe risk that Line 5 poses to the region's freshwater and wetlands, as well as its harmful effects on the climate.[88]
    - Declining air quality in urban areas threatens the health of city dwellers, including Milwaukee residents and Marquette University students who live in neighborhoods surrounding the university.[89]
    - The negative effects of fossil fuel infrastructure in and around Milwaukee are felt most acutely in low-income communities and communities of color, which are disproportionately targeted as locations for Milwaukee's top industrial polluters.[90]

VI. The failure of fossil fuel companies to address climate and environmental risks

The fossil fuel industry remains resolutely committed to a business model that produces and exacerbates climate change and other environmental harms, and to the suppression of nonviolent

[84] Matt Jones, Urban Heat Island: How it Impacts Southeast Wisconsin, Spectrum News 1 (Sept. 10, 2021)
[85] IPBES Workshop on Biodiversity and Pandemics: Workshop Report at 3, Intergovernmental Platform on Biodiversity and Ecosystem Services (Oct. 2020).
[86] Renee N. Salas, James M. Shultz, & Caren G. Solomon, The Climate Crisis and Covid-19 — A Major Threat to the Pandemic Response, New Eng. J. Med. (2020).
[87] Key Facts: Line 5 & the Proposed Oil Tunnel, For Love of Water (Feb. 5, 2021).
[88] Chris Hubbuch, Northern Wisconsin oil pipeline reroute panned in public hearing; opponents say risk to water, climate too great, Wisconsin State Journal (July 2, 2020).
[89] UN Health Agency Warns of Rise in Urban Air Pollution, United Nations (May 12, 2016) (noting that "[m]ore than 80 percent of people living in urban areas that monitor air pollution are exposed to air quality levels that exceed guidelines set by the World Health Organization").
[90] Mary Collins, Risk-Based Targeting: Identifying Disproportionalities in the Sources and Effects of Industrial Pollution, Am. J. Pub. Health (Nov. 28, 2011).

protest. Investments that promote these activities directly contravene the Trustees' *charitable purposes*.

- Fossil fuel companies knew about the connection between their products and climate change decades before the general public, "as early as the 1950s and no later than 1968."[91]
  - Coal industry publications suggested as early as 1966 that the release of fossil fuels could cause "vast changes in the climates of the earth."[92] By 1968, the American Petroleum Institute, an industry trade group, was familiar with a study concluding that the burning of fossil fuels was likely to create significant environmental consequences.[93]
  - As early as 1977, Exxon scientists had privately concluded that "there is general scientific agreement that the most likely manner in which [hu]mankind is influencing the global climate is through carbon dioxide release from the burning of fossil fuels."[94]
  - Shell internally reached similar conclusions by at least the 1980s,[95] as did Mobil (then separate from Exxon).[96] By the 1980s, major fossil fuel companies had "internally acknowledged that climate change was real, it was caused by fossil fuel consumption, and it would have significant impacts on the environment and human health."[97]
- A 2017 report by the Carbon Disclosure Project found that seventy-one percent of all global greenhouse gas emissions since 1988 "can be traced to just 100 fossil fuel producers."[98]
- No major fossil fuel company has established itself as a willing participant in the transition to renewable energy.
  - In 2018, all fossil fuel majors approved projects that are noncompliant with the Paris Agreement goals.[99] That same year, the fossil fuel industry as a whole spent only about one percent of capital expenditures on renewable energy initiatives.[100]

[91] Brief of Amici Curiae Robert Brulle, Center for Climate Integrity, Justin Farrell, Benjamin Franta, Stephan Lewandowsky, Naomi Oreskes, and Geoffrey Supran in Support of Appellees and Affirmance, County of San Mateo v. Chevron Corporation, et al., County of Imperial Beach v. Chevron Corporation, et al., County of Marin v. Chevron Corporation, et al., County of Santa Cruz, et al., v. Chevron Corporation, et al., Nos. 18-15499, 18-15502, 18-15503, 18-16376 at 2 (9th Cir. 2019).
[92] Elan Young, Exxon knew -- and so did coal, Grist (Nov. 29, 2019).
[93] Oliver Milman, Oil industry knew of 'serious' climate concerns more than 45 years ago, The Guardian (Apr. 13, 2016).
[94] Shannon Hall, Exxon Knew about Climate Change almost 40 years ago, Sci. Am. (Oct. 26, 2015).
[95] John H. Cushman Jr., Shell Knew Fossil Fuels Created Climate Change Risks Back in 1980s, Internal Documents Show, Inside Climate News (Apr. 5, 2018).
[96] Nicholas Kusnetz, Exxon Turns to Academia to Try to Discredit Harvard Research, Inside Climate News (Oct. 20, 2020).
[97] Brief of Amici Curiae Robert Brulle, *et al.*, *supra* note 91, at 15.
[98] New report shows just 100 companies are source of over 70% of emissions, Carbon Disclosure Project (July 2017).
[99] Breaking the Habit - Why none of the large oil companies are "Paris-aligned", and what they need to do to get there, Carbon Tracker Initiative (Sept. 2019).
[100] Ron Bousso, Big Oil spent 1 percent on green energy in 2018, Reuters (Nov. 11, 2018).

    - A study by the London School of Economics found that no fossil fuel major has carbon-reduction plans that are Paris-compliant as of October 2020.[101] A September 2020 report by climate research group Oil Change International concluded that "[n]one of the evaluated oil majors' climate strategies, plans, and pledges come close to alignment with the Paris Agreement."[102]
- Fossil fuel companies continue to bet on long-term fossil fuel reliance.
    - Approximately half of the oil under BP's financial control is excluded from the company's decarbonization commitments.[103] As recently as November 2020, BP was buying up Canadian offshore oil parcels.[104]
    - According to leaked internal documents, ExxonMobil is betting on increases in future carbon emissions.[105] The 2018 investment plan by ExxonMobil, one of the world's largest oil companies, predicted that the firm's expanded oil and gas production would release an additional twenty-one million tons of carbon dioxide annually by 2025. When added to the emissions released by "end uses" of the company's products, the total additional emissions of ExxonMobil's growth strategy would amount to around 100 million tons of carbon dioxide per year. This figure — which represents only the anticipated *expansion* of ExxonMobil's business — is roughly equivalent to the entire annual emissions of the country of Greece.[106]
    - Several leading executives from Shell's renewable energy sectors recently quit in response to the company's lackluster efforts to decarbonize.[107] In December 2020, the company was actively engaged in litigation in the Netherlands in which it argued that emissions reduction commitments should not be legally binding.[108] In February 2021, the company revealed that it planned significant expansion of its gas export and production operations.[109]
    - Chevron plans to increase spending on exploration and extraction in the Gulf of Mexico and the Lower 48 states in 2021.[110]

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[101] Anjli Raval, Big fossil fuel groups all failing climate goals, study shows, Financial Times (Oct. 6, 2020).
[102] Big Oil Reality Check: Assessing Oil and Gas Company Climate Plans, Oil Change International (Sept. 2020).
[103] Kelly Trout, The Loopholes Lurking in BP's New Climate Aims, Oil Change International (Mar. 11, 2020) ("BP's accounting of its production excludes any oil and gas that it produces but does not sell… BP also excludes the production related to its 20% stake in Russia-based oil company Rosneft. We estimate that these accounting loopholes exclude from BP's net zero aim 46% of the total carbon that the company invested in extracting in 2018...").
[104] Julianne Geiger, From Billions To Millions: Canada's Offshore Oil Disappointment, OilPrice.com (Nov. 5, 2020).
[105] Kevin Crowley & Akshat Rathi, Exxon Carbon Emissions and Climate: Leaked Plans Reveal Rising CO2 Output, Bloomberg Green (Oct. 5, 2020); Emily Pontecorvo, Exxon's 'emission reduction plan' doesn't call for reducing Exxon's emissions, Grist (Dec. 15, 2020).
[106] Crowley & Rathi, *supra* note 105. ExxonMobil's growth strategy has since changed in light of the Covid-19 pandemic.
[107] Anjli Raval & Leslie Hook, Shell Executives Quit Amid Discord Over Green Push, Financial Times (Dec. 8, 2020).
[108] Laurel Wamsey, Climate Case Against Shell Begins In The Netherlands, NPR (Dec. 1, 2020).
[109] Jillian Ambrose, Shell to expand gas business despite pledge to speed up net zero carbon drive, The Guardian (Feb. 11, 2021).
[110] Carolyn Davis, Chevron Sharply Reduces '21 Spending, but Permian, Gulf of Mexico Still Priorities - Natural Gas, Natural Gas Intelligence (Dec. 3, 2020).

    - The American Petroleum Institute recently asserted that the oil industry remains essential to the American economy and promised to resist President Biden's climate agenda.[111]
- Shareholder engagement has not been an effective tactic for changing the industry's core business model, with recent attempts by shareholders to persuade fossil fuel companies to address climate risks going largely unheeded.
    - The Interfaith Center on Corporate Responsibility found that "150 requests from various responsible shareholders asking fossil fuel companies to evaluate financial risk from climate change regulation [between 1992 and 2015] were ignored or met with a dismissive reply," with leaders of companies including ExxonMobil and Shell explicitly stating their intentions to continue producing fossil fuels without interruption.[112]
    - Shareholder engagement group As You Sow noted in a 2018 report that, although oil and gas companies are disproportionate targets of shareholders' attempts to engage and intervene, the companies have been singularly unresponsive to requests to reduce greenhouse gas emissions.[113]
- The fossil fuel sector continues to undermine climate-friendly policymaking.
    - In the three years following the Paris Agreement, the five largest public fossil fuel companies "invested over $1 [billion] of shareholder funds on misleading climate-related branding and lobbying."[114]
    - Each year, "the world's five largest publicly owned oil and gas companies spend approximately $200 million on lobbying designed to control, delay or block binding climate-motivated policy."[115]
- As a 2013 article by environmental sociologists explained: "[a]lthough many factors have contributed to the failure to enact strong international and national climate change policies… a powerful and sustained effort to deny the reality and significance of human-induced climate change has been a key factor."[116]
- The fossil fuel industry's poor record of preventing, abating, and reporting pipeline leaks and accidents, and its heavy-handed tactics to gain access to private property, have negatively affected Wisconsin and neighboring states.
    - A log of oil and gas pipeline accidents maintained by the Pipeline and Hazardous Materials Safety Administration documents 5,747 "significant incidents"

[111] Nicholas Kusnetz, American Petroleum Institute Chief Promises to Fight Biden and the Democrats on Drilling, Tax Policy, Inside Climate News (Jan. 14, 2021).
[112] Taavi Tillmann, Jonny Currie, Alistair Wardrobe, & David McCoy, Fossil fuel companies and climate change: the case for divestment, 350 Brit. Med. J. (June 2015).
[113] 2020: A Clear Vision for Paris-Compliant Shareholder Engagement, As You Sow (Sept. 2018). The report urges fiduciaries to divest from the oil and gas sector so as to "protect their beneficiaries" if the companies do not adopt Paris-compliant plans by the close of the 2020 proxy season. *Id.* at 25. That deadline has now passed without any meaningful change of course by the industry. Raval, Big fossil fuel groups all failing, *supra* note 101.
[114] Big Oil's Real Agenda on Climate Change, InfluenceMap (Mar. 2019).
[115] Niall McCarthy, Oil and Gas Giants Spend Millions Lobbying to Block Climate Change Policies, Forbes (Mar. 25, 2019). BP spends approximately $53 million, Shell $49 million, and ExxonMobil $29 million per year. *Id.*
[116] Shaun W. Elsasser & Riley E. Dunlap, Leading Voices in the Conservative Choir: Conservative Columnists' Dismissal of Global Warming and Denigration of Climate Science, 57(6) Am. Behav. Scientist 754, 755 (2013).

nationwide between 2001 and 2020, resulting in 1,142 injuries and 256 fatalities.[117]

  - A 2017 report by the National Wildlife Federation estimated that Enbridge Inc.'s aging Line 5 pipeline spilled more than a million gallons of oil over a fifty-year time period.[118] In 2019, the State of Michigan sued Enbridge to shut down Line 5, and in 2020 Michigan Governor Gretchen Whitmer ordered the closure of the pipeline.[119] The Bad River Band, an Indigenous tribe in northern Wisconsin, also filed a lawsuit against Enbridge in 2019 to compel the closure of Line 5, which traverses the tribe's reservation.[120]
  - A 2019 leak at an Enbridge pipeline in south-central Wisconsin went unreported for over a year despite causing concern among local residents.[121]
  - Lobbying by Enbridge in 2015 resulted in changes to Wisconsin's eminent domain laws, making it easier for the government to force private property owners to allow pipeline construction on their land.[122]
  - A 2007 oil pipeline explosion near Clearbrook, Minnesota killed two people and resulted in a $2.4 million fine.[123] In proposing the fine, federal regulators noted that Enbridge had failed to follow procedural requirements for ensuring the structural integrity of the pipeline.[124]
  - In 2010, an Enbridge pipeline spilled 316,000 gallons of crude oil near Romeoville, Illinois.[125]
  - Also in 2010, an Enbridge pipeline spilled more than a million gallons of crude oil near Marshall, Michigan, contaminating nearby wetlands.[126] The spill resulted in a $177 million settlement and years-long cleanup effort overseen by federal regulators.[127] The spill has been described as the worst inland oil spill in United States history.[128]
- Finally, the fossil fuel industry has engaged in a sustained effort to silence protesters and increase the severity of criminal punishment for their activities.
  - Since 2017, the industry has pushed for the passage of numerous "critical infrastructure" bills in U.S. state legislatures to criminalize protests at oil and gas

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[117] Pipeline Incident 20 Year Trends, Pipeline and Hazardous Materials Safety Administration (last visited Oct. 25, 2021). These figures were compiled from the "Significant Incident 20 Year Trend" database (run date May 7, 2021).
[118] Garrett Ellison, Enbridge Line 5 has spilled at least 1.1M gallons in past 50 years, MLive (Apr. 26, 2017).
[119] Cheyna Roth, Enbridge Line 5 ordered shut down by Michigan Gov. Whitmer, MLive (Nov. 13, 2020).
[120] Danielle Kaeding, Bad River Tribe Files Federal Lawsuit Against Enbridge, Wisconsin Public Radio (July 23, 2019).
[121] Laura Schulte, Enbridge Energy 2019 Wisconsin spill went unreported to DNR over year, Milwaukee Journal Sentinel (Mar. 29, 2021).
[122] Dan Egan, Wisconsin leaders quietly make it easier to condemn private property for potential pipeline expansion,, Milwaukee Journal Sentinel (Nov. 9, 2017).
[123] John P. Myers, Enbridge fine for deadly explosion stands at $2.4 million, Superior Telegram (Aug. 18, 2010).
[124] *Id.*
[125] Top 20 onshore U.S. oil and gas spills since 2010, Associated Press (Nov. 17, 2017).
[126] EPA Response to Enbridge Spill in Michigan, U.S. Envtl. Protection Agency (last visited May 7, 2021).
[127] *Id.*
[128] Maria Gallucci, Enbridge Oil Spill: Five Years Later, Michigan Residents Struggle To Move On, International Business Times (July 24, 2015); *see also* Nat'l Transp. Safety Bd., Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release (last visited May 7, 2021) (noting that the leak continued for seventeen hours before Enbridge officials discovered it).

infrastructure sites, thirteen of which have become law.[129] Many of the bills are similar or identical to model legislation authored by the corporate lobbying group American Legislative Exchange Council, and at least three were accompanied by political contributions from oil and gas companies to the bills' sponsors.[130]

    - The majority of enacted critical infrastructure laws contain provisions for organizational as well as individual criminal liability.[131]
    - A wide range of commentators have criticized critical infrastructure laws as unnecessary, vague, and overly punitive, and two of the laws face litigation challenging their constitutionality.[132]

- The industry has also used lawsuits and subpoenas to accuse environmental advocates of defamation, racketeering, and other crimes, to label advocates as terrorists, and to chill advocacy targeting the industry's activities.[133]
- There is mounting evidence of collusion between paramilitary firms hired by fossil fuel companies and local police departments in suppressing protest against fossil fuel infrastructure projects, most notoriously Energy Transfer Partners' Dakota Access pipeline.
    - In response to protests at the Standing Rock reservation in 2016 and 2017, Energy Transfer Partners hired TigerSwan, a military contractor with experience in Iraq and Afghanistan. In collaboration with local police, TigerSwan used legally questionable tactics against protesters, including digital surveillance.[134] Water cannons, tear gas, and rubber bullets were also used, resulting in hundreds of injuries.[135]
    - Energy Transfer Partners also retained TigerSwan to respond to vandalism targeting the Dakota Access pipeline in Iowa in 2017, using scare tactics, residential surveillance, and the hiring of locals to pursue suspects in a wide-ranging operation that swept in dozens of people.[136]

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[129] Muzzling Dissent: How Corporate Influence Over Politics Has Fueled Anti-Protest Laws, Institute for Policy Studies (Oct. 2020). The states in which bills have passed into law are Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin. U.S. Protest Law Tracker, International Center for Not-for-Profit Law (last visited Feb. 10, 2021).

[130] New Report Details Impact of Secretive American Legislative Exchange Council on Communities of Color, Center for Constitutional Rights (Dec. 23, 2019); Gabrielle Cochette & Basav Sen, Muzzling Dissent: How Corporate Influence Over Politics Has Fueled Anti-Protest Laws at 8-9 (Oct. 2020).

[131] Namely, those enacted in Kentucky, Mississippi, North Dakota, Ohio, Oklahoma, North Dakota, South Dakota, Tennessee, Texas, and West Virginia. US Protest Law Tracker, *supra* note 129.

[132] Nicholas Kusnetz, More States Crack Down on Pipeline Protesters, Including Supporters Who Aren't Even on the Scene, Inside Climate News (Mar. 28, 2019); Susie Cagle, 'Protesters as terrorists': growing number of states turn anti-pipeline activism into a crime, The Guardian (July 8, 2019).

[133] *See, e.g.*, Amal Ahmed, Energy Transfer Partners Files Lawsuit Against Greenpeace, Texas Monthly (Dec. 15, 2017); Exxon's Campaign of Intimidation against Climate Defenders Ushers in a New McCarthy Era, EarthRights International (Dec. 21, 2016); Green Group Holdings v. Schaeffer: Defense of Environmental Protesters Against Defamation Lawsuit, American Civil Liberties Union (Feb. 7, 2017). A national coalition of civil rights organizations called Protect the Protest tracks and opposes these tactics.

[134] Antonia Juhasz, Paramilitary security tracked and targeted DAPL opponents as 'jihadists,' docs show, Grist (June 1, 2017).

[135] Alleen Brown, Medics Describe How Police Sprayed Standing Rock Demonstrators with Tear Gas and Water Cannons, The Intercept (Nov. 21, 2016).

[136] Alleen Brown, Will Parrish & Alice Speri, Tigerswan Responded to Pipeline Vandalism by Launching Multi-State Dragnet, The Intercept (Aug. 26, 2017).

- ■ A multi-part reporting series by the investigative journalism publication The Intercept concluded that "[l]eaked documents and public records reveal a troubling fusion of private security, public law enforcement, and corporate money in the fight over the Dakota Access pipeline."[137]
- ■ In 2019, the Canadian pipeline company Enbridge used digital and aerial surveillance, along with embedded informants, against nonviolent protesters targeting the company's Line 3 pipeline in Minnesota, attempting to follow the same playbook used by law enforcement at Standing Rock.[138]

- ○ The militarized response to climate protest by fossil fuel companies is at least a decade old. At a 2011 conference attended by members of the fossil fuel industry, an executive of Anadarko Petroleum recommended military-style tactics against citizen groups protesting hydraulic fracturing (also known as fracking): "I want you to download the US Army/Marine Corps counterinsurgency manual because we are dealing with an insurgency here."[139]

VII. The financial risk of fossil fuel investments

As an asset manager, the Board of Trustees has violated its *duty of care* by failing to adequately consider the risk of continued investment in fossil fuels despite ample evidence of the industry's financial precarity. In fact, the Trustees have lost money in recent years due to its commitment to fossil fuel assets over renewable energy securities. The untenable value thesis of fossil fuel investments is especially concerning for investors at charitable institutions. As a public charity that exists to support Marquette, whose mission is "the search for truth, the discovery and sharing of knowledge, the fostering of personal and professional excellence… for the greater glory of God and the common benefit of the human community,"[140] the Trustees are ostensibly committed to mitigating the worst effects of climate change. Such mitigation requires government regulation to reduce greenhouse gas emissions and the growth of the green technology sector — developments that pose an existential threat to the fossil fuel industry. In other words, the Board's fiduciary duties oblige it to promote the financial non-viability of the fossil fuel sector, making any continued investment in the sector unreasonable on its face.

- Oil, gas, and coal companies face an extremely uncertain financial future due to mismanagement, the failure to prepare for a renewable energy economy, social pressures and unrest created by the unequally distributed health and economic burdens of fossil fuel products, and the pressures of COVID-19.
  - ○ Oil and gas stocks have greatly underperformed other investments over the last ten years. While the S&P 500 Index has increased approximately 366 percent in value since 2011, the S&P Oil & Gas Exploration & Production Index has lost

[137] *Id.*
[138] Will Parrish & Alleen Brown, How Police Are Preparing for a Standoff Over Enbridge Line 3, The Intercept (Jan. 30, 2019).
[139] Bill McKibben, Shake Harvard Free of Oil Stock, The Boston Globe (Apr. 7, 2015).
[140] Leadership: Guiding Values, Marquette University (last visited Oct. 25, 2021).

approximately thirty-two percent of its value over the same time period,[141] and the S&P Oil & Gas Equipment & Services Select Industry Index has lost approximately forty-seven percent of its value.[142] Even prior to the COVID-19 crisis, leading financial analyst Jim Cramer stated that fossil fuel stocks were "just done" as profitable investments, thanks to falling demand and the impact of divestment campaigns.[143]

  - From the fourth quarter of 2019 to August 2020, seven of the world's largest oil companies lost eighty-seven billion in value as a result of increased emissions regulations and collapsing demand during the COVID-19 pandemic.[144]
  - In January 2021, the S&P rating agency warned leading fossil fuel companies that they were at risk of imminent credit downgrades due to economic pressures resulting from the energy transition.[145]
  - Between 2015 and 2020, fossil fuel assets in U.S. portfolios lost 9.6 percent of their value. Renewable energy assets gained 65.6 percent in value over the same period.[146]
- In August 2020, ExxonMobil was dropped from the Dow Jones stock index, a reflection of the company's rapidly declining business: Since 2008, its market capitalization has shrunk from $500 billion to around $175 billion.[147]
- In February 2021, ExxonMobil reported quarterly losses of $20.1 billion.[148]
- Since 2010, the world's five oil "supermajors" — ExxonMobil, BP, Chevron, Shell, and Total SA — have spent far more on dividends and stock buybacks ($556 billion) than they have earned from business operations ($340 billion), indicating an unsustainable reliance on borrowing and asset sales to inflate their financial performance.[149]
- The coal industry, especially in the United States, is collapsing: the share of U.S. electricity produced by coal has declined from forty-five percent in 2008 to twenty-four percent in 2020, while eight coal companies, including the largest private coal firm, declared bankruptcy in 2019.[150]
- The Governor's Task Force on Climate Change advises divestment given the fossil fuel industry's financial precarity: "As climate change accelerates and renewable energy continues to become increasingly cost competitive, a growing number of financial analysts argue that fossil fuels will prove to be a bad investment. Over the past few years, coal and oil stocks have shown great vulnerability . . . If this trend continues, especially

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[141] Data from S&P Dow Jones Indices (S&P Global, Oct. 16, 2021).
[142] Data from S&P Dow Jones Indices (S&P Global, Oct. 16, 2021).
[143] Kevin Stankiewicz, There's no more money to be made in oil and gas stocks, Jim Cramer says, CNBC (Feb. 3, 2020).
[144] Jillian Ambrose, Seven top oil firms downgrade $87bn in nine months, The Guardian (Aug. 14, 2020).
[145] Ben Butler, Rating agency S&P warns 13 oil and gas companies they risk downgrades as renewables pick up steam, The Guardian (Jan. 27, 2021).
[146] "Energy Investing: Exploring Risk and Return in the Capital Markets," International Energy Agency and the Centre for Climate Finance and Investment at 10 (June 2020)
[147] Avi Salzman, Why Exxon Is Being Dropped From the Dow, Barron's (Aug. 25, 2020).
[148] ExxonMobil reports results for fourth quarter 2020 and provides perspective on forward plans, ExxonMobil (Feb. 2, 2021).
[149] Clark Williams-Derry, Tom Sanzillo, and Kathy Hipple, In Q1, Four of Five Oil Majors Paid More Cash to Investors Than They Made From Operations, Institute for Energy Economics and Financial Analysis (May 2020).
[150] Fred Pearce, As Investors and Insurers Back Away, the Economics of Coal Turn Toxic, Yale Environment 360 (Mar. 10, 2020).

as Americans continue to travel less due to the pandemic, removing fossil fuels from a stock portfolio becomes a more mainstream option. Enacting divestment legislation could accelerate this shift and move us further from economic reliance on fossil fuels. Multiple studies have demonstrated that divesting from fossil fuels does not have a statistically significant impact on overall portfolio performance and has only a marginal impact on the utility derived from such portfolios."[151]

- As outlined in "The Financial Case for Fossil Fuel Divestment" by the Sightline Institute and the Institute for Energy Economics and Financial Analysis, investment in the fossil fuel sector is now unacceptably risky thanks to price volatility, the rise of renewable energy sources, and government climate regulations. The traditional value thesis that justified investment in the sector — based on the assumptions that demand for oil, gas, and coal will continue to grow and that companies' extensive untapped reserves represent a sure source of future profits — are no longer tenable.[152]
    - There are various reasons for the fossil fuel industry's transformation from a secure source of investment returns to a dangerously speculative risk sector: "The world economy is shifting toward less energy-intensive models of growth, fracking has driven down commodity and energy costs and prices, and renewable energy and electric vehicles are gaining market share. Litigation on climate change and other environmental issues is expanding and campaigns in opposition to fossil fuels have matured. They are now a material risk to the fossil fuel sector and a force for the reallocation of capital to renewable energy and electric vehicles as a source of economic growth. The risks, taken cumulatively, suggest that the investment thesis advanced by the coal, oil and gas sector that worked for decades has lost its validity."[153]
    - The report notes that "[t]he financial case for fossil fuel divestment is strong. Over the past three and five years [prior to 2018], respectively, global stock indexes without fossil fuel holdings have outperformed otherwise identical indexes that include fossil fuel companies. Fossil fuel companies once led the economy and world stock markets. They now lag . . . Fossil fuel stocks, once prime blue-chip contributors to institutional funds, are now increasingly speculative. Revenues are volatile, growth opportunities are limited, and the outlook is decidedly negative."[154]
    - Comparing fossil fuel-free funds to traditional funds, the report concludes that divesting endowments of oil, gas, and coal holdings poses no risk to future returns: "Over the past five years, the MSCI-All Country Global Index without fossil fuels has outperformed the Index that includes fossil fuels."[155]
- The Carbon Tracker Initiative calculates the remaining amount of carbon dioxide that may be released into the atmosphere if international warming limits are to be met. As of November 2019, the world could continue to release carbon dioxide at current rates for only thirteen more years in order to have a fifty percent chance of meeting the 1.5 degree Celsius target. Under this limited "carbon budget," fossil fuel majors would have to

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[151] Governor's Task Force on Climate Change Report, *supra* note 59, at 94.
[152] Tom Sanzillo, Kathy Hipple, and Clark Williams-Derry, The Financial Case for Fossil Fuel Divestment, Sightline Institute and the Institute for Energy Economics and Financial Analysis (July 2018)
[153] *Id.* at 4.
[154] *Id.* at 1.
[155] *Id.* at 38.

reduce emissions from oil and gas production forty percent below 2019 levels by 2040. Such reductions — which represent only a moderate chance at avoiding catastrophe — would render the majority of oil and gas reserves unexploitable and unprofitable.[156]

- According to a 2019 study by the Mercer consulting firm, investment portfolios will be greatly affected by future global warming. If warming is held to two degrees Celsius — the target set by the 2015 Paris Agreement and one which will still result in widespread harm — the global economy will suffer significant damage from climate change while also transitioning to a renewable energy base. In this scenario, according to the study, portfolio assets in the coal industry will suffer cumulative impacts of 58.9 percentage points by 2030 and 100 percentage points by 2050, while assets in oil and gas will suffer cumulative impacts of 42.1 and 95.1 percentage points, respectively.[157] Other studies have concluded that major energy companies who continue to rely on fossil fuels would lose between thirty and sixty percent of their value.[158]
- In its most recent financial stability report, the Federal Reserve reported that "climate change, which increases the likelihood of dislocations and disruptions in the economy, is likely to increase financial shocks and financial system vulnerabilities that could further amplify these shocks."[159]
- A wave of litigation against companies responsible for climate change damages poses an additional risk to investment in the fossil fuel sector. A report from the law firm Clyde & Co LLP concludes that "[o]il majors are currently facing threatened or pending litigation on a number of fronts and across a number of jurisdictions. Their liability insurers and reinsurers will undoubtedly be watching these cases with keen interest . . . Companies in a number of sectors may find themselves exposed not just to damages claims for climate change, but also the cost of defending litigation, the reputational harm of being associated with such litigation and the consequential impacts on operations and value."[160]
- In a sign of the growing consensus that fund managers have a duty to assess climate risks in their portfolios, the multibillion-dollar Australian Retail Employees Superannuation Trust (REST) recently settled a beneficiary lawsuit that faulted the fund for failing to disclose how it would manage the risks posed by climate change and the plummeting value of fossil fuel stocks. REST acknowledged that "climate change is a material, direct and current financial risk" and committed to manage its investments in a way that would support net-zero greenhouse gas emissions by 2050 and the Paris Agreement goal of 1.5 degrees Celsius warming.[161]
- In an August 2020 open letter, over 100 leading economists, including Nobel Prize laureate Joseph Stiglitz, former Secretary of Labor Robert Reich, identified the continued existence of the fossil fuel economy as "fundamentally incompatible" with long-term social and economic well-being and cited divestment as an essential tactic for bringing about systemic change: "When our largest banks, most influential investors and most prestigious universities place bets on the success of the fossil fuel industry, they provide

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[156] Balancing the Budget: Why deflating the carbon bubble requires oil & gas companies to shrink, Carbon Tracker Initiative (Nov. 1, 2019).
[157] Investing in a Time of Climate Change: The Sequel 2019 at 34, Mercer LLC (2019).
[158] The Carbon Bubble: The financial risk of fossil fuels and need for divestment at 7, European Green Party (2020).
[159] Board of Governors of the Federal Reserve System, Financial Stability Report at 58 (Nov. 2020).
[160] Climate change: Liability risks at 37, Clyde & Co LLP (Mar. 2019).
[161] Michael Slezak, Rest super fund commits to net-zero emission investments after Brisbane man sues, ABC News (Nov. 2, 2020).

it with the economic and social capital necessary to maintain the dangerous status quo. Instead, these institutions should divest from fossil fuel companies and end financing of their continued operations while reinvesting those resources in a just and stable future."[162]

VIII. Industry fraud and the fiduciary duty to avoid fraudulent investments

Despite well-known facts regarding the fossil fuel industry's alleged efforts to defraud investors, the Trustees have persisted in buying industry securities, violating their *duty of care*.

- Fossil fuel companies have allegedly long engaged in a fraudulent attempt to hide the financial risks associated with emissions regulations and future fossil fuel extraction. This alleged fraud has been a matter of public record since at least 2015[163] and a matter of common knowledge for investors since at least 2019, when the Massachusetts Attorney General sued ExxonMobil for misleading consumers and investors.
    - In 2019, the Massachusetts Attorney General sued ExxonMobil, one of the world's leading oil companies, for three alleged violations of the Wisconsin Consumer Protection Act.
        - The state's Second Amended Complaint alleges that "[f]or many years, Exxon Mobil Corporation . . . the world's largest publicly traded oil and gas company, systematically and intentionally has misled Massachusetts investors and consumers about climate change. In order to increase its short-term profits, stock price, and access to capital, ExxonMobil has been dishonest with investors about the material climate-driven risks to its business and with consumers about how its fossil fuel products cause climate change—all in violation of Massachusetts law."[164]
        - According to the Complaint, ExxonMobil scientists in the 1970s accurately predicted the rate of global warming that would be caused by fossil fuel use. The company was well aware of how its business activity would damage the planet; for example, a company scientist told management in 1981 that climate change will "produce effects which will indeed be catastrophic" and that it would be necessary to sharply reduce fossil fuel use.[165]
        - Despite this knowledge, ExxonMobil — like many of its peers in the industry — persisted in a "highly misleading" campaign to spread doubt about climate science and to prevent measures that would decrease the use of fossil fuels. As late as 2015, ExxonMobil's CEO was publicly disputing

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[162] Jeffrey Sachs, Joseph Stiglitz, Mariana Mazzucato, Clair Brown, Indivar Dutta-Gupta, Robert Reich, Gabriel Zucman, et al, Letter from economists: to rebuild our world, we must end the carbon economy, The Guardian (Aug. 4, 2020).

[163] Neela Banerjee, Lisa Song, and David Hasemyer, Exxon's Own Research Confirmed Fossil Fuels' Role in Global Warming Decades Ago, Inside Climate News (Sept. 16, 2015).

[164] Second Amended Complaint, Massachusetts v. ExxonMobil, No. 1984-CV-03333-BLS1(Mass. Sup. Ct. June 5, 2020) at 1.

[165] *Id.* at 5.

    - the scientific consensus that rising atmospheric carbon dioxide levels produce catastrophic warming.[166]
    - The Attorney General concluded that ExxonMobil's value will fall precipitously in coming years, thanks in large part to an expected transition to renewable energy that will make the companies' oil and gas reserves valueless: "When those reserves cease to have future value, other things being equal, ExxonMobil securities are likely to decline in value as well, perhaps dramatically, much as the market value of coal companies has collapsed in recent years as the deployment of cleaner, more efficient fuel sources has reduced expected future coal demand."[167]
    - According to the Complaint, "[t]he systemic risk climate change poses to the world's financial markets is comparable to, and could well exceed, the impact of the 2008 global financial crisis . . . The risks of climate change and regulatory responses to it pose an existential threat to [the company's] business model and therefore to investments in ExxonMobil securities."[168]
    - The Attorney General explicitly stated that investment in companies like ExxonMobil puts investors like Marquette in danger of serious financial damage: "ExxonMobil's omissions and misrepresentations put its . . . investors at increased risk of losses in the future, as greater recognition of the physical and transition risks of climate change to ExxonMobil, other fossil fuel companies, and the global economy increasingly diminishes the market valuation of ExxonMobil securities, potentially under sudden, chaotic, and disorderly circumstances."[169]
  - A former senior accounting analyst for ExxonMobil has alleged in a whistleblower complaint to the Securities and Exchange Commission that the company has repeatedly overstated the value of its U.S. oil and gas assets — which will likely prove unprofitable due to the collapse of the fracking boom — fraudulently inflating the company's worth to investors by as much as fifty-six billion dollars.[170]
- Despite the revelation of this alleged fraudulent behavior, and in the face of existential threats to their business models, oil companies continue to refuse to provide investors with any assurances that they are preparing for the effects of climate change. ExxonMobil and Chevron, for example, have blocked shareholder proposals that ask the companies to describe how they will adjust their operations to satisfy the warming targets established under the Paris Agreement.[171]

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[166] *Id.* at 9, 50-51.
[167] *Id.* at 8.
[168] *Id.* at 65, 80-81.
[169] *Id.* at 138.
[170] Nick Cuningham, Exclusive: Whistleblower Accuses Exxon of 'Fraudulent' Behavior for Overvaluing Fracking Assets For Years, Desmog Blog (Feb. 2, 2021).
[171] Dana Drugman, Exxon, Chevron, Chase Reject Shareholder Requests to Address Climate Risk, The Climate Docket (Jan. 29, 2020).

IX. The financial prudence of fossil fuel divestment

Despite the frequent claim that removing an asset class like fossil fuels from an endowment would violate the fiduciary duty to maintain a diverse portfolio, fossil fuel divestment poses no risk to a portfolio's diversity and flexibility, nor does it impact returns. The Board of Trustees has violated its *duty of care* and its *duty of loyalty* by failing to embrace a divestment strategy that would both improve the endowment's performance and cure the fiduciary violations created by fossil fuel investment.

- A 2018 London School of Economics analysis led by Jeremy Grantham, one of the world's leading asset managers, concluded that removing any one of ten major asset classes such as technology or utilities from a portfolio produced no discernible impact on overall long-term returns. The analysis states that the purported financial peril of fossil fuel divestment was "mythical," and that "[i]nvestors with long-term horizons should avoid oil . . . on investment grounds."[172]
- Divestment from fossil fuels does not threaten the profitability of invested funds and thus does not violate a fiduciary's duty to ensure the prudent management of an endowment. In recent years, investment portfolios lacking fossil fuel holdings have matched or outperformed funds still containing the risky investments.
    - The most comprehensive study to date of the endowment performance at universities that have divested from fossil fuels concludes that divestment does not have a negative effect on investment returns.[173] Other research indicates that fossil fuel divestment does not significantly limit portfolio diversification opportunities, allowing investors to satisfy their fiduciary duty to maintain balanced holdings even as they avoid the risks posed by stranded assets and the energy transition.[174]
    - A 2019 study of university endowments that adopt "socially responsible investment" [SRI] policies concludes that such policies benefit the universities. Surveying SRI endowment returns from 2010 to 2019, the study reports that "donations are 33.3% per year higher among universities that incorporate SRI policies into their endowments" and that "SRI policies predict greater university donations, higher student enrollment, and more extensive risk management practices by the endowment fund."[175]
    - In 2020, the financial research agency Morningstar reported that European sustainable investment funds — defined as "funds that use environmental, social, and governance criteria as a key part of their security selection and portfolio-construction process, and/or indicate that they pursue a sustainability-related theme, and/or seek a measurable positive impact alongside financial return" —

[172] Jeremy Grantham, The mythical peril of divesting from fossil fuels, London School of Economics (June 13, 2018).
[173] Christopher Ryan and Christopher Mariscano, Examining the Impact of Divestment from Fossil Fuels on University Endowments, 17 NYU J. L. and Business, Roger Williams Univ. L. Studies Paper No. 195 (June 23, 2020).
[174] Auke Plantinga and Bert Scholtens, The financial impact of fossil fuel divestment, 21 Climate Policy 1 (2020).
[175] George O. Aragon, Yuxiang Jiang, Juha Joenväärä, and Cristian Ioan Tiu, Socially Responsible Investments: Costs and Benefits for University Endowment Funds at 5, (July 21, 2020).

    - had outperformed traditional funds over the past ten years, generally posting higher returns and surviving longer than traditional funds.
    - Separate 2021 studies by the investment firms BlackRock and Meketa found "evidence of modest improvement in fund return" after divestment from fossil fuels, and specifically noted that fiduciaries do not violate their duty of prudence when they divest from the risky fossil fuel sector.[176]
    - A 2018 analysis concluded that the New York State Common Retirement Fund would have earned an additional $22.2 billion ($137 billion versus $114.8 billion) from 2008 to 2018 had it divested from fossil fuels.[177]
- The Governor's Task Force on Climate Change recognizes that divestment produces no adverse financial effects for institutions. As one of its climate solutions for Wisconsin, the report states: "Multiple studies have demonstrated that divesting from fossil fuels does not have a statistically significant impact on overall portfolio performance and has only a marginal impact on the utility derived from such portfolios."[178]

X. Divestment by peer institutions

Hundreds of large institutional investors have opted in recent years to divest from fossil fuel producers, including many universities situated similarly to Marquette. Their reasoning applies to Marquette's circumstances as well as their own: the Trustees have failed to *invest with the care that an ordinarily prudent person in a like position would exercise under similar circumstances.* Peer institutions of Marquette University[179]including Boston University, Georgetown University, The George Washington University, Creighton University, and others have made commitments to divest their endowments from fossil fuels or have already fully divested their endowments from the fossil fuel industry.

- Institutional divestment from the fossil fuel industry has become increasingly common. Many institutions have pointed to the moral and financial imperative of abandoning holdings in oil, gas, and coal, and there is broad consensus that fossil fuel divestment is both necessary and effective as a means of mitigating climate disaster.[180]
    - Institutional investment in fossil fuel firms "provid[es] [them] with the capital to continue oil and gas production, to persuade members of Congress to provide industry-specific tax breaks and other favors, and to thwart carbon taxes and new

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[176] Tom Sanzillo, IEEFA: Major investment advisors BlackRock and Meketa provide a fiduciary path through the energy transition, Institute for Energy Economics and Financial Analysis (Mar. 22, 2021).
[177] Toby A.A. Heaps, Divestment would have made NY pension fund $22B richer, Corporate Knights (Oct. 4, 2018).
[178] Governor's Task Force on Climate Change Report, *supra* note 59, at 94.
[179] Referent Institutions, Marquette University (2015).
[180] *See, e.g.*, How falling demand for oil is set to transform international relations, World Economic Forum (Aug. 20, 2019) (citing the "global campaign in support of divestment from fossil fuels" as one of the key factors in the ongoing energy transition worldwide); Gunther Thallinger, The zero that every investment portfolio needs, World Economic Forum (Jan. 14, 2021) ("To address climate change effectively, investors must steer their entire portfolios towards climate neutrality. . . . [I]t could become necessary to reduce assets with a non-satisfactory sustainability approach. In the extreme case of non-existence of such approaches, divestment is the ultima ratio.").

public-transportation projects and other policies — actions that ultimately delay the transition from the greenhouse gas-emitting fuels."[181]

  - In its lawsuit against ExxonMobil, the Massachusetts Attorney General concluded that institutional divestment is effective in reducing the fossil fuel industry's harmful effects on the climate: "Insofar as they damage companies' reputations for their social responsibility and environmental stewardship, and thus their societal 'license to operate,' divestment efforts pose an additional climate-related risk to oil and gas companies. In 2018, an oil major that competes with ExxonMobil acknowledged that divestment campaigns and related efforts pose a material risk to its business and the price of its securities."[182]
    - The Attorney General was referencing an investor disclosure by Shell, in which the company stated that the divestment movement "could have a material adverse effect on the price of our securities and our ability to access equity capital markets . . . other financial institutions also appear to be considering limiting their exposure to certain fossil fuel projects. Accordingly, our ability to use financing for future projects may be adversely impacted."[183]
    - Other fossil fuel companies have likewise acknowledged the effects of investors' decisions to pull their funds: Prior to its bankruptcy declaration, for example, Peabody Energy stated in SEC filings that "[t]here have also been efforts in recent years affecting the investment community, including investment advisors, sovereign wealth funds, public pension funds, universities and other groups, promoting the divestment of fossil fuel equities and also pressuring lenders to limit funding to companies engaged in the extraction of fossil fuel reserves. The impact of such efforts may adversely affect the demand for and price of securities issued by us, and impact our access to the capital and financial markets."[184]
  - In addition to "hasten[ing] the [fossil fuel] industry's decline," divestment commitments from large institutions create pressure on governments to take action and make political space for the shift away from fossil fuels."[185]
- Leading educational institutions have pledged to abandon their fossil fuel assets, citing the financial and ethical obligation to divest. Such institutions have often chosen divestment *in addition* to a suite of other policies, including producing climate- and sustainability-related research, reducing on-campus environmental impact through emissions reductions and other measures, and engaging in shareholder advocacy with companies that have demonstrated their real commitment to the goals of the Paris Agreement and whose core business model is not at odds with those goals. Many leading

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[181] Prem Thakkar, Reading the Fine Print of University Fossil Fuel Divestment Pledges, The American Prospect (Mar. 1, 2021).
[182] Second Amended Complaint, Massachusetts v. ExxonMobil, *supra* note 164, at 108-09.
[183] Annual Report and Form 20-F 2017 — Strategic Report at 13, Royal Dutch Shell PLC (2017).
[184] Peabody Energy Corporation, Form 10-K: Annual Report at 30, Securities and Exchange Commission (2014).
[185] Emma Howard, A beginner's guide to fossil fuel divestment, The Guardian (June 23, 2015) (quoting Jamie Henn, of 350.org); *see also* Naomi Oreskes, Harvard and Other Schools Make a Choice on Fossil Fuels, The New York Times (Oct. 2, 2021) ("Where investors put their money reflects their expectations of how the future will unfold, and those expectations, when acted upon, shape our future.").

educational institutions have also committed to meaningful climate action on a much more rapid timescale.

- In March 2020, Brown University made public that it had begun selling its investments in fossil fuel extraction companies in October 2017, arguing that the climate crisis called for serious action beyond teaching and research. "The urgency of the situation calls for additional action," Brown's president Christina Paxson wrote in a letter to the Brown community.[186]
  - Paxson explained the move as aligning with "the view that, as the world shifts to sustainable energy sources, investments in fossil fuels carry too much long-term financial risk."[187]
- On May 22, 2020, the Cornell University Board of Trustees announced a moratorium on new private investments focused on fossil fuels and a phase-out of existing investments in that area, effectively divesting the endowment from the fossil fuel industry.[188]
  - Like many investors, when Cornell's Trustees announced their moratorium on fossil fuel investments, they cited the financial imperative behind their actions: "We're doing the right thing from an investment perspective, particularly for an endowment with a perpetual time horizon" said Ken Miranda, the university's chief investment officer, in a Cornell press release.[189]
- On October 1, 2020, the University of Cambridge announced plans to divest all direct and indirect holdings from the fossil fuel industry and to achieve net-zero greenhouse gas emissions by 2038.[190]
  - As of December 2020, the university had already withdrawn investments in "conventional energy-focused public equity measures," and planned to divest from "all meaningful exposure in fossil fuels" by 2030. It now aims to achieve net-zero greenhouse gas emissions across its entire investment portfolio by 2038.[191]
  - Cambridge's announcement was justified on moral grounds. "The University is responding comprehensively to a pressing environmental and moral need for action with an historic announcement that demonstrates our determination to seek solutions to the climate crisis," said Stephen Toope, the university's vice-chancellor.[192]
  - In addition to leveraging the university's endowment, Cambridge also made clear its continued commitment to research and teaching, emphasizing that all research funding and donations will now be

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[186] Christina Paxson, Letter from President Paxson: Brown's actions on climate change, Brown University, (Mar. 4, 2020).
[187] *Id.*
[188] Kathryn Stamm, Cornell to Effectively Divest from Fossil Fuels, Trustees Vote, Cornell Daily Sun (May 22, 2020).
[189] James Dean, Cornell announces moratorium on fossil fuel investments, Cornell Chronicle (May 22, 2020).
[190] Matthew Taylor, Cambridge University to divest from fossil fuels by 2030, The Guardian (Oct. 1, 2020).
[191] *Id.*
[192] Cambridge to divest from fossil fuels with 'net zero' plan, University of Cambridge (Oct. 1, 2020).

scrutinized against the university's goal of reducing greenhouse gas emissions "before any funding is accepted."[193]

- In April 2020, the University of Oxford announced plans to divest its endowment from fossil fuel companies.[194]
  - Oxford's divestment decision was made in accordance with its Oxford Martin Principles for Climate-Conscious Investment, a set of guidelines that led the university to determine that fossil fuel investments "hinder" worldwide efforts to (1) bring CO2 emissions to zero and (2) limit global warming to 1.5 degrees C.[195]
  - Oxford's divestment pledge was seen as consistent with the university's academic and teaching mission, and administrators did not see divestment as precluding climate- and sustainability-related research or efforts to promote sustainable campus operations. In fall 2020, months after announcing its divestment pledge, Oxford released drafts of a sustainability plan to achieve net-zero carbon and biodiversity net gain by 2035.[196]
- In September 2019, the University of California system announced divestment of its over eighty-three billion dollar endowment and pension fund from fossil fuels.[197]
  - In an op-ed in the Los Angeles Times, fund managers cited their fiduciary duty to the long-term financial wellbeing of the institution, writing that "[t]he reason we sold some $150 million in fossil fuel assets from our endowment was the reason we sell other assets: They posed a long-term risk to generating strong returns for UC's diversified portfolios."[198]
  - The fund managers also pledged to take the opportunity to reinvest in climate change solutions, writing that "[w]e have been looking years, decades and centuries ahead as we place our bets that clean energy will fuel the world's future. That means we believe there is money to be made."[199]

- Several of Marquette's peer universities have divested from fossil fuels.
  - Boston University announced divestment from fossil fuels in September 2021. Boston University President Robert Brown explained that "[divestment] is putting us on the right side of history."[200]
  - In February 2020, Georgetown University announced the divestment of its endowment from all public and private fossil fuel assets.[201]

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[193] *Id.*
[194] University of Oxford cuts ties to fossil fuels industry, BBC News (Apr. 28, 2020).
[195] Oxford Martin Principles for Climate-Conscious Investment, Oxford Martin Net Zero Carbon Investment Initiative (Feb. 2018) (adapted from R.J. Millar, C. Hepburn, J. Beddington, J. and M.R. Allen, Principles to guide investment towards a stable climate, Nature Climate Change 8, (2018), 2-4.
[196] Aiming for zero carbon and biodiversity net gain by 2035, University of Oxford (Nov. 20, 2020).
[197] Jagdeep Singh Baccher and Richard Sherman, Opinion: UC investments are going fossil free. But not exactly for the reasons you may think, Los Angeles Times (Sept. 17, 2019).
[198] *Id.*
[199] *Id.*
[200] Jessica Colarossi, Boston University to Divest from Fossil Fuel Industry, BU Today (Sept. 23, 2021).
[201] Fossil Fuels Divestment Continues Georgetown's Commitment to Sustainability, Georgetown University (Feb. 6, 2020).

        - In its announcement, Georgetown stressed the financial risk of continued investment, with Michael Barry, Georgetown's chief investment officer, noting that "climate change, in addition to threatening our planet, is increasing the risk of investing in oil and gas companies, as we expect a more volatile range of financial outcomes."[202]
        - Georgetown President John DeGioia also identified moral concerns as important to the decision, noting that "caring for our environment is one of the most urgent moral and practical concerns of our time."[203] President DeGioia also explained that "[Pope Francis's] words [in *Laudato Si'*] inform and strengthen our commitment to the environment, and to one another."[204]
    - On June 29, 2020, the George Washington University divested from fossil fuels.[205]
        - The George Washington University President Thomas LeBlanc stated that through divestment, "the George Washington University demonstrates its leadership in addressing the global threat of climate change."[206]
    - In December 2020, Creighton University announced plans to phase out all fossil fuel investments from their $587 million endowment within ten years.[207]
        - Creighton University President Rev. Daniel S. Hendrickson asserted that divestment "can be accomplished without a negative impact on the strength and overall performance of our endowment, which greatly serves the mission of the institution."[208]
    - On October 14, 2021, Loyola University Chicago "approved a new sustainable investment policy that will lead to a divestment from many fossil fuel-related investments."[209]
        - Loyola University Chicago President Jo Ann Rooney and Wayne Magdziarz, senior vice president and chief financial officer, stated that the goal of the policy is to "create a more sustainable investment strategy that aligns with Loyola's Jesuit mission."[210]
    - In March 2015, Syracuse University announced full divestment from coal mining and other fossil fuel companies.[211]
        - "Syracuse has a long record of supporting responsible environmental stewardship and good corporate citizenship, and we want to continue that record," said Chancellor Kent Syverud in the official announcement.

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[202] *Id.*
[203] *Id.*
[204] Susan Svrluga, Georgetown University says it will divest from fossil fuel companies, The Washington Post (Feb. 6, 2020).
[205] GW to Eliminate All Fossil Fuel Investments from Endowment, GW Today (June 29, 2020).
[206] *Id.*
[207] Brian Roewe, Creighton University to Divest Fully from Fossil Fuels Within 10 Years, National Catholic Reporter (Jan. 5, 2021).
[208] *Id.*
[209] Rob Kozlowski, Loyola University Chicago sets fossil fuel divestment policy, Pensions and Investments (Oct. 15, 2021).
[210] *Id.*
[211] Sara Swann, Syracuse University announces it will divest from fossil fuels, The Daily Orange (Mar. 31, 2015).

"Formalizing our commitment to not invest directly in fossil fuels is one more way we do that."[212]

- On June 23, 2014, the University of Dayton became the first Catholic school in the United States to divest from coal and fossil fuels.[213]
    - The University of Dayton Board of Trustees "unanimously approved the new investment policy, which reflects the University's commitment to environmental sustainability, human rights and its religious mission."[214]

- Several universities in the Midwest have recently divested from fossil fuels.
    - In September 2021, the University of Minnesota announced its divestment from fossil fuels.[215]
        - University of Minnesota Regent Mike Kenyanya praised the persistent advocacy of student leaders, saying "The other week we had fires on one side of the country, a drought in the middle… This is the kind of activism and pressure we need."[216]
    - In March 2021, the University of Michigan Board of Regents voted to divest from fossil fuels.[217]
        - University President Mark Schlissel explained that the university's divestment "is informed by the growing risk of investments in fossil fuels during the essential transition to a lower carbon economy."[218]
        - According to Regent Mark Bernstein, the vote reflected the fact that climate change "is a big and complicated problem, and the University of Michigan is in the business of solving big complicated consequential problems; leaders don't shy away from hard challenges."[219]
    - In October 2020, the University of Illinois divested its endowment from fossil fuels.[220]
        - The University of Illinois Sustainability Programs Coordinator noted that the Illinois Climate Action Plan, of which the divestment decision is a part, was formed with input from students, faculty, and staff, and that it is "a strategic plan to expand a culture of sustainability."[221]
        - The plan includes specific benchmarks, including the edict to "fully divest University of Illinois system endowment from all companies involved in extraction, manufacturing, production, and transportation of fossil fuels" by the end of fiscal year 2020.[222]

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[212] *Id.*
[213] Dayton Divests, University of Dayton News (last visited Oct. 15, 2021).
[214] *Id.*
[215] Ryan Faircloth, Under student pressure, University of Minnesota to phase out fossil fuel investments, Star Tribune (Sept. 24, 2021).
[216] *Id.*
[217] Calder Lewis et. al., Regents disinvest from holdings related to fossil fuels, commit to net-zero endowment by 2050 and invest $140 million into renewable energy, The Michigan Daily (Mar. 25, 2021).
[218] *Id.*
[219] *Id.*
[220] Ben Zigerman, UI's New Climate Plan Include Divestment from Fossil Fuels, The News-Gazette (Oct. 14, 2020).
[221] *Id.*
[222] Institute for Sustainability, Energy, and Environment, Illinois Climate Action Plan 2020, Appendix D: Formal Procedures at 210.

- In addition to peer universities, many other large-scale charitable funds with analogous fiduciary duties have divested.
  - Pension funds that have divested from fossil fuels include the California Public Employees' Retirement System (coal), the California State Teachers' Retirement System (coal), the country of Ireland, the New York City Employees Retirement System, the New York State Common Retirement Fund, the Teachers Retirement System of the City of New York, and the City of Providence, Rhode Island (partial).[223]
  - Other major funds that have divested include the five-billion-dollar Rockefeller Foundation,[224] Norway's $1.1 trillion sovereign wealth fund (oil and gas exploration and production)[225] and the ninety-billion Storebrand hedge fund (ExxonMobil, Chevron, and other environmental bad actors).[226]

XI. The fossil fuel industry's scientific misinformation campaigns and attacks on academia

The Trustees' *charitable purposes* are contravened by the decades-long efforts of fossil fuel companies to obscure scientific reality and undermine academic research. These anti-academic activities have been undertaken in bad faith and cannot be attributed to intellectual disagreement. By funding this activity, the Trustees expose the Marquette community and society at large to injury, violating their *duty of loyalty.*

- Beginning in the 1980s, and in response to mounting evidence of climate risks,[227] fossil fuel companies halted their climate research and "began a campaign to discredit climate science and delay actions perceived as contrary to their business interests."[228] This campaign was multi-pronged, consisting of the development of internal policies to suppress the companies' own knowledge, public communications to sow doubt about the dangers of fossil fuels, and the funding of organizations and research to undermine climate science.[229]
  - In 2007 testimony to the U.S. House of Representatives Committee on Science and Technology, Harvard's Dr. James McCarthy described a network of forty-three organizations funded by ExxonMobil whose goal was to "distort, manipulate and suppress climate science, so as to confuse the American public

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223 1000+ Divestment Commitments, GoFossilFree.org (updated Dec. 9, 2020).
224 *Id.*
225 Terje Solsvik, Norway sovereign wealth fund to divest oil explorers, keep refiners, Reuters (Oct. 1, 2019).
226 Jillian Ambrose, Major investment firm dumps Exxon, Chevron and Rio Tinto stock, The Guardian (Aug. 24, 2020).
227 *See supra* at Section III.
228 Brief of Amici Curiae Robert Brulle, Center for Climate Integrity, Justin Farrell, Benjamin Franta, Stephan Lewandowsky, Naomi Oreskes, and Geoffrey Supran in Support of Appellees and Affirmance at 17, County of San Mateo v. Chevron Corporation, et al., County of Imperial Beach v. Chevron Corporation, et al., County of Marin v. Chevron Corporation, et al., County of Santa Cruz, et al., v. Chevron Corporation, et al., Nos. 18-15499, 18-15502, 18-15503, 18-16376 (9th Cir. 2019).
229 *Id.*

about the reality and urgency of the global warming problem, and thus forestall a strong policy response."[230]

  - Between 1998 and 2005, ExxonMobil alone spent nearly sixteen million dollars funding groups that promote climate denial, according to a report by the Union of Concerned Scientists.[231]
  - Over about the last three decades, "five major U.S. oil companies have spent a total of at least $3.6 [billion] on advertisements."[232] These ads, along with other public communications, have promoted narratives the companies know to be false: In the case of ExxonMobil, for example, between 1977 and 2014, only twelve percent of ads acknowledged that anthropogenic climate change is real, compared to eighty percent of internal documents.[233]

- These activities were summarized in an amicus brief by academics and researchers as part of the ongoing tort litigation by California counties against fossil fuel companies,[234] and by this office's complaint against ExxonMobil in its deceptive advertising litigation.[235]
- Academic research has confirmed that the fossil fuel industry's "major tactic was and continues to be manufacturing uncertainty . . . [and] constantly asserting that the evidence is not sufficient to warrant regulatory action. Historically these efforts focused on specific problems such as secondhand smoke, acid rain, and ozone depletion, but in the case of [climate change] they have ballooned into a full-scale assault on the multifaceted field of climate science, the IPCC, scientific organizations endorsing [climate change], and even individual scientists."[236]
- Undermining the work of academics and scholars has been another key tactic of the fossil fuel industry. These activities affect researchers everywhere, including at Marquette, insofar as they raise the professional and reputational costs of doing climate change research and muddy scientific consensus on the subject.
  - ExxonMobil has repeatedly sought to portray the Intergovernmental Panel on Climate Change — a coordinating body of respected scientists and academics that publishes periodic reports on climate science to aid policymakers — as biased and untrustworthy.[237]
  - Following publication of his famous "hockey stick graph," climate scientist Michael E. Mann faced years of efforts to discredit him and his work, and "many [of these] attacks . . . trace directly to involvement by the fossil fuel industry."[238]

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230 Second Amended Complaint, Massachusetts v. ExxonMobil, *supra* note 164, at ¶195.

231 Smoke, Mirrors & Hot Air: How ExxonMobil Uses Big Tobacco's Tactics to "Manufacture Uncertainty" on Climate Change, Union of Concerned Scientists (July 16, 2007).

232 Emily Holden, How the oil industry has spent billions to control the climate change conversation, The Guardian (Jan. 8, 2020).

233 Geoffrey Supran & Naomi Oreskes, Assessing ExxonMobil's climate change communications (1977–2014), 12(8) Envtl. Res. Letters (Aug. 2017).

234 *See* Brief of Amici Curiae Robert Brulle, et al., *supra* note 228.

235 *See* Second Amended Complaint, Massachusetts v. ExxonMobil, *supra* note 164, at Part IV.B.

236 Riley E. Dunlap & Peter J. Jacques, Climate Change Denial Books and Conservative Think Tanks: Exploring the Connection, 57(6) Am. Behav. Scientist 699, 700 (2013) (internal citations omitted).

237 David Hasemyer & John H. Cushman Jr., Exxon Sowed Doubt About Climate Science for Decades by Stressing Uncertainty, Inside Climate News (Oct. 22, 2015).

238 How the Fossil Fuel Industry Harassed Climate Scientist Michael Mann, Union of Concerned Scientists (Oct. 12, 2017).

- In 2015, an industry-funded group sought to win access to the private correspondence of University of Arizona climate scientists in order to cast doubt on their work.[239]
    - In 2018, Former EPA secretary Scott Pruitt moved to adopt rules on public access to data that were widely seen as harmful to academic researchers.[240] These rules had long been sought by the fossil fuel industry.[241]
- According to Robert Brulle, a sociologist at Drexel University, "[T]he financial steering of intellectual inquiry is a big issue. . . . The academy is really dependent on external funding sources, and it drives a certain research agenda. I'm not saying that the people they fund are dishonest or illegitimate. But this has a systematic effect, in that it heightens certain voices and leaves others invisible, or reduces their staying power, within the academy. And so you end up with a biased system."[242]
- At least one fossil fuel company has sought to influence the outcome of ongoing litigation by funding academic research, again undermining the institutional integrity of universities.
    - In 1989, the Exxon Valdez oil spill led to a $5.3 billion verdict against the oil giant by an Alaskan jury in *In re Exxon Valdez*. By the 1980s Exxon had embraced an aggressive form of philanthropy known as "venture philanthropy,"[243] and rather than simply appeal the award, the company undertook to fund academic research that might undermine the verdict. As one Exxon official opined, "With the judges, there's at least a reasonably good chance that they'll be able to see things as they ought to be . . . ."[244]
    - The upshot of the research was that juries' punitive damage awards in cases that involve "normative judgments" are "arbitrary," "unpredictable," "erratic," and

[239] Michael Halpern, Arizona Superior Court Protects Academic Freedom in Climate Email Disclosure Case, Union of Concerned Scientists (Mar. 30, 2015).
[240] Letter to EPA Administrator Scott Pruitt regarding proposed "Strengthening Transparency in Regulatory Science" rule, Harvard University Office of the President (June 4, 2018).
[241] Marianne Lavelle, Pruitt's Own Scientist Appointees Challenge EPA Science Restrictions, Inside Climate News (May 17, 2018).
[242] Wen Stephenson, Other Universities Are Divesting From Fossil Fuels—but Harvard Is Doubling Down on Them, The Nation (May 4, 2016).
[243] Lee Smith, The Unsentimental Corporate Giver, Fortune (Sept. 21, 1981). ("With relatively few employees and correspondingly little need to support local institutions that employees depend upon, Exxon [could] concentrate its charity on projects remote from immediate concerns, such as interdisciplinary studies at universities.")
[244] Stephanie Mencimer, Blocking the Courthouse Door: How the Republican Party and its Corporate Allies Are Taking Away Your Right to Sue 231 (2006) (quoting Freudenberg notes from conversation with Exxon official). "The authors of the studies have insisted they were given complete autonomy in pursuing their work. One academic who took Exxon money, however, was fired after he produced an article that conflicted with the company's political agenda." *Id.* at 230.

"incoherent," and ought to be replaced with a schedule-based system of fines.[245] One professor called for the total abolishment of punitive damages.[246]
  - A comparison of industry-funded law review articles on punitive damages with those supported by universities "found that the former were uniformly critical of punitive damages and jury awards, while the latter overwhelmingly defended them."[247] The same study found that courts cited industry-funded studies more often.[248]

XII. The Trustees' refusal to consider divestment from fossil fuels

Ignoring repeated efforts by Marquette students and faculty to align the university's investment practices with its charitable mission, the Trustees have failed to act in *good faith* or with *due care*.

- Members of the Marquette University community have consistently argued that investment in fossil fuels is inconsistent with the university's values and with its mission to pursue excellence, faith, leadership, and service "for the greater glory of God and the common benefit of the human community."[249]
  - In 2019, Fossil Free Marquette created a petition calling for divestment with 300 signatures to Marquette University President Michael Lovell, the Marquette University Board of Trustees, and the Marquette University Endowment Office.[250]
  - In January 2020, Fossil Free Marquette formally called on the university to divest from fossil fuels.[251]
  - On September 29, 2020, Fossil Free Marquette held a student demonstration calling for Marquette University to divest its endowment from fossil fuels.[252]

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[245] Mencimer at 230; Thomas O. McGarity, A Movement, A Lawsuit, and the Integrity of Sponsored Law and Economics Research, 21(1) Stan. L. & Pol'y Rev. 51, 52, 55-56 (2010); Cass Sunstein, Daniel Kahneman, & David Schkade, Assessing Punitive Damages (With Notes on Cognition and Valuation in Law), 107 Yale L.J. 2071 (1998); Cass Sunstein, Daniel Kahneman, et al, Predictably Incoherent Judgments, 54 Stanford L. Rev. 1153 (2002); Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade, & W. Kip Viscusi, Punitive Damages: How Juries Decide (University of Chicago Press 2002).
In Exxon Shipping Co. v. Baker, the U.S. Supreme Court substantially reduced the damage award against Exxon, holding that punitive damages may not exceed actual damages in maritime cases. 554 U.S. 471, 513 (2008). The Court declined to rely on the funded studies but was aware of their existence. *Id.* at 501 n. 17.

[246] McGarity, *supra* note 245, at 55-56 (citing W. Kip Viscusi, The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts, 87 Geo. L.J. 285 (1998)).

[247] McGarity, *supra* note 245, at 56 (citing Shireen A. Barday, Note, Punitive Damages, Remunerated Research, and the Legal Profession, 61 Stan. L. Rev. 711, 713 n. 9, app. A (2008)). Beyond power to control research, sponsorship can compromise research integrity by coloring peer evaluation and through the implicit threat of funding termination. *Id.* at 53. McGarity writes, "Since it is normally impossible to know whether a sponsor has in fact determined the outcome of research . . . it may be appropriate to conclude that sponsorship undermines the integrity of sponsored research when the researchers behave as if the sponsor controlled the research." *Id.*

[248] *Id.* at 56.

[249] Our Mission, Marquette University (last visited Oct. 23, 2021).

[250] Marquette University: Divest from Fossil Fuels, GoFossilFree.org (last visited Oct. 23, 2021).

[251] Annie Mattea, Student group calls for university to divest in fossil fuels, Marquette Wire (Jan. 28, 2020).

[252] Alexa Jurado, Fossil Free Marquette holds divestment protest, Marquette Wire (Sept. 29, 2020).

- In March 2021, Marquette University Student Government Senate passed Recommendation #1, which called for Marquette to divest from fossil fuels.[253] The Marquette University Student Government Senate also passed Resolution #1, providing for a student referendum on fossil fuel divestment.[254]
- On April 22, 2021, 87% of Marquette University undergraduates voting in the student referendum supported fossil fuel divestment.[255]

- Despite the strong support for fossil fuel divestment among members of the Marquette community, the Trustees have refused to commit to divestment. University officials rely on vague, conciliatory statements and instead of making meaningful progress on divestment.
  - In May 2021, Vice President of Student Affairs Xavier Cole said, "I don't think that anyone disagrees on divestment, it's just a matter of when."[256]
  - After the student referendum, in May 2021, Endowment Office Chief Investment Officer Sean Gissal stated "the idea of investment in fossil fuels having a moral component, we agree (with students) more than we disagree. It's the timeline of how and when we divest where we disagree."[257] At the same time, Gissal said that divestment is a "last resort" and argued that fossil fuel company holdings are important as "a diversifier to protect the portfolio."[258]

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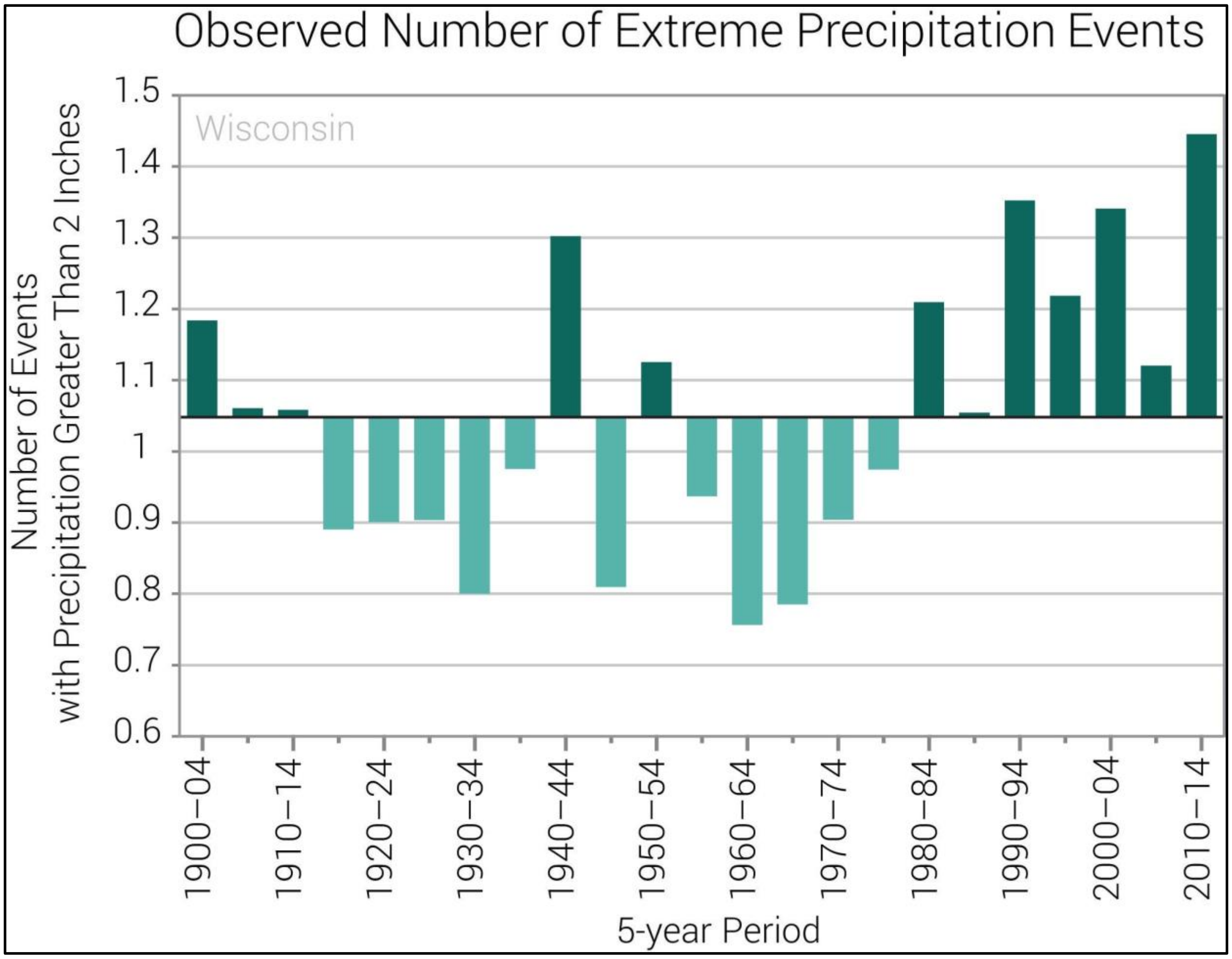
[253] Bruce Deal, *et. al.*, Recommendation #1: A Recommendation for Marquette University Fossil Fuel Divestment (Apr. 2021).
[254] Bruce Deal, *et. al.*, Resolution #1: A Resolution to Conduct an Undergraduate Student Referendum on Fossil Fuel Divestiture at Marquette University (Apr. 2021).
[255] Brian Roewe, Marquette students call for fossil fuel divestment, National Catholic Reporter (Apr. 30, 2021).
[256] Megan Woolard, University agrees on fossil fuel divestment, not on timeline, Marquette Wire (May 4, 2021).
[257] *Id.*
[258] *Id.*

Appendix A



Observed Number of Extreme Precipitation Events, 1900-2014. Source: Wisconsin State Climate Summaries, National Oceanic & Atmospheric Administration (last visited May 7, 2021).

Appendix B

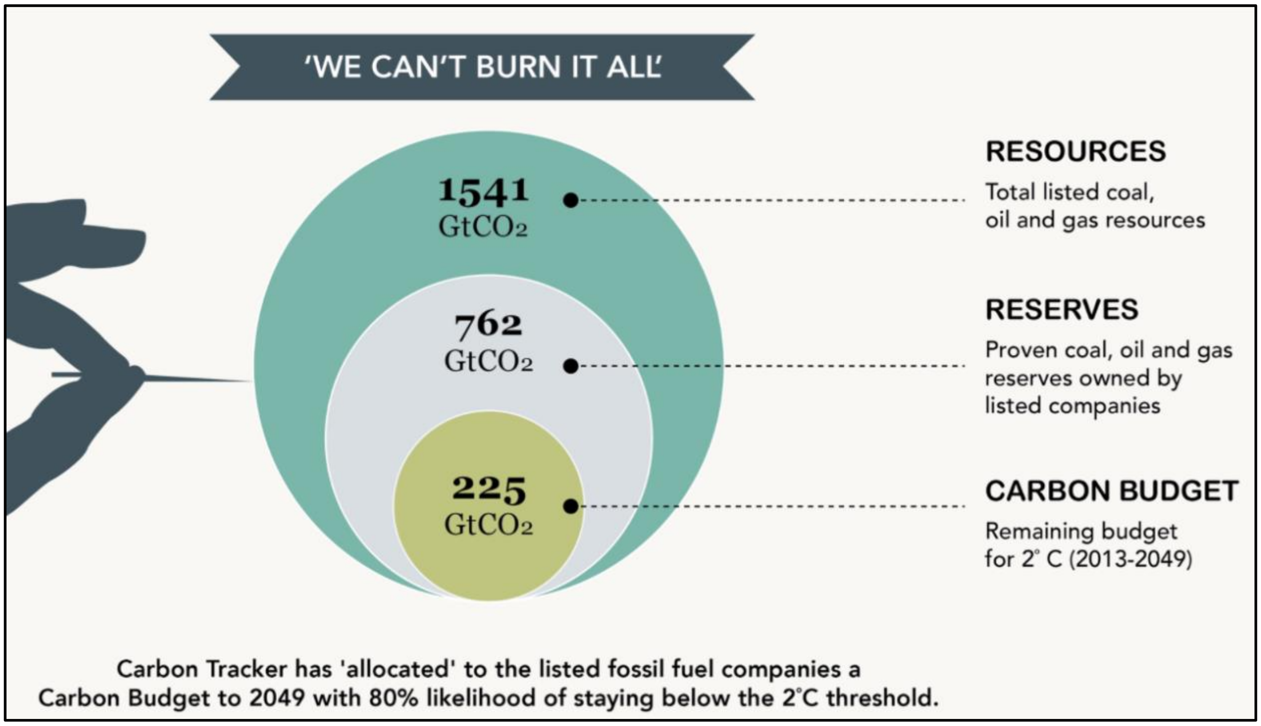


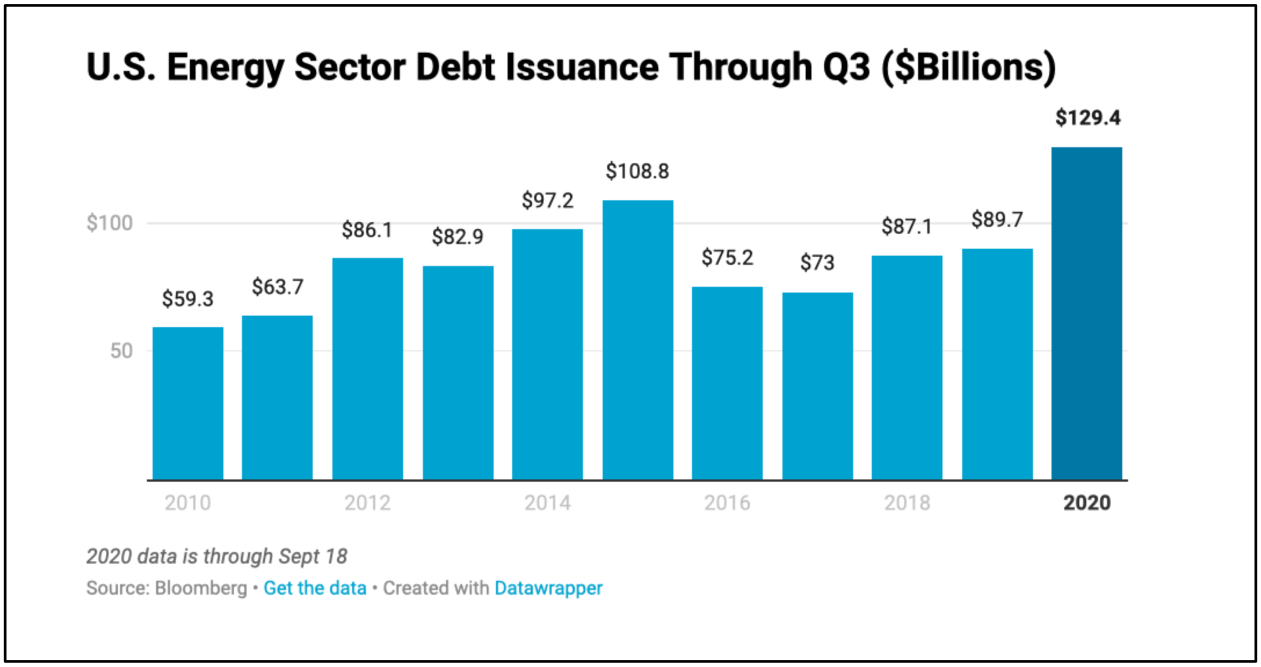
Illustration of Carbon Bubble, as reprinted in Katharine Earley, Carbon Tracker measures oil and coal risk for investors, The Guardian (Apr. 30, 2015). Source: Carbon Tracker Initiative.

Appendix C

Comparison of ten-year performance of S&P 500 Energy Index[259] (white) with S&P 500 Index (blue).[260] Created using comparison tool at S&P 500 Dow Jones Indices (last visited Oct. 19, 2021).

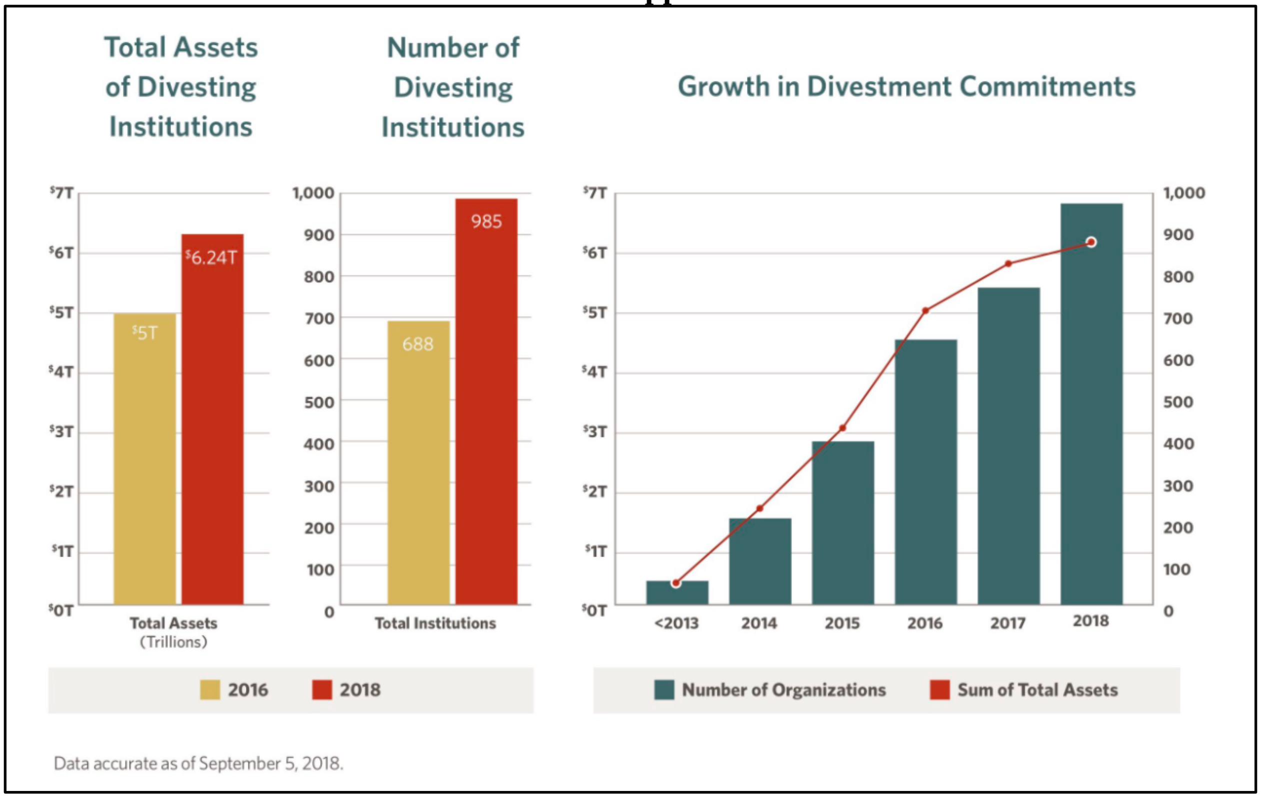
[259] The S&P 500 Energy Index includes only fossil fuel companies and does not encompass renewable energy.
[260] The energy sector's recovery in late 2020 came in part thanks to a large bailout of corporate debt markets by the federal government. *See* Lukas Ross, Alan Zibel, Dan Wagner & Chris Kuveke, Big Oil's $100 Billion Bender, Public Citizen (Sept. 30, 2020).

Appendix D



U.S. Energy Sector Debt Issuance Through Q3 ($Billions), as reprinted in Lukas Ross, Alan Zibel, Dan Wagner & Chris Kuveke, Big Oil's $100 Billion Bender, Public Citizen (Sept. 30, 2020). Source: Bloomberg.

Appendix E



Institutional Divestment Pledges as of 2018. Source: The Global Fossil Fuel Divestment and Clean Energy Investment Movement (2018 Report), Arabella Advisors.