Appeal No. 21-2449

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PROTECT OUR PARKS, INC., et al.,
Plaintiffs-Appellants,

v.

PETE BUTTIGIEG, SECRETARY OF THE U.S. DEPARTMENT OF TRANSPORTATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
Hon. Robert Blakey
1:21-cv-02006

PLAINTIFFS-APPELLANTS'
EMERGENCY MOTION FOR A STAY PENDING APPEAL OF DENIAL OF PRELIMINARY INJUNCTION, AND TO EXPEDITE THE APPEAL

NOW COME the Plaintiffs-Appellants, by and through their undersigned counsel, and respectfully move this Court to enter an Order staying the Defendants' activities associated with groundbreaking construction and excavation in Jackson Park in regards to the proposed Obama Presidential Center scheduled to start on August 16, 2021 pending appeal, and expediting the appeal pursuant to Federal Rule of Appellate Procedure 8(a)(2), and in support thereof, state as follows:

REASONS FOR RELIEF REQUESTED

On August 5, 2021, the district court denied Plaintiffs' motion for preliminary injunction seeking to enjoin certain activities associated with groundbreaking for the

Obama Presidential Center ("OPC") sited in Jackson Park with extensive work now scheduled by the Barack Obama Foundation ("Foundation") to begin on August 16, 2021. (Ex. R, Declaration of Robbin Cohen, ¶ 5, (all referenced exhibits are attached to the Rachlis Declaration submitted with this motion) That groundbreaking starts with a deep, extreme, and irreversible excavation and site clearing of a 19.3 acre space located at the heart of Jackson Park, which will tear up this Frederick Law Olmsted masterpiece. (Id., ¶¶ 28, 33). That work will also include the permanent removal of the Women's Garden (a historic resource of Jackson Park) and the closure of its roadways, including the Midway Plaisance, Hayes Drive, Marquette Drive, and Cornell Drive, which are vital links in the transportation network running from Northern Indiana to the Chicago Loop. The City will start work to alter Hayes Drive as soon as the City finalizes the contracts for such work, which will involve incursions into Jackson Park, and lead to the removal of dozens of trees on its eastern and western boundaries. (Ex. F, Rachlis Declaration, ¶ 6)

The City and Foundation have agreed to delay the destruction of trees until after September 1, 2021. However, after September 1, 2021, the Foundation and City will begin systematically to remove hundreds of trees from the 19.3 acre site of the proposed OPC, as well as to accommodate road work for Hayes Drive and other locales. In total, nearly 20% of all trees in Jackson Park will be cut down. This wanton act has a significant impact on migratory birds and nesting practices, at the same time the dust, noise and diminished air quality will compromise public health. Once

those trees are cut down, there is no turning back, as any planted saplings will take a generation at least to mature (if they survive).

On August 5, 2021, the District Court denied Plaintiffs' motion (Ex. EE), stating that Plaintiffs did not meet the standard for injunctive relief; while the order indicates another order would follow, no such additional order has issued. On August 6, 2021, Plaintiffs filed a notice of appeal and Plaintiffs' Rule 62 motion to stay, but that motion to stay has not been ruled upon. Given the OPC's construction start date of August 16, 2021 for excavation work and the September 1, 2021 date for tree removal, Plaintiffs file this emergency motion to stay the District Court's order denying the preliminary injunction and to stay the "groundbreaking" activity and tree removals described above until this Court has had the opportunity to consider and rule upon Plaintiffs' appeal of the denial of preliminary injunction motion, and thereby avoiding the serious harms to the environment and historic resources – irreparable harms to the Plaintiffs and community at large.

I. BACKGROUND

A. The OPC and the Faulty Federal Reviews,

The City of Chicago and Chicago Park District (collectively the "City") delegated to the Foundation the choice of location for what was originally billed as a Presidential Library, but has now been transformed into the OPC. The Foundation chose to build its private development on public trust property, taking 19.3 acres of Jackson Park (Ex. R, Cohen Declaration, ¶ 3) and with it, the closure of the entire transportation system in Jackson Park, which includes ripping up Cornell Drive, the

Midway Plaisance going east, and closing off Hayes and Marquette Avenues. Those losses prompt the unneeded expansion of Lake Shore Drive and Stony Island Avenue to offset the road closures in Jackson Park made solely to pave the way for the proposed OPC. (Ex. BB, Supp. Mitchell Declaration, ¶¶ 6-8) However, all of this activity will lead to the removal at least 800 trees *(see* Ex. L). If that plan goes forward, at least 30 acres in Jackson Park will be lost for the public enjoyment forever, a significant portion of its space, and the beneficial use of the areas of Jackson Park will be permanently and severely compromised. (Ex. E, Mitchell Declaration, ¶¶ 6-7; Ex. CC, Declaration of Grahm Balkany, ¶ 4 & Ex. A thereto)

The proposed OPC triggered several major federal reviews pursuant to the following: (i) Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c) (hereinafter "Section 4(f)") and 23 U.S.C. § 138(a); (ii) Section 106 of the National Historic Preservation Act of 1966, 54 U.S.C. § 306108 (hereinafter "Section 106"); (iii) the Urban Park and Recreation Recovery Act, 54 U.S.C. §§ 200501-200511 (hereinafter "UPARR"); and (iv) the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (hereinafter "NEPA"). This review was required because at least $200 million needed to "improve" the Jackson Park roadway system are federally funded.

All of the aforementioned federal statutes require a comprehensive regulatory review of alternatives in order to determine how to best address the adverse effects and impacts that constructing the OPC will have on environmental and historic resources. These regulatory schemes call for a fixed three-stage mode of analysis: the review must first seek to avoid, then to minimize, and last to mitigate the impacts

of development on environmentally and historically valuable land. These federal reviews are rigorously applied to avoid creating adverse impacts from reasonably foreseeable consequences of a massive project such as the one at bar.

Regrettably, this well-established process was wholly aborted by the Federal Defendants, which responded to the City's and Foundation's efforts to sidetrack any holistic review of the impact of the OPC on environmental, historical, cultural, and safety concerns in Jackson Park. Instead, throughout all public hearings, the government agencies stonewalled anyone who sought to address questions of avoidance and minimization. Then, having ignored these issues, in February 2021, its Finding of No Significant Impact (FONSI) (Ex. 11 to Ex. A) precluded any further NEPA review (and by extension concluded any further review under Section 4(f) review and Section 106).

The crux of Plaintiffs' April 2021 complaint (Ex. A) is that these federal agencies and other Defendants-Appellees consciously ignored the detailed methodology and regulatory framework that required that the government agencies ask whether some other prudent and feasible site could eliminate the multiple threats posed by the Jackson Park site for the OPC. Plaintiffs claim that the Federal Defendants purposefully engaged in the illegal practice of project segmentation, whereby they improperly split the OPC project into two or more smaller pieces, in order not to ask whether any reasonable and prudent alternatives to the Jackson Park site existed, with the OPC's many adverse features outlined above at pages 2-3.

The Plaintiffs claim that such artificial segmentation resulted in agency reports that ignored readily available avoidance or minimization alternatives — most notably an available construction site just to the west of Jackson Park — if the OPC project was taken as a whole. The artificial truncation of the entire review process allowed the various reviews to concentrate exclusively on road construction choices or alternatives only *after* the destruction of land within Jackson Park, including the roadways, trees, lagoons, and other architectural features.

Plaintiffs further allege that the serious environmental impacts associated with the OPC required that an environmental impact statement ("EIS") be prepared.

B. Procedural History

After discussion with opposing counsel regarding scheduling (see Ex. B), consistent with the order, on June 15, 2021, Plaintiffs filed their motion for a preliminary injunction and brief in support. Four declarations were submitted in support (Exs. E-H). On July 15, 2021, defendants submitted 120 pages of opposition (Exs. K, M, Q) and four (4) amicus briefs were filed in support of the Defendants-Appellees' Opposition to Plaintiffs' Motion for a Preliminary Injunction. (Exs. S-V) Declarations were submitted by Robbin Cohen of the Foundation and two from the City/Park District. (Exs. R, N, O) The Plaintiffs submitted a reply brief, along with two additional declarations (Exs. X, BB, CC)

On July 20, 2021, the Honorable U.S. District Judge Robert Blakey heard oral argument. (Ex. W, Transcript) On August 5, 2021, the District Court issued an Order denying the motion for preliminary injunction stating that the Plaintiffs did not meet

the standards for a preliminary injunction. (Ex. EE) Reference to a forthcoming order is made, but as of this filing, has not issued.

A notice of appeal was filed on August 6, 2021 (Ex. FF) and a Rule 62 motion was filed that same day seeking a stay which has not yet been ruled upon. (Ex. GG) Because of the time sensitive nature of the matter, and with the Court having issued an order denying the preliminary injunction motion, Plaintiffs are filing the motion to stay at this time.

II. STANDARD OF REVIEW

In reviewing a motion for a stay pursuant to Federal Rule of Appellate Procedure 8(a)(2), this Court should consider the likelihood of success on appeal, the likelihood of irreparable harm absent the court order, and where applicable, the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Glick v. Koenig*, 766 F.2d 265, 269 (7th Cir. 1985).

III. ARGUMENT

A. The Plaintiffs-Appellants Are Likely to Succeed on Appeal.

To obtain a preliminary injunction, Plaintiffs are not required to show that they are certain to win the case. Here, Plaintiffs established that they have some likelihood to prevail on the merits because the federal defendants have ignored or refused to meet the substantive or procedural steps required under the federal statutes set out above, based on the principles discussed below.

1. Segmentation.

The plain text of these environmental and preservation statutes leaves no doubt as to their unequivocally broad scope:

49 United States Code § 303 of the Transportation Act states:

> It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

Consistent with that mission, Section 4(f) of the Transportation Act (49 U.S.C. § 303(e)(1)(A)) requires the Secretary of Transportation to "align, to the maximum extent practicable, the requirements of this section [§ 303] with the requirements of [NEPA] and section 306108 of title 54, including implementing regulations."

The federal law contains a rich body of law dealing with the principle of **segmentation**, which is embodied in these explicit regulations. In order to ensure meaningful evaluation of alternatives, FHWA regulations require that each action evaluated in an EIS or FONSI:

> (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
>
> (2) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and
>
> (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

23 C.F.R. § 771.111(f)(1)-(3).

"'Piecemealing' or 'segmentation'" is an impermissible approach to the application of these statutes to avoid having to review prudent and feasible alternatives or other statutory obligations. *City of West Chicago v. United States Nuclear Regulatory Comm'n,* 701 F.2d 632, 650 (7th Cir. 1983) (segmentation improper to "avoid the NEPA requirement that an EIS be prepared for all major federal actions with significant environmental impacts.") Agencies segment an overall plan into smaller parts involving action with less significant environmental effects to avoid meeting the full requirements of the law.

Here, for each of the analyses prepared by the Federal Defendants under the various statutes, the Federal Defendants segmented the OPC project so as to avoid application of the critical elements and review of the various statutes to the entire OPC project. Constructing the 235-foot tower in Jackson Park (along with the remainder of the campus) is a massive endeavor whose impact on trees, traffic, birds, and esthetics has already been noted, *supra.* Yet, the Defendants incomprehensibly put blinders that block any sensible review of alternative sites for the entire project, by insisting the Transportation Act, NEPA and NHPA did not apply to the "local" matter of destroying Jackson Park, but only kick in, as the title of the Section 4(f) Report insists, to deal with two issues. First, the reconfiguration of Lake Shore Drive to the east and Stony Island to the west, but *only after* the destruction of Jackson Park is completed, and, second, to the need under the UPARR to locate alternative acreage for some parkland taken for the OPC.

The Federal Defendants offered only these supposed reasons for deeming the construction of the OPC in Jackson Park "local:"

> "The roadway closures and the decision to locate the OPC in Jackson Park are local land use and land management decisions by the City and are not under the jurisdiction of FHWA. These actions **are not** subject to Section 4(f) because:
>
> (1) These actions do not require an approval from FHWA in order to proceed;
>
> (2) These actions are not transportation projects;
>
> (3) These actions are being implemented to address a purpose that is unrelated to the movement of people, goods, and services from one place to another (i.e., a purpose that is not a transportation purpose).

(Ex. 8 to Ex. A at 2 (bold in original.) The same logic was applied to the reviews performed under NEPA and NHPA (*See* Ex. 10 to Ex. A at 26-27 (Environmental Assessment discussing only alternatives to road expansion and UPARR); Ex. 3 to Ex. A at 3 (AOE prepared under NHPA))

Plaintiffs are likely to succeed in regards to establishing that such frail reasons do not remotely support the segmentation of the OPC project. The first statement is a worthless conclusion of law. The second is preposterous, unless a transportation project is construed perversely to apply only to the creation of new roads and not to the removal of old ones. Indeed, it is undisputed that the road expansion on Stony

Island Avenue and Lake Shore Drive are necessitated solely by the creation of the OPC and its road closures that are demanded by the OPC itself. (*See* Ex. 8 to Ex. A at 2, 5) It defies common sense, and makes a mockery of the various regulatory frameworks, to insist that the OPC project as whole is not a transportation project when its mandated road closures and road expansion relate to ground access to the OPC.

The third reason provided is wrong on its face, for whatever the stated reasons of the various defendants, the necessary and foreseeable effect of the entire OPC project is to disrupt transportation patterns in and around Jackson Park. There is neither a fixed beginning nor an observable end to the road project, but a multitude of overlapping removal and expansion activities that cannot operate independently as required under 23 C.F.R. § 771.111(f)(1)-(3).

The case law in both the Seventh Circuit and elsewhere fully supports Plaintiffs' position. For example, *Highway J. Citizens Group v. Mineta*, 349 F.3d 938 (7th Cir. 2003), found that it was proper to segment, even under a hard-look analysis, the construction of the Ackerville Bridge Project from a connecting road because that roadwork project "will not have any substantial effect [sic] on the existing pattern of groundwater flow, concentration of contaminants, nor cause any increase in health risks due to ground water contamination in the vicinity." *Id.* at 946. In that case, the physical separation mandated against treating both projects as one. Those principles dictate the opposite result here, as the admitted purpose, reasonable foreseeability

and physical configuration all dictate that segmentation of the OPC project is inappropriate.

That was exactly the result in *Delaware Riverkeeper Network v. Federal Energy Regulatory Comm'n,* 753 F.3d 1304 (D.C. Cir. 2014), where the Circuit Court refused to allow segmentation of several legs of a pipeline project done at different times because of the combination of their direct and indirect effects: "Given the self-evident interrelatedness of the projects as well as their temporal overlap, the Commission was obliged to consider the other three other Tennessee Gas pipeline projects when it conducted its NEPA review of the Northeast Project." *Id.* at 1319.

It is indeed an error of law for the Federal Defendants to refuse to conduct the required investigation *at all*. Thus, the Federal Defendants fail not only under the hard-look doctrine that routinely requires agencies to look at all the ramifications of their project, but also under the de novo review required in this Circuit. *See Michigan v. U.S. Army Corps. Of Engineers*, 667 F.3d 765, 769 (7th Cir. 2011): "As usual, we review questions of fact for clear error and questions of law *de novo*."

Once it is recognized that the OPC is a single project affecting all of Jackson Park, the government agencies fall under a strict obligation to consider multiple ways to eliminate, minimize, or mitigate the adverse impacts that arise from that project in a strict lexical order: first, there must be an effort to *avoid* the project by moving it elsewhere. If that cannot be done, the next option is to *minimize* the impact of the project; and if that cannot be done, then as a last resort, steps must be taken to *mitigate* the harm. *See* 36 C.F.R. § 800.4-800.6. The federal government only looked

at these options, not for the construction of the OPC or road closures, but only for the road expansions of Lake Shore Drive and Stony Island Avenue. The attorney for the Federal Defendants confirmed this at oral argument, claiming that there was no obligation to look at such alternatives for the OPC and related road closures. (Ex. W at 40; *see also id.* at 36)

2. Failure To Require an EIS.

Plaintiffs also have some likelihood of success on their claim that the federal agencies failed to require that an EIS be prepared. An EIS must be prepared when an EA reveals that a proposed action *may* significantly impact the environment. 42 U.S.C. § 4332(2)(C). The applicable regulations make clear that context and intensity must be considered when looking at "significance." *See* 40 C.F.R. § 1508.27. Here, an EIS is required for numerous reasons under the applicable standards.

First, entire portions of the submitted EA largely ignore and understate present and significant impacts. For example, the EA acknowledges that close to 1,000 mature trees must be cut to make way for the proposed OPC and the related expansion of the roadways. (Ex. 10 to Ex. A at 30). The vast majority of these trees are in good/fair condition, and are mature or near maturity. (Ex. L, Fed. Defs. Ex. 17, Part 1, pp. 189-202)) Yet, the EA and FONSI inexplicably treat that massive transformation of landscape as insignificant and fully mitigated, as if an equal number of saplings were the functional and aesthetic equivalents of the majestic trees they are to replace, only years after the cutting is finished. (Ex. 11 to Ex. A, FONSI at 4). These replacements fail to mitigate the enormous losses in tree coverage that

currently exists. (*See* Ex. E, Mitchell Declaration, ¶¶ 8-11, 15; Ex. BB, Supp. Declaration ¶ 11). The clear-cutting of the 19.3 acres is doubly significant when those acres are located in critical portions of the park and take up significant areas of space. *(Id,*; Ex. CC, Balkany Declaration, ¶¶ 4 & Ex. A thereto).

Second, the severe impact of loss of trees on migratory birds, ambient noise and deteriorated air quality, was largely cut off. (Ex. 10 to Ex. A at 29-34) The Defendants self-imposed mortarium on tree cutting during the current breeding season is a concession of significance and cries out for an EIS as such impacts represent a permanent destruction of the landscape, nesting and migratory paths, and the environmental benefits *in* perpetuity.

Third, other elements of the record meet the definition of significance which require the preparation of an EIS. For example, the applicable regulations note that when considering intensity, the government must consider "[u]nique characteristics of the geographic area" such as "historic or cultural resources, park lands . . . wild and scenic rivers, or ecologically critical areas." 40 C.F.R. §1508.27(b)(3). Those areas are found everywhere in Jackson Park, which is listed on the National Register of Historic Places (as is the Midway Plaisance, and the Chicago Boulevard Historic District), and is an Olmsted masterpiece that has reached its maturity. (Ex. E, Mitchell Declaration, ¶ 8, 11) Within the area, of course, lies the Women's Garden, whose unique historical features are slated for removal in the initial groundbreaking. Its destruction represents a permanent and irreparable harm that cannot be offset by the bare promise to build a substitute garden somewhere else

years later. (Ex. E, Mitchell Declaration, ¶ 7) That concern is reinforced by a second intensity factor that focuses upon OPC projects' adverse effects on "districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places." 40 C.F.R. § 1508.27(b)(8).

Significance also becomes more likely where "the effects on the quality of the human environment are likely to be highly controversial," 40 C.F.R. § 1508.27(b)(4), and when there is "a substantial dispute" about the action's size, nature, or impact, *Friends of the Earth, Inc. v. U.S. Army Corps of Engineers*, 109 F. Supp. 2d 30, 32 (D. D.C. 2000) (citations omitted). Here, these factors are up for grabs as the parties and much of the public is engaged in a fierce and loud dispute about the disruption of traffic patterns, the destruction of trees, the mammoth size of the main OPC building, its awkward placement on the Midway Plaisance, the destruction of key features of Jackson Park, and in particular the wisdom of locating the OPC in an Olmsted public park and its impact on the community. (Ex. E, Mitchell Declaration, ¶ 6; Ex. BB, Supp. Declaration at 13)

An EIS is also required "if it is reasonable to anticipate a cumulatively significant impact on the environment." 40 C.F.R. §1508.27(b)(7). Cumulative impacts result from "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency (Federal or Non-Federal) or person undertakes such other actions." *Id.* § 1508.7. Significant cumulative impacts may occur even if the impacts from individual actions are minor. *Id.*

The point is especially true because the NEPA regulations contain explicit "constructive use" regulations that require federal agencies to consider not just the land occupied by the new project, but also lands that are not occupied but which are subject to serious nuisance-like harms. These various indirect effects are brought within the scope of NEPA under its constructive use determinations, § 774.15, which requires in essence a more comprehensive analysis even when a transportation project does *not* incorporate land from a Section 4(f) property, so long as the proximity of the project generates severe negative impacts on protected activities, features, or attributes protected under Section 4(f). Hence the agency is duty-bound to consider not only the trees that are cut down, but also of those that are damaged, in ways that compromise the ability to provide migratory and local birds to nest, forage, and seek shelter in other trees throughout Jackson Park.

B. The Plaintiffs-Appellants Will Be Irreparably Harmed Without a Stay.

These extensive and disruptive "groundbreaking" activities throughout Jackson Park will cause permanent and irreparable harm to the Plaintiffs and others in the absence of a stay pending appeal. Plaintiffs are all users of Jackson Park, both personally and professionally. Their use comprises of study, appreciation, and use of the landscape itself—including its mature trees, which are part of its fabric—to fully enjoy Jackson Park. For example, Professor Mitchell studies and teaches about this landscape, bringing his University of Chicago landscape history students to Jackson Park, including the area where the planned excavations will occur. (Ex. BB, Mitchell Supp. Declaration ¶ 4) Mitchell uses and enjoys the Women's Garden and Midway

Plaisance, the entire area where the OPC is being located, as well as its relationship to Jackson Park. (*Id.*) He also uses Cornell Drive, Hayes and other historic roads, which will be disrupted (and destroyed) through the work on the OPC. (*Id.*, ¶ 9) The same is true for all plaintiffs, including but not limited to Herb Caplan and Stephanie Franklin, all of whom used and continue to use Jackson Park. (Exs. 4, 5) All of the declarants use and enjoy the roadway system. Through the acts of groundbreaking (and the subsequent efforts) described above, these Plaintiffs and the public will suffer irreparable harm unless the status quo is preserved.

Such harm is recognized by the law. As an initial matter, courts have consistently held that the loss of use of land is presumed irreparable because the land is considered unique. *United Church of the Med. Ctr. v. Med. Ctr. Comm'n*, 689 F.2d 693 (7th Cir. 1982); *see also In re Beswick*, 98 B.R. 904 (N.D. Ill. 1989). The loss created by the impacts of the destruction of Jackson Park and its roadway system falls within such a category. As Professor Mitchell notes, the landscape is mature at this point, and will be irrevocably lost with the destruction of the trees and roadways and addition of construction elements that inexorably alter Jackson Park and its key historic components. (Ex. E, Mitchell Declaration, ¶ 11). Jackson Park works as a whole to form a unique historic resource, now recognized on the National Register of Historic Places, and well known as a grand Olmsted design and as part of the 1893 World's Fair—a historic resource that will be mangled through the groundbreaking activity and tree removals that are not addressed by saying there are more trees and parkland.

The courts have found that the loss of mature trees used by plaintiffs in a national forest is irreparable. *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990) The *Cronin* court noted that the trees proposed to be cut down would not have grown back to their present height until most of the plaintiffs were deceased, thereby adding to the irreparable harm. *Id.* at 445. *See also Committee of 100 On the Federal City v. Foxx,* 87 F. Supp. 3d 191, 205 (D.D.C. 2015)(removal of 200 trees "would inflict a sufficiently severe and irreversible injury to Ms. Harrington and other residents to clear the bar of irreparable harm."); *Friends of the Parks v. Dole,* 1987 WL 18918 (N.D. Ill. Oct. 20, 1987) (loss of trees is irreparable); *Saunders v. Washington Metropolitan Area Transit Authority*, 359 F. Supp. 457, 462 (D.D.C. 1973) ("[p]laintiffs would suffer irreparable injury in the removal of trees from their neighborhood."); *Sequoia Forestkeeper v. U.S. Forest Serv.*, 2021 WL 3129603, at *27-*28 (E.D. Cal. July 23, 2021) (holding that removal of trees creates irreparable harm, and stating that the economic impact that USFS would face due to any delay created by complying with NEPA tips the balance against granting injunctive relief).

C. A Stay Would Serve the Public Interest.

The Supreme Court has made it clear, as has Congress through the various federal statutes at issue, that there is an overriding policy of protecting parkland and the environment. In *Overton Park*, Justice Thurgood Marshall set forth that critical policy as he wrote that "protection of parkland was to be given paramount importance. **The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular**

case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412–13 (1971) (emphasis supplied).

This important public policy has been enforced through the grant of a preliminary injunction: "*Overton Park* and § 4(f) make clear that the ultimate public interest is in the preservation of parklands unless and until it is shown that parklands unavoidably must be used for highway purposes. They may not be used for highway purposes solely because a state's preferred means of financing the cost of construction of a bridge may not be applied to another site if the other site is otherwise feasible and prudent, and the cost of its construction may be otherwise financed." *Coal. for Responsible Reg'l Dev. v. Brinegar*, 518 F.2d 522, 527 (4th Cir. 1975).

Furthermore, courts have recognized that there is a public interest in having Congressional mandates in NEPA carried out accurately, faithfully and completely. *See Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 15 (D.D.C. 1998) ("Therefore, the public interest would be served by having the federal defendants address the public's expressed environmental concerns, as encompassed by NEPA, by complying with NEPA's requirements.").

Importantly, the public interests protected here through the issuance of a stay motion protect against certain outcomes; put differently, a stay acts to preserve a

status quo that would be certain to be severely and permanently disrupted through the various groundbreaking activities. There is no basis in the record to support the need to ignore the undeniably critical concerns and certain harms identified by Plaintiffs in exchange for what are at best speculative and unsupported concerns; the Cohen Declaration (Ex. R) provides no documentation to support the purported harms described, and which ultimately lie more than five years down the road. The suggestion that costs of delays are decisive would lead to virtually all NEPA reviews being scrubbed given their necessary delays. The Cohen declaration also raises issues of available funding for construction (noting only $200 million set aside for a $700 million development) which may impact the ability of the Foundation to proceed. (*Compare Id.,* ¶¶ 39-40 to Ex. DD) It is in the public interest to resolve all such issues *before* destruction of irreplaceable public resources begins.

D. This Court Should Expedite This Appeal.

In order to alleviate concerns or any alleged harm related to a stay, Plaintiffs ask for the appeal to be expedited. Plaintiffs will be prepared to submit their opening brief consistent with a schedule set by this Court (Plaintiffs suggest a date of fourteen days after this motion is resolved, and would file a reply brief within seven to ten days after the Defendants have submitted their brief in opposition to Plaintiffs' opening brief).[1]

[1] Adjustments in this schedule may be appropriate to take into account any further orders from the District Court as referred to in the August 5, 2021 denial order.

IV. CONCLUSION

Based on the foregoing, the Plaintiffs-Appellants respectfully request that this Court enter an Order staying the groundbreaking construction activity and tree removal at the OPC site pending appeal and expedite this appeal pursuant to Federal Rule of Appellate Procedure 8(a)(2).

Dated this 9th of August, 2021.

Respectfully Submitted,

PROTECT OUR PARKS, INC.; NICHOLS PARK ADVISORY COUNCIL; STEPHANIE FRANKLIN; SID E. WILLIAMS; BREN E. SHERIFF; W.J.T. MITCHELL; and JAMIE KALVEN,

Plaintiffs-Appellants

By: /s/ Richard Epstein
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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2021, I electronically filed the foregoing **Plaintiffs-Appellants' Emergency Motion For A Stay Pending Appeal Of Denial Of Preliminary Injunction, And To Expedite The Appeal** with the Clerk of the United States District Court for the Northern District of Illinois, using the CM/ECF system. Copies of the motion were served upon counsel of record via the CM/ECF system.

/s/ Richard Epstein