## 1NC

### Kritik

#### Blackness exists as a metaaporia that interrogates the cyclical ways violence onto blackness is morphed and ultimately appropriated. The 1AC relies on a redemptive narrative of humanity that is fundamentally inaccessible for blacks. Their project is ultimately meant to hide and recreate moments of black death for the sake of redeeming Human life.

Wilderson 20 [Frank B. Wilderson, professor of Drama and African American studies at the University of California, Irvine, “Afropessimism”, page 13-17, JMH]

For most critical theorists writing after 1968, the word aporia is used to designate a contradiction in a text or theoretical undertaking. For example, Jacques Derrida suggests an aporia indicates “a point of undecidability, which locates the site at which the text most obviously undermines its own rhetorical structure, dismantles, or deconstructs itself.” But when I say that Black people embody a meta-aporia for political thought and action, the addition of the prefix meta- goes beyond what Derrida and the poststructuralists meant—it raises the level of abstraction and, in so doing, raises the stakes. In epistemology, a branch of philosophy concerned with the theory of knowledge, the prefix meta- is used to mean about (its own category). Metadata, for example, are data about data (who has produced them, when, what format the data are in, and so on). In linguistics, a grammar is considered as being expressed in a metalanguage, language operating on a higher level of abstraction to describe properties of the plain language (and not itself). Metadiscussion is a discussion about discussion (not any one particular topic of discussion but discussion itself). In computer science, a theoretical software engineer might be engaged in the pursuit of metaprogramming (i.e., writing programs that manipulate programs). **Afropessimism**, then, **is** less of a theory and more of **a metatheory: a critical project that, by deploying Blackness as a lens of interpretation, interrogates the unspoken, assumptive logic of Marxism, postcolonialism, psychoanalysis, and feminism through rigorous theoretical consideration of their properties and assumptive logic, such as their foundations, methods, form, and utility; and it does so, again, on a higher level of abstraction than the discourse and methods of the theories it interrogates.** Again, Afropessimism is, in the main, more of a metatheory than a theory. **It is pessimistic about the claims theories of liberation make when these theories try to explain Black suffering or when they analogize Black suffering with the suffering of other oppressed beings. It does this by unearthing and exposing the meta-aporias, strewn like land mines in what these theories of so-called universal liberation hold to be true.** If, as Afropessimism argues, Blacks are not Human subjects, but are instead structurally inert props, implements for the execution of White and non-Black fantasies and sadomasochistic pleasures, then this also means that, at a higher level of abstraction, the claims of universal humanity that the above theories all subscribe to are ~~hobbled~~ [constricted] by a meta-aporia: a contradiction that manifests whenever one looks seriously at the structure of Black suffering in comparison to the presumed universal structure of all sentient beings. Again, Black people embody a meta-aporia for political thought and action— Black people are the wrench in the works. Blacks do not function as political subjects; instead, our flesh and energies are instrumentalized for postcolonial, immigrant, feminist, LGBTQ, transgender, and workers’ agendas. These so-called **allies are never authorized by Black agendas predicated on Black ethical dilemmas. A Black radical agenda is terrifying to most people on the Left**—think Bernie Sanders—**because it emanates from a condition of suffering for which there is no imaginable strategy for redress—no narrative of social, political, or national redemption**. This crisis, no, this catastrophe, this realization that I am a sentient being who can’t use words like “being” or “person” to describe myself without the scare quotes and the threat of raised eyebrows from anyone within earshot, was crippling. I was convinced that if a story of Palestinian redemption could be told . . . its denouement would culminate in the return of the land, a spatial, cartographic redemption; and if a story of class redemption could be told . . . its denouement would culminate in the restoration of the working day so that one stopped working when surplus values were relegated to the dustbin of history, a temporal redemption; in other words, since postcolonial and working-class redemption were possible, then there must be a story to be told through which one could redeem the time and place of Black subjugation. I was wrong. **I had not dug deep enough to see that though Blacks suffer the time and space subjugation of cartographic deracination and the hydraulics of the capitalist working day, we also suffer as the hosts of Human parasites, though they themselves might be the hosts of parasitic capital and colonialism**. I had looked to theory (first as a creative writer, and only much later as a critical theorist) to help me find/create the story of Black liberation—Black political redemption. What I found instead was that **redemption, as a narrative mode, was a parasite that fed upon me for its coherence. Everything meaningful in my life had been housed under the umbrellas called “critical theory” and “radical politics.”** The parasites had been capital, colonialism, patriarchy, homophobia. And now it was clear that I had missed the boat. My parasites were Humans, all Humans—the haves as well as the have-nots. If critical theory and radical politics are to rid themselves of the parasitism that they heretofore have had in common with radical and progressive movements on the Left, that is, if we are to engage, rather than disavow, **the difference between Humans who suffer through an “economy of disposability” and Blacks who suffer by way of “social death,” then we must come to grips with how the redemption of the subaltern** (a narrative, for example, of Palestinian plenitude, loss, and restoration) **is made possible by the (re)instantiation of a regime of violence that bars Black people from the narrative of redemption**. This requires (a) an understanding of the difference between loss and absence, and (b) an understanding of how the narrative of subaltern loss stands on the rubble of Black absence. Sameer and I didn’t share a universal, postcolonial grammar of suffering. Sameer’s loss is tangible, land. The paradigm of his dispossession elaborates capitalism and the colony. When it is not tangible it is at least coherent, as in the loss of labor power. But how does one describe the loss that makes the world if all that can be said of loss is locked within the world? **How does one narrate the loss of loss? What is the “difference between . . . something to save . . . [and nothing] to lose”?** Sameer forced me to face the depth of my isolation in ways I had wanted to avoid; a deep pit from which neither postcolonial theory, nor Marxism, nor a gender politics of unflinching feminism could rescue me. Why is anti-Black violence not a form of racist hatred but the genome of Human renewal; a therapeutic balm that the Human race needs to know and heal itself? Why must the world reproduce this violence, this social death, so that social life can regenerate Humans and prevent them from suffering the catastrophe of psychic incoherence— absence? Why must the world find its nourishment in Black flesh?

#### The politics of “care”, whether institutional or individual, are coopted by the state not to reduce harm, but increase it---their moral calls for helping others only mask the articulation of blackness as a threat to the smooth functioning of a white supremacist government

Sharron, 19 - Kelly Christina Sharron, Doctorate in Philosophy from the University of Arizona, 2019(“THE CARING STATE: THE POLITICS OF CONTRADICTION IN FERGUSON, MISSOURI,” Proquest Dissertations Library, bam)

Introduction: The Politics of Care: Feminism, Feminist Theory, and the State

This dissertation emerged out of an ongoing interest in state power, particularly as it relates to the carceral state. The conversation and events that overwhelmed these topics, for me, have been police violence. The shooting of Michael Brown, an unarmed black teenager, by white officer Darren Wilson in Ferguson, Missouri became a national story, and framed what would become ongoing attention to police brutality. Moreover, the degree to which the police force and National Guard responded with military equipment, weapons, tanks, and riot gear sparked debate about what role police forces play in communities, if they have overstepped their authority, and the legitimacy of protest. While these are all important and worthy contributions, what seemed more troubling was the way that people readily accepted the solutions offered by the state. These solutions, and the rhetoric surrounding them, are what I have framed as “care.” They included things like community policing, accountability, and soft reforms like body cameras. As more unarmed people of color were killed by the police, it became immediately clear that the solutions offered were not enough to upend the problem, policing itself.

One of the most popular images to circulate after the Ferguson grand jury decision is one of a young black boy in an embrace with a white cop during a protest taking place in Portland, Oregon. This photo was shared over 400,000 times on Facebook, and marked a desire for reconciliation without meaningful change. The police officer appears to be comforting the boy, who is sobbing; it marks a tender moment between two differently affected groups, as though this could have been Wilson and Brown under different circumstances, if only they would have exhibited more care. In telling the story behind the photo, the pictured police Sgt. Bret Barnum approached the boy, Devonte Hart, who was holding a “free hugs” sign, “not as a police officer but just as a human being” (Grinberg 2014). Barnum continued, “it really solidified what all of us do this work for – this job for – to create good will” (Grinberg 2014). This isn’t the only “feel good” photo to circulate, there were other hugs, high fives, sharing food, etc. that all indicated this sense of peace and racial harmony. This sentimental moment between officer and person of color demonstrates a will and desire to care. These moments of sentimentality, as embodied in the state, are at the center of this dissertation. They foster the feeling that policing could be about good will, and that the state doesn’t necessarily intend to commit harm.

It is not just that the caring solutions and rhetoric offered by the state were ineffectual. These responses actually produce more harm. What on face appears to be contradictory aims and effects of state power, violence and care, are actually integral to each other. The reforms and sympathetic rhetoric offered by the state do not contribute to less policing, but rather extend policing. Rather than take on the serious critiques of policing, these reforms are offered as a way to harmoniously and surreptitiously continue and exacerbate the violent effects of policing. As it became clear in the years that followed, reforms failed to substantially affect police brutality, and in fact helped to short circuit some of the critiques about policing, all the while making the state appear kinder and gentler.

This dissertation investigates this range of political effects, from the violence and militarization to the use and popularization of care as a technique of re-legitimization and extension of state power. Brown’s death was not the first killing of an unarmed black person by a white officer to rise to public attention, but it did garner a particular resonance among activists, political officials, and the media. This dissertation takes stake in two particular moments: the death of Brown and the grand jury’s decision to not indict Wilson. These moments sparked larger questions about the function of the criminal justice system and who is afforded legal protections. The criticism of the grand jury decision and Ferguson policing practices culminated in a Department of Justice (DOJ) investigation that found racial injustices and disproportionately distributed revenueraising practices. In looking to care as a state technique, this dissertation examines media, state, and activist discourses surrounding the death of Brown, as well as the historical and political context of St. Louis. Using a cultural studies framework, I examine these discourses and archives asking: What are the particularities of Ferguson that catalyzed such a response? What is the context in which racist policing practices emerge? How does the political system admit injustice while also maintaining the fiction of colorblind democracy? This dissertation reveals the nuances and contradictions of state practice with respect to history, space, militarization, and justice. Finally, I consider the practices of social movements and the possibilities of incorporating care into more revolutionary frameworks amidst state-based care.

I situate my discussion of the shooting of Michael Brown in four fields of study: feminist theory, state theory, cultural studies, and political geography. I deploy feminist theory to understand how difference is made meaningful and contributes to disparate life outcomes; state theory to contextualize this iteration of statecraft with regard to care and violence; cultural studies to read and interpret language, discourse, and texts that are made meaningful through power; and political geography to discuss the impact of processes of spatialization and differentiation on policing practices. As I argue, in the contemporary U.S. landscape, state power relies on violence alongside inclusion, sympathy, and recourse. While Brown was shot in an act of violence, and the Grand Jury resulted in a legal violence, the subsequent responses of the Attorney General, President Obama, and the Department of Justice illustrate the ways in which the violence of the state is reoriented into rhetoric of justice, sympathy, and impending equality. Both violence and the more insidious operations of power are necessary to the functions of the state.

Brown’s death has a continued resonance in the ongoing attention to police violence, yet it was not the first, last, or most extraordinary. While Ferguson lies at the heart of this dissertation, I explore the political, social, and cultural milieu in which Ferguson is situated and articulated. Amidst a background of ongoing police militarization, dominant frameworks seek to maintain that blackness, as a constellation of ideas projected on and embodied in particular people, is the threat to American peace and justice rather than the extra-/illegal actions of the police. This dissertation seeks not only to unravel this claim, and demonstrate the racist ideologies that guide police action under even its most benevolent forms, but also to demonstrate the racist, gendered, sexualized, and classed underpinnings of the most idyllic of terms and aspirations from the state, and the ways in which these contradictions are actually critical to its function. The events in Ferguson exceed the geographic and political stakes of the event itself. Ferguson is instructive to the larger context of police and state power. Brown’s death is not an isolated instance, and protest and social movements do not respond to Brown alone. Rather, Brown’s death points to the larger milieu of racist policing practices—past, present, and future—taking place in Ferguson and across the United States over generations. Stuart Hall et. al's Policing the Crisis (1978; 2013) provides a framework and model to think about the significance of a singular event (in their case, the Handsworth mugging) and its relationship to the social milieu. Of their method, they say: Our concern was to use such a starting point – concrete events, practices, relationships and cultures – to approach the 'structural configurations that cannot be reduced to the interactions and practices through which they express themselves'... we sought to emulate the ethnographic imagination but also to move beyond the focus on the here and now of everyday 'interactions and practices' by locating them in the histories taking place behind all our backs (Hall et al. 1978; 2013, xi).

The text shuttles between the historical context, the Handsworth mugging, the symbol of the mugger, the state, the media, and the structuring logics of law and order. I follow the method put forth in Policing the Crisis to describe the events in Ferguson, but also their larger histories, contexts, representations, and effects. I also describe the expressions of care and their contextualization amidst violent rhetoric and effects.

Care

Sara Ahmed opens The Cultural Politics of Emotion (2015) with a question: “How does a nation come to be imagines as having a ‘soft touch’? How does this ‘having’ become a form of ‘being’, or a national attribute?” (Ahmed 2015, 1). Deeply personal, and personalized, attributes like emotions, feelings, and orientations, take on a national form, and are narrated as traits of the nation. Taking Ahmed’s description of national emotions as a starting point, I explore these questions throughout: How are emotions imagined to be part of collective bodies and institutions? What are the implications of imagining care as an institutional activity or affective orientation? What does it mean to make the police care?

In The Care of the Self (1986) Michel Foucault talks about care as pertaining to the body and the soul, as a means to cultivate and perfect oneself. Foucault describes the evolution of care:

It took the form of an attitude, a mode of behavior; it became instilled in ways of living; it evolved into procedures, practices, and formulas that people reflected on, developed, perfected, and taught. It thus came to constitute a social practice, giving rise to relationships between individuals, to exchanges and communications, and at times even to institutions. And it gave rise, finally, to a certain mode of knowledge and to the elaboration of a science” (Foucault 1986, 45).

Foucault describes a shift in care from the self to more general realms like medicine, knowledge, and institutions. Care is an orientation toward the self, as well as to objects. Foucault provides the scaffolding to think of care as extending beyond the self, or relations between people, and to thinking about the state and police as institutions of care, or as institutions involved in caring relations. In other words, the state has the capacity to care, to invoke care, for its citizens.

The meaning of care includes many dimensions including care for the self, care for others, and institutionalized care. Care most often describes a relational, ethical orientation, which eschews individualism in favor of communitarian ethics (See Engster 2005; Thomas 1993). These discussions and various viewpoints on care are related to the central terms discussed by Ahmed and Foucault, namely the integration of care into institutions and the projection of care, feelings, and emotions onto national bodies. I briefly consider care and caring, particularly as they have been developed in feminist ethics and theory, as feminine, ethical, interdependent, blurring public and private spheres, and finally when oriented to the state. While the meaning of care and its implications are often debated and discussed, care is generally portrayed as a panacea to political problems with very little consideration of what some potential pitfalls of care, or how care could be mobilized in malevolent ways.

#### The caring state is endemic to democratic politics---even if the aff is a “new framing” of care, it still falls back into the same tropes of American exceptionalism their evidence critiques---which means even if our evidence is older, it better accounts for their phenomenon across time

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As I was writing during the 2016 U.S. election, I considered the election to be part of the pageantry of the caring state. On the one hand there was the establishment Democratic party attempting to appease, and give lip service to more progressive liberals, all the while continuing what had been business as usual politics: large donors, the neoliberal doctrine, and the continuation of status quo power and privilege. On the other, there was what seemed to be a circus with a large field of candidates giving way to an explicitly sexist, racist, and billionaire populist. Democrats and Hillary Clinton seemed content to define themselves through distance from the more violent rhetoric of President Trump’s campaign. Instead of offering substantive change, Democrats presented the continuation of the status quo, nothing radical, nothing revolutionary, but not Trump. It seemed like the perfect moment to define the caring state, and as though Trump had presented its violent foil. The caring state upholds personal liberty, it praises the inclusion of difference, it wags its finger at the violent state apparatus, with a little wink behind everyone’s backs. Before the election, it seemed somewhat nauseating to continue to praise, and vote in favor of, the caring state, but at least it was better than the alternative (which of course is precisely the point – be gracious because it could be much worse).

This dissertation develops the caring state within the context of Brown’s death in Ferguson, Missouri, and the events of the next year that followed, roughly the time period of 2014-2015. It was a time defined by the Obama presidency, referenced many times throughout this dissertation, as marking the progress of the nation. President Obama, and other people of color in leadership was indicative of the ways the state had changed. It was the hallmark of care, the ability of leaders to empathize and understand the charges of racism, and to be able to frame that pain within the state rubric. This dissertation has been critical of inclusion, empathy, and care as state strategies and techniques to further violence. Much of the analysis in this dissertation is grounded in the rhetoric of President Obama and his appointees like Attorney General Eric Holder. The connection between caring and the state seemed to rely on what had now become Democratic party principles. President Trump and his supporters seemed to favor a much bolder, more violent will of the state that can’t neatly be captured by care. This violent rhetoric was obvious with regard to the U.S./Mexico border and the prison industrial complex, inciting rational fear, the effects of which have been made evident in the years since.

After the 2016 election, it seemed as if the caring state had given way, or returned, to the violent state. Instead of tolerance and inclusion, there was a return to hate speech, exclusion, and the shrinking sphere of legal protections. In the wake of Trump’s election and in the myriad of racist, homophobic, and transphobic people being appointed to new positions of leadership, the topic of state violence rose to prominence, not inflected through any particular moment, but as an overarching sense of doom. Movements formerly on the fringes of mainstream hate now have a President that speaks to and for them, and one who has the power to wield the American war machine. In this conclusion, I discuss the contemporary political moment, and ask if the caring state is indeed over. Returning to Ahmed’s original query about Britain, was the U.S. election also a reaction to being “soft?” Is the election of Donald Trump a reaction to care? Here I frame Trump’s rise to power as a transition from the pseudotolerant neoliberalism to the fascist impulses of populism. Rather than as a distinct break, these forms of governance exist on a continuum, a continuum that needs to be resisted at all levels, not just at either easily recognizable pole.

After November 8th, 2016, people were forced to grapple with the implications of the election. Two kinds of rhetoric emerged, either that President Trump represents a wholly new kind of leadership, the likes of which we’ve never seen, or a continuation and logical outcome of increased militarization, migration, and economic destitution, trends that arguably started in the wake of World War II. Both explanations seem insufficient to explain the current political landscape, a landscape that has willingly given a voice to the most vile of opinions. The 2016 election had many questioning if we had left neoliberalism and headed toward fascism. Neoliberalism operates by way of consent, albeit a manufactured consent based in economic privatization, unfettered wage gaps, and the collusion of state and capital. Fascism, by contrast, is meant to signify a nationalist, violent, concentrated form of authoritarian governance with a strong leader. The American check on these forms of power has consistently been articulated as representative democracy through voting, term limits, and Constitutional authority vested in the courts. As has always been clear, these checks are insufficient for marginalized populations, and do little to ward off either fascism or neoliberalism. There is nothing new or un-American about anti-Semitism, white supremacy, or heteropatriarchy, and to think there would be short sighted, however new the framing of “alt-right” may be. This is perhaps the greatest flaw in the American democratic experiment and the logic of American exceptionalism - there is nothing inherently moral or ethical about the will of the people.

Neoliberalism and fascism are not as distinct as their common definitions may suggest and both are possible under US democracy. Since the rise of neoliberalism, the transition from “difference” to “diversity” has resulted in the normalization of difference based on its proximity to whiteness, heterosexuality, and upward mobility. Difference has been evaluated based on its offerings to the generalization of the US as a benevolent nation. In other words, minorities are strategically deployed to serve the state’s interests, and those acts of benevolence are only a calculated use of care to mitigate violence. The question of diversity has played out in a puzzling way as people try to grapple with the phenomenon that two-time Obama voters were moved to endorse the racist working-class rhetoric of Trump. The fall of the “blue wall” and the power of angry, white voters in those states of industrial decay are articulated as a failure of the Clinton campaign to take seriously a Republican threat in those blue strongholds and the lack of economic messaging to those areas ravaged by globalization. Throughout his Presidency, Obama contended with increasing racial tensions, the attention paid to police brutality, targeted mass shootings, and the rise of BLM. In the face of white brutality, whiteness resurged and was perceived to be under attack. America, it seems, was growing too diverse, while forgetting the hard work of white Americans that had “made America great.” The very dynamics of care had propelled the electorate to more severe forms of violence

#### Slavery morphs and recodes itself in different ways- it relies on the sadism of liberal progress narratives to perfect itself and maintain “life”. Only the alternative can disrupt this project and render these promises incoherent.

Wilderson 20 [Frank B. Wilderson, professor of Drama and African American studies at the University of California, Irvine, “Afropessimism”, page 94-96, JMH]

Northup’s book implies, without stating directly, why this generalization of sadism—brutality as the constituent element of family bonding—cannot be understood as being triggered by transgressions. It is as ubiquitous as the air he breathes. “It was rarely a day passed without more whippings . . . It is the literal, unvarnished truth, that the crack of the lash and the shrieking of slaves, can be heard from dark till bedtime . . .” Patsey and Solomon, unlike Stella and me, were living in a place and time when civil society and the Human were neither ashamed nor embarrassed by this. A thousand miles upriver and one hundred twenty six years later, Josephine was shocked by this inheritance, but it didn’t take her long to recover, and to claim it. Though the structure of Stella’s “life” (or, better, **the paradigm of social death**, for the quotation marks are essential here) **cannot be reconciled with the** structure of Josephine’s life (or **the paradigm of social life**), there is a connection. But **this connection is parasitic and perverse—regardless of what the socially dead Black person (i.e., Stella and Patsey) or the socially alive Human (i.e., Josephine or Mary Epps) might say about their “relationship.”** It is parasitic because White and non-Black subjectivity cannot be imbued with the capacity for selfknowledge and intersubjective community without anti-Black violence; without, that is, the violence of social death. In other words, **White people and their junior partners need anti-Black violence to know they’re alive.\*** If Hattie McDaniel were to truly die, as Stella proclaimed, it would be tantamount to the death of a parasite’s host. This is what makes social death something more surreal than the end of breath. It is, in the words of David Marriott, a deathliness that saturates life, not an embalming; a resource for Human renewal. **It is perverse for many reasons: one of which is the fact that as civil society matures** (from 1853 to December 1979, when it all went south with Josephine)—and we move historically from the obvious technologies of chattel slavery to universal suffrage, the discourse of human rights, and the concept of universal access to civil society— the anti-Black violence necessary for the elaboration and maintenance of White (and non-Black) subjectivity gets repressed and becomes increasingly unavailable to conscious (as opposed to unconscious) speech. (“I judge people by the quality of their character,” as Dr. King said, “and not the color of their skin”; or the commonly spoken, “At the end of the day, we’re all Americans and we’re in this together”— and other such malarkey of the conscious mind.) But the pageantries of naked and submissive Black flesh, pageantries of bleeding backs and buttocks, whip marks, amputations, and faces closed by horse bits, provide evidence of the role sadism plays in the constitution of White subjectivity, and *12 Years a Slave* makes this visible on the screen, despite its repression in the narrative of both the film and civil society writ large. It is tempting and commonplace to reduce Mary and Edwin Epps’s sadism to individual psychopathology. Or one might think that Edwin Epps is one of a group of exceptionally sadistic people who lived in an exceptionally sadistic time and place. But the film, and to an even greater extent the autobiography, sees (rather than narrates) sadism—the sexual perversion in which gratification is obtained by inflicting physical or mental pain on a love object—not as the individual pathology of a handful of people, but as a generalized condition; generalized in that pleasure, as a constituent element of communal life, cannot be disentangled from anti-Black violence. Conventionally, **the object of sadism can**, tomorrow, **become the subject of sadism**. But the sadism that constitutes the spectacles of *12 Years a Slave*, and which constitutes early nineteenth century society, is not imbued with such reciprocity. The Slaves of social death cannot switch places and make Edwin Epps or his equally cruel wife the love objects of their collective sadism. If they did so in private (if Patsey beat Edwin or Mary in a private bedroom encounter, for example) **it is because such a reversal was occasioned and allowed—in other words, the master used his prerogative and power to play a different game, one in which he suffers because suffering fulfills his fantasy and because, unlike the Slave, his fantasies have “objective value.”** Such role reversals do not imbue the encounter with reciprocity. **The changes that begin to occur after the Civil War and up through the Civil Rights Movement, Black Power, and the American election of a Black president are merely changes in the weather. Despite the fact that the sadism is no longer played out in the open as it was in l840, nothing essential has changed.**

#### Only through embracement of disorder and incoherence via the alternative are we able create revolutionary politics that disrupt the generative mechanism of civil society.

Wilderson 20 [Frank B. Wilderson, professor of Drama and African American studies at the University of California, Irvine, “Afropessimism”, page 249-252, JMH]

Again, though this is a bond between Blacks and Whites (or, more precisely, between Black and non-Blacks), it is produced by a violent intrusion that does not cut both ways. Whereas the phobic bond is an injunction against Black psychic integration and Black filial and affilial relations, it is the lifeblood of White psychic integration and filial (which is to say, domestic) and affilial (or institutional) relations. For whoever says “rape” says Black; whoever says “prison” says Black; and whoever says “AIDS” says Black—the Negro is a phobogenic object: a past without a heritage, the map of gratuitous violence, and a program of complete disorder. If a social movement is to be neither social democratic nor Marxist, in terms of its structure of political desire, then it should grasp the invitation of social death embodied in Black beings. **If we are to be honest with ourselves, we must admit that the “~~Negro~~” “Black” has been inviting Whites, as well as civil society’s junior partners** (for example, Palestinians, Native Americans, Latinx) **to the dance of social death for hundreds of years, but few have wanted to learn the steps.** They have been, and remain today (even in the most anti-racist movements, like anti-colonial insurgency) invested elsewhere. Black liberation, as a prospect, makes radicalism more dangerous to the U.S. and the world. **This is not because it raises the specter of an alternative polity (such as socialism, or community control of existing resources), but because its condition of possibility and gesture of resistance function as a politics of refusal and a refusal to affirm, a program of complete disorder. One must embrace its disorder, its incoherence, and allow oneself to be elaborated by it, if indeed one’s politics are to be underwritten by a revolutionary desire.** What other lines of accountability are there when slaves are in the room? There is nothing foreign, frightening, or even unpracticed about the embrace of disorder and incoherence. The desire to be embraced, and elaborated, by disorder and incoherence is not anathema in and of itself. No one, for example, has ever been known to say, Gee whiz, if only my orgasms would end a little sooner, or maybe not come at all. Few so-called radicals desire to be embraced, and elaborated, by the disorder and incoherence of Blackness—and the state of political movements in the U.S. today is marked by this very Negrophobogenisis: Gee-whiz, if only Black rage could be more coherent, or maybe not come at all. Perhaps there is something more terrifying about the joy of Black than there is in the joy of sex (unless one is talking sex with a Negro). Perhaps coalitions today prefer to remain inorgasmic in the face of civil society—with hegemony as a handy prophylactic, just in case. If, **through this stasis or paralysis, they try to do the work of prison abolition, that work will fail, for it is always work from a position of coherence (such as the worker) on behalf of a position of incoherence of the Black: radical politics morphed into extensions of the master’s prerogative.** In this way, **social formations on the Left remain blind to the contradictions of coalitions between Humans and Slaves. They remain coalitions operating within the logic of civil society and function less as revolutionary promises than as crowding-out scenarios of Black antagonisms, simply feeding Black people’s frustration.** Whereas the positionality of the worker (whether a factory worker demanding a monetary wage, an immigrant, or a white woman demanding a social wage) gestures toward the reconfiguration of civil society, the positionality of the Black subject (whether a prison-slave or a prison-slave-in-waiting) gestures toward the disconfiguration of civil society. From the coherence of civil society, the Black subject beckons with the incoherence of civil war, a war that reclaims Blackness not as a positive value, but as a politically enabling site, to quote Fanon, of “absolute dereliction.” It is a “scandal” that rends civil society asunder. Civil war, then, becomes the unthought, but never forgotten, understudy of hegemony. It is a Black specter waiting in the wings, an endless antagonism that cannot be satisfied (via reform or reparation), but must nonetheless be pursued to the death. But lest we forget, this is not a question of volition. It is not as simple as waking up in the morning and deciding, in one’s conscious mind, to “do the right thing.” **For when we scale up from the terrain of the psyche to the terrain of armed struggle, we may be faced with a situation in which the eradication of the generative mechanism of Black suffering is something that is not in anyone’s interest.** Eradication of the generative mechanisms of Black suffering is not in the interest of Palestinians and Israelis, as my shocking encounter with my friend Sameer, on a placid hillside, suggests; because his anti-Black phobia mobilizes the fantasy of belonging that the Israeli state might otherwise strip him of. For him to secure his status as a relational being (if only in his unconscious), his unconscious must labor to maintain the Black as a genealogical isolate. “The shame and humiliation runs even deeper if the Israeli soldier was an Ethiopian Jew.” The Israelis are killing the Palestinians, literally; but psychic life, Human capacity for relations, is vouchsafed by a libidinal relay between them and their common labor to avoid ~~“niggerization”~~ [~~negroization~~] [racialization] (Fanon). **This relay is the generative mechanism that makes life life. It is also the generative mechanism of Black suffering and isolation. The end of this generative mechanism would mean the end of the world. We would find ourselves peering into the abyss.** This trajectory is too iconoclastic for working-class, post-colonial, and/or radical feminist conceptual frameworks. The Human need to be liberated in the world is not the same as the Black need to be liberated from the world; which is why even their most radical cognitive maps draw borders between the living and the dead. Finally**, if we push this analysis to the wall, it becomes clear that eradication of the generative mechanisms of Black suffering is also not in the interests of Black revolutionaries. For how can we disimbricate Black juridical and political desire from the Black psyche’s desire to destroy the Black imago, a desire that constitutes the psyche?** In short, bonding with Whites and non-Blacks over phobic reactions to the Black imago provides the Black psyche with the only semblance of psychic integration it is likely to have: the need to destroy a Black imago and love a White ideal. “In these circumstances, having a ‘white’ unconscious may be the only way to connect with—or even contain—the overwhelming and irreparable sense of loss. The intruding fantasy offers the medium to connect with the lost internal object, the ego, but there is also no ‘outside’ to this ‘real fantasy’ and the effects of intrusion are irreparable.” This raises the question, who is the speaking subject of Black insurgent testimony; who bears witness when the Black insurgent takes the stand? Who is writing this book?

### CP

#### The United States federal judiciary should issue a call for the views of the Solicitor General regarding unilateral refusal to license pharmaceutical patents for generic drugs and biosimilar medications as an anti-competitive business practice. The Office of the Solicitor General should find in favor of granting certiorari and appropriate legal change.

#### The CP solves the case by having the Supreme Court invite the legal view of the Solicitor General and then having the Office support legal modification---they’ll follow advice, but the process of letting it develop before prohibition builds SG independence.

Lepore ’10 [Stefanie; March 2010; Assistant General Counsel for Litigation at EQT Corporation, Former Adjunct Professor of Law at Duquesne University, JD from the George Washington University School of Law, BA in Politics and Philosophy from the University of Pittsburgh; Journal of Supreme Court History, “The Development of the Supreme Court Practice of Calling for the Views of the Solicitor General,” vol. 35]

I. Introduction

“When the Supreme Court invites you, that's the equivalent of a royal command. An invitation from the Supreme Court just can't be rejected.”1 The guest most frequently invited to the Supreme Court is the Solicitor General. Even before the practice of the Supreme Court calling for the views of the Solicitor General process developed, the Court occasionally invited the Solicitor General to participate as amicus in important cases by submitting a brief and/or participating in oral arguments before the Court.2 As then–Solicitor General Simon E. Sobeloff remarked to then–Attorney General Herbert Brownell in a 1954 letter about the landmark school desegregation cases, “The Supreme Court has expressly extended an invitation to the United States to participate in the reargument. While this by no means compels participation, such an invitation is not to be lightly declined.”3

The Solicitor General “has developed a unique relationship with the Supreme Court, one in which it serves as an adviser as well as an advocate.”4 The Solicitor General fulfills his role as the Court's adviser and advocate by responding to the Court's invitation to express the views of the United States in given petitions for certiorari.5 Here, the Solicitor General acts as a special type of amicus, because the Solicitor General is neither a party to the proceeding nor opining on behalf of one of the parties, but rather acting as a sort of “partner” to the Justices.6 When the Justices believe that, before they can grant or deny a petition for certiorari, they would like another opinion of the merits of a petition, they “call for the views of the Solicitor General,” known colloquially as CVSG.7 Because of the enormous amount of trust that the Court has in the Solicitor General's office, the Court values the Solicitor General's opinion as “provid[ing][the] best judgment with respect to the matter at issue.”8 However, this unique relationship of trust between the Court and the Solicitor General, such that the Solicitor General's opinion is treated as tantamount to the opinion of a tenth Justice,9 did not develop until the 1950s.

This paper will examine how the CVSG process developed. Part II will provide general background information, explaining the office of the Solicitor General, the Supreme Court practice of granting certiorari and the reasons for doing so, and the process by which the Supreme Court invites the Solicitor General to express the opinion of the United States. Part III will examine the environment that laid the groundwork for the CVSG process to emerge: the personal relationships that existed between individual Justices and attorneys in the Office of the Solicitor General and the political climate that instituted a political partnership between the Court and the Solicitor General. Finally, Part IV will argue that the CVSG process represents the culmination of the mutually beneficial relationship between the Court and the Solicitor General and then describe the first petitions for certiorari in which the Supreme Court exercised its option to CVSG.

II. Background Information

A. The Solicitor General

Congress created the Office of the Solicitor General with the Federal Judiciary Act of 1870.10 As an officer within the executive branch, the President appoints the Solicitor General, and the Solicitor General is then subordinate to both the President and the Attorney General.11 In appointing the Solicitor General, the President looks at the same criteria that affect the nomination of a Supreme Court Justice: well-respected, legal experience, and probably shares a similar legal philosophy of the President's administration.12 Because the Solicitor General is formally a member of the Department of Justice, his office is in that department's building.13 However, as a testament to the Solicitor General's dual roles as government lawyer and adviser to the Supreme Court, he also has permanent chambers in the Court.14

“Politics and law are at the intersection of the solicitor general's responsibilities.”15 The Solicitor General must be “learned in the law” and is entrusted with representing the interests of the United States, assisting the Attorney General, and “translating the policies of the government, the president, and the executive branch into litigation.”16 The Solicitor General decides which cases that the government lost in lower courts will be appealed to the Supreme Court, controls government litigation at the Supreme Court, advocates as amicus curiae in cases where the government is not a party, and advises the Supreme Court on petitions for certiorari.17 Although the Solicitor General experiences some political pressure from the President and the President's administration, the tradition of independence of the Solicitor General's office helps to ensure that the Solicitor General largely retains autonomy from political sways.18 Indeed, the Attorney General does not usually attempt to control the litigation strategy of the Solicitor General.19 Instead, the Solicitor General's agenda is structured by the Supreme Court's agenda: as the Supreme Court's power and docket changes, so does the role of the Solicitor General.20 Not only is the Solicitor General's agenda structured around the Supreme Court, but the Solicitor General helps to set that of the Court: a “principal chore of the Solicitor's office is to help the Supreme Court set its docket by screening petitions for certiorari.”21

B. Grant, Deny, or CVSG: The Certiorari Process

“A petition for certiorari is, stripping away the legal verbiage, a request to the Supreme Court to hear and decide a case that the petitioner has lost either in a federal court of appeals or in a state supreme court.”22 Parties can file petitions for certiorari throughout the year, and the petitions therefore generally accumulate at between 80 to 100 per week.23 When a petition for certiorari first arrives at the Court, it is sent to the “cert pool,” which was first created at the suggestion of Justice Powell in 1972.24 The “cert pool” consists of the law clerks of the participating Justices, who collectively pool their law clerks to divide the petitions for certiorari among themselves.25 The law clerks divide the thousands of petitions so that one of them reads every petition, assesses the worthiness of the petition for the Court's review, and writes an annotated certiorari memo “outlining the facts and contentions” of the petition.26 The law clerks circulate the annotated certiorari memos for each petition for certiorari to the participating Justices, who then review the memos and make a preliminary decision on how to vote on the petition.27 Before the Justices meet collectively to determine the fate of a petition for certiorari, the Chief Justice circulates a “discuss list”—a list of the petitions that he would like to discuss with the other Justices.28 The Associate Justices are also free to add petitions to the “discuss list,” and any petition for certiorari not discussed at a conference is denied certiorari without a vote.29 For much of the year, except during the Court's recess between July and the last week of September, the Justices vote on the petitions for certiorari in weekly conferences held in a room next to the Chief Justice's Chambers.30 These Conferences in which the Justices vote on petitions for certiorari are only attended by the Justices; “they are not open to the public or to other Court personnel.”31

When a petition for certiorari is on the discuss list at a weekly conference and therefore ready for the Justices' ultimate decision, the Justices have several voting options.32 Most obviously, they can vote to grant in full or deny in full certiorari.33 However, they have several options that fall between these two extremes. For instance, sometimes the Justices believe that more information is necessary before they can reach a full decision to grant or deny certiorari, and they will therefore CVSG.34 If several petitions for certiorari raise the same issue, the Court may accept all of them “to address that issue more fully than a single case would allow them to do.”35 The Court may also choose to narrow the granting of certiorari by choosing one issue raised in the petition or posing an issue sua sponte to the parties.36

After the Court has granted certiorari, either in full or in part, the Court then decides between giving the petition full consideration and giving it summary consideration.37 For petitions granted full consideration, the Court will hear oral arguments, receive briefing on the merits from the parties, and issue “a decision on the merits with a full opinion explaining the decision.”38 If, instead, the Court gives a petition summary consideration, the petition may take two routes.39 Usually, in summary consideration, the Court issues a “GVR,” which entails granting certiorari (G), vacating the lower court decision (V), and remanding the case to the lower court for reconsideration (R).40 In the remainder of summary consideration petitions, the Court issues a per curiam opinion—a short, unsigned opinion on the merits.41

When hearing and deciding cases on the merits, the Court operates by majority rule.42 However, when making certiorari decisions, the historical practice of the Court, called the “rule of four,”43 is to require four out of nine votes from the Justices.44 The Court has never been very forthcoming about why one petition is deemed worthy of certiorari and another not worthy. Instead, it advises that “certiorari will be granted only for compelling reasons.”45 Those compelling reasons, though “neither controlling nor fully measuring the Court's discretion,” are described in Rule 10 of the Rules of the Court.46 The criteria described in Rule 10 for evaluating a petition for certiorari are: (1) a conflict between two appellate courts, often called a circuit split; (2) a conflict between the court at issue and Supreme Court precedent; (3) importance of the issues in the petition; and (4) procedural posture of the case.47 Although these criteria for certiorari may seem somewhat imprecise and vague, it has long been certain that “[t]he Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions.”48

C. The CVSG Process: Calling for the Views of the Solicitor General

“[T]he group of lawyers that has the greatest impact on the Court is the set of about two dozen who work for the Office of the Solicitor General in the Justice Department.”49 Indeed, when the Supreme Court calls for the views of the Solicitor General, the Solicitor General becomes “an important ally for the justices, who rely on the office's expertise to control their docket and help structure doctrinal development.”50 Essentially, the Supreme Court is requesting the Solicitor General's opinion on a petition for certiorari because the Justices believe that the petition is important and potentially worthy of certiorari but need more information, in the form of another legal opinion, before they can make a final decision.51 In the CVSG role, the Solicitor General puts aside any partisan advocacy concerns that the Office may otherwise have in order to “assist in the orderly development of the law and to insist that justice be done even where the immediate interests of the federal government may not appear to benefit.”52 The Solicitor General provides “a less partisan review of the law and a survey of existing precedent.”53 Traditionally, even where government interests would prefer otherwise, the Solicitor General does not hesitate to advise the Justices that the Court lacks jurisdiction over an issue raised in a petition or that the petition simply does not satisfy the Court's criteria for granting certiorari.54 There are a number of circumstances in which the Court will CVSG: where a federal interest is involved; where there is a new issue without established precedent; where there has been a change in the development of an issue; or where an evolving issue has become more complicated and attached to other issues.55 Former Solicitor General Kenneth Starr described the purposes of the CVSG process as follows:

The CVSG has a twofold purpose. First, it serves to guide the Court or assist the Court as to whether the case is important enough to merit review. Second, it serves to offer the position of the U.S. on the merits of the issue. With respect to the former …[i]t is a courtesy to the government. With respect to the latter—the position of the U.S.—there we followed the professional responsibility of assimilating the views of different parts of the Justice Department and the agencies and putting forth the best arguments.56

The high rate of correlation between the Solicitor General's certiorari recommendations and the Court's certiorari decisions is a testament to the Court's trust in the nonpartisan legal opinion of the Solicitor General.57 Indeed, the Terms from 2001 to 2006 saw a 100-percent correlation between the Solicitor General's recommendation that the Supreme Court grant certiorari and the Court's doing so.58 While the correlation is slightly less when the Solicitor General recommends that the Court should deny certiorari, the rate is still high enough to suggest more than simple coincidence.59

#### The net benefit is OSG: The Solicitor General is intervening in climate suits to control emissions but has limited bandwidth and influence.

Clark ’22 [Lesley; January 19; Reporter at E&E News/Politico, BA at the University of Massachusetts, Amherst, Former Washington and White House Correspondent at McClatchy; E&E News ClimateWire, “Biden Fails to Fulfill Pledge on Climate Lawsuits,” https://www.eenews.net/articles/biden-fails-to-fulfill-pledge-on-climate-lawsuits/]

A DOJ spokesperson said it had "taken a wide variety of actions that address the climate crisis and will continue to look for ways to do so, including opportunities" to participate in the cases. "While we can’t comment on the deliberative process, climate change and environmental justice remain among the department’s top priorities," spokesperson Wyn Hornbuckle said.

Biden’s pledge to get involved in the climate fight came as part of his environmental justice plan, which emphasized the need to reduce pollution in low-income neighborhoods and communities of color.

During her own presidential campaign, Vice President Kamala Harris called for oil companies to be “held accountable,” saying they are “causing harm and death in communities."

Climate lawyers had expected the Biden administration to stand in contrast to Trump’s DOJ, which filed a half-dozen "friend of the court" briefs in support of the oil industry’s arguments in a procedural battle that has stalled the climate liability lawsuits.

While state and local governments have filed the cases in state courts, industry attorneys have tried to get the challenges bumped to federal courts, where the companies may stand a better chance of winning. The Supreme Court last year allowed federal appeals courts to consider a broader set of arguments in favor of federal jurisdiction, further delaying the climate cases (Greenwire, May 24, 2021).

“The president pledged that they would ‘strategically support’ the cases, and they have failed to do that,” said Richard Wiles, president of the Center for Climate Integrity. “And that’s significant. The Department of Justice is an important voice on the legal landscape, and its absence is conspicuous.”

Wiles said the department under Biden has not submitted briefs “or offered any support” for any of the cases — most of which are currently entangled in disputes over whether the cases should be heard in state or federal court.

Wiles said it’s possible that DOJ lawyers don’t believe state courts are the proper venue but noted that federal appeals courts have mostly ruled in favor of keeping the lawsuits in front of state judges.

“You would think that the DOJ would not hesitate to concur with what the courts have said,” Wiles said. “But they’re not doing that.”

Taking on the oil industry

Wiles said the U.S. government has historically been reluctant to confront the oil and gas industry.

Biden’s political fortunes have been hurt by rising gas prices, and the president was forced to defend himself last fall against charges of hypocrisy for calling on the world’s largest oil producers to increase output, even as he called for the world to slash emissions and move beyond fossil fuels.

His administration last year opened up more than 80 million acres of the Gulf of Mexico for auction after a court ruling, despite a campaign pledge to ban new oil and natural gas leasing on public lands and waters (Greenwire, Nov. 17, 2021).

“In the broader context, this just continues a very sad trend of administration after administration failing to take on the industry in any meaningful way,” Wiles said.

Donald Kochan, a professor and deputy executive director of the Law & Economics Center at George Mason University’s Antonin Scalia Law School, suggested that the administration could be waiting for its proposed climate legislation to succeed — or fail — before it engages with the judicial branch.

If Biden is unable to land his ambitious climate spending package, its collapse could “add fuel” to the plaintiffs’ argument that legislative gridlock has made it impossible to achieve climate gains in Congress, Kochan said.

“It could give them the ammunition to say, ‘Once again, we tried to go the legislative route, and again it failed. The court is the last and only hope,’“ he said.

Yet Kochan said he believes intervention by the judicial branch would be a mistake.

“It’s not a legitimate argument to say that because the Legislature is not producing, that it’s a legitimate claim for expanding the constitutional powers of the courts,” he said. “The courts are limited and should stay in their own lane. Congress and the administrative agencies are the best suited to resolve complex issues of policy and science that require expert analysis.”

He added, “If the executive branch becomes a cheerleader for judicial encroachment into their own sphere of authority, then one of the primary constitutional checks breaks down.”

Climate challengers stay mum

Democratic state attorneys, who have used congressional hearings and letters to urge Garland and DOJ to intervene in the climate liability litigation, were largely silent on the Biden administration’s lack of action.

Minnesota Attorney General Keith Ellison, who wrote a March editorial calling Biden’s pledge to back the lawsuits a “vitally important part of the new administration’s broader effort to restore trust in government,” declined through a spokesperson to comment.

Ellison in June 2020 filed a lawsuit against Exxon; Koch Industries Inc.; and the American Petroleum Institute, an oil and gas trade group, accusing the industry of misleading Minnesotans about climate change.

He and five other Democratic state attorneys involved in the climate liability fight last year urged DOJ to disavow the amicus briefs that the Trump administration had filed on behalf of the fossil fuel industry in some of the cases (Climatewire, April 7, 2021).

A spokesperson for D.C. Attorney General Karl Racine, who led that missive, declined comment but pointed to the letter, which cited Biden’s campaign pledge and argued that intervention by Trump’s DOJ had undermined their efforts.

Sara Gross, chief of the Affirmative Litigation Division at the Baltimore City Law Department, said the city would “certainly welcome the administration’s support” in its efforts “to hold fossil fuel companies accountable for their deception about their products and climate change and the costs that their actions are imposing on our residents, workers and businesses.”

The 4th U.S. Circuit Court of Appeals will take a fresh look next week at Baltimore’s lawsuit against BP PLC for flooding and other climate-related damages.

‘Weaponize the DOJ’

Although the administration hasn’t intervened in the climate liability suits, Biden’s campaign promise has come up in at least one other case.

Energy Policy Advocates, a conservative research group, pointed to the pledge in a brief it filed last February in the U.S. Court of Appeals for the District of Columbia Circuit in defense of the Trump administration’s decision to leave ozone standards unchanged.

The group’s attorney — Christopher Horner, who in a Washington Times column called Biden’s pledge an effort to “weaponize the DOJ” — warned in the brief that if the states that had sued over the ozone standards were unsuccessful in challenging the government, they might try to pursue public nuisance litigation.

“Further troubling and adding to concerns … is that the new administration ran for office vowing to deploy its Department of Justice to assist the same plaintiffs in private litigation,” Horner wrote.

The American Petroleum Institute, the oil and natural gas industry trade group that has been named as a defendant in several of the climate liability lawsuits, criticized Biden for issuing the pledge when he released his environmental justice plan in July 2020.

Paul Afonso, API’s senior vice president and chief legal officer, said at the time that “rather than wasting taxpayer resources endlessly litigating,” the focus should be on industry innovation and emissions reduction.

While API did not directly address the administration’s role in the litigation, the group pointed to a statement from Afonso in which he said, “The record of the past two decades demonstrates that the industry has achieved its goal of providing affordable, reliable American energy to U.S. consumers while substantially reducing emissions and our environmental footprint. Any suggestion to the contrary is false.”

Karen Sokol, a law professor at Loyola University, said Biden’s DOJ likely has limited bandwidth as it prepares for what she called a “coming wave of anti-climate lawsuits” challenging the steps it has taken to address emissions. Opponents have sued over the administration’s pause on oil and gas leasing and are mounting challenges to Biden’s bid to raise the cost of carbon.

And Solicitor General Elizabeth Prelogar is getting ready to defend EPA’s ability to regulate greenhouse gases from power plants before the Supreme Court next month in a case that could have major implications for Biden’s climate agenda (Climatewire, Nov. 1, 2021).

But Sokol said she had expected the administration to at least counter the Trump DOJ argument that the climate liability cases should be heard in federal court.

“I know the DOJ has a lot on its plate, but that would seem to be something that is pretty easy for them,” she said. “This is not strategic support in terms of weighing in on the merits of these claims. This is just based on a federal/state jurisdictional matter, and the executive has something to say about that.”

#### Antitrust expansion forces the OSG to play partisan hardball, crashing the office’s overall effectiveness.

Cordray ’10 [Margaret and Richard Cordray; November 2010; Professor of Law at the Capital University Law School, JD from Boalt Hall School of Law, BCL from Oxford University, BA from University of the Pacific; Attorney General for the State of Ohio, BA from Michigan State University, MA from Oxford University, JD from University of Chicago Law School; Boston College Law Review, “The Solicitor General's Changing Role in Supreme Court Litigation,” vol. 51]

I. The Solicitor General

The Solicitor General, as the federal government's chief appellate lawyer, is the country's most influential litigator. 17 <<FOOTNOTE BEGINS>> 17 See 28 U.S.C. § 505 (2006). By statute, the Solicitor General is required to be "learned in the law." Id. The Solicitor General is also responsible for conducting all Supreme Court litigation, determining whether the government will pursue an appeal to any appellate court, and determining whether the government will file an amicus brief or intervene in any appellate litigation. 28 C.F.R. § 0.20(a)--(c) (2008). <<FOOTNOTE ENDS>> In recent years, the Solicitor General's involvement in the Supreme Court has changed in important ways, both at the certiorari and merits stages. 18 Before embarking on our discussion of these changes, we begin with a brief overview of the Solicitor General's office, describing its responsibilities, advantages, and extraordinary success in Supreme Court litigation.

A. Responsibilities

The Solicitor General is tasked with supervising all of the government's appellate litigation. 19 In performing this responsibility, the office focuses on two primary functions: coordinating the government's legal strategy across the various agencies and departments, and stepping in to represent the government in cases that have reached the Supreme Court level. 20

Consolidating all appellate litigation within the Solicitor General's office enables the federal government to coordinate and present a considered litigation strategy that looks beyond the immediate concerns of individual agencies to the longer-term interests of the federal government. 21 In a bureaucratic structure as vast as that of the United States, the specific litigation preferences of the individual agencies and departments often conflict with one another, or are inconsistent with the broader interests of the government as a whole. 22 The Solicitor General, however, is able to take a more comprehensive view, and thus pursue only those cases which present significant issues and are compatible with the government's larger goals. 23

Management of the government's overall litigation strategy is tightly interwoven with the Solicitor General's other primary focus--representing the United States in the Supreme Court. 24 Conducting all Supreme Court litigation involves a myriad of tasks, including selecting the cases on which to seek certiorari, writing briefs at the certiorari and merits stages, responding to the justices' requests for the Solicitor General's views on whether the Court should grant review in certain nongovernment cases, deciding whether to participate as amicus curiae, and presenting oral arguments. 25 Two of these tasks in particular--the selection of cases on which to seek certiorari and the decision of which cases to enter as amicus--are highly discretionary, and thus effectively enable the Solicitor General to set the government's legal agenda. 26

At the certiorari stage, the Solicitor General employs a rigorous screening process, petitioning for Supreme Court review in only a small fraction of the cases that the government loses below. 27 In determining which cases to pursue, the Solicitor General relies on the Supreme Court's own standards, which focus on the presence of a conflict between the lower courts and the importance of the issue. 28 The Court's standards, however, are highly amorphous, giving the justices virtually unfettered discretion and litigants limited guidance. 29

Nonetheless, former solicitors general have identified key factors that shape their decisions on whether and when to seek review. 30 First among these factors is the presence of a true conflict between the U.S. courts of appeals. 31 In addition, the Solicitor General looks for "important" cases, based on the degree to which the adverse ruling limits executive power, undermines enforcement of federal legislation, or restricts the federal government's power regarding the states or individuals. 32

Beyond these core factors, the Solicitor General considers whether the facts of a particular case present the issues and the government's position favorably, how the case will impact the long-term development of the law, whether the subject area will be of interest to the Court, and whether the government will win on the merits. 33 The Solicitor General also must prioritize, bringing only the most important cases to the Court. By carefully limiting the number of petitions filed, the Solicitor General's office not only safeguards its reputation with the Court, but also avoids ceding to the justices control over which cases from the federal government the Court will hear. 34 <<FOOTNOTE BEGINS>> 34 See SALOKAR, supra note 25, at 114-15 (noting that solicitors general must set priorities so as not to overburden the Court or undermine the Solicitor General's reputation with it); Lee, supra note 27, at 598-99 (opining that, if the Solicitor General did not sharply restrict the petitions for certiorari he files, he would enable the Court, rather than the administration, to decide which cases were comparatively most important); cf. Cohen & Spitzer, supra note 22, at 396, 421 (contending that the Solicitor General's screening processes are so selective that it changes the Supreme Court's "menu of cases," making unavailable to the Court cases it would like to hear); id. at 414 (estimating that the Solicitor General may be withholding twenty percent of the cases that the Supreme Court would like to review). <<FOOTNOTE ENDS>>

Political considerations also influence the Solicitor General's decision-making process. Although solicitors general frequently claim independence from politics, they are appointed by and serve at the pleasure of the President. 35 They are advocates for the policies and priorities of the administrations in which they serve, and ideology thus inevitably plays a role as they set the government's litigation agenda, select cases, and frame arguments. 36 <FOOTNOTE BEGINS>> 36 See Devins, supra note 21, at 318 (noting that in selecting cases, the "Solicitor General must also balance concerns far removed from the standard criteria for cert-worthiness, including policy objectives of the Department of Justice and the White House"); John O. McGinnis, Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory, 44 STAN. L. REV. 799, 802-08 (1992) (reviewing CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION--A FIRSTHAND ACCOUNT (1991)) (arguing that, under the Constitution, the Solicitor General's role is to advocate the President's positions); see also infra notes 183-213 and accompanying text (discussing the role of the Solicitor General). <FOOTNOTE ENDS>>

The role of ideology is perhaps most evident in the Solicitor General's decisions on whether to participate in a case as amicus curiae. 37 The Solicitor General has great leeway to enter cases in which the government is not a party; indeed, the Supreme Court's procedures facilitate, and even encourage, the Solicitor General's doing so. The Court's rules specifically exempt the Solicitor General from the standard requirement that a prospective amicus obtain the consent of the parties or the Court to file a brief. 38 And further, although the Court rarely grants an amicus's request to participate in oral argument, it routinely permits the Solicitor General to do so. 39

In addition, at the petition stage, the Supreme Court frequently invites the Solicitor General to provide views on whether the Court should grant certiorari (a privilege extended to no other litigant), 40 and then generally follows the Solicitor General's recommendation. 41 <<FOOTNOTE BEGINS>> 40 The Court periodically "calls for the views of the Solicitor General" on whether to review cases in which the United States is not a party. See Ruth Bader Ginsburg, Workways of the Supreme Court, 25 T. JEFFERSON L. REV. 517, 519 (2003) (opining that the Solicitor General "acts as a true friend of the Court" in this regard); Office of the Solicitor General Workload Report Compilation, 1984 Term Through 2008 Term 4-13 (Jul. 6, 2009) [hereinafter OSG Workload Reports] (unpublished data compilation) (on file with authors) (providing data on invitations received in each of the 1986-2008 Terms--ranging from a high of forty-three in the early 1990s to a low of eleven in the late 1990s--and the total number of amicus briefs filed at the petition stage). Most cases in which the Court takes this step are civil cases involving complex statutory or regulatory schemes. See David C. Thompson & Melanie F. Wachtell, An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General, 16 GEO. MASON L. REV. 237, 245, 280-81 (2009) (providing data on the Court's practices and examples of its inviting the Solicitor General's views in regulatory areas "involving complex regulatory regimes," including antitrust, intellectual property, and ERISA). The Solicitor General invariably files a brief in response to the Court's invitation both at the petition stage and, if the case is granted, at the merits stage. See SALOKAR, supra note 25, at 142-45 (discussing the Court's practice of inviting the Solicitor General to provide views on cases at the certiorari stage). The Court may also invite the Solicitor General to participate at the merits stage, but does so rarely. See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 738 (9th ed. 2007). <FOOTNOTE ENDS>> At this stage, the Solicitor General's office typically comes in as amicus only in response to such an invitation, although it occasionally participates as amicus without invitation. 42

At the merits stage, however, the Solicitor General exercises much greater discretion over whether to enter cases in which the government is not a party, and it is here that the office can "play partisan hardball." 43 Although most cases the Solicitor General enters involve legal issues that directly affect federal interests, 44 the office can, and periodically does, participate in cases raising issues of social policy independent of any direct federal interest. 45 <<FOOTNOTE BEGINS>> 44 See Lee, supra note 27, at 599 (providing examples of cases directly implicating federal interests, including Title VII cases, antitrust cases, securities cases, voting cases, and criminal cases); Cooper, supra note 38, at 686-90 (showing that, during the mid-1930s, mid-1950s, and mid-1980s, the Solicitor General filed the vast majority of the office's amicus briefs in cases involving either (1) the interpretation of federal codes or (2) a state issue that might affect a complementary federal issue (under, for example, the Fourth or Fifth Amendments to the Constitution)). <<FOOTNOTE ENDS>> In determining whether to participate as amicus, the Solicitor General considers whether presentation of the federal government's views will be valuable to the Court, whether there are significant federal law enforcement interests at stake, and whether the case presents issues that are critical to the administration's political agenda. 46 <<FOOTNOTE BEGINS>> 46 See CAPLAN, supra note 27, at 197 (describing the standards that former Solicitor General Archibald Cox employed in deciding whether to enter a case as amicus: the case had to present an important question of constitutional law, which would affect a large number of people, and would have an impact on the government's more direct interests, in the sense that the government would be directly affected by the outcome); Lee, supra note 27, at 599-600 (opining that "in every single case the Court would be better off if it had the benefit of [the Solicitor General's] views," but that the Solicitor General must carefully limit the number of cases entered, so as not to risk undermining the Solicitor General's special status with the Court); Steven Puro, The United States as Amicus Curiae, in COURTS, LAW, AND JUDICIAL PROCESSES 220, 221 (S. Sidney Ulmer ed., 1981) (quoting Robert Stern, former Acting Solicitor General, on the key question in deciding whether to participate as amicus: "'Is this case valuable in presenting the United States' arguments to the Court?'"). <<FOOTNOTE ENDS>> The significance of this last consideration is reflected in the pattern of amicus filings under different administrations: solicitors general in Democratic administrations have submitted substantially more amicus briefs in civil rights cases (and have primarily advocated pro-rights positions), whereas solicitors general in Republican administrations have submitted substantially more amicus briefs in criminal cases (and have generally advocated tighter restrictions on defendants' rights). 47

B. Success Rate

When the Solicitor General decides to pursue a case, the office enjoys remarkable success. This success begins with the petition stage and continues through the merits stage, whether the United States is participating as a party or as an amicus. 48

At the petition stage, the Court grants approximately 70% of the Solicitor General's petitions for certiorari, an astonishing number compared to the approximately 3% that the Court grants at the request of other litigants. 49 When the Solicitor General is participating as amicus at the petition stage--almost always at the Court's invitation 50 --the Court follows the Solicitor General's recommendation to grant or deny in well over 75% of the cases 51

At the merits stage, the Solicitor General's winning percentage is also extraordinarily high. Studies of various time periods show that when the Solicitor General represents the United States as petitioner, the Solicitor General wins 70-80% of the time (as opposed to other petitioners, who win approximately 60% of the time). 52 Even more impressive, as respondent the Solicitor General wins 50-60% of the time (as opposed to other respondents, who win approximately 40% of the time). 53 Overall, the Solicitor General's winning percentage is 60-70% (as opposed to the 50% win rate for all litigants). 54

When participating as amicus on the merits, the Solicitor General is even more successful than as a party. Overall, when the Solicitor General steps in as amicus, the office wins 70-80% of the cases, regardless of which side it supports. 55 And the Solicitor General's presence as amicus has a powerful effect on outcome: a petitioner's likelihood of winning increases approximately 17% when the Solicitor General comes in on its side and decreases approximately 26% when the Solicitor General supports the respondent. 56

C. Inherent Advantages

The Solicitor General's success is attributable to a variety of factors. Perhaps foremost is the expertise that the Solicitor General brings to each case. 57 The Solicitor General has a small staff of highly credentialed attorneys who specialize in Supreme Court advocacy. 58 These attorneys are experienced in crafting petitions for certiorari, writing briefs on the merits, and presenting oral argument, all of which demand different and specific skills. 59 In addition, the attorneys focus exclusively on the Supreme Court, so they are intimately familiar with the views and concerns of each justice, the nuances of precedent, and the most effective way to present argument. 60

With this expertise, the Solicitor General has built a reputation for excellence which has led the Court to rely on the Solicitor General to winnow out cases that do not merit the Court's attention, to present the Court with trustworthy arguments, and to provide the Court with valuable information about the practical ramifications of different decisions. 61 The Solicitor General carefully guards this special standing with the Court, "lest the reservoir of credibility which is the source of this special advantage be diminished." 62 <<FOOTNOTE BEGINS>> 62 Lee, supra note 27, at 597 (arguing that the Solicitor General must use the office's adversarial advantages "with discretion, with discrimination, and with sensitivity"); see also Strauss, supra note 61, at 172 (noting that the "Office's reputation with the Justices, and the Court's image of the Office, are very important both to the Office's ability to do its job for the Executive Branch and to the functioning of the government in general"); infra notes 263-266, 286-291 and accompanying text (discussing the debate over how political the Solicitor General can be without endangering the office's elevated status with the Court). <<FOOTNOTE ENDS>>

#### Climate suits are key to mitigation globally---extinction.

Oppenheimer ’22 [Michael, Noah Diffenbaugh, Christopher Field, Stephen Pacala, Daniel Schrag, and Susan Solomon; January 24; Albert G. Milbank Professor of Geosciences and International Affairs at Princeton University, Heinz Award Winner and Fellow of the American Association for the Advancement of Science; Amicus Brief in West Virginia, et al., Petitioners, v. Environmental Protection Agency, et al., Respondents, “Brief of Climate Scientists Michael Oppenheimer, Noah Diffenbaugh, Christopher Field, Stephen Pacala, Daniel Schrag, and Susan Solomon as Amici Curiae in Support of Respondents,” http://www.supremecourt.gov/DocketPDF/20/20-1530/211180/20220124150915825\_20-1530%20et%20al.%20-%20bsac%20ClimateScientists.pdf]

The question presented in this case is of great importance to amici because it has the potential to curtail the United States’ ability to combat climate change at the federal level at a critical time. It is extremely likely that humanity’s greenhouse gas emissions have already fundamentally altered the Earth’s atmosphere, raising global surface temperature levels by about 2 degrees Fahrenheit since the late 19th century. While Americans have already felt, and will continue to feel, the impacts of climate change, regulatory action by EPA can still mitigate future danger—assuming EPA retains broad authority to act.

SUMMARY OF ARGUMENT

A decade ago, this Court recognized that EPA had found “‘compelling’ evidence” that humanity’s greenhouse gas (e.g., carbon dioxide) emissions have changed the Earth’s climate. See American Elec. Power Co. v. Connecticut, 564 U.S. 410, 417 (2011). At the time, the “dangers of greenhouse gas emissions” were projected to include “heat-related deaths; coastal inundation and erosion”; “more frequent and intense hurricanes, floods, and other ‘extreme weather events’”; and “drought due to reductions in mountain snowpack and shifting precipitation patterns.” Id.

The perilous future identified in American Electric has begun to emerge. Since that ruling, the scientific community has only grown more certain that humanity’s actions have rapidly increased the Earth’s temperature. It is now “unequivocal that human influence has warmed the atmosphere, ocean, and land.” Intergovernmental Panel on Climate Change, Sixth Assessment Report, Headline Statements at 1 (Aug. 2021) (“IPCC Sixth Assessment”).3 And there is “[e]xtensive evidence[] … that human activities, especially emissions of greenhouse gases, are the dominant cause” of global warming since the 1950s. See U.S. Global Change Research Program, Climate Science Special Report: Fourth National Climate Assessment, Volume I at 10 (2017) (“Fourth National Climate Assessment, Vol. I”).4 Global surface temperature has already risen about 2 degrees Fahrenheit when compared to the late 19th century.5 It is not too late to limit further warming and if greenhouse gas emissions can be significantly reduced, additional warming may amount to less than 2 degrees (i.e., a total warming of less than 4 degrees since the late 19th century). In the absence of sustained efforts to reduce greenhouse gas emissions, however, the total increase in temperature could surpass 10 degrees—leading to physical and ecological impacts that would be irreversible for thousands of years, if ever.

To put those numbers into perspective, the current 2 degree increase in temperature already has had notable effects across the country. Summer heatwaves and other periods of unusually warm weather have become more frequent and more intense, leading to balmy Decembers on the Atlantic Seaboard and temperatures in the Pacific Northwest during the summer of 2021 that were hot enough to melt power cables and buckle roads. Climate change has increased total rainfall and extreme flooding from storms like Hurricane Harvey, causing losses of human life and destroying billions of dollars of property in Texas and Louisiana. And rising temperatures have set the stage for a prolonged drought in the American west, increasing devastation from wildfires in environments as different as Montana forestland and the suburbs of Boulder, Colorado. If the world remains on a path of high and rising greenhouse gas emissions, and the global temperature increases by 10 degrees or more, the impact on the American way of life is expected to be far worse. Absent large expenditures on measures to defend the coast, children born this year could see portions of coastal cities like New Orleans, Miami, and Annapolis disappear under a rising ocean. Such large increases in temperature, and accompanying increases in frequency or intensity of extreme weather events and drought could also have severe impacts on the United States’ food security, economy, and national defense. These impacts would continue or accelerate already existing trends, but a dramatic increase in temperature raises the possibility of black swan events that have severe consequences but are difficult to predict—for example, destabilization of parts of the Antarctic or Greenland ice sheets leading to rates of sea level rise several times current estimates.

These projections are not a counsel of despair. It is still possible to mitigate the human and economic costs of climate change—as particularly relevant here, if greenhouse gas emissions from existing power plants and other sources can be reduced. But such mitigation will require significant coordination at the federal level. And this Court has recognized that EPA is the nation’s “primary regulator of greenhouse gas emissions,” the entity with “the scientific, economic, and technological resources [necessary to] cop[e] with issues of this order.” American Elec. Power, 564 U.S. at 428. Because the D.C. Circuit’s ruling below recognizes EPA’s obligation to develop the rules necessary to reduce greenhouse emissions, we respectfully submit that the decision should be affirmed.

ARGUMENT

I. IT IS UNEQUIVOCAL THAT HUMAN ACTIVITY IS THE CAUSE OF UNPRECEDENTED GLOBAL WARMING

A. The Greenhouse Effect Controls The Earth’s Temperature, Which Has Been Rising At An Unprecedented Rate

The basic physics of the greenhouse effect are wellestablished. The Earth’s atmosphere contains not just nitrogen and the oxygen we breathe, but also greenhouse gases like water vapor, carbon dioxide, methane, and nitrous oxide. Fourth National Climate Assessment, Vol. I at 74-80. As this Court has summarized, “greenhouse gases are so named because they ‘trap … heat that would otherwise escape from the [Earth’s] atmosphere.’” American Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 416 (2011). The resulting “‘greenhouse effect … helps keep the Earth warm enough for life.’” Id.

Indeed, much of the difference in surface temperature between the Earth, Venus (whose surface is hot enough to melt lead), and icy Mars can be explained by their respective greenhouse gas levels. See Climate Change, Part I: H. Comm. Hearing Before the Subcomm. on Environment at 3 (Apr. 9, 2019) (Testimony of Dr. Michael Oppenheimer) (“Oppenheimer 2019 Testimony”). 6 Without greenhouse gases, for example, the Earth’s average surface temperature would sink as lowas 0 degrees. NASA Earth Observatory, Effects of Changing the Carbon Cycle (June 16, 2011).7 It is similarly well-established that the Earth is warming at an unprecedented rate. See IPCC Sixth Assessment, Summary for Policymakers at 88; see also Fourth National Climate Assessment, Vol. I at 10 (“This period is now the warmest in the history of modern civilization.”). It can be stated with high confidence that the Earth’s surface temperature has risen more quickly since 1970 than it has in any other 50-year period since the days of Julius Caesar. Id. As a result, “the six warmest years on record have all occurred since 2012,” including 2021. See National Oceanic & Atmospheric Admin., U.S. saw its 4th-warmest year on record, fueled by a record-warm December (Jan. 10, 2022).9 For Maine and New Hampshire, 2021 was “their second warmest year on record” and one of the five warmest for 19 other “states across the Northeast, Great Lakes, Plains, and West.” Id.

We can state with high confidence that as temperatures have risen, the concentrations in the Earth’s atmosphere of the greenhouse gases (carbon dioxide, methane, and nitrous oxide) have also increased and now are higher than they have been in hundreds of thousands of years. IPCC Sixth Assessment, Summary for Policymakers at 8. Carbon dioxide alone makes up a higher percentage of the atmosphere than it has in millions of years. Id. As the National Oceanic and Atmospheric Administration charts below demonstrate, the concentration of carbon dioxide in the atmosphere has skyrocketed in the last sixty years—as is apparent by comparison with the prior 800,000 years.10

B. The Only Convincing Explanation For The Rapid Rise In Global Temperature Is That Human Activity Has Altered The Makeup Of The Earth’s Atmosphere

The observation of both a rapidly heating Earth and the skyrocketing levels of carbon dioxide in the modern era is not coincidental. Rather, the evidence is now “unequivocal that human influence has warmed the atmosphere, ocean, and land” and that “[w]idespread and rapid changes in the atmosphere, ocean, … and biosphere have occurred.” IPCC Sixth Assessment, Summary for Policymakers at 4. Indeed, “[g]reenhouse gas emissions from human activities are the only factors that can account for the observed warming over the last century; there are no credible alternative human or natural explanations.” U.S. Global Change Research Program, Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II at 39-40 (2018) (“Fourth National Climate Assessment, Vol. II”)11; see also, e.g., Mann et al., Record Temperature Streak Bears Anthropogenic Footprint, 44 Geophys. Res. Lett. 7936, 7936 (2017) (“th[e] sequence of record-breaking temperatures [between 2014-2016] had a negligible (<.003%) likelihood of occurrence in the absence of … warming” caused by human activity).

Specifically, the average surface temperatures both globally and in the United States have increased by about 2 degrees since the late 19th century, with the majority of that increase occurring in the last 35 years. See Lindsey & Dahlman, Climate Change: Global Temperature (updated Aug. 12, 2021);12 EPA, Climate Change Indicators: U.S. and Global Temperature (figs. 1-2) (updated Apr. 2021);13 Fourth National Climate Assessment, Vol. I at 14. With “significant reductions in the emissions of greenhouse gases,” it may be possible to limit that rise to less than 4 degrees. Fourth National Climate Assessment, Vol. I at 35. Without such reductions, the average global temperature increase could reach anywhere from 4 to 10 degrees by late in this century, depending on actual emissions. IPCC Sixth Assessment, Summary for Policymakers at 14.

Another demonstration of the connection between the rise in greenhouse gas concentrations in the atmosphere and global warming is a set of new observations from robotic thermometers (called “floats”) across the world’s oceans that are measuring heat absorption by the ocean at a global scale with unprecedented precision. See Destin, National Oceanic & Atmospheric Admin., The Argo Revolution (updated July 9, 2021).14 These floats show that the deep ocean is slowly warming across the globe, and such warming is a predictable consequence of rising atmospheric greenhouse gas levels. Johnson & Lyman, Warming trends increasingly dominate global ocean, 10 Nature Climate Change 757, 757, 760 (2020); Lyman et al., Robust warming of the global upper ocean, 465 Nature 334, 334, 336 (2010); IPCC, Special Report on the Ocean and Cryosphere in a Changing Climate, Summary for Policymakers at 7, 9 (2019) (“IPCC Ocean and Cryosphere”).15 Indeed, such sustained warming of the deep ocean cannot be explained by any process other than the rise of greenhouse gases.

As one of us has summarized, “the broad outlines of [this] problem bearing high risk for humans and society” have been clear for over thirty years, “even if many important details remained to be fleshed out.” Oppenheimer 2019 Testimony at 3. By the late 1980s, it was known that (1) “atmospheric carbon dioxide … was increasing and the only plausible explanation was fossil fuel combustion along with a lesser contribution from deforestation,” (2) “climate models projected a significant warming due to the increasing greenhouse effect,” and (3) “it was … understood that the warming could bring Earth to temperatures not experienced in several million years by the end of the 21st century.” Id. at 5. These findings led the United Nations—and later the United States, under the leadership of President George H.W. Bush—to create organizations dedicated to the study of climate change. Id. at 5-6 (discussing the founding of the Intergovernmental Panel on Climate Change); see also U.S. Global Change Research Program, Legal Mandate.16

Since its inception, the IPCC has released six full assessments of the basic science of climate change, the most recent of which is cited throughout this brief. Each report has provided increasingly strong evidence that human activity is responsible for the changes in the global climate:

* The Second Assessment, published in 1996, concluded that “The balance of evidence suggests a discernable human influence on global climate.” Oppenheimer 2019 Testimony at 6 (quoting IPCC, Second Assessment: Climate Change 1995 (1996) at 2217).
* The Third Assessment, published in 2001, found that “There is new and stronger evidence that most of the warming observed over the last 50 years is attributable to human activities.” Id. (quoting IPCC, Third Assessment: Climate Change 2001 at 5 (first published 2001)18).
* The Fourth Assessment, published in 2007, “strengthened this finding further: ‘Most of the observed increase in global average temperatures since the mid-20th century is very likely due to the observed increase in [human] greenhouse gas concentrations.’” Id. (quoting IPCC, Fourth Assessment: Climate Change 2007, Summary for Policymakers at 5 (first published 2007)19).
* The Fifth Assessment, published in 2013, stated that “‘[i]t is extremely likely that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by [humanity’s] increase in greenhouse gas concentrations and other’ human activity.” Id. (quoting IPCC, Fifth Assessment: Climate Change 2014, Summary for Policymakers at 5 (first published 2013)20).
* And, as noted, the Sixth Assessment— published in August 2021—concluded that the evidence “unequivocal[ly]” shows that human activity has led to climate change. See supra p. 4.

The U.S. Global Change Research Program’s reports— which are jointly authored by thirteen federal agencies pursuant to the Global Change Research Act of 1990— have followed a similar trajectory as the IPCC’s.

* The first National Assessment, published in 2000, acknowledged that “[h]umans are asserting a major and growing influence on some of the key factors that govern climate” and that “[t]he intensity and pattern of temperature changes within the atmosphere implicates human activities as a cause.” See U.S. Global Change Research Program, Climate Change Impacts On The United States, Report Overview at 12-13.21
* The second National Assessment, published in 2009, stated that “[t]he global warming observed over the past 50 years is due primarily to human- induced emissions of heat-trapping gases.” See U.S. Global Change Research Program, Climate Change Impacts in the United States at 9 (emphasis added).22
* The third National Assessment, published in 2014, found that “observations unequivocally show that … the warming of the past 50 years is primarily due to human-induced emissions of heat-trapping gases.” U.S. Global ChangeResearch Program, Climate Change Impact in the United States at 5 (emphasis added).23
* And, as noted, the fourth National Assessment, first published in 2017, noted that there is “no convincing alternative explanation” for the global increase in temperature beyond human activity. Fourth National Climate Assessment, Vol. I at 10; supra pp. 4-5.

In sum, after decades of study, both the global and American scientific communities have arrived at the same, unequivocal conclusion: Human activity—in particular, the emission of greenhouse gases—has increased the Earth’s temperature. See, e.g., Fourth National Climate Assessment, Vol. II at 36 (“[T]he evidence of human-caused climate change is overwhelming and continues to strengthen.”).

II. CLIMATE CHANGE ALREADY AFFECTS EVERY AMERICAN AND—WITHOUT ACTION—ITS IMPACT ON DAILY LIFE IS EXPECTED TO GROW IN DRAMATIC AND NOT FULLY PREDICTABLE WAYS

1. Climate Change Has Already Had Notable Effects Across The Country

There is “a direct connection” between the 2 degree global temperature rise that has already taken place and “the resulting changes that affect Americans’ lives, communities, and livelihoods, now, and in the future.” Fourth National Climate Assessment, Vol. II at 36; see also id. at 55 (changes caused by warming “increasingly threaten the health and well-being of the American people”). Between 2015 and April 2018 alone, for example, “the United States … experienced 44 billiondollar weather and climate disasters …, incurring costs of nearly $400 billion.” Id. at 66-68. Indeed, warmer temperatures in the United States have already been associated with a number of interrelated long-term climate trends, short-term weather events, and resulting impacts, such as (1) extreme heat and heatwaves, (2) rising sea levels, and accompanying coastal flooding, (3) increases in the frequency and intensity of storms producing heavy precipitation, including hurricanes and typhoons, (4) more intense and longer droughts, (5) wildfires, and (6) habitat degradation increasing risk of local extinctions and biodiversity loss.

a. Extreme Heat and Heatwaves: Temperatures across the United States have “increased rapidly” since the 1970s and in recent years, “twice as many hightemperature records have been set as low-temperature records.” Fourth National Climate Assessment, Vol. I at 186, 190-192; see also supra p. 8. Heatwaves (i.e., “6- day periods with a maximum temperature above the 90th percentile”) have similarly increased in most places in the country. Fourth National Climate Assessment, Vol. I at 191. By the federal government’s estimate, the frequency has increased from 2 heatwaves per year in the 1960s to 6 per year in the 2010s. See EPA, Climate Change Indicators: Heat Waves (updated Apr. 2021).24 This is no coincidence, as historical warming has made the hottest days of the year both more likely and hotter between 1961 and 2010. Diffenbaugh et al., Quantifying the influence of global warming on unprecedented extreme climate events, 114 Proceedings Nat’l Academy Sci. U.S.A. (“PNAS”) 4881,4882 (2017).25 To take one recent example, an early study suggests that last summer’s heatwave in the Pacific Northwest—where temperatures rose 40 degrees above average, hot enough to melt power cables and make asphalt buckle—was “virtually impossible without human-induced climate change.” See Philip et al., Rapid attribution analysis of the extraordinary heatwave on the Pacific Coast of the US and Canada June 2021, World Weather Attribution (July 7, 2021);26 see also Januta, Pacific Northwest heat wave ‘virtually impossible’ without climate change-research, Reuters (July 8, 2021);27 see also Fischels, PHOTOS: The Record- Breaking Heat Wave That’s Scorching The Pacific Northwest, NPR (June 29, 2021).28

The increasing temperature is especially troubling because “[e]xtreme heat is the leading cause of climaterelated death in the” United States. See Climate Change Science: Hearing Before the H. Comm. on Science, Space, and Technology at 14 (Mar. 12, 2021) (Testimony of Dr. Michael Oppenheimer) (“Oppenheimer 2021 Testimony”).29 In particular, “[h]igh temperatures in the summer are linked directly to an increased risk of illness and death, particularly among older adults, pregnant women, and children.” Fourth National Climate Assessment, Vol. II at 55. From 1991 to 2018, 37% of heat-related summer deaths worldwide were attributable to human-caused climate change. Vicedo- Cabrera et al., The burden of heat-related mortality attributable to recent human-induced climate change, 11 Nature Climate Change 492, 492 (2021); see also Schwartz, More Than a Third of Heat Deaths Are Tied to Climate Change, Study Says, N.Y. Times (May 31, 2021).30

b. Sea Levels And Flooding: It can be stated with high confidence that global sea levels have risen faster since 1900 than over any prior century in 3000 years. See IPCC Sixth Assessment, Summary for Policymakers at 8. Rising sea levels are directly linked to climate change. Most of the heat trapped by greenhouse gases has been absorbed by the oceans, which have reacted to this heat as most liquids do—by expanding and taking up greater volume. Id. at 11; Oppenheimer 2021 Testimony at 5-6. At the same time, the ice sheets located around the Earth’s poles and mountain glaciers alike have begun to melt at an increasing rate—that meltwater eventually ends up in the ocean. See IPCC Sixth Assessment, Summary for Policymakers at 11; Oppenheimer 2021 Testimony at 5-6.

Ocean levels rose 2.5 times faster between 2006- 2015 (about 14 inches per century) than they did between 1901 and 1990 (about 6 inches per century). IPCC Ocean and Cryosphere, Summary for Policymakers at 10; Oppenheimer 2021 Testimony at 6. Rising sea levels have increased coastal flooding at high tide as much as “5- to 10-fold” over the norm in the 1960s in cities like Miami, Wilmington, North Carolina, and Charleston, South Carolina. Fourth National Climate Assessment, Vol. II at 99, 757. Similarly, areas of Norfolk, Virginia are now 4 times more likely to flood than they were in the 1960s. Id. at 758. And between 1932 and 2016, Louisiana lost 2006 square miles of land due in part to high rates of sea level rise. Id. at 775. That is the equivalent of one football field-sized piece of land disappearing every 34 to 100 minutes. Id.

c. Storms and Hurricanes: Heavy rain and snow storms across most of the United States “have increased in both intensity and frequency since 1901.” Fourth National Climate Assessment, Vol. II at 152. This result is consistent with higher temperatures leading to “higher levels of water vapor in the atmosphere, which in turn lead to more frequent and intense precipitation extremes.” Id. at 88. Storm-caused flooding inflicts billions of dollars in damage annually in the United States, and research suggests that intensifying storms have been responsible for about a third of those costs in recent years. Davenport & Diffenbaugh et al., Contribution of historical precipitation change to US flood damages, 118 PNAS 1, 3 (2021).31 For example, the exceptionally heavy precipitation and flooding events that occurred in the mid-Atlantic states including Pennsylvania, New Jersey, Maryland, and Washington, D.C. in 2018 were made 1.1 to 2.3 times more likely by human-caused climate change. Winter et al., Anthropogenic Impacts on the Exceptional Precipitation of 2018 in the Mid-Atlantic United States, 101 Bull. Am. Meteorological Soc’y 5, 5 (2020).32

Notably, the increase in intense rainstorms has combined with sea level rise to make hurricane season in the Atlantic Ocean more dangerous. Fourth National Climate Assessment, Vol. I at 27. While climate change may not necessarily increase the total number of hurricanes, hurricanes’ precipitation totals are expected to rise. Unusually high precipitation totals have been observed and directly linked to climate change in some recent hurricanes. For example, one study estimated that as much as 38% of the total rainfall from Hurricane Harvey—a storm that made landfall in Texas and Louisiana in 2017—was caused by “humaninduced climate change”; another study estimated that human activity made “the event itself three times more likely.” Fourth National Climate Assessment, Vol. II at 95. And higher sea levels in combination with storm surge have further increased the risk of coastal flooding. Trenberth et al., Hurricane Harvey Links to Ocean Heat Content and Climate Change Adaption, 6 Earth’s Future 730, 741-742 (2018) (using Hurricane Harvey to demonstrate how human-induced climate change causes higher sea temperature, intensifies storms, and increases flooding rains);33 Lin et al., Hurricane Sandy’s flood frequency increasing from year 1800 to 2100, 113 PNAS 12071, 12071-12073 (2016) (the frequency of Hurricane Sandy-like extreme flood events has increased significantly over the past two centuries due to the compound effects of sea level rise and storm surge).34

The results were catastrophic. The 2017 Atlantic hurricane season, for example, caused more than 250 deaths and $250 billion in damage. Fourth National Climate Assessment, Vol. II at 66. Hurricane Harvey’s rainfall in Houston was about 30 inches and higher amounts fell at some locations nearby, with its total rainfall “likely exceed[ing] that of any known historical storm in the continental United States.” Id. at 66, 95- 96. It killed 68 people and inflicted $125 billion in damage, National Oceanic & Atmospheric Admin., Service Assessment: August-September 2017 Hurricane Harvey iv (June 2018);35 it also “knocked out power to 300,000 customers in Texas,” including hospitals and water treatment facilities, Fourth National Climate Assessment, Vol. II at 643.

d. Droughts: Rising global temperatures can “play a critical role in increasing the rate of drought onset, overall drought intensity, and drought impact through altered water availability and demand,” Fourth National Climate Assessment, Vol. II at 399; and it can be said with medium confidence that “human-induced climate change” has made droughts worse by increasing the rate at which water evaporates into the atmosphere, IPCC Sixth Assessment, Summary for Policymakers at 8; see also id. at 24 (as temperatures increase in the future, “the level of confidence in and the magnitude of the change in droughts … increase”).

Drought conditions in recent years have caused billions of dollars in damage in the western half of the United States. Fourth National Climate Assessment, Vol. II at 67. For example, the Northern Great Plains region—which encompasses states like Idaho and North Dakota—endured a severe drought in 2017 that damaged wheat crops and forced ranchers to sell off their cattle because they were unable to feed them. Id. Even today, Lake Powell—the nation’s second-largest reservoir, which supplies drinking water to 40 million people in states like Utah and Arizona—is at just 27% of capacity. See Maffly, Feds tighten Colorado River flow at Glen Canyon Dam as ever-shrinking Lake Powell nears critical level, Salt Lake Tribune (Jan. 7, 2022);36 Meiners, Scientists see silver lining in fed’s latest efforts to avoid ‘dead pool’ at Lake Powell, St. George Spectrum & Daily News (updated Jan. 12, 2022).37

e. Wildfires: Climate change can also play a role in wildfires, as higher temperatures dry out vegetation and make forests more likely to burn. Fourth National Climate Assessment, Vol. I at 243. Extreme wildfires are increasing in the western United States and human-caused warming has contributed to at least two-thirds of that increase. Zhuang et al., Quantifying contributions of natural variability and anthropogenic forcings on increased fire weather risk over the western United States, 118 PNAS 1, 7 (2021);38 see also Diffenbaugh & Field, et al., Atmospheric variability contributes to increasing wildfire weather but not as much as global warming, 118 PNAS 1, 1 (2021) (Commentary).39 Specifically, “[h]uman-caused climate change is estimated to have doubled the area of forest burned in the western United States from 1984 to 2015.” Fourth National Climate Assessment, Vol. II at 521. During the summer of 2015 alone, “over 10.1 million acres—an area larger than the entire state of Maryland—burned across the United States.” Id. at 67-68. The scope of the wildfires in that year was unprecedented since recordkeeping began in 1960, burning over 5 million acres in Alaska and 1 million in Montana. Id. In both 2017 and 2020, more than 10 million acres across the United States were burned each year. Congressional Res. Serv., Wildfire Statistics (updated Oct. 4, 2021).40

As a more recent example, just last month, the suburbs of Boulder County, Colorado were hit by the most destructive wildfire in state history—one that damaged or destroyed roughly 1,000 homes, see NASA Earth Observatory, Colorado Faces Winter Urban Firestorm (Dec. 30, 2021).41 The six months prior to the fire were the warmest on record in the region, which was experiencing extremely dry conditions. Swain, The Deadly Dynamics of Colorado’s Marshall Fire, Outside (Jan. 11, 2022).42 Although climate change did not start the fire, in the words of one local researcher, it “led to a perfectly built stack of fuels in the fireplace, ready and waiting to be burned.” Freedman, Climate scientists grapple with wildfire disaster in their backyard, Axios (Jan. 3, 2022);43 see also Chuck, How climate change primed Colorado for a rare December wildfire, NBC News (updated Jan. 2, 2022).44

f. Loss of Biodiversity: Increases in temperature affect not just the land and seas, but the creatures that inhabit them. A hotter world “aid[s] the spread of invasive species” to new locations, while forcing other species to “shift[] their ranges … and [make] changes in the timing of important biological events.” Fourth National Climate Assessment, Vol. II at 53. For example, tree-killing bark beetles have been able to dramatically expand their ranges in both the eastern and western United States. Id. at 250, 649, 1115. And in the Mississippi River Basin—the home of over 300 fish species, as well as waterfowl, turkey, moose, and alligator—more frequent hot days and milder winters have begun to disrupt the wildlife’s mating and migration patterns. See National Wildlife Federation, A Hunter’s & Angler’s Guide to Climate Change: Challenges, Opportunities & Solutions 8-9 (Oct. 2021).45

In some cases, climate change has thinned species’ populations and contributed to local extinction. See Wiens, Climate-Related Local Extinctions are Already Widespread Among Plant and Animal Species, 14 PLOS Biology 1, 1 (2016) (“[C]limate-related local extinctions have already occurred in … 47% of the 976 species surveyed” and “will presumably become much more prevalent as global warming increases”);46 Panetta et al., Climate Warming Drives Local Extinction: Evidence from Observation and Experimentation, 4 Sci. Adv. 1, 1 (2018) (finding that “local warming is driving local extinction”).47 The Midwest, for instance, may soon lose iconic trees like the paper birch and the black ash. Fourth National Climate Assessment, Vol. II at 873, 886.

The loss of biodiversity is not limited to the land. Oceans are getting warmer, see supra pp. 11-12, 18, and “[i]t is virtually certain that human-caused [carbondioxide] emissions are the main driver” of ocean acidification, IPCC Sixth Assessment, Summary for Policymakers at 5. Acidification has caused a marked decrease in carbonate ions—the building blocks of coral and sea shells, Fourth National Climate Assessment, Vol. II at 357. The United States’ major coral reefs are thus both dying (from the increased water temperatures, among other contributors to decline) and unable to rebuild (due to acidification). Id. at 359, 368. If no action is taken to reduce greenhouse gas emissions, the percentage of live coral in Hawaii will decline from 38% in 2010 to 11% in 2050; in southern Florida, live coral will vanish almost entirely. See EPA, Multi-Modal Framework for Quantitative Sectoral Impacts Analysis: A Technical Report for the Fourth National Climate Assessment 171-172 (May 2017).48 Further north, the shellfish that live in the Gulf of Maine are also vulnerable to warming and ocean acidification, reducing the ability of Mainers to catch or raise shellfish like lobsters, scallops, blue crabs, and oysters. Fourth National Climate Assessment, Vol. II at 687. And on the other side of the country, salmon populations have been declining for decades and even facing extinction as a result of a warming climate. Crozier et al., Climate change threatens Chinook salmon throughout their life cycle, 4 Comms. Biology 1, 3, 5 (2021).49

2. Absent Action, More Severe Consequences Are Expected

Under any realistic emissions scenario, global surface temperature will continue to increase until at least 2050. IPCC Sixth Assessment, Summary for Policymakers at 14. If greenhouse gas emissions can be significantly reduced, additional warming may be limited to less than 2 degrees, or a total warming of less than 4 degrees since the late 19 century. Id. In the absence of sustained efforts to reduce greenhouse-gas emissions, the total increase in temperature could surpass 10 degrees. Id.

With “every additional increment[al]” change in temperature, “changes in extremes continue to become larger,” meaning “increases in the frequency and intensity of hot extremes, … heavy precipitation, … agricultural and ecological droughts; an increase in the proportion of intense tropical cyclones; and reductions in Arctic sea ice, snow cover and permafrost.” IPCC Sixth Assessment, Summary for Policymakers at 15. Failing to reduce greenhouse gas emissions will “impose substantial damages on the U.S. economy, human health, and the environment.” Fourth National Climate Assessment, Vol. II at 1347. It will also lead to physical and ecological impacts that would be irreversible for thousands of years—if ever. IPCC Sixth Assessment, Summary for Policymakers at 21 (noting that changes to ocean temperature and acidification—as well as to permafrost at the Earth’s poles—“are irreversible for centuries to millennia”).

Because listing all potential harms that could occur in the next thirty to eighty years as a result of climate change would require hundreds of pages, see, e.g.,Fourth National Climate Assessment, Vol. II at 72- 1308, we have included representative examples below.

a. Coastal Cities And Landmarks Flooded: Under even a low emissions scenario, oceans will rise approximately 7-13 inches by midcentury and approximately 11-23 inches in eighty years. Oppenheimer 2021 Testimony at 7; Oppenheimer, et al., Sea Level Rise and Implications for Low-Lying Islands, Coasts, and Communities 321, 327, in IPCC Special Report on the Ocean and Cryosphere in a Changing Climate.50 To put that amount of sea level rise in practical terms, by 2050, water levels during storms and very high tides that were only seen once a century are expected every year in places like Savannah, Jacksonville, Miami, and San Diego. Oppenheimer 2021 Testimony at 9. The Northeast also faces flooding, particularly in the historic districts of cities like Annapolis, Maryland and Newport, Rhode Island, as well as portions of Washington D.C. near the tidal basin. See Fourth National Climate Assessment, Vol. II at 695-696 (noting that the “historic districts” in coastal cities and towns—like Annapolis and Newport, Rhode Island—already “face the threat of rising sea levels”). Without reductions in greenhouse gas emissions, ocean levels would go even higher, as much as approximately 9-16 inches by midcentury and approximately 24-43 inches by 2100. Oppenheimer 2021 Testimony at 7; Oppenheimer, Sea Level Rise and Implications for Low-Lying Islands, Coasts, and Communities 327.

b. Food Security At Risk: In numerous parts of the world, “[c]limate change has already affected food security due to warming, changing precipitation patterns, and greater frequency of some extreme events.” IPCC, Climate Change and Land, Summary for Policymakers at 10 (2020).51 In the United States, “increases are expected in the incidence of drought and elevated growing- season temperatures,” which will decrease the “[a]verage yields of many commodity crops (for example, corn, soybean, [and] rice”) and “specialty crops” like fruits and vegetables. Fourth National Climate Assessment, Vol. II at 399-400; see also Gray, Global Climate Change Impact on Crops Expected Within 10 Years, NASA Study Finds, NASA (Nov. 2, 2021) (under a high emissions scenario, corn yields are projected to decline 24% by 2030).52

The Midwest’s agricultural sector will be hit particularly hard and is “projected to be the largest contributing factor to declines in the productivity of U.S. agriculture.” Fourth National Climate Assessment, Vol. II at 875. Indeed, “[p]rojected changes in precipitation, coupled with rising extreme temperatures before mid-century, will reduce Midwest agricultural productivity to levels of the 1980s” (assuming no major technological advances). Id. at 873.

c. Heat-Related Health Issues Spread: Rising heat will pose an increasing threat to human health. For example, if no action is taken to reduce greenhouse gas emissions, “almost three-quarters of the world’s population” will be exposed to deadly levels of heat and humidity for at least 20 days a year by 2100. Mora et al., Global risk of deadly heat, 7 Nature Climate Change 501, 505 (2017).

In North America, climate change is projected to shift the “geographic range and distribution of diseasecarrying insects and pests,” meaning that “more people” “could [be] expos[ed] … to ticks that carry Lyme disease and mosquitos that transmit viruses such as West Nile, … dengue, and Zika.” Fourth National Climate Assessment, Vol. II at 57, 545. Incidences of West Nile in particular “are projected to more than double by 2050[,]” “resulting in $1 billion per year in hospitalization costs and premature deaths under a higher [emissions] scenario.” Id. at 552. Moreover, “[i]ncreasing water temperatures associated with climate change are projected” to increase the number of “harmful algae and coastal pathogens” in fresh water. Id. at 545. In the Great Lakes, for example, “[i]ncreased water temperatures and nutrient inputs contribute to algal blooms, including harmful cyanobacterial algae that are toxic to people, pets and many native species.” Id. at 895.

d. Damage to National Economy: If greenhouse gas emissions are not reduced, the United States is projected to lose more than two billion labor hours a year by 2090 due to increasing temperatures, “costing an estimated $160 billion in lost wages.” Fourth Climate Assessment, Vol. II at 50. Other harms wrought by climate change, including to coastal property, air quality, roads, and inland flooding, are expected to lead to over $200 billion in additional damage on an annual basis. Id. at 1358. For consumers, energy and water costs may skyrocket—particularly in the southern United States—as the demand for air conditioning increases and the competition for water between individuals, farmers, and power plants continues to grow. See, e.g., id. at 777-778.

e. National Security At Risk: Rising temperatures and intensifying storms due to climate change also implicate the United States’ national security. The Department of Defense has recognized for well over a decade that “[g]lobal climate change will have wide ranging implications for U.S. national security interests.” See U.S. Department of Defense, The National Security Implications of Climate-Related Risks and a Changing Climate 2-3 (May 2015);53 see also U.S. Department of Defense, Climate Risk Analysis 4 (Oct. 2021) (“Climate change touches most of what th[e] Department does, and this threat will continue to have worsening implications for U.S. national security.”).54 For example, national security is directly “impacted by damage to U.S. military assets such as roads, runways, and waterfront infrastructure from extreme weather and climate-related events.” Fourth National Climate Assessment, Vol. II at 59. More broadly, “changes in climate increase risks … by affecting factors that can exacerbate conflict and displacement outside of U.S. borders, such as food and water insecurity and commodity price shocks.” Id. Indeed, “in worst-case scenarios[,] climate-change related impacts could … contribute to mass migration events or political crises, civil unrest, shifts in the regional balance of power, or even state failure.” U.S. Department of Defense, Climate Risk Analysis at 8.

f. Some of the Most Extreme Outcomes Are Unpredictable: It can be stated with high confidence that the probability of (currently) “low-likelihood, highimpact outcomes increases with higher global warming levels.” IPCC Sixth Assessment, Summary for Policy-makers at 27; accord Fourth National Climate Assessment, Vol. II at 66 (similar). For instance, “[h]uman influence has likely increased the chance of” multiple climate-change-related impacts occurring at the same time, like “concurrent heatwaves and droughts,” IPCC Sixth Assessment, Summary for Policymakers at 9 (emphasis omitted), or “extreme rainfall combined with coastal flooding,” Fourth National Climate Assessment, Vol. II at 44-45. The “physical and socioeconomic impacts” of such “compound extreme events can be greater than the sum of the parts.” Id. at 91. In the heatwave/drought example, demand for water would go up as supply goes down; in the extreme rainfall/coastal flooding example, ground that is already water-logged from the rain might absorb far less flood waters than normal.

Higher temperatures—and their accompanying effects— also increase the likelihood of “large-scale shifts in the climate system” (i.e., “tipping points”). Fourth National Climate Assessment, Vol. II at 66; see also IPCC Sixth Assessment, Summary for Policymakers at 27 (“with higher global warming levels,” “[a]brupt responses and tipping points of the climate system … cannot be ruled out”). For example, it can be projected with high confidence that—over the next eighty years—water from increased rainfall and melting ice will weaken the Atlantic ocean currents that move warm water north and cold water south. IPCC Sixth Assessment, Summary for Policymakers at 27; see also Fourth National Climate Assessment, Vol. I at 418. While it can be said with medium confidence that the currents will not collapse during this century, “[i]f such a collapse were to occur, it would very likely cause abrupt shifts in regional weather patterns and water cycles”—e.g., shifting rain events further south andaway from Europe, IPCC Sixth Assessment, Summary for Policymakers at 27 (emphasis omitted)—and could cause sea levels in the northeastern United States to rise as much as 1.6 feet, Fourth National Climate Assessment, Vol. I at 418. As another example, warming temperatures in the Arctic could release substantial amounts of carbon dioxide and methane trapped in the permafrost and the ocean floor, “driv[ing] continued warming even if human-caused emissions stopped altogether.” Id. at 418-419.

III. The United States Still Has the Opportunity to Help Mitigate the Effects of Climate Change

While we cannot avoid all negative effects from climate change, it is not too late to limit the harm. Indeed, “[m]any climate change impacts and associated economic damages in the United States can be substantially reduced over the course of the 21st century” through reducing greenhouse gas emissions. U.S. Fourth National Assessment, Vol. II at 1347. Practically speaking, this means that “[d]ecisions made today determine risk exposure for current and future generations” and “the severity of future impacts will depend largely on actions taken to reduce greenhouse gas emissions and to adapt to the changes that will occur.” Id. at 34.

As the nation with the second-highest emissions of carbon dioxide from fossil fuel combustion in the world (and higher than the largest emitter, China, on a per capita basis), Global Carbon Project, Global Carbon Budget at 19-20 (Nov. 4, 2021),55 the policies that the United States sets into place can make a substantial difference in the conditions that future generations will face. See IPCC Sixth Assessment, Summary for Policymakers at 27-29 (noting “with high confidence … that there is a near-linear relationship” between carbon dioxide emissions and global warming). Substantially reducing emissions could “avoid[] thousands to tens of thousands of deaths per year from extreme temperatures,” and “hundreds to thousands of deaths per year from poor air quality.” Fourth National Assessment, Vol. II at 1359. And if global warming can be limited to less than a total of 4 degrees, the ultimate economic costs of climate change this century could be less than 1/4 of what they would be under a high emissions scenario. Fourth National Assessment, Vol. II at 1360. This Court should exercise caution before unduly limiting EPA’s ability to enact rules that help protect the future for today’s and tomorrow’s children.

### Case

**We must theorize slavery as maximum captivity in order to produce a structural analysis capable to think of the resistance necessary to disrupt that system. Only working within pathology can produce the end of the world.**

Sexton (Jared, Professor of African-American Studies) 2016 (Afro-Pessimism: The Unclear Word, Rhizomes Journal, C.A.)

[4] The reticence expressed about the force and signification of Afro-Pessimism, which in some quarters has bloomed into open if largely uninformed resistance, has taken on the logic of preemptive strike. Though we have little engagement in print thus far, due in part to the recentness of the published literature, certain discussions are nonetheless afoot on the left "devoted to blaming pessimism for whatever crisis is thought to occupy us at the moment." Afro-Pessimism, in this case and on this count, is thought to be, in no particular order: a negative appraisal of the capabilities of black peoples, associating blackness with lack rather than tracing the machinations through which the association is drawn and enforced, even in the black psyche, across the **longue durée**; a myopic denial of overlapping and ongoing histories of struggle and a fatal misunderstanding of the operational dynamics of power, its general economy or micro-physics, reifying what should be historicized en route to analysis; a retrograde and isolationist nationalism, a masculinist and heteronormative enterprise, a destructive and sectarian ultra-leftism, and a chauvinist American exceptionalism; a reductive and morbid fixation on the depredations of slavery that superimposes the figure of the slave as an anachronism onto ostensibly post-slavery societies, and so on. [5] The last assertion, which actually links together all of the others, evades the nagging burden of proof of abolition and, moreover, fails to acknowledge that one can account for historically varying instances of anti-blackness while maintaining the claim that slavery is here and now. Most telling though is the leitmotif of offense**,** and the felt need among critics to defend themselves, their work, their principles and their politics against the perceived threat. In place of thoughtful commentary, we have distancing and disavowal. The grand pronouncement is offered, generally, without the impediment of sustained reading or attempted dialogue, let alone careful study of the relevant literature. The entire undertaking, the movement of thought it pursues, is apprehended instead as its lowest common denominator, indicted by proxy, and tried in absentia as caricature.[[1]](http://www.rhizomes.net/issue29/sexton.html#footnote-1) [6] Astonishingly, all of this refuses to countenance the rhetorical dimensions of the discourse of Afro-Pessimism (despite the minor detail that its principal author is a noted creative writer and its first major statement is found in an award-winning literary work of memoir) and the productive theoretical effects of the fiction it creates, namely, a meditation on a poetics and politics of abjection wherein racial blackness operates as an asymptotic approximation of that which disturbs every claim or formation of identity and difference as such.[[2]](http://www.rhizomes.net/issue29/sexton.html#footnote-2) Afro-Pessimism is thus not against the politics of coalition simply because coalitions tend systematically to render supposed common interests as the concealed particular interests of the most powerful and privileged elements of the alliance. Foremost, Afro-Pessimism it seeks, in Wilderson's parlance, "to shit on the inspiration of the personal pronoun we" (143) because coalitions require a logic of identity and difference, of collective selves modeled on the construct of the modern individual, an entity whose coherence is purchased at the expense of whatever is cast off by definition. The subject of politics is essentially individual and there is in effect always another intervention to be made on behalf of some aspect of the group excluded in the name of the proper.[[3]](http://www.rhizomes.net/issue29/sexton.html#footnote-3) The ever-expansive inclusionary gesture must thus be displaced by another more radical approach: an ethics of the real, a politics of the imperative, engaged in its interminably downward movement. This daunting task entails making necessity out of virtue, as it were, willing the **need** for the black radical imagination and not just its revisable demand. If certain scholars whose work has been instructive or inspirational for Afro-Pessimism miss this point too, it may have something to do with the search for a method of gaining agency that, while rightly suspending the assumption of an a priori agent, nonetheless rushes past the hidden structure of violence that underwrites so many violent acts, whether spectacular or mundane**.** [7] Such may provide reassurance for those informed by the basic assumptions and animated by the **esprit de corps** of the theoretical orientations and conceptual frames in question, but it cannot be mistaken for an adequate defense of a disposition. We would do well, on this score, to heed Joshua Dienstag's rather germane suggestion in Pessimism: Philosophy, Ethic, Spiri**t** that "some thought should be given to why this word functions so well as a gesture of dismissal" and, likewise, to "the routine use of 'pessimist' and its cognates as a casual intellectual put-down" (Dienstag 2006: x). For present purposes, Afro-Pessimism as epithet would be the obverse of the unasked question: Why has this discourse found its articulation now? Rather than simply motivating speculation about the psychological states and political commitments of theorists, commentators, students, advocates or adherents; the intervention and implications of Afro-Pessimism, however they are adjudged, "need to be addressed at the theoretical level at which they arose" (Dienstag 2001: 924). Dienstag writes further: Critics have often mistaken a depiction of the world for a **choice** about our future, as if [scholars] had rejoiced at the decline or decay they described. [...] Yet, despite the abuse they attract pessimists keep appearing—and this should not be surprising since the world keeps delivering bad news. Instead of blaming pessimism, perhaps, we can learn from it. Rather than hiding from the ugliness of the world, perhaps we can discover how best to withstand it (Dienstag 2006: x).[[4]](http://www.rhizomes.net/issue29/sexton.html#footnote-4) [8] As if they rejoiced about the wrong things and, by contrast, failed to rejoice about the right ones. Why not turn this (moralistic) accusation into (political-intellectual) opportunity? Indeed, the moniker "Afro-Pessimism" emerges at a certain inaugural moment as the embrace of a critical outlook deemed, upon review, to be disappointing or discouraging to an ostensibly progressive, even modernist anti-racism (Hartman 2003). Détournement. Resignification. A simple enough term for withstanding the ugliness of the world—and learning from it—might be suffering and Afro-Pessimism is, among other things, an attempt to formulate an account of such suffering, to establish the rules of its grammar, "to think again about the position of the ex-slave," as Bryan Wagner puts it in his Disturbing the Peace**,** "without recourse to the consolation of transcendence" (Wagner 2009: 2). The difficulty has to do with the special force that the consolation of transcendence—be it cultural, economic, geographical, historical, political, psychological, sexual, social or symbolic—brings to bear on the activity of thinking, no less of speaking and writing, about those whose transcendence is foreclosed in and for the modern world.

#### No empirical evidence that patent thickets persist.

Barnett ’17 [Jonathan; Winter 2016-2017; Law Professor at the University of Southern California; Regulation, “Are There Really Patent Thickets?” https://gould.usc.edu/assets/docs/directory/1000201.pdf]

In the ongoing debate over patent reform, it is common to assert that there are "too many" patents, or that patents are "too strong," or both. The result, so the argument goes, is that the patent system is being turned on its head. Rather than promoting innovation, the patent system slows innovation by entangling companies in a "thicket" of licensing negotiations and infringement litigation. But a minority school of thought has always expressed skepticism that thickets would ever persist. The reason is simple: markets don't like to leave money on the table. When a patent thicket persists and the commercialization pathway is blocked, then money is being left on the table because a deal that could be made is not being made. That missed opportunity would seem to provide a powerful incentive to think constructively about how to unravel the thicket. If so, then markets would be expected to arrive at a solution, unlock the suppressed value, and divide it accordingly.

This debate reduces to a factual question: do markets really tolerate thickets for any significant period of time so that innovation is actually delayed or hindered to a significant extent? In recent published research, I have tackled this question. The results are remarkably consistent across more than a century of experience in a variety of U.S. markets and survive close scrutiny of contemporary information and communications technology (ICT) markets characterized by intensive levels of patent acquisition and litigation. Contrary to the thicket argument, markets are adept at identifying, preempting, and unraveling intellectual property (IP) webs that could have slowed down innovation and commercialization. Whether it's radio, aircraft, and automobiles in the 1900s and 1910s, petroleum refining in the 1920s and 1930s, or ICT from the 1990s through the present, patent-intensive markets do not appear to suffer from the increased prices, reduced output, and delayed innovation that should appear if the thicket thesis were correct. This is true if the number of IP holders is small, which might be expected since the costs of reaching agreement are relatively low; but it is also often true when the number of IP holders is large, which is not expected.

#### Applying antitrust to product hopping would annihilate pharma, raising prices.

Miller ’16 [Benjamin M. Miller; 2016; J.D. at George Washington University; Boston University Journal of Science and Technology Law, “Product Hopping: Monopolization or Innovation,” vol. 22, no. 1]

3. Procompetitive Justifications

"When a legitimate business justification supports a monopolist's exclusionary conduct, that conduct does not violate § 2 . . . ," In the third step of the Microsoft framework, the defendant assumes the burden of proving procompetitive justifications for its conduct. There are multiple justifications for product hopping. The most substantial justification is the role of antitrust law to promote innovation. Product hopping also incentivizes consumer education programs and decreases costs faced by manufacturers that are passed on to consumers.

a. Antitrust Law Should Promote Product Innovation

Product innovation is one of the cornerstones of competition in the current economy. Because innovation "stimulates long-term economic growth," it is inimical to the purpose of antitrust law to condemn a brand-name manufacturer's innovation efforts as anticompetitive. Given the substantial costs and high level of uncertainty involved, the promotion of innovation in the pharmaceutical industry is paramount. "[O]nly 30% of marketed drugs ever earn enough profit to cover their average developmental costs" of roughly $1 billion. That figure does not even take into account pharmaceuticals that do not make it past the development phase and into the marketing phase. Additionally, drug development is becoming increasingly complex, lengthy, and more expensive. As a result, this already low success rate may become even lower.

A decreased success rate creates a need to increase the reward for successful innovations in order to continue promoting innovation. However, the amount of patent-granted market exclusivity that innovator firms currently receive in the pharmaceutical industry is insufficient to allow recoupment and to encourage investments in innovation. While the typical patent receives 20 years of marketing exclusivity, the Hatch-Waxman Act limits the amount of marketing protection that an innovator pharmaceutical company can receive to 14 years at most, This is far too little time to allow recoupment, especially considering the high costs and low success rates of pharmaceutical innovation. Moreover, this 14-year period is the maximum attainable. Given the extensive and complex NDA process that new drugs face, it is common for a newly approved drug to receive marketing exclusivity for a much shorter period of time. As the FDA increases the length and complexity of its approval process, the amount of patent protection that pharmaceutical drugs receive will only decrease further.

It is in light of these market and regulatory realities that antitrust law must be applied. One of the key goals of antitrust law is "to bring new and better technologies, products, and services to consumers." Because "the social losses caused by innovation restraints are large," courts should be especially mindful of the costs when applying antitrust law. Further, the "treble damage provision of the antitrust laws tends to occasion overdeterrence in the Section 2 context" and results in even greater impairment to beneficial innovation.

#### Product hopping doesn’t occur.

Miller ’16 [Benjamin M. Miller; 2016; J.D. at George Washington University; Boston University Journal of Science and Technology Law, “Product Hopping: Monopolization or Innovation,” vol. 22, no. 1]

Some critics argue that promoting innovation has its limits, and that a product hop should be considered anticompetitive when a new drug does not contain substantial changes or provide substantial added benefits to consumers. These critics fail to appreciate both the realities of innovation previously discussed and the safeguards against abuse provided by the patent and pharmaceutical regulatory systems. The patent system's obviousness requirement, discussed in Part II.B.l, supra, requires that a new product embody a technical or scientific advancement of the relevant art before conferring the benefits of patent protection. Notably, the Supreme Court has recently made it more difficult to satisfy the obviousness requirement and receive a patent. Any pharmaceutical drug that has received patent protection has therefore satisfied this standard. The relevance of obviousness to product hopping is due to the essential function that patents play in allowing an innovator pharmaceutical company to recoup its investment, thus incentivizing its innovative efforts. A pharmaceutical drug that does not receive patent protection will not be further developed or marketed, and therefore the abuse identified by product hopping critics is unlikely to occur. The fact that patents are never considered definitively valid and are constantly vulnerable to validity challenges serves as an additional barrier against anticompetitive abuses.

## Block

### Kritik

#### Social death is phenomenologically, psychoanalytically, and structurally crystallized as the paradigmatic positionality of black existence—their statistics are a unique link.

Mubimurusoke, 22—Intercollegiate Department of Africana Studies, Claremont McKenna College (Mukasa, “Extra-ordinary Black Vulnerability,” *Black Hospitality*, 33-73, SpringerLink, dml)

To say the intervention of afropessimism has been contentious, for both black studies and the general public, would be an understatement. The reviews of Frank Wilderson’s latest work alone express a kind of resentment that is so sharp it’s hard not to believe that these writers did not interpret Wilderson’s work as a hand sealed personal condemnation of their livelihood (McCarthy 2020) (Cunningham 2020). These reviews are often written with a semi-performative defiance of Wilderson’s contention about their ‘social death’, but what cannot go overlooked in these types of responses is that even in their avowed defiance these reviewers cannot escape the political ontology that locates them on the other side, as opposed to the other end, of humanity. These reviews are written from an experience the reviewers often feel can approximate the experience of their apparent fellows, but Wilderson is concerned with the metanarrative of structural positionalities and not the performative capacities perceived in everyday existential experiences or personal expression. Wilderson is not challenging how they may feel from day to day, but what they are, or are not, in the grand scheme of things that exceeds performative political gestures through an extra-ordinary vulnerability.4

The distinction between the performance of blackness and its ontological status that motivates Wilderson builds primarily from the term social death, originally attributed to Orlando Patterson. The term has been adopted and deployed by many to describe the depraved or degraded status of persons under conditions of oppression. Wilderson adopts the definitional components of naked (gratuitous) violence, natal alienation, and dishonor from Patterson, but interprets them beyond certain ontic conditions—where, for instance, for Patterson anyone may become a slave—to a specifically black ontological paradigm that is crystallized phenomenologically and psychoanalytically in the work of Frantz Fanon and the interpretations of his work by David Marriott. Wilderson also takes up Hortense Spillers psychoanalytic framing and vocabulary of a foundational grammar of suffering that reoccurs indefinitely through a violation of the flesh over against a grammar of freedom of the body. Additionally, he builds off Saidiya Hartman—who also has Spillers, Patterson, and Fanon in mind—by replacing the terms of human degradation with logics of the object of commodification, whereby black social death is better conceived in terms of fungibility and accumulation instead of exploitation and alienation. Wilderson conceives the continuity and coalition of these black theorists—and others—to paint the picture of a black existence that demands an entire reimagining of the political through the lens of extra-ordinary vulnerability in three registers that will be explicated in the rest of this chapter: discursively, materially, and psychically.

Beginning at the discursive level, Wilderson’s discussions of black social death offers his readers a number of different perspectives and occasions to recognize the fundamental nature of this paradigmatic condition: from movies and theater, from political to social movements, from domestic to international understandings of blackness. In all these arenas, he remains steadfast in his analysis of the terms of social death as excessive to the limits of their restrictive economies. To reach the level of paradigmatic political positionality, he stresses the separation of the identity formations and performative gestures we may attribute to black people uniquely, or that they may even share with other groups, from the ontological or paradigmatic that overdetermines their stature as fungible, accumulative, and abject. In the essay “End of Redemption,” he states it bluntly:

Blackness is social death, which is to say that there was never a proper meta-moment of plentitude, never a moment of equilibrium, never a moment of social life. Blackness as a paradigmatic position (rather than as an ensemble of identities, cultural practices, or anthropological accoutrement), cannot be disimbricated from slavery. The narrative arc of the slave who is Black (unlike Orlando Patterson’s generic slave who may be of any race) is not an arc at all, but a flat line, what Hortense Spillers calls ‘historical stillness”: a flat line that ‘moves’ from disequilibrium to a moment in the narrative of faux equilibrium, to disequilibrium restored and/or rearticulated. (Wilderson III, Afro-Pessimism and the End of Redemption 2016)

There are two things to note. First, his contention that blackness is a paradigmatic position often is overlooked or misrepresented. Here he is insisting that the qualities we attribute to the performance of blackness, the unique ‘cultural practices’ or ‘anthropological accoutrement’ that one may recognize as contributing to what it means to be black—for example, black music or other cultural performances—are not definitive of the ontological or paradigmatic position of blackness. This is not to say they are completely distinct, but they are not essential and also cannot be separated, or ‘disimbricated’, from the structural foundation of white civil society as its negation. This is to say blackness cannot be separated from the structural position of ‘the Slave’. Of course, this does not mean blacks in contemporary society are subject to or the object of the same types of violence of chattel slavery, but their metaphysical role in the formation of the political world remains the same. Just as the proletariat who is not forced to work 80 hours or who attains healthcare and vacation days, is still the laborer and not the capitalist, the black sharecropper, prisoner, or CEO (or President!) is still in the metaphysical position of ‘the Slave’ and as such is discursively illegible at the level of political ontology, falling rather into the general economy of white supremacy.

We need only to recall the insistent fashion in which President Obama and his wife Michelle Obama—despite or perhaps in light of his office—had been hailed in terms of abject blackness through images of primates, to realize how their political agency was rendered illegitimate or simply illegible despite his properly America political behavior of, for instance, ordering drone strikes in the Middle East and being scornful of ‘absentee’ black fathers. We can describe this illegibility as extra-ordinary insofar as it exceeds the general level of discourse of an accepted humanism, while at the same time appearing banal, as an everyday regular preoccupation with the affective assertion of white supremacy. In other words, these images and the language of dehumanization supersede the discourse of the human and appeal to the paradigmatic black abjectness as cursed existence, regardless of President Obama’s performance (queue ‘Amazing Grace’) as the highest political agent in the land.

The second thing to note in Wilderson’s passage is that this ‘flat line’ or ‘historical stillness’ in the ‘narrative arc’ of ‘the Slave’ serves as another axis in the description of social death. For some the diachronic narrative arc of black life, particularly in America, projects a trajectory of increasing freedom. This would entail some initial point of coherence or equilibrium that is forgotten through violence and displacement only to be returned to, perhaps in a new light. This may be the narrative of Pan-Africanism, a return to the motherland with a newfound unity, or black liberalism, a return to foundations of American equality and fraternity; that is, ‘the arc of the moral universe is long, but it bends toward justice.’ However, these are false narratives, since with the creation of blackness any original equilibrium was eliminated. ‘Africa’ did not exist prior to European invasion and there is no ‘Africa’ or land of the free (for black people) to return to. With no place to retreat, the contours of a legible vulnerability are imagined with Pan-Africanism, but they are ultimately destroyed, since underneath these restricted conversations, there is no place or time that does not fall victim to the extra-ordinary vulnerability of its destruction by white supremacist disregard and/as destruction.

Instead, what we witness with different black political ‘movements’—the implication of motion can only be metaphorical at the paradigmatic level—is a historical stillness. Imagined equilibrium with moments like emancipation, the civil rights legislation, or decolonization only unveil the persistence of disequilibrium. There is no actual movement, or arc, in this historical narrative; no point of reference to imagine a newness as long as black people remain in the paradigmatic, ontological position of ‘the Slave’. How else does one come to understand the practically rote action and reactions to spectacular violence against black people—death, protests, deceptive or limited legislation,Footnote5 and repeat—if not the historical stillness of the black story; where history instead appears to be an eerily persistent and placid backdrop that exceeds all narrative possibilities? Sexton’s rubric of the general and restricted economies is translated into historiographical terms, whereby non-black political movements participate in restricted economies that contribute and participate in the story of the redemptive human; meanwhile, black narratives have no stable foundation against which to project such a narrative; instead, they are overwhelmed by the excesses of force of the white supremacist general economy that destroys narrative capacities. To further elaborate, the uniqueness of black social death via Orlando Patterson’s concepts, Wilderson explains on the next page:

Patterson’s three constituent elements of slavery—naked (or gratuitous) violence, general dishonor, and natal alienation—make the temporal and spatial logic of the entity and of setting untenable, impossible to conceive (as in birth) and/or conceive of (as in assume any coherence). The violence of slavery is not precipitated as a result of any transgression that can be turned into an event (which is why I have argued that this violence is gratuitous, not contingent); dishonor embodied by the slave is not a function of an event either; his or her dishonor is general, as Patterson writes, or as David Marriott has argued, it is best understood as abjection rather than degradation (the latter implies transition); and since a slave is natally alienated, s/he is never an entity in the meta-narrative genealogy. (Wilderson III 2016)

With Wilderson’s elaborations of Patterson’s elements of slavery in these terms of narrative and event we arrive at a clearer sense of what they entail: these elements are not based on any contingent relationship to the violation of the human story, instead they mark the permanent stature outside of it. In other words, ‘historical stillness’ is maintained because the elements of slavery are not predicated on any form of recognition that justifies their position. There are no events or substantive qualities that circumscribe black identity outside of being black, which must be insistently enforced. Antiblack violence comes from nowhere, everywhere, all the time; their lack of honor not only is an abjection they were born into, but has no origin story, no history—the proverbial Middle Passage and the very real forced miscegenation, territoralization, and one-drop rule obliterated them—and that’s why they cannot be placed in any formal genealogy that can be recognized as such, for Wilderson. Here again we are brought to terms with the extra-ordinary: these three registers of natal alienation, general dishonor, and gratuitous violence explicate the ways in which blackness necessarily exceeds the normal components of forced labor that are horrific but still imply relationality. Blackness emerges from, or recedes into, an ever-present general economy of reproductive material for consumption by white civil society, instead of having the quality of a legible human story with recognizable relations and heritage that confer a sense of origin.

Through these articulations of social death and slavery, we can also see how there is a difference between black social death and the amorphous ‘terrorist’ explored by Butler in Precarious Life. Butler is thorough in her explication of how the designation of people of Middle Eastern descent as ‘dangerous’ (Butler 2004, 76) set them in a precarious position within relation to the law. With the help of classic neo-cons Donald Rumsfeld, Dick Cheney, and John Yoo, this identity was imposed by indefinitely (to this day) suspending standard judicial procedures which entail the horrifying acts of torture and total disregard of civilian life that facilitate the economic control and exploitation of the Middle East. The rendering of Middle Easterners outside of the juridical norms of the United States— that is, as always already criminal and never escaping the status of enemy combatant even after capture and detention—seemingly locates them totally outside of the political and, in a manner, analogous to social death (Butler 2004, 76–79). The tragedy of America and the West’s policy toward the Iraq, Afghanistan, and the Middle Eastern post 9/11 are contemptible; nevertheless, they do not occupy the same condition of black social death.Footnote6 A threat to the American nation is ontologically distinct from a threat to the white political order.

To understand this distinction, we cannot only look at the practices of the state or the devastating reality of the current condition of people terrorized by the state. The question and narrative of national security is set in a different key than “the Negro question” and the security of whiteness. The existence and maintenance of Guantanamo Bay does not address or contest ontological and paradigmatic concerns which Wilderson identifies in the first above quoted passage through the idea of a ‘meta-moment of plentitude’ and in the second one as an ‘event’. The crucial difference is that there is a time and/or place imagined for the ‘terrorist’ in Guantanamo or the immigrant or the European American to return to that indicates a cultural, historical, and positional integrity of humanity, that is, a meta-moment of plenitude, that had been violated in their narrative of subjection as human, an identity that had been upset and that, furthermore, may be returned to and where ‘equilibrium’ can be found again. Such a place or time does not exist for the extra-ordinary condition of black people who exist as “a fatal way of being alive” (Marriott 2000, 15).

The economic exploitation and deathly violence against Middle Easterners belong to a narrative arc where a transgression took place, that is, 9/11 or denial of natural resources and land access, that precipitated their stature as ‘dangerous’. In this narrative arc there is a place that still exists, even if physically under siege now, and time that did and, in the future, may exist from where their heritage may be retrieved and/or flourish. An equilibrium can be returned to after the dehumanizing practices of post- or even pre-9/11 destruction and occupation. Such an equilibrium for the positionality of ‘the Slave’ is not conceivable. In “Gramsci’s Black Marx: Whither the Slave in Civil Society” Wilderson uses the work of J. M. Coetzee to describe an anthropological and historical schema used by Europeans to map the integrity of humanness or proper political subjectivity. In this schema, black data is missing from either the anthropological or the historical axis, which if existent would secure this stature of humanness at the discursive level, but since it is absent, this leads to a crisis or a scandal of being uninterpretable. Other groupings may rely on anthropological categories such as clothing and work or historical categories such as entitlements, sovereignty, or immigration (Wilderson III 2003, 234–237). Black people in America, and across the diaspora, are interpreted as missing signifiers in this discourse and thus are illegible within the human narrative. It is in this sense that black vulnerability is not simply pathogenic by the standards described above and sharable with Middle Easterners, rather their vulnerability is illegible, abject—that is, they have no honor or relationality—and normalizing; thus it is extra-ordinary. The constellations of human agency are not diverted or deferred and there’s not simply a ‘sense of powerlessness’ that may be corrected or reoriented. The Slave does and must occupy a structural position without any imaginable recursion to political agency in order for the human identity to live on in strength or peril. Adjacent to the sun of Bataille’s general economic cosmology, blackness emerges from the black hole of white supremacy, which is imperceptible and ultimately unknowable, but nevertheless fuels the cosmological order of the human universe.Footnote7

Now it may also be prudent to emphasize how Wilderson makes a strategic departure from Patterson to identify a crucial distinction in terms of slavery. While Patterson innovatively recognizes that slavery is not reducible to forced labor—the labor you may find also as an indentured servant or even as a contractor in sports—but is structural, he also understands the position of slavery as social death to be applicable to anyone who may, for instance, become a prisoner of war—for example, the prisoners of Guantanamo Bay—even though the slave as prisoner of war may return physically and/or psychically to a prior plentitude, that is, a legible cultural home. For Wilderson, non-blacks may indeed experience slavery, but it is not a constitutive event for their identity or for their narrative. They have the advantage of the capacity to conjure a reason for the violence perpetrated against them that led to their oppression, servitude, or even slavery as the reaction to a performative transgression of normative expectations, even if this transgression is outside of their own cognitive and practical cultural formation.Footnote8 The conditions of black social death prohibit such a coherent formation in as much as it remains in its structural antagonism with the human or white civil society as incoherent, illegible, abject and thus always under the thumb of white civil society by prohibiting any sort of imaginative coherence or semblance of freedom.Footnote9

These examples illustrate the underlying extra-ordinary affective investment by white civil society in its libidinal economy and they can save one from being led too far astray by relying upon another red herring: the tragically true but ultimately misleading accumulation of facts and stats of black abject life. Inasmuch as the facts and corresponding events of black life are discursively approximated—for example, police violence, prison statistics, homelessness rates, the wage gap, and the performative gestures of blacks in responses, for example, public mourning and protest—they do not necessarily get to the excessive affective economy and, therefore, Wilderson maintains that the problem is beyond the expression of language or as he professes in another essay, and just as poignantly, “taxonomy can itemize atrocities but cannot bear witness to suffering.” The ‘grammar of suffering’ that organizes black social death remains opaque at a discursive level, that is, the semiotics of the human, but it subtends the positionality of the black slave, or the ‘position of the unthought.’ Many people may want to compare the quantitative overlap of black tragic facts with those of the poor, and indeed there is overlap, but the coincidence of these facts and atrocities does not get to the fundamental level of black vulnerability that exceeds restrictive articulations. The lists of atrocities, while undeniable and horrific, rely on numbers and data that confuse this violence for a violation of the human that does not extend to black people and thus they divert attention from the affective comfort and security that antiblackness calls forth in a way that literally vitalizes white civil society even if it cannot be spoken of coherently and exceeds rationality.

The transatlantic slave trade, the Maafa, the Berlin Conference, the State of the Unions, had and continue work in the transformation of ‘Africans into blacks’ over against the human and as such forbid narratives of return to a political ‘home’—even the memory of a home—that has not been transmogrified by the shadow of blackness.Footnote10 Under these conditions, how can black vulnerability be legible in any political terms? With no humanity to return to, black people are extra-ordinarily vulnerable and open to violation from a general economy; they have no sanctuary literal or imagined, just a black hole. Experiencing a ‘sense of powerlessness’ or lack of autonomy makes sense only in terms of degradation, not in terms of complete illegibility and abjection. It is literal open season, and not simply for death, but in as much as blackness plays a constitutive role, black people’s vulnerability also becomes the non-discursive backdrop for which white civil society can write their own story and, therefore, complete annihilation would be undesirable. Whether it be a trip to the Heart of Darkness or the Caribbean and New Orleans, c.f. Faulkner’s Absalom, Absalom!, or to the largest protests in American history, blackness is the framework for white civil society’s coming of age; forever illegible because it comes from the illogical general economy of vulnerability found in the excessive resources of the libidinal economy.11

#### O’Donnell is a white speaking on Black matters—reject them for introducing this scholarship where it wasn’t invited

O’Donnell, 20—Assistant Professor of Philosophy at Oakton Community College (Patrick, “Ontology, Experience, and Social Death: On Frank Wilderson’s Afropessimism,” <https://philpapers.org/archive/ODOOEA.pdf>, DML)

But yet again, perhaps I should be more pessimistic about my own ability to engage these views. As a non-Black reader, I am simply not part of the audience Afropessimism is really meant to address. Wilderson claims that the lifeblood of Afropessimism is “the imaginations of Black people on the ground, and the intellectual labors of Black people in revolt,” and that his own work is merely a theoretical articulation of what “Black people at their best” already know (173). In a cinematic retelling of a poorly received presentation in Berlin, Wilderson tells a room full of non-Black academics: “I’m not talking to anyone in this room. Ever. When I talk, I’m talking to Black people. I’m just a parasite on the resources I need to do work for Black liberation” (187). Toward the end of the book, he listens as a young Black woman tearfully describes how his class has given her a vocabulary to account for the resentment she holds for her white mother and Asian-American boyfriend: “they are all embodiments of capacity, and capacity is an offense” (333). Passages like this effectively establish choir and preacher, and the choir probably didn’t get to where they are because someone gave them a convincing argument.

The rest of us may console ourselves with Wilderson’s often poignant narrative, but otherwise there’s no way in. Perhaps it is for people better placed than I to pick up what Wilderson is putting down. Perhaps many of Wilderson’s readers will already know something I don’t, by virtue of walking a path I could never walk. Perhaps the fact that people like me just don’t get it is one of the highest compliments that can be paid to this book. Yet, if you are one of the many readers who does not already experience the truth of Afropessimism in your bones, Afropessimism simply shouldn’t change your mind.

#### We straight turn Mahoney

Kelley, 15—Gary B. Nash Professor of American History at UCLA (Robin D.G., “Beyond Black Lives Matter,” Kalfou, Vol. 2, Iss. 2, (Fall 2015): 330-337, dml)

This implicit appeal to acknowledge us-to recognize our humanity, our dignity, and our right to live-is understandable in a world where the statesanctioned killing and caging of Black bodies is routine. But as George Lipsitz observed, such appeals are embedded in a humanist logic that emphasizes "interiority" and feeling, thereby elevating "the cultivation of sympathy over the creation of social justice."7 That is to say, our feelings of empathy in any representation of suffering are designed to be understood and individually felt rather than transformed into collective praxis. This is partly why concepts like reparations are so antithetical to modern liberalism. Given the trauma produced by an endless video loop of Black people dying at the hands of police officers who are almost never indicted, let alone prosecuted and convicted, collective healing and the cultivation of sympathy are to be expected. On one hand, this makes the movement's counterslogan, "All Lives Matter," all the more offensive and painful. "All Lives Matter" is heard and felt as a belittling or decentering of anti-Black racism. It trades on postracial myths of equivalency in suffering. On the other hand, sometimes we react to "All Lives Matter" with such hostility that it stands in as an unambiguous expression of anti-Black racism. Can we salvage these words? Don't we want to build a world in which every life is valuable, cherished, and sustained? Are we not seeking a world that recognizes multiple sites of dispossession and recognizes that state violence inside US borders is inseparable from US militarism around the world? The fact that we are compelled to a defensive position is a consequence of focusing on proving our value rather than critiquing the system that devalues all of us and destroys the world in the process.

The veracity of our humanity was never the issue-then or now. The problem lies with Western civilization's very construction of the human. As Sylvia Wynter, Cedric Robinson, Aimé Césaire and others have been saying for decades, the "Negro" was an invention, a fiction-like that of the Indian, the Oriental, the "Mexican," etc. Or in Frantz Fanon's oft-quoted line from The Wretched of the Earth: "It is the colonist who fabricated and continues to fabricate the colonized subject."8 Indeed, the entire structure of global white supremacy depends on such inventions, like the fictions of the Arab as non- or anti-Western and the "Immigrant" as essentially Latino/a, or the notion that indigenous people (in North America at least) are all dead. This is why we have such a hard time acknowledging that most so-called immigrants from Mexico and Central America are, in fact, indigenous.

The very foundations of Western civilization were built on such fabrications and enacted through violence. Once they crumble, so goes Western civilization's conceit as well as the massive philosophical smokescreen that enables (racial) capitalism-the greatest, most destructive, most violent crime wave in history-to masquerade as the engine of progress, a pure expression of freedom and liberty, the only path to human emancipation. The modern world that invented the Negro, the Oriental, the Indian, and the Savage as a means of inventing European Man was built on the theft of humans, theft of land and water, indiscriminate murder, violation of customary rights, moral economy, enclosure of the commons, destruction of the planet-outright lawlessness, justified by supposed rationality or what Weber might call instrumental rationality. To leave it at Black Lives Matter unintentionally conceals the crime. After all, these were the very processes that birthed the liberal humanism to which BLM activists seem to appeal.

In his book Forgeries of Memory and Meaning, Cedric Robinson further elaborates on the systems of racial maintenance and myth making, the "racial regimes" responsible for the inventions of the Negro (the Indian, the Oriental) and their relation to capital. What exactly are racial regimes? In Robinson's words, they "are constructed social systems in which race is proposed as a justification for the relations of power." The power is real and formidable but surprisingly unstable. For Robinson, "the covering conceit of a racial regime is a makeshift patchwork masquerading as memory and the immutable. Nevertheless, racial regimes do possess history, that is, discernible origins and mechanisms of assembly. But racial regimes are unrelentingly hostile to their exhibition."9 In other words, to say that anti-Blackness is foundational to Western civilization is not to say that it is fixed or permanent. On the contrary, it is incredibly fragile and must be constantly remade; it is epiphenomenal to the production of Blackness-which is an essential component of modern racial regimes, but not its totality. In the last century alone, racial regimes have been remade, reconfigured, destabilized, and consolidated many times, employing new technologies to circulate old racial fabulations and new fictions in the process of capitalist expansion.

Proving one's humanity will not uproot racial regimes, for the very evidence of our humanity is their raison d'etre. Our exploitation is evidence of our value, but it requires enormous intellectual, juridical, and psychic resources to conceal our humanity. Slavery was not just social death, but was based on a cost-benefit analysis that assumed the disposability of Black lives. The system of extracting surplus emerged within a logic of racial hierarchy and racial subjugation that dragged Africans, Asians, and Europeans proletarianized by enclosure to the lands of the Americas, Oceania, parts of South Asia and Africa, and the Eastern Mediterranean-where indigenous people were dispossessed, enslaved, or exploited by other means. Enclosure is yet another example of theft and violence masking as "law, order, security": backed by the rule of law, the state employs violence to discipline, to reclassify, to criminalize, and to destroy sovereignty and create disorder. Enclosure is part of this process of war-a war on the commons, which ultimately turns some of the expropriated people into a proletariat (including European industrial, maritime, and landless rural labor, as well as prostitutes and beggars), turns a portion into settlers, and sends a portion to the workhouse. Some are merely casualties whose flesh mingles with the earth and whose bodies-sometimes hanging from a tree or broken on the wheel-serve to terrorize those who resist the new discipline.10

While the value of Black labor may have ebbed and flowed with the changing character of the global economy, there has never been a moment in US history when our humanity mattered, when Black people could enjoy full privileges and protections of citizenship. But the same can be said of most of the planet-at least until the mid-twentieth century, although I would venture to say this is still the case. What Black resistance calls into question is the inhumanity of the system, the inhumanity of those who subjugate in the name of civilization; it insists that the survival of humanity (and this is not the humanity defined by the Enlightenment) depends on the complete destruction of racial capitalism, patriarchy, and regimes of normativity.

As I wrote in the aftermath of the George Zimmerman verdict, unless we come to terms with this history, we will continue to believe that the system just needs to be tweaked, or the right-wing fringe defeated, or our humanity acknowledged.11 We will miss the routine character of state violence; its origins in the very formation of colonialism, slavery, and capitalism; and the ways in which routine violence has become a central component of US policies, including drone warfare and targeted killing. We cannot change the situation simply by finding the right legal strategy, the best policies, or recognition.

#### Libidinal economy is true

Chico et al 11 (A Primer on "Libidinal Economy" in Relation to Black Folks. Cosmic Hoboes: An Afropessimist Meditation (No)Space. <https://cosmichoboes.blogspot.com/2011/08/primer-on-libidinal-economy-in-relation.html>)

People who are interested in struggle need to understand the "libidinal economy." Coalition politicos like Al Sharpton like to tell us to put the unique experiences of black folks in the backseat to the interests of poor folks more generally. Such politicians expect us to submerge our interests as black people on the assumption that if poor people in general benefit from a political concession, poor black people will share equally in such benefits. Such politicos will continue to ignore the repeated evidence that a lot of nonblack people hate black people, even if doing so costs them money. If someone tells you that the problems black folks face are really just the problems that poor people face, they are telling you to ignore the libidinal economy. They are telling you that the political economy of capitalism is more important than the libidinal economy of antiblack racism. What is "libidinal economy"? In Red, White, and Black: Cinema and the Structure of U.S. Antagonisms (2010, Duke University Press), black political theorist Frank Wilderson highlights the distinction between political economy and libidinal economy (p. 9): Jared Sexton describes libidinal economy as “the economy, or distribution and arrangement, of desire and identification (their condensation and displacement), and the complex relationship between sexuality and the unconscious.” Needless to say, libidinal economy functions variously across scales and is as “objective” as political economy. Importantly, it is linked not only to forms of attraction, affection and alliance, but also to aggression, destruction, and the violence of lethal consumption. He emphasizes that it is “the whole structure of psychic and emotional life,” something more than, but inclusive of or traversed by, what Gramsci and other marxists call a “structure of feeling”; it is “a dispensation of energies, concerns, points of attention, anxieties, pleasures, appetites, revulsions, and phobias capable of both great mobility and tenacious fixation.” What does all this mean? Let's interpret this elaborate definition and get to how it thinks of "economy." When we think of economy, we usually think of something having to do with money. Wilderson uses the term political economy to refer to economy in the ways that we usually think of it: the ways people exchange materials and decide on how things are valued. Economy doesn't just mean the economy in the sense of the stock market or banks, but also any means of determining whether something is worth doing or possessing based on how much capital and labor power it yields. In struggle, we see over and over that money talks and bullshit walks. Economy has to do with what they value moves people to act. Economies are therefore very important to political action. But can there be an economy that exchanges something other than money or capital? Yes. To understand "economy" as Wilderson and Sexton use it, we have to think of economy in a more general way as things of all kinds that we can trade or save. You can accumulate not only cash or material items, but also fears and desires. Certain people accumulate more fear (the black athlete) and desire (the blonde cheerleader) than others. The term libidinal economy refers to the systems of exchange and valuation for fantasies, desires, fears, aversions, and enjoyment. Economy is about exchange and accumulation. Everyone feels fear and aggression, but where is it directed? The libidinal is about both people's desires, fantasies, and pleasures AND their phobias, fears, and violent consumptions. A libidinal economy has to do with which groups a subject is attracted to, which groups it is willing to form alliances with, and which people it is willing to provide affection to. Where can we see this libidinal economy? How can we illustrate this distinction? The libido is the collection of things like phobias and desires that are unconscious and invisible but that have a visible effect on the world, including the money economy. Some examples: We see libidinal economies at work any time there is a response by state that is out of all proportion to the material effects of any practice they are regulating. The USA incarcerates three million people, despite the fact that doing so has an adverse impact on US financial security. Hence the libidinal economy of the fear of black and brown people (who together comprise the overwhelming majority of inmates) trumps the political economy of the cost-benefit analysis of maintaining prisons. Let's take another example of the powder - versus crack-cocaine distinction, in which the same drug is punished differently at the federal level. Because the two drugs are chemically identical, there shouldn't be any distinction between how their use and sale is punished. In 2010, the law made it so that these two drugs were punished the same, although the Obama administration isn't in any hurry to make the abolition of this distinction retroactive so that the mostly black and brown people who are locked up because of it will get released. But the legal abolition of this distinction is not essential for us to look at. What is essential is why that distinction was made in the first place. Wilderson's work suggests that, for civil society, black people pose a threat that has nothing to do with the chemical content or the social and cultural effects of crack. Simply by being associated with black people, crack is seen as 100 times more threatening than is powder cocaine. The financial and social costs of locking all those black and brown people up and the financial and social costs of allowing all those white people to go free and continue to sell does not really matter to civil society. What the powder- versus crack-cocaine distinction shows is the desire to contain the threat that blackness symbolizes. This is the mark of libidinal economy. Cops, soldiers, firemen are considered sexually desirable because they become the heroes of civil society. The Oscar Grant shooting. Amadou Diallo was a victim of a extreme kind of violence because of the phobias that converged on his body. What is the exchange? Civil society has an anxiety about crime, and crime is always attached to black in urban areas. Police don't have to get a monetary award, but they get the gratitude of civil society. How does this play out in ways that don't have to do strictly with money? The desire for them may not show up in the amount of money they make. Cops get rewarded for their aggression. When the cop slammed dude into the glass at BART. Prison guards, thought of as having the toughest beat on the planet. They get rewarded for being the last line of defense against George Jackson. Oscar Grant was an accumulation of aggression and phobias. Why are the black people in Prince George's County, Maryland, segregated from white people in their same socioeconomic bracket with the same kinds of high-value real estate, and the same kinds of political-economic values? Living around white people has a value that cannot be explained in strictly monetary terms. AFDC benefited mostly white single mothers, and enjoyed a long history of support from 1936-the 1960s. It initially excluded black people. By the 1960s, when black people started getting it, attitudes changed toward it, making it seem like it was undeserved and a drain on national prosperity, and by 1984, when Ronald Reagan referred to "welfare queens in Cadillacs," it was clear that AFDC was "a black thing." In actual statistical terms, it was still used mostly by white women. But once it became associated with poor black women, it was seen as in need of drastic, radical reforms. But is this "libidinal economy" really that important? Frank Wilderson is using the distinction between a money economy and an economy of desire over and over again throughout this book. Wilderson talks about this by talking about the difference between word and deed. This is not the hypocrisy of the system. It IS the logic of the system. So Europeans tried to resolve the lack of labor power by passing laws that reduced homeless white people to the status of slaves. In the end, however, they never really enforced these laws. Wilderson quotes David Eltis, an economic historian, who says that the costs of settling the "new world" would have been significantly reduced if Europeans has simply enslaved other Europeans. But, Wilderson points out, "what Whites would have gained in economic value, they would have lost in symbolic value; and it is the [symbolic value] which structures the libidinal economy of civil society." In other words, the symbolic costs of Europeans enslaving other Europeans would have been too great. Instead, they went to Africa for their slaves, even though the financial cost of doing so was much, much greater. The radical left doesn't make this distinction. Cornel West and Tavis Smiley say they want to organize a new Poor People's Campaign, but they won't be able to explain why this is a failed project from the start. This is because they won't think about the aspects of coalition building that have nothing to do with money or the lack of money. In the late 1970s and early 1980s, the so-called "Reagan Democrats" were poor and working-class white people, many of them in unions, who voted overwhelmingly for Reagan against their own economic interest. The white left mistakenly thinks about the Reagan Democrats as people who were duped. They view them as an example of what Marx called "false consciousness" and they see it as their duty to inform the white poor and working class of why they should vote left. But there were all kinds of signs that white poor and working-class folks simply hated black people and didn't want to live anywhere that there was a large community of black people, even if those black people are of the same or higher socioeconomic status. The Reagan Democrats were excited by Reagan's antiblack rhetoric of law and order, a rhetoric that was in response against the activities of the Black Liberation Army, Weather Underground, Black Panthers, and Black Guerilla Family. Marxists think a person is in a state of false consciousness if her political or social interests go another way than her material or financial interests. If you adopt this view, then you probably think that the Reagan Democrats just need to be educated correctly about what they have in common with the black poor and working class. You have to think that their hatred of black people is somehow "false" simply because it runs counter to their financial interests. But this would be to ignore their interest in maintaining white supremacy and antiblack racism. One of the things white men would lose would be access to black bodies for sexual pleasure and amusement. These examples are not just isolated cases of false consciousness, ignorance, media manipulation, or some mystical thing called "prejudice." They are all of those things, but they are also something much, much greater that any student of struggle needs to be aware of. These examples reveal the contours of an economy of desires that is not primarily concerned with money. It's not that the political economy isn't also antiblack. In fact, both economies are antiblack.

### CP

#### Only extinction risk.

Miller-McDonald ’19 [Samuel; January 4; M.A. in Environmental Management from Yale University, B.A. in Human Ecology from College of the Atlantic; The Trouble, “Deathly Salvation,” <https://www.the-trouble.com/content/2019/1/4/deathly-salvation>]

A devastating fact of climate collapse is that there may be a silver lining to the mushroom cloud. First, it should be noted that a nuclear exchange does not inevitably result in apocalyptic loss of life. Nuclear winter—the idea that firestorms would make the earth uninhabitable—is based on shaky science. There’s no reliable model that can determine how many megatons would decimate agriculture or make humans extinct. Nations have already detonated 2,476 nuclear devices.

An exchange that shuts down the global economy but stops short of human extinction may be the only blade realistically likely to cut the carbon knot we’re trapped within. It would decimate existing infrastructures, providing an opportunity to build new energy infrastructure and intervene in the current investments and subsidies keeping fossil fuels alive.

In the near term, emissions would almost certainly rise as militaries are some of the world’s [largest emitters](https://www.nytimes.com/interactive/2017/06/01/climate/us-biggest-carbon-polluter-in-history-will-it-walk-away-from-the-paris-climate-deal.html). Given what we know of human history, though, conflict may be the only way to build the mass social cohesion necessary for undertaking the kind of huge, collective action needed for global sequestration and energy transition. Like the 20th century’s world wars, a nuclear exchange could serve as an economic leveler. It could provide justification for nationalizing energy industries with the interest of shuttering fossil fuel plants and transitioning to renewables and, uh, nuclear energy. It could shock us into reimagining a less suicidal civilization, one that dethrones the death-cult zealots who are currently in power. And it may toss particulates into the atmosphere sufficient to block out some of the solar heat helping to drive global warming. Or it may have the opposite effects. Who knows?

What we do know is that humans can survive and recover from war, probably even a nuclear one. Humans cannot recover from runaway climate change. Nuclear war is not an inevitable extinction event; six degrees of warming is.

#### 1. PROCESS---the perm eliminates the CVSG---it’s only possible for pending cases.

Days ’96 [Drew; October 1995; Solicitor General of the United States, LLB From Yale Law School, BA from Hamilton College; Southern Methodist University Law Review, “The Solicitor General and the American Legal Ideal,” vol. 49]

Third, the Solicitor General is often asked formally by the Supreme Court through a process referred to in the relevant jargon as "CVSG" (or "call for the views of the Solicitor General") to express his views on whether a pending petition for certiorari in a non-government case should be granted. In such instances, the Court is not seeking the advice of an advocate or a partisan, but rather of an officer of that court committed to providing his best judgment with respect to the matter at issue.

#### 2. SEQUENCING---the perm cuts out stage one of the decisional process, where the Court solicits and genuinely considers the views of the SG before moving ahead with cert. It must be prior AND open to reversal to show reliance of their expertise---that’s Lepore.

<<FOR REFERENCE>>

When a petition for certiorari is on the discuss list at a weekly conference and therefore ready for the Justices' ultimate decision, the Justices have several voting options.32 Most obviously, they can vote to grant in full or deny in full certiorari.33 However, they have several options that fall between these two extremes. For instance, sometimes the Justices believe that more information is necessary before they can reach a full decision to grant or deny certiorari, and they will therefore CVSG.34 If several petitions for certiorari raise the same issue, the Court may accept all of them “to address that issue more fully than a single case would allow them to do.”35 The Court may also choose to narrow the granting of certiorari by choosing one issue raised in the petition or posing an issue sua sponte to the parties.36

After the Court has granted certiorari, either in full or in part, the Court then decides between giving the petition full consideration and giving it summary consideration.37 For petitions granted full consideration, the Court will hear oral arguments, receive briefing on the merits from the parties, and issue “a decision on the merits with a full opinion explaining the decision.”38 If, instead, the Court gives a petition summary consideration, the petition may take two routes.39 Usually, in summary consideration, the Court issues a “GVR,” which entails granting certiorari (G), vacating the lower court decision (V), and remanding the case to the lower court for reconsideration (R).40 In the remainder of summary consideration petitions, the Court issues a per curiam opinion—a short, unsigned opinion on the merits.41

When hearing and deciding cases on the merits, the Court operates by majority rule.42 However, when making certiorari decisions, the historical practice of the Court, called the “rule of four,”43 is to require four out of nine votes from the Justices.44 The Court has never been very forthcoming about why one petition is deemed worthy of certiorari and another not worthy. Instead, it advises that “certiorari will be granted only for compelling reasons.”45 Those compelling reasons, though “neither controlling nor fully measuring the Court's discretion,” are described in Rule 10 of the Rules of the Court.46 The criteria described in Rule 10 for evaluating a petition for certiorari are: (1) a conflict between two appellate courts, often called a circuit split; (2) a conflict between the court at issue and Supreme Court precedent; (3) importance of the issues in the petition; and (4) procedural posture of the case.47 Although these criteria for certiorari may seem somewhat imprecise and vague, it has long been certain that “[t]he Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions.”48

C. The CVSG Process: Calling for the Views of the Solicitor General

“[T]he group of lawyers that has the greatest impact on the Court is the set of about two dozen who work for the Office of the Solicitor General in the Justice Department.”49 Indeed, when the Supreme Court calls for the views of the Solicitor General, the Solicitor General becomes “an important ally for the justices, who rely on the office's expertise to control their docket and help structure doctrinal development.”50 Essentially, the Supreme Court is requesting the Solicitor General's opinion on a petition for certiorari because the Justices believe that the petition is important and potentially worthy of certiorari but need more information, in the form of another legal opinion, before they can make a final decision.51 In the CVSG role, the Solicitor General puts aside any partisan advocacy concerns that the Office may otherwise have in order to “assist in the orderly development of the law and to insist that justice be done even where the immediate interests of the federal government may not appear to benefit.”52 The Solicitor General provides “a less partisan review of the law and a survey of existing precedent.”53 Traditionally, even where government interests would prefer otherwise, the Solicitor General does not hesitate to advise the Justices that the Court lacks jurisdiction over an issue raised in a petition or that the petition simply does not satisfy the Court's criteria for granting certiorari.54 There are a number of circumstances in which the Court will CVSG: where a federal interest is involved; where there is a new issue without established precedent; where there has been a change in the development of an issue; or where an evolving issue has become more complicated and attached to other issues.55 Former Solicitor General Kenneth Starr described the purposes of the CVSG process as follows:

#### 2. It severs immediacy, required by ‘should.’

Sawyer ’17 [David; July 20; Judge on the Michigan Court of Appeals and J.D. from Valparaiso School of Law; Court of Appeals of Michigan, “Spartan Specialties, Ltd. v. Senior Servs,” Lexis 1178]

The specifications in the drawings for the mini-piles stated that the capacity for the mini-piles was "to be" 6,000 or 8,000 pounds and that the length of the mini-piles was "to be" adequate to get into undisturbed soil to a depth adequate for obtaining the required capacity. The specifications in the project manual stated that the mini-piles "should" have a capacity of 4 tons and 3 tons, that the mini-piles "should" be driven to minimum depth of 25 feet, and that a grout bulb "should" be formed at the base of a mini-pile. Kenneth Winters, an expert in structural engineering, and Richard Anderson, an expert in geotechnical engineering, agreed with Steve Maranowski, plaintiff's president, that the specifications in the project manual, because those specifications used the word "should," were permissive and suggestions of what plaintiff could do to achieve the required capacity. However, the trial court, when it instructed the jury on how to interpret the contract, instructed the jury that it was to interpret the words of the contract by giving them their ordinary and common meaning. An ordinary and common meaning of the word "should" is that it denotes a mandatory obligation. See People v Fosnaugh, 248 Mich App 444, 455; 639 NW2d 587 (2001) (stating that "the word 'should' can, in certain contexts, connote an obligatory effect"); Merriam-Webster's College Dictionary (11th ed) (defining "should," in pertinent part, as "used in auxiliary function to express obligation, propriety, or expediency"). Accordingly, viewing the evidence in a light most favorable to defendant, reasonable jurors could have honestly reached different conclusions on whether the specifications in the project manual were mandatory and, because Maranowski admitted that plaintiff did not use grout bulbs and did not drive all the mini-piles at least 25 feet into the ground, whether plaintiff breached the contract. Morinelli, 242 Mich App at 260-261.

#### It fosters judicial uptake and law creation through pure advice.

Schoenherr ’22 [Jessica and Nicholas Waterbury; February 2022; Assistant Professor at University of South Carolina, PhD in Political Science from Michigan State University; PhD Candidate in Political Science at Washington University St. Louis, MA in Political Science from Washington University, St. Louis, BA in Political Science from Michigan State University; Journal of Law and Courts, “Confessions at the Supreme Court,” https://www.journals.uchicago.edu/doi/epdf/10.1086/714087]

The Solicitor General’s Reputation

When Congress created the Department of Justice in 1870, it placed within that agency an “officer, learned in the law, to assist the Attorney-General in the performance of his duties, to be called the Solicitor-General, who shall be appointed by the President, by and with the advice and consent of the Senate.”1 The attorney general would head the Justice Department and broadly oversee federal law enforcement while the subordinate solicitor general would mange all appellate litigation involving the US government, including deciding which cases to appeal and how to approach the justices when appearing before the Court (Pacelle 2003). The Office of the Solicitor General excels at these tasks, getting more cases on the Court’s docket and winning more at the merits stage than any other advocate (Black and Owens 2011, 2012a). While scholars have, at various points, attributed this incredible success to the office’s expertise and professionalism (Perry 1991; Salokar 1992), repeated interactions with the justices (McGuire 1995), and ideological alignment with the Court (Bailey et al. 2005), research ultimately shows solicitors general are so successful because they sit in the office itself (Black and Owens 2012c).

Part of the solicitor general’s success is dependent on the unique, mutually beneficial relationship the Office of the Solicitor General has with Supreme Court justices. By agreeing to appeal only the “best” federal cases to the Supreme Court, the solicitor general keeps thousands of cases off the Court’s docket and helps the justices manage their caseload (Black and Owens 2011). The solicitor general and the attorneys who work in the office have become so skilled at identifying cases worthy of review that the justices often ask the solicitor general to advise them on cases to which the US government is not a party, filing a Call for the Views of the Solicitor General (CVSG), to which the solicitor general always responds (Black and Owens 2012b).2 Even when the justices do not file a CVSG, the solicitor general’s input is always welcome at the Court (Collins 2008), and the appearance of an amicus brief by the solicitor general can signal a case’s certworthiness and importance (Caldeira and Wright 1988; Black and Boyd 2013; Schoenherr and Black 2019). In exchange for the help, the Court rewards the solicitor general with considerable sway over the decision-making process, following the office’s docket recommendations up to 90% of the time (Black and Owens 2012c) and siding with the government’s position two-thirds of the time when it is a party on the merits (Segal and Reedy 1988; Segal 1990; Deen, Ignagni, and Meernik 2003; Johnson, Wahlbeck, and Spriggs 2006) or participates in the case via an amicus brief (Bailey et al. 2005; Black and Owens 2012c). This advantage disappears when a former solicitor general enters private practice (Black and Owens 2012a), underscoring that only the attorney serving as the “tenth justice” receives this unparalleled advantage.

#### The SG bats 1000 on antitrust---the Court always follows their direction.

Hungar ‘9 [Thomas and Ryan Koopmans; Spring 2009; Partner at Gibson, Dunn & Crutcher LLP and Cochair of the Firm’s Appellate and Constitutional Law Practice Group, Former Deputy Solicitor General of the United States; Associate at Gibson, Dunn & Crutcher LLP; Antitrust, “Appellate Advocacy in Antitrust Cases: Lessons from the Supreme Court,” vol. 23]

It is no secret that recent years have seen an upsurge in the Supreme Court’s level of interest and involvement in antitrust cases. In the last five full Terms (October 2003–June 2008), the Court decided nine antitrust cases.1 To put that number in context, in the five preceding Terms (October 1998–June 2003), the Court decided only two antitrust cases.2 There can be little doubt that the Justices have shown a greater willingness, and apparently see a greater need, to grapple with antitrust issues than was true only a few years earlier. Those developments may be partially attributable to changes in personnel at the Court, most significantly the presence and role of Chief Justice Roberts, whose private practice experience may make him well-attuned to the importance of clear guidance from the Court in the antitrust area. It is also no secret that the Court’s recent antitrust cases reveal some discernible trends—the most obvious being the fact that in each one of these cases the Court ruled for the defendant, generally by lopsided margins. In addition, in each of these nine cases the defendant was also the petitioner— the party who persuaded the Court to grant certiorari. If past is prologue, that fact suggests that the most important battle for antitrust litigants at the Supreme Court is fought at the certiorari stage, where the Court is deciding which cases to hear on the merits.

But even with the Court’s enhanced interest in antitrust jurisprudence, convincing the Court to hear a case in this area is no small feat. The Court receives more than 8,000 petitions for writs of certiorari every Term, but hears and decides only 70–80 cases on the merits—less than one percent of the total. The odds are somewhat better in the antitrust area, but still fairly low: From September 2002 to October 2008, 94 petitions were filed that presented issues of antitrust law; the Court granted certiorari in only ten, a rate of less than 11 percent. 3 The list of denied petitions includes several high-profile cases, including the Third Circuit’s decision in LePage’s 4 and the Eleventh Circuit’s decision in Schering-Plough.5 While persuading the Supreme Court to grant review is never easy, an understanding of the types of arguments and considerations that appear to have been successful in past cases may help improve the odds. In this article we analyze the Court’s recent decisions for clues to the types of issues and arguments that seem to pique the Court’s interest at the certiorari stage, and follow those clues to identify some issues that seem ripe for review by the Court down the road.

Some Key Certiorari Considerations in Antitrust Cases

*The* Importance of the Government’s Role. When filing a certiorari petition in an antitrust case, it is important for the petitioner to bear in mind the key role of the Solicitor General’s office at the certiorari stage through the filing of “invitation briefs.” Since 2002, the Solicitor General has filed eleven amicus curiae briefs in antitrust cases expressing the government’s view regarding the decision whether to grant certiorari, ten of them at the invitation of the Court.6 In every case, the Court’s decision to grant or deny certiorari was consistent with the Solicitor General’s recommendation. That is a remarkable record, especially considering that the FTC was the petitioner in one of the cases in which the Solicitor General recommended the denial of certiorari.7

A keen understanding of the Solicitor General’s decisionmaking process is, therefore, an important qualification for counsel who seek certiorari in antitrust cases. In light of that reality, it is not surprising that, in each of the last ten antitrust cases before the Court, the lead counsel for the petitioner was an alumnus of the Solicitor General’s office.8

#### The court has total influence---Congress AND agencies will implicitly mold their behavior.

Sitaraman ’18 [Ganesh; September 2018; Co-founder and Director of Policy for the Great Democracy Initiative, Professor of Law at Vanderbilt University; The Great Democracy Initiative, “Taking Antitrust Away from the Courts,” <https://greatdemocracyinitiative.org/wp-content/uploads/2018/09/Taking-Antitrust-Away-from-the-Courts-Report-092018-3.pdf>]

The second failure was the structure of government agencies. Compared to how most of the rest of government works, antitrust is exceptional. Normally, Congress passes laws commanding agencies to act to regulate – the EPA regulates clean air and water, the National Highway Transportation Safety Administration regulates safety in cars and trucks, the Consumer Products Safety Commission regulates children’s toys. These agencies are staffed with experts in the field, they hire scientists and commission studies, and they are designed to receive input from industry and the general public. Agencies are empowered to use their considerable expertise to make regulations setting standards or regulating specific practices. Courts are able to review the agency’s regulations, and they generally give deference to the substance of the regulation as long as it is within the agency’s discretion and so long as the agency has used its expertise to come to a reasoned decision. If a court strikes down an agency’s regulation for failing to consider an aspect of the problem or acting outside their statutory authority, the agency has a chance to correct its failure.

Antitrust doesn’t work this way. At first, Congress passed the Sherman Antitrust Act in order to make monopolization and monopolists’ practices illegal. The law was written with extremely broad language, and the Supreme Court narrowed the law, declaring that only unreasonable market practices were covered by the statute. In response, Congress passed new antitrust laws, created an antitrust agency (the FTC), and empowered the FTC to interpret its charter and make rules. But in practice, a timid FTC has failed to take up its congressionally authorized role and has largely abandoned the project of making regulations to interpret and enforce the antitrust laws it administers.13 This has left the Supreme Court to define the substance of antitrust law. This is a serious problem. Agencies have considerable expertise and are politically accountable to Congress and the President. In contrast, the Court is made up of unelected, unaccountable judges who have no expertise in business realities or any specific sector of the economy. Worse still, the FTC now defers so completely to the Supreme Court’s policymaking choices that it has narrowed its own statutory authorities to align with judicially-invented policies. Judicial lawmaking in this arena also ties back to the ideology problem. Normally, the courts provide a check on regulatory agencies, which utilize their expertise and have a transparent process for making regulations. In antitrust, because the courts have no expertise, they rely on the parties in the case and academics to teach them about markets and competition through an ad-hoc process of allowing amicus briefs during litigation.14 A skewed set of intellectual inputs, and limited public participation, leads to judicial lawmaking that is disconnected from the reality of the economy.

#### All antitrust runs through the OSG, so expansion requires overt advocacy that scorches their reputation---the CP’s input through a prior, involuntary method creates an apolitical veneer.

Karr ’12 [Elliott; August 2; JD from The George Washington University Law School, BA from Ohio State University; George Washington Law Review, “Independent Litigation Authority and Calls for the Views of the Solicitor General,” vol. 77]

Although the Solicitor General is subject to removal at will by the President, 32 and therefore not independent in the traditional sense of the word, it is widely thought that the Solicitor General still has some measure of independence. Even though the Solicitor General is appointed by the President and is supervised by the Attorney General, the DOJ has noted that "the Solicitor General has enjoyed a marked degree of independence," 33 and others have referred to the office as "quasi-independent" in nature. 34 The Solicitor General's independence is beneficial because, "to the extent the Solicitor General can be shielded from political and policy pressures - without being unaware of their existence - his ability to serve the Attorney General, and the President, as 'an officer learned in the law' is accordingly enhanced." 35 This independence is also important because, as a repeat player before the Court, the Solicitor General is able to build institutional capital with the Court. 36 If the Solicitor General were seen by the Court as simply representing the views of the President, as opposed to exercising independent legal judgment, his capital and authority with the Court would be diminished. 37

Even though it is in the President's best interests to allow the Solicitor General to act independently in most circumstances in order to ensure having an effective litigator before the Supreme Court, it does not follow that the Solicitor General is completely free from presidential control, as "the appearance of independence is not independence." 38 As an initial matter, the President appoints the Solicitor General, and is likely to attempt to appoint someone whose political and legal views are as similar as possible to his own. More importantly, the Solicitor General is ultimately subject to presidential control because of the President's removal power. Unlike the heads of a traditionally independent agency, the Solicitor General cannot take actions that run contrary to the President without fear of being removed from office. In all but the most politically charged cases, however, there is a good chance that the President will not interfere with the actions of the Solicitor General because many cases do not seem important enough for the President to become directly involved.

While in the vast majority of Supreme Court cases the Solicitor General can expect a large degree of independence from the President, the location the Office of the Solicitor General within the DOJ, and the supervision of the Attorney General can also undermine his independence. Frequently, the Solicitor General must resolve competing claims made by different agencies of the government when deciding what position to take before the Supreme Court. 39 This process is generally not considered problematic because there is thought to be some benefit in having the interests of the government, in most instances, represented before the Supreme Court by a single voice. Also, the Solicitor General is usually capable of being a neutral arbiter of opposing agencies' views, either adopting the position of one of the agencies before the Court, or taking his own position somewhere between the views espoused by the agencies. 40 As long as the Solicitor General is able to maintain this impartiality, he can effectively represent the agencies as components of the Federal Government.

It is not clear, however, that the Solicitor General is able to satisfactorily fill the role of the impartial arbiter under all circumstances, given his position within the DOJ. "When one of the competing interests … is one enforced by the [DOJ] itself, it is somewhat more difficult for the Solicitor General to be completely neutral … ." 41 This may be simply a matter of similar jurisprudential and policy preferences of the Solicitor General and the Attorney General (given that they are both appointed by the President), as opposed to the Attorney General putting pressure on the Solicitor General to handle a case in a particular way. It also may merely be that, because the Office of the Solicitor General is located within the same building as other DOJ attorneys, the Solicitor General is influenced by proximity, both physically and institutionally. Whatever the reason, it is still troubling that the two agencies that are charged by Congress with enforcing particular statutes are not accorded equal deference by the Solicitor General in preparing positions before the Supreme Court.

With respect to the FTC in particular, the preference for DOJ views may be more significant. The FTC and the DOJ, through its Antitrust Division, both enforce the nation's antitrust laws. The FTC's position as a traditionally independent agency allows it to develop legal positions that are different from those of the DOJ. When the FTC endorses a position that differs from the views of the Antitrust Division, the Solicitor General may be more likely to value the views of the DOJ's antitrust lawyers more strongly, in terms of whether or not to take a case, or what arguments should be made. "It has been said that the administrative agencies fare badly when opposed to the antitrust policies of the Department of Justice itself … . This occurs most often when the agency … has authority to appear separately [before the Court] on its own behalf." 42

Because the Solicitor General is ultimately subject to removal at will, the President is in a better position to control the positions the Solicitor General, as opposed to some independent agency, takes before the Supreme Court. Independent agencies have the power to make legal policy that runs counter to the will of the President, but allowing the Solicitor General to control litigation before the Supreme Court can help the President ensure independent agencies do not deviate from presidential priorities. 43 By deciding not to pursue cases where the agency would prefer a reversal, and vice versa, the Solicitor General is able to significantly impact the amount of legal policymaking that the independent agencies are able to undertake.

II. The Battle for Control

Congress and the President are frequently at odds over the question of centralized litigating authority. For the President, having government litigation concentrated in the DOJ provides a greater amount of control by the President over the policymaking done by agencies. Congress, however, has an incentive to promote decentralized litigating authority because it "enlarges department and agency responsibility, thereby providing oversight committees greater opportunities to influence agency business." 44 As a result, there has, in some cases, been a back and forth battle between the two branches over whether particular agencies should represent themselves before the federal courts.

Many administrations have made efforts to curb the amount of independent litigating authority agencies possess. In 1933, President Roosevelt issued an Executive order that first established DOJ control over government litigation, replacing the largely decentralized regime that preceded it. 45 Later, the Hoover Commission called for Congress to make the DOJ "the chief law office of the Government" by centralizing governmental litigation under it, but Congress responded by granting both independent and executive agencies the ability to try their own cases. 46 Later administrations attempted to increase their control over government litigation by narrowly interpreting statutes authorizing independent litigation. 47 For example, during the first Bush administration, the DOJ advised the Postal Service that it could not represent itself in a dispute with the Postal Rate Commission, in light of statutory authorization that was ambiguous. 48 President Bush then directed the heads of the Postal Service to withdraw the case and sent letters threatening to remove them from office if they refused to cooperate. 49 Although the Postal Service was vindicated by an injunction blocking the removal and the D.C. Circuit's ruling that the Postal Service possessed independent litigating authority, 50 this episode demonstrates the importance to the executive of controlling the litigation conducted by an agency.

III. History of FTC Independent Litigation Authority

As noted earlier, in general, the DOJ, or more specifically the Office of the Solicitor General in the case of Supreme Court litigation, will control the litigation by agencies unless Congress provides otherwise. Congress has, however, provided a number of agencies with independent litigating authority. Generally, agencies are only authorized to represent themselves before the lower federal courts. However, some agencies, such as the FTC, have been granted the power to represent themselves before the Supreme Court. This Part looks at the circumstances surrounding Congress's decision to grant independent litigation authority to the FTC, in particular actions by the DOJ that made its representation of the FTC's interests untenable.

The FTC was granted independent litigation authority before the Supreme Court in 1975 under the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act. 51 This authorization gave the FTC the right to represent itself before the Supreme Court only in cases where the Solicitor General decided not to petition for certiorari; if the Solicitor General wanted to take the case, he could do so. 52 Just two years earlier, the FTC had been granted the authority to represent itself in the lower courts. 53 Previously, lower court litigation on behalf of the FTC was awkwardly divided between the DOJ and the FTC's own lawyers, with the DOJ handling injunctive actions and civil penalty suits, while the FTC was responsible for enforcement proceedings and judicial review. 54 This division of labor created problems when the FTC and DOJ disagreed on substantive areas of antitrust law and policymaking efforts and resulted in poor representation of the FTC's positions through filing delays, settlements that did not reflect the agency's policy goals, and even the refusal to file cases in the first place. 55 By granting the FTC independent litigation authority before the lower courts, Congress mitigated the representational problems and internal conflict that would have been inherent in having two separate agencies charged with regulating the same area of the law, while simultaneously requiring one of the agencies to represent the other in court.

In addition to the problems with the DOJ's representation of the FTC before the lower federal courts, Congress also recognized the Solicitor General's poor track record with respect to the FTC. Problems with the Solicitor General's representation of the FTC illuminate Congress's decision to grant the FTC independent litigation authority before the Supreme Court in 1975. 56 In 1968, the DOJ took a position against the FTC in FTC v. Guignon, 57 and, in an amicus brief, argued that the agency was not authorized to represent itself in subpoena enforcement proceedings. 58 This position likely reflected a "desire [by the DOJ] to maximize its litigating authority at the expense of the FTC." 59 More problematic was the Solicitor General's decision to shield a decision favorable to the DOJ from judicial review by not seeking certiorari, arguing that the issue was not "of sufficient general importance to warrant requesting the Supreme Court to review it." 60 In another case, St. Regis Paper Co. v. United States, 61 the FTC was effectively denied representation when the Solicitor General sided with the position of the Census Bureau on an issue related to confidentiality claims of reports filed with the Census Bureau. 62 There, the Solicitor General decided not to "burden[] the Court with briefs from different agencies," but "attempted … to set forth the competing arguments as effectively and objectively as possible." 63 In the brief, however, the Solicitor General represented the FTC by arguing that the position the FTC proffered was not the proper one. 64 This illustrates the conflict that the Solicitor General faces when representing a government that is composed of various agencies that do not always come to the same position, as well as the difficulties that the FTC had in obtaining adequate representation before it was granted independent litigating authority. These events played a key role in motivating Congress to award the FTC independent authority, as Congress found that "the investigative and law enforcement responsibilities of the Federal Trade Commission have been restricted and hampered because of inadequate legal authority." 65

Congress's intent in granting independent litigating authority to the FTC does not necessarily lead to the conclusion that the Solicitor General should never be involved in cases where the FTC is litigating. For example, in 1974, the House Committee on Interstate and Foreign Commerce maintained that the government's interest in putting forward its position with one voice outweighed the interest the FTC had in litigating its cases in the manner tailored to meet its particular enforcement goals. 66 In addition to concerns about the adequacy of the FTC's representation before the Supreme Court, a likely motivating factor behind Congress's decision to transfer this authority to the FTC from the Solicitor General was a combination of the desire to limit the power of the President and the DOJ following Watergate and the "Saturday Night Massacre," 67 as well as the overwhelming popularity of the FTC at the time during the "age of consumerism" of the 1970s. 68

These political circumstances illustrate the types of issues that Congress can take into account when dividing the power to litigate cases before the Supreme Court among various federal agencies. Congress's ultimate transfer of the litigating authority to the FTC shows that Congress did not intend the Solicitor General to play as significant of a role in determining what cases should reach the Supreme Court, given that the cutting off of access to the Supreme Court, as occurred in Guignon, is in part what led Congress to adopt the 1975 law. Congress's decision guaranteed that the FTC's voice would be heard before the Supreme Court, regardless of whether it was at odds with views of the current administration.

IV. The Court Intercedes

It is common in discussion of the unitary executive theory to look at subsequent actions taken by the President and Congress designed to increase the power of one branch at the expense of the other. In the area of independent Supreme Court litigating authority, however, the Court itself has also played an important role. In general, the Court's actions have favored centralized control of government litigation within the Office of the Solicitor General. The motivation behind these acts is unlikely to be the Court taking sides in a conflict between the other two branches. Rather, the Court is probably motivated by self-interest, as it is well served by having the Solicitor General represent all government matters to it.

One of the more mundane methods by which the Supreme Court facilitates the participation of the Solicitor General in government litigation is the requirements for filing an amicus brief. Under Supreme Court Rule 37, in order to file an amicus brief before the Court, the party wishing to file the amicus brief must either obtain permission from both parties, or from the Court after filing a motion. 69 When the Solicitor General wants to file an amicus brief, however, he does not need to get leave from the Court. 70

A much more important method by which the Court has begun to involve the Solicitor General in government litigation has been to "Call for the Views of the Solicitor General" ("CVSG") at the certiorari stage of litigation in order for the Solicitor General to advise the Court as to whether it should grant the petition for certiorari. While ordinarily the Solicitor General is expected to represent the interests of the government, when CVSG'ed, the Solicitor General acts, in the words of one former Solicitor General, as "an officer of that Court committed to providing his best judgment with respect to the matter at issue." 71 While the authority of the Solicitor General to litigate cases before the Supreme Court is clearly laid out in statutes and regulations, the CVSG process has no such legal basis.

#### Advice through CVSG creates the gloss of neutrality that lets the office advocate without been seen as overstepping.

Pacelle ‘3 [Richard; 2003; Professor and Department Head in Political Science at the University of Tennessee, PhD in Political Science from Ohio State University, BA from the University of Connecticut; Between Law and Politics: The Solicitor General and the Structuring of Race, Gender, and Reproductive Rights Litigation, p. 24-26]

Responding to Invitations

In the third category of cases, the Court “calls for the views of the solicitor general” (CVSG). The invitation to participate via an amicus brief occurs almost exclusively at the petition stage, when the Court is asking the solicitor general whether certiorari should be granted. If the petition is granted, then the office normally files a brief on the merits. The “invitation” to participate is not really a request, but is treated as an order.48 When the Court “invites” the solicitor general to enter a case, the office’s flexibility is circumscribed. In these cases, the solicitor general is often acting not as an agent of the executive branch but as a legal advisor to the Supreme Court. In inviting the solicitor general’s participation, justices normally expect the office to provide a less partisan review of the law and a survey of existing precedent. This resembles the original intention of the amicus curiae brief, which was designed to be a recitation of legal positions by a disinterested “expert witness.”49

Some argue that the reason that it adopts a more neutral position in the invited cases is because the office has no real interest in the case or as Lawrence Wallace put it “we do not have a dog in the fight.”50 This was echoed by Walter Dellinger: “My guess would be that briefs filed in the invited cases give the appearance of greater disinterest and impartiality because the Solicitor General chooses not to file an amicus brief voluntarily. . . . The case is not very controversial until some members of the Court thought that the challengers had a better case than the lower court did. The case is lower on the radar screen until the Supreme Court thinks the issue needs ventilation.” Or it may be because the issue is very contentious according to Dellinger: “Different branches of government have conflicting views and the Solicitor General declined to get involved to avoid controversy. This can occur when there are very strong views, but they differ from one agency to another. . . . The Solicitor General takes neither position and may draft a brief reflecting the different views of the agencies.”51

In this capacity the solicitor general is less the “tenth justice” and more the “fifth clerk.” According to Days, “The Court is explicitly asking for help. The Court wants a theory for locating the case in terms of the thousands of other cases it needs to address.” Thus, the solicitor general serves more as an officer of the Court than as an advocate. The Court is more likely to invite the solicitor general to participate under certain circumstances. The Court will invite the solicitor general when it perceives that a federal interest is involved. The office may be asked to file when there is a new issue without established precedent. The solicitor general is asked to provide a broader context or perspective for the Court to use in approaching the new issue.52 Invitations are also likely when there is a change in the development of an issue. As issues evolve, they take on a greater complexity and often get attached to other issues. When this occurs, the Court may ask the solicitor general to help formulate the proper doctrinal stream and find a niche for the new fact situation.

While the CVSG can limit the type of arguments the office can make, it provides opportunities as well. First, the invitation extends the government’s influence into another area. More broadly, the solicitor general generates a reservoir of good will with the Court that can be borrowed against when the solicitor general has a case the office considers important. Kenneth Starr felt that the invitation to file a brief gives the government a great advantage: “I viewed the CVSG as the Court seeking guidance, but affording the US the courtesy of being heard without putting the US in the position of being in the case sua sponte. If the US were doing that with regularity, the government would be charged with being an officious intermeddler.” According to Starr:

The CVSG has a two fold purpose. First, it serves to guide the Court or assist the Court as to whether the case is important enough to merit review. Second, it serves to offer the position of the US on the merits of the issue. With respect to the former—assisting the Court—it is a welcome opportunity for the US as so much litigation affects the government, but we’re not involved. It is a courtesy to the government. With respect to the latter—the position of the US—there we followed the professional responsibility of assimilating the views of different parts of the Justice Department and the agencies and putting forth the best argument. 53

#### It has huge emissions AND shapes global policy.

Hultman ’21 [Nathan; March 1; Nonresident Senior Fellow in the Global Economy and Development Program at the Brookings Institute, and Samantha Gross, Fellow and Director of the Energy Security and Climate Initiative, Bachelor of Science in Chemical Engineering from the University of Illinois, Master of Science in Environmental Engineering from Stanford, and Master of Business Administration from the University of California at Berkeley; Brookings Institute Report, “How the United States can Return to Credible Climate Leadership,” https://www.brookings.edu/research/us-action-is-the-lynchpin-for-successful-international-climate-policy-in-2021/]

In this context, the reaction in the global climate community to Joe Biden’s election as U.S. president has been overwhelmingly positive. The world sees the importance of U.S. action to limit overall global temperature rise, and President Biden’s campaign, appointments — including former secretary of state John Kerry as special presidential envoy for climate — and early actions in office indicate his interest in a new approach to climate change. However, the Biden administration immediately faces a difficult challenge. Four years of U.S. absence from the global climate community — including global climate negotiations and international efforts to reduce greenhouse gas emissions — have left a big gap in international leadership and credibility. How does the new administration meet the moment? How does the United States regain its credibility on the world stage?

Since greenhouse gas emissions mix throughout the global atmosphere and oceans, emissions in one part of the world impact the climate everywhere. The Paris Agreement calls for all countries to reduce emissions in line with their own development goals and political realities. But science suggests that a goal of net-zero emissions from the largest emitting countries by mid-century is necessary. In this context, credible U.S. action is critical. As the world’s largest economy, second-largest greenhouse gas emitter, and superpower re-engaging on climate diplomacy, U.S. actions can either dampen or accelerate global action. If the United States fails to make commitments that the rest of the world views as serious, it will be harder to pressure other countries to take more serious action. Credible U.S. action could form the basis for genuine leadership, as the United States displayed preceding the Paris COP through its bilateral commitments with China.

#### Scientific consensus agrees extinction’s likely due to severity, interlinked impacts, and lack of resilience.

Abegão ’22 [João L. R.; Ph.D. Candidate in Environmental History at the University of Lisbon, Master's Degree in Ecology and Environment, “The Limits of Sustainability: Lessons from Past Societal Collapse and Transformation, for a Civilization Currently Defying Humanity’s Safe Operating Space”, Sustainable Policies and Practices in Energy, Environment and Health Research: Addressing Cross-Cutting Issues, p. 439-440]

1 Introduction

Twenty-First Century industrial society (hereafter, civilizational project) remains bound by the same constraints that brought about the collapse or transformation of past complex societies. However, the current anthropic impact and the degree of complexity are far apart from anything humanity has previously achieved. Indeed, a case can certainly be made that the biophysical limits that govern the safe operating space for humanity have or are being breached (Rees 2020; Rockström et al. 2009; McLaughlin 2018; Dasgupta 2021). Thus, concern over the potential fate of modern industrial society has been raised (Ehrlich and Ehrlich 2013; Gowdy 2020; Capon 2020); as ecosystems shift or collapse (Kareiva and Carranza 2018), non-human life declines or slips into extinction (McCauley et al. 2015; Dirzo et al. 2014); the climate is disrupted through anthropogenic action (Ripple et al. 2019), and deforestation and population grow unimpeded (Bologna and Aquino 2020; Bystroff 2021). As the fabric of human civilization is eroded (Convention on Biological Diversity 2020), the way humans can inhabit this Earth will be transformed (Halstead 2018; Steffen et al. 2018), with global catastrophic risks being elevated to an eminent concern (Carpenter and Bishop 2009; Kuhlemann 2019; Beard et al. 2021).

As a result, more than 250 scientists and academics have published a letter (Weyhenmeyer et al. 2020) alerting to the risk of societal collapse, where they affirmed:

As scientists and scholars from around the world, we call on policymakers to engage with the risk of disruption and even collapse of societies […] Researchers in many areas consider societal collapse a credible scenario this century.

Many explanations have been advanced to make sense of the historical trends and sporadic events that have led to profound transformations or the collapse of past complex societies. ‘Collapse’ in itself has become a popular word, with its meaning dissolved. However, it is explicit that it relates to a political, demographic, economic, ecological cause or some sequence or amalgamation of these1 (Johnson 2017; Middleton 2017; Bárta 2020). Under these circumstances, it is argued that the determinants that led to crises and protracted recovery or collapse of former complex societies do not just remain fully at work but are more significant than ever. This is linked to cumulative historical influence, changes to their severity (how bad the consequences can become), magnitude (how many people are affected), probability (likelihood of materialization), and loss of resilience (the capacity to absorb disturbances and rebound).

#### Tipping points make it rapid and unsurvivable---court action’s key.

Wood ’22 [Mary; Winter 2022; Philip H. Knight Professor and Faculty Director of the Environmental and Natural Resources Law Center at the University of Oregon, JD from Stanford Law School; Indiana Law Journal, “On the Eve of Destruction: Courts Confronting the Climate Emergency,” vol. 97]

This Article explores the role of the courts in our climate emergency. It begins by appraising our climate reality and then illuminating the governmental malfeasance that delivered our nation this existential threat. It will suggest that the climate crisis worsened to the point of all-out emergency due to an imbalance of power between the three branches of government and a colossal failure of constitutional checks and balances. Essentially unbridled discretion grew in the executive branch, which used environmental laws to advantage fossil fuel corporations even as the mounting peril of their products was patently clear. Over the course of several presidential administrations, a dispassionate and ineffective judiciary failed to protect the country from a mounting ecological tyranny wielded by environmental agencies-to the point that little restraint existed when the Trump administration floored the accelerator on fossil fuel development, speeding the nation, and the entire world, toward the climate cliff.2 The World Meteorological Organization has predicted that the earth will blow past the key temperature target of 1.5 degrees Celsius in the next five years.3 [FOOTNOTE] 3. Press Release, World Meteorological Org., New Climate Predictions Increase Likelihood of Temporarily Reaching 1.5 0C in Next 5 Years (May 27, 2021), https://public.wmo.int/en/media/press-release/new-climate-predictions-increase-likelihoodof- temporarily-reaching-15- 0c-next-5 [https://perma.cc/7SZ7-EVFC]. A draft report by the UN Intergovernmental Panel on Climate Change (IPCC) released to the press in June 2021 underscores the gravity of the climate crisis. See Marlow Hood, Crushing Climate Impacts to Hit Sooner than Feared: Draft UN Report, PhYSORG (June 23, 2021), https://phys.org/news/2021-06-climate-impacts -sooner.html [https://perma.cc/QFL2-J2YC] (summarizing the report as concluding that "dangerous thresholds are closer than once thought, and dire consequences stemming from decades of unbridled carbon pollution are unavoidable in the short term," and "[s]pecies extinction, more widespread disease, unliveable heat, ecosystem collapse, cities menaced by rising seas-these and other devastating climate impacts are accelerating and bound to become painfully obvious before a child born today turns 30."). [END FOOTNOTE]

Against such climate reality, this Article then examines the leading American climate case, Juliana v. United States.4 The lawsuit was brought in 2015 against the Obama administration on behalf of twenty-one youth plaintiffs who challenged the entire American fossil fuel system. 5 The young plaintiffs sought a declaration that their government, by controlling the fossil fuel energy system responsible for destroying the climate system upon which all life, liberty, and property depends, was violating their fundamental rights under the Due Process Clause of the Constitution and the venerable public trust principle. They further sought injunctive relief ordering government defendants to develop a remedial plan to decarbonize the energy system and take actions to restore the climate system according to scientifically developed standards-before society passes points of no return that will trigger uncontrollable, runaway heating that is not survivable. The ambition of these twenty-one plaintiffs, combined with the rank urgency of stopping climate destabilization, evoked a characterization of this lawsuit as "the biggest case on the planet."6

The plaintiffs secured a decisive and sweeping victory in the U.S. District Court for the District of Oregon, which announced for the first time ever a constitutionally grounded right to a "climate system capable of sustaining human life." But this remarkable case did not proceed to trial. Instead, it was taken by the Ninth Circuit on an interlocutory appeal and dismissed by a bitterly divided appellate panel of three judges. The majority and dissenting opinions articulate two profoundly different judicial roles-paradigms explored in this Article. The majority opinion dismissing the case, penned by Judge Andrew Hurwitz and joined by Judge Mary Murguia, suggests that the judiciary has no conceivable role in addressing the climate crisis and that the matter must be left to the two political branches-the very branches that delivered this emergency to the American public in the first place. The opinion solidifies the imbalance of power by casting courts in what this Article calls a "passive umpire" role. This role typifies the court's function in simpler cases brought under narrow environmental statutes-cases that end in clear wins or losses and, in the case of victories for plaintiffs, usually result in straightforward remands to the agency. Such rulings characteristically terminate judicial involvement altogether.

The dissent by Judge Staton positions the court to squarely confront the reality of the climate emergency and avail itself of a last chance at forcing government to slam the brakes on the fossil fuel system before our agencies push the nation (and indeed the world) over the climate precipice. Judge Staton's vision of judicial involvement falls directly in line with that of other civil rights cases dealing with constitutional rights violations: desegregation, treaty rights, and prisoners' rights cases. In these cases, government's violations reflect longstanding, baked-in, institutional disregard for constitutional protections, and the remedy is not a simple remand. Instead, the court serves what this Article calls an "engagement role" in which the judge uses problem-solving tools as well as skilled mediation techniques to arrive at broad declaratory relief and remedial plans designed to correct the dysfunction that caused the agency to violate the plaintiffs' constitutional rights. These cases may entail extended judicial involvement, sometimes lasting over many decades, to correct the course of the defendants' institutional malfeasance and establish safeguards to ensure the agencies will not slip into recidivism. To Judge Staton, this judicial role, requested by the plaintiffs, was reasonable and feasible, grounded in ample precedent, with tools readily applicable to the climate crisis despite its unprecedented and daunting complexity.8 As this Article later explains, the clear momentum of international cases is in line with Judge Staton's view, as more and more courts are holding their governments accountable for climate action.

After an unsuccessful petition for en banc review before the Ninth Circuit, the groundbreaking Juliana case is back in the Oregon district court where plaintiffs have tried to engage in settlement discussions with the Biden administration and also await a decision on a motion to amend their complaint to adjust the remedy they seek. The Article ends by suggesting the climate-specific parameters of a judicial role in this next phase of the Juliana litigation and, more broadly, in cases around the globe.

I. ALIGNING A LEGAL APPROACH WITH THE LAWS OF NATURE AND THE FOUNDATIONAL PUBLIC TRUST

The climate crisis puts human life in grave peril. Laws that fail to fully confront this reality will prove to be irrelevant, abstract, and ineffectual. As Oren Lyons, educator and faithkeeper of the Onondaga Nation, puts it: "The thing that you have to understand about nature and natural law is, there's no mercy .... There's only Law."9 In other words, Nature, not Congress, wields the supreme laws by which we must abide.10 Our edifice of environmental law, immense as it is and operative for over half a century, has come altogether unhinged from the arrangement that Nature established to keep our climate system in balance. For decades, the U.S. government has commandeered statutory law to actually repudiate those supreme laws of Nature by invoking permit systems to legalize colossal landscape damage and unfathomable amounts of pollution-contaminating the waters, poisoning the soils, and flooding the atmosphere with greenhouse gas emissions. Journalist Elizabeth Kolbert sums it up: "It may seem impossible to imagine that a technologically advanced society could choose, in essence, to destroy itself, but that is what we're now in the process of doing." 1

Any discussion of government's role in climate crisis must be framed by the deepest obligations of sovereignty itself as tied to those laws of Nature. While many foundational rights exist in specific form in constitutions designed to organize democracies, the ecological rights of all sovereigns toward their citizens reside most anciently in the public trust principle, a primordial doctrine with roots tracing to the Roman Institutes ofJustinian. 12 This principle animates legal systems throughout the world. 13 It characterizes vital natural resources as a "trust," a lasting ecological endowment meant to sustain society into perpetuity. The ecological wealth comprises the "res" of the trust and is owned in common by the citizens as present and future beneficiaries. Government is the trustee of this invaluable commonwealth and must manage it strictly for the benefit of its citizens. As many courts have held, the trust principle prohibits government (with narrow exceptions) from allowing "substantial impairment" of the trust." Because the trust principle conceives of rivers, wildlife, streambeds, and the atmosphere itself as discernable components of the "res,"15 it requires legal systems to align environmental mandates with the laws of Nature.

The public trust principle's macro approach, geared to the holistic requirements of sustaining a resource in its totality, differs greatly from the compartmentalized, fractured procedural requirements of environmental statutes that come to bear in myopic fashion on singular actions. 16 The Clean Air Act, Clean Water Act, Endangered Species Act, and National Environmental Policy Act (NEPA), for example, will be triggered by individual harmful actions-such as a proposed oil lease, a proposed industrial plant, or a proposed discharge of pollution-and their legal force scopes only to those discrete actions, shutting out the big picture of resource health. By contrast, the public trust scrutinizes the trustee's overall management of the natural asset-the river, wetland, species, or atmosphere-and stays unyielding on this point: government has a fiduciary obligation to sustain this endowment to support a flourishing society into the future." In this framework, survival resources remain quintessential public property belonging to posterity, and government's clear responsibility is to manage such ecological wealth strictly for the endurance of society itself, for the benefit of both present and future citizens-not for the advantage of private parties or profiteers who may seek to despoil the trust and appropriate it for their own purposes. 18

Grounded in the logic of survival and inter-generational justice, the principle has been operational in the United States since the nation's beginning and continues to influence cases worldwide (though many courts in other nations simply express the principle as a duty to future generations). 19 Many judges, scholars, and lawyers find that the doctrine has constitutional underpinnings as an attribute of sovereignty itself.20 Professor Gerald Torres and Nathan Bellinger describe the trust as a slate "on which the Constitution was written," 2 1 embracing "inherent rights that pre-date[] the United States Constitution." 2 2 At its core, the principle remains essentialist and democratic, securing "inherent and indefeasible" public property rights 23 originally reserved through the people's social contract with the sovereign government. Public trust rights thus function as a restraint exercised by citizens against their government. In the United States, these rights are fundamentally American, as they originate in the sovereign compact, but they are less familiar than rights focused on the individual-such as the freedom of religion or equal protection. Public trust rights materialize as collectively-held property rights. As the U.S. Supreme Court decided in the landmark public trust case, Illinois Central Railroad Company v. Illinois, 24 a state legislature could not convey away to a private railroad corporation the lakebed of Lake Michigan in which "the whole people are interested."25 Justice Field proclaimed, "The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people." 26

By enforcing a trust over crucial resources, courts prevent any present set of legislators from wielding so much power over ecology as to cripple future legislatures in meeting their citizens' needs. Moreover, courts make clear that the legislature cannot abdicate the trust because it remains an "attribute of sovereignty," a constitutive principle that government cannot shed. As a federal district court explained: "The trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign." 27 Holding constitutional force, the principle is perpetually binding on legislatures and agencies.28

The public trust doctrine can only serve its fundamental purpose if enforced by the courts.29 In this way, the public trust falls in step with a recursive theme throughout history: courts embody a unique role in our constitutional democracy, assigned the duty to enforce the fundamental and inherent rights of citizens against their own government. If the Illinois Central case was the manifestation of this constitutional role in 1892, the Juliana case is the manifestation of this same role today, though the stakes are exponentially greater than in earlier times, likely greater than the Illinois Central Justices could possibly have imagined. Never in America's history has the underlying prospect of political environmental tyranny in our democratic system been brought to the fore so dramatically in the form of a court proceeding. While Justice Field said it "would not be listened to" that the great shoreline of Lake Michigan could fall into private hands, 30 the question today is whether it will "be listened to"-and indeed judicially affirmed-that the climate system sustaining all life on Earth will collapse, largely at our government's own doing31 in its ambition to deliver short-term advantages to the fossil fuel industry.

II. THE CLIMATE IMPERATIVE

Justice Holmes wrote that the common law embodies "the felt necessities of the time." 32 To evaluate any legal approach to the climate emergency, we must first determine what Nature requires to maintain society's stability and to perpetuate the ecological endowment for present and future generations. In this regard, leading scientists emphasize the need to bring atmospheric carbon dioxide back down to 350 parts per million-the highest level at which the planet and its inhabitants can remain generally safe.33 Present levels soar above that, at 418 parts per million, as fossil fuel emissions continue to spew carbon dioxide and methane gas into our atmosphere.34 It is projected that the current "business as usual" trajectory will lock in a temperature rise of eleven degrees Fahrenheit over pre-industrial temperatures by the end of the century, and possibly much earlier.35 Such heating is not broadly survivable.36 Children born today will face a world in cataclysmic collapse if Humanity fails to rapidly change course.37 Indeed, courts across the world are now grasping the severity of our climate emergency. 38 As an Australian court recently declared in a case challenging an approved coal mine:

It is difficult to characterise in a single phrase the devastation that the plausible evidence presented in this proceeding forecasts for the Children. As Australian adults know their country, Australia will be lost and the World as we know it gone as well . .. [This] will largely be inflicted by the inaction of this generation of adults, in what might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next.39

Climate tipping points40 infuse this situation with an urgency never before confronted by the law.

Footnote 40 begins:

40. See generally FRED PEARCE, WITH SPEED AND VIOLENCE: WHY SCIENTISTS FEAR TIPPING POINTS IN CLIMATE CHANGE, at xxiv-vi (2007) (describing "unstoppable planetary forces" beyond tipping points and the end of climatic stability). A recent draft report released by U.N. scientists underscored the danger of such tipping points. See Hood, supra note 3 (summarizing report: "the report outlines the danger of compound and cascading impacts, along with point-of-no-return thresholds in the climate system known as tipping points, which scientists have barely begun to measure and understand.. . . A dozen temperature trip wires have now been identified in the climate system for irreversible and potentially catastrophic change.").

Footnote 40 ends.

Society faces the very real and imminent prospect of uncontrollable, runaway heating if it pushes global temperatures beyond a point of no return: Nature's own positive feedback loops would drive up the heating more and render it impossible to return to safety (barring risky, untried, very expensive, and potentially disastrous geoengineering solutions).41 One such tipping point lurks in the permafrost, covering the northern latitudes, containing a colossal amount of carbon dioxide and methane.4 2 When permafrost melts, it releases those greenhouse gases into the atmosphere. 43 Vast tracts of permafrost have already begun to melt, and scientists warn that we are on the verge of "massive" permafrost collapse. 4 4 In late 2019, the United Nations Secretary-General, Ant6nio Guterres, explained: "The point of no-return is no longer over the horizon. It is in sight and hurtling towards us." 45 More recently, he pronounced: "[T]he state of the planet is broken . . Humanity is waging war on nature. This is suicidal."46

Three touchstones define the massive decarbonization effort necessary to avoid these tipping points. First, looking back, global society had to start bending down the curve of greenhouse gas emissions by 2020.47 By all logical measure, at the end of 2019, President Trump's frenzied and reckless promotion of fossil fuels seemed to make that key requirement unattainable.48 But the COVID-19 pandemic that disabled the world caused a wholly unexpected, abrupt eight percent drop of carbon dioxide emissions, perhaps keeping open a slim window of opportunity to stave off tipping points.4 9 The remaining requirements announced by U.N. scientists are to curtail emissions by forty-five percent by 2030, and to achieve full decarbonization by 2050.50 Feasible as these may appear on paper, these numbers will ruthlessly probe the depths of Humanity's collective resolve in the decades to come. The International Energy Agency forecasts that, in 2023, a COVID economic rebound will produce the largest annual output of carbon dioxide emissions in human history.51

Emerging from these climate imperatives is an inescapable reckoning: there is no way to continue wholesale reliance on fossil fuels, even for a few more years, and still remain on the safe side of those tipping points. 2 In spite of this long-known reality, the U.S. government has deliberately organized this nation's energy system around oil, coal, and natural gas.5 3 Moreover, it has supplied the world with these dangerous fossil fuels." The Ninth Circuit Juliana panel acknowledged that "the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change" and that (at the time the case was decided in 2019) "the country is now expanding oil and gas extraction four times faster than any other nation." 55

Ninth Circuit Judge Andrew Hurwitz strung together a stepwise outline of our present situation, even as he dismissed the youths' case: (1) "since the dawn of the Industrial Age, atmospheric carbon dioxide has skyrocketed to levels not seen for almost three million years"; (2) "[t]his unprecedented rise stem[ming] from fossil fuel combustion will wreak havoc on the Earth's climate if unchecked"; (3) "climate change is affecting [plaintiffs] now in concrete ways and will continue to do so unless checked"; (4) "this growth [of emissions] shows no signs of abating"; and (5) this trend "may hasten an environmental collapse."56

### Case

#### You should flip traditional procedures of impact calculus and compare impacts from the perspective of the wretched of the earth. This means consciously refusing to evaluate impacts at the existential or universal level, or artificially inflating our impacts in your calculus to be equivalent to theirs.

Colebrook, 21—Edwin Erle Sparks Professor of English at Pennsylvania State University (Claire, “Can Theory End the World?,” symploke, Volume 29, Numbers 1-2, 2021, pp. 521-534, dml)

Finally, playing the game of theory sustains the world. How to end the world, and open another game, and not do so in the grand style? It amounts to this: I live and am constituted through this world of theory and yet know it is neither just nor capable of generating justice from its own resources. Too many chances have been given, and still the barbarism. Decades of theory and still, here we are in an age of accelerated mass extinctions and exacerbated micro and macro aggressions. It is all too easy for me, from within the privileged space of theory, to say it’s not worth saving; but it is perhaps a worse violence to pretend that this world must be saved. Given that being who one is requires holding on to one’s world, it would be best for theory to accept that its world is ending, and that it cannot and should not be saved. It can no longer be a question of saving the world for theory, or saving theory for the sake of the world. What is left is something like a minimal theory: other than the project of saving the world what remains is the decency of ending the world of theory well. Do “we” hang on to the world we have, keep going as long as we can, and eke out some end days? I think there are some ways in which theory has the resources for the end of the world, but only if it recognizes how much of it is bankrupt and complicit—how much it has been saving itself and its world—and how much other worlds offer.

Conclusion

The truth of the relative. Rather than think of exiting theory to find THE truth of some other world, it is possible to draw from theory to think the truth of worlds. This would not be the relativism of truth but the truth of the relative. What might it be like to look at “the world” from a point of view in which it has no value? Such a project would be counter-apocalyptic. Rather than pre-emptively mourning the world we have now, such that the very possibility of its non-being elicits a desire to save the world at all costs, one might imagine looking at “the world” from the point of view of those for whom it has no value. This is not as metaphysically audacious as it sounds; it happens all the time. There is certainly a world in which theory does not matter, in which the type of thinking and questioning one finds in theory does not matter. This end of the world is theory somehow rendering itself parochial, and perhaps approaching modes of theory in which what “we” do as theory seems oddly mythic, which of course it is. I think the path towards this county-theory or para-theory or hyper-theory is multiple: by thinking of those for whom this world does not matter—the wretched of the earth—by thinking of the capacity within this world to imagine another “we” or another “us,” and then perhaps also imagining that this world that has saved itself at all costs in order to become the world takes up a minor role in the worlds of the cosmos.