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 BUTTIEGIEG, 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 PROTECT OUR PARKS, INC., *ET AL.*'S OPENING BRIEF

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2449

Short Caption: Protect Our Parks, Inc., et al. v. Pete Buttigieg, Secretary of the U.S. Dept. of Transportaion

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Protect Our Parks, Inc., Nichols Park Advisory Council, Stephanie Franklin, Sid E. Williams, Bren A. Sheriff, W.J.T. Mitchell, and Jamie Kalven

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Professor Richard Epstein and Rachlis Duff & Peel, LLC (Michael Rachlis)

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ Richard A. Epstein Date: August 9, 2021

Attorney's Printed Name: Richard A. Epstein

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Signature: /s/ Michael Rachlis Date: August 9, 2021

Attorney's Printed Name: Michael Rachlis

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Stephanie Franklin, Jamie Kalven, W.J. T. Mitchell, Nichols Park Advisory Council, Protect Our Parks, Inc.,

Bren A. Sheriff, Sid E. Williams

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Not Applicable

Attorney's Signature: /s/ Thomas G. Gardiner Date: August 24, 2021

Attorney's Printed Name: Thomas G. Gardiner

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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Not Applicable

Attorney's Signature: Catherine M. Keenan Date: August 27, 2021

Attorney's Printed Name: Catherine M. Keenan

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☑

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JURISDICTIONAL STATEMENT

The district court has subject matter jurisdiction over the underlying action pursuant to 28 U.S.C. § 1331 (federal question), as well as 28 U.S.C. § 1367(a) (supplemental jurisdiction). The federal statutes involved in the case are 5 U.S.C. § 706, 23 U.S.C. § 138(a), 42 U.S.C. §§ 4321-4347, 49 U.S.C. § 303(c), 54 U.S.C. § 306108, and 54 U.S.C. §§ 200501-200511.

The United States Court of Appeals for the Seventh Circuit has appellate jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1). On August 5, 2021, the district court entered an order denying Plaintiffs' motion for preliminary injunction, with an additional explanation for the decision issued on August 12, 2021. Plaintiffs timely filed a notice of appeal on August 6, 2021.

STATEMENT OF ISSUES

Did the District Court err in denying Plaintiffs' request for preliminary injunction in finding no likelihood of success when, *inter alia*,

(i) the Obama Presidential Center is a unified and intertwined project supported by federal funds and approvals;

(ii) the Court applied a no-look deference standard to the federal agencies;

(iii) the Court ignored the destruction of hundreds of trees, migratory bird habitats and other concerns which necessitate an environmental impact statement;

(iv) the Court failed to apply a standard requiring that Plaintiffs only show a likelihood of success that is better than negligible; and

(v) the Court failed to hold an evidentiary hearing when contested declarations were presented?

INTRODUCTION

Both the letter and spirit of longstanding federal laws are designed to offer steadfast protection to the environment, to parkland and to unique historic resources. Those protections have utterly broken down in this case as the Defendants entirely ignore this futile development project's long-term environmental and public health implications through its destruction of almost 1,000 trees, along with the habitat for birds and historic roadways. In a report by the US Forest Service, "urban trees within the land sector collectively represent the largest net carbon sink in the United States, offsetting more than 11 percent of total GHG emissions in 2019 (U.S. EPA 2021)." *See* https://www.fs.fed.us/nrs/pubs/ru/ru_fs307.pdf As significantly, the damage to the roadways will increase traffic pollution, putting people at greater risk for ozone and particulate pollution.[1] Put differently, the health and safety of the human and natural environment has been swept aside by the Defendants who in the classic "Chicago Way" have muscled their way into Jackson Park in order to build the massive Obama Presidential Center (OPC). The initial construction work on that project has begun and is destroying Jackson Park, already impacting the Women's Garden, wildlife, birds, trees and the community. To achieve that dubious honor, the

[1] According to the American Lung Association, ozone and particulate pollution are linked to increased risk of lower birth weight in newborns.

Defendants have shredded the Congressionally approved regulatory framework that requires a thorough examination of prudent and feasible alternatives enacted in order to avoid such wholesale and wanton destruction.

The District Court's result-oriented rejection of Plaintiffs' motion for preliminary injunction is now on appeal. Its superficial reasoning showed undue deference to the Defendants in reaching the bald conclusion that Plaintiffs were unlikely to succeed on their federal claims against these unprecedented actions. In so doing, the District Court blessed an artificial fragmentation of a single project into small pieces that let the various reviews concentrate exclusively on road construction only *after* the piecemeal destruction of Jackson Park. As described further below, the District Court's deference to the federal agencies is neither appropriate nor earned, for its artificial segmentation of a unified project circumvented any meaningful environmental assessment of the problems as it misdirected the various mandatory reviews to concentrate exclusively on road construction only *after* the destruction of Jackson Park, including its roadways, trees, lagoons, and other interrelated architectural features. Its opinion renders meaningless the regulatory framework at issue, and it reduces the federal judiciary to a mere spectator on all environmental and preservation issues, thereby setting remarkably flabby precedent that will undercut environmental protection and historical preservation around the nation in the years to come.

STATEMENT OF THE CASE

A. Relevant Factual History.

Today Jackson Park is in a regrettable state of historical transition, with many of its distinctive features under attack. Yet at the same time, Jackson Park – the most visited park on the South Side of Chicago – is a historical and environmental landscape masterpiece, designed by the greatest American landscape architect, Frederick Law Olmsted. It is comprised of various elements including the Museum of Science Industry and lagoons. Only about 200 acres out of its 551 acres of the park are actual traditional green space, as the remainder is largely devoted to two large bodies of water (the west and east lagoons), limited access areas (*i.e.*, golf course), buildings and its critical roadways and vistas that include important transportation routes such as Cornell Drive, the Midway Plaisance, Marquette Drive and Hayes Drive. [Dkt. 80, Ex. 12, Balkany Decl.; Dkt. 31-1, Ex. 2, Mitchell Decl.] Olmsted's unique conception for Jackson Park had been continually respected since the Park's founding in 1871, through prudent maintenance and updates of its landscape, roadways and vistas.

All that changed in mid-August 2021 when heavy construction equipment made its initial incursion into Jackson Park, followed on September 1, 2021 by the arrival of tree cutting contractors who within days made wood chips out of hundreds of trees. This appeal arises from the District Court's denial of Plaintiffs' motion for a preliminary injunction, and seeks to protect what remains of the original design pending the review of the case on the merits, and ultimately to undo as much of the

recent destruction of the park and restoring what remains in compliance with various federal and state laws.

This planned destruction of Jackson Park has its roots in 2016, when the Obama Foundation ("Foundation") prevailed upon the City of Chicago ("City") to implement its plan to build its private development on public trust property by turning over 19.3 acres of Jackson Park to the Foundation. [A.068-A.069, Cohen Decl.] That end could only be accomplished by reshaping the entire historic transportation system in Jackson Park, which includes ripping up Cornell Drive and the Midway Plaisance going east, as well as closing off Hayes Drive and Marquette Drive. [Dkt. 1-1, Ex. 2, 10/31/18 Ordinance at 85903] From the start, the City and the Foundation recognized that the OPC could be built at its proposed location only if Lake Shore Drive and Stony Island Avenue were expanded in an effort to offset some of the traffic losses attributable to the necessary road closures in Jackson Park. Widening these two roads is narrowing Jackson Park on its east and west side, by lopping off yet another ten (10) acres of its land. [A.091-A.096, Mitchell Supp. Decl.] Put differently, from the outset the OPC envisioned a large and involved transportation project that directly led the loss of at least thirty (30) acres in Jackson Park, leaving it permanently and severely scarred. [A.092-A.093, Mitchell Decl., ¶¶ 6-7; A.081-A.083, Balkany Decl., ¶ 4] Additionally, it was known at the time that completion of the OPC would necessarily require the removal of at least eight hundred (800) trees [Dkt. 46, Fed. Defs. Resp. Br. in Oppn. to Pls. Mot. for Prelim.

Inj., p.14], which in turn would create significant negative impacts on migratory birds, wildlife and the human environment.

The creation of these massive "improvements" was backed by some $200 million federal dollars which in turn triggered several major federal regulatory reviews and permitting requirements under the following statutes: (1) 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); (2) Section 106 of the National Historic Preservation Act of 1966, 54 U.S.C. § 306108 (hereinafter "Section 106"); (3) the Urban Park and Recreation Recovery Act (hereinafter "UPARR"), 54 U.S.C. §§ 200501-200511; (4) the National Environmental Policy Act (hereinafter "NEPA"), 42 U.S.C. §§ 4321-4347; (5) permitting requirements under the Section 404 of Clean Water Act and Section 408 of the Rivers and Harbors Act.

This suite of federal statutes includes the requirement of comprehensive regulatory reviews of alternatives in order to address the anticipated adverse effects and impacts that the OPC development would have on environmental and historic resources. These regulatory schemes generally call for an analysis in this fixed three-stage sequence: the proposed project must first seek to avoid, then to minimize, and only, if avoidance and minimization are not possible, to mitigate all adverse impacts, both direct and reasonably foreseeable, of development on environmentally and historically valuable land. However, these were not performed relative to large parts of the OPC project.

1. The OPC Federal Review Process Started with Section 106 Review.

The federal review process at issue here was initiated in December 2017, with the Section 106 process ostensibly conducted by Defendant Federal Highway Administration ("FHWA") (although largely controlled by the City). To perform that review, the FHWA defined the scope of the "undertaking" in order to determine the adverse effects. Here, the "undertaking" was initially and correctly defined to include "the construction of the OPC in Jackson Park by the Obama Foundation, the closure of roads to accommodate the OPC and to reconnect fragmented parkland, the relocation of an existing track and field on the OPC site to adjacent parkland in Jackson Park, and the construction of a variety of roadway, bicycle and pedestrian improvements in and adjacent to the park." [*See* Dkt.1-1, Compl. Ex. 3, January 16, 2020 Assessment of Effect Report at 1] The "undertaking" created adverse effects on Jackson Park, the Midway Plaisance "because it will alter, directly or indirectly, characteristics of the historic property that qualify it for inclusion in the National Register." [*Id.* at 40, § 3.5.2.1]

Notwithstanding this explicit determination that the undertaking included the entire OPC project, the Federal Defendants persistently refused to look at alternatives to avoid, minimize or mitigate the park-wide adverse effects of this vast undertaking. [*See* Dkt. 1, Compl., ¶ 200]

2. Review Under Section 4(f) of the Department of Transportation Act.

The unified nature of the OPC project was emphatically acknowledged in the Section 4(f) report, which described the expansion of Lakeshore Drive and Stony

Island Avenue, and the closure of other roads as the necessary and foreseeable consequences of placing the OPC exactly where the Foundation demanded that the City place it. [Dkt. 1-2, Compl. Ex. 8 at 2] Notwithstanding this history, the Section 4(f) report ignored the inter-relationship between the OPC, the road closures, and road expansions, claiming that the review of alternatives need only look at the expansion of Lake Shore Drive and Stony Island Avenue. The report baldly concluded that all other actions were "local" and thus 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)."

[*Id.* (emphasis in original)]

Immediately, thereafter, in its discussion of UPARR, the Section 4(f) Report made the equally categorical statement that "[t]he UPARR decision is not a transportation project," because "it has a purpose unrelated to the movement of people, goods and services from one place to another." *Id.* Having adopted such reasoning, these federal reviews refused to look at alternatives to destruction of parkland in Jackson Park from either the placement of the OPC or the related road closures. That narrow review of alternatives approved the preferred alternative of expanding of both Lake Shore Drive and Stony Island – as the Foundation and City demanded from the outset.

3. Environmental Assessment Under NEPA.

The Environmental Assessment was released at the end of September 2020 – in the height of the first wave of the COVID 19 pandemic — with virtually no warning or discussion. [Dkt 1-2, Ex. 10] The EA first acknowledged the plethora of adverse impacts, which it then promptly dismissed as temporary, insignificant and/or mitigated — a theme echoed by the Defendants throughout the preliminary injunction proceeding.

Trees. Mature trees in Jackson Park took one hundred (100) years or longer to reach full size. [A.094-A.095, Mitchell Supp. Decl., ¶ 11] These large trees have long provided safe nests to local and migratory birds. They absorb large amounts of water that help stabilize the local environment, and they remove large amounts of carbon dioxide from the air. Countless recent studies speak to their critical role in maintaining the fragile ecological balance. *See, e.g.*, The Morton Arboretum, Benefits of Trees, available at https://mortonarb.org/plant-and-protect/benefits-of-trees/ ("Numerous scientific studies have shown that trees promote health and well-being by reducing air pollution, encouraging physical activity, enhancing mental health, promoting social ties, and even strengthening the economy."). Yet at no point does the EA (nor its referenced Tree Memorandum [Dkt. 31-1, Ex. 6, AE Appendix D, Trees Technical Memorandum]) explain why the massive impacts from clear cutting about 800 mature are "insignificant," let alone point to a single instance anywhere in the United States where a similar determination has ever been made, especially in a city that is in fact *tree poor*. By no stretch can this massive destruction of trees be

dismissed as *de minimis*. [Dkt. 80, Ex. 10, Mark Rivera, "Chicago tree canopy dwindling; calls for equity, tree planting in underserved communities," June 30, 2021; *see also* A.064-A.065, Mitchell Decl., ¶¶ 8-9; A.094-A.095, Mitchell Supp. Decl., ¶ 11]

During the injunction proceeding, the Federal Defendants suggested that about forty percent (40%) the targeted trees were in a "declining" condition. [Dkt. 46, Fed. Defs. Resp. Br. in Oppn. to Pls. Mot. for Prelim. Inj., p. 14] However, their own study identifying the trees to be removed reflects that ninety-two percent (92%) of trees were *in good or fair condition* [Dkt. 61-22, Fed. Defs. Ex. 17, Part 1, Appendix D-1], and that 93% of which were mature or semi-mature when totaling such identifications against entire number of trees listed. [*Id.*]

That reference to "temporary" harm did not account for the length of time before that next generation of trees reach maturity. No new trees can be replanted at the site during construction, which the Foundation estimates to last a minimum of four (4) years and two (2) months, given the proposed OPC's anticipated opening in the fall of 2025. [*See* A.067, Cohen Decl., ¶ 5] Nevertheless, its optimistic timeline does not make allowances for any future glitches caused by storms, floods, strikes, accidents at the site, and faulty coordination of the extensive and ongoing roadwork. [*See* A.084-A.085, Balkany Decl., ¶¶ 9-12] The inevitable vagaries in construction could easily lead to a five- to ten-year delay before *any* new trees could be planted. The EA finding also ignored the extensive length of time for such trees, once planted, to reach maturity. For example, the one-caliper trees are more likely to take root, but will take decades to mature. The four-caliper trees are less likely to take root,

even if the survivors mature sooner. Thus, the return-to-the-current tree population, if it ever occurs, could easily take several generations. Consequently, the destruction of these trees was far from "insignificant" or "temporary." It was extensive and manifestly irreparable.

Migratory Birds. The systematic risks to migratory birds are compounded by the removal of tree covering whose synergistic effects cannot be ignored. *See* 40 C.F.R. § 1508.27(b)(8).[2] Admitting significance to both trees and migratory birds, the Defendants banned the cutting of trees until the end of *this and only this,* migratory bird season, which it wrongly stated ended as of September 1, 2021. In fact, the fall migration season actually runs from August 15 through November 30, 202; indeed, the matter is so serious that avian researchers called for lights out over Chicago to help protect the 16,000 birds per hour that were expected to fly over the city. https://www.nbcchicago.com/news/local/researchers-call-for-lights-out-alert-to-protect-thousands-of-birds-migrating-over-chicago/2606015/. Now, not only are many of these trees lost for posterity, the planned construction work in and around Jackson Park continues to create noise and dust that will drive large numbers of migratory birds away from the nearby trees. In addition, the erection of the 235-foot OPC tower building perched over to the Mississippi flyway poses the risk of a new and permanent obstacle, still avoidable, but only if construction on the OPC is halted.

[2] The provisions of NEPA are implemented by regulations issued by the Council on Environmental Quality ("CEQ"), 40 C.F.R. § 1500 *et seq*. While CEQ issued revised NEPA regulations in 2020, the FHWA completed its NEPA analysis in 2019. Accordingly, the applicable NEPA regulations for this matter are the 1978 CEQ regulations.

Road Construction and Traffic Patterns. As with many Olmsted landscapes, the elaborate network of roads forms an integral part of the overall design [*see* A.092-A.095, Mitchell Supp. Decl., ¶¶ 5-9, 11] both for its scenic vistas and its transportation functions. The requisite road closures and diversions are already compromising the use of the roadway system, and pervasively impaired all activities in Jackson Park for the public. [*Id.*] The road closures will continue to create massive disruptions in traffic, with stalls and delays for local and interstate traffic for years, magnified by smog and other environmental detriments.

Worse, the EA relied upon flawed methodologies to assess traffic issues. For example, the EA offered travel time comparisons, without first explaining what counts as an "acceptable" travel time. Similarly, Section 3.2.2 of the EA conclusorily denies any direct traffic impacts from the road closures to Cornell Drive and Midway Plaisance South, which has shifted traffic to other routes, which are already heavily traveled, but does little to address the actual significant delays created. [Dkt. 1-2, Compl. Ex. 10 at 12-14] Studies using average speeds were not performed. The report also ignored any special events at the proposed OPC, whose peak load activities could generate significant parking and traffic congestion. Instead, the 2020 Traffic Congestion Technical Memorandum relies upon artificially low traffic and parking numbers, and erroneously assumed a high average auto occupancy value, without fully considering other multimodal factors (transit, pedestrian/bicycle, taxi/Uber/Lyft, school bus, etc.). [Dkt. 61-40, Fed. Defs. Ex. 21, Part 6]

Having ignored and/or misapplied these issues, in February 2021, the federal agencies published a Finding of No Significant Impact ("FONSI"), which accepted the conclusions of the EA, as well as the Section 4(f) and Section 106 reviews. [Dkt. 1-2, Compl. Ex. 11, FONSI at 1]

B. Procedural History.

1. Plaintiffs' Complaint.

On April 14, 2021, Plaintiffs filed their Complaint [Dkt. 1, Compl.] challenging the federal agencies and other Respondents for consciously ignoring and/or manipulating the detailed regulatory framework, which requires these governmental agencies to examine the possibility of some prudent and feasible alternative site for the OPC outside Jackson Park.

2. Motion for Preliminary Injunction.

Shortly after filing of the Complaint, Plaintiffs were unable to reach a voluntary standstill arrangement with the Defendants. Therefore, on June 15, 2021, Plaintiffs filed their motion for preliminary injunction, seeking to preserve and protect the community's threatened environmental and historical resources pending the review of their case on the merits. [Dkt. 30] The preliminary injunction was supported by three separate declarations, and a supporting memorandum. [Dkts. 31, 31-1]

The District Court first entered an agreed-upon briefing schedule which included a July 15, 2021 date for Defendants' response brief. Later the District Court unilaterally altered the schedule to allow each of the three responding groups of

Defendants to file separate forty-page opposition briefs, and simultaneously (without any party requesting) extended the time for the Defendants to submit their response brief and shortened the reply time from the Plaintiffs. [Dkt. 38, 7/8/21 Minute Entry] The Court further stated that it would issue a ruling based on written submissions. *Id.* Plaintiffs requested oral argument, and the District Court provided only one date prior to mid-August, which date was also before Defendants were ordered to provide their response briefs. Plaintiffs accepted the date, and oral argument was held on July 20, 2021 [A.097-A.174, 7/20/21 Transcript of Proceedings] (just before oral argument, the Defendants provided their response briefs [Dkts. 46, 47, 48]). Subsequently, on July 30, 2021, the Plaintiffs submitted their reply brief along with two declarations contesting Defendants' declarations, and noting the propriety of an evidentiary hearing. [Dkt. 80, Pls. Reply Brief, at 40]

3. The District Court Denies Plaintiffs Motion for Preliminary Injunction.

On August 5, 2021, the District Court issued a one sentence Order denying Plaintiffs' motion for preliminary injunction, and stating that an opinion would follow, which (although not served through the ECF system) it issued on August 12, 2021, providing additional reasons for its August 5, 2021 order. [A.002-050, 8/12/21 Dist. Ct. Opinion] That opinion only addressed the Plaintiffs' likelihood of success on the merits, which it found unlikely based on Plaintiffs' claims under NEPA, Section 4(f), NHPA, UPARR, and the Clean Water Act and Rivers and Harbors Act, by deferring exclusively to the Federal Defendants, and accepting at face value their

denial that they had engaged in an improper segmentation of a unified federal project.

4. Plaintiffs Appeal to the Seventh Circuit and Seek a Motion to Stay.

Plaintiffs filed a notice of appeal on August 6, 2021 seeking a stay, which this Court denied on August 13, 2021, followed by per curium decision issued on August 19, 2021. [A.051-060, 8/19/21 Seventh Cir. Opinion]

SUMMARY OF ARGUMENT

The District Court erred in its interpretation of every relevant precedent addressing NEPA, Section 106, and Section 4(f) to allow the federal agencies to skirt the required rules of segmentation by engaging in an unprecedented "no-look" review of the OPC project. In taking that course, this Court's determination on the motion to stay suggests that the Defendants can prevail simply because they defined their project in such a narrow fashion (*i.e.*, as construction of the OPC in Jackson Park) that, by definition, left no feasible alternative for consideration outside of Jackson Park. However, this slapdash standard of review flatly contradicts the operative test set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), which states that:

> [T]he generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary's decision is entitled to a presumption of regularity. But that presumption is not to shield his action from a thorough, probing, in-depth review.

Overton Park, 401 U.S. at 415 (citations omitted).

The District Court necessarily deviated from the standard of review of *Overton Park* failing to cite, let alone discuss, that decisive authority. So did this Court when it rejected Plaintiffs' motion to stay the construction activities with a useless proposition: "The City's objective was to build the Center in Jackson Park, so from the Park Service's perspective, building elsewhere was not an alternative, feasible or otherwise." [A.058, 8/19/21 Seventh Cir. Opinion at 8] By that strained logic, the Supreme Court could have easily decided *Overton Park* for the Department of

Transportation: "The federal government's objective was to build a highway through Overton Park, so that from its perspective, building elsewhere was not an alternative, feasible or otherwise." But this truism simply cannot state the law. This precedent would allow any applicant for federal funding or approval to define away any alternatives by just narrowing the description of the project and its purpose. The question in this case was where on the South Side, not where in Jackson Park, alternative sites were available to build the OPC, so as to avoid and/or minimize adverse effects on parkland, environmental, and historic resources. Similarly, the operative question in *Overton Park* was where to place the freeway in Midtown Memphis, which was a task far more challenging than locating a free-standing presidential center, given that any alternative highway would have to go through business and residential neighborhoods.

In ruling against Plaintiffs, the District Court dodged its obligations by adopting a form of abject deference manifestly inconsistent with *Overton Park* and its progeny in several critical dimensions. To start, the District Court allowed the Defendants to use an impermissibly narrow definition of a major federal action that necessarily dismembered Jackson Park solely to escape examining any alternatives for the OPC outside of Jackson Park. Next, the District Court shunned *any* substantial inquiry into the Defendants' choices, at the same time ignoring the intentionally interconnected nature of the OPC project. This flawed effort infects the entirety of all federal reviews here and the District Court's analysis. Such deference allowed the District Court to conclude, improperly, that the Plaintiffs could not

prevail on the merits in their demand relative to their various challenges to the failed reviews, as well as the failure to prepare an EIS. The District Court also committed other errors that would, at a minimum, necessitate further proceedings on the preliminary injunction.

STANDARD OF REVIEW

An appellate court reviews a district court's grant or denial of a preliminary injunction in three ways: first, by asking whether the district court's findings of fact were clearly erroneous; second, by reviewing its balancing of factors for an abuse of discretion, and, third, by reviewing its legal conclusions *de novo*. *Meridian Mut. Ins. Co. v. Meridian Ins. Group, Inc.* 128 F.3d 1111 (7th Cir. 1997) (reversing denial of motion for preliminary injunction) (citing *Grossbaum v. Indianapolis Marion County Building Authority*, 100 F.3d 1287, 1292 (7th Cir.1996), *cert. denied,* 520 U.S. 1230 (1997) (citations omitted).

ARGUMENT

I. THE DISTRICT COURT'S DENIAL OF A PRELIMINARY INJUNCTION IGNORED THE SETTLED LAW REQUIRING THE COURT "TO ENGAGE IN A SUBSTANTIAL INQUIRY" OF THE PLAINTIFFS' CONTENTIONS UNDER THE SUPREME COURT'S *OVERTON PARK* DECISION.

The District Court only addressed the question of whether the Plaintiffs had established that they are likely to succeed on the merits. [A.049, 8/12/21 Dist. Ct. Opinion at 48]. The District Court expressly failed to address any other issues raised by Plaintiffs that are part of the complete injunction analysis: whether an injunction is needed to address some irreparable harm, whether the balance of equities favors Plaintiffs, and whether issuing the injunction advances the public interest. Plaintiffs note that the record reflects that Plaintiffs presented evidence on all of those issues, including but not limited to the fact that: (a) the destruction of at least eight hundred (800) trees constitutes irreparable harm; (b) that the balance of harms favored the grant of the injunction as there was certain harm to the environment and otherwise; that dominant fact far outweighs conclusory claims of economic development from locating the OPC in Jackson Park, which will, in fact, strangle economic development on the South Side of Chicago based on location and by blocking traffic from both the Chicago Loop and Northern Indiana; and (c) public interest favors enforcement of the federal laws and policies pending review, particularly when it implicates the health and welfare of the human and natural environment. Since the District Court made no determinations whatsoever on those issues, Plaintiffs' brief focuses only upon the District Court's single determination.

This Court has held that "[a] party moving for preliminary injunctive relief need not demonstrate a likelihood of absolute success on the merits. Instead, he must only show that his chances to succeed on his claims are 'better than negligible,'" a threshold the Court has characterized as low. *Valencia v. City of Springfield, Illinois,* 883 F.3d 959, 966 (7th Cir. 2018). The District Court failed miserably in applying that threshold to the matter at bar. The District Court made no specific findings of fact, but even if it did, those and its legal conclusions (which are reviewed *de novo*) are erroneous and require reversal of the denial of Plaintiffs' preliminary injunction request.

A. This Court Grievously Misconstrued the Applicable Law by Concluding that the Federal Agencies' Plan Was Not a Form of Segmentation Prohibited Under NEPA, Section 106, and Section 4(f).

1. The record establishes that the OPC project is an integrated project including all major roads in Jackson Park and the road expansions of Lake Shore Drive and Stony Island Avenue.

The District Court's opinion is wrongly premised on treating the four (4) roads in Jackson Park and the expansion of Lake Shore Drive and Stony Island Avenue as separate projects. The description of that project is given with the Notice of Final Federal Agency Action on Proposed Transportation Project in Illinois, 86 Fed. Reg. 8677 (Feb. 8, 2021), which speaks of one project:

> The proposed construction along Lake Shore Drive, Stony Island Avenue, Hayes Drive, *and other roadways* in Jackson Park and the construction of proposed trails and underpasses in Jackson Park, Cook County, Illinois. (Emphasis added).
>
> Lake Shore Drive (U.S. Route 41) will be widened to the west to provide an additional southbound travel lane

> between 57th Street and Hayes Drive. To accommodate the additional travel lane, the 59th Street Inlet Bridge will be widened and modifications at the intersections of 57th Street, Science Drive, and Hayes Drive are proposed. Hayes Drive will be reconfigured to remove existing on-street parking to provide two travel lanes in each direction with minimal widening. Stony Island Avenue will be widened to the east to accommodate additional through lanes and turn lanes at cross-street intersections. Proposed bicycle and pedestrian accommodations include the construction of four underpasses within Jackson Park. Proposed trails and connections along Cornell Drive, Hayes Drive, and Marquette Drive will also be constructed.

The "other roadways" referred to in the first paragraph above include Cornell Drive and the Midway Plaisance going east. That characterization is confirmed in the second paragraph above, for the only way that trails and connections can be constructed is to close Cornell Drive, including the east bound lanes from the Midway Plaisance that now lead into Lake Shore Drive. Additionally, other historic transportation roads and vistas comprising Jackson Park, such as Science Drive (which is referenced above), run off of Cornell Drive to provide access to the parking under the Griffin Museum of Science and Industry. Moreover, there is no delineation of any work inside Jackson Park that would fall *outside* of this description, and certainly none that would limit the project description to cover *only* the reconfiguration of Stony Island Avenue and Lake Shore Drive.

Separately, the federal reviews themselves recognized the unitary and wholistic nature of the OPC project. The Section 106 review defined the "undertaking" at issue was the entire OPC project. The Section 4(f) report admits and recognize that the expansion of Lake Shore Drive and Stony Island Avenue is

properly "related" — indeed is proximately caused by — the OPC. "The need for the [Federal Highway Administration] action [which is the expansion of Lakeshore Drive and Stony Island] arises as a result of changes in travel patterns caused by the closed roadways." [Dkt. 1-2, Compl. Ex. 10 at 12]

Nonetheless, the scope of the OPC project is not recognizable from the narrow description offered by this Court or the District Court. The following sentences are key:

> The Federal Highway Administration approved construction of new roadways to make up for the roadways the City was to close. . . .
>
> The City's construction plans also required closing a few local roadways near the location where the City is to be built. The City was free to close these local roads without federal approval, but when it proposed widening other streets to make up for the closures and sought federal funds to do so the Highway Administration stepped in under Section 4(f) of the Transportation Act of 1966.

[A.052, A.053, 8/19/21 Seventh Cir. Opinion at 2, 3; *also see,* A.038, A.040-041, 8/12/21 Dist. Ct. Opinion at 37, 39-40]

These sentences advance a false narrative this costly project would have been approved even if the proposed OPC had been slated to be built outside of Jackson Park. But that fanciful rewriting of history wholly ignores the description in the Federal Register, the Federal Reports, none of which should act to preclude an injunction pending a review and resolution of Plaintiffs' Complaint on the merits.

As an initial matter, the idea that the expansion is an effort to "make up" for the closures is itself an admission – not a defense to – the interrelationship and proximate cause of the road closures and road expansion. The "make up" is required

for the OPC project to proceed, a situation far removed, for example, from which was erecting suicide barriers on a bridge, which the D.C. Circuit held was not a transportation project. *National Trust for Historic Preservation in U.S. v. Dole,* 828 F.2d 776 (D.C. Cir. 1987).

Second, the passage grossly understates tight connections between the OPC project and roadways. The four (4) so-called "local" roads left unnamed include these key arteries: the Midway Plaisance going east, Cornell Drive going north and south, Hayes Drive and Marquette Drive going east and west. None of these roads are by any stretch of the imagination local, as Cornell Drive forms part of the road that links Interstate 90 to Lake Shore Drive. Physically, none of them are lined with any houses or businesses. They all run through Jackson Park where they serve as part of a unified network of roads that provides meaning to Olmsted's original vision that treats these roads as key constituents to urban parks, which in this instance connects Northern Indiana to the Chicago Loop.

An explicit identification of the roads being closed brings into sharp focus the interrelationship of all aspects of this transportation project, which is generally described in the Section 4(f) Report and EA. Cornell Drive has six (6) lanes, three (3) in each direction, and it must handle local and commuter traffic in the morning and afternoon rush hours. The Midway Plaisance going east from Hyde Park has three (3) lanes as well. The junction of the Midway Plaisance and Lake Shore Drive is currently subject to massive delays during weekday rush hours. Cutting the carrying capacity of the Midway Plaisance in half will result in enormous delays at peak hour

times. On a daily basis, large numbers of cars and buses access DuSable via Lake Shore Drive to reach the burgeoning activities for literally thousands of University of Chicago students, physicians, employees, and patients. Specifically, the University of Chicago Laboratory Schools, the Law School, the School of Social Work, and the University of Chicago Hospitals, among others, are located on the Midway Plaisance. If the cars and buses are forced to travel south, then traffic will back up dramatically. On the north side of Jackson Park, the timed turn-off from Lake Shore Drive to the Midway Plaisance will be shut down, thereby forcing people to exit either as far south as 79th Street (where they will then have to battle heavy traffic because of the closure of Cornell Drive) or north at the 47th Street exit (which has a stop sign to make way for northbound traffic at the same junction). That backup in traffic will result in even further congestion. [Dkt. 1-2, Compl. Ex. 8, December 18, 2020 Final Section 4(f) Evaluation at 3, 5-7.]

2. The extensive work in Jackson Park is a major federal program or project covered by NEPA, Section 106, and Section 4(f).

Pursuant to 40 C.F.R. § 1508.18 (2003), a major federal action "includes actions with effects that may be major, and which are *potentially* subject to Federal control and responsibility." (Emphasis added.) "Actions include new and continuing activities, including projects and programs entirely or *partly* financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17)." 40 C.F.R. § 1508.18(a) (emphasis added)). Additionally, the covered "[a]ctions include the circumstance where the responsible officials fail to act and that

failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action." 40 C.F.R. § 1508.18.

The massive actions needed to build the OPC in Jackson Park cannot be considered as anything other than a major federal project, backed by millions of federal dollars. In order to deny that conclusion, the District Court assumed that the federal monies flowing in abundance to finance the roadwork in Jackson Park were dedicated *only* for use on Stony Island Avenue and Lake Shore Drive. However, money is in fact fungible, particularly on an interconnected project such as the one at bar.. For example, the expansion of the road is required by and intertwined with shutting down half of the Midway Plaisance going east, done solely to accommodate a demand from the Foundation to place the OPC further north where people would get a better, but still somewhat cockeyed, view of the OPC tower from the west end of the Midway Plaisance. From this perspective, the work on the OPC unquestionably is a major federal project under NEPA, an "undertaking" under Section 106 and a transportation project under Section 4(f), for which alternatives must be reviewed.

3. The structure of NEPA, Section 106, and Section 4(f) have been drafted to secure the robust protection of environmental, historical, and cultural resources.

In balancing various historical, transportation, and environmental interests, the dominant tension in the law has been between two rival forces. First, administrative expertise is valuable, which points in the direction of at least some judicial deference. But the danger is that unfettered deference will allow politically savvy applicants and administrative allies to take liberty with the rules, and thus,

defeat the application of NEPA whose broad protections **s**hould not be frittered away. Section 4(f) of the Transportation Act specifically provides, consistent with "the policy of the United States Government that *special effort"* is to be made to protect public parks, that a transportation project can be approved "only if" there is no prudent and feasible alternative to using the land and all possible planning to minimize harm to the park is included. 49 U.S.C. § 303(c) (emphasis supplied). To achieve the statutory mission articulated in Section 4(f) the phrase "transportation program or project" cannot be construed narrowly.

The relevant case law on this point starts with the Supreme Court's decision in *Overton Park*, which paired any deference owed to an agency with the adoption of a protocol requiring that the agency and the courts actively supervise any review conducted under either NEPA or Section 4(f). The operative passage reads:

> Even though there is no *de novo* review in this case . . ., the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary's decision is entitled to a presumption of regularity. But that presumption is not to shield his action from a thorough, probing, in-depth review.

Overton Park, 401 U.S. at 415 (citations omitted).

This articulation is clearly an effort to straddle the difference by making sure that the presumption in favor of administrative regularity is rebuttable by a "thorough, probing, in-depth" review that is required in all cases. Yet, the District Court (and furthered by this Court's analysis in ruling on the motion to stay), totally disregarded this principle by writing that: "The City's objective was to build the [OPC] in Jackson Park, so from the Park Service's perspective, building elsewhere was not

an alternative, feasible or otherwise." [A.058, 8/19/21 Seventh Cir. Opinion at 8] That narrow definition of a program or project cuts the heart out from *Overton Park* in allowing the government to prevail by unilaterally delineating the scope of the project — namely, by announcing the purpose was to build a freeway through Jackson Park so that building that road anywhere else was not "feasible or otherwise."

That evisceration of the *Overton Park* standard led this Court to err in writing that:

> [A]s the district court recognized, segmentation refers only to the situation that arises when an agency arbitrarily separates related *federal* actions from one another. The [OPC] is a local project, and the federal government has no authority to fix its location. Without federal involvement we do not even reach the issue whether the federal government segmented its actions. *See Old Town Neighborhood Ass'n Inc. v. Kauffman*, 333 F.3d 732, 735 (7th Cir. 2003). That is because the NEPA requires an impact statement only for "major Federal actions," which the relevant regulations define to mean actions that are "potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18 (2019).

[A.057, 8/19/21 Seventh Cir. Opinion at 7]

No one disputes that the federal government does not have the power to "fix" the location of the OPC. But all that benign platitude means is that its environmental statutes do not allow the federal government to build any structure, or engage in any activity, for any private party, or to force them to do the same. However, that proposition does not mean that the federal agencies have *no* oversight of those programs or projects that *do* receive federal funding and other federal approvals, such as this project, which can and properly act to influence placement of developments that create adverse impacts to parkland, the environment and historic resources.

The extensive interconnections of the roadway system in and around Jackson Park and the OPC is precisely the type of combined activities that are "potentially subject" to federal control and require various reviews.

Therefore, the District Court's and this Court's reliance upon *Old Town Neighborhood* is singularly inapt in the context of this case because of the enormous gulf between the two cases. In *Old Town Neighborhood*, the local project in Goshen, Indiana was cordoned off from the highway work done outside of town before any federal money was received, so that this timely precaution made the project local at that time. *Old Town Neighborhood*, 333 F.3d at 734. However, *Old Town Neighborhood* also held that provisional immunity would be lost if at any point thereafter the city decided to accept any federal funds for its projects, as the two parts of the transaction would then be considered together under a version of the "step-transaction" doctrine:

> If there is such authority, however, a court may combine the stages, after the fashion of the step-transaction doctrine in tax law, into a sequence. If there really is an agreement that Goshen will prepay the costs of widening Third Street, following which the Secretary will approve reimbursement, then the federal government effectively is borrowing the construction costs from Goshen. Promising to repay borrowed money is just a particular way to obligate federal funds, no less subject to § 106 of NHPA than any other means to write a check. But if, as Goshen insists, there will never be federal reimbursement, there is no series of stages to be compressed into one transaction and no problem under these federal statutes.

Id. at 736.

In Jackson Park, that financial barn door has long been kept open. As confirmed by the various approvals that were published in the Federal Register, the

cash requested by the City from the federal government is in place and flowing for work on a transportation project that is not just potentially, but *actually*, subject to federal control, a project which is the planned and foreseeable result – indeed admittedly necessitated by – the purported non-federal actions. Unfortunately, the District Court made exactly the same error, and for exactly the same wrong reasons, in writing that:

> The decision to locate the OPC in Jackson Park was not itself subject to federal review. Rather, as discussed in *PoP I* and *PoP II*, and in the unrebutted declaration of the Foundation's Robbin Cohen, the City—together with the Foundation—made the decision to locate the OPC in Jackson Park, and there exists no evidence that this decision required federal review or involvement. Accordingly, there simply is no basis to conclude that the agencies engaged in improper segmentation when one of the alleged project "segments" does not actually fall under federal review.

[A.034, 8/12/21 Dist. Ct. Opinion at 33]

The entire structure of NEPA, Section 106, and Section 4(f) would be gutted if these statutes could be sidelined solely by the unilateral decision of a regulated party to define the scope of its own project and to locate at some particular place, thereby eliminating the consideration of any alternatives, which is required. While NEPA, Section 106, and Section 4(f) do not give any federal agency the power to dictate the specific location of a private development, the control over these projects is necessarily divided such that the federal agencies and the courts are legally obliged to deny an application or override a decision if it fails to meet the exact standards articulated in Section 4(f) of the Transportation Act and other relevant statutes. To put it another way, where segments are closely intertwined such that there is *every*

indication that *both segments* are supported by federal dollars and thus are subject to federal review, the entire regulatory framework would become a dead letter under the District Court's stilted interpretation.

The bare assertion by any public or private official—the Foundation not excepted—that this is a "local" matter is wholly irrelevant in the face of the complex set of financial and construction activities that point unambiguously in the opposite way. The federal agencies must prove that isolated status; it cannot be lightly presumed to be true, if the thorough review announced and applied in *Overton Park* is to remain viable. The segmentation analysis is critical because if a project is not outside of federal review, then alternative sites must be considered to avoid or minimize adverse impacts on such a project, precisely the issue at bar. Toward that end, it becomes important to note that the case against segmentation is fortified by two other principles of unquestioned applicability—cumulative effects and constructive use.

The Code of Federal Regulations applicable to this project states that agencies are duty-bound to analyze the cumulative impacts of past, present, and reasonably foreseeable projects on the environment. 40 C.F.R. § 1508.25(a)(2). That proposition is widely accepted, and indeed, the Section 106 regulations explicitly require the consideration of cumulative impacts. 36 C.F.R. § 800.5(a)(1). Thus, as the Circuit Court of the District of Columbia wrote in *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 33 (D.C. Cir. 2015), "Where there is federal action, NEPA requires governmental review, with public input, of the full range of such action's reasonably

foreseeable direct or indirect environmental effects. Federal actions subject to NEPA include federal authorizations granted to private parties, such as oil pipeline construction companies." And Jackson Park.

In a similar vein, the doctrine of constructive use, also ignored by both this Court and the District Court, points to the need to prevent just those evasions used by the Defendants in this case. In evaluating the effect of any project, the following regime holds:

> **(a)** A constructive use occurs when the transportation project does not incorporate land from a Section 4(f) property, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the property are substantially diminished.

23 C.F.R. § 774.15(a).

Put differently, this provision provides that if the conduct of the project in question creates a common law nuisance, then its adverse consequences have to be taken into account, including, but not limited to, the massive damage to trees and birds, both local and migratory. The entire roadwork system in Jackson Park constitutes a transportation project supported directly and/or indirectly by federal monies and federal permits, requiring that alternatives to avoid or minimize adverse effects from the project be performed. This regulation further extends the analysis to cover not only the land occupied by the project, but also all of the collateral damage resulting in a substantial diminution in value to nearby resources. Hence, that analysis reaches both the trees that will be cut down as well as the trees that will be

compromised by damages to their root system. More specifically, the trees will be damaged by changes in the water flow and water table causing damage to the trunks and foliage, and by noise (including both direct and indirect) vibrations from the construction of the OPC.

4. The federal agencies engaged in illegal segmentation.

The basic regulations for segmentation read as follows:

> (f) Any action evaluated under NEPA as a categorical exclusion (CE), environmental assessment (EA), or environmental impact statement (EIS) must:
>
> (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).

These regulations on segmentation contain no language indicating that a court should offer any special deference to the agency on their scope and application. Indeed, in these circumstances, the presumption of deference should be avoided because the agency is not making a judgment on the merits, but instead is seeking to evade its responsibilities for making any analysis at all which is an error of law. *See Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 769 (7th Cir. 2011) ("As usual, we review questions of fact for clear error and questions of law *de novo*.")

Generally, this Circuit has acknowledged the key role segmentation can play. *See Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 962 (7th Cir. 2003)(*quoting City of West Chicago v. NRC*, 701 F.2d 632, 650 (7th Cir. 1983)). *Mineta* itself shows how that segmentation analysis should be properly done. In that case, Citizens challenged the Ackerville Bridge/Lovers Lane Project and the County J/Highway 164 Project because a "contamination plume" containing arsenic and trichlorethylene ("TCE") was migrating toward the site of the Ackerville Bridge. Among other things, Citizens asked the court to suspend the project until the plume was isolated and corrected, and also "to require the FHWA to prepare an Environmental Impact Statement ("EIS") for the Ackerville Bridge Project." *Id*. at 942. The issue of segmentation arose because the plaintiffs insisted that the two projects should be treated as one. The *Mineta* court noted that: "*If* an agency considers the proper factors and makes a factual determination on whether the environmental impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference." *Id.* at 953 (emphasis added). The initial "if" says it all. Deference has to be based on factual analysis, and has to be earned rather than conferred as a matter of right. In *Mineta*, the requisite analysis was in fact made under the "hard look" doctrine, *id*. at 954—never invoked in the reviews of Jackson Park—to explain why the plume did not pose the kind of menace requiring any remediation. *Id.* at 955. There was no causal connection between the bridge and the highway so their separation made perfectly good sense given that the repair of bridges was tightly confined by location in the way that road construction is not. But it is equally clear that the sharp physical

and functional separations that were present in *Mineta* are wholly absent in Jackson Park. Nonetheless, apart from the rote citation of the segmentation principle, the District Court did not pursue any analysis whatsoever of the far more integrated and complex Jackson Park.

Mineta is only one of many cases that applies these segmentation regulations, but its hard-look methodology orientation disappears without a trace when, in denying the motion to stay, this Court insisted that the Plaintiffs' position "fail[ed] to take into account the deference courts owe to agencies with respect to the scope of a project." [A.056, 8/19/21 Seventh Cir. Opinion at 6] In support of that proposition, this Court cites *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), which never once uses the word "deference" in its discussion of arbitrary and capricious review because the issues in that case overwhelmingly favored the government.

At issue in *Kleppe* was the question of whether the government was required to generate "a regionwide, comprehensive environmental impact statement" with regard to the proper rules for mining coal deposits (located in parts of Montana, Wyoming, North Dakota, South Dakota, and Nebraska) before "issuing coal leases, approving mining plans, granting rights-of-way, and taking the other actions necessary to enable private companies and public utilities to develop coal reserves on land owned or controlled by the Federal Government." *Id.* at 395. At the time, there was no plan for any regional legislative or administrative action, and thus, it hardly makes any sense to ask for a massive inquiry to cover matters that are not in flux. But the situation before this Court in Jackson Park could not be more different, given

that the six roads in Jackson Park are not located in five separate states, but intersect and run parallel within close proximity with each other.

Regrettably, this dangerous form of analogical reasoning also applies to cases cited by the District Court in articulating its stunted view of the segmentation issue. Of particular interest are two cases from the District of Columbia Circuit court which show vividly when segmentation matters and when it does not. The first decision is *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304 (D.C. Cir. 2014), in which the question was whether the government engaged in improper segmentation when it sought to obtain permits to repair one segment of a continuous pipeline that was connected to, and operated in unison, with other segments. That careful opinion started its segmentation analysis by referring to the regulation's requirements of interdependence set forth above. The *Delaware Riverkeeper Network* court held that there was no evidence that any of the segments of the single pipeline had some "logical termini," *id.* at 1315, or "substantial independent utility," *id.* at 1316. In its operation, the operational connections among the separate repairs were too strong to deny the presence of segmentation, as it was essential to deal with the cumulative impacts of the overall upgrade project. The court's conclusion followed swiftly:

> [W]e hold that in conducting its environmental review of the Northeast Project without considering the other connected, closely related, and interdependent projects on the Eastern Leg, FERC impermissibly segmented the environmental review in violation of NEPA. We also find that FERC's EA is deficient in its failure to include any meaningful analysis of the cumulative impacts of the upgrade projects.

Id. at 1309.

The analytical framework at work in *Delaware Riverkeeper Network* led to the opposite result in *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31 (D.C. 2015), yet another pipeline case. There, the Sierra Club challenged the Corps' failure to not analyze the full range of consequences that would follow from the construction of the "Flanagan South oil pipeline pumps crude oil across 593 miles of American heartland from Illinois to Oklahoma," *id.* at 33-34, even though the federal power to issue permits only extended to those portions of the pipeline that operated on federal land. Those portions constituted less than five percent (5%) of its length, whereas all other segments were subject to oversight by various state public utility commissions. The court conducted a segmentation analysis, and concluded that "the agencies were required to conduct NEPA analysis of the foreseeable direct and indirect effects of those regulatory actions. However, on the facts of this case, the agencies were not obligated also to analyze the impact of the construction and operation of the entire pipeline." *Id.* at 35.

Needless to say, the current situation in Jackson Park is leagues removed from this last *Sierra Club* case. The level of interconnection between roads in Jackson Park features innumerable daily interactions between pedestrians and vehicular traffic night and day, which are far tighter than the occasional pipeline repairs in *Delaware Riverkeeper Network*, and which occur in close physical proximity with each other.

Undeterred, however, the District Court made manifest errors when it first paraphrased and then misapplied the segmentation analysis:

> Based on the record, Plaintiffs' improper segmentation theory fails. Improper segmentation occurs when an agency attempts to engage in piecemeal NEPA reviews "of projects that are 'connected, contemporaneous, closely related, and interdependent,' when the *entire project at issue is subject to federal review*." *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 50 (D.C. Cir. 2015) (emphasis added) (*quoting Del. Riverkeepers*, 753 F.3d at 1308).

[A.033-A.034, 8/12/21 Dist. Ct. Opinion at 32-33]

The first conditions are satisfied; the italicized words are quoted totally out of context from the very passage in which the District of Columbia Circuit Court held that the entire pipeline project was not subject to federal review because ninety-five percent (95%) of the pipeline was not on federal lands, a point that is never mentioned in the District Court opinion.

The District Court offers an equally inaccurate summarization of *Scottsdale Mall v. State of Indiana*, 549 F.2d 484 (7th Cir. 1977), when it quoted in isolation a snippet stating that the law "does not infringe on the right of a state to select a project to be financed solely out of its own funds" – which Jackson Park is not. *Id.* The fuller statement of facts indicates that this Court found that Indiana had engaged in impermissible segmentation of a comprehensive project when it decided to turn down federal funds for the last stage of a highway construction project after it had accepted federal funds for the earlier three stages of that same project, during which time it cooperated closely with the federal government. The District Court took the italicized words completely out of context when the full passage conveyed the exact opposite meaning:

> We do not view 23 U.S.C. § 145 as granting to a state the prerogative to avoid compliance with NEPA. Rather, in view of the cogent policy statements of Congress with respect to environmental considerations as expressed in NEPA, we see § 145 as a general recognition by Congress of each state's sovereign right to choose which of its many transportation construction projects shall be programmed for Federal-Aid Highway Act (FHWA) assistance. As the last sentence of the quoted statute points out, FHWA provides for a federally assisted state program, and the fact that federal funds are authorized by Congress through appropriation or the fact that those funds are made available for expenditure *does not infringe on the right of a state to select a project to be financed solely out of its own funds*. Section 145, however, does not give the state the right to avoid the requirements of NEPA.

Scottsdale Mall, 549 F.2d at 488 (emphasis added).

Thereafter, this Court concluded that due to the "federal participation in the programing, location, design, preliminary engineering, and right-of-way acquisition stages, required conclusion that entire highway bypass project was a 'major federal action' within National Environmental Policy Act thus requiring an environmental impact statement for remaining segments." *Id.* The federal grant for the roadwork in Jackson Park also precludes such segmentation.

5. The federal agencies' actions are the factual and proximate cause of the environmental harms in this case.

In order to bolster its decision, the District Court and this Court relied upon *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004), to support the proposition that the federal agencies' actions were somehow not the factual and proximate cause of the harms in question. This Court found that "[t]he Park Service's approval was a factual cause of the Center's placement in Jackson Park, because construction could not start without its approval, but the agency's limited authority prevented it from

being a proximate cause of any damage resulting from the Center." [A.057, 8/19/21 Seventh Cir. Opinion at 7] That point is clearly incorrect because it confuses two issues raised in *Public Citizen*.

First, the entire agency exercise was irrelevant in that case because the President had the sole authority to make the final decision, no matter what the agency found, so that its actions could not have a causal connection to the ultimate outcome. But that case is wholly inapposite here, given its rationale that: "Since FMCSA [the Federal Motor Carrier Safety Administration] has no ability to prevent such cross-border operations, it lacks the power to act on whatever information might be contained in an EIS and could not act on whatever input the public could provide." *Id.* at 754. Neither NEPA nor Section 4(f) played any role in the *Public Citizen* decision, although Section 4(f) does vest the sole power in the Secretary of Transportation, thereby rendering *Public Citizen* irrelevant.

Second, Public Citizen made a separate argument that the plaintiff did not satisfy the proximate cause requirement. In general, that issue asks whether there is some intervening event that severs the connection between some "but for" cause and the undesired result. *Id.* at 754. That causal connection could not be established in *Public Citizen*, which arose because the plaintiffs claimed that allowing Mexican trucks on American highways would increase the total level of pollution in ways that required an EIS. *Public Citizen* parried that objection by stating that the two major purposes of NEPA were to give the agency "detailed information" to make its decision and to allow the public to participate, *id.* at 768, neither of which is called into play

when the President has final authority. But both of these ends are emphatically critical where, as in the present case, the FHWA has the authority to deny funding for a project but nonetheless chooses not to look at any of the relevant issues.

There is, moreover, a more traditional causal argument that points in the same direction, namely, that adding Mexican trucks on the roads could well be offset by a decline in American trucks on the same roads, so that the plusses and minuses could cancel out, and hence, any causal connection could not be established. An illustration of how causal connection can be negated on traditional remoteness grounds is *Holmes v. Sec. Inv. Prot. Corp.,* 503 U.S. 258 (1992). In *Holmes*, the petitioner had participated in two stock manipulation schemes that prevented two-broker dealers from meeting their customer obligations. (*Id*.) Their shortfall, in turn, triggered the obligation of the SIPC to reimburse their customers. (*Id*.) SIPC sued Holmes under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U. S. C. §§ 1961-1968, but was thwarted by its failure to demonstrate that the petitioner's machinations were the proximate cause of the loss, which required "some direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. at 268. The *Holmes* court held that it was uncertain whether the loss resulted from the defendant's machination or, "*e.g.,* the broker-dealers' poor business practices or their failures to anticipate financial market developments." *Id.* at 259.

However, in this case, proximate cause is clear for the Plaintiffs because the Defendants cannot point to any set of independent causes that could sever that tight causal connection. Cornell Drive will be destroyed and the expansion of Stony Island

Avenue and Lake Shore Drive will be necessary to construct the OPC in Jackson Park as part of one integrated plan. That is true with the other road closures. It is difficult to imagine a tighter connection between the closing and expansion of roadways and the execution of a predetermined plan, particularly important when the threshold to establish is a negligible chance of success on the merits of its claims relative to NEPA, Section 4(f) and NHPA, which Plaintiffs demonstrate here.

6. The absolute deference allowed by the District Court has gutted NEPA and Section 4(f) reviews.

While *Overton Park* requires this Court "to engage in a substantial inquiry" neither the District Court's opinion (nor this Court on the motion to stay) asks a single hard question about the unprecedented practices of the two federal agencies. Instead, the uncritical deference gives the federal agencies a free pass to give the right answer to the wrong question. The wrong question of the "meticulous tree survey" only asked what new trees would reduce the damage from cutting at least 800 trees, which is akin to asking how best to arrange the deck chairs on the Titanic. In contrast, the right question to ask is why undertake this massive cutting operation at all if it wrecks Jackson Park. What does it mean to talk about long-term benefits when neither the long-term or short-term is specified? The short-term losses are known with certitude. The long-term gains are neither identified nor quantified. Therefore, it is flatly wrong for the District Court to state that there were some "unaffected 500-plus acres of Jackson Park" – a gross oversimplification that is itself disputed – without taking any evidence on the question as to how many of those acres have tree coverings. It certainly does not include the half of Jackson Park that is under water.

As discussed *infra*, given the significant impacts of the destruction, an EIS is necessary and appropriate.

This Court's conclusion derived from positions advanced by the Defendants (*i.e.*, that there were changes before, so let there be changes now) is itself contested, as it ignores both the magnitude of the actions now and the supplemental declaration of Professor W.J.T. Mitchell, a recognized expert in the area, that this is the first major do-over of any Olmsted Park ever by creating a dominant central structure that was against his fundamental structural principles. To justify that stark result, a seemingly random citation to *Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 673 F.3d 518, 526 (7th Cir. 2012), a case dealing with cumulative effects of siting logging projects in the Chequamegon–Nicolet National Forest, is beyond comprehension. In that case, the court rejected a challenge to the government's "fail[ure] to consider how a future project in the Forest's Fishel area *might* alter the cumulative impacts analysis." *Habitat Educ. Ctr.*, 673 F.3d at 522 (emphasis added). That cannot possibly count as a decisive precedent in support of the District Court's position on segmentation and for absolute deference.

7. The federal agencies are not entitled to deference for their utilization of an improper baseline in their environmental analysis.

The District Court also erred by deferring to the federal agencies in their analysis of alternatives relative to the planned roadwork on the eastern and western edges of Jackson Park, which will be necessitated by the placement of the OPC. The District Court affirmed the use of an improper baseline for making the relevant comparison of alternatives, which is substantiated by the incorrect way in which the

Environmental Assessment ("EA") describes the three available alternatives. [*See* Dkt. 1-2, Compl. Ex. 10, EA ¶ 4.0, at 15-16]

Here, the EA identifies three alternatives. Alternative A represents the status quo without the OPC being built in Jackson Park. However, its inclusion on the list plays a wholly illusory role. All the work of the EA was done by comparing Alternative B (where all damage has implemented and the OPC has been built) to Alternative C (which had the OPC constructed along with the expansions on Lake Shore Drive and Stony Island Avenue). But the relevant comparisons between Alternatives A and C or A and B never took place, for the Report only compares Alternative C with Alternative B, neither of which looks beyond the confines of Jackson Park. Hence its predetermined outcome. But even if Alternative C is better than Alternative B, other options outside Alternative B were never considered and thus never compared to Alternatives A or C. Alternative A is show piece and not the baseline. The use of a faulty baseline—Alternative B—guts the entire EA by allowing the most destructive actions to take place without even a rudimentary review of any relevant (and indeed, superior) alternatives outside Jackson Park.

The federal agencies' artificial analysis is of a type that courts have already rejected in other NEPA cases, including *Openlands v. U.S. Dept. of Transp.,* 124 F. Supp. 3d 796, 807 (N.D. Ill. 2015). In that case, the district court held that the EIS—as the EA was not deemed sufficient— for the proposed Illiana Corridor did not comply with either NEPA or Section 4(f). There, the agency's alternative A, or "no-build" baseline, presumed the building of the Illiana Corridor, and thus, compared

two different routes without first asking whether or not the project should be built at all. There the bona fide no-build scenario is comparable to our Alternative A. *Id.* at 805. The *Openlands* court held that "[w]ithout such an analysis, it is impossible to determine the extent to which building the Corridor will increase traffic on existing roads and the impact such increased traffic may have on the study area." *Id.* at 808. The district court concluded that: "In short, the purpose and need for the Illiana Corridor identified in the EIS are derived directly from the faulty 'no build' analysis. Because that analysis does not substantiate the purpose and need, the FHWA's approval of the ROD [record of decision] and final EIS is arbitrary and capricious and in violation of NEPA." *Id.* at 807. "[A]bsent a supported no build analysis, the EIS does not comply with NEPA's directive to analyze the project's direct impacts." *Id.* at 808.

The concerns raised in *Openlands* are, if anything, more urgent in this case. The court's analysis in *Openlands* determined that even an exhaustive EIS fell short. *A fortiori*, the simple EA in this case that never discusses relevant alternatives cannot support a FONSI, and must give way to a complete EIS that addresses multiple alternatives to the proposed OPC site. The huge omissions in the present case, by comparison with *Openlands*, show emphatically that the Plaintiffs in this action are likely to succeed on the merits. The current state of affairs in Jackson Park is the touchstone for any proper analysis of alternatives, and as such, the required "hard look" should start there, and not a contrived "no-build" fiction that incorporates the a completed OPC into the distorted baseline. *See, e.g., Idaho v. Interstate Com.*

Comm'n, 35 F.3d 585, 595-96 (D.C. Cir. 1994) (lead agency may not delegate its responsibilities to project proponent); *S. Utah Wilderness All. v. Norton*, 237 F. Supp. 2d 48, 52-54 (D.D.C. 2002) (lead agency has a "duty to conduct an independent analysis of alternatives"); *Sierra Club v. Watkins*, 808 F. Supp. 852, 871-72 (D.C. 1991) (agency's efforts to address alternatives must be reasonable).

The District Court's opinion wrongly brushes aside the *Openlands* precedent and similar cases [A.035, 8/12/21 Dist. Ct. Opinion at 34], and instead, chooses to largely parrot arguments from the Defendants, which are unpersuasive for the reasons discussed above.

8. The District Court committed other errors in its rulings on a likelihood of success.

Plaintiffs are also likely to succeed upon their claims that Defendant Army Corps of Engineers improperly issued permits under Section 404 of the Clean Water Act and Section 408 of the Rivers and Harbors Act. These permits and modifications should be voided because no modifications to any existing permits are needed at all given the possibility of prudent and feasible alternatives that would eliminate the need for any such modifications, none of which were reviewed through the faulty process described earlier.

Plaintiffs are also likely to succeed on their UPARR claim. The statutory scheme under UPARR requires that the Defendants replace parkland that has been removed to become non-recreational from a protected site with equal amounts of parkland located elsewhere. Before making any such changes however, an applicant is required to be sure to evaluate "all practical alternatives to the proposed

conversion." The Plaintiffs are reasonably likely to succeed on this claim given the failures of the National Park Service and the City. For instance, the record evidence reflects that the critical 4.6 acres of recreation space protected under UPARR (within the existing 1010 boundary) was predetermined and preselected, identified well before City plan commission hearings in May 2018, and without the evaluation of all practical alternatives at the time. The only record evidence of such evaluations is in documents dated 2019 and "updated" in 2020. [*See* Dkt. 71-10, Fed. Defs. Ex. 10 at cover page] These documents are a post-hoc rationalization, not reflective of an actual search for alternatives performed earlier to satisfy the statutory requirements, which the National Park Service is charged with ensuring occurred.

Also, the District Court erred when it determined that Plaintiffs were unlikely to succeed on their anticipatory demolition claim under Section 110(k) of the NHPA. [A.047-A.049, 8/12/21 Dist. Ct. Opinion at 46-48] The unrebutted evidence established that in August 2018 the City removed approximately 40 trees, consistent with an agreement between it and the Foundation to build a new track and field area to replace the existing track and field facility that was located on land slated to become part of the new OPC. [Dkt. 1-2, Compl. Ex. 17 (Agreement Between City and Foundation)] All of this work was done years before the Section 106 process was completed (it only began in December 2017); indeed, it even occurred *before* the form of the transfer to the Obama Foundation was approved by City Council in October 2018. Such undisputed facts themselves demonstrate the intent of the City to circumvent the process by just moving forward (all too similar to what happened to

the defunct Women's Garden, which had also been brought to the Court's attention [Appeal Dkt. 15, Supp. Decl. Of Michael Rachlis]).

The District Court erred in its determination of no likelihood of success, by relying largely on the Federal Defendants' blanket acceptance of the City's explanation that it did not intend to circumvent the Section 106 review process. [*See* Dkt. 61-9, Fed. Defs. Ex. 9, at 3 ("The FHWA accepts the City's explanation for the actions it took . . . . ")] The City's lame "explanation" for moving forward with its premature demolition included that its actions did not predispose them to an outcome [Dkt. 61-8, Fed. Defs. Ex. 8, at 2-3], a blatantly inaccurate statement when this was being done as part of the OPC project and being funded by the Foundation; there could not be a greater way of saying that this development is happening. Here again, these facts establish at a minimum that Plaintiffs have a reasonable chance of success, which the District Court ignored.

II. THE DISTRICT COURT ERRED IN ITS DETERMINATION THAT THE PLAINTIFFS WERE NOT LIKELY TO SUCCEED ON THEIR CLAIMS THAT THE FEDERAL DEFENDANTS FAILED TO REQUIRE AN EIS.

A federal agency must prepare an EIS for a major federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). If the agency finds that no EIS is required because the proposed action will not have a significant impact, then the agency reports its decision in a FONSI. 40 C.F.R. § 1508.13. Further, 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 both context and intensity must be considered

when looking at "significance." *See* 40 C.F.R. § 1508.27. Here, both the context and intensity of the actions show beyond doubt that the environmental impact is significant such that Plaintiffs are likely to show that the Respondents are required to conduct a full EIS, rather than just an EA.

Under the context prong in a site-specific action, the agency must consider the significance of the impact on the locale, including both short-term and long-term effects. 40 C.F.R. § 1508.27(a). In this instance, the short-term and long-term negative impacts on the locale of Jackson Park are infinite. In the short-term, effects include local noise, air pollution, traffic jams, and damage to breeding sites. The long-term effects are worse, including the health benefits and aesthetic loss of at least *eight* hundred (800) trees, the vast majority of which are mature or near maturity. Of the trees counted for these reports, the figure represents seventeen (17) percent, an incredibly high figure. [Dkt. 31-1, Ex. 6, AE Appendix D, Trees Technical Memorandum] The clear-cutting of these acres will prove doubly significant as those acres of land are located in critical portions of Jackson Park and occupy significant areas of space. [*Id.*; A.081-A.083, A.090, Balkany Decl., ¶ 4 & Ex. A thereto] There has been, to Plaintiffs' knowledge, not a single regulation, case, or practice that defers to any agency that equates trees and saplings—until this one, done without so much as a second glance, let alone a substantial review performed through an EIS.

Furthermore, the clearing of these trees has already resulted in the loss of trees that are critical to migratory birds. [Dkt. 1-2, Compl. Ex. 10 at 29-34] The

Defendants' self-imposed moratorium on tree cutting is an acknowledgement of the significant impact both on the short and long term.

Another factor properly considered when looking at intensity is whether the action affects "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources [and] park lands [and] [t]he degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources." 40 C.F.R. §§ 1508.27(b)(3), (8). 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. [A.064, A.065, Mitchell Decl., ¶¶ 8, 11] Within the area, of course, once lay the Women's Garden whose undignified destruction represents a permanent and irreparable harm that cannot be offset by the bare promise to build a substitute garden somewhere else in subsequent years. [A.063-A.064, *Id*. ¶ 7] As noted, the Defendants began destruction of the Women's Garden even before any transfer of land to the Foundation. [Appeal Dkt. 15, Rachlis Supp. Decl., ¶¶ 3-4 and attached photos]

Another intensity factor is whether "the effects on the quality of the human environment are likely to be highly controversial," 40 C.F.R. § 1508.27(b)(4), and whether there is "a substantial dispute" about the action's size, nature, or impact. *Friends of the Earth, Inc. v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 32 (D.

D.C. 2000) (citations omitted). In the present case, the public is engaged in a prolonged fierce and loud dispute regarding the disruption of traffic patterns, the destruction of trees, the mammoth size of the main OPC building, the awkward placement of the OPC 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 and public. [A.062-A.063, Mitchell Decl., ¶ 6; A.096, Mitchell Supp. Decl., ¶ 13] The initiation of the cutting of the trees associated with the project has only intensified this debate.

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." 40 C.F.R. § 1508.7. Significant cumulative impacts may occur even if the impacts from individual actions are minor. *Id*. This is especially true because the NEPA regulations contain explicit "constructive use" regulations, *see supra* at 31, that require federal agencies to consider not just the land occupied by the new project, but also lands that are not occupied that are subject to serious nuisance-like harms. These various indirect effects are brought within the scope of NEPA under its constructive use determination, 23 C.F.R. § 774.15. Such determination requires, in essence, a more comprehensive analysis even when a transportation project does *not* incorporate land from a Section 4(f) property, as 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 have been cut down, but also the trees that are now likely to be damaged in ways that will continue to compromise the ability to provide migratory and local birds to nest, forage, and seek shelter in other trees throughout Jackson Park. Notions of deference do not, and should not, alter the objective degree of consequences that "may" significantly impact the environment. This project, which has been self-proclaimed as the largest and most significant project in generations [Dkt. 47-1, Cox Decl., at 3], is precisely the sort that require an EIS.

III. THE DISTRICT COURT ERRED IN FAILING TO CONDUCT AN EVIDENTIARY HEARING.

At numerous points in its opinion, the District Court relies on what it terms the "uncontested" Declaration of Robbin Cohen in ruling against the Plaintiffs. [*E.g.*, A.034] However, the Cohen Declaration was not undisputed, but in fact was contested openly and explicitly on every one of its substantive elements by the Declarations of Grahm Balkany and W.J.T. Mitchell. The Court wrongly (but somehow consistently) ignored these disputes in reaching its determination on Plaintiffs' motion for preliminary injunction.

Further, while trumpeting its alleged "uncontested" nature, the District Court ignored its substance and frailties. For example, while Cohen sets forth a time-table of fifty (50) months for completion of the OPC [A.072, Cohen Decl., ¶ 21], that timetable makes no allowance or contingencies for delay and is hugely problematic.

[A.085-A.086, Balkany Decl., ¶ 12] Further, she offers no critical path or construction schedule, just generalized claims without any factual basis, and then throws out an unanalyzed and unsupported number of $2.2 million per month as a dollar figure associated with delay. [*Id.*, ¶¶ 8-9]

The District Court also walked past the extraordinary statements in the Cohen Declaration that admitted that the Foundation at present has insufficient funds to finish the construction of the OPC in light of its other continuing obligations, further establishing Plaintiffs' likelihood of success on the merits. In this regard, the Cohen Declaration provides: "To date, the Foundation has raised over $200 million in donations and pledges explicitly dedicated for use in the development of the Presidential Center as it has been planned and publicly described." [A.076, Cohen Decl., ¶¶ 39-40] But even if that statement is taken at face value, the funds needed to complete and maintain the OPC are not in hand. In order to accomplish the transfer of the land from the City to the OPC, there are requirements for funding. The Master Agreement between the Foundation and the City, which was included in the 2018 City Ordinance, allows for the transfer of possession of Jackson Park to the Foundation, only upon certification that gifts or funds received by the Foundation exceed the costs of construction. [*See* Dkt. 1-1, Compl. Ex. 2, p. 85959 (Master Agreement, Paragraph 12(j))] While the Court had grounds at that moment to enter the injunction given such statements, at a minimum a hearing relative to the declaration and the statements therein was appropriate and necessary.

However, the District Court erroneously relied upon the Cohen Declaration as "uncontested" and failed to hold an evidentiary hearing. A court cannot admit and/or rely upon such a declaration that contains no evidentiary support for the assertions set forth therein; such matters would necessitate a hearing to allow plaintiffs to further address what are disputed matters of fact. *See, e.g., Ty, Inc. v. GMA Accessories, Inc.,* 132 F.3d 1167, 1171 (7th Cir. 1997) (if genuine issues or material fact are created by the response to a motion for a preliminary injunction, a hearing is required) (citations omitted). *See, also FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact.").

CONCLUSION

The Plaintiffs respectfully request that the District Court's order denying their motion for preliminary injunction be reversed and a preliminary injunction entered or at a minimum is remanded for a hearing.

Respectfully Submitted,

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

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Type-Volume Certification

The undersigned counsel hereby certifies that this brief complies with the type-volume limitations of Circuit Rule 32(a), (b), and (c) of this Court, because the brief contains 13,998 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

/s/ Richard Epstein
Richard Epstein

Certificate of Service

I hereby certify that on September 20, 2021, I electronically-filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in these consolidated appeals are registered CM/ECF users and that service will be accomplished by and through the CM/ECF system.

/s/ Richard Epstein
Richard Epstein

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 BUTTIEGIEG, 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

REQUIRED SHORT APPENDIX TO OPENING BRIEF OF PLAINTIFFS-APPELLANTS PROTECT OUR PARKS, INC., et al.

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ORAL ARGUMENT REQUESTED

Appendix Certification

The undersigned counsel hereby certifies that all of the materials required by Circuit Rule 30(a) and 30(b) are included in the Appendix.

/s/ Richard Epstein

Table of Contents for Required Short Appendix

Docket. No. Cite	Date of Entry or Filing	Description	Appendix Number
District Court Dkt. 83	8/5/21	Minute Entry from District Court (Blakey)	A.001
District Court Dkt. 94	8/12/21	Memorandum Opinion and Order from District Court (Blakey)	A.002-A.050
7th Circuit Dkt. 37	8/19/21	Opinion from the Seventh Circuit Appellate Court (Per Curiam)	A.051-A.060

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.3.3
Eastern Division

Protect Our Parks Inc, et al.

Plaintiff,

v.

Case No.: 1:21−cv−02006
Honorable John Robert Blakey

Pete Buttigieg, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, August 5, 2021:

MINUTE entry before the Honorable John Robert Blakey: After considering the parties' briefs and oral argument, this Court finds that Plaintiffs have not met the standard for injunctive relief on their federal claims, and accordingly denies their motion for preliminary injunction [30]. This Court will issue a more detailed opinion and set additional dates and deadlines by separate order. Defendants' motion to dismiss [28] remains under advisement. Mailed notice(gel,)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PROTECT OUR PARKS, INC., et al., Plaintiffs, v. PETE BUTTIGIEG, et al. Defendants.	Case No. 21-cv-2006 Judge John Robert Blakey

MEMORANDUM OPINION AND ORDER

On August 16, 2021, construction is set to start on the Obama Presidential Center (OPC) in Chicago's Jackson Park. Since the City of Chicago made the decision to locate the OPC in Jackson Park in 2016, efforts to preempt the construction at that site have persisted. In 2018, Plaintiff Protect Our Parks, Inc. and several individuals sued the City of Chicago and the Chicago Park District in this Court under various federal and state laws attempting to halt construction. This attempt was unsuccessful: this Court granted summary judgment in the defendants' favor on all claims, and the Seventh Circuit affirmed on the federal claims and held that the plaintiffs lacked standing to pursue their state-law claims.

Notwithstanding, six months after the Seventh Circuit's decision and just four months before groundbreaking, Plaintiff Protect Our Parks and several other new Plaintiffs have again sued to halt construction on the OPC. This time they sue not only the City and Park District, but also the Barack Obama Foundation and several

federal and state agencies under a series of federal- and state-law theories, some old and some new. More recently, Plaintiffs moved for a preliminary injunction on their federal claims, asking this Court to enjoin the imminent groundbreaking at Jackson Park. [30]. In support of their motion, Plaintiffs argued that various federal agencies failed in performing statutorily mandated reviews concerning construction of the OPC and its effects on the environment, historical resources, and wildlife, among other things. If the agencies had adequately performed these reviews, Plaintiffs claimed, the agencies would have concluded that a superior site to Jackson Park exists to host the OPC. As explained further below, this Court denied the motion. [83].

I. Background

A. Procedural History

In May 2018, Plaintiff Protect Our Parks and several individuals sued the City of Chicago and the Chicago Park District under federal and state law seeking to stop the construction of the OPC in Jackson Park. This Court granted summary judgment to the defendants on all claims, and the plaintiffs appealed. *See Protect Our Parks, Inc. v. Chicago Park District*, 971 F.3d 722, 728 (7th Cir. 2020) (*PoP II*), *cert. denied sub nom. Protect Our Parks, Inc. v. City of Chicago*, No. 20-1259, 2021 WL 1602736 (U.S. Apr. 26, 2021). On appeal, the Seventh Circuit affirmed this Court's grant of summary judgment on the plaintiffs' two federal claims—that the defendants took their property in violation of the Fifth and Fourteenth Amendments. *Id.* at 736. The court of appeals vacated summary judgment, however, on the plaintiffs' claims under Illinois law, which alleged violations of the public trust doctrine and ultra vires

actions, finding that the plaintiffs lacked Article III standing to sue on those claims. *Id.* at 732. On remand, this Court, consistent with the Seventh Circuit's holding, dismissed the state-law claims for lack of jurisdiction.

Undeterred, Plaintiff Protect Our Parks, along with Nichols Park Advisory Council (NPAC), and individuals Sid Williams, Stephanie Franklin, Bren Sheriff, Dr. W.J.T. Mitchell, and Jamie Kalvin have sued again seeking to halt construction on the OPC. [1]. Plaintiffs claim that the construction project has triggered several major federal regulatory reviews, specifically, those under: (1) § 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c) and 23 U.S.C. § 138(a); § 106 of the National History Preservation Act of 1966 (NHPA), 54 U.S.C. § 306108; the Urban Park and Recreation Recovery Act (UPARR), 54 U.S.C. §§ 200501–200511; and the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4347. *Id.* at ¶ 2. According to Plaintiffs, these federal statutes require comprehensive reviews of alternatives to determine how to address any adverse effects created by the OPC and to evaluate opportunities to avoid, minimize, or mitigate future adverse effects. *Id.* at ¶ 2. Defendants, Plaintiffs assert, have essentially ignored the regulatory frameworks requiring them to evaluate alternative sites to Jackson Park. *Id.* at ¶¶ 2–3.

As a result, Plaintiffs have now sued, in addition to Defendants the City of Chicago (the City), the Chicago Park District (the Park District), and the Barack Obama Foundation (the Foundation), Pete Buttigieg in his official capacity as Secretary of the Department of Transportation; Stephanie Pollack in her official

capacity as Acting Administrator of the Federal Highway Administration (FHWA); Arlene Kocher in her official capacity as the Division Administrator of the Illinois Division of the FHWA; Matt Fuller in his official capacity as the Environmental Programs Engineer of the Illinois Division of the FHWA; Anthony Quigley, P.E., in his official capacity as the Deputy Director, Region 1 Engineer of the Illinois Department of Transportation; Deb Haaland in her capacity as the Secretary of the United States Department of the Interior; Shawn Benge in his capacity as Deputy Director of Operations of the National Park Service (NPS), exercising the delegated authority of the Director of the NPS; John E. Whitley in his capacity as Acting Secretary of the Army; and Paul Culberson in his capacity as Commanding Officer of the Army Corps of Engineers. *Id.* at ¶¶ 23–34.

The fifteen-count complaint asserts claims for: (1) violation of section 4(f) of the Department of Transportation Act against the federal and state transportation and highway administration Defendants, the City, the Park District, and the Foundation (Count I); (2) violation of NEPA against all Defendants (Count II); violation of UPARR against the Interior Department, NPS, the City, the Park District, and the Foundation (Count III); violation of section 106 of the NHPA against all Defendants (Count IV); violations of Rivers and Harbor Act and Clean Water Act against the Army Corps Defendants, the City and the Park District (Count V); violation of the public trust doctrine against the City, the Park District, and the Foundation (Count VI); an ultra vires claim against the City and the Park District (Count VII); violation of article VIII, section 1 of the Illinois Constitution against the City, the Park District,

and the Foundation (Count VIII); violation of the Illinois Constitution Takings Clause against the City, the Park District, and the Foundation (Count IX); improper delegation of authority under federal statutes against all Defendants (Count X); improper delegation of authority in violation of the Illinois Constitution against the City, the Park District, and the Foundation (Count XI), violation of article I, section 2 of the Illinois Constitution against the City, the Park District, and the Foundation (Count XII), violation of article I, section 16 of the Illinois Constitution against the City and the Foundation (Count XIII); violation of section 110(k) of the National Historic Preservation Act against all Defendants (Count XIV); and, in the alternative to Counts I, II, and IV, violation of the Illinois State Agency Historic Preservation Resources Act against all state officials, the City, the Park District, and the Foundation (Count XV).

Plaintiffs seek a preliminary injunction on their federal claims. [31] at 17.

B. Factual Background[1]

1. The City Approves Jackson Park as the Site of the OPC

In 2014, the Foundation began a nationwide search for the future location of the Barack Obama presidential library. *PoP II*, 971 F.3d at 728. Eventually, it settled upon Jackson Park, a public park owned by the Chicago Park District, on Chicago's South Side as the site of the OPC. *Id.*; *PoP I*, 385 F. Supp. 3d at 668. The

[1] This Court presumes familiarity with the facts concerning the inception of the OPC and the decision by the City of Chicago to locate the OPC in Jackson Park, as set forth in great detail in this Court's prior order on the parties' cross-motions for summary judgment, *Protect Our Parks, Inc. v. Chicago Park District*, 385 F. Supp. 3d 662 (N.D. Ill. 2019) (*PoP I*), and the Seventh Circuit's opinion in *PoP II*. This Court therefore only briefly revisits the facts relevant to Plaintiffs' present motion.

site selected for the OPC within Jackson Park comprises 19.3 acres, or 3.5% of the 551.52 acres that make up the Park. *PoP I*, 38 F. Supp. 3d at 668. The site lies on the western edge of Jackson Park and includes parkland bounded by South Stony Island Avenue to the west, East Midway Plaisance Drive North to the north, South Cornell Drive to the east, and South 62nd Street to the south. *Id.* The OPC site also includes land within the park currently existing as city streets: the portion of East Midway Plaisance Drive North between Stony Island Avenue and South Cornell Drive, and a portion of South Cornell Drive between Eastern Midway Plaisance Drive South and East Hayes Drive. *Id.* at 668–69. As part of the construction, these street portions will be closed and removed to restore the landscape's connection to the lagoon and lake. *Id.* at 669. When built, the OPC will consist of a campus containing open green space, a plaza, and four buildings: the Museum Building; the Forum Building; a Library Building; and a Program, Athletic, and Activity Center. *Id.* at 669.

Upon selection of Jackson Park as the site of the OPC, the City acquired the 19.3 acres necessary for the OPC from the Park District, enacted ordinances required to approve construction of the OPC, and entered into a use agreement with the Foundation that governs the terms of construction, ownership, and operation. *PoP II*, 971 F.3d at 728.

2. Declarations For and Against the Preliminary Injunction

At the parties' request, this Court set Plaintiffs' motion for preliminary injunction for oral argument on July 20, 2021; the parties declined to present any live witnesses, opting instead just to argue their respective positions. This Court

therefore relies upon the arguments and evidence presented in the parties' briefs, including the various declarations submitted by each side and the administrative record.

a. Robbin Cohen for the Foundation

The Foundation submitted the declaration of Robbin Cohen, Executive Vice President – Obama Presidential Center, Strategy, and Technology. [48-1]. Cohen attests that the federal reviews were completed in February 2021 and the OPC's construction start date is August 16, 2021. *Id.* at ¶¶ 4–5. Assuming construction stays on schedule, construction will take four years and two months and the OPC will open in Fall 2025. *Id.* at ¶ 5. The Foundation itself will pay for the construction and operation of the OPC, and the total project will cost approximately $700 million, paid for by donations to the Foundation. *Id.* at ¶ 6.

As for the selection of Jackson Park as the site of the OPC, Cohen explains that in 2014, the Foundation issued a "Request for Qualifications" relating to the future OPC; after receiving over a dozen responses proposing locations around the country, the Foundation issued a "Request for Proposals" to applicants from Chicago, New York, and Hawaii. *Id.* at ¶ 10. Then, in May 2015, the Foundation announced it selected the South Side of Chicago for the future home of the OPC and that it would consider certain South Side sites that had been presented to it. *Id.* In July 2016, the Foundation announced it selected Jackson Park on Chicago's South Side as the site of the OPC. *Id.*

The Foundation then applied to the City for various approvals to move the project forward in Jackson Park. *Id.* at ¶ 11. The City ultimately approved Jackson Park for the site of the OPC. *Id.* The City and Foundation then executed a "Master Agreement" in May 2019, which provides that the Foundation will construct, install, occupy, use, maintain, operate, and alter the OPC and related buildings and green spaces upon the completion of certain conditions, including the resolution of federal agency reviews. *Id.* at ¶ 13.

b. Plaintiffs' Declarations

Plaintiffs also submitted several declarations in support of their motion. One of their declarants, Plaintiff W.J.T. Mitchell, serves as a professor of English and Art History at the University of Chicago and lives in Hyde Park on Chicago's South Side. [31-1] at 8–14. Mitchell attests that he frequently visits Jackson Park as a place for rest and recreation, namely, for walking, biking, golfing, and tennis. *Id.* at 9. According to Mitchell, the proposed reconfiguration and destruction of Jackson Park land and the Midway Plaisance will "irreparably diminish and harm the aesthetic, recreational, environmental, and historic values" of those places. *Id.* at 10. Mitchell also believes that the placement of the OPC involves one of the most prized parts of Jackson Park—the Midway Plaisance, Woman's Garden, and the scenic woodland containing mature trees adjacent to Stony Island. *Id.* In particular, Mitchell states that the Midway Plaisance serves as a crucial east-west artery connecting South Side neighborhoods with Jackson Park and Washington Park, and that the OPC's plan to

close the eastbound lane will have the effect of destroying the essential function of the historic space and crucial component of urban infrastructure. *Id.* at 12–13.

Another declarant, Plaintiff Stephanie Franklin, is a Hyde Park homeowner and has used and enjoyed the aesthetic benefits of Jackson Park and Midway Plaisance throughout her life. *Id.* at 20. Franklin serves as the president of Nichols Park Advisory Council (NPAC), another Plaintiff in this case. *Id.* According to Franklin, NPAC constitutes a park advisory council organization that advises the Park District; she and the NPAC believe that the aesthetic and recreational values of Jackson Park will be irreparably diminished and harmed by the proposed OPC. *Id.* at 20–22.

Herb Caplan, the president of Plaintiff Protect Our Parks, also proffered a declaration. [31-1] at 31. He, like Franklin and Mitchell, also believes that the OPC's construction will diminish and harm the aesthetic, environmental, and recreational value of Jackson Park. *Id.* at 33.

3. Federal Reviews

Although the federal government had nothing to do with the initial decision to situate the OPC in Jackson Park, the City's action did trigger a number of federally-mandated reviews and actions, the adequacy of which Plaintiffs now challenge.

a. UPARR Conversion

First, the City's decision to approve Jackson Park as the location of the OPC necessitated action by the NPS under the UPARR Act. Congress established the UPARR Act in 1978 to provide federal assistance for the rehabilitation of recreational facilities in economically distressed urban communities. *See* 54 U.S.C. §§ 200501–

200511; 36 C.F.R. § 72.72(a) ("The UPARR program has made funds available for the renovation and rehabilitation of numerous urban parks and recreation facilities."); [61-10] at 7. The Act authorizes NPS to convert property assisted under UPARR to non-public recreation uses only if it "finds it to be in accord with the then-current local park . . . and only on such conditions as [NPS] considers necessary to ensure the provision of adequate recreation properties and opportunities of *reasonably equivalent location and usefulness*." 54 U.S.C. § 200507 (emphasis added).

The OPC's placement in Jackson Park triggered UPARR because the project would require conversion of UPARR-assisted property. In the 1980s, the City received federal funds for Jackson Park under UPARR grants, in exchange for which the City agreed to maintain Jackson Park for public recreation uses. [61-10] at 7; [61-22] at 13, 22. Upon the City's decision to place the OPC in Jackson Park, the NPS determined that the construction would require a conversion of 4.6 acres of parkland to non-recreation uses within the boundary of the OPC buildings, as well as an additional conversion of 5.2 acres for the proposed transportation improvements to non-recreation uses. [61-22] at 23.

To balance those potential losses of Jackson Park land to non-recreational uses, the City identified a potential replacement area just outside of the Park to convert to recreational uses. [61-10] at 33. That replacement property sits on the east end of the Midway Plaisance between Stony Island Avenue and the Metra Electric Railway, just west of Jackson Park. *Id.* Per the City's proposal, the replacement property will be converted into a new play area and will include

improved open space and rehabilitated walkways. *Id.* at 33–34. As conceived, the City's proposed replacement elements would amount to a *net gain* of approximately 6.6 acres of recreational uses in Jackson Park. *Id.* at 36. After assessing the City's proposal, NPS concluded that the replacement properties satisfied regulatory requirements for the partial conversion of UPARR-funded properties in Jackson Park. *Id.* at 47.

b. FHWA's Section 4(f) Review

The City's decision to close portions of three roadways within Jackson Park to accommodate the OPC also prompted the Chicago Department of Transportation (CDOT) to propose use of federal funding for roadway construction and bicycle and pedestrian improvements within the Park. [61-22] at 20–21. This in turn triggered the FHWA's review under section 4(f) of the Department of Transportation Act of 1966, which permits the Secretary of Transportation to "approve a transportation program or project" that requires the "use of publicly owned land of a public park . . . or land of an historic site of national, State, or local significance . . . only if . . . (1) there is no prudent and feasible alternative to using that land; and . . . (2) the program or project includes all possible planning to minimize harm to the [publicly owned land] resulting from the use." 49 U.S.C. § 303(c); *see Old Town Neighborhood Ass'n Inc. v. Kauffman*, 333 F.3d 732, 736 (7th Cir. 2003) (noting that section 4(f) is triggered where a project requests approval from the Secretary of Transportation and stating that entities "that proceed on their own dime need not meet conditions for federal assistance or approval"); *see also* [61-35] (final section 4(f) evaluation).

The proposed OPC location in Jackson Park implicated four section 4(f) properties (public parks and historic sites): Jackson Park, Midway Plaisance, Jackson Park Historic Landscape District and Midway Plaisance, and the Chicago Park Boulevard System Historic District (CPBS). [61-35] at 17. Ultimately, after undergoing multiple analyses, the FHWA's section 4(f) evaluation found no feasible and prudent alternative to the use of those section 4(f) properties. *Id.* at 51–57.

Because the FHWA found that no feasible and prudent alternatives existed to using section 4(f) property, the FHWA then examined how to best minimize and mitigate any adverse impact from using the section 4(f) properties affected by the construction. *Id.* at 58. The FHWA assessed nine alternatives that included, for instance, widening Lake Shore Drive, "aimed to incrementally improve operations and available transportation capacity in order to minimize permanent use of Section 4(f) resources." *Id.* Ultimately, the FHWA found that only one alternative, Alternative 9 (widening Lake Shore Drive, widening Stony Island Avenue, and reconfiguring Hayes Drive), fully met the project purpose of accommodating changes in travel patterns resulting from closing roadways in Jackson Park and improving pedestrian and bicycle access and circulation to and from Jackson Park. *Id.* at 65. The FHWA then conducted further analysis to generate sub-alternatives representing different means to implement Alternative 9 and subjected two of those sub-alternatives, 9A and 9B, to a "least harms analysis." *Id.* at 67. Ultimately, the FHWA found that Alternative 9B caused the least overall harm to section 4(f) properties. *Id.* at 80–82.

c. USACE Permits

The City's choice of Jackson Park for the OPC also necessitated the involvement of the U.S. Army Corps of Engineers (USACE), which administers both the Rivers and Harbors Appropriation Act of 1899 (RHA) and the Clean Water Act (CWA).

In 2014, the Park District and the USACE entered into an agreement to complete an ecological restoration project within Jackson Park and along the Lake Michigan shoreline. [61-22] at 76. This project, known as the Great Lakes Fishery and Ecosystem Restoration (GLFER), includes about 147 acres of native habitat within Jackson Park along the shoreline and 24 acres of new natural areas, as well as the installation of over 600,000 native plants. *Id.* It is the existence of the GLFER that implicates USACE's involvement under the RHA.

Section 408 of the RHA makes it "unlawful for any person or persons to take possession of or make use of for any purpose . . . work built by the United States," but authorizes the USACE to "grant permission for the alteration or permanent occupation or use of . . . [a] public work[] when in the judgment of the Secretary such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work." 33 U.S.C. § 408. The Park District requested a permit pursuant to section 408 of the RHA from USACE on August 20, 2019. [61-22] at 79; *see also* [61-46] at 2. The Park District made this permit request because the OPC's construction will permanently impact the GLFER, specifically by co-opting narrow strips located along the project perimeter to accommodate roadway improvements,

for a total of 1.32 acres. [61-44] at 16. The Park District proposed mitigating these adverse impacts by planting 2.43 acres of native plants and by rehabilitating a deteriorated historic path and lagoon overlook along the Inner Harbor. *Id.* After reviewing the section 408 permit and preparing an Environmental Assessment, USACE found that the Park District's proposal qualified for a section 408 permit because it would "not adversely impact the usefulness of the USACE project. To the contrary, the design of the proposed alteration will improve usefulness of the GLFER project by increasing the restored natural areas acreage as well as improving park accessibility through pathway connections to the Obama Presidential Center." [61-45] at 4. In January 2021, the USACE granted a section 408 permit, allowing the Park District to "permanently impact a total of 1.32 acres" of the GLFER, "which will be offset by implementation of 2.43 acres" of a planned mitigation area in Jackson Park. [61-46] at 2.

The City's proposed transportation improvements also implicated section 404 of the CWA because the need to provide construction access at two existing bridges will require temporarily dewatering a total of 0.24 acres of waters of the United States and expansion of the 59th Street Inlet Bridge will require 0.04 acres of new fill in waters of the United States. [61-42] at 2. Under section 404 regulations, "no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States." *Fox Bay Partners v. U.S. Corps of Eng'rs*, 831 F. Supp. 605, 609 (N.D. Ill. 1993) (quoting 40 C.F.R. § 230.10(c)).

The USACE determined that the transportation project complies with the terms and conditions to receive a Regional Permit 3, which applies to projects "that impact no more than 0.5 acres of waters of the U.S." [61-42] at 2; [61-3] at 2. The USACE found, specifically, that the project "will result in no more than minimal individual and cumulative adverse effects on the aquatic environment and will not be contrary to the public interest." [61-41] at 14. The USACE therefore approved the issuance of a permit for the construction. [61-41]; [61-42] at 2.

d. NEPA

The City's decision to place the OPC in Jackson Park also prompted various agencies, including NPS and FHWA, to prepare an Environmental Assessment (EA) pursuant to NEPA to evaluate the environmental impacts of the proposed federal actions. [61-22] at 3, 13–14.

Signed into law in 1970, NEPA establishes a national policy to "encourage productive and enjoyable harmony between man and his environment." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321)); *see also Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 953 (7th Cir. 2003) (observing that NEPA reflects a "broad national commitment to protecting and promoting the environment"). Under NEPA, federal agencies must "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official" on:

(i) the environmental impact of the proposed action,

> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C). This "detailed statement" is called an environmental impact statement (EIS). *Pub. Citizen*, 541 U.S. at 757. The Council of Environmental Quality (CEQ), established by NEPA to issue regulations interpretating NEPA, has promulgated regulations guiding agencies in determining which actions require the preparation of an EIS. *Id.* Relevant here, the regulations allow an agency to permit a more "limited document," an environmental assessment (EA), if the agency's proposed action "neither is categorically excluded from the requirement to produce an EIS nor would clearly require the production of an EIS." *Id.*; *see also Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 673 F.3d 518, 525 (7th Cir. 2012).

Under the operative regulations,[2] the EA is a "concise public document" that provides "sufficient evidence and analysis for determining whether to prepare" an EIS. *Pub. Citizen*, 541 U.S. at 757 (quoting 40 C.F.R. § 1508.9(a) (2019)). If, pursuant to an EA, an agency determines that the regulations do not require it to prepare an EIS, it must issue a "finding of no significant impact" (FONSI), which "briefly

[2] The regulations were amended in July 2020 and became effective in September 2020, a month after the issuance of the EA in this case. *See* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020); [61-22] at 2. The parties agree that the new regulations do not apply here.

presents the reasons why the proposed agency action will not have a significant impact on the human environment." *Id.* at 757–58 (citing 40 C.F.R. §§ 150.1(e), 1508.13 (2019)). Put simply, an agency's preparation of an EA leads either to a FONSI, or alternatively, to a finding that it must prepare an EIS. *Hoosier Env't Council, Inc. v. U.S. Army Corps of Eng'rs*, 105 F. Supp. 2d 953, 970 (S.D. Ind. 2000) (citing *Rhodes v. Johnson*, 153 F.3d 785, 788 (7th Cir. 1998)). In this case, the agencies did not prepare an EIS. Instead, they prepared an EA, *see* [61-22], and then a FONSI in which NPS and FHWA concluded that "there is no significant impact to the human environment associated with" the federal actions with respect to the OPC—namely, NPS' approval of the conversion of UPARR-assisted land in Jackson Park and the FHWA's authorization of funding for transportation improvements, [61-43] at 2.

NEPA also requires that agencies "study, develop, and describe appropriate alternatives" to major federal projects. 42 U.S.C. § 4332(2)(C)(iii), (2)(E). Here, the EA examined three such alternatives: Alternative A, the no-action alternative, where NPS does not approve the UPARR conversion, the OPC is not built, and no roads are closed; Alternative B, where NPS approves the UPARR conversion, the OPC is built, and roads are closed, but the FHWA does not approve funding for the transportation improvements; and Alternative C, where the NPS approves the UPARR conversion and the FHWA approves funding of the transportation improvements identified in Alternative 9B of the FHWA's section 4(f) Evaluation. [61-22] at 27–28. After review, the agencies selected Alternative C as the "preferred alternative" because it best

"meets the purposes and needs of both NPS and FHWA." *Id.* at 79–80. Those agencies concluded that the analysis in the EA demonstrated that the selected action would not have a significant impact on the environment. [61-42] at 2.

e. NHPA

The City's decision to place the OPC in Jackson Park also triggered the application of section 106 of NHPA, which requires federal agencies to "take into account the effect" of any "undertaking on any historic property" prior to approving the expenditure of federal funds. 54 U.S.C. § 306108. Under NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4; assess the adverse effects of the undertaking on any eligible historic properties, *id.* § 800.5(a); and consult with "other consulting parties" to "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects" on those historic properties, *id.* § 800.6(a).

The FHWA served as the lead agency in preparing an assessment of effects to historic properties (AOE) from the "undertaking"—the OPC's construction and related federal actions by NPS, FHWA, and USACE. [61-13] at 7–8. The AOE identified two historical properties that would be adversely affected by the OPC's construction: (1) Jackson Park and Midway Plaisance; and (2) the CPBS Historic District. *Id.* at 46–47, 62, 87–88. The AOE described those adverse effects, as well as actions the various agencies and the City will take to avoid, minimize, and mitigate the impacts from the OPC and road closures. *Id.* at 46–47, 62, 81–86.

f. The City's Tree Removal in 2018

Finally, this Court summarizes the facts relating to Plaintiffs' anticipatory demolition claim under section 110(k) of NHPA. Section 110(k) prohibits federal agencies from issuing a loan, permit, license, or other assistance to an applicant who, "with intent to avoid the requirements [of section 106 of NHPA], has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur." 54 U.S.C. § 306113. An exception exists, however, if the agency "determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant." *Id.*

In August 2018, the Advisory Council on Historic Preservation (ACHP)[3] notified FHWA that it became aware that trees were being cleared in Jackson Park, which was then already undergoing section 106 review. *See* [61-7]; *see also* [61-6]. The FHWA then flagged this issue for the City, which subsequently provided a written explanation for its actions. [61-8]. The City explained that, in August 2018, the Park District began site preparation (including removing trees and grading the surface) for the building of a new track and field in Jackson Park. *Id.* at 2. The City further explained that the Foundation had agreed to donate the funds for the track and placed no conditions on the donation related to approval of the OPC. *Id.* at 3. The work, according to the City, lies entirely outside the area proposed for the OPC

[3] The ACHP is the federal agency charged with administering the NHPA. *See Nat'l Min. Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003).

and outside the area where any proposed traffic improvements would be made; the work is intended to provide improved track and field and recreational opportunities in the Park, despite the eventual OPC construction. *Id.* The City also explained that it had consulted NPS prior to its work on the track and field and that it understood NPS agreed that the new track and field were not subject to federal review. *Id.* at 4. Nevertheless, the City agreed to cease construction until the completion of section 106 reviews. *Id.* at 2.

In response to the City, the FHWA issued a letter in September 2018 stating that although construction of the track and field portion did not itself implicate federal review, it *does* factor into the section 106 and NEPA processes. [61-9] at 4–5. Ultimately, however, the FHWA determined that section 110(k) did not apply to the City's work with respect to the track and field facilities because the City did not take any actions with the intent to avoid the requirements under section 106. *Id.* at 5.

II. Legal Standard

A preliminary injunction constitutes "an extraordinary remedy" reserved for exceptional cases. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *LHO Chi. River, L.L.C. v. Rosemoor Suites, LLC*, 988 F.3d 962, 968 (7th Cir. 2021). A party seeking a preliminary injunction must establish it has a likelihood of success on the merits, that it has no adequate remedy at law, and that it will suffer irreparable harm if a preliminary injunction is denied. *Speech First, Inc. v. Killeen*, 968 F.3d 628, 637 (7th Cir. 2020), *as amended on denial of reh'g and reh'g en banc* (Sept. 4, 2020).

If the moving party meets these threshold requirements, this Court then "must weigh the harm the denial of the preliminary injunction would cause the

plaintiff against the harm to the defendant if the court were to grant it." *Id.*; *see also Tully v. Okeson*, 977 F.3d 608, 613 (7th Cir. 2020), *cert. denied*, No. 20-1244, 2021 WL 2519129 (U.S. June 21, 2021). To do so, this Court must also consider the public interest in granting or denying the injunction. *Speech First*, 968 F.3d at 637. This Court uses a "sliding scale approach" when weighing these considerations. *Cassell v. Snyders*, 990 F.3d 539, 545 (7th Cir. 2021).

III. Analysis

Before considering the merits of the claims, this Court summarizes the appropriate standard of review of the federal agencies' actions surrounding the OPC. Plaintiffs ask this Court to review the agencies' actions under the Administrative Procedure Act (APA), which sets "forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020). The APA directs a "reviewing court" to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Courts find an agency decision arbitrary and capricious if it "runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Dep't of Workforce Dev.-Div. of Vocational Rehab. v. U.S. Dep't of Educ.*, 980 F.3d 558, 565–66 (7th Cir. 2020) (quoting *Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 668 (7th Cir. 2016)). Judicial review under this standard is deferential, and "a court may not substitute its own policy judgment for that of the agency." *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158

(2021). This Court's task "simply ensures that the agency has acted within a zone of reasonableness" and "has reasonably considered the relevant issues and reasonably explained the decision." *Id.* In reviewing an agency's decision under the arbitrary and capricious standard, this Court looks at the "entire record," and upholds the agency actions if it discerns a "rational basis for the agency's choice" even it disagrees with the agency's action. *Boucher v. U.S. Dep't of Agric.*, 934 F.3d 530, 547 (7th Cir. 2019) (quoting *Israel v. U.S. Dep't of Agric.*, 282 F.3d 521, 526 (7th Cir. 2002)).

With these standards in mind, this Court turns next to determining whether Plaintiffs demonstrate a likelihood of success on the merits of their claims.

A. NEPA Claim

This Court begins its analysis with Plaintiffs' NEPA claim. Plaintiffs raise two primary challenges under NEPA. First, they argue that agencies acted arbitrarily and capriciously by issuing a FONSI at the conclusion of their EA and by not preparing a more detailed EIS. [31] at 19–25. Second, they contend that the agencies failed to consider alternative locations to Jackson Park for the OPC. *Id.* at 25–32. This Court will consider those arguments in order below.

1. Decision to Forego the EIS

Plaintiffs contend that the agencies improperly elected to forego an EIS, arguing that an EIS was mandated based upon any assessment of the evident environmental impacts and the relevant regulatory factors.

a. Environmental Impacts

First, Plaintiffs posit that "entire swaths" of the EA ignore and understate environmental impacts. [31] at 20. They complain that the EA acknowledges that

close to 1,000 mature trees must be cut to make way for the OPC and expansion of roadways, but "treats that massive transformation . . . as insignificant and fully mitigated" by the commitment to plant an equal number of saplings. *Id.* at 20. Plaintiffs also take issue with the cutting of hundreds of trees on the eastern and western edges of Jackson Park due to the impact on air quality and migratory birds. *Id.* These complaints, however, amount to nothing more than disagreements about substantive decisions that the various Defendants made to address the environmental impacts caused by the OPC. NEPA "does not mandate particular results," and so long as "adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Mineta*, 349 F.3d at 953 (quotation omitted); *accord Indian River County v. U.S. Dep't of Transp.*, 945 F.3d 515, 522 (D.C. Cir. 2019) ("NEPA is not a suitable vehicle for airing grievances about the substantive policies adopted by an agency, as NEPA was not intended to resolve fundamental policy disputes."), *cert. denied sub nom. Indian River County v. Dep't of Transp.*, 141 S. Ct. 243 (2020).

This Court thus does not evaluate whether the agencies made the "right" decisions, but rather whether in making those decisions they followed the NEPA procedures. *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 593 F. Supp. 2d 1019, 1024 (E.D. Wis. 2009), *aff'd sub nom. Habitat Educ. Ctr. v. U.S. Forest Serv.*, 609 F.3d 897 (7th Cir. 2010). And the agencies indisputably did so here with respect to trees and the impacts of cutting down the trees to migratory birds. The EA includes as Appendix

D a 75-page "Tree Technical Memorandum" which identifies and discusses the impacts from the anticipated removal of trees to accommodate the OPC. [61-22] at 164–239. Among other things, the Tree Memo identifies the species, size, and health of each tree that will be removed, *id.* at 179–81, and extensively details strategies to mitigate the effects of tree removal, including replacing each tree (on a 1:1 ratio) with 2.5-inch to 4-inch caliper trees that will complement the historic landscape of Jackson Park and that will serve functional purposes related to aesthetics, shade, sightlines, and access, *id.* at 183–86, *see also id.* at 42.

The EA also extensively considers the environmental impacts of the OPC to migratory birds, acknowledging that the habitat for migratory birds will be temporarily impacted by the clearing of 789 trees from Jackson Park and that the City has committed to ban tree removal from March 1 to August 31 to protect the birds during breeding season. *Id.* at 41–42, 84, 121–25.

Further, the EA includes an air quality analysis detailed in Appendix E. *See id.* at 42, 240–300.

Based upon their assessments, the agencies concluded in the EA that its tree replacement plan would result in "long-term beneficial impacts to the overall tree population, tree species diversity, and anticipated tree canopy when the replanted trees reach maturity." *Id.* at 182. Upon examination of the EA, this Court finds that the agencies satisfied NEPA's requirements by analyzing the serious impacts from tree removal to the overall environment, air quality, and migratory birds. This Court thus lacks a basis to disturb their substantive judgment that the tree replacement

project will result in a net benefit to Jackson Park. *See Boucher*, 934 F.3d at 547 (instructing courts to defer to agencies as long as they can discern a "rational basis for the agency's choice").

b. Regulatory Factors

Plaintiffs next complain that the agencies failed to adequately consider certain enumerated regulatory factors relevant to a finding of whether there exist "significant" environmental impacts from the project that would warrant an EIS. [31] at 21. Because the agencies failed to adequately consider these factors, Plaintiffs argue, the EA erroneously finds the non-existence of "significant" environmental impacts, and thus is not entitled to deference. *Id.*

Under the operative regulations, whether a project "significantly" affects the human environment such as to require the preparation of an EIS depends upon two elements: context and intensity. 40 C.F.R. § 1508.27(a)–(b) (2019); *see Mineta*, 349 F.3d at 953. Plaintiffs emphasize the intensity element. The regulations enumerate ten factors that "should be considered" in assessing the "intensity" element. 40 C.F.R. § 1508.27(b) (2019). Plaintiffs contend that the agencies insufficiently considered the following four factors: (1) "unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas"; (2) the "degree to which the effects on the quality of the human environment are likely to be highly controversial"; (3) the "degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic

Places or may cause loss or destruction of significant scientific, cultural, or historical resources"; and (4) whether "the action is related to other actions with individually insignificant but cumulatively significant impacts." *Id.*; *see* [31] at 20–25.

This Court will consider whether the agencies sufficiently addressed these regulatory factors relevant to "intensity," bearing in mind that as long as "an agency considers the proper factors and makes a factual determination on whether the environmental impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference." *Ind. Forest*, 325 F.3d at 859; *accord Del. Audubon Soc'y v. Salazar*, 829 F. Supp. 2d 273, 284 (D. Del. 2011) ("Presence of enumerated intensity factors does not mandate a finding of significance; rather, the agency must establish only that it addressed and evaluated the factors.") (citing *Coliseum Square Ass'n, Inc. v. Jackson,* 465 F.3d 215, 233–34 (5th Cir. 2006)).

Unique Characteristics. First, this Court finds no merit to Plaintiffs' argument that the agencies failed to consider the unique characteristics of Jackson Park. *Contra* [31] at 21–22. In fact, the EA places great emphasis and focus upon the unique geographic characteristics of Jackson Park. For instance, the EA discusses in detail impacts: to water resources (Lake Michigan, the North and South Lagoons, a pond, and four wetlands), [61-22] at 42–43; archaeological resources, *id.* at 44; wildlife, *id.* at 40–42, and air quality, *id.* at 42. The EA further details mitigating measures the agencies would take to protect Jackson Park's unique characteristics, such as, for example, prohibiting tree removal through August 31 to protect certain bird species during their breeding season. *Id.* at 41. Plaintiffs may not agree with

the agencies' determination that the construction would not significantly impact the unique geographical characteristics of the area, but this Court cannot second-guess their substantive decisions *de novo*. *Ind. Forest,* 325 F.3d at 859.

Controversy. Plaintiffs next contend that the agencies failed to consider "the degree to which the effects on the quality of the human environment are likely to be highly controversial." C.F.R. § 1508.27(b)(4) (2019); *see* [31] at 22. This Court employs a two-step analysis to determine whether an agency adequately evaluated this factor: first, the plaintiffs must initially demonstrate that "experts and state and federal agencies disagree about the effects of the [construction] on the human environment"; and second, assuming plaintiffs meet that initial burden, this Court then decides whether the record shows that "these concerns were addressed . . . in finding that the project would not significantly affect the environment." *Ind. Forest*, 325 F.3d at 860 (quotation omitted).

To meet the first of these two prongs—the existence of a disagreement—Plaintiffs argue that a controversy exists about the construction's size, nature, and impact, including the disruption of traffic patterns, the destruction of trees, the size of the OPC building and its placement on the Midway Plaisance, the destruction of "key features" of Jackson Park, and the decision to place the OPC in a public park designed by Frederick Law Olmsted.[4] [31] at 22. In support, Plaintiffs point to the declaration of Plaintiff W.J.T. Mitchell, a landscape historian and professor at the University of Chicago, whose declaration highlights some of these points of

[4] Frederick Law Olmsted, known as the father of American Landscape architecture, designed the site now known as Jackson Park.

disagreement with the City, namely his belief that there exists "a mistaken idea that nineteen plus acres confiscated by the OPC plan do not represent a large part of Jackson Park," and that the planned closing of the east-bound lane of Midway Plaisance, which serves as an east/west artery connecting South Side neighborhoods with Jackson Park and Washington Park, will destroy both the effect of Midway Plaisance as a historical space and a crucial part of urban infrastructure, [31-1] at 12, 13. Yet the scope of this Court's NEPA review "is limited to the administrative record that was before the agency at the time it made its decision." *E. Band of Cherokee Indians v. U.S. Dep't of the Interior*, No. CV 20-757 (JEB), 2021 WL 1518379, at *25 (D.D.C. Apr. 16, 2021) (quoting *Rock Creek Pack Station, Inc. v. Blackwell*, 344 F. Supp. 2d 192, 201 (D.D.C. 2004)). Plaintiffs fail to demonstrate that Mitchell's views were before the agencies at the time they prepared the EA, and accordingly, may not use that piece of evidence to demonstrate a disagreement.

Regardless, even if Plaintiffs could demonstrate a genuine disagreement with the agencies about the impact to certain features of Jackson Park, that disagreement does not "render the defendants out of compliance under this [controversy] factor." *Mineta*, 349 F.3d at 957. Plaintiffs must also demonstrate the second step of the "controversy" inquiry—that their concerns were not addressed by the agencies in finding that the project would not significantly affect the environment. *Ind. Forest*, 325 F.3d at 860. And Plaintiffs fall short on this second step too because the EA fully addresses these effects. *See* [61-22] at 24–26, 32–38 (change in traffic patterns), 164–239 (tree removal), 18–20 (size of the OPC building and relationship to Midway

Plaisance), 61–67 (historic properties). In sum, because the record "is replete with scientific data addressing the concerns" which Plaintiffs raise, this Court cannot say (for the purposes of the instant motion) that the agencies acted arbitrarily and capriciously in finding no significant impact and not ordering an EIS. *Ind. Forest*, 325 F.3d at 861.

Effects on historic sites, districts, or highways. Plaintiffs next argue that the EA ignores impacts on three National Register historic resources—Jackson Park, the Midway Plaisance, and the Chicago Boulevards Historic District—as well as "other unique and irreplaceable features of Jackson Park." [31] at 22–23. Far from ignoring these issues, however, the EA discusses these resources at length. [61-22] at 61–67. Thus, again, the record undermines the notion that the agencies acted arbitrarily and capriciously in addressing this factor and in finding no significant impact. *See Mineta*, 349 F.3d at 957 ("That conclusion was informed and reasoned, and thus cannot be second-guessed.").

Cumulative effects. Plaintiffs also argue that the agencies improperly ignored a number of cumulative effects that will arise from the OPC's construction. [31] at 23–25. Not so. The EA addresses all of the effects Plaintiffs claim have been ignored. For instance, Plaintiffs claim the construction involves not only the OPC building, but also the destruction of a road system and creation of a new roadway system that will narrow the park and expose Jackson Park to noise, fumes, dirt, and other types of pollution. *Id.* at 24. But the EA plainly considers the creation of a new roadway system and the effects stemming of this project. [61-22] at 13, 20–26. Plaintiffs also

claim that the EA includes only a cursory cumulative impact analysis with respect to the GLFER area in Jackson Park, [31] at 24, yet the EA devotes an entire section to analyzing the impacts of the OPC's construction on GLFER, *see* [61-22] at 76–79. Finally, Plaintiffs complain that the EA "makes no reference" to a golf course that has been targeted for future destruction. [31] at 24. Contrary to this assertion, however, the EA discusses the golf courses within Jackson Park but notes that, at the time of the assessment, the rehabilitation of those golf courses was "not considered" because "final plans and design" for the courses had not yet been approved. [61-22] at 44–45. An agency does not act arbitrarily or capriciously by excluding from a cumulative impacts analysis "any project that cannot be meaningfully discussed at the time" the EA is issued. *Habitat Educ. Ctr.*, 673 F.3d at 527. Thus, in sum, none of Plaintiffs' objections to the EA's cumulative impacts analysis square with the record.

For these reasons, this Court cannot find that Plaintiffs are likely to succeed on the merits of their contention that the agencies acted arbitrarily and capriciously by foregoing an EIS.

2. Inquiry Into Reasonable Alternatives

Plaintiffs also argue that the agencies failed to "study, develop, and describe appropriate" alternatives, as required under NEPA. [31] at 25–32. This inquiry into reasonable alternatives remains operative even if, as is the case here, the agency finds no significant environmental impact. *Mineta*, 349 F.3d at 960 (citing *River Rd. All., Inc. v. Corps of Eng'rs of U.S. Army*, 764 F.2d 445, 452 (7th Cir. 1985)); *see* 42 U.S.C. § 4332(2)(C)(iii), (2)(E). This Court's review "is not of the agency's substantive

judgment, but of the sufficiency of the agency's consideration of the reasonable alternatives." *Mineta*, 349 F.3d at 960. The regulations require that an agency always study a no-action alternative. *Habitat Educ. Ctr.*, 593 F. Supp. 2d at 1027 n.13 (citing 40 C.F.R. § 1502.14(d) (2019)).

The EA examined three alternatives: Alternative A, the statutorily required no-action alternative, where NPS does not approve the UPARR conversion, the OPC is not built, and no roads are closed; Alternative B, where NPS approves the UPARR conversion, the OPC is built, and roads are closed, but the FHWA does not approve funding for the transportation improvements; and Alternative C, where the NPS approves the UPARR conversion and the FHWA approves funding of the transportation improvements identified in Alternative 9B of the FHWA's section 4(f) Evaluation. [61-22] at 27–28. After review, the agencies selected Alternative C because it best "meets the purposes and needs of both NPS and FHWA." *Id.* at 80. Plaintiffs fault the agencies' review of alternatives in several ways.

First, Plaintiffs devoted much of their briefing and oral argument to accusing the agencies of engaging in segmentation. *See* [31] at 26; [80] at 14–24. Segmentation refers to an improper practice by which an agency attempts to circumvent NEPA by dividing a federal action into smaller components to mask the overall impacts of the single action. *Mineta*, 349 F.3d at 962; *see also Louie v. Dickson*, 964 F.3d 50, 56 (D.C. Cir. 2020). The "classic example" of improper segmentation occurs where an agency builds small portions of a highway (and performs separate NEPA reviews of each portion) to avoid assessing the overall effects of the highway as a whole. *See Oak*

Ridge Env't Peace All. v. Perry, 412 F. Supp. 3d 786, 832 (E.D. Tenn. 2019), *appeal dismissed*, No. 19-6332, 2021 WL 2102583 (6th Cir. Jan. 14, 2021); *see also, e.g.*, *Del. Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1318 (D.C. Cir. 2014) (concluding that an agency engaged in improper segmentation when it failed to consider the comprehensive effects of four related and connected pipeline projects).

Invoking this doctrine, Plaintiffs complain that the agencies engaged in "segmentation" by limiting their NEPA review of "reasonable alternatives" to those presuming that the OPC is either built on Jackson Park (Alternatives B and C) or not (Alternative A), without also assessing whether alternatives sites *outside of* Jackson Park also exist. *See* [31] at 26–28. The agencies' decision, so the argument goes, resulted in a flawed assessment of "reasonable alternatives" under NEPA because the agencies failed to evaluate allegedly superior substitute sites *outside of* Jackson Park as alternatives. *Id.* at 28 (arguing that if "required reviews of possible alternatives had been properly performed, . . . at least one such site, located just to the west of Washington Park, would have been found to be not only prudent and feasible, but also superior to the Jackson Park site"); [80] at 22 (arguing that "Defendants carefully choreographed their narrowing of the scope of [their federal reviews], making it impossible to consider any site other than the one that was chosen").

Based on the record, Plaintiffs' improper segmentation theory fails. Improper segmentation occurs when an agency attempts to engage in piecemeal NEPA reviews "of projects that are 'connected, contemporaneous, closely related, and

interdependent,' when the *entire project at issue is subject to federal review*." *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 50 (D.C. Cir. 2015) (emphasis added) (quoting *Del. Riverkeeper*, 753 F.3d at 1308). The decision to locate the OPC in Jackson Park was not itself subject to federal review. Rather, as discussed in *PoP I* and *PoP II*, and in the unrebutted declaration of the Foundation's Robbin Cohen, the City—together with the Foundation—made the decision to locate the OPC in Jackson Park, and there exists no evidence that this decision required federal review or involvement. Accordingly, there simply is no basis to conclude that the agencies engaged in improper segmentation when one of the alleged project "segments" does not actually fall under federal review.

Even when considered outside the contours of the anti-segmentation doctrine, Plaintiffs' argument that the agencies should have considered sites outside of Jackson Park as part of their "reasonable alternatives" analysis fails under NEPA. NEPA does not "expand agency jurisdiction over land uses." *Quechan Indian Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, No. CV 07-0677-PHX-JAT, 2007 WL 1890267, at *8 (D. Ariz. June 29, 2007); *see Scottsdale Mall v. State of Indiana*, 549 F.2d 484, 488 (7th Cir. 1977) (noting that NEPA "does not infringe on the right of a state to select a project to be financed solely out of its own funds"). NEPA only requires that agencies explore "reasonable alternatives," *Envtl. Law & Policy Ctr. v. U.S. Nuclear Regulatory Comm'n*, 470 F.3d 676, 685 (7th Cir. 2006), and agencies need not explore alternatives that "present unique problems, or are impractical or infeasible," *Latin Americans for Soc. & Econ. Dev. v. Adm'r of Fed. Highway Admin.*,

756 F.3d 447, 470 (6th Cir. 2014); *see also Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 217 (D.C. Cir. 2013) (noting, with respect to the plaintiffs' proposals of alternatives under NEPA, that "the short and dispositive answer to the [plaintiffs'] argument is that the agency lacks authority to impose the alternatives proposed by the [plaintiffs] and those alternatives would go beyond the scope of the pilot program"); *Nat. Res. Def. Council, Inc. v. F.A.A.*, 564 F.3d 549, 557 (2d Cir. 2009) (noting that NEPA does not require agencies to consider any alternatives that could only be implemented after changes in government policy or legislation) (citing *Nat. Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 93 (2d Cir. 1975)). Because the agencies have no authority to choose an alternative site to Jackson Park, or to force the City to build the OPC in Washington Park, they acted neither arbitrarily nor capriciously by confining their review of "reasonable alternatives" to those involving Jackson Park.

Plaintiffs also rely upon *Openlands v. United States Department of Transportation* to support their argument that the agencies engaged in a flawed study of alternatives. 124 F. Supp. 3d 796 (N.D. Ill. 2015). In *Openlands*, the district court considered the adequacy of an EIS studying the environmental impacts of a proposed interstate tollway project. *Id.* at 804–05. The court found that the agencies preparing the EIS acted arbitrarily and capriciously in considering alternatives under NEPA. *Id.* at 806–08. More specifically, the agencies included a "fatally flawed" no-action alternative that assumed that the project would be built already. *Id.* at 806. Here, in contrast, the no-action alternative—Alternative A—assumes that

the OPC is *not* built and that the federal government takes no actions. [61-22] at 27–28. *Openlands* therefore does not apply.

Finally, Plaintiffs accuse the EA of "separat[ing] out the OPC and its construction from the remainder of the work needed to repair the damage wrought by" the construction, namely, the closure of certain roads, improvement of other roads, and relocation of a track and field within Jackson Park. [31] at 26. That clearly did not occur here. Rather, as discussed in detail above, the entire EA concerns itself with the overall impacts of the OPC's construction on the environment, roads, historical properties, and other resources.

In sum, Plaintiffs have pointed to no errors in the agencies' consideration of alternatives. On the contrary, the agencies "followed required procedures, evaluated relevant factors and reached a reasoned decision." *Envtl Law & Policy Ctr*, 470 F.3d at 685. Thus, this Court finds it unlikely that Plaintiffs will succeed on the merits of their claim that the agencies failed to adequately consider reasonable alternatives under NEPA.

B. Section 4(f) Claim

Plaintiffs also seek a preliminary injunction on their section 4(f) claim. Section 4(f) of the Transportation Act provides that the Secretary of Transportation may only approve a "transportation program or project" "requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance" if "(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the

park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use." 49 U.S.C. § 303(c).

As with their NEPA claim, Plaintiffs argue that the Secretary of Transportation failed to consider "feasible alternatives" to the road closures and the decision to place the OPC in Jackson Park. [31] at 32–33. This argument fares no better under section 4(f) than under NEPA. To reiterate, the City made the decision to use Jackson Park as the site of the OPC. Moreover, neither the OPC's construction nor its operation requires federal funding or approval, and the OPC itself is not a transportation project. Because § 4(f) applies only to transportation projects requiring federal approval, 49 U.S.C. § 303(c), the FHWA had no jurisdiction over the City's decision to situate the OPC within Jackson Park and no authority to evaluate alternatives to the *site* itself; neither the FHWA nor this Court can compel the City to force the OPC to build its compound in Washington Park instead of Jackson Park. Accordingly, it was neither arbitrary nor capricious for the FHWA not to consider sites outside of Jackson Park in its "feasible alternatives" analysis.

To be sure, the OPC project did still trigger section 4(f) review because the City requests federal funding for certain roadway, bike, and pedestrian improvements that it intends to make, and the improvements constitute a transportation project that requires the use of section 4(f) properties (i.e., Jackson Park, Midway Plaisance). *See* [61-35] at 11, 17; 49 U.S.C. § 303(c). And the statute requires FHWA to confirm that "there is no prudent and feasible alternative to using that land," and to then

ensure that the project includes all possible planning to minimize harm. 49 U.S.C. § 303(c).

The record confirms that the FHWA adequately performed these statutory duties. As to the first of those duties to confirm that there exists no feasible and prudent alternative to using § 4(f) land, as stated in the § 4(f) report, because the project area "is surrounded by 4(f) properties," only two avoidance alternatives exist: (1) the no-action alternative, which presumes that the OPC site is located in Jackson Park, that the City closes certain roadways within Jackson Park, and that no roadway improvements are completed in response to the closed roadways; and (2) so-called "congestion management process strategies," which involve ways to reduce congestion that do not involve major construction. [61-35] at 51–57. But, as the report concludes, neither avoidance alternative is feasible and prudent. *Id.* Specifically, the report states that a traffic analysis revealed that the no-action alternative is not feasible and prudent because it does not provide sufficient pedestrian and bicyclist accommodations to improve access and circulation to Jackson Park. [61-35] at 52. And similarly, the report finds that the "congestion management process strategies" are not feasible and prudent because a traffic analysis shows that the strategies would have limited effectiveness in improving traffic operations. *Id.* at 55.

Plaintiffs suggest that the FHWA failed to meet its second duty under the statute—to ensure that the roadway improvements project included all possible planning to minimize harm to the Park. [31] at 33; *see* 49 U.S.C. § 303(c). Plaintiffs

fail to specifically articulate how the agencies failed in this regard, and therefore waive this argument. *See M.G. Skinner & Assocs. Ins. Agency, Inc. v. Norman-Spencer Agency, Inc.*, 845 F.3d 313, 321 (7th Cir. 2017) ("Perfunctory and undeveloped arguments are waived, as are arguments unsupported by legal authority.").

Regardless, the record confirms that the FHWA abundantly considered harm minimization. The section 4(f) report includes a fulsome discussion and analysis of harm minimization, assessing nine alternative construction schemes to improve transportation capacity and minimize the use of section 4(f) resources. [61-35] at 58–82.

In sum, Plaintiffs' arguments that the agencies acted arbitrarily and capriciously in conducting their section 4(f) review lacks support in the record, and Plaintiffs have failed to demonstrate any likelihood that they could succeed on their section 4(f) claim.

C. NHPA Section 106 Claim

Next, this Court considers Plaintiffs' likelihood of success on their section 106 claim under NHPA. The NHPA comprises a "series of measures designed to encourage preservation of sites and structures of historic, architectural, or cultural significance." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 108 n.1 (1978); *see Maudlin v. Fed. Emergency Mgmt. Agency*, 138 F. Supp. 3d 994, 1000 (S.D. Ind. 2015) ("The NHPA reflects Congress's longstanding interest in historic preservation."). Section 106 of the NHPA provides:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having

> authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.

54 U.S.C. § 306108. Under NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4; assess the adverse effects of the undertaking on any eligible historic properties, *id.* § 800.5(a); and, with the input of consulting parties, "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects" on those historic properties, *id.* § 800.6(a).

In moving for a preliminary injunction on their NHPA claim, Plaintiffs again assert that the FHWA precluded such review by engaging in "segmentation"—that is, by failing to include the OPC project itself in its review, and instead focusing upon only the effects to Jackson Park adjacent to the project. [31] at 34. This argument is baseless. As discussed, the OPC itself is not a federal project, and thus the doctrine of segmentation is simply not applicable in this context. Moreover, Plaintiffs' contention that the FHWA focused only upon effects adjacent the project, as opposed to effects caused by the project itself, is unsupported. After FHWA determined that the historical properties that would be adversely affected by the OPC's construction included Jackson Park, Midway Plaisance, and the CPBS Historic District, [61-13] at 45–63, it then analyzed in great detail the effects the OPC's construction and placement in Jackson Park would have on historic properties, including the destruction of roadways, *id.* at 55, and removal and replacement of certain parts of the historical landscape (such as the Perennial Garden/Women's Garden) to

accommodate the OPC, *id.* at 56–60. Defendants have thus unquestionably addressed the adverse effects created by the OPC project itself.

Ostensibly, Plaintiffs also argue that the law required Defendants to consider alternatives to Jackson Park itself as part of their duties to evaluate avoidance, minimization, and mitigation measures. *See* [31] at 34 (arguing that "mitigation measures were the only game in town – not avoidance or minimization – assuming the destruction of Jackson Park was a done deal"). That argument again is based upon the false notion that the agencies were involved in the decision to locate the OPC in Jackson Park. As explained above already, the City (and others), not federal agencies, made the decision to locate the OPC in Jackson Park. And neither NHPA nor the regulations imposed upon the agencies a "duty to consider alternative sites for construction"; rather, the regulations' "references to alternatives are . . . more sensibly interpreted as applying only to changes in the *existing* proposal that could make it more compatible with its surrounding environment." *Wicker Park Historic Dist. Pres. Fund v. Pierce*, 565 F. Supp. 1066, 1075–76 (N.D. Ill. 1982) (emphasis in original). Indeed, the City's decision to locate the OPC in Jackson Park constrained the agencies' evaluation of alternatives and modifications under NHPA, as it did under NEPA.

Plaintiffs' claim also fails to the extent that they believe section 106 compels a certain result. It does not. Section 106 is merely a procedural statute requiring a federal agency to take certain steps prior to beginning a project. *Narragansett Indian Tribe ex rel. Narragansett Indian Tribal Historic Pres. Office v. Nason*, No. CV 20-576

(RC), 2020 WL 4201633, at *2 (D.D.C. July 22, 2020) (citing *See Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003)); *see also see also Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 846 (10th Cir. 2019) (emphasizing that the section 106 process "does not demand a particular result"), *reh'g denied* (June 24, 2019); *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, 608 F.3d 592, 610 (9th Cir. 2010) (describing the NHPA as a "procedural statute requiring government agencies to 'stop, look, and listen' before proceeding with agency action"); *Waterford Citizens' Ass'n v. Reilly*, 970 F.2d 1287, 1291 (4th Cir. 1992) (observing that "Congress did not intend this provision to impose general obligations on federal agencies to affirmatively protect preservation interests"). Accordingly, this Court does not second-guess the agencies' substantive decisions based upon its own *de novo* review; instead, this Court confines its review to the very narrow question of whether the agencies followed through with their mandate to meaningfully evaluate ways to avoid, mitigate, and minimize adverse effects to historic properties. 36 C.F.R. § 800.6(a). The agencies indisputably did, as evidenced by the AOE's discussion of the actions the various agencies and the City will take to avoid, minimize, and mitigate the impacts from the OPC and road closures. [61-13] at 46–47, 62, 81–86. Accordingly, this Court finds Plaintiffs have failed to demonstrate any likelihood of success on their § 106 claim.

D. UPARR Claim

Next, this Court considers the likelihood of success on the merits of Plaintiffs' UPARR claim. The UPARR Act focuses upon providing recreational opportunities in economically distressed urban communities. *See* 54 U.S.C. §§ 200501–200511; 36

C.F.R. § 72.72(a) ("The UPARR program has made funds available for the renovation and rehabilitation of numerous urban parks and recreation facilities."). Under the applicable regulations, "all recipients of funds for renovation and rehabilitation projects are obligated . . . to continually maintain the site or facility for public recreation use." 36 C.F.R. § 72.72(a).

UPARR authorizes NPS to convert property assisted under UPARR to non-public recreation uses. The statute provides that:

> The Secretary shall approve such a conversion only if the Secretary finds it to be in accord with the then-current local park and recreation recovery action program and only on such conditions as the Secretary considers necessary to ensure the provision of adequate recreation properties and opportunities of reasonably equivalent location and usefulness.

54 U.S.C. § 200507. The regulations further provide that "NPS will only consider conversion requests" if certain "prerequisites have been met." 36 C.F.R. § 72.72(b). One such prerequisite stipulates that the conversion proposal "assures the provision of adequate recreation properties and opportunities of reasonably equivalent usefulness and location." *Id.* § 72.72(b)(3). Another requires that "All practical alternatives to the proposed conversion have been evaluated." *Id.* § 72.72(b)(1).

Plaintiffs' sole argument on this claim posits that NPS failed to evaluate other practical alternatives and focused solely upon the eastern end of the Midway Plaisance as the replacement recreation site for the conversion. [31] at 35–36. This argument fails for two reasons. First, the regulations do not require the NPS itself to consider alternatives *to the replacement recreation sites*. Instead, the regulations state that NPS "will only consider conversion requests" if the applicant (here, the

City) has demonstrated that "All practical alternatives *to the proposed conversion* have been evaluated." 36 C.F.R. § 72.72(b) (emphasis added). The *proposed conversion* is the conversion of Park land to accommodate the OPC. And NPS did consider whether the City evaluated practical alternatives to this *proposed conversion*. In the NPS' final UPARR Stewardship Review, NPS evaluated the City's considerations of alternatives to the conversion and concluded that it appropriately ruled out alternatives to the actual converting actions. [61-47] at 3. More specifically, NPS noted that the proposed conversions "were necessary to avoid serious traffic impacts," and thus, as corroborated by FHWA's section 4(f) analysis, no practical alternatives exist as to the conversion of strips of parkland along certain roadways. *Id.* Similarly, NPS explained that it found that the City's UPARR conversion proposal appropriately evaluated other alternatives against the backdrop of its objectives—locating the OPC in a community where the former President worked and lived, for example—and ultimately concluded that no practical alternatives to the conversion existed. *Id.* In short, NPS did what the regulations required by ensuring that the City demonstrated that it considered all practical alternatives to the conversion. 36 C.F.R. § 72.72(b).

Second, to the extent Plaintiffs suggest that Defendants failed to fully consider replacement recreational sites, that assertion similarly lacks any basis in fact or law. While the regulations require that NPS consider conversion requests only if the proposal "assures the provision of adequate recreation properties and opportunities of reasonably equivalent usefulness and location," 36 C.F.R. § 72.72(b)(3), the record

demonstrates that the City's proposal meets this prerequisite. The City considered seven potential replacement sites, including the eastern end of the Midway Plaisance (which it ultimately chose), Harold Washington Park, and five other vacant sites located between 57th and 71st streets in Chicago. [61-10] at 41–43. The City ruled out Harold Washington Park and the vacant lots because none of them are: (1) close to the conversion area in Jackson Park; (2) designed by Olmsted, the designer of Jackson Park; or (3) listed on the National Register of Historic Places. *Id.* at 42. Four of the vacant sites, the City noted, also are not wholly owned by the City, and therefore using them would have required the City to acquire those unowned portions. *Id.* The eastern end of the Midway Plaisance, on the other hand, checked more of the City's boxes because it sits directly across the street from the OPC conversion area, is well suited for diverse forms of recreation like the areas to be converted, and is designed by Olmsted. *Id.* NPS considered this information from the City in approving its conversion request, finding that the City demonstrated the replacement area would provide adequate recreation properties and opportunities of reasonably equivalent usefulness and location. *See* [61-47] at 3–4. Contrary to Plaintiffs' argument, the NPS had no further duties under UPARR to examine any alternative properties or to itself consider alternatives to conversion. Thus, Plaintiffs are unlikely to succeed on the merits of their UPARR claim.

E. USACE Permits

This Court next considers Plaintiffs' claims implicating the USACE. The RHA makes it unlawful to "alter, deface, destroy, move, injure . . . or . . . impair the usefulness of any . . . work built by the United States . . . for the preservation and

improvement of any of its navigable waters, but also authorizes the USACE to "grant permission for the alteration or permanent occupation or use of" a public work "when in the judgment of the Secretary such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work." 33 U.S.C. § 408. The CWA authorizes the USACE to issue permits for the "discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). Plaintiffs advance two arguments for why they believe USACE acted arbitrarily and capriciously when granting permits under the RHA and CWA, but neither has merit.

First, Plaintiffs argue that they are likely to succeed in having the USACE-issued permits voided "given the possibility of prudent and feasible alternatives" that would eliminate the need for the permits at all. [31] at 37. This argument fails for the same reasons it did under NEPA, NHPA, and UPARR: USACE simply had no control over the initial decision to place the OPC in Jackson Park and no jurisdiction to compel the City to pick a different site chosen by federal authorities.

Second, Plaintiffs complain that the RHA permit allows the GLFER to be modified despite it being an "interconnected system that cannot be pulled apart and relocated." *Id.* at 38–39. Despite their dismay about the fact that GLFER will be altered, however, Plaintiffs do not address any statutory criteria governing the USACE's issuance of a section 408 permit; nor do they explain why they believe the USACE's actions were arbitrary or capricious.

Regardless, this Court cannot find that USACE acted arbitrarily or capriciously based upon the record. After reviewing the section 408 permit and

preparing an Environmental Assessment, USACE found that the Park District's proposal qualified for a section 408 permit because it would "not adversely impact the usefulness of the USACE project," and that to the contrary, the "design of the proposed alteration will improve usefulness of the GLFER project by increasing the restored natural areas acreage." [61-45] at 4. This fulfills USACE's statutory duty to grant a permit because, in its judgment, the proposed project "will not be injurious to the public interest and will not impair the usefulness of such work." 33 U.S.C. § 408.

For these reasons, this Court finds that Plaintiffs are unlikely to succeed on the merits of their RHA and CWA claims.

F. Anticipatory Demolition

Finally, Plaintiffs move for a preliminary injunction on their "anticipatory demolition" claim. Section 110(k) of the NHPA prohibits federal agencies from issuing a loan, permit, license, or other assistance to an applicant who, "with intent to avoid the requirements [of section 106 of NHPA], has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur." 54 U.S.C. § 306113.

Invoking this provision, Plaintiffs argue that the City and Park District intentionally removed trees and demolished an athletic field to accommodate the OPC, and that this action amounts to a violation of section 110(k) precluding FHWA and USACE from granting their respective funding and permits. [31] at 39. In making this argument, Plaintiffs assume the fact that the City removed the trees

makes it automatically liable for anticipatory demolition under § 110(k) such that the agencies erred by granting funding and permits. [31] at 41 (arguing that the "acts taken by the City, Park District and Foundation, both in regards to the destruction of the trees and in regards to the development of OPC, involve adverse effects that constitute anticipatory demolition in violation of Section 110(k)"). But as with many of their other claims, Plaintiffs fail to focus correctly on the appropriate statutory inquiry—in this case, whether a federal agency has found that the City, "*with intent to avoid the requirements*" under NHPA, has "significantly adversely affected a historic property." 54 U.S.C. § 306113 (emphasis added).

In this case, the FHWA accepted the City's explanation that it believed the construction work on the track and field did not implicate federal review, thus concluding that the City did not undertake that work with the intent to avoid NHPA review under section 106. [61-9] at 4–5. The FHWA acted neither arbitrarily nor capriciously in reaching this conclusion. The City explained the reasons it began the track and field work while section 106 review remained pending, including that the work lies entirely outside the area affected by the OPC, that the track and field would provide recreational opportunities to counter those lost due to the OPC's construction, and that it had consulted with NPS, which indicated the track and field itself was not subject to federal review. *See* [61-8]. This record supports the conclusion that the City engaged in this early construction *not* with the intent to avoid section 106 review, but because it genuinely believed the construction did not implicate federal review. Plaintiffs argue that FHWA engaged in a "blanket acceptance of the City's

explanation that it did not intend to circumvent the Section 106 review process," [80] at 27, suggesting a naivete; yet they offer nothing to undermine the City's explanation. Therefore, this Court cannot say that FHWA acted arbitrary and capriciously in accepting the City's reasonable explanation of its actions and subsequently concluding that the City did not engage in an anticipatory demolition. This Court accordingly finds it unlikely that Plaintiffs will succeed on their anticipatory demolition claim.

G. Plaintiffs Fail to Meet a Threshold Preliminary Injunction Element

To obtain a preliminary injunction, Plaintiffs must establish some likelihood of success on the merits, that they lack an adequate remedy at law, and that without an injunction they will suffer irreparable harm. *GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357, 364 (7th Cir. 2019), *cert. denied sub nom. GEFT Outdoor L.L.C. v. City of Westfield*, 140 S. Ct. 268 (2019). This Court must deny the injunction if they fail to meet any of these threshold elements. *Id.* (citing *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008)). Plaintiffs have failed to demonstrate that any of their federal claims are likely to succeed, and thus, this Court denies their motion for preliminary injunction for failure to meet this threshold element. In light of this finding, this Court need not address the other requisite elements.

IV. Conclusion

For the reasons stated above, this Court denied Plaintiffs' motion for preliminary injunction [30] by prior minute order [83].

Dated: August 12, 2021

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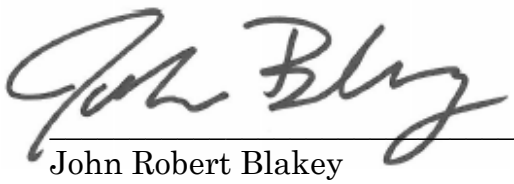

John Robert Blakey
United States District Judge

In the

United States Court of Appeals

For the Seventh Circuit

No. 21-2449

PROTECT OUR PARKS, INC., *et al.*,

Plaintiffs-Appellants,

v.

PETE BUTTIGIEG, Secretary of Transportation, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 21-cv-2006 — **John Robert Blakey**, *Judge*.

AUGUST 19, 2021

Before KANNE, WOOD, and HAMILTON, *Circuit Judges*.

PER CURIAM. In 2016, the City of Chicago and the Barack Obama Foundation selected Jackson Park in Chicago as the location for the Obama Presidential Center. The Center, consisting of a museum, public library, and other spaces for cultural enrichment and education related to the life and presidency of Barack Obama, will take up about 20 acres of the park and require that the City close several nearby roadways. The National Park Service approved the City's plan to build

in the park on the condition that the City expand nearby spaces for public recreation. The Federal Highway Administration approved construction of new roadways to make up for the roadways the City was to close. Both agencies together performed an environmental assessment and concluded that their decisions would have an insignificant effect on the environment and were the least damaging alternatives available to each agency. But they did not consider whether the City could have further reduced environmental harms by building the Center elsewhere.

A group of concerned local citizens, headed by the organization Protect Our Parks, Inc., argued that this environmental review was too cramped; they sought to enjoin construction of the Center under the Administrative Procedure Act (APA), 5 U.S.C. § 702. The district court denied Protect Our Parks's request for a preliminary injunction on August 5. Protect Our Parks promptly moved to enjoin construction pending its appeal from that order. We denied that motion on August 13 and now explain our decision.

I

This is the second time Protect Our Parks has appeared before this court challenging the construction of the Center. It previously asserted that the City's choice to build the Center in Jackson Park violated state law and the United States Constitution. We affirmed summary judgment for the defendants on the constitutional claims but vacated judgment on the state-law claims for lack of jurisdiction, because Protect Our Parks's claims amounted to little more than a policy disagreement with the City's decision to locate the Center in Jackson Park. *Protect Our Parks, Inc. v. Chi. Park Dist.*, 971 F.3d 722, 728 (7th Cir. 2020), *cert. denied sub nom. Protect Our Parks, Inc. v.*

City of Chicago, No. 20-1259, 2021 WL 1602736 (U.S. Apr. 26, 2021).

While that litigation was ongoing, federal agencies reviewed the City's plans. Several agencies had a hand in the process, but the motion now before us centers on two: the National Park Service and the Federal Highway Administration.

The Park Service became involved because Jackson Park benefited from federal grants under the Urban Park and Recreation Recovery Program. The grants committed the City to maintaining Jackson Park for public-recreation purposes. Constructing the Center will require a conversion of recreational park land to non-recreational buildings. The relevant statute provides that the Service "shall approve such conversion" if it is consistent with an applicable program and there are conditions "to ensure the provision of adequate recreation properties and opportunities of reasonably equivalent location and usefulness" in the park. 54 U.S.C. § 200507. The City proposed constructing new recreation areas nearby for a net gain of public-recreation property, and the construction was consistent with all existing park plans, and so the Service gave its approval. The agency saw no other practical alternative that would fulfill the City and Foundation's objectives, which included building the Center in the community where President Obama had lived and worked.

The City's construction plans also required closing a few local roadways near the location where the Center is to be built. The City was free to close these local roads without federal approval, but when it proposed widening other streets to make up for the closures and sought federal funds to do so, the Highway Administration stepped in. Under section 4(f) of the Department of Transportation Act of 1966, the use of

parkland for a federal transportation program or project required the Administration to find that "(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the park …." 49 U.S.C. § 303(c). The Administration reviewed several possible plans for how to build new roadways and approved "Alternative 9B" as the only feasible and least harmful option. Each alternative it considered, including the one it labeled "no-action," assumed that the Center would be built and the existing roadways closed; the differences were confined to the questions whether and how new roads would be constructed to compensate.

The two agencies together prepared an environmental assessment and concluded that their decisions would not cause a "significant" impact requiring an environmental impact statement under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(C). See 40 C.F.R. § 1508.9 (2019) (describing environmental assessment). In conducting that assessment, the agencies noted that they did not "have approval authority over the placement of the [Center] in Jackson Park (or of its design); nor do they have approval authority over the road closures in Jackson Park." They limited their review to the environmental impact of "alternatives within the scope of their authority" and split the possibilities into three alternatives: (A) neither the Park Service nor the Highway Administration approves the City's proposal, (B) only the Park Service approves, and (C) both approve.

Protect Our Parks's claims in this lawsuit center on the agencies' chosen alternatives. It contends that the agencies arbitrarily limited themselves to the parts of the City's plans over which they had approval authority, rather than more

globally considering alternatives, including the possibility of a different location for the Center. If they had considered building the Center elsewhere, Protect Our Parks insists, then the agencies would have found that there were less environmentally damaging locations. Protect Our Parks further contends that the agencies' environmental assessment failed to appreciate fully the impact of Alternative C.

The district court denied a preliminary injunction. It concluded that the agencies had no obligation to consider alternative locations and that Protect Our Parks's disputes with the assessment were "nothing more than disagreements about substantive decisions" that were unlikely to succeed. See *Protect Our Parks, Inc. v. Buttigieg*, No. 21-cv-2006, 2021 WL 3566600 at *9 (N.D. Ill. Aug. 12, 2021).

Protect Our Parks appealed the denial of the preliminary injunction, 28 U.S.C. § 1292(a)(1), and moved for an injunction pending the outcome of its appeal, FED. R. APP. P. 8. We denied the motion after considering the arguments in support of it, the defendants' responses, and submissions from *amici curiae*.

II

An injunction pending appeal is an extraordinary remedy, just like any other injunction. See *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007). To be entitled to this interim relief, the party seeking the injunction (here, the plaintiff) "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Although a plaintiff

need not show by a preponderance of the evidence that she will win her suit, the mere possibility of success is not enough; she must make a "strong" showing on the merits. *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762–63 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1754 (2021). Protect Our Parks's claims do not meet this standard.

Protect Our Parks's central theory is that the agencies unlawfully "segmented" their review under the NEPA. That statute requires federal agencies to prepare an environmental impact statement for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). "'Piecemealing' or 'segmentation,' … 'allows an agency to avoid the NEPA requirement that an [impact statement] be prepared for all major federal action with significant environmental impacts by segmenting an overall plan into smaller parts involving action with less significant environmental effects.'" *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 962 (7th Cir. 2003) (quoting *City of West Chicago v. NRC*, 701 F.2d 632, 650 (7th Cir. 1983)). Protect Our Parks insists that the agencies found no significant environmental impact only by separating the federal decisions—whether to approve the conversion of recreation property and whether to expand the roadways—from the state decision to build the Center in Jackson Park. If the agencies had considered alternative locations, Protect Our Parks argues, then they would have found building elsewhere to be the least environmentally harmful option.

The first problem with Protect Our Parks's position is that it fails to take into account the deference courts owe to agencies with respect to relevant scope of a project. See *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (finding the decision of the Department of the Interior not to prepare an EIS regarding

coal production on the entire Northern Great Plains region not to be arbitrary). In addition, as the district court recognized, segmentation refers only to the situation that arises when an agency arbitrarily separates related *federal* actions from one another. The Center is a local project, and the federal government has no authority to fix its location. Without federal involvement we do not even reach the issue whether the federal government segmented its actions. See *Old Town Neighborhood Ass'n Inc. v. Kauffman*, 333 F.3d 732, 735 (7th Cir. 2003). That is because the NEPA requires an impact statement only for "major Federal actions," which the relevant regulations define to mean actions that are "potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18 (2019). Environmental harm that federal agencies do not cause is irrelevant. See *Mineta*, 349 F.3d at 954 & n.3.

Moreover, the agency's actions must be both a factual and a proximate cause of the asserted harm. See *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004). The Park Service's approval was a factual cause of the Center's placement in Jackson Park, because construction could not start without its approval, but the agency's limited authority prevented it from being a proximate cause of any damage resulting from the Center. The Park Service "shall" approve conversion that meets the criteria of 54 U.S.C. § 200507; it need not assess "the environmental impact of an action it could not refuse to perform." *Pub. Citizen*, 541 U.S. at 769; see also *Sauk Prairie Conservation All. v. U.S. Dep't of the Interior*, 944 F.3d 664, 680 (7th Cir. 2019) ("Because the National Park Service had no authority to end the helicopter training, there is no causal connection between its decision to approve the provision [that permitted training] and any environmental effects continued training might have."), *cert. denied*, 140 S. Ct. 2764 (2020). Put another

way, the agencies must take the objectives they are given and consider alternative means of achieving those objectives, not alternative objectives. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) (Thomas, J.). The City's objective was to build the Center in Jackson Park, so from the Park Service's perspective, building elsewhere was not an alternative, feasible or otherwise.

The causal link between the Center and the Highway Administration's actions is even more tenuous. Constructing the Center is not an effect of the Administration's approval, but the predicate condition for it. The City has the authority to close the roadways to build the Center without federal approval. See *Old Town Neighborhood Ass'n*, 333 F.3d at 735–36. If the Center were not built and the roadways were not closed, then the Highway Administration would have no new road construction to approve or disapprove.

In any event, the agencies did consider the full environmental impact of the Center's construction (as an "indirect" effect of the Park Service's decision to approve conversion) and concluded that it was not "significant." We review that determination under the APA's familiar "arbitrary and capricious" standard, 5 U.S.C. § 706(2)(A), and ask only if the agency's decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). "If an agency considers the proper factors and makes a factual determination on whether the environmental impacts are significant or not, that decision implicates substantial agency expertise and is entitled to

deference." *Mineta*, 349 F.3d at 953 (quoting *Ind. Forest Alliance, Inc. v. U.S. Forest Serv.*, 325 F.3d 851, 859 (7th Cir. 2003)).

Protect Our Parks has not shown it is likely to overcome this deference. Its arguments are, as the district court recognized, disputes with the agencies' substantive judgment, which we typically do not second-guess, so long as the agency has followed the required procedures. See *Env't L. & Pol'y Ctr. v. NRC*, 470 F.3d 676, 685 (7th Cir. 2006).

Protect Our Parks contends that the agencies ignored the environmental impact of cutting down around 800 trees to build the Center. But the agencies reviewed a meticulous tree survey and determined that the City's plan to provide 1:1 replacement with new trees would result in long-term environmental benefits, or at least end up neutral. Protect Our Parks argues that current trees and future saplings are not equivalent, but it is not our role to decide the relative value of the long- and short-term. Protect Our Parks also argues that the City's decision to restrict tree removal during migratory birds' breeding season is an admission that removing the trees will significantly harm the birds. The City's efforts to mitigate harm, though, do not imply that the harm, *once mitigated*, remains significant; they do not even necessarily imply it was significant to begin with. The agencies reasonably determined that the unaffected 500-plus acres of Jackson Park will provide the birds a comfortable environment during construction. Finally, the agencies took the necessary "hard look" at Jackson Park's historical features. See *Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 673 F.3d 518, 526 (7th Cir. 2012). The agencies recognized that Jackson Park will change with the addition of the Center, but they also recognized that it has changed before. The City's plans include conscious efforts to integrate

the Center with the existing landscape and to fulfill the vision of the Park's designer, Frederick Law Olmsted. Protect Our Parks is unlikely to show that the agencies made a clear error in judgment when weighing the benefits of change against history.

III

For the foregoing reasons, we denied the motion for an injunction pending appeal. Protect Our Parks also asks us to expedite this appeal. That request is granted, and an expedited briefing schedule will issue separately.