

**Appeal No. 21-2449**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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

v.

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

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

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

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**ORAL ARGUMENT REQUESTED**

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**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\_\_\_\_\_

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

PROTECT OUR PARKS, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 21-cv-2006
	)	
PETE BUTTIGIEG,	)	
SECRETARY OF THE U.S. DEPARTMENT	)	
OF TRANSPORTATION, et al.,	)	
	)	
Defendants.	)	

**DECLARATON OF W.J.T. MITCHELL**

W.J.T. Mitchell, under oath, declares and states as follows:

1. My name is Dr. W.J.T. Mitchell. I am one of the plaintiffs in the above referenced matter.
  
2. I submit this declaration based on personal knowledge and could competently testify on the matters set forth below if called. This is submitted in support of the motion for injunctive relief filed by plaintiffs in this matter.
  
3. I am the Gaylord Donnelley Distinguished Service Professor of English and Art History at the University of Chicago. I have been teaching at the University of Chicago since 1978, and for the last 42 years have been the Editor of the interdisciplinary humanities journal, *Critical Inquiry*. I am a Chicago resident, living in Hyde Park for decades.
  
4. I am landscape historian, with extensive knowledge of the parks created by Frederick Law Olmsted, who is without question the most famous landscape architect in American history. I have studied Olmsted’s 1871 design (along with Calvert Vaux) of Chicago’s “South Park” system, which includes Jackson and Washington Parks connected by the Midway Plaisance.

I have extensive knowledge of their design, importance, and usage as recreational spaces, as beautifully crafted landscapes, and as historic monuments to democratic values. Olmsted, a prominent abolitionist and intellectual inspiration for the post-Civil War Progressive Era, is responsible for converting the European model of private landscape gardens exclusively for the aristocracy, into a model of free, open public space for all American citizens. I am the author of numerous essays on landscape, and the editor of a book entitled *Landscape and Power* (2nd ed. 2005), that examines the way culture and politics have informed the long history of landscape aesthetics in a variety of media.

5. I am also a frequent visitor to Jackson Park as a place for rest and recreation, as well as instructional tours with my University of Chicago students in courses on “Space, Place, and Landscape.” Like many South Siders, I have used Jackson Park for walking, biking, golfing, and tennis for almost half a century.

6. As part of my professional work, I have become familiar with the various issues and plans under discussion in regards to proposal for the Obama Presidential Center that is proposed for placement in Jackson Park. I have attended numerous neighborhood meetings and examined published reports and information provided as part of the federal reviews to learn about the proposed plan. In the spring of 2018, along with my colleague, University of Chicago Professor Jonathan Lear, I circulated a petition asking the Obama Foundation to reconsider its choice of the Jackson Park site. Almost two hundred University of Chicago faculty signed this petition. As a follow-up, I organized a public symposium on the debates surrounding the OPC’s choice of the Jackson Park location. Consisting of representatives from several neighborhood organizations along with nationally recognized experts on public parks and landscape architecture, the symposium was attended by several hundred people, and was telecast on cable television. The

telecast is still available at the following link: <http://cantv.org/watch-now/the-obama-presidential-center-a-symposium/>. The Obama Foundation was invited to send a representative to engage in public debate but declined to do so.

It is my professional opinion that the proposed reconfiguration and the destruction of lands within Jackson Park and to the Midway Plaisance associated with the planned groundbreaking and further construction for the Obama Presidential Center will irreparably diminish and harm the aesthetic, recreational, environmental, and historic values of Jackson Park as well as the Midway Plaisance. To that end, my, and the community's, use of Jackson Park, its roadways and the Midway Plaisance area for transportation, recreational and aesthetic purposes will be irreparably compromised by the proposed actions by the City and the Foundation. The same applies to community members' abilities to further their interests and enjoy elements of the park such as the Women's Garden, the historic landscapes, trees, and excellent birding opportunities. All these elements will also be irreparably compromised by the proposed actions by the City and Foundation.

7. As an initial matter, the placement of the OPC buildings on the 19.2 acres that were selected by Obama Foundation and President Obama involve one of the most prized parts of Jackson Park. The area includes the Midway Plaisance, and the Woman's Garden, as well as the scenic woodland with over a thousand mature trees adjacent to Stony Island. When considering the fact that about two thirds of the area of Jackson Park's 552 acres consists of lagoons and the golf course, as well as the Museum of Science and Industry, these 19.2 acres constitute a very substantial percentage of the park's public green space. The planned removal of the Woman's Garden is itself irreparable, but a groundbreaking in the 19.2-acre area that will uproot and

excavate the land is also severe and irreparable, as is the removal of historic trees from their current locations.

8. Furthermore, the trees in the 19.2-acre area for the proposed placement of the various OPC structures are particularly important to this Olmsted landscape. The negative environmental impact of clear-cutting so many trees is obvious. But from the standpoint of historical aesthetics, the damage is even more egregious. Jackson Park is, in effect, a 150-year-old work of art that has now achieved its maturity. Landscape architecture is an artform that requires centuries to achieve fulfilment. The landscape gardens of England, for instance, from Kensington Gardens in London, to Castle Howard in the north, and Stourhead in the west are now protected by the National Trust as the irreplaceable crown jewels of the English countryside. The minimal replacement of green space by the Obama Center will consist of rooftop lawns and miniature saplings that will in no way replace the magnificent century-old trees that they will destroy. In the four-to-five-year construction period envisioned, this beautiful green space will be bulldozed and clear cut, transforming a magnificent public park into a muddy wasteland with nothing but bulldozers, trucks, and building cranes. It will not be a pretty picture.

9. There will be an additional destruction of around 400 more trees caused by the need to expand Lake Shore Drive and Stony Island Avenue to make up for the closing of Cornell Drive. This drive was part of Olmsted's original design of Jackson Park, and is a key feature. Over the years it has expanded to become an essential part of the roadway infrastructure of the South Side. Many landscape experts agree that Cornell Drive may have become too large and could benefit from prudent design improvements. But to completely eliminate it, and to re-route all the roadways (including Hayes and Marquette Drives) in and around Jackson Park at considerable taxpayer expense and disruption is really several steps too far, and undermines the integrity of

Jackson Park and its design. I further note that the work and closure of Marquette is far removed from the OPC site, but is close by and appears related to possible changes to the Jackson Park Golf Course which has been reported publicly but is not part of the review process. Aside from the aesthetic damage to the park, its destruction to the historical integrity and import of Jackson Park, and the environmental damage to the neighborhood, the destruction of crucial infrastructure for South Side residents is really beyond the pale.

10. There is a mistaken idea that nineteen plus acres confiscated by the OPC plan do not represent a large part of Jackson Park. As mentioned above, only about one-third of Jackson Park is open public green space because of the lagoons and the golf course. When one includes “hardscapes” like roads and parking lots, a conservative estimate indicates that the Obama Center will take almost 20% of the public green space of the park.

11. Similarly, the fact that Jackson Park has more trees than the ones being destroyed by the Foundation’s plan does not diminish the significance associated with the trees that will be removed as a result of the OPC plan. This is like saying it is okay to cut off one of your arms and legs because you will still have one arm and one leg left.

12. The historic Midway Plaisance is another key historic area that will be damaged by the proposed OPC. The Midway Plaisance, an essential feature of the original South Parks plan, is a magnificent, mile long boulevard three city blocks wide lined with mature trees. It includes playfields and a skating rink in the sunken field or “plaisance” at the center, and features the monumental Lorado Taft *Fountain of Time* at its Western terminus. It also serves as a crucial east-west artery connecting the neighborhoods of the South Side along with the two magnificent Olmsted Parks: Jackson Park to the East, Washington Park to the West. The OPC’s plan to close



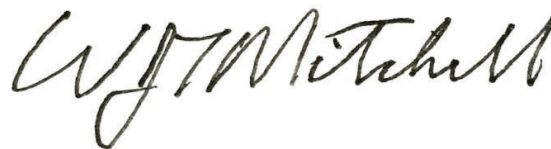
the east-bound lane has the effect of destroying the essential function of the Midway as both a symbolic historical space and a crucial component of urban infrastructure.

13. The Foundation and City are planning for a fall 2021 groundbreaking which as I understand will begin with construction activity, excavation, removal of the Woman's Garden and tree removal within the 19.2 acres where the OPC is being proposed, as well as the start of incursions into the western and eastern portions of Jackson Park in order to start roadwork construction involving Hayes Drive. Hayes Drive is another original vista that is part of Jackson Park's original design, which will be altered by the proposed plan. This confluence of plans to build the OPC campus means that we are literally at the last decisive moment, before an irreparable, irreversible (and completely unnecessary) process of destruction will descend on one of the great historic spaces of the city of Chicago. This seems especially regrettable, given the abundance of vacant land in underserved communities on the South Side, vacant lots that could be transformed into beautiful, historic destinations that will draw visitors from across the world without requiring the clear cutting of large numbers of tree or the disruption of existing infrastructure. For example, the alternate site at the Western edge of Washington Park at the corner of Garfield Boulevard and Martin Luther King, Jr. Drive, was itself recognized as the superior site by the Obama Foundation's own consultants. It is ideally situated on public transportation from downtown by the Green Line elevated train; it is almost as close to the University of Chicago and the Obamas' own residence in Kenwood as the Jackson Park site; it could transform a large sector of vacant lots into a magnificent monument to the Obama presidency; it could expand the public green space of Washington Park on its western frontier; and it is ideally situated on the commercial corridor of Garfield Boulevard where cafes and restaurants could quickly spring up (in fact, the "Arts Block" on Garfield created by Chicago artist Theaster Gates has already shown the potential

of this site). Finally, its location in a conspicuously underserved neighborhood would reinforce President Obama's legacy as a community organizer who addressed the real needs of neighborhoods.

14. Prior to the groundbreaking, but during pendency of the federal reviews that had begun in December 2017, there was activity that involved the destruction of approximately 30 to 40 trees and of areas within the 19.2 acres of Jackson Park where the Obama Presidential Center is proposed to located. Those areas are all within the area of Jackson Park that is on the National Register.

15. If the proposed confiscation and privatization of Jackson Park goes forward it will be the first occasion that I am aware of involving the destruction of an Olmsted Park in such fashion. This seems especially regrettable.



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W.J.T. Mitchell

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

PROTECT OUR PARKS, INC., <i>et al.</i>	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 21 CV 2006
	)	
PETE BUTTIGIEG	)	Judge John Robert Blakey
SECRETARY OF THE U.S.	)	
DEPARTMENT OF TRANSPORTATION,	)	
<i>et al.</i>	)	
	)	
Defendants.	)	

**Declaration of Robbin Cohen**

1. My name is Robbin Cohen. I am the Executive Vice President – Obama Presidential Center, Strategy, and Technology at The Barack Obama Foundation (the “Foundation”). In my role, I oversee and am responsible for all aspects of the planning, design, construction and operation of the Obama Presidential Center (the “Presidential Center”), which will be the Nation’s fourteenth presidential center and the first one in Chicago. I was the Foundation’s first employee when it was created in 2014 and served as its Executive Director from 2014 to 2020 when my title changed to Executive Vice President. Prior to working for the Foundation, I worked for over 24 years in the real estate industry, leading and managing all aspects of design, construction, and operation of many large and complex real estate developments. I have a B.B.A. from the University of Michigan and am a Certified Public Accountant.

2. I am offering this Declaration in support of the Foundation’s Memorandum of Law in Opposition to Plaintiffs’ Motion for a Preliminary Injunction. I have personal knowledge of the facts set forth in this Declaration.

3. The Presidential Center will be located on a 19.3-acre site on the western edge of 551-acre Jackson Park on the South Side of Chicago. The Foundation chose this site to host the Presidential Center following an extensive national search process during which the Foundation received applications for proposed sites in New York City, Hawaii, Chicago and elsewhere. The Jackson Park site was one of the sites proposed by the University of Chicago in its application to the Foundation, which noted that the Jackson Park site would require approval from the City of Chicago and Chicago Park District. After a year of deliberation, the Foundation announced in July 2016 that it had selected the Jackson Park site as the Presidential Center’s future home.

4. Since that announcement, the Foundation has been waiting more than five years to break ground, while the City of Chicago considered and approved the project (2016 – 2018) and the federal administrative reviews were conducted (2017 – February 2021). Now, after this long wait, the completion of these federal and local approvals, and the imminent completion of the necessary, in-progress utility relocation work at the site by the Chicago Park District (April – August 2021), the Foundation has fully mobilized and all the preparations are in place for groundbreaking and construction on the Presidential Center project.

5. The construction start date for the Presidential Center is August 16, 2021—which has been set since February 1, 2021, immediately upon the long-awaited conclusion of the federal reviews. The project is scheduled to be completed in four years and two months, and the construction work has been meticulously scheduled by the day. If the project stays on schedule, the Presidential Center will open in Fall 2025—approximately nine years after the conclusion of the Obama presidency and the selection of the Jackson Park site. As a recent article in the Wall Street Journal pointed out, the Presidential Center “is poised to set a modern record for time between a presidency and completion,” as presidential centers “opened in recent decades have done so in about half the time as what is expected for” the Obama Presidential Center.<sup>1</sup>

6. The Foundation will pay for the construction and operation of the Presidential Center, whose grounds, museum, and other buildings will generally be open to the public in the same way as the other grounds in Jackson Park and the other museums in Chicago’s parks. Current estimates are that the construction itself will cost approximately \$500 million, and the total project is expected to cost approximately \$700 million, which will be paid for by donations to the Foundation from private entities and individuals, as a result of the Foundation’s fundraising efforts.

7. As detailed below, the Foundation has spent approximately \$70 million since the July 2016 announcement to plan and design the Presidential Center based on the unique characteristics of this site, and to plan and implement the upcoming \$500 million construction project (¶¶ 16-23).

8. As I detail below, an injunction would be devastating to the Presidential Center project. It would stop the project in its tracks and impose severe, tangible harms on the Foundation, including increased construction costs from delay (¶¶ 24-38). It would also result in a substantial impairment of the Foundation’s fundraising ability that would threaten the financial health of the project (¶¶ 39-40). Preventing the Foundation from proceeding with the carefully-planned construction schedule would create massive uncertainty in the project; it would create delay of an uncertain length not directly connected to the duration of any injunction, because the project’s schedule depends on staying on track from the very beginning in light of Chicago’s winters, contractor commitments, and other core construction factors (¶¶ 24-33). Delaying the construction and operation of the Presidential Center would also delay the addition of a substantial number of jobs in Chicago, both immediately (relating to the construction) and over the longer term. (¶¶ 35, 41-47). It would also delay the substantial benefits to Chicago and its

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<sup>1</sup> John McCormick, *Obama Presidential Center Delay to Set Modern Record*, Wall Street J., June 16, 2021, available at <https://www.wsj.com/articles/obama-presidential-center-to-set-modern-record-for-timetable-to-opening-11623848401>.

citizens that will flow from the Presidential Center opening, and which studies have concluded will increase visitors to Chicago and the South Side from around the country and the world in light of the Presidential Center's unique and historic significance (§§ 48-56).

#### **Site Selection and City Approvals and Agreements (2014-2019)**

9. The Foundation was formed in 2014 during President Obama's second term as a 501(c)(3) nonpartisan, not-for-profit organization with its primary place of business in Chicago, IL. From the beginning, a core purpose of the Foundation has been to build and operate the Presidential Center.

10. In 2014, the Foundation issued a Request for Qualifications relating to the future Presidential Center and, after receiving over a dozen responses proposing locations around the country, issued a Request for Proposals to applicants from Chicago, New York, and Hawaii. In May 2015, the Foundation announced that it had selected the South Side of Chicago for the future home of the Presidential Center and would be considering the South Side sites that had been presented to it. In July 2016, the Foundation announced that it had selected the Jackson Park site after careful deliberation regarding all the site options. As the Foundation's chair, Marty Nesbitt, said at the announcement, "The President and First Lady believe that locating the Presidential Center at Jackson Park will have the greatest long term impact on the combined communities. With its aesthetics, iconic location, [and] historical relevance from the World's Fair, we believe Jackson Park will attract visitors on a national and global level that will bring significant long term benefits to the South Side." In addition, both President and Mrs. Obama have spoken publicly about the significance for them of having the Presidential Center located in Jackson Park—eight blocks north of where Mrs. Obama grew up, adjacent to the neighborhood where the Obamas lived together and their daughters were born and spent their early years, and near where President Obama began his career.

11. The Foundation then applied to the City of Chicago for various approvals necessary to move the project forward in Jackson Park, and negotiated several detailed agreements with the City pending Chicago City Council approval. In response to these applications and draft agreements, the City of Chicago initiated extensive public discussions and hearings pursuant to an array of legal requirements. Ultimately, the City determined that Jackson Park was the appropriate location for the Presidential Center, with formal approvals coming from the Chicago City Council and the Chicago Plan Commission, as well as the Chicago Park District. These actions were consistent with the statutory authorization from the Illinois General Assembly in the Museum Act that "presidential libraries, centers and museums" can be placed in municipal public parks.

12. Among other findings, the ordinance passed unanimously by the City Council on October 31, 2018 contained ten single-spaced pages of detailed findings that described the City's conclusions about the extensive benefits to the City that would result from the Presidential Center being located in Jackson Park—especially in light of Chicago's history of "building great public institutions . . . in parks along Chicago's lakefront." The ordinance found that these benefits would include progress toward the development of a Museum Campus South, the enhancement of Jackson Park's ecology (noting that the Presidential Center project "will result in a net gain of approximately three to four acres of new, added green space within Jackson

Park”), “accessibility and usability” (noting that the current Presidential Center site is separated from the rest of Jackson Park, including the adjacent lagoons, by six lanes of traffic on Cornell Drive), and public safety.

13. The City’s approvals led to the City and Foundation entering into a “Master Agreement,” dated May 17, 2019, which grants to the Foundation the right to construct, install, occupy, use, maintain, operate, and alter the Presidential Center and its related buildings and green spaces upon the completion of several conditions, including the resolution of the federal agency reviews and the execution of a “Use Agreement” in substantially the form approved by the City Council.

14. Pursuant to the Use Agreement, the Foundation will construct the Presidential Center’s buildings at its own expense and, upon completion, transfer ownership of the buildings and other site improvements to the City at no charge. The Foundation will then operate and maintain the Presidential Center at its own cost for the life of the Use Agreement.

15. These arrangements will allow the Presidential Center to join eleven other museums already located in the city parks of Chicago: the Adler Planetarium, Art Institute of Chicago, Chicago History Museum, DuSable Museum of African American History, The Field Museum of Natural History, Museum of Contemporary Art, Museum of Science and Industry, National Museum of Mexican Art, National Museum of Puerto Rican Arts and Culture, The Chicago Academy of Sciences/Peggy Notebaert Nature Museum, and John G. Shedd Aquarium.

### **Pre-Construction Planning and Investments**

16. The Foundation designed the Presidential Center specifically for the unique characteristics of the Jackson Park site, in response to community and general public feedback gathered during the project’s multi-year planning and design process, and within the scope of the City’s approvals: the buildings were crafted to the size and shape of the site and designed for integration with parkland; walkways were designed considering the historic character of the property; the landscaping plan is based on and improves on the current level of biodiversity and environmental benefits of existing plantings; the plans for a library branch, nature trail, expanded playground, and other recreation areas are based on the needs of the surrounding community. It cannot be transposed to a new site. It also cannot be altered in any significant way, even for this site, without incurring great expense and significant additional delays in the process.

17. In the years since it selected the Jackson Park site, the Foundation has spent tens of millions of dollars and the project team has spent hundreds of thousands of hours investing in and planning for the Presidential Center project in Jackson Park, as detailed below.

18. First, the Foundation has already spent approximately \$70 million on designing and preparing for construction of the Presidential Center at this site, including \$18.5 million in 2020, and \$3.14 million in May and June of this year alone. A substantial portion of the Foundation’s spending includes contracts with numerous architects, engineers, consultants, outsourced project managers, and others to assist in the development of the Presidential Center. The Foundation is currently working with at least 41 professional services companies and individuals as contractors or subcontractors. Each of these contractors has dedicated staff and

established teams for this project and devoted many of their key personnel for large amounts of time to construction and planning issues related to the Presidential Center. One third of the dollars spent on contractors and suppliers since the project's inception has been spent on certified diverse businesses (MBE, WBE, VBE, PDBE and/or LGBTQ-owned).

19. These numbers undercount the Foundation's financial investment, as they do not account for significant costs tied to the Presidential Center, including the Foundation's departments performing creative, communications, legal, development, finance, and public engagement roles, or those developing museum exhibits. The Foundation has built a large internal team to support the Presidential Center project. Currently, the Foundation has more than 25 full-time employees dedicated to the construction of and planning for the Presidential Center, and dozens of others who support the project.

20. Second, since the Foundation is responsible for paying for the construction and operation of the Presidential Center, including the estimated \$500 million in hard construction costs, it has engaged in and devoted a large amount of resources toward very extensive fundraising efforts. Financing the Presidential Center is the primary fundraising goal for the Foundation, and the majority of funds raised are directed toward its development and construction.

21. Third, the Foundation devoted a great deal of time and resources to many months of careful planning regarding the process of selecting construction contractors for the Presidential Center project. As described in greater detail below, the Presidential Center project is expected to take 50 months to complete, based on estimates from Foundation contractors, and its complexity requires intricate sequencing. The relationship between the project groundbreaking and the winter months is critical. In addition, construction is constrained by the need to protect migratory birds by avoiding tree-cutting for half of the year—between March 1 and August 31.

22. In December 2020, as the federal agency reviews appeared to be moving toward their final stage, the teams of Foundation employees and contractors working on the Presidential Center project began crafting a detailed construction schedule that was consistent with these constraints and allowed for groundbreaking to occur by August 2021 (with tree-cutting to begin in September 2021), following necessary utility relocation work by the Chicago Park District. Then, in the first quarter of 2021, as the federal reviews were completed, the Foundation's process of soliciting bids from construction contractors and making contract awards and commitments to them began. This process of selecting construction contractors has continued throughout 2021 in a tightly planned sequence to ensure that the different trades, key equipment, and other elements needed to construct the Presidential Center will all be in place for the mid-August 2021 groundbreaking.

23. Fourth, the Foundation has now awarded the first set of contracts for the \$500 million project, totaling approximately \$150 million, including \$120 million in cost of work. Consistent with the Foundation's commitment to ensure that its construction spending has a positive local impact and assists historically underrepresented contractors, over half of the dollar value of the cost of work in of these contracts (\$65.2 million) has been awarded to companies run by women or minorities.

24. Stopping the project from proceeding for an undetermined period of time, as a preliminary injunction would, would fundamentally disrupt the carefully-planned construction sequence for the project, creating very large, un-budgeted costs for the Foundation and massive uncertainty about when and how the project could be resumed. This disruption and uncertainty would play havoc with the ability of individual contractors and subcontractors to work on the project based on an altered schedule because of their obligations to other projects.

**Construction Must Operate According to a Carefully Planned Schedule**

25. To understand the very serious impact such an unplanned, sudden, forced halt in the project would have, it is important to understand the complexity and uniqueness of the Presidential Center project, including its work schedule and sequencing that accounts for the limitations imposed by the March-through-August tree-cutting moratorium and anticipated winter weather.

26. The Presidential Center will house the Presidential Museum, with official artifacts and records, a branch of the Chicago Public Library with an adjacent presidential reading room, and numerous expansive public spaces including acres of restored and improved green space that will reconnect parts of Jackson Park that are currently disconnected by streets comprising multiple lanes of traffic. The Museum will tell the story of our nation's first African-American President and First Lady, their path to the White House, and the many individuals, communities, and social currents that shaped their journey. The Museum will focus on the historic Obama presidency, its successes and challenges, and its legacy of inspiring individual people to come together to solve problems in their community.

27. The project is expected to take 50 months primarily because of the complexity and uniqueness of the Museum Building. It will take 40 months for the Museum Building construction to reach the point where the museum exhibits can be installed, which will in turn take 10 months to put in place. Extensive landscaping work that will expand and improve the green spaces at the Presidential Center site will also be time-consuming. Other parts of the Presidential Center can be built concurrently with this work on the Museum Building, but any delay on the Museum Building will necessarily delay the entire project. Therefore, notwithstanding the other work done on the site, the minimum amount of time expected to complete the Museum for public opening is 50 months.

28. First, the Museum Building has a highly creative and complex design, requiring that special structural engineering and carefully sequenced construction procedures be followed in order to build it. All of the Museum Building's major structural elements, including the floors, columns, beams, exterior wall, and core walls, are constructed of cast-in-place concrete. Due to the building's geometry, each floor plate and the angle and location of the outside walls at each floor level are different, meaning that the entire building is custom-formed, making the work substantially more labor- and time-intensive. In addition, more than 40% of the Presidential Center's building space will be underground, requiring a very substantial amount of below-grade work during the first part of the project, all of which is weather dependent. Thus, any delay that pushes the below-grade work into winter would almost certainly result in substantial, additional cost, uncertainty, and delay.



29. Second, because the building is not just a museum but a place where a former U.S. President and United States Secret Service will frequent, and U.S. and foreign leaders will visit, the construction must occur in a special fashion to meet high security standards. These security standards further complicate the construction of the exterior walls and add to the overall duration to form, reinforce, pour, strip, and finish all of the exterior walls of the building.

30. These factors create complexity that has fundamentally impacted the planning, timing, and sequencing of the construction schedule, including the need to have certain construction contractors available and ready to work when their time in the sequence comes.

31. In addition, before the Museum can even begin to be readied for exhibit installation, the building must be weather-tight and “dust free” and be able to maintain stable museum-quality environmental controls. This is required by museum industry standards for archival storage which must be met before exhibits including presidential records can be installed for display. At a high-level, “dust free” condition means the museum gallery spaces are fully enclosed and that all dust-producing work (and most work) is complete in the gallery spaces. Before it can bring presidential records or other artifacts into the building, the Foundation must collect environmental data and demonstrate it can maintain museum-quality environmental stability—in terms of temperature and humidity—in the completed gallery spaces for at least 30 consecutive days.

**The Financial and Other Impact of  
Prohibiting the Groundbreaking From Occurring As Scheduled**

32. Prohibiting the carefully orchestrated schedule and sequence for the Presidential Center project from proceeding would, at a minimum, result in a delay of an uncertain period of time that would almost certainly be substantially longer than the exact period that an injunction is in place. This lengthy and uncertain delay would create major financial costs for the Foundation.

33. Because the construction sequence and schedule accounts for winter month limitations, any significant delay of the August 2021 groundbreaking date would almost certainly push the beginning of construction into the winter. This would dramatically increase the difficulty of initial below-grade and foundation work in light of the risk that the ground will be frozen. This would result in a difficult choice between stopping work until the ground is not frozen, or continuing the work in a much slower and more expensive fashion. The latter option creates substantial additional construction cost. It also necessitates delay in the project, although less delay than in the first option. But under either option, this portion of the project would be delayed, which would therefore delay other work. It would also disrupt the ability to perform on-time work in future years that has been scheduled to avoid the winter months, such as later landscaping work which cannot occur close to early winter when the chances of getting plantings safely established is lessened and plants are more likely to be affected by frost. This domino effect means that delaying the groundbreaking would likely have an exponentially large impact on the overall period of delay.

34. Estimating the extent of the devastating impact and cost to the Foundation and the project from this type of sudden, unplanned delay of uncertain duration imposed on the eve of

groundbreaking is very difficult. Such estimates would depend in part on whether the selected construction contractors—who have scheduled equipment, tradespeople, and other resources to be ready at the precise, scheduled time—can and will adjust their commitments and schedules in order to do the work on the project at a different time than scheduled, and at an unknown date in the future. There is a very substantial risk that at least some of these contractors will not be able to do so. The cost of attempting to find substitute contractors, and the additional cost from retaining such contractors, would be very high. In addition, even if the existing construction contractors end up being able to adjust their schedules to stay with the project, the delay would result in unavoidable increased costs under the applicable contracts because of out-of-sequence work, premium time labor, and expedited manufacturing and delivery costs, among other things.

35. Stopping construction work that is about to begin would also create substantial harm by retracting tens of millions of dollars of imminent work from numerous smaller Chicago companies that are certified as historically underrepresented contractors—mostly companies owned by women or minorities. Consistent with the Foundation’s mission, it has ensured that a large percentage of the construction contracts have gone to such companies. In fact, for the first set of construction contracts awarded, over half of the direct work costs—over \$65 million—will go to them. For these firms, working on the Presidential Center project is a big deal; it is not just another project that, if frozen by an injunction, they can put to the side while they and their employees turn to another project waiting on the shelf. They do not have the scale to bid on other jobs as well. Thus, preventing the project from proceeding means that these companies will not be working during this period. That loss of employment and tens of millions of dollars of income for local companies who need and deserve the work hurts the Foundation and many others. For example, more than half of the concrete work that will be performed during construction of the Presidential Center will be performed by II in One Contractors, Inc. and Trice Construction Company. II in One Contractors, Inc. is a minority-owned business led by President Robert J. McGee, Jr., and Trice is a woman- and minority-owned business headed by President and CEO Stephanie Hickman. The value of the contracts these firms have been awarded is approximately \$50 million. Both businesses have focused significant effort on obtaining and preparing for the Presidential Center project, and have chosen not to bid on alternate projects because of their expectation that they will be focusing on the Presidential Center as planned. An indefinite pause in the project now would be disastrous for both firms.

36. Separately, a sudden halt to the project of uncertain duration would create an immediate risk that its project team—made up of numerous professional services contractors (architects, engineers, exhibit designers, project managers, etc.) who are deeply embedded in all aspects of the project and critical to its success—would leave the project and become committed to other long-term projects. To maximize the chance of retaining these contractors despite such a sudden stoppage, the Foundation would be required to continue paying for much of its project team for an indeterminate amount of time—just to keep them “on call” to be ready to resume the project at an uncertain date in the future.

37. An injunction which delayed the project start date would therefore increase the cost of the Presidential Center by at least \$2.2 million per month. First, the Foundation would be forced to pay monthly costs to keep its existing third-party project management, project design, and construction teams in-place and engaged, in addition to continuing to pay the salaries of Foundation staffers who are dedicated to the planning, design and construction of the

Presidential Center. Again, this number does not include amounts spent on the many other Foundation employees who dedicate significant time to the Presidential Center project (*See* ¶ 19). Second, rising construction costs, including increasing costs for materials, would increase the cost of the Presidential Center. The \$2.2 million per month amount does not include the real increased costs that would come from changing the conditions under which work is performed, such as the increased cost of performing below-grade work during the winter.

38. The Foundation's only alternative to carrying the heavy monthly costs associated with retaining staff and third-party teams in place indefinitely would be to expend significant resources to wind down the effort and suffer further schedule delay in ramping back up once the injunction is lifted. The extensive future costs that would result from the decision to dismantle the team and later ramp up would include associated retraining time and costs, and higher prices as vendors start to doubt the viability of the project or move on to other projects.

39. An injunction would likely have a highly negative impact on the revenue side of the project as well. As set out above, the Foundation is a nonprofit that is responsible for paying the project's \$700 million cost, which it is funding through past and future donations and pledges. Unlike other projects being built by large private entities with corporate treasuries or bank financing, or by public entities through tax dollars, this project is being funded exclusively as a result of the fundraising efforts by the Foundation. An injunction that delays the project indefinitely and renders the timing of the construction uncertain would act as a strong negative force against future fundraising, making it even more difficult to raise funds for the project. Without a clear date for groundbreaking, many individuals, corporations, and philanthropic organizations are hesitant to commit funding toward the project.

40. In addition, there would be a serious risk that some donors would rescind already pledged donations that are restricted to use for the Presidential Center as they worry about the delay and its impact on the viability of the project. 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. Delay and uncertainty from an injunction would create the significant risk that the Foundation could lose some of these donations and pledges.

**Delay in Construction Would Also Delay and Potentially Prevent  
The Presidential Center's Economic and Other Benefits From Being Realized**

41. The Foundation is excited about the extensive benefits that the Presidential Center will provide to the South Side and the City of Chicago as a whole, including the economic boost that \$500 million in construction spending will provide. Much of that money will be injected into the local economy as the Foundation ramps up its construction workforce.

42. According to the Environmental Assessment's Appendix I and the Economic Impact Assessment which it discusses, 3,682 full- and part-time jobs, with an associated total income of \$214.6 million, are forecast to be created in Illinois as a result of the construction of the Presidential Center alone (2,017 jobs due directly to the Presidential Center's operations, including through direct employment and construction spending; 673 jobs due to indirect impacts including business-to-business purchases arising from local spending; and 992 jobs due to the

impact on local industries caused by the expenditures of household income generated by the other newly created jobs). The construction and start-up of the Presidential Center is expected to result in jobs for 1,407 residents of the South Side (accounting for approximately 40% of the jobs created in Illinois), with an associated income of \$86 million. The Presidential Center operating workforce itself will be approximately 250-300 workers. Additionally, \$569.6 million in output (the increase in the value of total sales or “gross local product”) is expected to be added to the state’s economy simply as a result of construction.

43. The impact of on-site construction jobs alone will begin immediately. The Foundation’s contractors estimate that nearly 150 personnel will be working on site within the first five months of the project—a number that will rise as construction moves to different phases.

44. The Foundation is aware of the devastating impact that the pandemic has had on unemployment in South Side neighborhoods. For those citizens facing incredibly high unemployment rates, these new construction jobs would be especially welcome and can provide a critical boost to families and neighborhoods.

45. The Foundation has worked hard to create and implement a strong workforce development strategy, one of the most important elements of the Presidential Center construction project, to ensure that the positive employment effects of this construction spending will help those in Chicago most in need. Among other things, the Foundation included two specific workforce goals in the Presidential Center construction manager’s contract: 35% of the total on-site construction work hours should be performed by residents of the City’s South and West side neighborhoods (roughly equivalent to about 450 full-time jobs over the life of the project) and 10% of the project’s total on-site construction work hours are to be performed by residents located in the project’s direct “impact area.”

46. In addition, the Foundation has invested in and is implementing a long-term program to help vastly increase the number of “trades ready” workers from historically under-represented neighborhoods and groups. Among other things, the Foundation is providing financial and other resources in partnership with the We Can Build It Consortium, which includes Hire360 and Chicago Women in Trades (CWIT), and their partners, to promote and increase local participation in the building trades. The Foundation’s program partners have been asked to focus their recruitment efforts on specific South and West Side neighborhoods with a goal of producing roughly 400 trades ready residents in the next two years, with some ready as early as the end of this year. The Foundation will expect its construction managers and other contractors to tap into this talent pool as a first resort for hiring needs.

47. As described above, stopping construction from proceeding would also harm the Foundation’s ability to award meaningful contracts to a host of local and diverse businesses, many of which are emerging businesses who have been hurt by the pandemic and cannot wait indefinitely for this project to begin. The Foundation is also partnering with the University of Chicago on their Small Business initiatives, and is exploring partnership opportunities with financial institutions to help support small businesses working on the Presidential Center. The Foundation is also committed to helping develop a strong small business corridor around the Presidential Center and beyond—one that consists of locally-owned retail, restaurants, and key

resident services. The Foundation intends to be a catalyst for investment in the local community, including by drawing new businesses to the area to cater to new tourism. Uncertainty regarding the timeline for the Presidential Center would wreak havoc on this effort. If it becomes uncertain when the Presidential Center will open, others who are interested in investing in the local community will be unable to plan and prepare accordingly.

48. In addition to the concrete economic benefits the Presidential Center will provide, opening the Presidential Center in Jackson Park as soon as it can be accomplished serves the public interest in numerous important ways, as the City of Chicago has stated in detailed findings: the Presidential Center will create a connected South Side museum campus with the Museum of Science and Industry; it will revitalize a portion of a crown jewel park, Jackson Park; and it will create a community hub for activities. Every day that the Presidential Center is delayed is a loss to the City of Chicago and the communities surrounding the Jackson Park site.

49. The parkland at the Presidential Center will give South Side residents a world-class park, with lush gardens, varied topography, beautiful walking and bicycling paths along the Lagoon, children's play areas, and a great lawn that can be used for quiet relaxation, special events, sunbathing and picnics. The Center will increase the amount of green space in Jackson Park by converting portions of large roads back into parkland, and will create easier access to the beautiful lagoon by increasing the connectivity of the park—currently spliced by a six-lane thoroughfare. In recognition of Jackson Park's status as one of the state's premiere bird-watching sites, the landscape will include plants that attract a broad range of birds and protect their natural habitat in the space.

50. Several interior areas of the Presidential Center, including areas of the Museum Building, Forum Building, Chicago Public Library branch, and the Presidential Reading Room, will be free and open to the public, and the outdoor areas will generally be open to the public during Park District hours, like all other open spaces in Jackson Park. To ensure wide access to the ticketed Museum galleries, the Foundation will provide at least 52 free admission days each year to the community to ensure that the Presidential Center is accessible to all, irrespective of their ability to pay admission, and will provide year-round free admission for school groups.

51. The Presidential Center will feature a wide range of community amenities, including a Presidential Museum, a new branch of the Chicago Public Library; a Forum building with an auditorium and several flexible program rooms; a Program, Activity & Athletic Center; a fruit & vegetable garden with a teaching kitchen; and an expansive nature-inspired playground for children of all abilities.

52. The Presidential Center's Museum will celebrate the nation's first African American president and first family through an understanding of progressive movements, and American history—including the unique legacy of the South Side. The Presidential Center will collaborate with the Chicago Public School system to develop a robust school tour program to ensure wide access to this important educational content.

53. The Presidential Center's Chicago Public Library branch will offer a free and open 21st-Century library experience, welcoming residents and visitors of all ages and backgrounds, with innovative library programming for our neighborhood and technology that allows visitors to build global connections.

54. As a space meant for the public to enjoy, the Presidential Center Forum building will offer large gathering spaces and smaller, more intimate venues for study and reflection which will be available to the public without an admission fee.

55. The Presidential Center will create a vibrant hub and gathering place for the local community. Onsite programming will include public lectures, workshops, cultural activities, and civic engagement opportunities that will be open to all of our neighbors.

56. Finally, the Presidential Center will be designed as an open, engaging environment for all visitors. The Presidential Center campus will lead with universal design principles, providing a place that is equally welcoming for all visitors. The Presidential Center will work closely with fellow members of the Museum Campus South to bring more visitors and create collaborations and synergies with institutions like the DuSable Museum and the Museum of Science and Industry.

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57. The Foundation's goal is to open the Presidential Center as soon as possible so that its community neighbors can benefit from the opportunities provided by this new cultural institution. Each month of delay on the project leads to a delay in the Foundation's ability to open the Presidential Center and begin providing these public services to the community.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: July 15, 2021

  
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Robbin Cohen

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

PROTECT OUR PARKS, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 21-cv-2006
	)	
PETE BUTTIGIEG,	)	
SECRETARY OF THE U.S. DEPARTMENT	)	
OF TRANSPORTATION, et al.,	)	
	)	
Defendants.	)	

**DECLARATION OF GRAHM MATHEW BALKANY**

Grahm Balkany, under oath, declares and states as follows:

1. My name is Grahm Mathew Balkany.
2. I submit this declaration based on personal knowledge and could competently testify on the matters set forth below if called. This is submitted in support of the motion for injunctive relief filed by Plaintiffs in this matter, and specifically to counter the declaration of Ms. Robbin Cohen, submitted by one of the Defendants in opposition to the request for a preliminary injunction, as well as other statements made in the submissions of the Defendants in opposition to the Plaintiffs' request for injunctive relief.
3. I am architect with approximately 20 years of experience, licensed in the State of Illinois. I have a significant history in designing and consulting on developments of various types and scale, including several large-scale engagements in residential, commercial, hospital, and institutional sectors throughout the United States. In my practice, I routinely work with owners, general contractors, and clients in the construction and budgeting of projects. I attended Rice University, and hold two degrees from the Illinois Institute of Technology, the first in architectural engineering, the second a five-year professional degree in architecture with a minor in civil

engineering, both of which were awarded summa cum laude and where I was the class valedictorian. I currently am a member of the American Institute of Architects and hold other professional licenses, including registered Interior Designer status in the state of Illinois, Certified Simulator status from the National Fenestration Rating Council, and others. My work has been recognized in various capacities, including being named among the “Top Ten in Chicago Architecture” by architecture critic Blair Kamin, and being selected as *Chicagoan of the Year* in 2009 by the McCormick-Tribune Foundation. I am a Chicago resident, and have been living near Jackson Park for decades. My former residence was directly situated on Jackson Park, and I know the space, its configuration, and landscaping intimately.

4. As an initial matter, there are references to the “19.3 acre site” for the proposed Obama Presidential Center (“OPC”), allegedly representing only 3.5 percent of Jackson Park, based on a calculation that Jackson Park has 551 acres. (*See* Cohen Declaration, ¶ 3) These figures are fundamentally wrong, and fail to fully represent the totality of impact the development will have on the park. In the interest of more comprehensively evaluating the situation, I have conducted a detailed, to-scale study of Jackson Park and have based my tabulations on existing land use, the legal description of the property deeded to the City for leasehold to the Obama Foundation, and as much available information pertaining to the road closures and reconfiguration as is currently made public. As set forth below, based on my calculations, the total acreage taken by the Obama Foundation is well in excess of 11% of the total usable green space. This figure does not include the wide variety of collateral damage inflicted upon the park by other actions related to the construction of the Presidential Center, including permanent road widening and reconfiguration in many locations; relocation of paved recreational areas, sporting equipment, and other displaced elements; and inestimable other damage caused by the presence of heavy



construction equipment in the park. I have reached this conclusion by conducting a detailed digital analysis of the entire park, drawn to-scale as accurately as possible, making use of high-resolution overhead imagery coupled with various field verifications. Conclusions drawn from these calculation are as follows (*see* Exhibit A hereto for a tabulation of results):

- a. My figures generally agree with those of Ms. Cohen concerning the overall size of Jackson Park. She states that the park is 551 acres, while I have calculated it to be 557 acres (a difference of just 1.07%). This is most likely due to my inclusion of piers and the somewhat variable measurements of irregular shorelines. In any case, the 557-acre figure is more conservative regarding the following results.
- b. Per my tabulations, the leased site of Jackson Park to the Obama Foundation is 19.8 acres. In the immediate vicinity of the proposed Presidential Center, there is additional impacted land that is eliminated from the park, retained by the City of Chicago and not subject to the lease. Therefore, I feel that the 19.3-acre figure stated is neither factual nor fully representative of the Presidential Center's impact on its immediate surroundings.
- c. Taken as a whole, Jackson Park consists of 83.4 acres (15.0%) water. Another 132.0 acres (23.74%) is currently hardscape (paving, playgrounds, or sporting equipment) or buildings, leaving only 341.6 acres. However, much of the green space in Jackson Park is of a limited-access nature, including the golf course and fenced harbors. Free-access, unencumbered park spaces are relatively scarce within the park, totaling only 201.1 acres (36.16%). Considered in this fashion, the 19.8 acres directly lost to the Obama Foundation's lease and site clearance are quite substantial, representing a figure of near 9.8%.
- d. As mentioned prior, the 19.8 acres directly leased to the Obama Foundation is by no means the full extent of historic green space impacted by the Foundation's actions. Taking into account road expansion on Lake Shore Drive, Stony Island Avenue, and Hayes Drive (conservatively understood to be 4.6 acres); a relocated running track (3.6 acres); and new pathways (conservatively estimated at 1.5 acres), the total parkland known to be impacted rises to 29.5 acres. This figure is assuredly conservative, as there will be damaged areas due to construction, and there are many additional probable detriments, such as the likely relocation of displaced athletic facilities, and pedestrian underpasses that have been suggested in the City of Chicago's final traffic study.
- e. Elimination of functional and well traveled public roads, and a certain amount of other hardscape, is quickly offset by other road expansion and the extensive amount of hardscape in the new plan, by virtue of traditional (non-vegetated) roofs and numerous pathways present for the OPC. Furthermore, most gains are due to the elimination of roadways south of the OPC site, not in the vicinity of the

development, and all gains are more than offset by the intended expansion of the Jackson Park golf course. Therefore, the Obama Presidential Center project should be seen as a net loss to green space in the park, particularly to freely open, public green space, which is the most valuable type, and is increasingly scarce. The magnitude of this loss is greater than is stated elsewhere.

5. As a general matter, it is important to note that while the Cohen Declaration makes various claims of delays and costs associated with such delays, there is not a single document attached to the declaration to support any of the statements therein. So, beyond the fact that many of the statements are exaggerated, they are also completely unsupported and cannot be verified for accuracy.

6. The Foundation's submission and the Cohen Declaration suggest that the delays placed upon them between 2016 and 2021 are unusual due to city approvals and regulatory reviews. However, such delays are to be expected when the site involved arises from a publicly owned park, necessitating extraordinary procedural maneuvers, political efforts, and regulatory review. The selection of such a site is the primary cause of the delays.

7. The Cohen Declaration states that any delays from an injunction would be "devastating to the Presidential Center," including "tangible harms... including increased construction costs." (Cohen Declaration, ¶ 8) Whereas the Foundation has specified that the source of funding construction is through their own fundraising (without involvement of financing), and whereas the land itself was conveyed as a leasehold to the Defendants for a nominal, flat fee of \$10, and whereas the Defendants are a 501(c)3 not-for-profit organization that will not pay property taxes, it can be concluded that the holding costs on the property are negligible. Any substantive current and recurring costs relating to the site or construction of the facilities would therefore be a result of deliberate and specific actions taken by the Foundation,

acting in its own interest. Accordingly, any construction-related costs, present or future, are the sole result of actions of the Defendants, taken at their own risk.

8. To the extent that Ms. Cohen may be referring to contract-related items, no contracts are provided, and thus there is no way to understand the terms or provisions that may incur costs. Further it is unknown when such agreements were entered into and then negotiated.

9. The Cohen Declaration describes a situation where it appears there are virtually no contingencies for delays, and no expectation of preconstruction planning or lead times prior to physical construction (Cohen Declaration, ¶¶ 25-39), but critically fails to attach a construction schedule or other information from which one could definitively understand the plan and schedule moving forward. A construction schedule is made up of multiple parallel paths that lead to the final product; however, at any given time, there is typically only one “critical path.” As such, many activities can be delayed, changed, rescheduled, and/or reordered with no impact to the critical path or final delivery date. However, deployment and planning activities almost invariably will comprise at least one portion of the critical path. For example, material lead times, engineering work, contractor deployment, managerial activities, equipment availability, permit times, and regulatory reviews all can contribute to the “critical path,” but have nothing to do with physical activity on site. As such, in the absence of a detailed construction schedule, the veracity of statements made pertaining to the ostensible impact of an injunction, theoretical added costs, and the realism of the construction timeline cannot be ascertained.

10. The Cohen Declaration suggests that any delay to the construction will be unexpected and untenably harmful to the Foundation, but goes on to state that “notwithstanding the other work done on the site, the minimum amount of time expected to complete the Museum for public opening is 50 months.” (Cohen Declaration, ¶ 27) The use of the phrase “minimum

amount of time” is an admission that the construction schedule has already been understood by the Foundation and their contractors as a variable matter, subject to numerous contingencies and potential delays.

11. In any event, all construction projects experience delays, and it would be grossly negligent not to allow for proper contingencies in any construction schedule, particularly one with the complexities of the chosen construction site. The proposed project is located on man-made land that has been developed for nearly one-hundred-and-fifty years, built on lake fill, where formerly there was a devastating fire and rubble from prior structures likely exists. It is one that involves multiple state and federal agencies, nearby protected wetlands, highly variable and unknown underground conditions, street and utility rerouting, and heavy exposure to lakefront weather conditions that may adversely impact schedule.

12. The Cohen Declaration is misleading in suggesting that avoidance of winter conditions is essential to the success of the project, wherein it is stated, “The relationship between the project groundbreaking and the winter months is critical.” (Cohen Declaration, ¶ 21) The Declaration further provides: “[i]n addition, more than 40% of the Presidential Center’s building space will be underground, requiring a very substantial amount of below-grade work during the first part of the project, all of which is weather dependent.” (Cohen Declaration, ¶ 28) These statements are likely overstated. Below-grade and site-related work commonly proceed in Chicago during all seasons. There may be certain challenges in extreme weather, but work undertaken by competent contractors rarely comes to a complete halt, nor does it suffer tremendously. Furthermore, if the anticipated construction start date is, as stated, August 16, 2021 (Cohen Declaration, ¶ 5), the Defendants clearly understand that land preparation, foundation, excavation, and below-grade construction are likely to take place in cold weather. These actions comprise the

first physical stages of any construction project, but are hardly instantaneous. Moreover, as construction of the tower alone is expected to take a minimum of 50 months (more than four years), and whereas the Defendants state that 40% of the “building space” is underground, it stands to reason that a considerable percentage of the work must occur during the winter and unfavorable weather. The only alternative would be to anticipate lapses in construction during winter, in which case the Defendants’ claims in this regard are moot.

13. The Cohen Declaration also provides that “to maximize the chance of retaining these contractors despite such a sudden stoppage, the Foundation would be required to continue paying for much of its project team for an indeterminate amount of time—just to keep them ‘on call’.” (Cohen Declaration, ¶ 36) In my professional experience, payments of this nature are extraordinarily unusual, if not unprecedented. In practical terms, if the contractor in question is not receiving enough funding to keep their workforce on-staff – *i.e.*, commensurate with the actual labor costs of the work – they will not be sufficiently compensated to keep the project active. Ms. Cohen states, without providing any supporting evidence as to the figure or its derivation, that their estimated payments are in the range of “\$2.2 million per month.” (Cohen Declaration, ¶ 37) It can be reasonably inferred that the payments being stipulated are in no sense equivalent to the amounts needed to sustain the workforce: If the project has \$500 million in hard costs, over 50 months (\$10 million per month), and if labor is 50% or more of the hard costs, the monthly workforce payment alone would be \$5 million or more. In summary, the unsubstantiated \$2.2 million figure is not rationalized and is most probably ineffective for its stated purpose. To the contrary, work goes on-hold commonly in construction, for various reasons, including material delays, regulatory issues, financial challenges, or, most recently, health-related concerns. The vagaries of the marketplace are well known to all contractors and design professionals, and are considered part of

the cost of doing business. Payments of the sort stipulated may be necessary not for the reasons stated, but primarily if the Foundation opted at its own discretion to provide such liquidated damages as a part of their contractual negotiations.

14. The Cohen Declaration also states that the Foundation has spent approximately “\$70 million on designing and preparing for construction of the Presidential Center,” including “a substantial portion” for “contracts with numerous architects, engineers, consultants, outsourced project managers, and others to assist in the development.” (Cohen Declaration, ¶ 18) While a certain portion of this expenditure may be site-specific, a good deal of valuable information and planning obtained during design would be expected to translate to any chosen site. In any event, such monies were spent during the process for approval, before the City Council and the federal reviews were completed, and as such were self-imposed costs.

15. The Cohen Declaration suggests the “complexity” of the project as a reason why the construction schedule is stringent. (Cohen Declaration, ¶ 28) However, the overall design of the building is mostly straightforward. The building is rectilinear, relatively short, and has no novel materials, detailing, or curvature. Slight irregularities in the design are hardly challenging in today’s digital age, especially when viewed in contrast with contemporary, groundbreaking work that explores extraordinarily complex forms and spatial configurations. The Center is intended to be built on a flat site with urban access, and has no known environmental or structural complexity. While there may be certain challenges, as there are with any project, the bulk of the design appears to be prosaic in nature. Therefore, most aspects of the professed project “complexity” must be accounted for as results of the defendants’ own actions in opting for a site encumbered by various other issues, which can include, *inter alia*, a construction site plagued by numerous difficulties.

16. The Cohen Declaration states that the project will create “acres of restored and improved green space that will reconnect parts of Jackson Park that are currently disconnected.” (Cohen Declaration, ¶ 26) The definitions of “restored,” “improved,” and “disconnected” are discretionary, but what can be said with certainty is the following:

- a. The land taken from Jackson Park for private enterprise is no longer a part of the public green space.
- b. The “restored green space” cannot be considered to any substantial extent as such due to the fact that most of the plantings will be above occupied structures, or raised, based on information previously provided during discovery, as much as 32 feet above the street by means of artificial implements. This land is not *terra firma* and will, by functional requirements of contemporary construction, have limited depth and engineered content. It is in no way a substitute for true earth, where full-growth plantings and real ecosystems can develop. Most trees, by example, require substantially more depth to fully mature. Further, the biodiversity, maturity, harmonized inter-species relationships, and organic response of said plantings in this artificial context cannot reach the same levels that are found in nature.
- c. Any plantings placed above functioning structures, which require maintenance, repair, and replacement, can only be considered provisional. Compared to native Midwest trees, which typically do not reach maturity for at least 50 or 60 years, or to true ecosystems, which take hundreds of years to establish and develop, the lifespan of any human construct is comparably less. The average lifespan of a premium roofing system in the United States is routinely stipulated and warranted at no more than 30 years. Therefore, the “restored” (Cohen Declaration, ¶ 26) landscapes will be in a constant state of destruction and reset, and cannot be considered a replacement in-kind.

17. The Cohen Declaration provides that the “walkways were designed considering the historic character of the property” (Cohen Declaration, ¶ 16), but there is no demonstrable connection between the proposed design and the historic character of the park. The very presence of the private institution within the park cuts at the very principles on which the park was designed. Visually, there is no connection whatsoever, with frenetic and cramped pathways leading to artificial hills atop occupied structures. The busy and contrived appearance of the “improvements” (Cohen Declaration, ¶¶ 16, 49) has no relation to its surroundings except on the most superficial

terms.

18. The Cohen Declaration provides that delaying the project will also “delay the addition of a substantial number of jobs in Chicago.” (Cohen Declaration, ¶ 8) This is purely speculative, and can be said with regard to any project. Were economic development and the provision of such benefits to the City a primary consideration, the Defendants, which include seasoned professionals with “over 24 years in the real estate industry” (Cohen Declaration, ¶ 1), would surely have selected a site without an unusual number of known obstacles, where an operational facility could very well have been occupied and functional at the current time. I have spent significant amount of time looking at this exact issue, and can attest that there were and are many alternative sites with significantly fewer encumbrances, including an area in the immediate vicinity near Washington Park which offers a very similar context. These alternative sites could easily operate without such physical constraints, and would provide the desired economic outcomes with less delay and expense, within the heart of the community where underinvestment has most demonstrably occurred.

Further declarant sayeth not.



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Graham Mathew Balkany, AIA



**Park Space Allocation as a Function of Total Park Area**

Row Labels	Values					
	Current: Acreage	Current: Percentage of Total	Future: Acreage	Future: Percentage of Total	Change [Acres]	Change [%]
<b>Private</b>	<b>0.0</b>	<b>0.00%</b>	<b>19.8</b>	<b>3.55%</b>	<b>19.8</b>	<b>0.04</b>
<b>Hardscape</b>	<b>0.0</b>	<b>0.00%</b>	<b>6.8</b>	<b>1.22%</b>	<b>6.8</b>	<b>0.01</b>
Edifices	0.0	0.00%	1.0	0.18%	1.0	0.00
Buildings (Exposed)	0.0	0.00%	1.0	0.18%	1.0	0.00
Paving	0.0	0.00%	5.8	1.05%	5.8	0.01
Playgrounds	0.0	0.00%	0.8	0.14%	0.8	0.00
Walks - Paved (Additions)	0.0	0.00%	5.1	0.91%	5.1	0.01
<b>Vegetated Spaces</b>	<b>0.0</b>	<b>0.00%</b>	<b>13.0</b>	<b>2.33%</b>	<b>13.0</b>	<b>0.02</b>
Limited Access	0.0	0.00%	13.0	2.33%	13.0	0.02
Green Roof	0.0	0.00%	1.9	0.35%	1.9	0.00
OPC Parks	0.0	0.00%	10.5	1.89%	10.5	0.02
Raised Bed Planters	0.0	0.00%	0.1	0.02%	0.1	0.00
Restricted Areas OPC	0.0	0.00%	0.4	0.07%	0.4	0.00
<b>Public</b>	<b>557.0</b>	<b>100.00%</b>	<b>536.5</b>	<b>96.32%</b>	<b>-20.5</b>	<b>-0.04</b>
<b>Beaches</b>	<b>7.8</b>	<b>1.40%</b>	<b>7.8</b>	<b>1.40%</b>	<b>0.0</b>	<b>0.00</b>
Beaches	7.8	1.40%	7.8	1.40%	0.0	0.00
Beaches	7.8	1.40%	7.8	1.40%	0.0	0.00
<b>Hardscape</b>	<b>132.0</b>	<b>23.70%</b>	<b>122.6</b>	<b>22.00%</b>	<b>-9.5</b>	<b>-0.02</b>
Edifices	12.8	2.30%	12.8	2.30%	0.0	0.00
Buildings	12.7	2.27%	12.7	2.27%	0.0	0.00
Monuments	0.0	0.01%	0.0	0.01%	0.0	0.00
Walls	0.1	0.02%	0.1	0.02%	0.0	0.00
Paving	117.5	21.09%	108.6	19.49%	-8.9	-0.02
Ball Courts (Replacement)	0.0	0.00%	3.6	0.64%	3.6	0.01
Ball Courts / Sand Fields	7.9	1.42%	3.6	0.64%	-4.4	-0.01
Boat Launches	0.1	0.02%	0.1	0.02%	0.0	0.00
Piers and Boat Slips	3.6	0.65%	3.6	0.65%	0.0	0.00
Playgrounds	0.7	0.12%	0.5	0.09%	-0.2	0.00
Revetment	3.9	0.71%	3.9	0.71%	0.0	0.00
Riprap	1.0	0.18%	1.0	0.18%	0.0	0.00
Road (Expansion)	0.0	0.00%	4.6	0.83%	4.6	0.01
Roads	50.9	9.13%	40.1	7.20%	-10.7	-0.02
Surface Parking	11.0	1.98%	11.0	1.97%	0.0	0.00
Walks - Paved	37.8	6.78%	34.4	6.18%	-3.4	-0.01
Walks - Paved (Additions)	0.0	0.00%	1.5	0.27%	1.5	0.00
Walks - Unpaved	0.6	0.11%	0.6	0.10%	0.0	0.00
Utility	1.7	0.30%	1.2	0.21%	-0.5	0.00
Service Yards	1.7	0.30%	1.2	0.21%	-0.5	0.00
<b>Vegetated Spaces</b>	<b>333.8</b>	<b>59.92%</b>	<b>322.7</b>	<b>57.94%</b>	<b>-11.0</b>	<b>-0.02</b>
Free Access	217.7	39.08%	176.8	31.74%	-40.9	-0.07
Ball Courts (Green)	2.9	0.53%	1.2	0.21%	-1.8	0.00
Green Roof	6.3	1.14%	6.3	1.14%	0.0	0.00
Park Proper	201.1	36.10%	162.3	29.13%	-38.8	-0.07
Park Proper (Expansion)	0.0	0.00%	1.5	0.28%	1.5	0.00
Parking Islands and Parkways	7.3	1.32%	5.5	0.98%	-1.9	0.00
Limited Access	116.1	20.84%	146.0	26.20%	29.9	0.05
Dune Habitat	5.2	0.93%	5.2	0.93%	0.0	0.00
Golf Course	105.7	18.97%	105.7	18.97%	0.0	0.00
Golf Course (Expansion)	0.0	0.00%	29.9	5.36%	29.9	0.05
Restricted Areas	5.2	0.94%	5.2	0.94%	0.0	0.00
<b>Water</b>	<b>83.4</b>	<b>14.98%</b>	<b>83.4</b>	<b>14.98%</b>	<b>0.0</b>	<b>0.00</b>
Lagoons / Harbors	83.4	14.98%	83.4	14.98%	0.0	0.00
Lagoons / Harbors	83.4	14.98%	83.4	14.98%	0.0	0.00

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

PROTECT OUR PARKS, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 21-cv-2006
	)	
PETE BUTTIGIEG,	)	
SECRETARY OF THE U.S. DEPARTMENT	)	
OF TRANSPORTATION, et al.,	)	
	)	
Defendants.	)	

**SUPPLEMENTAL DECLARATION OF W.J.T. MITCHELL**

W.J.T. Mitchell, under oath, declares and states as follows:

1. My name is Dr. W.J.T. Mitchell. I am one of the Plaintiffs in the above referenced matter.
  
2. I submit this supplemental declaration based on personal knowledge and could competently testify on the matters set forth below if called. This is submitted in support of the motion for injunctive relief filed by Plaintiffs in this matter, and in rebuttal to the response of the City and Park District and the declarations submitted by Maurice Cox and Mike Kelly by the City of Chicago and Chicago Park District, as well certain assertions by Robbin Cohen from the Obama Foundation.
  
3. Those documents suggest that Jackson Park has been the subject of a “long history of change” and that it has “constantly evolved over a century to suit the needs of the community.” The Defendants argue that “the park was changed in numerous ways that deviated from the 1895 plan, including changes to accommodate traffic.” (Brief from City Defendants at 4) References are made to the expansion of Cornell Dive, and the installation of a Nike anti-aircraft missile

system as examples. Mr. Kelley promises that the Presidential Center will preserve the park's character. (Kelley Declaration at ¶¶ 8-10; *see also* Cox Declaration, ¶¶ 5-6)

4. Those statements are wholly inaccurate as a matter of fact, and from my professional views as a landscape historian who teaches the subject at the University of Chicago and who uses, visits, and studies Jackson Park. The proposed OPC will inflict severe harms on Jackson Park, which I personally visit and use for my professional work and personal enjoyment (including the area in which the OPC is proposed to be placed and the Midway Plaisance, as well as various roads and vistas that are now being subject to possible closure). Indeed, when I take my students to Jackson Park for my class Space, Place and Landscape, one location that I frequently visit is the area where the proposed are for the OPC Campus, as well as the Midway Plaisance. Contrary to the statements in those declarations, the Presidential Center will permanently erase key elements of the original plan. It will not be an improvement, and in the immediate future (and that means for years) it promises to disrupt the infrastructure of the South Side, and transform a popular site for public recreation into an ugly construction site.

5. While some small elements of Jackson Park are naturally different than they were in 1895, the fact is that the fundamental structure of the park remains largely intact and consistent with Olmsted's original plan. In this regard, it is important to note that Olmsted's vision was to have Jackson Park as natural as possible, and the proposed changes destroy that and other critical elements of the Jackson Park and the Midway Plaisance. The placement of the OPC *permanently* diminishes those natural and structured elements.

6. When I note that the fundamental structure of Jackson Park remains intact, I mean that its relation to the urban infrastructure, the environmental conditions of marshland, and the provision of public green space have been consistently maintained. This structure includes the tree

population, plantings, and careful replacement of dying or diseased trees. Olmsted did extensive research to find trees that can survive in marshland. The democratic, public character of Jackson Park consists in free and open spaces of natural scenery. Olmsted explicitly warned against the intrusion of monumental buildings: “the interest of the visitor, who in the best sense is the true owner . . . should concentrate on features of natural, in preference to artificial beauty. . . all such architectural structures should be confessedly subservient to the main idea, and . . . nothing artificial should be obtruded on the view as an ultimatum of interest.” It is indeed ironic that the forced placement of the OPC into Jackson Park undermines its democratic underpinnings by privatizing critical elements of the park and making them largely inaccessible because of the inevitable security measures. This takeover of the open space in the park is much greater than the 3.5% that is mentioned because when considering the lagoons, golf course and other space, the amount of usable space is approximately 200 acres. The impact transforms the park as a whole.

7. That fundamental structure is permanently altered, not “improved” by the proposed OPC. The awkward placement of the 237’ OPC tower at the east end of the Midway destroys a fundamental design element by violating the planned symmetry of the mile-long “plaisance” or boulevard connecting Jackson Park to Washington Park. Further, the height of the tower also undermines Jackson’s Park’s structure as it becomes a towering figure over everything in the park in direct contradiction to the original plans.

8. If that is not enough, the closure of Cornell Drive (as well as the other streets that were part of the recognized historic roadways designed by Olmsted) fundamentally changes the structure of Jackson Park and its relation to the transportation infrastructure of the South Side. Cornell Drive was originally designed as a carriage way, and its expansion to accommodate the automobile has in no way altered its basic shape. Any problems with crossing Cornell Drive may

be easily solved in the way Olmsted solved similar problems in New York's Central Park, with clever use of bridges and sunken roads, or lane reductions. Nothing justifies the permanent severing of a basic commuter artery linking the South Side to downtown; the effects on traffic and the neighborhood will be devastating, not to mention the exorbitant costs of expanding Lake Shore Drive and Stony Island as compensation.

9. The items mentioned by the City in their submission as reflecting purported substantial alterations of Jackson Park over time are just inaccurate. Cornell Drive's expansion is not a substantial alteration. While the road is slightly larger than originally contemplated, its function as a roadway and vista remains the same. Furthermore, any issue associated with that can be addressed by way to taking measure to temper traffic perhaps through reducing the number of lanes. Removing Cornell Drive is a dramatic and permanent structural change to the park and neighborhood that permanently destroys the original plan of Jackson Park. I use Cornell Drive frequently, as well as other roads that are part of Olmsted's original roadways and vistas, and that will be permanently altered with the proposed changes.

10. Reference to the Nike missile cite is specious. It is interesting that the Nikes are being presented as a precedent for changes and "improvements" to the park. The fact is that they were a temporary installation on a relatively small site, tenuously justified as important to national defense – none of those concerns are remotely at issue here. After considerable effort by residents of the South Side, they were finally removed.

11. The removal of at least 17% of the tree population of Jackson Park is massively significant, which I have knowledge of through my study and work as a landscape historian including years of study of Jackson Park's landscape. It will drastically change the landscape, and defeat the purpose of having such trees in the landscape. They are irreplaceable, and any talk of

“replacement” by saplings (whether 2.5-inch caliper or 4-inch calipers) is preposterous. They were originally included for health purposes for people and wildlife and have now matured to maximum beauty and environmental benefit. The tree landscape has never been altered in this fashion except for natural causes such as disease or storm damage. There has never been an “improvement” to Jackson Park that required clear-cutting hundreds of mature trees, much less excavating a 500-car garage below the water table. This excavation is likely to damage the adjacent lagoon system, causing the water to drain into the deep excavation, leaving historic Wooded Island stranded in a mud flat. The maturity of the landscape and its benefits to the human and wildlife population is largely ignored; cutting them down will be a permanent change in the condition of the park, not to mention a scandalous act of environmental destruction. Olmsted regarded his democratic public parks as “the lungs of the city,” and in a time of climate change, the preservation of mature trees should be a very high priority. Jackson Park is a 150-year-old work of art, a masterpiece of landscape architecture which I use as a textbook in my landscape classes. Destroying it would be like burning the books and documents in a library, entirely contrary to everything the Obamas have stood for.

12. There is much discussions in the Cox and Kelley declarations (as well as the Foundation declarant Robbin Cohen) about delays. Such delays were caused by choosing a location that is unsuitable for such a development, which has necessitated the reviews (which themselves are not complete). If the site west of Washington Park had been chosen the OPC would probably be finished by now. Such a location was actually rated superior to Jackson Park by the Foundation’s own consultants, for its location on vacant private land, public transit, and an adjacent commercial corridor precisely at the center of the sort of underserved neighborhood that launched the former President’s career.

13. Similarly, in my experience in working on such issues, while the selection of the South Side for the location was and is a welcome decision, the location of Jackson Park is highly controversial and there has been a sustained public outcry against this plan since it was first announced. Public support for the placement of the OPC on the South Side does not mean that the public supports having it in Jackson Park. Deference to the former President and First Lady and a sense that this is a “done deal” have tended to stifle the widespread public discontent with the destruction of Jackson Park. In 2018, hundreds of the University of Chicago faculty members signed a petition against the Foundation’s seizure of the park. In the same year, a public symposium drew over 200 members of the community, the university, and national experts on landscape. The Obama Foundation declined my invitation to participate, and publicly defend their plans. Despite the assertions of Valerie Jarrett, the Foundation’s President, that the Foundation welcomes debate, in my experience they have done everything possible to avoid it.

Further declarant sayeth not.



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W.J.T. Mitchell

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

1		
2		
3		
4	PROTECT OUR PARKS, INC., et al.,	) Docket No. 21 CV 2006
5	Plaintiffs,	
6	-vs-	) Chicago, Illinois July 20, 2021 11:00 o'clock a.m.
7	PETE BUTTIGIEG, SECRETARY OF THE U.S. DEPARTMENT OF	
8	TRANSPORTATION, et al.,	
9	Defendants.	)

TRANSCRIPT OF PROCEEDINGS - Motion Call  
BEFORE THE HONORABLE JOHN ROBERT BLAKEY

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24  
25

1 (The following proceedings were had in open court:)

2 THE COURT: Appearance on behalf of plaintiffs?

3 MR. RACHLIS: Good morning, your Honor. Michael  
4 Rachlis and Richard Epstein on behalf of the plaintiffs.

11:09AM 5 THE COURT: All right. Hang on. One second. This  
6 is a very big courtroom. Everyone's got masks. It's  
7 difficult for my court reporter to know who is talking so  
8 when you do talk, you got to stand and only individual  
9 appearances. One more time.

11:09AM 10 MR. RACHLIS: Good morning, your Honor. Michael  
11 Rachlis. I'm one of the attorneys on behalf of the  
12 plaintiffs.

13 THE COURT: Find a microphone also.

14 MR. EPSTEIN: Can I stand there?

11:09AM 15 THE COURT: You can do there if you want, too. Go  
16 ahead.

17 MR. EPSTEIN: My name is Richard A. Epstein.

18 THE COURT: You got to be louder, sir. One more  
19 time.

11:09AM 20 MR. EPSTEIN: What?

21 THE COURT: Louder, please.

22 MR. EPSTEIN: Oh. Can I take the mask off?

23 THE COURT: You may. Anyone who is speaking can  
24 take off the mask if they want.

11:09AM 25 MR. EPSTEIN: My name Richard Epstein. I'm here

1 representing Protect Our Parks and I'm going to address the  
2 questions associated with the preliminary motion that we had  
3 filed about this particular case.

4 THE COURT: Thank you so much. Have a seat, sir.

11:10AM

5 MR. EPSTEIN: So --

6 THE COURT: Sir, we're doing appearances. Please  
7 sit down.

8 MR. EPSTEIN: Oh, sure.

9 THE COURT: Okay. On behalf of the defense?

11:10AM

10 MR. HOFFMAN: Good morning, your Honor. David  
11 Hoffman on behalf of the Barack Obama Foundation.

12 MS. FLINT: Hello, your Honor. Tacy Flint on  
13 behalf of the Barack Obama Foundation.

11:10AM

14 MR. GEHLERT: Your Honor, David Gehlert on behalf  
15 of the federal defendants; and with me is the  
16 Jeffrey Candrian.

17 THE COURT: All right. Individual appearances.  
18 Are you going to be speaking, sir?

19 MR. CANDRIAN: No, your Honor.

11:10AM

20 THE COURT: Okay, great. Or not "great"  
21 but understood.

22 MR. WORSECK: Good morning, your Honor. Andrew  
23 Worseck for the City of Chicago.

11:10AM

24 MS. NAVARO: Good morning, your Honor. Ann Navaro  
25 for the City of Chicago.

1 MS. HAMPTON: Good morning, your Honor. Rachel L.  
2 Hampton on behalf of the Barack Obama Foundation.

3 MR. RODDY: Good morning, Judge. Joe Roddy on  
4 behalf of the Chicago Park District.

11:10AM

5 THE COURT: All right. Anyone else need to make an  
6 appearance? All right. Excellent.

7 A couple of housekeeping matters. There's a --  
8 Gloria, it's Docket Entry 74 which is the federal defendants'  
9 unopposed motion for extension to file -- extension to file  
10 their answer. That will be granted. A new deadline will be  
11 set in due course.

11:11AM

12 We're here also today on plaintiff's motion for a  
13 preliminary injunction. There is ongoing briefing but I did  
14 want to make sure the parties had a full opportunity to  
15 address the Court orally. It's interesting -- I mean,  
16 there's actually a tactical advantage, I guess, to hearing  
17 your opposing counsel's oral argument before you file the  
18 remaining briefs but I know the parties are interested in a  
19 swift and a fair hearing so that's why I'm accommodating the  
20 parties with the current schedule. I'm glad the parties were  
21 able to reach an agreement on that.

11:11AM

11:11AM

22 There's also pending motions from a variety of  
23 defendants regarding the motion to dismiss. It's my  
24 expectation that we would not be arguing that today. We  
25 had -- that's on a different timetable than the injunctive

11:12AM

1 relief. It's also my understanding that the -- in terms of  
2 the evidentiary support, both for and against the preliminary  
3 injunction, is contained within the briefing and all we're  
4 doing today is arguing. There's not going to be the  
5 presentation of any live testimony.

11:12AM 6 Is that your understanding, counsel for the  
7 plaintiff?

8 MR. EPSTEIN: Yes.

9 MR. RACHLIS: Yes, your Honor.

11:12AM 10 THE COURT: Okay. Any defendants disagree? Okay.  
11 The record will reflect no is disagreeing.

12 All right. Well, I'm going to hear from everybody.  
13 I know the parties wanted a substantial amount of time. In  
14 order for my -- I do have a full call as you can tell and my  
11:12AM 15 court reporter does need a lunch. So I reviewed the  
16 pleadings and in my estimation, 45 minutes per side is  
17 sufficient to address the issues.

18 So on behalf of the plaintiffs, you're going to  
19 have a full 45 minutes. Defendants, you're going to have 45  
11:13AM 20 minutes collectively so you need to -- if you need to discuss  
21 amongst yourselves how you want to break up that time, I'll  
22 give you all the time you need to pow wow on that. And if  
23 you want to reserve time in rebuttal, that's okay, you just  
24 need to watch the clock; and I'm happy to give you any  
11:13AM 25 warnings that you want in terms of that.

1 So we'll have a short recess so you guys can confer  
2 on how you want to break up your argument; and then when  
3 you're ready to reconvene, let me know.

4 (Brief pause.)

11:14AM

5 THE COURT: Counsel, ready to proceed?

6 MR. EPSTEIN: Yes.

7 THE COURT: All right. Whenever you're ready.

8 MR. EPSTEIN: Thank you, your Honor. My name is  
9 Richard Epstein and I'm counsel for Protect Our Parks and I'm  
10 here to defend the motion that we have made for a preliminary  
11 injunction with respect to the Obama Presidential Center.

11:14AM

12 As you well know, the issues involve the question  
13 of whether or not this case is likely to succeed on the  
14 merit, whether there turns out to be some issues with respect  
15 to irreparable harm or whether or not there's some offsetting  
16 equities that the defendants can do assuming that we  
17 establish our first two elements, and then a general  
18 discussion of the question associated with the public  
19 interest in these cases. I'm going to begin with the first  
20 question which I think is a quite simple one to state but for  
21 which there is no answer.

11:14AM

11:14AM

22 In dealing with the various claims in connection  
23 with both the NEPA statute on the one hand and transportation  
24 statute on the other is a clear commitment of the statute  
25 that there be a broad consideration of all the relevant

11:15AM

1 interests associated with the construction and deployment of  
2 the various roads around the Obama Presidential Center and  
3 the difficulties in building the Obama Presidential itself.

4 One of the things that people are always worried  
11:15AM 5 about in connection with these statutes is whether or not  
6 there will be various strategic evasions that parties will  
7 try to take in order to avoid the full brunt of the way in  
8 which these statutes work. One of the doctrines that is key  
9 with respect to this issue is the doctrine of segmentation,  
11:15AM 10 an issue which we have addressed very exhaustively in the  
11 briefs that we have supplied. There are 120 pages of reply  
12 briefs on this particular point and there is not one mention  
13 with respect to the doctrine of segmentation in the way in  
14 which the defendants wish and purport to describe the  
11:16AM 15 problem.

16 So why is it that segmentation is so small is if  
17 you're trying to deal with a major and comprehensive effort  
18 to deal with these sorts of issues, it becomes imperative to  
19 make sure that the entire issues are before the Court. So in  
11:16AM 20 this particular case if one just were to use ordinary  
21 language and go through the proceeding, what is at stake is  
22 the entire construction as a unitary matter of the Obama  
23 Presidential Center or of its impacts on the construction  
24 site and all of the roadwork that has to be done in  
11:16AM 25 connection with what is going on. If you go and you look at

1 the various definitions of a project, it turns out it is  
2 perfectly consistent with taking all of these things in  
3 question.

11:16AM

4 So what the segmentation doctrine says is that  
5 people who wish to put a project forward cannot chop it down  
6 into little bits and then try to analyze each of the little  
7 bits as if the general pools associated with the statute are  
8 not in evidence. That is exactly what the defendants have  
9 done in this particular case.

11:17AM

10 If you look at the way in which these proceedings  
11 have done, the defendants have adopted a very odd view as to  
12 what this transaction is about. Starting at the very  
13 beginning of this particular situation, they have taken the  
14 position, one, that this is strictly a local project with  
15 respect to most of the activities in question in dealing with  
16 this thing, too. And, two, that any kind of measures that  
17 they have to take with respect to avoidance and mitigation  
18 are to be done with the projects as they define.

11:17AM

19 As best I can tell from their briefs, they think  
20 that there are two issues that need some kind of  
21 consideration. One of them is the adjustments that are going  
22 to be made to Lake Shore Drive on the east side of the  
23 project and the other is the adjustments that are going to be  
24 made to Stoney Island on the west side of the project. And  
25 the second thing they write about in their statements is the

11:17AM



1 question of how the UPARR statute is going to be evaluated in  
2 this case given the fact that there's a necessary loss of  
3 park land that is going to happen if you build the Obama  
4 Presidential Center and any associated roadwork with it and  
5 so therefore they have to make adjustments for that.

11:18AM

6 We then start to look at the way in which this  
7 particular situation interacts with the basic statute, there  
8 is a strict hierarchical notion that has to be observed. The  
9 first element in this situation is at all costs, you must  
10 seek if there's a way to avoid the particular problem in

11:18AM

11 question; and once that is done, you then -- if you can do  
12 that, you need go no further. Then there are questions of  
13 minimization on the secondhand and what that does is allows  
14 you to shrink the size of the project if relocated so as to  
15 avoid the worst impacts when avoidance is not possible. And,  
16 third, there is a question of mitigation. If, in fact, the  
17 project goes through in the first and second, can there be  
18 something that you could do to soften the blow. These are  
19 strict lexical requirements.

11:18AM

20 If you take the narrow definitions of the projects  
21 that the defendants do, there is simply no effective way to  
22 deal with avoidance. If you're going to widen Lake Shore  
23 Drive, you have to widen Lake Shore Drive and the same is  
24 true with the situation on Stoney Island Avenue. And also if  
25 you're going to deal with UPARR, the only thing you have to

11:19AM

1 worry about is the loss of those narrowed acreage. You do  
2 not have to worry about the entirety of Jackson Park.

3 If, on the other hand, what you do is you get an  
4 accurate definition of the project which requires you to take  
11:19AM 5 into account all of the effects with respect to all of the  
6 attitudes that are going on in this particular case, you get  
7 a very different view.

8 So starting with the first particular point, what  
9 is this project? What the defendants do in order to keep  
11:19AM 10 their narrow definition is they argue as best one can tell  
11 that it is not a transportation project to rip out various  
12 kinds of roads. It is only a transportation project to put  
13 roads in there. If you start looking at the evasion  
14 doctrines, if you start looking about the fact that in order  
11:19AM 15 to make sure that NEPA and the Transportation Act are  
16 effectively required, you cannot make that particular kind of  
17 segmentation. You have to consider the whole thing. Once  
18 you start to do that, then the question of avoidance takes a  
19 very different structure. Now what you have to do given the  
11:20AM 20 fact that this is an impermissible segregation is to figure  
21 out whether or not there's some alternative site in which you  
22 can do this.

23 So the first question to ask on this inquiry is the  
24 simple question is this segmentation defensible and the  
11:20AM 25 answer to that question is for an integrated project, no. If

1 one looks very closely at the regulations under this, what  
2 you have to do is to pick something which has relatively  
3 broad terminal and you have to show that there is no  
4 interdependence between this project that you wish to deal  
5 with and the project that, in fact, has been fallen on the  
6 map.

11:20AM

7 There are a couple of cases that deal with this  
8 issue. One of them dealing with bridges says, well, there  
9 are two separate projects if you're trying to deal with a  
10 bridge and narrow constraints and another project when you  
11 are dealing with a road which is downstream. These are  
12 sufficiently separate bridges and require very different  
13 considerations because of the physical location and the  
14 constraints on the project than do roads; you can separate  
15 them.

11:20AM

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16 In the *Old Town* case, Judge Easterbrook did a  
17 different kind of segregation. It was a case in which the  
18 City of Goshen wished to expand the size of its particular  
19 road but the trial judge had ordered that this requires a  
20 NEPA investigation because it was an integrated project that  
21 took place with Route 33. It turned out, however, that the  
22 city had not taken any money at that time. And so what Judge  
23 Easterbrook did on appeal is to say no, no, no, we can let  
24 this go through but we're going to do a segmentation analysis  
25 and that analysis is going to require that you agree that if

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1 you take any federal moneys for the part of the road that you  
2 wish to do, then in effect the NEPA investigation is going to  
3 be done. He invoked in this particular connection the Step  
4 Transaction Doctrine which is taken from tax law in lots of  
5 other areas and it's the same thing as the segmentation  
6 doctrine in a slightly different guise. It says that you  
7 cannot evade the tax laws, you cannot evade the environmental  
8 laws to the extent that you are dealing with a situation when  
9 fragmentation of a serious issue gives rise to a hopeless  
10 one.

11 We think that the case for segmentation in this  
12 particular case is simply hopeless. All of these roads are  
13 put together in a single comprehensive situation. If you're  
14 going to ask why it is that you have to expand Lake Shore  
15 Drive and Stoney Island it's because there is the plan to  
16 completely decimate what is going to happen to Cornell Avenue  
17 in the middle. If you're trying to figure out why you need  
18 to make further tract's adjustments, the insistence on the  
19 Obama Foundation that they be able to locate their site  
20 somewhat further north necessitates the closing down of the  
21 Midway Plaisance going east back to Lake Shore Drive so what  
22 you have to do is to adjust the transportation project going  
23 west. All of these things are completely integrated so then  
24 the question has to be can you go ahead.

25 One of the things that's quite clear is that the

1 defendants misstate the law in saying that when you're  
2 dealing with these kinds of reviews, the federal government  
3 has to have the power to authorize the construction that  
4 takes place at some other site. That is simply false. The  
11:22AM 5 appropriate test under all of these situations is you first  
6 see if you can find a superior or equal site with respect to  
7 functionality and so forth and then, if you can, the choice  
8 is left to the particular applicant to use the alternative  
9 site or to stop everything from going together.

11:23AM 10 One of the things that's so quite striking about  
11 this particular case is at no point during the course of the  
12 briefing that they do do they mention a single alternative  
13 site to the Obama Presidential Center as a whole. Instead  
14 they had these tiny mitigation programs for what is a tiny,  
11:23AM 15 tiny part.

16 One of the things that the plaintiffs in this case  
17 have done is to develop at great length an explanation as to  
18 why it is that at least one site, ten acres of connected land  
19 located to the west of Washington Park, is by every single  
11:23AM 20 test that is given with respect to significance under the  
21 regulation, every single test. That site is not only the  
22 equal to but is superior to the situation that one has if you  
23 start thinking about Jackson site, an impossible site to work  
24 on, as being the alternative.

11:24AM 25 Let us start with certain kinds of consideration.

1 When you're dealing with these sorts of things,  
2 transportation in and out of the center is absolutely  
3 critical if you're dealing with transportation. It is  
4 impossible to get sensible work on roads inside Jackson Park  
11:24AM 5 because it ends in a cul-de-sac which means that people have  
6 to come in and go out. If you look west of Washington Park,  
7 it's over the Green Line, it's a very short walk to the Red  
8 Line. There is, in fact, all sorts of public transportation  
9 that comes by and there is, in fact, easy access to the Dan  
11:24AM 10 Ryan Expressway and all sorts of space in which you can build  
11 parking facilities that can be more easily constructed above  
12 ground assuming that the street traffic and parking spaces  
13 are available will permit it.

14 On this particular score, it turns out that the  
11:24AM 15 site is utterly, utterly superior to any particular site that  
16 they have started to offer. If there had been a word of  
17 defense in this situation, then we could keep what they have  
18 offered. But as I've mentioned to you before, silence was  
19 the word with respect to this, the word segmentation does not  
11:25AM 20 appear in any of their papers, and the effort to try to  
21 figure out whether or not this alternative site would make  
22 any particular kind of sense is, in fact, also ignored.

23 The second thing that one wants to do having shown  
24 that this site is superior is to ask about the very difficult  
11:25AM 25 question associated with the issues of dealing with matters

1 of irreparable injury. Now it is very clear that irreparable  
2 injury is not a trump in the sense that if you can show any  
3 particular irreparable injury, it means that the project must  
4 necessarily stop. It is one very key factor in this  
5 situation but there is always a potential offset with respect  
6 to the material that is given under Section 3 of this  
7 particular statute which talks about the purported  
8 justifications that are going to be necessary in this case.  
9 But in order to do this kind of analysis, you have to start  
10 with the question of irreparable injury and the issue here  
11 kind of boils around multiple points. I'll mention three of  
12 them, although there are certainly more that you have to  
13 consider.

14 The first is surely the question with respect to  
15 the trees that are involved in these cases, the second has to  
16 do with nesting for local and for migratory birds, and the  
17 third has to do with the inevitable traffic jams that will  
18 come when you try to remove a large portion of a very  
19 difficult infrastructure as it exists and make it easier and  
20 more difficult to do this thing. This is absolutely critical  
21 because this is not simply a Chicago matter. It is a matter  
22 for the entire area along Lake Michigan which includes the  
23 heavy traffic that is going to come north from Indiana on a  
24 daily way to work somewhere in Chicago. It's also an  
25 important local matter with respect to traffic because you

1 will shut down the interchange going north on Lake Shore  
2 Drive at 59th Street which means that people from South  
3 Shore, people coming to the University will be facing a very  
4 heavily complicated situation.

11:26AM

5 So looking at this, the first question is trees and  
6 it's a very difficult kind of question. One of the things  
7 that's really very clear about this, if you look at the  
8 various announcements that are made by the Biden  
9 Administration with respect to this particular issue, it is

11:27AM

10 very clear that in their efforts to step up the enforcement  
11 of environmental statute, they list trees as one of the  
12 absolute key components that must be protected and generated  
13 at all costs. Just in the newspaper yesterday, Deb Haaland,  
14 the Secretary of Interior, announced that we have discovered  
15 new benefits from having forest cover, tree covers. These go  
16 to questions having to do with carbon capture. They have to  
17 do with nesting birds and so forth. And so the destruction  
18 of these trees would count as reparable injuries.

11:27AM

19 Is there any case law that starts to deal with this  
20 particular problem and the answer to that question is there  
21 most surely is. There is a case called *Fox* from 2015 in the  
22 District of Columbia which deals with the question of whether  
23 or not there is irreparable injury under these circumstances  
24 when 200 trees are taken down. And the particular answer in  
25 that case is yes, of course it counts as though it's going to

11:27AM



1 be a form of irreparable injury. This is the absolute number  
2 of trees that matter. It doesn't matter what the percentage  
3 of these trees are with respect to trees that are growing  
4 elsewhere either in the Park District or anywhere else. It's  
5 the question of can you find a diminution that is  
6 significant. This is clearly not a case of de minimis and  
7 it's clearly a case in which there's heavy significance under  
8 every definition that is given of significance with respect  
9 to NEPA and the regulations that take place underneath it.

10 All of the kinds of harms that we're talking about are likely  
11 to take place.

12 The defendants have implicitly acknowledged the  
13 fact that this is exactly what is going to happen because  
14 under their own schedule, they have decided that they would  
15 postpone the cutting down of the trees until September 1st to  
16 allow the heavy migratory bird traffic which will take place  
17 to continue without interruption. Well, the question you  
18 then have to ask is, is this going to be something that's  
19 going to be available next year. The way in which the

20 defendants answer this is a series of rose cold optimistic.  
21 They said this is only a temporary situation. "Temporary" is  
22 in the eyes of the beholder. A separate second sensible  
23 definition with respect to temporary is a definition which,  
24 say, lasts maybe a year or so but they're going to have to  
25 spend at least five years by their own account optimistically

1 to figure out how you prepare this site for the building of  
2 the structure and then they plan to plant saplings of one to  
3 four inches to take the place so temporary for them means  
4 that we will manage to be able to return to the stat --  
11:29AM 5 status quo ante. 50 or 60 years from now in anybody's book,  
6 whether you add in the temporary time or not, that is simply  
7 a permanent injury so we do not think that there's any  
8 serious question on that. If 200 trees would qualify, then a  
9 thousand or more trees in Jackson Park will start to qualify.

11:29AM 10 So the question that you then have to look at is  
11 the third factor that I've started to talk about, namely the  
12 question of doing all this particular situation, can we start  
13 to think of any kind of a justification that will allow this  
14 to happen so it turns out in some cases you can.

11:30AM 15 So in one case involving Lake Michigan, the Seventh  
16 Circuit had to deal with the question of could you close down  
17 the intersections on the rivers going south into this  
18 particular area in order to keep predatory fish from coming  
19 in and consuming everybody else. Judge Wood when she  
11:30AM 20 examined this particular situation, she made it very, very  
21 clear that it turned out that this was a kind of irreparable  
22 injury. She does not want to minimize the serious and I  
23 don't think that the seriousness of the issue should be  
24 minimized in this particular case.

11:30AM 25 But she says there are further complications that

1 you have to worry about. If, in fact, you try to do all of  
2 this, you're going to ruin all sorts of other activities that  
3 have to take place within this particular network of rivers  
4 and lakes and creeks and streams and those things, in fact,  
5 also have very important social function. So on the other  
6 side of the ledger, there is involved the question of other  
7 gains that are necessary to achieve.

8 And then if you start to take it the next step  
9 further, how effective is the advice that the proponents of  
10 that particular restriction in dealing with the problem at  
11 hand. And after an exhaustive examination of what went on,  
12 what the Judge concluded was that it was not likely to be  
13 very, very effective anyhow so you do have an irreparable  
14 injury but you have irreparable injuries on the other side of  
15 the issue. You have huge cost problems and a lot of  
16 collateral situation and she basically decided that  
17 irreparable injuries are not a trump even though it's a very,  
18 very heavy type of situation.

19 This same issue of what do you do with the things  
20 takes place in other kinds of cases. There's a case  
21 involving Hillsdale in which the issue is where it is that  
22 you manage to locate a facility which is needed by a company  
23 which moves goods back and forth through a transportation  
24 grid. It's quite clear that the places that you can give  
25 under these circumstances are highly limited. It has to be

1 near roads. It has to be near other kinds of transportation,  
2 depots and so forth.

3 In that particular case, they looked at seven  
4 alternative sites, concluded that this one was better than  
11:32AM 5 any of the others. It is the same problem that you have  
6 elsewhere, namely that there is a possibility of an  
7 irreparable injury that could take place. No matter what you  
8 do, it cannot be a trump because the alternatives will have  
9 similar kinds of difficulties. The best thing to do is to  
11:32AM 10 figure out how you minimize these particular situations and  
11 it was rightly given a degree of deference in that case to  
12 figure out what the ideal configuration ought to be about.

13 Well, when you start coming to the situation with  
14 respect to the Obama Center, this is pure fantasy. The Obama  
11:32AM 15 fantasy is not a part of a detailed network. There is no  
16 established facility that you're trying to expand in one form  
17 or another. If you located it in the area that we are  
18 talking about west of Washington Park or any one of a number  
19 of sites, all of these problems would disappear. There is,  
11:32AM 20 in fact, no particular necessity in this particular case to  
21 keep all four units that are indeed involved here, to keep  
22 all those four units together. If you move to the area west  
23 of Washington Park, you could have all the things like the  
24 library and put it closer to people where they can use it  
11:33AM 25 because there's many vacant land. There is no vacant land

1 whatsoever in the Jackson Park area, which is a high-rent  
2 area with very specific uses, but that particular order takes  
3 place.

11:33AM

4 If you're thinking about what's going on in Jackson  
5 Park and you noticed that they're talking about an athletic  
6 center, you just have to look at the map with respect to  
7 Washington Park to realize that on the other side of Martin  
8 Luther King Drive, there is an existing athletic facility  
9 whose activities can easily dovetail with those which take  
10 place in the Obama Center.

11:33AM

11 So not only do you have a situation here where the  
12 alternative site can be considered, it's also an alternative  
13 site under these particular circumstances where in fact you  
14 can get better traffic, a larger consumer situation, all of  
15 the things that the defendants seek to talk about in their  
16 fourth element on this case about public interest goes  
17 squarely against them. This is a case in which it is  
18 mind-bogglingly easy to recognize that the alternative site  
19 is much the more preferred site in the question about how you  
20 do.

11:33AM

11:34AM

21 There is also the question about irreparable harms  
22 that will come from putting the Obama Presidential Center  
23 where they want it. The defendants make a great deal about  
24 the affidavit they submit by Robbin Cohen with respect to the  
25 difficulties in the organization associated with this thing,

11:34AM

1 the amount of money that they're going to lose or what the  
2 judge does. What the affidavit does in effect is to act as  
3 though with military precision. You can execute the most  
4 complicated plan imaginable and do it in four years and two  
11:34AM 5 months no questions asked. You start to ask questions,  
6 however, and you realize that this is simply a deck of cards.  
7 It's just totally useless.

8 What happens is are you going to be able to be sure  
9 that you can put a complicated prospect together. Just the  
11:35AM 10 other week, there was major flooding in Hyde Park. If you  
11 move west to the Washington Park neighborhood, it turns out  
12 the flood risk is vastly reduced. That flooding can easily  
13 reduce the speed of what's going on. There can be all sorts  
14 of other disturbance, accidents on the construction site,  
11:35AM 15 difficulties in procuring materials, receiving defective  
16 materials that have to be returned, weather events on  
17 particular days that you can't devote. And so what happens  
18 is you then realize that this particular project -- it's a  
19 pipe dream to assume that it's going to take four years and  
11:35AM 20 two months, but it is not a pipe dream to assume that it's  
21 going to create serious irreparable harms of itself of  
22 exactly the kind that one needs to avoid.

23 So picking at this thing in a more particular  
24 fashion, this is clearly a situation where dredge and fill is  
11:35AM 25 very much an issue. Given the fact that you are located

1 about 70 feet from the west lagoon and the staging site has  
2 to be larger, it's pretty clear that you're going to have all  
3 sorts of illegal releases that are going to take place into  
4 Lake Michigan, which essentially are per se violations with  
5 respect to what goes on on the Clean Water Act.

11:36AM

6 Is there a word that the defendants say in this  
7 particular case to explain how it is they're going to deal  
8 with this thing? No. The only thing that we do is we get  
9 perfect assurance that if you believe everything that we  
10 write here, that is if you believe in the tooth fairy, we can  
11 execute this thing in absolutely perfect fashion. Well, this  
12 is going to delay everything else.

11:36AM

13 So one of the other arguments that the defendants  
14 make is that it can mitigate these harms. Mitigation is  
15 never a defense if it turns out that avoidance is possible as  
16 moving this particular site when able to do and what kind of  
17 mitigation do they want to plan for. Well, they can't do  
18 anything in the short run because you can't plant a single  
19 tree so long as this is going on so mitigation in a,  
20 quote/unquote, temporary way is going to start in year six or  
21 is it year seven or year eight.

11:36AM

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22 And in the interim, there's all sorts of  
23 environmental damages because Washington -- Jackson Park,  
24 rather, is now going to be a staging ground for one of the  
25 most difficult execution situations that you could possibly

11:36AM

1 imagine. Then if you could even put these trees in, it turns  
2 out that the defendants are faced with an impossible dilemma.  
3 If they make them really small, they might take but if  
4 they're going to be one inch, it's going to take them 50  
11:37AM 5 years to grow. Make them a little bigger, a higher fatality  
6 rate but you get that down a little. There is no way that  
7 one can say that mitigation devices of this sort are remotely  
8 equal to the challenge that is posed under this particular  
9 Act. In the *Fox* case, they were willing to sacrifice 200  
11:37AM 10 feet -- trees because there was no other way they could  
11 rebuild the facility that was constructed in 1904 and was  
12 utterly out of use.

13 In this particular case, there is no pre-existing  
14 structure that has to be moved or repaired. It is a case of  
11:37AM 15 simply where it is you wish to plop this thing down and the  
16 defendants cannot make this case out. They can tell you, oh,  
17 we will put the right kind of saplings to plant by way of  
18 mitigation but that turns out to be preposterous. They can  
19 also tell you that some of the trees are in bad repair but  
11:37AM 20 that's equally indefensible. They wish to have at least \$200  
21 million of public funds, state, federal and city. In order  
22 to build this structure, you take a tiny fraction of that  
23 amount and you can actually repair some of the trees that are  
24 in distress and make things work.

11:38AM 25 Well, they turn around and they also say there are



1 dangerous crossings that will take place which are going to  
2 be --

3 THE COURT: Counsel, let me interrupt you for a  
4 moment.

11:38AM

5 MR. EPSTEIN: Yeah.

6 THE COURT: Is it this Court's role to conduct a  
7 de novo review of the merits of an alternative site, is that  
8 the way this case is postured right now? Because it's not,  
9 right?

11:38AM

10 MR. EPSTEIN: No, it is. It's exactly what's  
11 required. They have to do the following.

12 THE COURT: I'm not talking about them. I'm  
13 talking about me.

14 MR. EPSTEIN: Okay. I will tell you --

11:38AM

15 THE COURT: Hang on.

16 MR. EPSTEIN: All right.

17 THE COURT: Hang on, hang on. Please, let me  
18 finish my question. I'm not the City Council. I'm not the  
19 federal government, at least not that part of the federal  
20 government. And based on the wisdom of our framers, we have  
21 a divided government for better or worse -- and I think for  
22 the better -- but each part of divided government has to play  
23 their role within a larger system.

11:38AM

24 Is it my role today based on the claims  
25 presented -- and obviously, there are a variety of claims.

11:39AM

1 There's at least -- there's 15. Is it my role to revisit the  
2 merits of an alternative site selection or am I reviewing it,  
3 the decision that was made by others, through a particular  
4 standard? Could you address that as part of -- because  
5 you're making a --

11:39AM

6 MR. EPSTEIN: Yeah. I'll address it right now,  
7 your Honor.

8 THE COURT: Hang on, hang on. You're making a lot  
9 of substantive arguably great arguments regarding why didn't  
10 they put it somewhere else but is that really the question  
11 that I have to answer today?

11:39AM

12 MR. EPSTEIN: The answer is it most certainly is.

13 THE COURT: Okay. Go ahead.

14 MR. EPSTEIN: The way this scheme starts to work is  
15 you issue a finding, a finding of no significant  
16 environmental impact. If it turns out that that is  
17 incorrect, then you have to go through an EIS. At both  
18 stages, the answer under the law is that these are hard-look  
19 reviews that have to take place. That's the standard done in  
20 connection with 4(f) reviews that took place in the *Overton*  
21 case, 1971, where in fact we had a much stronger case for  
22 buildings through the park than going around it and she --  
23 and Justice Marshall in the Supreme Court was completely  
24 emphatic about the fact that no, federal courts have to come  
25 in.

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1 This has been an area in which there has been  
2 consistent and powerful federal intervention even in the  
3 cases where environmental impact statements have been made  
4 and in this particular case they haven't even gone that far.  
5 If you have to give a hard look, you must look at the  
6 alternative sites and it --

11:40AM

7 THE COURT: Hang on a second. That wasn't my  
8 question. My question was whether or not my review is  
9 de novo of the merits or is there a different standard? I'm  
10 not -- no one is disputing the fact that I have a job to do  
11 here and it's -- and it's a hard look. You can use whatever  
12 phrase you want. The question is whether or not I -- is  
13 there a deferential standard, for example, as to the  
14 determinations of the Executive and the Legislative or is it  
15 a de novo one?

11:40AM

11:40AM

16 MR. EPSTEIN: Look, there is enormous ground  
17 between the two. It is certainly not a deferential standard.  
18 It is not a de novo review. The phrase that is used is hard  
19 look. The separation of powers' functions are made and  
20 follows. If, in fact, you would find that an environmental  
21 impact statement is required, then they are going to be  
22 required to do it because the injunction that we request will  
23 now be given as a matter of law when that site is on the  
24 case.

11:41AM

11:41AM

25 But there is no way in these particular

1 circumstances given everything that we have alleged that one  
2 can use a deferential standard in looking at something which  
3 turns out to involve the single-worst environmental impact  
4 statement ever made as far as I'm concerned in years of doing  
11:41AM 5 this stuff is the one that has come back in this case. So  
6 you are duty-bound, in fact, to give it the hard look and  
7 they cannot escape this view by saying that the project is so  
8 truncated that nothing else is there so --

9 THE COURT: All right. Thank you for my answer and  
11:41AM 10 I interrupted you so go ahead. Pick up your argument  
11 wherever you want. Go ahead.

12 MR. EPSTEIN: Well, so essentially what happens is  
13 if you start to look at all of this stuff and you're trying  
14 to figure out irreparable harm, it turns out that it's  
11:42AM 15 probably a per se rule that simple acts that are done by way  
16 of mitigation without any kind of further justification are  
17 always insufficient to overcome this. If you started to look  
18 at the cases where it is overcome -- the bridge cases, the  
19 tunnel cases, the water cases -- there's always a powerful  
11:42AM 20 interest that is being put on the other side.

21 What is the interest that's being put on the other  
22 side? Again from the defendants, there is total silence with  
23 respect to this particular issue notwithstanding the concerns  
24 of the Biden Administration to heighten environmental  
11:42AM 25 protection. They just refuse to do this. What they do is

1 they snip and snap at a particular element, tried to argue  
2 that each of them is less serious than you think and then to  
3 say that since each is less serious than you think, you could  
4 ignore the clear imperative directions under these particular  
5 rules is that the aggregation of individual effects has to be  
6 taken into account and that is going to be subject to the  
7 hard review. There is no answer.

8 So the last point that I was talking about is what  
9 happened is the defendants make the argument that the  
10 intersection that is dealing at the -- the situation on  
11 Cornell Drive is something you have to worry about. Well, if  
12 it is dangerous what you can do is build an overpass or an  
13 underpass. There's absolutely no reason why it is you have  
14 to strike down all of Cornell Drive in order to make sure  
15 that passers are going to be there. They then argue that  
16 this is an interesting area and you're able to walk back and  
17 forth across this. Well, for the next five years this thing  
18 is going to be under construction and then when a system --  
19 it's not going to be the Jackson Park that it was before  
20 because there's going to be a very substantial removal of  
21 acreage not only inside the park to build the structure but  
22 also taking out roads which are certainly part of park land  
23 under every definition inside Cornell Avenue and so forth.

24 When it comes to the issue of shutting down Cornell  
25 Drive, there is only one explanation for why it is done. The

1 Obama Foundation in so many words requested that the City do  
2 this and it passed legislation that did this, no review  
3 whatsoever, and is no environmental justification for taking  
4 a far rolling road and knocking it out so that the traffic  
11:44AM 5 could come in on a narrower situation creating jams up and  
6 down Lake Shore Drive and throughout Hyde Park so the traffic  
7 issues are nightmarish. There is no justification in this  
8 case whatsoever for saying that you can improve the way in  
9 which the traffic situation starts to work.

11:44AM 10 How much time do I have left, your Honor?

11 THE COURT: You have 15 minutes.

12 MR. EPSTEIN: I'm going to take five more minutes  
13 and then I'll reserve the rest for rebuttal.

14 THE COURT: You got it.

11:44AM 15 MR. EPSTEIN: So what happens is if you start to  
16 look at the question of whether or not there is any equity,  
17 there is no equity whatsoever that has been advanced with  
18 respect to the project in the way in which it has been put.  
19 So what happens is we now have the first three factors every  
11:44AM 20 one of which cries out for a preliminary injunction on your  
21 part under any kind of a hard-look standard.

22 So the last question that one starts to look at is  
23 the issue of whether or not it turns out this is in the  
24 public interest and here what happens is the Obama Foundation  
11:45AM 25 is in high gear announcing all of the amazing benefits that

1 start to take place from locating Jackson Park inside --  
2 rather, the OPC inside Jackson Park.

3 Well, there are certain difficulties. The first  
4 thing we want to note is that the original projected cost for  
5 this was \$500 million. The current projected cost is \$700  
6 million. This is like the Boston dig for Tad Williams. That  
7 is not a final estimate on money any more than it is on time.

8 And so one of the things that has to be answered, is there a  
9 serious risk that this project will begin while it is only

10 partially funded. And generally speaking, no responsible

11 approval will be made by any organization if there is a  
12 serious risk that they will run out of money before they

13 finish this thing. But if you look at what it is that

14 Mr. Robbin Cohen (sic) has suggested, he talks to the

15 fundraising prowess as though with the equal of cash in hand  
16 when it is nothing whatsoever the sort.

17 Then there are the totally fabricated numbers that  
18 you can get 900,000 people into the Obama Center when you're  
19 going into a cul-de-sac. The answer is you cannot. If you

20 work it out on terms of the day, you're going to have to

21 process at least 150 to 200 people every hour that this is

22 open and there are going to be days in which it's going to be

23 closed. The Obama Foundation acknowledges that there are

24 additional security issues that are associated with the fact

25 because it's a Presidential Center. Their report announces

1 that there will be a residence for the president and the  
2 first lady in the building which requires additional security  
3 24/7 throughout the entire year whether or not they're going  
4 to be in the residence. So you have all of this problem and  
5 they put that number down there, it is an utter falsehood.

11:46AM

6 Then, on the other hand, if you wanted to figure  
7 out what's going on, if you're trying to speak about the  
8 public interest, you have to worry about the alternative  
9 site. There are no such complications that take place. It's  
10 going to be far easier to get people into the situation if  
11 you're looking at this situation in the area around  
12 Washington Park than it is here and you can do much more for  
13 the neighborhood.

11:46AM

14 One of the striking features about the Obama plan  
15 is they're willing to give money to the community. Is it the  
16 community around Jackson Park? No, because there's nothing  
17 you can do there. Stoney Island is a solid wall on the west  
18 and there are many apartment houses north of 56th Street and  
19 buildings all of which are going to be compromised. You  
20 build the Center around the situation as it exists outside of  
21 Washington Park, all of the sudden the synergies are  
22 possible.

11:47AM

11:47AM

23 If you're talking about creation of jobs, you can  
24 do it a lot faster there, get a lot more jobs and you also  
25 can have neighborhood rehabilitation there given the vacant

11:47AM



1 parks and the ability for expansion. A public library will  
2 make much more sense where there are people to use it than it  
3 will in Jackson Park where it is utterly inaccessible. So on  
4 these particular scores, the thing is totally OTD'd.

11:47AM

5 It's even worse than that. What they do is they  
6 say this will show that Chicago is innovative and bold and  
7 what they have in effect there are all sorts of civil  
8 organizations to write on their behalf. It is notable that  
9 they did not get any environmental groups to write on their  
10 particular behalf because there's nothing that you can say to  
11 defend this particular process.

11:48AM

12 So what is the reaction that other people are going  
13 to take? Well, if you look through the material that we put  
14 in our public trust situation and so forth, it's very clear  
15 that the general rule that people have is, Professor Epstein,  
16 why did you decide to argue this case? There are two fatal  
17 objections to your position, Chicago and Obama. Why do you  
18 think that you can do this? So what's going to happen is you  
19 will create an air of cynicism about this entire project by  
20 virtue of the fact that everybody will have understood that  
21 thing has been rammed through by the Obama Foundation in  
22 cahoots with everybody else. This is not the way to improve  
23 public consumption; and if you do come to Chicago, you're  
24 going to have to kowtow to the Foundation arguably or to many  
25 of its minions in efforts to get various kinds of approvals.

11:48AM

11:48AM

11:48AM

1 I predict that when -- particularly when this thing  
2 starts to implode and the utter chaos that will take place in  
3 the roads, the delays in construction, it will be a  
4 catastrophe. The public interest factor basically squares  
5 with the other three factors that I've mentioned.

11:49AM

6 I will hold my peace now, wait for rebuttal, but I  
7 will again repeat what I said at the onset: The case for a  
8 preliminary injunction is overwhelming. There is a very  
9 strong likelihood of success on every one of the four  
10 elements involved and you have a series of defendants' briefs

11:49AM

11 that greet all of the serious arguments with dead silence  
12 except for the public interest argument because they are  
13 convinced that the constricted view of what counts as a  
14 project will spare them from the hard intellectual work to  
15 which you must give a hard-look review. Thank you, your  
16 Honor.

11:49AM

17 THE COURT: Thank you, counsel. On behalf of the  
18 defendants?

19 MR. GEHLERT: I apologize for the scratching, your  
20 Honor, but I understand we are to switch these before  
21 speaking.

11:50AM

22 THE COURT: That's all right.

23 MR. GEHLERT: Your Honor, David Gehlert on behalf  
24 of the federal defendants, the federal agencies involved in  
25 this matter. I appreciate you making the time for us to

11:50AM

1 present to you today. I want to start with Mr. Epstein's  
2 fundamental point about segmentation and then I'll move --  
3 take a step back and talk about the issue that you raised and  
4 what your proper role is before moving on to some of the  
5 other points.

11:50AM

6 I want to assure the Court that there has been no  
7 improper segmentation here, that the federal defendants, in  
8 fact, took a hard look at all of the impacts stemming from  
9 the very narrow federal decisions that were in front of  
10 those, including the impacts from the construction of the  
11 Obama Presidential Center, or OPC, itself. I would refer the  
12 Court to Section 5 of the Environmental Assessment which  
13 talks about the impacts of the decisions from an  
14 environmental perspective and lays out in great detail  
15 exactly what the impacts of the OPC will be and exactly what  
16 the impacts of the federal decisions will be.

11:50AM

11:51AM

17 The other document that's well worth looking at and  
18 makes this point clear is the Assessment of Effects which  
19 looks at the impacts of the decisions from the historical  
20 standpoint; and Section 3 goes into great detail about the  
21 effects of the OPC and the related federal actions on the  
22 historical aspects of Jackson Park. And when I say the  
23 agencies took a hard look and their analysis was copious in  
24 detail, I mean it. There's an entire technical report that  
25 addresses just the effect of the shadows of the building on

11:51AM

11:51AM

1 the landscape and it gets into things like how is the  
2 lighting going to affect migratory birds. This is an  
3 incredibly detailed analysis, your Honor.

4 With that, I do want to take a step back --

11:52AM

5 THE COURT: Do you want to spread of record the  
6 points that were raised by the plaintiff with respect to  
7 irreparable injury, in particular the trees and traffic  
8 situation?

11:52AM

9 MR. GEHLERT: Yeah. I will be talking about the  
10 trees mostly from the standpoint of how it was -- how the  
11 trees were considered in the environmental analysis and why  
12 the tree removals do not require an EIS. The co-defendants  
13 will be talking more about the other elements in particular  
14 with irreparable harm.

11:52AM

15 THE COURT: Okay.

11:52AM

16 MR. GEHLERT: But I want to focus a little bit on a  
17 little bit of background with what exactly my clients, the  
18 federal defendants, were asked to decide. As your Honor  
19 knows from the prior litigation, the City of Chicago  
20 authorized the Obama Foundation to construct the OPC within  
21 Jackson Park. That required -- or as a result of that  
22 decision, the City asked the federal government to take a  
23 couple of actions. One is because Jackson Park had been the  
24 beneficiary of a federal grant back in the '80s for

11:53AM

25 recreation, we needed to do what -- consider what is called a

1 conversion where protected recreation lands will be used for  
2 another non-recreation purpose and that's -- what the statute  
3 does is require that you provide substitute recreation, and  
4 I'll talk about that in a little bit more detail, but that's  
5 the decision that was before the Park Service.

11:53AM

6 Mr. Epstein referenced traffic jams and the City's  
7 decision to remove certain roads and that, no doubt, has an  
8 impact on traffic. My client, the Federal Highway  
9 Administration, was called in to address that because the

11:53AM

10 City has asked for federal funds to make transportation  
11 improvements within the park. And they're not just roads,  
12 they want to improve accessibility for people on bikes, for  
13 pedestrians and wanting to reconnect the entire park. As  
14 we'll talk about in a moment, the area where the OPC site is  
15 now is isolated from the rest of the park and it won't be at  
16 the end of this project.

11:54AM

17 And finally, the Army Corps of Engineers was asked  
18 to issue two different permits because of a road project is  
19 going to impact a very small wetland and there is an existing  
20 habitat improvement project, which we refer to as the  
21 GLFER -- the Great Lakes Ecosystem Restoration Project -- and  
22 so the Corps was asked to approve a slight modification of  
23 that and they did. So those are the federal actions that are  
24 at issue here.

11:54AM

11:54AM

25 As I said, the analysis considered not only the

1 federal actions but also the related actions related to the  
2 OPC itself. You asked what is the standard here, your Honor,  
3 and that was a very perceptive question and you're absolutely  
4 right, this is not a de novo hearing. In fact, it's hard to  
5 conceive of a scenario where my clients are entitled to  
6 greater deference from.

11:55AM

7 As an initial matter, this is a case under the APA.  
8 As you -- I'm sure you know, your Honor, the general standard  
9 is arbitrary and capricious which generally means that the  
10 decision has no basis within the record. But in this

11:55AM

11 context, we have federal agencies applying their particular  
12 expertise to statutes that they are charged with  
13 administering so they are entitled to substantial deference  
14 on that basis. And I want to read from a decision by the

11:55AM

15 Seventh Circuit that's quoted in our brief. "In the context  
16 of NEPA, arbitrary and capricious review prohibits a court  
17 from substituting its judgment for that of the agency as to  
18 the environmental consequences of its actions," and that's  
19 the Highway J. Citizens Group; and, in essence, plaintiffs  
20 are asking this Court to do exactly that and that is  
21 impermissible under the APA.

11:55AM

22 You heard Mr. Epstein talk at great length about  
23 how plaintiffs think that the OPC should be built on a site  
24 near Washington Park. Their argument is that the agency's --  
25 my clients failed to consider an alternative located outside

11:56AM

1 of Jackson Park. There's a simple reason why we did not look  
2 at alternatives outside of Jackson Park. And let me back up  
3 and say the City, in deciding to place the OPC in Jackson  
4 Park, did in fact look at numerous alternative locations,  
11:56AM 5 then they made their decision. And the question is do the  
6 federal defendants have the authority to second-guess the  
7 City and tell them to put the OPC somewhere else. And the  
8 answer to that question, as you alluded to when you were  
9 referring to enumerated powers, is clearly no.

11:57AM 10 The federal government does not have the authority.  
11 This is not a federal project. It's not being built on  
12 federal land. The City, or the City affiliates, own Jackson  
13 Park. It's not being federally funded. The Obama Foundation  
14 is paying for it. There's no statute that gives the federal  
11:57AM 15 authority -- the federal government the authority to step in  
16 and say sorry, Chicago, you can't allow the Foundation to  
17 spend its money on your park; and that lack of authority has  
18 a consequence in terms of NEPA and the other statutes that  
19 require analysis of alternatives. It's very clear

11:57AM 20 black-letter law that federal agencies are not required to  
21 assess the impacts of alternatives that they have no  
22 authority to implement.

23 The Supreme Court alluded to this in the *Public*  
24 *Citizen* case that's cited in our brief. They said "it would  
11:58AM 25 be a pointless exercise for agencies to evaluate things that

1 they have no ability to control." And we cited a couple of  
2 circuit court cases that are directly on point for that  
3 authority. There's also a Seventh Circuit case that was  
4 cited in our brief as well. So we simply have no obligation  
11:58AM 5 to consider alternatives other than Jackson Park. This isn't  
6 a situation where the federal government has the authority to  
7 come in and tell the City to do something differently.

8 I'll talk a little bit about the trees because that  
9 was the subject of extensive analysis. There's an entire  
11:58AM 10 memorandum addressing the impact to trees. And yes, we  
11 directly acknowledge that roughly 789 trees -- I shouldn't  
12 say roughly. Exactly 789 trees will be removed as a result  
13 of the construction of the OPC. In fact, there's a list  
14 attached to the tree memorandum that identifies each and  
11:59AM 15 every one of those trees by species, by condition, and other  
16 factors. That may seem like a large number of trees but,  
17 your Honor --

18 THE COURT: That's a large number of trees. It  
19 doesn't seem that. It is a large number of trees.

11:59AM 20 MR. GEHLERT: There are thousands of trees in  
21 Jackson Park. That's an important point. You heard  
22 Mr. Epstein talk about impacts to migratory birds. There are  
23 two reasons that there's no significant impact to migratory  
24 birds here, one of which is the migratory birds stay  
11:59AM 25 generally close to the lake. The OPC is on the west end of



1 the park relatively far removed from the lake so it's not the  
2 area that the migratory birds most often use and the other  
3 point is there are thousands of trees left in the park.

12:00PM

4 My client's expert biologist determined that there  
5 was ample habitat within the park for migratory birds even  
6 when construction is going on and all the trees are removed;  
7 and that's on Page 30 of the Environmental Assessment.

12:00PM

8 The other thing to understand about the trees --  
9 and Mr. Epstein alluded to this -- is that they are going to  
10 be replaced on a better than one-to-one-basis. I want to

11 take exception with his claim that we're going to be planting  
12 saplings. The analysis talks about how the trees will be of  
13 two and a half or four caliper -- that's four-inch diameter  
14 essentially -- those are not insubstantial trees. Those are

12:00PM

15 trees that are between 15- and 25-feet tall. They are large  
16 trees that will provide immediate benefit. The majority of  
17 the trees are going to be the 2.5 caliper because smaller  
18 trees take root better and grow faster but there are going to  
19 be larger trees to provide an immediate shade effect.

12:01PM

20 I also wanted to talk a little bit about what my  
21 clients concluded regarding the trees. They said "at the end  
22 of the result of this process, there will be long-term  
23 beneficial impacts to the overall tree population, tree  
24 species diversity, and the anticipated tree canopy when the

12:01PM

25 replanted trees reach maturity" and that is the conclusion of

1 the expert biologist who looked at this and that's the  
2 conclusion that's entitled to deference; but there is ample  
3 support in the record for that.

4 As I said, the trees are going to be replaced on a  
5 one-to-one basis with good sized trees. They're going to be  
6 carefully curated to choose species that will thrive in this  
7 climate and that are consistent with the historic design of  
8 the park and they are going to be -- the species and the  
9 placement is going to be guided by historic references.

10 There's going to be an effort to try to restore some of the  
11 homestead typologies regarding the landscape. The trees are  
12 going to be clustered to create different layers which is  
13 consistent with the homestead design but it also brings  
14 biological benefit for birds to have multiple layers. So,  
15 your Honor, at the end, the tree community within the park  
16 will be larger, it will be healthier, and it will be more  
17 consistent with the historic design.

18 And I want to take issue with Mr. Epstein's  
19 characterization of our conclusions regarding the trees.  
20 Again, these are expert scientists who went out and evaluated  
21 the condition of every tree on the OPC site and they found  
22 that only about 20 percent of them are mature and healthy and  
23 roughly 40 percent of the trees on the existing OPC site now  
24 are in declining condition.

25 So we did -- we did acknowledge that while the

1 project is being constructed and in the 15 or so years it  
2 will take the trees to grow to maturity, yes, there will be  
3 some differences. But we concluded after applying expertise  
4 that under the long-term, this project will actually improve  
5 the health of the trees in Jackson Park and will not have an  
6 adverse effect on the habitat for wildlife or birds.

7 A couple other points for your Honor to be aware of  
8 when you consider whether the construction of the OPC within  
9 Jackson Park is an environmentally significant event is that  
10 Jackson Park has constantly changed over its long history.

11 As I'm sure your Honor knows, the Museum of Science and  
12 Industry is there. That was not part of the original design.  
13 The record includes a letter from Elizabeth Roman who is an  
14 architectural historian with the state. She talks about how  
15 Jackson Park has changed over its history. Most of those  
16 changes have been made to augment the use of the park by the  
17 public for recreation, education, and entertainment just as  
18 the OPC will. Others have been to involve the construction  
19 of public facilities, again just like the OPC.

20 And I want to talk a little bit about that change  
21 can actually be a good thing from the standpoint of history.  
22 Mr. Epstein didn't mention it much but there was a lot of  
23 discussion in plaintiff's briefs about the impact on the  
24 historic homestead design of the park. And the letter from  
25 Ms. Roman that I referred to in the record talks about how

1 sometimes change can be good from an historical perspective;  
2 and this is one of those cases where we have a significant  
3 change that's going to improve both the environment and the  
4 historic nature of the park.

12:05PM

5 And, Rachel, if we can call up the City aerial.

6 Your Honor, this is Jackson Park as it exists  
7 today. Do you see the field where the Bears' logo is?

8 That's roughly the site of where the OPC would be. That's  
9 obviously not the part of the original homestead design but

12:06PM

10 what I want to draw the Court's attention to is Cornell Drive  
11 alongside the OPC site. That's a six-lane road that  
12 essentially bisects the park. There's a chain-link fence on  
13 the east side of it so even if you could easily cross six  
14 lanes of traffic, you can't get to the rest of the park.

12:06PM

15 Rachel, can you show what that's going to look like  
16 after the site? Next one. This (indicating). So let me  
17 clear my scribbles.

18 This is what Cornell Drive is going to look like  
19 after the OPC. So the first photo is what plaintiffs are  
20 asking this Court to take the extraordinary remedy of  
21 entering a preliminary injunction to protect. This is what  
22 we will have after the project is completed; much better for  
23 the environment, much more consistent with the historic  
24 design.

12:07PM

25 And with that, your Honor, unless you have

1 questions, I'm going to turn it over to my co-defendants.

2 THE COURT: Did you complete your response to the  
3 segmentation argument? I didn't --

12:07PM

4 MR. GEHLERT: The segmentation argument, yes. We  
5 -- we did not segment at all. As I said, the Environmental  
6 Assessment and the Assessment of Effects both address the  
7 impact of the OPC in great detail. I think the point to bear  
8 in mind though, your Honor, is that the OPC is not a federal  
9 project. It's not federally funded. It's not on federal

12:07PM

10 land. It doesn't require federal action. It is a -- it's a  
11 decision that was made by the City and a decision that my  
12 clients are obligated to respect. We don't live in a  
13 federal -- in a federal system where the federal government  
14 can just tell the City of Chicago to take their park and put  
15 it somewhere else.

12:07PM

16 So we did take a hard look at all of the impacts,  
17 including the impacts of the OPC. We decided that in light  
18 of the scale of the park -- the park is very large, the OPC  
19 is just a tiny little segment of it and the park's history  
20 has changed, that that didn't constitute a significant change  
21 and therefore no environmental impact statement was required.

12:08PM

22 THE COURT: Thank you, counsel.

23 MR. GEHLERT: Thank you, your Honor.

24 MR. WORSECK: If the Court will indulge me.

12:08PM

25 Good afternoon, your Honor. Andrew Worseck on

1 behalf of the City of Chicago; and I will be addressing the  
2 public interest argument on behalf of the defendants, and the  
3 City and Park District most specifically.

4 Your Honor, I want to start with coming back to  
5 something plaintiff's counsel said when he was making his  
6 public interest argument. He was saying the public interest  
7 would favor the OPC being located in Washington Park versus  
8 Jackson Park. In his mind, Washington Park is a superior  
9 site and it is far better than the Jackson Park site. That  
10 is not the correct question that their motion presents with  
11 respect to the equities. The question is whether the  
12 proposal that is in front of you, the proposal that the City  
13 Council and the Park District approved in Jackson Park,  
14 whether it is equitable to enjoin that project or whether the  
15 public interests favors it proceeding without any delay and  
16 the public interest emphatically favors it proceeding without  
17 any delay and that's so for three main reasons.

18 The first is that, as we point out in our brief,  
19 any delay to a construction project of this magnitude and  
20 this expense is sort of per se irreparable harm to the City  
21 and the Park District. This is one of the City and Park  
22 District's most significant park development projects ever.  
23 It's been years in the making, years in the planning.  
24 It's projected to cost hundreds of millions of dollars to  
25 build, which the Foundation will be paying the bill for. Any

1 delay to that very complicated and involved effort to enhance  
2 Jackson Park for the benefit of all members of the City is by  
3 itself irreparable harm and it's against the public interest.

4 Second, any delay to the project moving forward  
12:10PM 5 will delay the ultimate completion and realization of all the  
6 benefits and amenities that the OPC will bring to the City  
7 and to the south side in particular. Any delay in getting  
8 started means there's going to be a delay on the back end in  
9 allowing the public to enjoy all of the many benefits and  
12:10PM 10 amenities of the OPC so that delay itself is also a form of  
11 irreparable harm and harm to the public interest because  
12 you're pushing off sort of indefinitely the time by which the  
13 public can enjoy these immense benefits.

14 And both of the points I just made would be true,  
12:11PM 15 really, in any year when we were talking about this project  
16 but there's a third reason why in the summer of 2021 it's  
17 even more imperative that the OPC be allowed to proceed  
18 without delay. And I don't need to tell the Court, we've  
19 come -- just we're coming through one of the most difficult  
12:11PM 20 years in the City's history coming out of the pandemic. It's  
21 been hard for all of us. It's probably been hardest for  
22 people in neighborhoods like those on the south side that  
23 have historically been underinvested and under-resourced.  
24 This is exactly the time when an economic jolt is needed in  
12:11PM 25 communities like the south side and that's what construction

1 will bring once construction commences on the OPC.

2 It will start in process a ramping up of  
3 construction jobs that will provide jobs -- estimated over a  
4 thousand jobs -- to people on the south side once the  
12:12PM 5 construction phase fully ramps up. And that economic  
6 benefit, that sort of short-term economic jolt is sorely  
7 needed right now and it would be inequitable to deny the  
8 people of the south side that kind of economic relief at this  
9 point in time.

12:12PM 10 But it's also very important to the City's  
11 long-term policy objectives with respect to development in  
12 communities that are underserved on the south and west sides;  
13 and this is something we talk about in our brief through the  
14 declaration of Commissioner Cox of the City's Department of  
12:12PM 15 Planning and Development. The City has recently made it a  
16 high priority to develop plans for long-term economic growth  
17 in investment in communities on the south side, and elsewhere  
18 in the City, that have been underinvested. But a key tenet  
19 of those policies -- and the Commissioner talks about two of  
12:13PM 20 those specific policies, the Woodlawn Plan Consolidation  
21 Report and the Invest Southwest Initiative -- a key tenet of  
22 those policies is that if you want to have long-term  
23 sustained economic and community growth in neighborhoods that  
24 have historically been underserved, you need to have very  
12:13PM 25 highly visible and tangible signs of progress. You need to



1 have things that the community will recognize as signaling a  
2 new day. You need to have things that private investment and  
3 private capital will recognize as signaling a new day. When  
4 you have those kinds of very tangible signals, then the  
5 support cascades. Those symbols serve as a catalyst for  
6 broader economic development and community commitment.

12:13PM

7 The OPC is a signature textbook example of the kind  
8 of highly visible public works project that is needed to  
9 sustain longer economic growth and development in these  
10 communities. If that were to be called into question at this

12:14PM

11 point in time in the summer of 2021 after the pandemic just  
12 as the City's broader policy agenda is starting to take root,  
13 that would not only be a very harmful blow to the morale of  
14 the community but it would also call into question the  
15 viability of these policies and these efforts to have a broad  
16 and long-term economic development agenda take root.

12:14PM

17 And I don't want to discount the resonance that an  
18 injunction would have with people on the south side. I think  
19 that the amicus brief submitted by a coalition of 60

12:14PM

20 community groups and individuals on the south side makes this  
21 point very well. They talk about how the OPC will start a  
22 resurrection of the south side and how they view it as a  
23 beacon of hope. For it to be enjoined would dash those  
24 hopes. It would dash morale. It would harm the public

12:15PM

25 interests. It would harm the City's objectives with respect

1 to the south side. It's much broader than just Jackson Park.  
2 It goes to the south side. It goes to the City as a whole.

3 And the other point I'd like to make, your Honor,  
4 Mr. Epstein spoke today about Washington Park as sort of  
5 being more in the public interest and that was something we  
6 hadn't really heard before and I've addressed that. I want  
7 to speak briefly about a point that they make in their  
8 brief -- and this is really the only thing -- the only other  
9 thing they have going for them with respect to why they think

10 the public interest and the equities are in their favor for  
11 an injunction and that is they argue that because we've  
12 alleged violations of NEPA and the National Historic  
13 Preservation Act, we sort of -- we get our likelihood of  
14 success factor in our favor and we also get the public  
15 interest and the equities factor in our favor and that's just  
16 wrong as a matter of law as we explained in our briefs.

17 The Supreme Court and the Seventh Circuit have made  
18 clear that you have -- you, Judge, have to do an independent  
19 analysis of each of the four factors that the plaintiffs have  
20 the burden of satisfying in order to get injunctive relief.  
21 It's not our job to explain why it's in the public interest  
22 that this project be allowed to proceed, although I've just  
23 done that and our briefs do that extensively. It's  
24 plaintiff's job, it's plaintiff's burden to explain why it's  
25 in the public interest for it not to proceed and they fall

1 flat on their face in that regard. The mere allegation that  
2 there's been statutory violations does not suffice.

3 The statute -- the statutes that they invoke here  
4 are procedural statutes, the federal statutes NEPA and HPA.  
12:16PM 5 They are procedural statutes. They require agencies to  
6 follow procedures to assess certain impacts but they do not  
7 speak to whether it's in the public interest for this  
8 particular project to succeed. That question, as my  
9 colleague explained, was simply beyond the purview of the  
10 agencies. That was not something they were looking at. That  
11 was not something they were empowered to look at.

12 If you, your Honor, are looking for a source, a  
13 governmental source, a governmental action, a legislative act  
14 that is the best proxy for what's in the public interest, we  
15 submit you should be looking to the legislative approvals by  
16 the City Council and the similar approvals by the Park  
17 District. Those are the bodies that are closest to the  
18 people of Chicago. Those are the bodies chosen by the people  
19 of Chicago to act in their interest, to make decisions about  
12:17PM 20 what is in their interest; and the City Council and the Park  
21 District did that extensively.

22 As your Honor is well aware and as your Honor  
23 documented in prior opinions regarding the OPC, this project  
24 has been extensively vetted and reviewed and debated and  
12:18PM 25 considered by the people of Chicago through their elected

1 representatives in the City Council and their proxies at the  
2 Park District. Those bodies have decided that this project  
3 is emphatically, emphatically in the public interest of the  
4 people of Chicago and those decisions are entitled to  
5 deference and respect we submit to your Honor.

12:18PM

6 THE COURT: Thank you, counsel.

7 MR. GEHLERT: Thank you.

8 MS. NAVARO: Good morning, your Honor. I'm Ann  
9 Navaro on behalf of the City of Chicago and you've heard from  
10 the federal defendants in detail on the merits of the legal  
11 issues before you but I'd like to highlight a couple of  
12 points of particular importance to the City and the Park  
13 District with respect to the merits and then I'm going to  
14 turn briefly to talk about why plaintiffs' claims of  
15 irreparable injury are not supported and don't warrant an  
16 injunction.

12:18PM

12:19PM

17 First of all with respect to the merits, the  
18 plaintiffs have not cited to any federal law that gives any  
19 of the federal agencies, defendants here, the power to choose  
20 or dictate or even analyze an alternate site for the  
21 Presidential Center. Essentially they are asking the federal  
22 government or this Court to decide how the City should make  
23 decisions for the management of its parks which is not  
24 supported in the law.

12:19PM

12:19PM

25 I'd also like to kind of set the table with a

1 little more explanation of the governing standard.

2 Mr. Gehlert explained that, in fact, the governing standard  
3 is not de novo review but an arbitrary and capricious  
4 standard of review and the Supreme Court certainly has given  
5 extensive discussion about the nature of that review. One of  
6 the seminal cases was *Motor Vehicle Manufacturers* in 1983  
7 where the court explained that the federal government's  
8 decisions when reviewed under an APA standard are due a  
9 presumption of regularity and the question for the Court is

10 really only whether the agency considered the relevant  
11 factors or whether the agency might have committed a clear  
12 error of judgment. And I would submit that under that  
13 standard, your Honor, it is clear that the agencies passed  
14 with flying colors. The extensive nature of the analysis,  
15 the point-by-point consideration of all the impacts of  
16 concern to the plaintiffs are replete in the record.

17 I'd like to --

18 THE COURT: Counsel for plaintiff noted the "hard  
19 look" language. Do you want to address that?

20 MS. NAVARO: Yeah. I'm glad you asked about that,  
21 your Honor. That was one thing I wanted to address. So the  
22 hard-look standard is a standard and it's one that you see  
23 often in the case law arising under the National  
24 Environmental Policy Act. It's not an APA standard; it's a  
25 NEPA standard. And the question the courts often ask is has

1 the federal government taken a hard look at the environmental  
2 impacts; and if the government has done so, that suffices.  
3 And so it's in the context of the arbitrary and capricious  
4 standard review but it is specific to NEPA.

12:21PM

5 THE COURT: So the hard look is by myself in the  
6 Article III standard or role or the hard look is from the  
7 other entities in government?

12:21PM

8 MS. NAVARO: Well, it's the other entities, your  
9 Honor. The Court reviews whether the federal agencies have  
10 taken the required hard look at environmental impacts which  
11 we submit they have certainly done here.

12:21PM

12 Also just briefly, both the National Environmental  
13 Policy Act and the National Historic Preservation Act, which  
14 are the two review statutes at issue here, so the agencies  
15 had to take certain actions under their own authorities --  
16 UPARR, the Department of Transportation Act, the Rivers and  
17 Harbors Act -- but each of those actions required the  
18 agencies to undertake review of environmental and historic  
19 impacts under the review statutes.

12:22PM

20 Those -- those two statutes have one important  
21 thing in common which is that they are both process statutes.  
22 They do not give any federal agency the authority to dictate  
23 the outcome of a project or to impose particular types of  
24 avoidance or mitigation. They require the agency to take a  
25 look, to listen, and to review impacts to the environment and

12:22PM

1 cultural resources.

2 I'd also like to talk a little more about the  
3 segmentation issue that your Honor asked about. Segmentation  
4 is a concept that arises under the National Environmental  
12:22PM 5 Policy Act and it arises in situations where a federal agency  
6 has divided a proposed federal action in a way to essentially  
7 purposefully avoid environmental review of the cumulative  
8 impacts or total impacts of an action. That is the opposite  
9 of what happened here. Here, the agencies got together in  
12:23PM 10 one environmental document, in one Environmental Assessment  
11 and reviewed all of their specific federal actions together  
12 to ensure that the impacts of those actions together would be  
13 adequately considered.

14 And a case that we did not cite in our brief but  
12:23PM 15 might be helpful to the Court is called *Delaware Riverkeeper*.  
16 It's 753 F.3d 1304. It was decided by the D.C. Circuit in  
17 2014 and that is what I would characterize as a classic  
18 segmentation case because in that case the Federal Energy  
19 Regulatory Commission approved a gas transmission line that  
12:24PM 20 connected with some other lines and they just approved this  
21 one additional piece of the line but then they went off and  
22 approved in separate decisions and based on separate  
23 environmental reviews other aspects of the same project and  
24 the Court pretty much easily found that it was really one  
12:24PM 25 interconnected project so that's a classic segmentation case

1 which is the opposite of what the agencies did here.

2 I'd also just like to briefly address Mr. Epstein's  
3 suggestion that it's the job of the agencies or perhaps the  
4 Court to find a superior site. Again, that is not the law.  
12:24PM 5 NEPA and cases addressing this across almost all circuits --  
6 many of the cases cited in our brief, in the federal  
7 government's brief -- instruct that "analyzing impossible  
8 options for a federal agency to implement would be a flight  
9 of fancy that doesn't serve NEPA's twin goals which are to  
10 inform the decision maker and the public."

11 It would not inform the decision maker or the  
12 public for the federal government to go off and identify  
13 potential other sites for the OPC when the federal government  
14 has no authority over those decisions.

12:25PM 15 Similarly, the National Historic Preservation Act  
16 does not require mitigation, does not require avoidance of  
17 historic impacts. Again, it is a process statute to make  
18 sure that federal agencies consider the impacts of their  
19 action.

12:25PM 20 I'd just like to briefly mention Section 4(f) of  
21 the Department of Transportation Act. Mr. Epstein suggested  
22 that, in essence, it applies to the entirety of this project  
23 but doesn't grapple with the terms of the statute which  
24 define the types of projects it applies to, which are  
12:25PM 25 transportation projects that use federal money to fund



1 highway work on federal aid highways. Neither the  
2 Presidential Center nor the closure of the roadways fall  
3 under that definition as the Department of Transportation  
4 explained in its decision document.

12:26PM 5 I would like to take one more minute to talk  
6 briefly about irreparable harm and I think just two quick  
7 slides. I'd like to show you a before picture of the site --  
8 yeah, that one, yes, thank you -- so that's what Jackson Park  
9 looks like now from above. And then an after view. And that

12:26PM 10 is what the Park will look like after the project is  
11 completed. So as you can see, the harms that plaintiffs  
12 complain of are in large part temporary, which is not  
13 sufficient to justify extraordinary relief. Most of the site  
14 will remain open park land as this Court has previously

12:27PM 15 recognized. The closure of Cornell will enhance the park by  
16 adding additional park land and restoring that historic  
17 connection. The women's garden will be rebuilt and, in fact,  
18 there will be 6.5 acres of additional green space over  
19 which -- over what's there now. So plaintiffs have not  
12:27PM 20 demonstrated the type of devastating permanent impact that  
21 warrants injunctive relief.

12:27PM 22 Plaintiffs also make a number of generalized and  
23 very speculative complaints such as concerns about harm to  
24 migratory birds. Harm to migratory birds is addressed  
12:27PM 25 specifically in Appendix C of the Environmental Assessment by

1 experts considering the potential for harms.

2 The bottom line, your Honor, is that not every  
3 impact or change or disagreement or opinion amounts to  
4 irreparable harm, otherwise preliminary injunctions would  
12:27PM 5 issue every time someone doesn't like a federal government  
6 action and that's simply not the case.

7 In summary, plaintiffs' claims don't support the  
8 extraordinary remedy they're seeking here today.

9 THE COURT: Thank you, counsel.

12:28PM 10 MS. NAVARO: Thank you.

11 THE COURT: Counsel?

12 MR. HOFFMAN: Good afternoon, your Honor. David  
13 Hoffman on behalf of the Obama Foundation. I'd like to  
14 address the third factor relating to the balance of harms  
12:28PM 15 between the parties and specifically as it relates to the  
16 harm to the Foundation. The Foundation, as I believe this  
17 Court is aware, has for years engaged in extensive work and  
18 spent tens of millions of dollars in planning the -- and  
19 designing the Center.

12:28PM 20 In the recent months, once the federal reviews were  
21 clearly coming to an end and did come to an end in early '21,  
22 the Foundation engaged in an extensive effort to bid for  
23 contractors, bring contractors on board, and create a  
24 sequence and schedule that is now scheduled to start on  
12:29PM 25 August 16th with an intricate sequence that's in place.

1 A sudden unplanned work stoppage of uncertain  
2 duration, which is what an injunction would be, would be  
3 devastating for the project. It would create delay that at a  
4 minimum would create millions of dollars of increased costs  
12:29PM 5 to the Foundation in terms of expected higher costs of  
6 materials, in terms of contractors that would either be lost  
7 because they wouldn't be able to or be unwilling to continue  
8 or even the contractors that stayed in terms of the expected  
9 cost in terms of premium work and other items that they would  
12:29PM 10 negotiate for. The extra cost of paying professional service  
11 vendors to stay on the shelf on hold to keep them on the  
12 project while no work is happening. Work being pushed into  
13 winter where the sequence is planned for the work to not  
14 happen in the winter because if -- in winter the work either  
12:30PM 15 cannot happen or it would be much more expensive and take  
16 much longer.

17 An injunction would mean compounded delay. We are  
18 not talking about a delay that would be a one-to-one ratio  
19 for the number of days for the some of the reasons I  
12:30PM 20 mentioned: Winter work, contractor change or contractors  
21 leaving the project, a delay of a few months likely means  
22 many months of delay because of the compounded delay. The  
23 Robbin Cohen Declaration as was referenced earlier goes into  
24 that in great detail. Delay from an injunction means  
12:30PM 25 uncertainty, something that can be absolutely devastating to

1 a project. An injunction would mean that the project would  
2 have to be frozen. The people working on the project would  
3 have to stop. Things would be demobilized. When it could  
4 start, who knows. And when it does start, they can't just  
12:30PM 5 snap their fingers and start again. That not only hurts  
6 contractors and the future willingness to sign on, it hurts  
7 fundraising. It creates a risk that pledges and donations  
8 already in place could be rescinded. It creates an  
9 intangible cost for the Foundation. It's important to the  
12:31PM 10 Foundation as it is to the City to be a catalyst for new  
11 investments in the community, drawing new business in. That  
12 uncertainty freezes that. As the declaration from the City  
13 Commissioner says "that would dampen if not stop outright the  
14 influx of capital." Delay means similarly an inability to  
12:31PM 15 provide the big economic boost that need -- these communities  
16 need now. This is something that Mr. Worseck talked about.

17 But in addition to jobs, in addition to the  
18 thousands of jobs that this will create that are sorrily  
19 needed, I don't want the Court to lose sight of the small  
12:31PM 20 businesses and contractors who have -- some of whom as we  
21 discussed in our brief and declaration are minority- or  
22 women-owned businesses who have chosen to bid on this project  
23 at the expense of bidding on other projects. They have  
24 relied on this project moving forward. If this project is  
12:31PM 25 stopped, they are out of work. These are small businesses.

1 With the incoming jobs that this contract will bring, we're  
2 talking about just for two contractors that we highlighted in  
3 our declaration worth \$50 million of work, that gets stopped  
4 if there's an injunction. The Foundation invested heavily  
5 and has spent tens of millions of dollars as I've said.

6 These plaintiffs have been aware for many months of  
7 this project, if not years, in terms of the supposed impact.  
8 Your Honor was here for the first litigation. And yet, in  
9 February 1st when after years of extensive review by the  
10 federal agencies, those reviews ended. These plaintiffs did  
11 not rush into court arguing irreparable harm. They waited  
12 from February, March, April, May -- until June 15th, a delay  
13 of four-and-a-half months, to ask for a preliminary  
14 injunction.

15 And I'd refer your Honor to the *Ixmation* case,  
16 I-x-m-a-t-i-o-n, a case by Judge Lee, that because of a very  
17 similar several-month-long delay in a similar situation where  
18 the defendant said this caused me millions of dollars of  
19 cost, he found that because of that delay in and of itself  
20 there was not irreparable harm that could be shown. We've  
21 cited numerous cases in our brief at Pages 26 and 23 where  
22 the harms that I'm describing to the defendant because it is  
23 construction costs, the loss of jobs, are more than  
24 sufficient to outweigh whatever claims a plaintiff claims in  
25 terms of environmental harm.

1 And just briefly -- since this factor is about the  
2 balance is compare those harms that I've described and that  
3 we lay out in great detail with the harms that plaintiffs  
4 claim -- and I would ask your Honor to look carefully at the  
12:33PM 5 plaintiffs' declarations -- all but one, all but one does not  
6 even mention their use of this site. In very generic terms,  
7 they talk about going to Jackson Park, walking in Jackson  
8 Park. There's one that talks about using the tennis courts  
9 and the golf course, none of which is anywhere close to this  
10 site. The only one that mentioned it mentions the women's  
11 garden briefly is something where they like the aesthetic  
12 effect. Certainly declarations that don't even mention the  
13 site itself cannot support an irreparable harm claim that has  
14 to be not generic harm but harm to these plaintiffs.

12:34PM 15 The trees, as has been stated, experts have  
16 determined that, sure, trees will be cut down but so many  
17 will be replaced and expanded. There will be a long-term  
18 benefit to the tree canopy. And I would note as we said in  
19 our brief, more than 80 percent of the trees coming down are  
12:34PM 20 either not mature or are not in good condition. That's a  
21 part of the record.

22 And I think the photo that was placed earlier that  
23 shows the overall, the Cornell Road bisecting it. And if you  
24 could put up the photo of Cornell Road itself. You saw the  
12:34PM 25 nice looking photo of what it will look like but this is it

1 now. To get from the site, which is off to the right in this  
2 picture, to the rest and the center of Jackson Park -- the  
3 lagoons, the wooded island -- would require a family to try  
4 to cross this six lanes and somehow get across this fence so  
12:34PM 5 you can't do that. You have to go -- if you live west of  
6 Jackson Park, you do not have an easy path.

7 And now if you go to the photo that's going to show  
8 what it's going to look like in the future, the point is you  
9 can now walk, you can walk into the middle of the park. The  
12:35PM 10 idea that this is a harm to plaintiffs much less  
11 irreparable -- I know counsel used the word preposterous --  
12 that's the word I would like to use here. The balance is  
13 heavily weighed in favor of the Foundation; and the City of  
14 Chicago is another defendant. We believe this factor weighs  
12:35PM 15 firmly in favor of the defendants.

16 And just to close, your Honor, with the public  
17 interest, the plaintiffs need not only -- in their claims of  
18 harm need not only to be compared to the harms of the  
19 defendant but the harms of others and there are seven of them  
12:35PM 20 here, seven plaintiffs, and there are 27 organizations and 33  
21 individuals and all the other individuals who are behind  
22 those organizations who have filed a wonderful amicus brief  
23 with your Honor, who -- and these are -- many of them are  
24 residents of Woodlawn. Not a single resident of Woodlawn  
12:35PM 25 among the plaintiffs group. Many of the residents -- and

1 they're speaking here just, just like through their brief and  
2 they have said we the community want this, this is good for  
3 Jackson Park, it is what we want. And every public body that  
4 has spoken about this -- the City, the Park District, the  
12:36PM 5 State of Illinois, several federal agencies -- have said this  
6 is a positive and appropriate development.

7 The federal agencies, the Justice Department has  
8 come in here and at the end of their brief had said these  
9 stories that will be told at the Obama Center need to be told  
12:36PM 10 as soon as possible. Do not delay. That is an important  
11 federal government interest.

12 The citizens of Chicago have acted through their  
13 democratically elected representatives, the City Council,  
14 which unanimously passed something. The Obama Foundation has  
12:36PM 15 raised and will be spending \$700 million of private funds to  
16 build this paid for by the Foundation, which will then be  
17 given to the City which will own this and the -- it will be  
18 open to the citizens of Chicago and the world to come. A  
19 south side museum campus will be created. Because Cornell  
12:37PM 20 Drive won't be there, neighborhoods at the west will now be  
21 connected with the lake. Jackson Park, as this Court found,  
22 will have an additional 4.7 of acres.

23 I have not -- I don't -- I believe it is  
24 unprecedented that all three century-old civic groups that  
12:37PM 25 have filed an amicus brief here together have ever done that



1 before. I don't -- I think that is unprecedented. Listen to  
2 their voices. They describe this as --

3 THE COURT: Counsel, I hate to interrupt you. Your  
4 time is expired. If you can conclude.

12:37PM

5 MR. HOFFMAN: May I close, your Honor?

6 THE COURT: Yes. You may.

7 MR. HOFFMAN: Okay. Your Honor, while Chicago has  
8 had the opportunity to build wonderful museums of history and  
9 art and science, this opportunity has never arisen before to

12:37PM

10 have a museum and center for a president from Chicago and we  
11 will always be the first and only place to have a museum to  
12 discuss and honor the first black U.S. president. We,

13 Chicago, the south side will have that honor and no one else  
14 will ever have that. This improves us as a city, it enhances

12:38PM

15 our experience as citizens, and we have been waiting for  
16 years for this. The eyes of Chicago are upon us. And what

17 you said two years ago "construction should commence without  
18 delay" is finally about to start. We respectfully ask this

19 Court not to let these seven plaintiffs block that from

12:38PM

20 occurring. We believe you have everything in front of you  
21 now to move forward expeditiously and we respectfully ask

22 that the motion be denied.

23 THE COURT: Thank you, counsel.

24 MR. HOFFMAN: Thank you.

12:38PM

25 THE COURT: On behalf of the plaintiffs?

1 MR. EPSTEIN: Yes. Thank you.

2 THE COURT: You have ten minutes. I'm giving you a  
3 little extra time. It's like soccer, you know, I'll add some  
4 time based on the flag.

12:38PM

5 MR. EPSTEIN: Thank you very much, your Honor. I  
6 think it's clear to say that every single proposition of law  
7 that were made by the defendants in this case are erroneous.  
8 Let me start with the invocation of the *Public Citizen* case.  
9 That was a very unusual type of situation in which there had

12:38PM

10 been a general order by the president to stop American --  
11 Mexican trucks coming onto American roads. And then what  
12 happened is that order was reversed by the president and then  
13 there was a NEPA challenge that was made with respect to it  
14 saying by allowing the trucks from Mexico to come onto the  
15 American road would increase traffic in ways that would  
16 create some kind of an environmental impact.

12:39PM

17 There were two ways in which this thing was stopped  
18 completely distinguishable from this. The first they say is  
19 you have a serious proximate cause problem, you've shown  
20 maybe but-for cause but there are so many intervening acts  
21 that can take place including, for example, the reduction in  
22 the number of American trucks that are riding the road  
23 because the Mexican trucks cannot be regarded as simply  
24 additive. They have to be considered with respect to  
25 replacement.

12:39PM

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1 More specifically, when the case came before  
2 Justice Thomas, he explicitly said "we hold under these  
3 circumstances there is no point for a review because the  
4 president has complete discretion on this with respect to  
5 that particular statute so it's pointless to try to force him  
6 to do something."

12:40PM

7 What happens is the defendants in this case take a  
8 very odd view of the case and they say that it stands for the  
9 proposition that if it turns out that the federal government  
10 cannot authorize construction in any particular case, it has  
11 no reason to do review. There's absolutely nothing  
12 whatsoever with respect to the *Public Citizen* case which  
13 addresses this.

12:40PM

14 What they are doing in effect is repealing NAFTA --  
15 not NAFTA, repealing NEPA and repealing the Transportation  
16 Act which makes it very explicit, the federal government need  
17 not have the power to order somebody to go to a site in order  
18 to ask the question of whether or not that particular site is  
19 a suitable alternative to the one that has been proposed. So  
20 if it turns out that is a suitable site, then you cannot  
21 build on the site which has environmental harm. You have the  
22 choice not to build at all. But to say that review is  
23 truncated under circumstances only where the federal  
24 government can authorize this situation is, in fact, a  
25 complete distortion of the way in which the particular NEPA

12:40PM

1 statute under these circumstances starts to work so that's  
2 the first difficulty they have.

3 The second difficulty that they're going to have in  
4 this case is they start talking about irreparable injury in  
12:41PM 5 these circumstances and it turns out Mr. Hoffman gives a very  
6 long and complicated account of all of the disruptions that  
7 are going to take place with respect to the plan that the  
8 Obama Foundation has put in place. One of the things that we  
9 know if you look at the thousands upon thousands of cases  
12:41PM 10 that have been decided under NEPA, there has never been a  
11 single one of them in which delay and financial repercussions  
12 to a particular party has been regarded as a sufficient  
13 justification.

14 Indeed, I have written at great length to say why  
12:41PM 15 it is under certain circumstances this is completely  
16 preposterous and one of the reasons is that sometimes when  
17 you start putting the delay in place, what happens is you're  
18 preventing the replacement of deleterious structures that are  
19 already there thereby increasing the overall level of harm.

12:42PM 20 To give an idea of how aggressive the federal  
21 government can be on these cases, when Eleanor Holmes Norton  
22 wrote to Mr. Buttigieg saying we think you've got too many  
23 parking places in Union Station, he stopped the construction  
24 of a billion-dollar plan in a central part to say whether or  
12:42PM 25 not you could reduce it 400, which ironically is 50 cars less

1 than the Obama Foundation is planning to put into this  
2 particular case. So every airport that's been slowed down,  
3 every tunnel, every bridge that has been slowed down has  
4 exactly the same story. In some of these cases, things ought  
5 to be expedited particularly because the existing equipment  
6 is bad but in this particular case there is no current  
7 disability. It is pure delay case. If you accept that as  
8 irreparable harm in this particular case, they're going to  
9 have to contend with the fact that every single environmental  
10 statute which has ever addressed this problem has turned out  
11 to deal with this in a very, very different kind of way.

12 Then, of course, we go back to the question of  
13 segmentation which was raised with great earnest by the  
14 various defendants under these circumstances and again what  
15 they wrote is a complete misrepresentation about the way in  
16 which the world works. This is not a case in what you do is  
17 to sort of say to the particular parties that are involved,  
18 the local governments and so forth, that they have final say  
19 over this.

20 One of the striking things is that when they  
21 finally saw the first Assessment of Effects, it had huge  
22 objections to the proposed project because of the adverse  
23 consequences. None of those were addressed in the sense that  
24 the project was not altered in response to anything that went  
25 on there. And so what the defendants are saying in this

1 particular case if, in fact, we go through the various kinds  
2 of procedural stuff, if we assure you that the trees are not  
3 a problem, if we assure you we can take care of the migratory  
4 birds, you are required to take that on faith.

12:43PM 5 A hard look is not a de novo review but a hard look  
6 says anything that any government agency puts forward has to  
7 be subject to rebuttal. So in this particular case, we have  
8 bird experts; they have bird experts. Some of my bird  
9 experts are, in fact, the federal government itself. If one  
12:44PM 10 starts to look recently at what the Biden Administration has  
11 said about the migratory birds and what they've said about  
12 the trees, they take positions that are diametrically opposed  
13 to everything that's been asserted in this particular case.

12:44PM 14 In fact, there was unanimous consent virtually on the part of  
15 everybody to remove the Trump order which says that only  
16 deliberate interferences with migratory birds are a subject  
17 of result. If you build a 230-foot tower in the Mississippi  
18 flyway, that's going to be a permanent interruption with the  
19 build. If you decide you're going to cut down a thousand  
12:44PM 20 trees or whatever the exact number turns in, put saplings,  
21 you've conceded that you've got five years of delay and then  
22 another 15 years for some of these trees to grow. There's a  
23 better way to do this. If it turns out that the City is  
24 correct and some of these trees are decrepit and have to be  
12:44PM 25 taken down, then you can plant saplings under those

1 circumstances in order to deal with that issue in the places  
2 to fill it in. There is no reason whatsoever to take down  
3 the entire forest when, in fact, there are much more moderate  
4 and the sensible rules to deal with this particular  
5 situation.

12:45PM

6 The City then, of course, wants to go forward and  
7 the Obama Foundation wants to go forward with all the  
8 arguments with respect to hardship. What they don't do,  
9 however, is consider the alternative. If, in fact, you were  
10 to build the Obama Presidential Center outside of Washington  
11 Park as we have suggested, you will create construction jobs.  
12 You will also have neighborhood effects. It turns out there  
13 is no bad underserviced neighborhood at Jackson Park. It  
14 turns out that's one of the more robust areas inside the area  
15 with essentially upper, middle-class homes.

12:45PM

12:45PM

16 You start going a little bit further west, you  
17 avoid all the water problems, all the traffic problems and  
18 everything else that starts to take place and you actually  
19 can devise a situation in which the kind of help that you  
20 wish to provide is the kind of help that you will be able to  
21 provide.

12:45PM

22 We're told whether the City has approved this  
23 unanimously. There were two things to say about that one is  
24 that the closure of the roads in Jackson Park is not just a  
25 City of Chicago situation. As I mentioned earlier, there are

12:46PM

1 many people who come north from Indiana and go south through  
2 the park. There are going to be enormous delays. Will the  
3 City Council of Chicago take into account the inconvenience  
4 of Indiana citizens? The answer to that question given the  
5 hasty way in which they ran these trials an issue that we  
6 will avert to when we deal with the delegation issue talking  
7 about the public trust doctrine, the answer is they are not  
8 going to start to do anything of the particular sort.

9 And if you then tried to figure out whether or not  
10 you're going to improve the situation when you snarl traffic,  
11 the argument that somehow that you will be able to create a  
12 signal of success, if this project turns south as I am  
13 confident it will if it takes place, this will be a signal of  
14 failure. The unanimous consent of the Chicago body is  
15 utterly irrelevant under a federal statute. NEPA is a  
16 federal override that applies regardless of the constellation  
17 of local people who are for or against a particular kind of  
18 proposal.

19 What they have to do in effect is to answer the  
20 fundamental question, given the structure of NEPA, given the  
21 structure of the Transportation Act, if you do not segment  
22 this project in the way in which they try, if you do not  
23 claim that somehow or other the Obama Presidential Center is  
24 apart from this when all of its indirect effects require  
25 wrecking the roads and changing the particular situation,



1 then you have to go through the other analysis. By saying in  
2 effect you don't have to do an alternative, this is a  
3 breath-taking assertion because hundreds upon hundreds of  
4 NEPA cases including cases that they cite, hundreds and  
12:47PM 5 hundreds of transportation cases including those that they  
6 have cited have made the alternative site evaluation under a  
7 comprehensive standard there.

8 One looks at the way in which the statement of  
9 purpose is put forward in Section 303 of this particular  
12:47PM 10 statute and what it says unambiguously is we want to talk a  
11 broad view, we are in favor of preservation. And in this  
12 particular case, you can have both. You can improve Jackson  
13 Park incrementally by dealing with trees and birds in  
14 sensible and prudent ways. The infinite ingenuity that the  
12:48PM 15 City claims to have with respect to the park can be put to  
16 good use at far lower costs by keeping the park as it is and  
17 upgrading it incrementally, which is the way in which this  
18 thing has gone since 1869. But to hear somebody say why do  
19 you care about the trees if they weren't around in 1869 is to  
12:48PM 20 simply misapprehend the situation.

21 The purpose in this particular case with any  
22 project is to engage in an upgrade and you put in a series of  
23 idyllic pictures and never asked what kind of situation is  
24 going to happen. If you can walk across Jackson Park but  
12:48PM 25 it's narrow and there's noise and there's filth for five

1 years, their definition of temporary is my definition of in  
2 perpetuity. They simply want to invert these situations.

3 So in closing, it seems to me that if one looks at  
4 this, we fully can see that the burden of proof is upon us in  
12:49PM 5 order to obtain a preliminary injunction but at the same  
6 point we think that the defendants have said nothing, either  
7 individually or in aggregate, which shows what's going on.

8 Their argument in favor of segmentation is wholly artificial,  
9 completely inconsistent with a protective statute which says  
10 "before you rip down an entire national monument, you might  
11 want to have some review." They say that's not the purpose  
12 of this case. It's microscopic.

13 Then it comes to irreparable injury, they  
14 manufacture an irreparable injury that is nowhere found in  
15 the books but all of the probable harms that happen are  
12:49PM 16 ignored. When it comes to the question of the balance of  
17 equities, they can't show a single reason apart from delay of  
18 why it is a superior site cannot be find elsewhere. All we  
19 need to do is to find an equivalent but we've trumped that  
12:49PM 20 and gone once better. And then what they do is they give a  
21 completely naive economic analysis which simply says all  
22 virtuous intended consequences will necessarily come to pass.  
23 We do not think that this is the case.

24 So if you look at everything that they have, they  
12:50PM 25 have unsupported suggestions about all of the wonders that

1 are associated. We have not had a chance to cross examine  
2 those situations because at every particular hearing they  
3 made the local argument to the point where they say avoidance  
4 is off the table. Minimization is off the table. Only  
12:50PM 5 mitigation is on the table. What kind of public hearing is  
6 that?

7 They said the neighborhoods want it. Well, the  
8 University of Chicago had 200 professors who wrote a petition  
9 that said exactly the opposite. If you talk to people who  
12:50PM 10 live in the neighborhood what's going on there, they're  
11 frightened to death that they won't be able to get home if  
12 they live in Vista home or if they live in the Montgomery  
13 place and so forth. Theirs is a selective history.

14 The reason why we need to have a much more  
12:50PM 15 comprehensive, a much more thorough review is there are two  
16 sides to this story and all of the rose glasses that one  
17 starts to see on the one side has to be tempered with a very  
18 powerful dose of realism which says that the vain and  
19 glorious plans will fail.

12:51PM 20 Let me give one analogy. There has always been the  
21 *KeLo* case where exactly the same arguments were made about  
22 how you would revitalize the neighborhood by ripping  
23 everything down and they ripped everything down and the  
24 Supreme Court said deferential, which is not the standard  
12:51PM 25 here. Well, what happened? The little pink house moved and

1 the site became a garbage dump and nothing else was built.  
2 There are downsides as well as upsides. NEPA, they put the  
3 burden of proof on us. But if it puts the burden of proof on  
4 us, it surely has to give us an opportunity to do this.

12:51PM

5 The defendants have claimed that somehow that we've  
6 engaged in trickery and delay. We have pushed this thing  
7 forward. Everybody understood what the issue was the day we  
8 filed the complaint. It's difficult to file these papers.

12:51PM

9 The thought that somehow this is going to be regarded as a  
10 waiver of a position that we have taken consistently  
11 throughout this case is sheer fantasy.

12:51PM

12 This case has to be decided. A hard look has to be  
13 given; and when that hard look is given, I predict that you  
14 will find that the case that the plaintiffs (sic) made is  
15 utterly unsupported by the kinds of arguments that they've  
16 made at this presentation and by the arguments that they put  
17 in their brief. Thank you.

12:52PM

18 THE COURT: Thank you, counsel. Motion -- Docket  
19 Entry 30 is going to be taken under advisement. All  
20 deadlines and dates to stand. Thank you. Court's in recess.

21 (Proceedings concluded at 12:52 p.m.)  
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C E R T I F I C A T E

I hereby certify that the foregoing is a complete, true and accurate transcript of the proceedings had in the above-entitled matter before the Honorable John Robert Blakey at Chicago, Illinois, on July 20, 2021.

/s/Laura LaCien  
Official Court Reporter

July 28, 2021  
DATE