No. 24-

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD A. EPSTEIN
16 Thomas Place
Norwalk, CT 06853

MICHAEL RACHLIS
Counsel of Record
RACHLIS DUFF & PEEL LLC
542 South Dearborn Street, Suite 900
Chicago, IL 60605
mrachlis@rdaplaw.net

Counsel for Petitioners

332432

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The questions presented are:

1. Whether the Obama Presidential Center project (the "OPC"), which includes four structures constructed over 19.3 acres of Frederick Law Olmsted's Jackson Park, located next to Lake Michigan, is a major federal action under the federal environmental laws when the roadwork required because of the destruction and alteration of its internal roadwork, necessitated by that construction, is federally funded?

2. Whether a federal court can properly defer to a federal agency's narrow, unsupported and highly deferential definition of a major project escapes review under this Court's recent decision in *Loper Bright v. Riamondo* (2024) and its well-established decision in *Citizens to Preserve Overton Park, Inc. v. Volpe* (1971)?

3. Whether the federal reviews of the OPC relied upon below employed illegal segmentation to allow large portions of the undertaking to escape federal review under the NEPA, the Transportation Act and other federal statutes, which conflicts with the established interpretive principles used in the D.C. Circuit?

4. Whether the Seventh Circuit erred in deferring to the federal agencies who either ignored or belittled the destruction of hundreds of trees, migratory bird habitats, and other

key environmental in declining to require an environmental impact statement?

5. Whether the Seventh Circuit erred in affirming the trial court's denial of the Plaintiffs' only motion for leave to amend pursuant to Fed. R. Civ. P. 15, which was filed before any discovery began, before any schedule was set, and before any trial date was set?

6. Whether the Seventh Circuit's refusal to reverse the Rule 12(b)(6) dismissal of state law claims for violation of the public trust doctrine and improper delegation violated both Illinois law and this Court's precedents dealing with the duty of loyalty, the duty of care, and the nondelegation doctrine under the public trust doctrine?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioners are Protect Our Parks, Inc., Jamie Kalven, W.J.T. Mitchell, Bren Sherriff, Sid Williams, and Stephanie Franklin.

Respondents referred to as the Federal Defendants are Pete Buttigieg, Secretary of the U.S. Department of Transportation, Stephanie Pollack, Acting Administrator of the Federal Highway Administration, Arlene Kocher, Division Administrator of the Federal Highway Administration, Illinois Division, Matt Fuller, Environmental Programs Engineer, Federal Highway Administration, Illinois Division, Deb Haaland, Secretary of the U.S. Department of the Interior, Shawn Benge, Deputy Director, Operations, Exercising the Delegated Authority of the Director of the National Park Service, John e. Whitley, Acting Secretary of the Army, Paul B. Culberson, Commanding Officer of the Army Corps of Engineers (hereinafter the Federal Defendants).

The other respondents are the City of Chicago, the Chicago Park District, and the Barack Obama Foundation.

Petitioner Protect Our Parks, Inc. is a non-profit corporation with no parent entities that does not issue stock.

RELATED PROCEEDINGS

Protect Our Parks, Inc., et al., v. Pete Buttigieg, et al., No. 21-cv-2006, U.S. District Court for the Northern District of Illinois. Judgment entered on August 12, 2021 (Motion for Preliminary Injunction) and March 29, 2022 (Motion to Dismiss); Final Judgment entered November 3, 2022.

Protect Our Parks, Inc., et al., v. Pete Buttigieg, et al., Appeal No. 21-2449, U.S. Court of Appeals for the Seventh Circuit, Affirming Denial of Preliminary Injunction, and Final Judgment entered on July 1, 2022.

Protect Our Parks, Inc., et al., v. Pete Buttigieg, et al., Appeal No. 22-3190, U.S. Court of Appeals for the Seventh Circuit, Affirming Denial of Request for Leave to Amend and Dismissal of Federal Law Counts, and Final Judgment entered on April 8, 2024; Denying Petition for Rehearing, June 10, 2024.

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF APPENDICES

Table of Appendices

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Federal Statutes

Page

Page

Federal Rules

State Statutes

Page

Other Authority

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Protect Our Parks, Inc., et al, v. Buttigieg, et al.*, 97 F.4th 1077 (7th Cir. 2024). [Appendix A, pp. 1a-39a] The Seventh Circuit opinion affirmed the decisions of the United States District Court for the Northern District of Illinois [Appendices B (pp. 40a-42a, unreported), D (pp. 66a-109a, reported at *Protect Our Parks, Inc., et al. v. Buttigieg, et al.*, 2022 WL 910641 (N.D. Ill., March 29, 2022)), & E (pp. 110a-112a, unreported)]

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

The Seventh Circuit's opinion was issued on April 8, 2024. Petitioners filed a petition for rehearing and rehearing *en banc* on May 23, 2024, which was denied on June 10, 2024. This petition is timely based on the 90 days provided for by Rule from the denial of the petition for leave to appeal.

STATUTORY PROVISIONS INVOLVED

49 U.S.C. Section 303 (a)—(c) (the "Transportation Act")—Policy on lands, wildlife and waterfowl refuges, and historic sites—

> **(a)** It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside

and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) Approval of Programs and Projects.— Subject to subsections (d) and (h), the Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204 of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

(1) there is no prudent and feasible alternative to using that land; and

(2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

42 U.S.C. § 4332(C)—Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts—

> **(C)** include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> **(i)** the environmental impact of the proposed action,
>
> **(ii)** any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> **(iii)** alternatives to the proposed action,
>
> **(iv)** the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> **(v)** any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and

local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

40 C.F.R. § 1501.1(a)—NEPA thresholds—

(a) In assessing whether NEPA applies or is otherwise fulfilled, Federal agencies should determine:

(1) Whether the proposed activity or decision is expressly exempt from NEPA under another statute;

(2) Whether compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute;

(3) Whether compliance with NEPA would be inconsistent with Congressional intent expressed in another statute;

(4) Whether the proposed activity or decision is a major Federal action;

(5) Whether the proposed activity or decision, in whole or in part, is a non-discretionary action for which the agency lacks authority to consider

environmental effects as part of its decision-making process; and

(6) Whether the proposed action is an action for which another statute's requirements serve the function of agency compliance with the Act.

40 CFR § 1508.18(a)—Major Federal action

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

40 CFR § 1508.27—Significantly

Significantly as used in NEPA requires considerations of both context and intensity: (a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant. (b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity: (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial. (2) The degree to which the proposed action affects public health or safety. (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas. (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial. (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks. (6) The degree to which the action may establish a precedent for future

> actions with significant effects or represents a decision in principle about a future consideration. (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts. (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources. (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973. (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

16 U.S.C. § 470(f)—Section 106 of the National Historic Preservation Act of the United States ("NHPA")

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any

> license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.

INTRODUCTION

On January 21, 2009, then-President Barack Obama issued a Memorandum on Transparency and Open Government which proclaimed:

> My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.
>
> *Government should be transparent.*

These stirring words have not carried over to his efforts through the Barack Obama Foundation (the "Foundation"), working hand in hand with the City of Chicago, to construct and operate the Obama Presidential Center ("OPC")—which is *not* a library[1]—at the heart of

1. On August 2, 2024 the National Archives and Records Administration announced that it was closing its Hoffman

historic Jackson Park, an urban masterpiece designed by Frederick Law Olmsted. While construction (far from complete) has been underway for over three years, there remains ingrained mystery and uncertainty about the OPC. Putting aside unknowns about how much space is precisely reserved for exhibits, private Foundation office space, the private residence and other items, mum is the word regarding the finances for the construction of this private project located on public trust property where the public is contributing nearly a quarter of a billion dollars.

Today no one knows the real costs for the OPC, whose completion date has been pushed forward again to early 2026. No one knows the actual current budget for the project. No one has reliable information regarding what the funding of the Foundation is dedicated to, or available for. The Foundation has not issued its Form 990 covering the 2023 fiscal year, or its annual report for the same. The mandatory endowment (which the Foundation estimated as $470 million as of 2021, but not updated) that the Foundation was required to set up under its Master Agreement with the City of Chicago, as of the last public reckoning, contained only $1 million contributed in June 2021. No one knows whether the Foundation has sufficient funds dedicated to, or even available for, the actual costs of construction of the OPC, which long ago exceeded the numbers advanced by the Foundation and upon which the City relied to transfer this public trust land, without conducting proper due diligence. The Foundation and

---

Estates facility that actually housed the records and artifacts of the Barack Obama Presidential Library. The contents are being permanently moved *not* to the OPC, but rather to College Park, Maryland next year.

the City, aided by unbalanced judicial rulings from the Northern District of Illinois and the Seventh Circuit, have effectively stonewalled Petitioners' every effort to obtain essential statutory review and public information in regards to this project.

Against this backdrop, the Seventh Circuit's affirmance of the District Court in favor of Respondents is erroneous in light of both *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024) and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) because that decision is tainted with unconstitutional deference to the federal agencies, as it found that the construction of the OPC (i) was not a major federal action; (ii) the destruction and alteration of roadwork to and around Jackson Park was separate and distinct from the OPC construction, and (iii) an environmental impact statement (an "EIS") was unnecessary for a multibillion project in historic Jackson Park based expressly on no-look, abject deference. The Seventh Circuit's extreme deference allowed the Foundation complete control over the location of the OPC, notwithstanding its profound impact of an admitted federal action, with severe adverse environmental consequences, without meeting its statutory obligation to examine alternative sites for the OPC. Such decision is not only inapposite to *Loper Bright* and *Overton Park*, but also conflicts with the D.C. Circuit opinion applying *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), a conflict already recognized by this Court by accepting *certiorari* in *Seven County Infrastructure Coalition v. Eagle County*, 2024 WL 3089539, *cert granted* (June 24, 2024). This case offers a test as to whether lower courts will be bound to follow Supreme Court precedent at the crossroads of environmental, administrative and

constitutional law. For these and other reasons set forth below, Petitioners request that certiorari be granted.

STATEMENT OF THE CASE

1. Defendant Barack Obama Foundation (the "Foundation") is a private, non-governmental entity which, in approximately 2014, began its search for a home for a presidential library for the 44th President of the United States.

2. In 2015, when Barack Obama was still president, a Chicago ordinance announced that "the City and the Foundation . . . [were] enter[ing] into a long-term ground *lease*" for the site." (emphasis added). [*See* Dkt. 1, p. 16][2] The City Council explicitly delegated *the entire selection process and choice* of final location to the Foundation and its namesake:

> WHEREAS, While the City Council is **confident** in the quality and thoroughness of both UIC's and UChicago's proposals, ***the City defers to the sound judgment of the President and his Foundation as to the ultimate location of the Presidential Library.*** [*Id.*] (Emphasis supplied)

It then continued:

> It is anticipated that the City and the Foundation will enter into a long-term ground lease that will allow the Foundation to develop, construct

2. Unless otherwise noted, "Dkt." refers to pleadings from Case No. 21-cv-2006.

> and operate the Presidential Center, and that the Foundation will enter into a use agreement, sublease or other agreement with NARA [National Archives and Records Administration] to operate the Library and Museum. [*Id.*]

3. Using that uncabined discretion, on July 29, 2016, and without further input or analysis from the City, the former President and the Foundation selected Jackson Park as that site, created by Frederick Law Olmsted, the greatest American landscape architect, which is included on the National Register of Historic Places. The OPC project has already dismantled some portions of Jackson Park's historic landscape by obliterating trees and wildlife. It is in the process of wrecking the Park's historic transportation system by closing roadways that remain integral to Olmsted's initial conception of Jackson Park and its surrounding area, and losing parkland to expansions of parts of Lake Shore Drive and Stony Island Avenue.

4. On May 17, 2018, the Foundation and the City submitted their revised plans for the OPC to the City Council, which in predetermined fashion, approved it unanimously on the same day after a brief public hearing. Five days later the City Council's Zoning Board approved the necessary amendments to the zoning laws, which were ratified by a 47 to 1 vote the next day.

5. Similarly, on October 31, 2018, the City also in predetermined fashion, passed a new ordinance that dropped the term "lease" from the proposal's description, because that word had become toxic after *Friends of the Parks v. Chicago Park District*, 160 F. Supp. 3d 1060,

1062 (N.D. Ill. 2016) held that a 99-year lease to the Lucas Foundation was tantamount to transferring a fee simple interest, subject to review for essential fairness under the public trust doctrine, after which the Lucas Foundation moved its project to Los Angeles, California. Without making a single substantive change, the City rechristened its one-time lease for the OPC as a "use agreement," which left the Foundation with all its former control of 19.3 acres of park land for 99 years for $10, and obligated the City of Chicago to engage in substantial modification to a site close to the Jackson Park Lagoon, plus extensive road work for, as of 2018, an estimated $200 million, paid for in full by federal funds.

6. With no barriers or opposition from the City, the Foundation abandoned its plan to build a presidential *library*, which it now rebranded a presidential *center*, done in large part to avoid statutory restrictions that limited the height of presidential libraries to 70 feet under the National Archives and Record Act. *See* 44 U.S.C. § 2101, *et. seq.* By rechristening the proposed campus a "presidential center," all those limitations, and others, no longer applied, permitting the monument to stretch to 235 feet high, solely for *its* own benefit.

7. The OPC project is monumental in terms of both size and investment, for which total construction and operating costs are unknown, but surely exceed $1.5 billion.

8. The massive undertakings to complete the OPC are backed by millions of federal dollars; and they mandate the destruction of four (4) roads in Jackson

Park, the needed expansion of both Lake Shore Drive and Stony Island Avenue. The project description in the NOTICE OF FINAL FEDERAL AGENCY ACTION ON PROPOSED TRANSPORTATION PROJECT IN ILLINOIS, 86 Fed. Reg. 8677-01 (Feb. 8, 2021), speaks of this as one connected project:

> The proposed construction along Lake Shore Drive, Stony Island Avenue, Hayes Drive, *and other roadways* in Jackson Park and the construction of proposed trails and underpasses in Jackson Park, Cook County, Illinois. (Emphasis added).
>
> Lake Shore Drive (U.S. Route 41) will be widened to the west to provide an additional southbound travel lane between 57th Street and Hayes Drive. To accommodate the additional travel lane, the 59th Street Inlet Bridge will be widened and modifications at the intersections of 57th Street, Science Drive, and Hayes Drive are proposed. Hayes Drive will be reconfigured to remove existing on-street parking to provide two travel lanes in each direction with minimal widening. Stony Island Avenue will be widened to the east to accommodate additional through lanes and turn lanes at cross-street intersections. Proposed bicycle and pedestrian accommodations include the construction of four underpasses within Jackson Park. Proposed trails and connections along Cornell Drive, Hayes Drive, and Marquette Drive will also be constructed.

The "other roadways" referred to in the first paragraph above include Cornell Drive and the Midway

Plaisance going east. That characterization is confirmed in the second paragraph above, for constructing these trails and connections requires closing Cornell Drive, including the east bound lanes from the Midway Plaisance that now lead into Lake Shore Drive. Additionally, other historic transportation roads and vistas comprising Jackson Park, such as Science Drive (which is referenced above), run off of Cornell Drive to provide access to the parking under the Griffin Museum of Science and Industry. Moreover, no work inside Jackson Park falls *outside* of this description.

9. Previously, in 2018, in a different and separate suit from the matter at bar, Protect Our Parks and others brought suit against the City and its park district for violations of the public trust and related doctrines. In June, 2019, the District Court (Judge John Robert Blakey) found that POP had standing to bring the challenges in that suit. On June 11, 2019, the District Court granted the defendants City of Chicago and Chicago Park District's motion for summary judgment on the merits, using a deferential standard that required the Court to ask *only* "whether sufficient legislative intent exists" for the project, thereby denying that there was any independent constitutional public trust standard, claiming the Illinois Park District Aquarium and Museum Act, 70 ILCS 1290/1, *et seq.*, ("Museum Act") provides "sufficient legislative intent . . . to permit diverting a portion of Jackson Park for the OPC." The District Court then recited unsupported claims of "a multitude of benefits to the public. . . . . as well as provide increased access to other areas of Jackson Park and the Museum of Science and Industry," [*see* Case No. 18-cv-3424, Dkt. 145, pp. 25, 32] without mentioning the road closures, the destruction of trees, or the huge public subsidies.

10. Approximately six weeks after the Court's June 11, 2019 Opinion, those agencies issued a combined report, titled "Assessment of Effects" (available at https://www.chicago.gov/content/dam/city/depts/dcd/supp_info/jackson/aoe_for_public_review.pdf) (the "AOE Report") which found that the "undertaking"—building the OPC in Jackson Park—would create adverse effects including the height and location of the OPC, the closure of various roads, the clear cutting of old age trees, the destruction of the Women's Garden, and the destruction of the viewshed and distinctive ambience of the original Olmsted design for Jackson Park. [*Id.*]

11. Thereafter on August 7, 2019, plaintiffs in that matter moved to vacate the Court's June 11, 2019 Judgment under Rule 60(b)(2), 60(b)(5), 60(b)(6) and Rule 62.1. [Case No. 18-cv-3424, Dkt. 156] The District Court sat on that ruling for three months, until after plaintiffs had filed their appeal in the Seventh Circuit on the initial judgment. Its opinion of November 6, 2019 ignored the AOE Report on adverse effects, holding that these shortfalls did not matter under a novel standard never applied previously anywhere, that the OPC passes constitutional muster so long as it supplies any "public benefit whatsoever." It further chastised the plaintiffs for not anticipating the content on the AOE Report before they were published. [*Id.*, Dkt. 165, p. 4]. That ruling was also appealed.

12. In August 2020, the Seventh Circuit held that the plaintiffs lacked the necessary specific and concrete interest to mount their state law public trust claims. It therefore reversed the entry of judgment against the plaintiffs, dismissing those claims for lack of subject

matter jurisdiction. It did hold, however, that the plaintiffs did have Article III standing to bring limited federal claims for violations of the takings and due process clauses, and held the defendants prevailed on those claims on the merits. *Protect Our Parks v. Chicago Park District*, 971 F.3d 722 (7th Cir. 2020).

13. After the AOE Report was issued, the federal reviews for the OPC project continued. The NHPA Section 106 review defined the "undertaking" at issue as the entire OPC project. The Section 4(f) report admitted and recognized that the expansion of Lake Shore Drive and Stony Island Avenue were properly "related"—indeed proximately caused by—the OPC. "The need for the [Federal Highway Administration] action [which is the expansion of Lakeshore Drive and Stony Island] arises as a result of changes in travel patterns caused by the closed roadways" demanded by the OPC. [*See* Dkt. 1-2, Complaint, Ex. 10 at 12] Relatedly, there is no dispute that the federal monies are flowing to support the OPC project. However, Respondents argued that the huge federal monies for altering the roadwork in Jackson Park were dedicated *only* for use on Stony Island Avenue and Lake Shore Drive, even though expansion of the roads was required by and intertwined with shutting down half of the Midway Plaisance going east, and done solely to accommodate the Foundation's demand to place the OPC further north where the pubic would get a clearer, if somewhat cockeyed, view of the massive OPC tower from the west end of the Midway Plaisance.

14. The current project is far from complete, and Respondents continue to demolish significant parts of Jackson Park, its historical resources, parkland, and

trees, with its adverse effects on the human environment, the historic landscape, wildlife, and migratory birds. Respondents admitted that the OPC project is a "major Federal action" requiring compliance with NEPA, but notwithstanding the intertwined nature of the OPC project, it was *only* the road expansions—not the destruction of the park itself—that were characterized as the major federal action subject to federal review; as such, the agencies interpreted the various statutes to not require review of alternative locations. The sheer magnitude of the project and gravity of the proposed changes cried out for an Environmental Impact Statement ("EIS"). Nonetheless the federal Respondents instead issued a Finding of No Significant Impact ("FONSI") based on an Environmental Assessment ("EA") notwithstanding the major adverse effects first identified in the AOE report of 2019.

15. These manifest failures led Petitioners in April 2021 to file a complaint against Respondents claiming, *inter alia*, that this truncated review violated both federal and state statutes and case law doctrines. [Case No. 21-cv-2006] The new case was assigned to Judge Jorge L. Alonso by rotation. The City of Chicago immediately applied to Judge Blakey to take control over that case because it was allegedly closely related to another suit filed by Protect Our Parks that had concluded (described *supra*). On April 30, 2021 Judge Blakey, without hearing or argument, recommended that the Executive Committee for the Northern District of Illinois approve that motion, even though Petitioners' new action had new claims and new parties which routinely bar such arguments. *See* Miran Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 Cornell L. Rev. 65 (2017). Judge Blakey issued a further order that purported to combine this

new case with the earlier litigation because of their core of common facts, without noting that the earlier case already had been concluded. Subsequently, the Executive Committee for the Northern District, after receiving a written request from the City and Foundation (and without response from Petitioners) issued a non-appealable order assigning the case to Judge Blakey.[3]

16. Judge Blakey proceeded to deny Petitioners' motion for a preliminary injunction for the federal environmental claims on August 10, 2021, but only published his opinion on August 19, 2021, one day before the 10-day appeal period to the Seventh Circuit ended. His shotgun decision was later affirmed by the Seventh Circuit. *See Protect Our Parks, Inc., et al. v. Buttigieg, et al.*, 39 F. 4th 389 (7th Cir. 2022) [Appendix C]; *see also Protect Our Parks, Inc., et al. v. Buttigieg, et al.*, 10 F.4th 758 (7th Cir. 2021) (denial of motion to stay pending appeal).

17. In November 2021, Petitioners sought leave pursuant to Fed. R. Civ. P. 15 to bring an additional public trust claim both individually and derivatively to prevent the transfer of possession of large swathes of Jackson Park to the Foundation on the ground that the transfer was illegal because the City and the Foundation made no attempt to satisfy contractual preconditions for that transfer. This motion was filed within approximately ten weeks after information supporting it became publicly available for evaluation: no discovery in the matter had

3. Such actions are all too common but rarely survive in appellate litigation and this case offers an opportunity to reexamine the practice.

begun; no discovery schedule was set; and no trial date was set. Petitioners explicitly disclaimed any third-party beneficiary causes of action, well-knowing that those were purportedly barred under Paragraph 34 of the Master Agreement between the City and the Foundation. On January 6, 2022, one day after briefing on the motion for leave was completed, Judge Blakey denied the motion on the grounds that Petitioners had pled third-party beneficiary claims, which decision effectively blocked all substantive examination of the financial terms of the agreement between the City and Foundation, which remain largely hidden to this day.

18. Judge Blakey then granted the Foundation and City Defendants' Fed. R. Civ. P. 12(b)(6) motion to dismiss all of Petitioners' state law claims. [Appendix D]

19. Subsequently, after the administrative record was completed and filed, the District Court entered summary judgment on Petitioners' federal claims for the reasons in its denial of the preliminary injunction. [Appendix B] Petitioners appealed all of these rulings again to the Seventh Circuit.

20. On April 8, 2024, the Seventh Circuit affirmed the District Court's decisions rejecting all of Petitioners' challenges under NEPA, the Transportation Act, and NHPA, whose common foundation was extreme deference to the federal agencies' decisions on interpretations of statutes and regulations, including those dealing with what elements comprise a major federal action and what alternatives were to be reviewed. [Appendix A] The Seventh Circuit affirmed dismissal of the state law claims, applying a heretofore novel standard of total deference in

dealing with both public trust and nondelegation claims. The Seventh Circuit affirmed the denial of the Rule 15 motion to amend by parroting the District Court's conclusion that Petitioners were bringing a third-party beneficiary claim barred by the agreement, despite Petitioners' explicit statement that they were not suing on the contract, but as taxpayers. *Malec v. City of Belleville*, 891 N.E.2d 1039, 1042 (Ill. 2008).

21. On May 22, 2024, Petitioners filed a timely petition for rehearing *en banc*. On June 10, 2024, the petition for rehearing was denied. [Appendix G]

REASONS FOR GRANTING THE WRIT

I. REVIEW IS WARRANTED BECAUSE THE SEVENTH CIRCUIT'S DECISION ON THE PETITIONERS' FEDERAL ENVIRONMENTAL REVIEW CLAIMS CONFLICTS WITH THIS COURT'S DECISIONS IN *LOPER BRIGHT* AND *OVERTON PARK* BY ADOPTING AN IMPROPERLY HIGH LEVEL OF DEFERENCE.

The Seventh Circuit's affirmance of the agency findings under NEPA, the Transportation Act, and NHPA unabashedly deferred to those agency decisions defining the project and segmenting the OPC out of their review, as the Court repeatedly stated that, *i.e.*, the "agency was entitled to take the Jackson Park site as a given where carrying out his duties." [Appendix A at 28a] Indeed, in an earlier opinion on Petitioners' motion to stay pending appeal, the Seventh Circuit admonished Petitioners for not recognizing that the Seventh Circuit need only defer to the agency actions: "The first problem with Protect

Our Park's position is that it fails to take into account the deference courts owe to agencies with respect to relevant scope of a project." *Protect Our Parks v. Buttigieg et al.*, 10 F.4th at 764.

The Seventh Circuit dodged its obligations under NEPA, the Transportation Act, NHPA, and the other statutes for which reviews were triggered by adopting a form of abject deference prohibited by *Loper Bright* and manifestly inconsistent with *Overton Park* and its progeny in three critical dimensions. First, it deferred to Respondents' use of an impossibly narrow definition of a major federal action under NEPA and interpretation of the Transportation Act which necessarily dismembered Jackson Park solely to escape examining any alternatives for the OPC outside of Jackson Park. Second, and related, the Seventh Circuit's complete deference approach allowed Respondents to segment the project. Third, the Seventh Circuit shunned *any* substantial inquiry into Respondents' choices, at the same time ignoring the intentionally interconnected nature of the OPC project. Both *Loper Bright* and *Overton Park* establish that such deference, which impacts all of Respondent's federal reviews, is unconstitutional.

Loper Bright overturned *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), holding that the Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency acted within its statutory authority. 144 S.Ct. at 2265. *Loper Bright* highlights and complements the Court's earlier decision in *Overton Park*, which states that:

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

401 U.S. at 415 (citations omitted). The Seventh Circuit's decision is clear error under these authorities and certiorari properly granted.

A. Unconstitutional Deference Regarding Definition of a Major Federal Action

The Seventh Circuit's decision here wrongly deferred to the interpretations of the various agencies of the relevant statutes and regulations when it found that the OPC project was a "local" project and not a unitary "major federal action." [Appendix A at 26a] Indeed, the case on which the Seventh Circuit relies as to what constitutes a major federal action, *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938 (7th Cir. 2003) [*see* Appendix A at 26a], demonstrates the vast gulf between proper review and the threadbare, deferential review undertaken here. The *Mineta* court stated in part that "[i]f an agency considers the proper factors and makes a factual determination on whether the environmental impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference." *Id.* at 953. Most critically, that statement followed an explicit factual determination that none of the construction activities on the road would in any way affect proposed tunnel repairs. But, the Seventh Circuit ignored that key condition precedent by showering uber-deference on the agency's unmoored discretion on

all matters of statutory interpretation about the definition of a major federal action that was applied here. This case affords the opportunity to determine whether such excessive deference survives under *Loper Bright*.

Certiorari is critical to decide whether an independent and non-deferential standard of the applicable statutes and regulations establishes whether the OPC project as a whole is a "major federal action." It is also necessary to decide whether the deference shown in the Seventh Circuit's decision is contrary to 40 C.F.R. § 1508.18 (2003), which defines a major federal action as one which " . . . includes actions with effects that may be major, and which are *potentially* subject to Federal control and responsibility" (emphasis added), especially when "[a]ctions include new and continuing activities, including projects and programs entirely or *partly* financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17)." 40 C.F.R. § 1508.18(a) (emphasis added).

Moreover, it is critical to ask whether the Seventh Circuit's deference can be justified or explained solely because a private actor serves as the site's developer. Lower courts have made it clear that even non-federal projects can constitute a "major federal action" for example: "(1) when the non-federal project restricts or limits the statutorily prescribed decision-makers' choice of reasonable alternatives; or (2) when the federal decision-makers have authority to exercise sufficient control or responsibility over the non-federal project so as to influence the outcome of the project." *Southwest Williamson County Community Association, Inc. v.*

Slater, 243 F.3d 270, 281 (6th Dist. 2001). Consistent with that decision, the non-federal action to which the Seventh Circuit deferred improperly restricted the statutory duty to examine alternative sites outside of Jackson Park, given the federal control over the funding for new roadwork. Certiorari is necessary to resolve the Seventh Circuit's conflict with *Loper Bright* and decisions like *Southwest Williamson.*

B. Unconstitutional Deference Allowing for Segmentation

It needs to be determined whether Seventh Circuit exercised independent judgment over the segmentation issue when it deferred to the agencies' definition of the project, which precluded any review of the critical issue under these various federal statutes, thereby allowing it to sidestep looking at any alternative sites for the OPC outside Jackson Park. At every turn in its opinion the Seventh Circuit found the agency properly removed the OPC from consideration in its duties to perform federal reviews, citing again to deferring to local decision makers under its misreading of *Mineta. See*, *e.g.*, Appendix A at 24a-27a (narrowing scope of NEPA review), Appendix A at 28a (narrowing scope of NHPA review ("Section 106 applies only to federal projects, not local work such as the Foundation's plan")); Appendix A at 27a (narrowing review under Section 4(f) of Transportation Act ("the FHWA had no authority to tell the Foundation to build the Center somewhere else or to forbid the City from authorizing that location.")).

This Court's opinion in *Loper Bright* raises the question of whether the Seventh Circuit unconstitutionally

deferred to the interpretation of the agencies (and private developers) of Congressional mandates, by segmenting the project to avoid a substantial review of *any* viable alternative that protected the environment and historic resources by refusing to look to alternative sites for the unitary OPC project in Jackson Park. The point is critical given the previous acknowledgement from these same federal agencies that the proposed undertaking collectively involved "the potential effects to historic properties from the Obama Presidential Center (OPC) project and certain related Federal actions in and near Jackson Park." [*See* Dkt. 1-1, Complaint, Ex. 3, January 16, 2020 Assessment of Effect Report at 1] Indeed, the roadwork involving the expansion of Lake Shore Drive and Stony Island is "related" to—indeed necessitated by—the OPC, so that a proper account of the undertaking includes "the construction of the OPC in Jackson Park by the Obama Foundation, the closure of roads to accommodate the OPC and to reconnect fragmented parkland, the relocation of an existing track and field on the OPC site to adjacent parkland in Jackson Park, and the construction of a variety of roadway, bicycle and pedestrian improvements in and adjacent to the park." *Id.*

In addition, the Seventh Circuit's analysis of segmentation has created a circuit split with the D.C. Circuit as seen in *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304 (D.C. Cir. 2014), itself a ground for certiorari review. There the question was whether the federal government engaged in improper segmentation when it sought permits to repair one segment of a continuous pipeline that was connected to, and operated in unison with, other segments. That court's careful opinion started its segmentation analysis by referring to the

regulation's requirements of interdependence of activities on a single site set forth above. The *Delaware Riverkeeper Network* court held that there was no evidence that any of the segments of the single pipeline had some "logical termini," *id.* at 1315, or "substantial independent utility," *id.* at 1316. Accordingly, the operational connections among the separate repairs were too strong to allow for segmentation, as it was essential to deal with the cumulative impacts of the overall upgrade project. The court's conclusion followed swiftly:

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

Id. at 1309.

The level of interconnection between roads in Jackson Park is marked by innumerable daily interactions between pedestrians and vehicular traffic night and day, which are far tighter than the occasional pipeline repairs in *Delaware Riverkeeper Network*. All the activities in Jackson Park occur in close physical proximity with each other. Indeed, the four (4) so-called "local" roads destroyed by the OPC are key arteries: the Midway Plaisance going east, Cornell Drive going north and south, Hayes Drive and Marquette Drive going east and west. Having consistency among the circuits on these frequent segmentation cases is critical to

the enforcement of the environmental laws, so resolving the circuit split regarding the segmentation analysis is vital.

C. Improper Deference In Regards to Analysis of Issues Under the Transportation Act/Section 4(f) Review

With respect to Section 4(f) review under the Transportation Act, the Seventh Circuit again improperly deferred to an agency's narrow interpretation of the project's definition as discussed above, in conjunction with its clearly erroneous mantra that the agency was entitled to take the construction of the OPC at the Jackson Park site as a given. Such deference is contrary to *Loper Bright* by artificially truncating the substantive review of statutorily required alternatives under the Transportation Act. While the Department of Transportation cannot force any developer to use one of the alternatives examined in the review, nonetheless, it still has the absolute authority to not approve funding for projects that do not meet federal environmental standards when there are feasible and prudent alternatives. *See* 49 U.S.C. § 303(c). Put differently, the federal government cannot propose but it can, and is duty bound to, veto in a proper case a request for funds after performance of a proper review, never undertaken here. The Seventh Circuit's decision impermissibly converts a *mandatory* statutory requirement under Section 4(f) into a discretionary one. *Certiorari* is needed to prevent the spread of this dangerous practice.

II. THE CIRCUITS ARE DIVIDED ON THE APPLICATION OF *PUBLIC CITIZEN* IN REGARDS TO LIMITATIONS ON NEPA.

As the federal register makes clear, and as the FHWA admits, "**[t]he need for the FHWA action arises as a result of changes in travel patterns caused by the closed roadways" necessitated by the OPC.** [Dkt. 1-2, Complaint Ex. 10 at 12 (emphasis added)] Without that roadwork, the OPC could not proceed forward. Despite this evidence of proximate cause, the Seventh Circuit relied on *Public Citizen* to support its limited application of NEPA by adopting the mantra that federal law does not require agencies to waste time and resources evaluating the environmental effect that those agencies neither cause nor have the authority to change. On this issue, which directly impacts the scope of review under NEPA (and impacts other related federal reviews), there is a circuit split between the Seventh Circuit (and other circuits) with the D.C. Circuit's decision in *Eagle County, Colorado v. Surface Transportation Board*, 82 F. 4th 1152 (D. C. Cir. 2023).

In *Eagle County*, the issue involved the approval for the construction and operation of a new rail line serving areas in Colorado and Utah. A local board performed a limited environmental review, expressly not considering issues such as the Endangered Species Act, effects of oil and development, or other rail carriers because the board interpreted that they had no jurisdiction over them.

The D.C. Circuit reversed, stating that the Board "cannot avoid its responsibility under NEPA to identify and describe environmental effects" of other matters "on

the ground that it lacks authority to prevent, control, or mitigate those developments." 82 F.4th 1180. That decision, moreover, goes much further than here for there the D.C. Circuit required the parties that constructed an 80-mile spur line in Utah to examine the effects of that construction as far away as Louisiana, Texas and Colorado, which were all subject to review by other government authorities. The railroad had already conducted an exhaustive study of the impacts of the new line on its immediate environs. Thus, even adopting the *narrowest* reading of the government's duty in *Eagle County*, it is imperative to include in the review alternative sites that were about one mile away from Jackson Park. The Court has recently accepted certiorari on the D.C. Circuit's opinion *Seven County Infrastructure Coalition v. Eagle County*, 2024 WL 3089539, *cert granted* (June 24, 2024), and should do so here, for no matter which way *Eagle County* comes out, the decision of the Seventh Circuit is wrong.

III. THE SEVENTH CIRCUIT'S DECISION REGARDING THE NECESSITY OF AN ENVIRONMENTAL IMPACT STATEMENT IS CONTRARY TO THIS COURT'S PRECEDENT CURBING UNBRIDLED DEFERENCE TO ADMINISTRATIVE AGENCIES.

In this case, it is imperative to ask whether the Seventh Circuit engaged in improper uber-deference to the federal agencies' decisions in flatly denying an EIS in direct contravention of this Court's *Loper Bright* decision:

> As we explained in *POP III*, the administrative record shows the 'agencies were very thorough.' The environmental assessment includes, among

> other things a Natural Resources Technical Memorandum that discusses the habits of migratory birds and how the project will the effect the nests as well as a Tree Technical Memorandum that considers each species of tree that will be cut down to build the Center. After reviewing each of these effects, the agencies concluded that none would have a significant impact. The environmental assessment thus confirms that the agencies took the necessary hard look at the environmental impact at likely environmental impact before reaching a decision.

Appendix A at 25a.

The federal agencies thus gave a hard look to the wrong question. The issue is not what replacements work best once Jackson Park is wrecked. It is the prior question of whether the project should be taken at all, to which *no* look, hard or otherwise, was given in making a finding of no significant impact, which to Petitioners' knowledge has *never* been granted on a project of this size. The law requires a federal agency to prepare an EIS for a major federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). Furthermore, an EIS must be prepared when an EA reveals that a proposed action *may* significantly impact the environment. 42 U.S.C. § 4332(C). The applicable regulations make clear that both context and intensity must be considered when looking at "significance." *See* 40 C.F.R. § 1508.27. Here, both the context and intensity of the actions show beyond doubt that the environmental impact is significant. The agencies' errors and omissions are particularly glaring when discussing the massive destruction of trees.

Here, the Seventh Circuit deferred to an agency decision based on a purportedly "meticulous tree survey" describing what new trees should be planted and green lighting without a second thought the destruction of more than 800 trees, the vast majority of which are mature or near maturity and in good to fair condition. In so doing, the Seventh Circuit let the agencies ask and answer the wrong question: how do we best replace the 800 trees cut down. Again, the right question is: why cut down those trees at all? Build this project elsewhere, and it becomes easy to save all those 800 trees. Such deference gave way to rubberstamping the agencies nonsensical solution which could take up to one hundred (100) years or more to plant new saplings of 2 to 4 inches in diameter to reach full size. [*See* Dkt. 61-22, Fed. Defs. Ex. 17, Part 1, Appendix D-1]

Certiorari could determine whether this omission is inexcusable. These *existing* large trees have for decades provided safe nests to local and migratory birds. [Dkt. 1-2, Compl. Ex. 10 at 29-34] They absorb large amounts of water that helps stabilize the local environment, and they remove large amounts of carbon dioxide from the air. Countless recent studies speak to their critical role in maintaining the fragile ecological balance. *See*, *e.g.*, The Morton Arboretum, Benefits of Trees, available at https://mortonarb.org/plant-and-protect/benefits-of-trees/ ("Numerous scientific studies have shown that trees promote health and well-being by reducing air pollution, encouraging physical activity, enhancing mental health, promoting social ties, and even strengthening the economy.").

In the face of this evidence, how could both the EA (and its referenced Tree Memorandum [Dkt. 31-1, Ex.

6, AE Appendix D, Trees Technical Memorandum]) conclude that clear-cutting about 800 mature trees was "insignificant," relying upon, *inter alia*, some possible future planting of saplings, without pointing to a single similar determination made anywhere else in the United States. This Court should ask whether that ruling is especially inappropriate in a city, like Chicago, that is in fact *tree poor*. [Dkt. 80, Ex. 10, Mark Rivera, "Chicago tree canopy dwindling; calls for equity, tree planting in underserved communities," June 30, 2021]

Nor should it matter, as the District Court claimed, that there were some "unaffected 500-plus acres of Jackson Park," or, indeed several thousand acres along the Chicago Lakefront, or the millions of acres nationwide. Any purported ratio would gut both NEPA and the Transportation Act by allowing government agencies to use the largest possible denominator to trivialize any government action. There is not a single regulation, case, or practice anywhere that defers to any agency judgment that equates mature trees from a historic park with saplings. Deference in such circumstances is wholly indefensible and is thus prohibited by both *Loper Bright* and *Overton Park*.

Furthermore, and also contrary to *Loper Bright*, the Seventh Circuit's improper deference infects the agencies' interpretations of federal regulations with regards to an EIS. For example, any well-designed EA or EIS must examine the intensity of any factor that affects "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources [and] park lands [and] [t]he degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in

or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources." 40 C.F.R. §§ 1508.27(b)(3), (8). Those vulnerable areas are found everywhere in Jackson Park, which is listed on the National Register of Historic Places (as is the Midway Plaisance, and the Chicago Boulevard Historic District), and is an acknowledged Olmsted masterpiece.

The court's improper deference also stretches to the agencies' interpretation of how "the effects on the quality of the human environment are likely to be highly controversial," 40 C.F.R. § 1508.27(b)(4). Here, the agencies and courts all ignore for example, a nonbinding advisory referendum in the November 2022 election, where citizens voted overwhelmingly (by 82 percent) to halt the destruction of trees in Jackson Park, in connection with the OPC and any related activities. *See*, Patty Wetli, South Side Voters Speak Up for Trees in Jackson Park and South Shore, Is Anybody Listening? WTTW News, Nov. 9, 2022 https://news.wttw.com/2022/11/09/south-side-voters-speak-trees-jackson-park-and-south-shore-anyone-listening.

The Seventh Circuit's decision and its deference on such issues is contrary to other circumstances where such a development of this size and its environmental destruction has not avoided an EIS, creating not only a conflict with this Court's authority, but other circuits' analyses. *See*, *e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1220 (9th Cir. 2008) (invalidating EA that "shunted aside significant questions with merely conclusory statements"); *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 340-41 (D.D.C. 2002) (EA must provide a "hard look" at potential

impacts). The Seventh Circuit decision runs contrary to all such decisions. Certiorari is needed to protect against the unprecedented lapse in environmental standard, when there is no identifiable reason why this private development had to be built on the most environmentally sensitive site on Chicago's south side.

IV. REVIEW IS WARRANTED BECAUSE THE SEVENTH CIRCUIT'S DECISION UPENDS FED. R. CIV. P. 15.

In late August 2021, Petitioners became aware of possible financial inconsistencies in respect to the Foundation and the OPC construction that arose months after the original complaint was filed in April 2021. Such matters involved, *inter alia*, that the City and the Foundation had not met all the strict conditions precedent that were necessary before the transfer of possession of the 19.3 acres in Jackson Park to the Foundation. Those conditions required generally that the Foundation establish that it had funds to pay for the cost of construction and to establish an endowment that would cover the operation and maintenance.

As to costs of construction, the Foundation claimed at the time the construction cost was $482 million, and, based on an unaudited report, it claimed it had already received $485 million, just above the stated cost of construction as of March 2021. Those numbers did not determine the accuracy of the claim, nor did it explain whether those dollars were committed to construction of the OPC or allocated somewhere else. Three months later, in June 2021, the head of the Foundation, Valerie Jarret, acknowledged that the costs for construction for the OPC had climbed to about $700 million. As to the

required endowment, the Foundation placed only $1 million dollars, when its own calculations demonstrated that this fund had to be $470 million in order to maintain, operate and improve the OPC. The Foundation shrugged off the difference of $469 million by saying that it had time to raise those monies, as if a bare promise was tantamount to an endowment. Thus, by late August, the Foundation had failed to meet the strict condition precedent for closing on the transfer of possession, for there is no indeterminate good faith exception to the strict conditions precedent for the transfer of possession. At that point, the sole remedy for the City was to postpone, without penalty, breaking ground until the money was raised to satisfied both conditions precedent. Despite these financial shortfalls, the City did not press the Foundation to update their representations that such conditions were met (as required under the Master Agreement (*see* Section 13(iv)) consistent with standard commercial practices); nor did the Foundation and the City waive these conditions precedent, even though Foundation assets were by now hundreds of millions of dollars short of its target amounts.

With these new issues arising, Petitioners made an effort to obtain better information including through correspondence in August and September 2021 to the City and Foundation. [*See* Dkt. 115, Exs. A & B] With no meaningful answer, Petitioners investigated further and filed their only Rule 15 motion in November 2021—approximately six months after the original complaint was filed and *before* (i) the trial court ruled on a Rule 12 motion against Petitioners' state law claims, (ii) any discovery had been begun or cut-off established, and any trial date set. Despite these manifest shortfalls, the Seventh Circuit affirmed the District Court's denial of Petitioners' motion.

That decision cannot stand under Rule 15 nor this Court's precedent.

Rule 15(a)(2) mandates that courts "should freely give leave when justice so requires." And this Court has enforced that mandate. *See*, *e.g. Forman v. Davis*, 371 U.S. 178 (1962). The Seventh Circuit's affirmance ignores that mandate, and compounds that initial blunder by incorrectly insisting that Illinois "does not recognize a cause of action that would allow a plaintiff to challenge a land use made in violation of a contract to which it is not a party." [Appendix A at 18a] The reference to "it is not a party" makes it appear that what was an explicit taxpayer claim could be mysteriously transformed into a third-party beneficiary claim.

The proposed amended complaint relied explicitly on a public trust theory consistent with *Paepcke v. Public Building Commission of Chicago*, 263 N.E.2d 11 (Ill. 1970) and *Malec*, allowing Plaintiffs standing either in their own right, or as public representatives.

> It is established that a *taxpayer* can enjoin the misuse of public funds, based upon taxpayers' ownership of such funds and their liability to replenish the public treasury for the deficiency caused by misappropriation thereof. Consequently, a taxpayer has standing to bring suit, even in the absence of a statute, to enforce the equitable interest in public property which he claims is being illegally disposed of.

Malec, 891 N.E.2d at 1042 (emphasis added).

Indeed, if the Seventh Circuit's theory was correct, any local government could routinely insulate itself from all taxpayer review by inserting into all its agreements a clause disallowing third-party beneficiary actions, and thereby routinely block all taxpayer standing cases. No legal authority allows a private contract clause to undercut an independent public trust cause of action.

To be sure, many standard commercial contracts include provisions like clause 34 that preclude third-party beneficiary contracts, for two reasons. First, the possibility that vested third-party rights would prevent any contract modification between the contracting parties, which is commercially unworkable. And second, no one wants any third party to weigh in on disputes that arise in the interpretation or application of the contract. But in this context those observations are irrelevant because the clause cannot defeat a taxpayer argument that the agreement fails *ab initio* because it does not satisfy its conditions precedent. To prevent all oversight is an open invitation for local governments to run haywire. Chicago and Illinois taxpayers have the right to know the financial circumstances of the agreements made between their local governmental entity and the Foundation, particularly where publicly available information already raised concerns about the Foundation's financial means to meet its obligations. The Foundation's 2021 990 form tax return and its 2021 Annual Report, covering the year of the transfer, reveal assets far below those needed to fund the construction of the OPC and to fund its endowment. The last publicly available piece of information—the 2022 Form 990 (while not directly relevant)—did not alter the financial concerns, as much of the new monies it mentions were not earmarked for the construction or

the endowment. It is there that the money trail ends. To make sure that this frightening state of affairs does not spread elsewhere, and to uphold the integrity of the federal rules, and this Court's authority regarding liberal amendments, as well as in regards to transparency and good government, certiorari should be granted on this issue.

V. REVIEW OF THE DECISION IS NECESSARY AS THE DISMISSAL OF THE PUBLIC TRUST AND OTHER STATE LAW CLAIMS IS CONTRARY TO THIS COURT'S AND OTHER PRECEDENT.

Petitioners' complaint sets forth facts regarding public and private benefit, along with additional facts as to how the City of Chicago delegated its authority over the project to the Foundation, and how the Foundation's actions were rubber stamped by the City of Chicago. Petitioners alleged that as citizens of Chicago they have, as acknowledged in *Malec*, an undivided equitable interest in Jackson Park, fully protected under Illinois law. The precise value of these interests is hard to determine, but they are worth hundreds of times more than the $10 received in this exchange, a transaction which blatantly violated *Monongahela v. United States*, 148 U.S. 312 (1893), which has long held that that these citizens are entitled to "full and perfect equivalent for the property taken." *Id.* at 326. That view is hard-wired into the Illinois and U.S. Constitution for duties of loyalty, care and candor have been well-recognized for both public and private trustees from the Founding period, including within this Court's seminal opinion in *Illinois Central v. Illinois*, 146 U.S. 387 (1892) which establishes key public trust principles. Certiorari should be granted to restore the traditional balance.

According to John Locke, the social contract required "*that the government had a fiduciary obligation to manage properly what had been entrusted to it.*" Robert G. Natelson, *Legal Origins of the Necessary and Proper Clause, 52, 53, in* Gary Lawson et al., The Origins of the Necessary and Proper Clause (2010) (*citing* John Locke, The Second Treatise of Government: § 136 (1690) (emphasis added)). Those principles were recognized and applied in *Milhau v. Sharp*, 15 Barb. 193, 206-207 (N.Y. Gen Term 1853), to set aside a sweetheart deal for the construction of an overhead rail line along Broadway in New York City. *See*, Schanzenbach & Shoked, *Reclaiming Fiduciary Law for the City*, 70 Stan. L. Rev. 565, 586-87 (2018). For Respondents and the Seventh Circuit, these authoritative sources disappeared down a memory hole.

Contrary to the Seventh Circuit's decision [Appendix A at 29a-37a], it has never been the law that a legislative declaration that a transfer blessed by the legislature, in this instance purportedly by the Illinois Museum Act (70 ILCS 1290), is free from independent constitutional scrutiny when the decision in *Paepcke* recognizes that the discretion exercised by the legislature must meet constitutional norms "by [examining] existing legislation measured by *constitutional* limitations." *Paepcke* at 21 (emphasis added). On this score, the contrast between *Paepcke* and the current case is eyepopping. *Paepcke* involved a transfer for four acres of land out of 100+ acres located Washington Park, west of Hyde Park, from one public use to another, from parkland to a school, which had only a modest effect on the recreational uses in the park. *Paepcke* at 19. There were no unbalanced and undisclosed financial dealings, no huge public subsidies to a private foundation, no massive destruction of trees

and wildlife habitat, no road closings, no delegation of virtually conclusive authority to a private party whose interest was averse to that of the state. It is not surprising that the transaction was fully defensible under applicable constitutional standards.

Yet at no point did either the District Court or the Seventh Circuit comment on the jaw-breaking differences between one case that represents a sensible social improvement and a second that represents an inexcusable giveaway of public lands and funds to a well-connected private party, when it is painfully clear that the primary purpose of OPC is to benefit a private party. In *Lake Mich. Fed'n v. U.S. Army Corps of Eng'rs*, 742 F. Supp. 441 (N.D. Ill. 1990), the deal between the City and Loyola was vastly more favorable to the City. It was struck down, on the ground that "the public trust is violated when the primary purpose of a legislative grant is to benefit a private interest." *Id.*, 742 F. Supp. at 445. The current transaction was wholly vulnerable to any court that sought to examine the relevant differences.

Similarly, the improper delegation of authority discussed *supra*, where the Foundation was provided *carte blanche* decision-making with the City left to rubber stamp those decisions, was pled but conveniently ignored by the Seventh Circuit and District Court, which also violated the principle of drawing all inferences against Petitioners. Having done so on a Rule 12(b)(6) motion [Appendix D], certiorari review is particularly necessary and appropriate.

Alternatively, this Court could certify questions of law to the Illinois Supreme Court (consistent with Illinois

Supreme Court Rule 20). Such questions include: (1) whether a transfer of public trust property to a private party is constitutional under *Paepcke* when evaluated solely as to whether a legislative declaration provided for and approved the transfer; and (2) whether an ordinance that provides full discretion to a private party to decide the location for such development on public lands is an improper delegation of legislative authority in violation of the Illinois Constitution. *People ex rel. Chicago Dryer Co. v. City of Chicago*, 413 Ill. 315, 323 (1952) (emphasis supplied).

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

Richard A. Epstein
16 Thomas Place
Norwalk, CT 06853

Michael Rachlis
Counsel of Record
Rachlis Duff & Peel LLC
542 South Dearborn Street,
Suite 900
Chicago, IL 60605
mrachlis@rdaplaw.net

Counsel for Petitioners

APPENDIX

TABLE OF APPENDICES

Page

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED APRIL 8, 2024

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 22-3190

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

Plaintiffs-Appellants,

v.

PETE BUTTIGIEG, SECRETARY OF TRANSPORTATION, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:21-cv-02006 — **John Robert Blakey**, *Judge.*

ARGUED OCTOBER 24, 2023 DECIDED APRIL 8, 2024

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

WOOD, *Circuit Judge.* This appeal represents, we hope, the final installment in the long-running challenge led by a group called Protect Our Parks, Inc. ("POP"), which strenuously objects to the location of the planned Obama Presidential Center in Chicago. See *Protect Our Parks,*

Inc. v. Chicago Park Dist., 971 F.3d 722 (7th Cir. 2020) ("*POP I*"), *cert. denied sub nom. Protect Our Parks, Inc. v. City of Chicago*, 141 S. Ct. 2583, 209 L. Ed. 2d 600 (2021); *Protect Our Parks, Inc. v. Buttigieg*, 10 F.4th 758 (7th Cir. 2021) (*per curiam*) ("*POP II*"); *Protect Our Parks, Inc. v. Buttigieg*, 39 F.4th 389 (7th Cir. 2022) ("*POP III*"). Throughout the present phase of the case, the Center has been under construction. But the rub is this: it is rising in a corner of Chicago's historic Jackson Park on a site selected by the Barack Obama Foundation. POP contends that Jackson Park should have been off-limits, and it insists that the Center easily could have been placed elsewhere. Raising a bevy of arguments—seven based on federal law, eight on state law—all seeking to prevent the construction of the Center in Jackson Park, POP and its co-plaintiffs sued numerous state and federal defendants. (We refer to the plaintiffs collectively as POP unless the context requires otherwise.) Construction is now well underway, and the Center is expected to be completed in late 2025.

Earlier adverse rulings from this court, plus the on-the-ground reality of the construction, have not deterred POP. Most recently, it asked us to enjoin construction until the courts resolve its federal-law theories. But it failed to make the requisite showing that it was likely to succeed with those contentions, and so we declined to grant the preliminary injunction it sought. See *POP III*, 39 F.4th at 397. In the meantime, the district court refused POP's request to amend its pleadings and dismissed the state-law causes of action. At the request of the parties, the district court then awarded summary judgment against POP on the federal-law theories.

POP has now asked us to overturn the district court's final judgment in its entirety. In support of its federal-law theories, it presents the identical factual record that we reviewed in *POP III*, supported by the same arguments. Those arguments remain unpersuasive. Moreover, we have identified no legal error in our earlier analysis of POP's case, and so we stand by that decision. We also conclude that POP's state-law theories were rightly dismissed and that the district court did not abuse its discretion when it denied POP's motion to amend the complaint. In summary, we affirm the judgment of the district court.

I. Background

Although this ground has been well trodden, we review the underlying facts and the course of the litigation for the convenience of those who do not wish to track down and reread our earlier decisions.

A. The Proposed Locations for the Center

In March 2014, the Barack Obama Foundation ("the Foundation"), a private not-for-profit organization, initiated a nationwide search for a future home for the Obama Presidential Center ("the Center"), a presidential library that would honor the work and legacy of the 44th president. Various organizations around the country and in Chicago recommended potential sites for the Center.

The University of Chicago proposed two locations near its campus: one in Washington Park and another in Jackson Park. Both are historic public parks in Chicago's

South Side; the latter is a 551-acre park that sits in the Hyde Park and Woodlawn neighborhoods where President Obama once lived, worked, and began his public career. The Foundation eventually ranked these potential sites as two of its top three choices for the future location of the Center and communicated its assessment to the City of Chicago ("City").

In 2015, the Chicago City Council passed an ordinance ("the 2015 Ordinance") in which it expressed its "robust commitment to bringing the Presidential Center to Chicago." The City Council determined that the Center would "expand the City's cultural resources, promote economic development, strengthen surrounding communities, ... and serve other important public purposes." The 2015 Ordinance described several possible locations for the Center, including the Jackson Park site that the University of Chicago had proposed. That site is a 19.3-acre portion of parkland that lies on the western edge of Jackson Park, bounded on the north by Midway Plaisance Drive North, on the east by South Cornell Drive, on the south by East Hayes Drive, and on the west by Stony Island Avenue.

The 2015 Ordinance did not authorize any kind of development. It stated only that "the City will introduce a separate ordinance authorizing the development, construction and operation of the" Center on whatever site was chosen. But to achieve the "public purpose of facilitating the location, development, construction and operation of" the Center, the 2015 Ordinance authorized the City to accept a transfer of the proposed portion of

Jackson Park from the Chicago Park District ("the Park District") if the Foundation settled on that site.

The Park District had held Jackson Park in the public trust since 1934, when a law passed by the Illinois General Assembly took effect. That law consolidated all existing parkland that lay entirely or partly within the territorial boundaries of Chicago and created the Park District to manage it. See 70 ILCS 1505/1. (The Park District later lost authority over parkland outside Chicago's corporate limits, but that change has no effect on our case. See *id.* 1505/1a.) Before the 1934 legislation, the parkland was held by the South Park Commission, which had been created in 1869 with the authority to select certain lands that would "be held, managed and controlled by them and their successors as a public park, for the recreation, health, and benefit of the public, and free to all persons forever[.]" 1 LAWS OF THE STATE OF ILLINOIS 1869, at 360. In addition to enjoying the status of public-trust land since it was acquired by the South Park Commissioners, Jackson Park has been on the National Register of Historic Places since 1972 for, among other things, serving as part of the grounds for the 1893 Columbian Exposition.

Shortly after the City passed the 2015 Ordinance, the General Assembly amended the Park District Aquarium and Museum Act. See 70 ILCS 1290/1 ("Museum Act"). The amendment, which became effective on January 1, 2016, allows cities and park districts to build museums, including presidential centers, in their public parks. *Id.* It also authorizes cities and park districts to contract out the construction, maintenance, and operation of those

museums to private entities organized for that purpose. *Id.* Finally, the amended Museum Act "reaffirmed" the General Assembly's view that museums "serve valuable public purposes[.]" *Id.*

B. The Selection of Jackson Park as the Site

After evaluating its options, the Foundation selected Jackson Park as its preferred site for the Center. It then submitted a specific proposal to the Chicago Plan Commission to build the Center at that location. Along with the proposal, the Foundation applied for the various permits and approvals needed to undertake the development. According to the plans, the Center will include four buildings and an underground parking facility, all situated on a campus at the northwestern edge of the park. It will feature a museum, a branch of the Chicago public library, spaces for cultural and educational events, athletic spaces, green space, and an archive commemorating the lives and legacies of President Barack Obama and First Lady Michelle Obama. In its proposal, the Foundation offered to cover all costs associated with the Center's construction.

The Plan Commission reviewed the Foundation's submissions, held public hearings on the proposal, and in May 2018 unanimously recommended approval of the application. The City Council approved the Plan Commission's recommendation and granted the necessary permits. A few months later, the City Council passed an ordinance ("the 2018 Ordinance") that allowed the City to accept title to the Jackson Park site from the Park

District. The 2018 Ordinance also authorized the City to enter into agreements governing the Foundation's use of the site. A second ordinance authorized the City to vacate portions of Midway Plaisance Drive South and Cornell Drive to make way for the Center.

Pursuant to the 2018 Ordinance, the City entered into an agreement with the Foundation ("Use Agreement") that set the terms of the Foundation's use of the Jackson Park site. It provides that the Foundation may use the Jackson Park site for 99 years, but that the City will retain title to the land and acquire title to the buildings and site improvements built on it. The Use Agreement also requires the Foundation to fund the construction of the Center and to operate it consistently with the requirements of the Museum Act. Finally, an option allows the City to terminate the Use Agreement if the Foundation fails to use the Center for its authorized purpose.

In May 2019, the City and the Foundation finalized a second agreement ("Master Agreement"). Section 12 of the Master Agreement sets forth various conditions precedent to the City's obligation to execute the Use Agreement. Relevant here are sections 12(h), which requires the Foundation to certify to the City in writing that it has received funds equal to the projected total cost of constructing the Center, and 12(j), which requires the Foundation to establish an endowment for the purpose of operating and maintaining the Center during the term of the Use Agreement. A provision in the Master Agreement gives the City the option to waive these or any other conditions precedent. Found in the final paragraph of

section 12, it states, in pertinent part, that "[i]f any one of the above conditions [including 12(h) and 12(j)] is not satisfied by the Closing Date, the City may, at its option, waive such condition[.]"

C. The Federal Review Process

The federal government took no part in the process of selecting the Jackson Park site as the location for the Center, nor did it participate in the design of the campus. The City did not need federal approval to close portions of existing roads in Jackson Park. But the project was not entirely clear of federal legal obligations. The choice of Jackson Park triggered five mandatory federal reviews: (1) one by the Federal Highway Administration ("Highway Administration") pursuant to section 4(f) of the Department of Transportation Act of 1966 ("Transportation Act"), see 49 U.S.C. § 303; (2) a joint environmental assessment by the National Park Service ("the Park Service") and the U.S. Department of Transportation pursuant to the National Environmental Policy Act ("NEPA"), see 40 C.F.R. § 1501.4 (2019); (3) a review by the Park Service under the Urban Park and Recreation Recovery Act ("UPARR Act"), see 54 U.S.C. §§ 200501-200511; (4) a review by the Highway Administration pursuant to section 106 of the National Historic Preservation Act ("NHPA"), see 54 U.S.C. § 306108; and (5) a review by the United States Army Corps of Engineers of the City's requests for a section 408 permit, see 33 U.S.C. § 408, and a permit to fill less than an acre of navigable waters temporarily, see 33 U.S.C. § 1344(a).

We thoroughly examined each of those agency reviews in *POP III*. See 39 F.4th at 393-96. None of the parties has pointed to any flaw in the recitation of the facts we drew from the administrative record and set forth in that decision. Indeed, the parties jointly stipulated that there are no pertinent facts other than those in the administrative record and there are no disputes of material fact relevant to the legal theories before us. Thus, rather than restate undisputed facts, we simply assume familiarity with this portion of *POP III*.

D. Procedural History

1. *POP I*

In 2018, POP (along with a few others not involved with this case) launched a lawsuit arguing that the plan for the Center violated the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. When that lawsuit came before this court, we affirmed the district court's grant of summary judgment for the defendants on the constitutional theories, but we vacated judgment on the state-law theories and dismissed them without prejudice because POP had not suffered an injury in fact and thus lacked Article III standing. See *POP I*, 971 F.3d at 728.

2. *POP II*

No sooner was the ink dry on *POP I* when POP joined forces with others who share its opposition to the Jackson Park site: Nichols Park Advisory Council,

which is an Illinois not-for-profit organization that shares POP's mission of advocating for public parks, and five individuals who reside in Chicago and who have long used and appreciated the aesthetic beauty of Jackson Park. POP and its new allies initiated the present action in April 2021 against the City and the Park District (collectively, "the City"), the Foundation, and a group of federal and state officers. The individual defendants, all of whom were sued only in their official capacities,[1] are Pete Buttigieg, the Secretary of Transportation; Shailen Bhatt, the Administrator of the Highway Administration; the Environmental Programs Engineer of the Illinois Division of the Highway Administration;[2] Deb Haaland, the Secretary of the Interior; Frank Lands, the Deputy Director of Operations of the National Park Service; Christine Wormuth, the Secretary of the Army; and Kenneth Rockwell, the Commander of the Chicago District of the Army Corps of Engineers.

POP relied on the Administrative Procedure Act, 5 U.S.C. § 702, for seven of the fifteen counts in its new complaint. Those counts raised the following theories: (1) the City, the Foundation, and the Highway Administration

1. Some of the officials named in POP's complaint have since been replaced by new officers. Pursuant to FED. R. APP. P. 43(c)(2), we have substituted the current officials.

2. This office is currently vacant. We note that it is unclear whether entities such as the Environmental Programs section of the Highway Administration are suable entities. The answer here does not matter, however. This is not a jurisdictional question, and the presence of the City, the Secretary, and the Administrator assures us that there are ample proper defendants.

defendants violated section 4(f) of the Transportation Act (Count I); (2) all federal defendants violated NEPA (Count II); (3) the City, the Foundation, the Park Service, and the Department of Interior violated the UPARR Act (Count III); (4) all defendants violated section 106 of the NHPA (Count IV); (5) the City and the Army Corps violated section 408 of the Rivers and Harbors Act, 33 U.S.C. § 408, and section 404 of the Clean Water Act, *id.* § 1344 (Count V); (6) all defendants violated Article I, Section 1 of the United States Constitution (Count X); and (7) all defendants violated section 110(k) of the NHPA, 54 U.S.C. § 306113 (Count XIV).

The other eight counts allege violations of various state laws: the public-trust doctrine (Count VI); the prohibition on *ultra vires* actions (Count VII); Article VIII, Section 1 of the Illinois Constitution (Count VIII); the Takings Clause of the Illinois Constitution (Count IX); Article II, Section 1 of the Illinois Constitution, which prohibits improper delegations of authority (Count XI); Article I, Section 2 of the Illinois Constitution (Count XII); Article I, Section 16 of the Illinois Constitution (Count XIII); and the Illinois State Agency Historic Preservation Resources Act, 20 ILCS 3420/1 (Count XV). Those counts fall within the district court's supplemental jurisdiction. See 28 U.S.C. § 1367.

Soon after filing its complaint, and just days before the Foundation was scheduled to break ground on the Center, POP moved for a preliminary injunction based on the federal-law theories. It insisted that construction of the Center in Jackson Park had to be enjoined because

the federal review process fell short—woefully so, in its view—of the statutory requirements. The district court concluded that POP was unlikely to prevail on the merits of its contentions and promptly denied its motion. POP then turned to us, seeking a preliminary injunction pending appeal, but, finding that POP had not shown the necessary likelihood of success on the merits, we denied this interim relief. See *POP II*, 10 F.4th at 763.

3. *POP III*

POP then moved ahead with its appeal of the district court's order denying its motion for a preliminary injunction. See 28 U.S.C. § 1292(a)(1). After full briefing and oral arguments, we held that POP failed to make "at least ... a 'strong' showing of likelihood of success ... under any of the theories it ... invoked." *POP III*, 39 F.4th at 397. POP's principal theory was that the federal agencies' decision not to prepare a full-blown environmental impact statement for purposes of NEPA (as opposed to a more abbreviated environmental assessment, which was done) was arbitrary and capricious. It was unlikely to succeed on this theory, we said, because "the record shows that the Park Service and Department of Transportation took the necessary hard look at the likely environmental consequences of the project before reaching their decisions." *Id.* at 398. The agencies had "thoroughly studied the project through the lens of the required regulatory factors before reaching their decision that no environmental impact statement was required," and so, we concluded, their decision "implicates substantial agency expertise and is entitled to deference." *Id.* at 399 (quotation omitted).

POP's second theory was that the Park Service and the Department of Transportation were under an obligation imposed by NEPA to evaluate alternative locations for the Center throughout Chicago. The agencies had avoided this alleged requirement, POP contended, by treating the City's selection of Jackson Park as a given. It saw the Department's decision not to question the selection of the Jackson Park site as an unlawful "segmentation" of the project to make the environmental impact appear smaller.

We concluded that this argument was "fatally flawed for three reasons." *Id.* "First, NEPA reaches only major federal actions, not actions of non-federal actors," and because "[t]he Center was not a federal project, ... no federal agency had the authority to dictate to the [Foundation or the City] where the Center would be located." *Id.* Second, POP failed to establish causation. We explained that "NEPA requires agencies to consider only environmental harms that are both factually and proximately caused by a relevant federal action." *Id.* Notably, "the federal government has no authority to choose another site for the Center or to force the City to move the Center, and so no federal action was a proximate cause of any environmental harms resulting from the choice of Jackson Park." *Id.* at 400. Finally, we said that POP "ignore[d] the 'reasonable' half of the reasonable-alternatives requirement" because "[i]t would be unreasonable to require agencies to spend time and taxpayer dollars exploring alternatives that would be impossible for the agency to implement." *Id.*

The same problems undermined many of POP's other theories. For example, it argued that the Highway Administration should have evaluated alternative locations

for the Center when conducting its section 4(f) review. But the Highway Administration's decision to take the location of the Center as a given was not arbitrary and capricious because the agency "could not have compelled the City to locate the Center at a different site." *Id.* at 401. POP's other arguments suffered from the same flaw. Thus, after thoroughly reviewing the administrative record and addressing each of POP's arguments, we concluded that the district court had properly denied its request for a preliminary injunction.

4. Events Following *POP II*

A few things happened between the time POP filed its interlocutory appeal and the date of our decision in *POP III*. In August 2021, the Foundation broke ground on the project. The construction in Jackson Park continues to this day. Press reports indicate that the Foundation expects the Center to be completed by late 2025. See, *e.g.*, Lynn Sweet, *Halfway Built, the Obama Presidential Center Is Already a South Side Landmark*, Chicago Sun Times (Oct. 13, 2023).

Back in the district court, there were two important developments. First, the City and the Foundation filed a motion to dismiss the state-law counts for failure to state a claim. See Fed. R. Civ. P. 12(b)(6). Second, after the motion to dismiss was briefed and argued but before the court ruled on it, POP sought leave to amend the complaint pursuant to Federal Rule of Civil Procedure 15(a). It wanted to add breach-of-contract and unjust-enrichment theories against the City and the Foundation,

on the ground that two conditions precedent of the Master Agreement had not been satisfied. The district court concluded that the two theories would be futile because POP had no enforceable rights under the Master Agreement; it accordingly denied leave. About three months later, the court granted the motion to dismiss the state-law counts.

Following this dismissal and our mandate in *POP III*, the parties submitted a joint stipulation to the district court. As we noted earlier, they agreed that all pertinent facts could be found in the administrative record and that no additional briefing was necessary beyond what was submitted at the preliminary-injunction stage. They also requested a final judgment on the federal-law counts in favor of the defendants in order to pave the way for appellate review. The district court adopted the parties' proposed order and entered final judgment for the defendants.

POP now appeals the judgments dismissing its state-law theories and awarding summary judgment to the defendants on the federal-law counts, as well as the district court's order denying leave to amend. We address these rulings in reverse sequence.

II. The Motion to Amend

POP filed its motion to amend in November 2021, seven months after its initial complaint. The amendment would have added two additional state-law theories against the City and the Foundation. The first asserts that the City

violated the Master Agreement because the conditions precedent to the transfer of parkland to the Foundation set out in sections 12(h) and 12(j) were not satisfied; the second attempts to raise an unjust-enrichment claim predicated on that failure. The district court denied the request, concluding that amendment would be futile because the Master Agreement does not confer legally enforceable rights on any of the plaintiffs. We review that decision for abuse of discretion. See *Johnson v. Cypress Hill*, 641 F.3d 867, 871 (7th Cir. 2011).

Once the time for amendments as a matter of course has expired, a party may amend its complaint only with leave from the district court or written consent of the adverse parties. See FED. R. CIV. P. 15(a)(2). Although a district "court should freely give leave when justice so requires," *id.*, "leave to amend is not to be automatically granted," *Johnson v. Methodist Medical Center of Illinois*, 10 F.3d 1300, 1303 (7th Cir. 1993), and "[a] district court does not abuse its discretion in denying a motion to amend when amending the pleading would be a futile act," *Wilson v. Am. Trans Air, Inc.*, 874 F.2d 386, 392 (7th Cir. 1989). An amendment would be futile "if the amended pleading could not survive a motion for summary judgment." *Wilson*, 874 F.2d at 392.

POP's first new theory, as we said, focuses on sections 12(h) and 12(j) of the Master Agreement. Section 12(h) provides that the Foundation must certify in writing that it has sufficient funds to cover the cost of constructing the Center; 12(j) requires the Foundation to establish an endowment to operate, enhance, and maintain the Center

for the duration of the lease term set forth in the Use Agreement. According to POP, neither of these conditions was satisfied by the time construction of the Center began. As we noted earlier, the Master Agreement authorizes the City to waive any conditions precedent to the contract, but no one suggests that the City pursued this option.

Even assuming, as we must, that the requirements of sections 12(h) and (j) have not been satisfied, POP's breach-of-contract theory is still futile. It is a "rather vanilla statement of contract law" that "a cause of action based on a contract may be brought only by a party to that contract, by someone in privity with such a party, or by an intended third-party beneficiary of the contract." *Northbound Group, Inc. v. Norvax, Inc.*, 795 F.3d 647, 651 (7th Cir. 2015) (quotation omitted). The Master Agreement is a contract between only the City and the Foundation: the plaintiffs play no part in it.

Neither can POP point to any rights as a third-party beneficiary of the Master Agreement. "Illinois law holds a strong presumption against creating contractual rights in third parties, and this presumption can only be overcome by a showing that the language and circumstances of the contract manifest an affirmative intent by the parties to benefit the third party." *Estate of Willis v. Kiferbaum Const. Corp.*, 357 Ill. App. 3d 1002, 830 N.E.2d 636, 642-43, 294 Ill. Dec. 224 (Ill. App. Ct. 2005) (citing *Bates & Rogers Constr. Corp. v. Greeley & Hansen*, 109 Ill. 2d 225, 486 N.E. 2d 902, 93 Ill. Dec. 369 (Ill. 1985)). Section 34 of the Master Agreement states that the contract confers no benefits upon non-parties, thereby expressly disavowing

any intention to confer contractual rights on POP and its co-plaintiffs.

POP does not argue that general principles of contract law provide the necessary enforceable rights. Rather, it argues that it can enforce the terms of the Master Agreement because the plaintiffs are municipal taxpayers and residents. POP contends that *Malec v. City of Belleville*, 384 Ill. App. 3d 465, 891 N.E.2d 1039, 322 Ill. Dec. 748 (Ill. App. Ct. 2008), supports this theory. We read that case differently. *Malec* is one of several cases holding that, under Illinois law, "'a taxpayer has standing to bring suit, even in the absence of a statute, to enforce the equitable interest in public property which he claims is being illegally disposed of.'" *Id.* at 1042 (quoting *Martini v. Netsch*, 272 Ill. App. 3d 693, 650 N.E.2d 668, 670, 208 Ill. Dec. 974 (Ill. App. Ct. 1995)). Those cases might allow a taxpayer to challenge a land use that violates state or municipal law, see *id.* at 1042-43, but they do not establish that an alleged violation of a municipal contract is grounds for a taxpayer suit. *Malec* does not recognize a cause of action that would allow a plaintiff to challenge a land use made in violation of a contract to which it is not a party. POP has not directed us to any authority that supports its position, and so it would be futile for it to add the proposed breach-of-contract claim.

Perhaps recognizing that its first theory falls short, POP suggests an alternative theory that we charitably will call unusual. It tells us that its self-styled breach-of-contract claim is actually a "taxpayer derivative action," and that it is merely trying to enforce contractual

rights belonging to the City. While we appreciate POP's creativity in this respect, we are unable to connect this new line of argument with the claim POP described in the proposed amended complaint. Illinois courts do allow a taxpayer to bring suit "on behalf of a local governmental unit to enforce a cause of action belonging to the local governmental unit." *Scachitti v. UBS Fin. Servs.*, 215 Ill. 2d 484, 831 N.E.2d 544, 550, 294 Ill. Dec. 594 (Ill. 2005). But recovery must run in favor of the local government. See *Feen v. Ray*, 109 Ill. 2d 339, 487 N.E.2d 619, 621, 93 Ill. Dec. 794 (Ill. 1985). Here, POP seeks relief *against* the City (which is a defendant-appellee in this case, and which is having no trouble speaking for itself). The lack of a relation between the relief requested in the amended pleading, on the one hand, and the nature of a taxpayer derivative suit, on the other, shows that this theory would not so much recharacterize the claim as it would transmogrify it. Because POP's proposed complaint is inconsistent with this new theory, it does not belong in the case. See *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir. 1996).

POP's second proposed new theory is also doomed. Under Illinois law, unjust enrichment "is a condition that may be brought about by unlawful or improper conduct as defined by law." *Alliance Acceptance Co. v. Yale Ins. Agency, Inc.*, 271 Ill. App. 3d 483, 648 N.E.2d 971, 977, 208 Ill. Dec. 49 (Ill. App. Ct. 1995) (quotation omitted). A party may not dress up an unsuccessful contract claim in the garb of unjust enrichment, but that is what POP is doing here. Its unjust-enrichment claim cannot stand on its own: "the request for relief based on unjust enrichment is tied

to the fate of the [breach-of-contract] claim." *Vanzant v. Hill's Pet Nutrition, Inc.*, 934 F.3d 730, 740 (7th Cir. 2019). The district court acted well within its discretion when it denied leave to amend.

III. The Federal-Law Theories

We now turn to familiar ground: POP's federal-law arguments. The district court awarded summary judgment to the defendants on all seven of those counts. On appeal, POP has presented adequate arguments challenging the rulings on only three of them. (We briefly address its four other points in Part V of this opinion.) We evaluate the district court's ruling *de novo*, construing the record in the light most favorable to POP and drawing all reasonable inferences in its favor. See *Burton v. Downey*, 805 F.3d 776, 783 (7th Cir. 2015).

A. Application of Law of the Case

As we noted at the outset, we covered much of this territory in *POP III*, where we concluded that POP had failed to establish a strong likelihood of success on the merits. See 39 F.4th at 397. With that decision in hand, the defendants urge us to conclude that *POP III* establishes the law of the case.

"The law of the case doctrine is a rule of practice, based on the sound policy that, when an issue is once litigated and decided, that should be the end of the matter." *Tully v. Okeson*, 78 F.4th 377, 380 (7th Cir. 2023) (cleaned up). It "establishes a presumption that a ruling made at

one stage of a lawsuit will be adhered to throughout the suit." *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1227 (7th Cir. 1995). Nonetheless, the rule is neither "a straitjacket," *id.*, nor "hard and fast," *Tice v. Am. Airlines, Inc.*, 373 F.3d 851, 854 (7th Cir. 2004). The strength of the presumption "varies with the circumstances." *Avitia*, 49 F.3d at 1227.

POP argues that the law-of-the-case rule has no force here because *POP III* was a preliminary-injunction ruling. As it sees things, a court may apply the doctrine only if its prior ruling was a final judgment on the merits. This argument misunderstands the doctrine.

It is true that in many circumstances it is inappropriate to allow a decision granting or denying a preliminary injunction to supply the law of the case in a later appeal. See, *e.g., Hunter v. Atchison, T. & S. F. R. Co.*, 188 F.2d 294 (7th Cir. 1951); *Thomas & Betts Corp. v. Panduit Corp.*, 138 F.3d 277 (7th Cir. 1998). We noted in *Thomas* two reasons why "[a] court must be cautious in adopting findings and conclusions from the preliminary injunction stage in ruling on a motion for summary judgment." 138 F.3d at 292 (quotation omitted). First, "findings of fact and conclusions of law made at the preliminary injunction stage are often based on incomplete evidence and a hurried consideration of the issues." *Id.* Second, "different standards apply in the two contexts (reasonable likelihood of success on an injunction, and the existence of any genuine issues of material fact on summary judgment)." *Id.* As we have noted elsewhere, "a less-than-developed record, a short timeline, and a concomitant truncated legal

analysis ... usually counsel against invoking the law of the case doctrine in a way that would preclude a full merits determination." *Tully*, 78 F.4th at 381.

But "rarely" does not mean "never." We, like our sister circuits, have recognized that "this general rule does not apply to 'a fully considered appellate ruling on an issue of law made on a preliminary injunction appeal.'" *Id.* (cleaned up and quoting 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478.5 (3d ed. 2019)); see also *Howe v. City of Akron*, 801 F.3d 718, 740 (6th Cir. 2015) (collecting cases from other courts of appeals). In other words, where the concerns we have discussed are not present, an earlier legal conclusion underlying a ruling on a motion for a preliminary injunction may establish the law of the case.

This case falls comfortably into that exception to the general rule. We had ample time in *POP III* to consider the identical record that is now before us, and so there are no new facts we must incorporate. The legal issues have also remained the same. These were litigation choices POP made. All it has done during this round is to present the same legal arguments that we rejected in *POP III* and to insist that our earlier conclusions of law were erroneous. Its arguments are no more persuasive now than they were then.

In the interest of completeness, however, we are willing to consider whether POP has offered any reason that would justify our setting aside those earlier legal conclusions. A party is "free to argue that an intervening

change in law or other changed or special circumstance warrants a departure" from law of the case. *Tice*, 373 F.3d at 854. We have identified various circumstances in which the court ought not to follow the law of the case, such as when there is "a decision of the Supreme Court [or of this court sitting *en banc*, see *Kathrein v. City of Evanston*, 752 F.3d 680, 685-86 (7th Cir. 2014),] after the first review that is inconsistent with the decision on that review ... [or] a conviction on the part of the second reviewing court that the decision of the first was clearly erroneous." *Chicago & N.W. Transp. Co. v. United States*, 574 F.2d 926, 930 (7th Cir. 1978).

We can find no decision of either this court or the Supreme Court that both post-dates and is inconsistent with our ruling in *POP III*. POP draws our attention to several decisions in which the Supreme Court has invoked the so-called "major questions" doctrine. See *Am. Hosp. Ass'n v. Becerra*, 596 U.S. 724, 142 S. Ct. 1896, 213 L. Ed. 2d 251 (2022); *Becerra v. Empire Health Foundation*, 597 U.S. 424, 142 S. Ct. 2354, 213 L. Ed. 2d 685 (2022); *West Virginia v. EPA*, 597 U.S. 697, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022). It argues that judicial deference to administrative agencies is now disfavored. That may be so (we have no need to express a view on the matter), but POP does not argue that this case presents a major question, nor has it drawn any other connection between this supposed general legal development and the issues raised in this case. It has not, for example, suggested that those cases changed the way courts review claims under the Administrative Procedure Act. And in any event, each of those decisions was issued before our decision in

POP III, and so they do not present the kind of unusual circumstances that warrant displacing the presumption that law of the case applies.

In a last gasp, POP also contends that our decision in *POP III* was clearly erroneous. See *Agostini v. Felton*, 521 U.S. 203, 236, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) ("The doctrine does not apply if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice." (cleaned up)). Rehearsing the same arguments that we heard and rejected in our earlier ruling, it urges us to reverse course and accept them this time around. We decline the invitation. Far from finding "manifest error" in our earlier analysis, *Tully*, 78 F.4th at 381 (quotation omitted), our fresh look at the matter convinces us that *POP III* was correctly decided. Our earlier ruling therefore controls the federal-law theories on appeal. We could stop there, but for the sake of completeness, we summarize our key findings on POP's principal federal theories.

B. NEPA (Count II)

As in *POP III*, POP argues that the defendants violated NEPA in three distinct ways. It first says that the federal agencies were required to prepare an environmental impact statement, rather than an environmental assessment. Their decision that the assessment was enough was arbitrary and capricious in POP's estimation, because the project requires the City to remove approximately 800 trees that provide nesting spaces for local and migratory birds, and it will affect an

historically and culturally significant area. This argument fails for several reasons.

First, it misunderstands what NEPA is supposed to do. "'The only role' for a court in applying the arbitrary and capricious standard in the NEPA context 'is to insure that the agency has taken a "hard look" at environmental consequences.'" *Highway J Citizens Group v. Mineta*, 349 F.3d 938, 953 (7th Cir. 2003) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21, 96 S. Ct. 2718, 49 L. Ed. 2d 576 (1976)) (alteration omitted). In other words, NEPA is a process statute, not one that imposes enforceable environmental standards. As we explained in *POP III*, the administrative record shows that "the agencies were very thorough." 39 F.4th at 398. The environmental assessment includes, among other things, a Natural Resources Technical Memorandum that discusses the habits of migratory birds and how the project will affect their nests, as well as a Tree Technical Memorandum that considers each species of tree that will be cut down to build the Center.[3] After reviewing each of these effects, the agencies concluded that none would have a significant impact. The environmental assessment thus confirms that the agencies took the necessary hard look at the likely environmental impact before reaching a decision. Having found and explained that "the proposed action will not significantly affect the environment," the agencies were not also required to prepare the more elaborate environmental impact statement. *Indiana*

3. Given the broad scope of the relief measures POP seeks, the fact that the trees are by now long gone does not render this appeal moot.

Forest Alliance, Inc. v. United States Forest Service, 325 F.3d 851, 856 (7th Cir. 2003).

Second, POP argues that the agencies unlawfully segmented their NEPA review. Segmentation "'allows an agency to avoid the NEPA requirement that an [environmental impact statement] be prepared for all major federal action with significant environmental impacts by segmenting an overall plan into smaller parts involving actions with less significant environmental effects.'" *Mineta*, 349 F.3d at 962 (quoting *City of West Chicago v. United States Nuclear Regulatory Comm'n*, 701 F.2d 632, 650 (7th Cir. 1983)). In an effort to prove that the agencies unlawfully segmented the project when reviewing it, POP points solely to the fact that the Foundation's selection of the Jackson Park site requires the City to close some roadways and construct new ones using federal highway funds.

The City's plan to use federal funds to construct new roads near the site does not have the implications POP believes that it does. NEPA covers only "major Federal actions." 42 U.S.C. § 4332(2)(C); see also *Mineta*, 349 F.3d at 962. The project is a local, not a federal, initiative. The federal agencies had (and have) no control over where the Center is being built, and NEPA imposes no requirement that they oversee the Foundation's or the City's actions. For that reason too, this argument fails; we need not restate the many other problems with it. See *POP III*, 39 F.4th at 399.

POP's third contention is that NEPA required the federal agencies to consider alternative sites for the

Center. This argument suffers from the same flaws as the last two. The federal agencies lacked the authority to dictate where the Center would be located, and so it would be unreasonable of them to waste time and resources exploring potential alternative sites. The federal agencies did all that NEPA required of them.

C. Transportation Act (Count I)

POP makes much the same reasonable-alternatives argument in support of its assertion that the City, the Foundation, and the Highway Administration defendants violated section 4(f) of the Transportation Act. Under that section, the Department of Transportation may approve a "transportation program or project" in a public park only if "(1) there is no prudent and feasible alternative to using the land; and (2) the program or project includes all possible planning to minimize harm to the park ... or historic site[.]" 49 U.S.C. § 303(c). According to POP, section 4(f) required the defendants to consider reasonable alternatives to the Jackson Park site.

Its view is mistaken. The Highway Administration had no authority either to tell the Foundation to build the Center somewhere else or to forbid the City from authorizing that location. As we explained in *Old Town Neighborhood Association, Inc. v. Kauffman*, "[e]ntities that proceed on their own dime need not meet conditions for federal assistance or approval." 333 F.3d 732, 736 (7th Cir. 2003). POP points out that the project in *Old Town* did not involve the use of federal funds. But the federal agencies did not somehow acquire the authority to approve or deny the Jackson Park site through the

City's request for road-building funds. The only difference that the request makes is that it required the Highway Administration to conduct federally mandated reviews. The agency was entitled to take the Jackson Park site as a given when carrying out its duties.

D. NHPA (Count IV)

POP's NHPA claim is the last of the federal-law theories. It argues yet again that a federal agency—here again, the Highway Administration—was required to consider alternative sites for the Center. The Highway Administration conducted a review pursuant to section 106 of NHPA, which is a procedural statute that requires agencies to "take into account the effect of the[ir] undertaking[s] on any historic property." 54 U.S.C. § 306108. Like NEPA, section 106 applies only to federal projects, not to local work such as the Foundation's plan to build the Center with the City's assistance. For that reason, and because the Highway Administration followed the procedural requirements of section 106, the defendants were entitled to summary judgment on this count.

IV. State-Law Theories

We arrive, finally, at POP's supplemental state-law theories. Upon a motion by the state defendants, the district court dismissed all eight of them pursuant to Federal Rule of Civil Procedure 12(b)(6). POP now appeals that decision, but we deem it necessary to discuss only two grounds. In so doing, we take a fresh look at the district court's decision to dismiss those two theories, accepting

all well-pleaded factual allegations in the complaint as true and drawing all reasonable inferences in POP's favor. See *St. John v. Cach, LLC*, 822 F.3d 388, 389 (7th Cir. 2016). To survive a motion to dismiss, "the complaint must state a claim that is plausible on its face," *id.* (quotation omitted), which means that the "factual content [must allow us] to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

A. The Public Trust (Count VI)

POP's primary state-law contention rests on the public-trust doctrine, which, it alleges, was violated by the actions of the City and the Foundation. It argues that Jackson Park is public-trust property under Illinois law, and, drawing an analogy to private trust law, that the City is akin to a trustee subject to fiduciary duties. The City breached its fiduciary duties, says POP, by transferring a portion of its parkland to the Foundation and giving the Foundation control over it.

Although we had no occasion to resolve POP's public-trust theory in *POP I*, we did explain the contours of the doctrine upon which it rests. In brief, "the public trust doctrine, established in American law by *Illinois Central Railroad Co. v. Illinois*, [146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892),] prohibits a state from alienating its interest in public lands submerged beneath navigable waterways to a private party for private purposes." 971 F.3d at 729. As originally formulated in *Illinois Central*, the doctrine permitted a state to "alienate publicly owned

submerged land to a private party [only] if the property will be 'used in promoting the interests of the public' or 'can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.'" *Id.* (quoting *Illinois Central*, 146 U.S. at 453).

The public-trust doctrine has evolved in Illinois so that it now applies to a broader swath of lands. Thus, as an Illinois appellate court has explained, although the doctrine applies to "mostly submerged land under Lake Michigan or the Chicago River," it extends also to "parks" and "conservation areas." *Timothy Christian Schools v. Village of Western Springs*, 285 Ill. App. 3d 949, 675 N.E. 2d 168, 174, 221 Ill. Dec. 261 (Ill. App. Ct. 1996). What matters is that land has been acquired and dedicated for a public purpose "by the sovereign," at which point "the agencies created by [the sovereign] hold the properties in trust for the uses and purposes specified and for the benefit of the public." *Paepcke v. Public Bldg. Comm'n of Chicago*, 46 Ill. 2d 330, 263 N.E.2d 11, 15 (Ill. 1970).

Illinois courts have developed a three-part test for determining whether a plaintiff may prevail on an alleged public-trust violation:

> [T]o state a cause of action under the public trust doctrine, facts must be alleged indicating that: certain property is held by a governmental body for a given public use; the governmental body has taken action that would cause or permit the property to be used for a purpose inconsistent with its originally intended public use; and such action is arbitrary or unreasonable.

Paschen v. Village of Winnetka, 73 Ill. App. 3d 1023, 392 N.E.2d 306, 309-10, 29 Ill. Dec. 749 (Ill. App. Ct. 1979); see also *Timothy Christian Schools*, 675 N.E.2d at 174. The parties agree that Jackson Park is public-trust land that has never been submerged, and that the Park District was created to administer it for the benefit of the public. See 1 The Laws of the State Of Illinois 1869, at 360; 70 ILCS 1505/1. Their disagreement turns on whether the construction of the Center and the formation of agreements allowing the Foundation to maintain the Center violate the requirement that the parkland be put to a public use.

We observed in *POP I* that a "[d]edication to a public purpose isn't an 'irrevocable commitment,' and judicial review of any reallocation is deferential, particularly if the land in question has never been submerged." 971 F.3d at 730 (cleaned up and quoting *Paepcke*, 263 N.E.2d at 16). When a reallocation of trust land to a new public purpose is challenged, "'[t]he courts can serve only as an instrument of determining legislative intent as evidenced by existing legislation measured against constitutional limitations.'" *Friends of Parks v. Chicago Park Dist.*, 203 Ill. 2d 312, 786 N.E.2d 161, 170, 271 Ill. Dec. 903 (Ill. 2003) (quoting *Paepcke*, 263 N.E.2d at 21). So long as constitutional limitations are not transgressed, our role is limited to ensuring that "there has been a sufficient manifestation of legislative intent to permit the diversion and reallocation contemplated by the plan." *Paepcke*, 263 N.E.2d at 18.

The Illinois General Assembly expressly permitted the construction and operation of presidential centers in parks held in the public trust with the passage of the

Museum Act. See 70 ILCS 1290/1. That law authorizes cities and park districts "to purchase, erect, and maintain within any such public park or parks edifices to be used as ... museums ... , including presidential libraries, centers, and museums[.]" *Id.* The Museum Act also permits municipalities to contract with certain private entities to erect, maintain, and operate presidential centers. *Id.* In enacting this legislation, the General Assembly "reaffirmed and found that the ... museums [] described in this Section, and their collections, exhibitions, programming, and associated initiatives, serve valuable public purposes[.]" *Id.* Among those purposes are "furthering human knowledge and understanding, educating and inspiring the public, and expanding recreational and cultural resources and opportunities." *Id.*

We have no doubt that the Center falls within this legislative grant of authority. As part of its efforts to honor the legacy of the nation's first Black president, the Center will feature records and artifacts from that president's administration and offer educational programming and initiatives to the public. It was also within the City's authority to contract with the Foundation, which was "organized for the construction [and] maintenance and operation of" the Center. *Id.* The Museum Act, coupled with the intended use of the Center and the City's existing arrangements with the Foundation, is enough to satisfy us that the portion of Jackson Park set aside for the Center will continue to serve a public purpose, as Illinois's public-trust doctrine requires.

POP does not dispute that the Center will bring these benefits to the public. Instead, it argues that we must

apply some form of heightened scrutiny to the proposed land use, because, in its view, the Use Agreement and the Master Agreement were flawed transactions. In POP's telling, these transactions somehow undermine the Center's eligibility for public-trust treatment, because the doctrine incorporates well-established fiduciary duties from private trust law. But POP supports this theory with just two sources: a law review article that does not discuss the public-trust doctrine in Illinois and a decision from a New York state trial court. It has not directed us to any decision from an Illinois court recognizing this theory, nor have we found such a case. That is the end of it. POP brought this contention to federal court under the supplemental jurisdiction, 28 U.S.C. § 1367, and so we are bound to apply the existing law of Illinois, not whatever POP hopes Illinois law may someday be. See *id.* § 1652; see also *Felder v. Casey*, 487 U.S. 131, 151, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988).

Changing tacks, POP argues that the General Assembly had no authority to modify the public purpose that originally supported the establishment of Jackson Park. It points to a passage in *Paepcke* that "refer[s] to the approach developed by the courts of ... Wisconsin, in dealing with diversion [of public-trust land] problems." 263 N.E.2d at 19. The approach to which *Paepcke* refers involves the application of five factors, one of which is to consider whether "the public uses of the original area would be destroyed or greatly impaired" by the proposed reallocation. *Id.* But that language is plainly *dicta*: the court referred to the Wisconsin approach only "[i]n passing," and it stated that the approach was "not controlling" and only "a useful guide for future

administrative action." *Id.* More recent cases confirm this understanding of *Paepcke*. In *Friends of Parks v. Chicago Park District*, for example, the Supreme Court of Illinois understood *Paepcke* as we have here, without mentioning the passage POP seizes on. See 786 N.E.2d at 170.

Finally, although POP has not alleged any specific profits that the Foundation will receive, we assume that the Foundation will benefit from maintaining and operating the Center. But under Illinois law, benefit to a private organization does not by itself violate the public-trust doctrine. See *id.* The doctrine would of course be violated if "the direct and dominating purpose here would be a private one" or if "the public purpose to be served [would] be only incidental and remote." *People ex rel. Scott v. Chicago Park Dist.*, 66 Ill. 2d 65, 360 N.E.2d 773, 781, 4 Ill. Dec. 660 (Ill. 1976). But, as we have explained, the General Assembly determined that the main purpose of museums such as the Center is to benefit the public and there is nothing in the record that suggests otherwise. POP's allegations suggest at most that any "benefit to private interest [is] to further [the] public purpose and [is] incidental to the public purpose." *Id.* (discussing *People ex rel. Moloney v. Kirk*, 162 Ill. 138, 45 N.E. 830 (Ill. 1896), which upheld a grant of submerged land to a private organization because the benefits to that organization were incidental to the public purpose). It is not our role to second-guess the re-purposing of a portion of Jackson Park for that new use, especially because the park was never submerged in navigable waters. Compare *Paepcke*, 263 N.E.2d 11 (never submerged land), with *Scott*, 360 N.E.2d 773 (submerged land). For all these reasons, POP has failed to state a plausible public-trust claim.

B. Improper Delegation (Count XI)

POP also argues that the City unlawfully delegated its authority to fix the location of the Center to the Foundation in violation of Article II of the Illinois Constitution, which provides that "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." ILL. CONST., art. II, § 1. Its "smoking-gun" evidence appears in a recital in the 2015 Ordinance: "Whereas, while the City Council is confident in the quality and thoroughness of both UIC's and [the University of] Chicago's proposals, the City defers to the sound judgment of the President and his Foundation as to the ultimate location of the Presidential Library[.]" POP sees further proof of unlawful delegation in the City's decision to defer to the Foundation's preferred location for the Center.

Under Illinois law, "the legislature cannot delegate its legislative power to determine what the law should be." *East St. Louis Fed. of Teachers, Local 1220 v. East St. Louis Sch. Dist. No. 189*, 178 Ill. 2d 399, 687 N.E.2d 1050, 1063, 227 Ill. Dec. 568 (Ill. App. Ct. 1998). Nevertheless, it "may delegate the authority to do those things it might properly do, but cannot do as understandably or advantageously, if the authority that is granted is delineated by intelligible standards." *R.L. Polk & Co. v. Ryan*, 296 Ill. App. 3d 132, 694 N.E.2d 1027, 1033, 230 Ill. Dec. 749 (Ill. App. Ct. 1998) (citations omitted). Although this rule usually is invoked when the legislature confers authority upon an executive agency, it also has been applied when authority is delegated to a private organization. See, *e.g., People v. Pollution Control Bd.*,

83 Ill. App. 3d 802, 404 N.E.2d 352, 356, 38 Ill. Dec. 928 (Ill. App. Ct. 1980). Even though the Illinois courts have not formulated extensive principles "on the question of delegation of legislative power to private parties," *id.*, they consistently have held that legislative bodies may not confer upon private organizations the authority to "decide what the law shall be," *People ex rel. Chicago Dryer Co. v. City of Chicago*, 413 Ill. 315, 109 N.E.2d 201, 204 (Ill. 1952).

We find no possible (let alone plausible) problem with delegation in POP's complaint. The recital at the heart of its allegations does not delegate anything; it is merely a statement by the City acknowledging that the Foundation was conducting a nationwide search for a location for the Center and expressing its desire that the site be in Chicago. A look at another recital in the 2015 Ordinance confirms that the City did not delegate any authority to the Foundation. It states that "the City will introduce a separate ordinance authorizing the development, construction and operation of the Presidential Center on the Selected Site, if [the University of] Chicago's proposal is selected[.]" The City did exactly that when it approved the plan and passed the 2018 Ordinance.

POP apparently takes issue with that process as well, but it cites no authority supporting the notion that preparing a project proposal is a legislative function, let alone a power that may not be delegated. And the fact that the City ultimately approved the location is evidence that it, not the Foundation, exercised the legislative function of authorizing the proposed development. Because POP's complaint contains no allegations of wrongful delegation,

it fails to state a claim under the separation-of-powers clause of the Illinois Constitution.

V. Remaining Theories

As we have now said several times, POP's complaint is chock-full of alternate legal theories, all directed at the same end: stop the Center and restore Jackson Park to its previous condition. We have discussed every approach that was adequately developed in the briefs, but there are still more. Four of the remaining theories (Counts III, V, X and XIV) are based on federal law: the UPARR Act; section 408 of the Rivers and Harbors Act and section 404 of the Clean Water Act; Article 1, Section 1, of the United States Constitution; and section 110(k) of the NHPA, respectively. Each of the other six theories (Counts VII, VIII, IX, XII, XIII, and XV) alleges a violation of Illinois law. The district court rejected all ten. On appeal, POP insists that it is actively pursuing all fifteen. Yet its briefs say hardly a word about the remaining ten, and so we will be equally brief with them.

"An appellant who does not address the rulings and reasoning of the district court forfeits any arguments he might have that those rulings were wrong." *Hackett v. City of South Bend*, 956 F.3d 504, 510 (7th Cir. 2020). The briefs are entirely silent on Counts III, V, IX, XII, XIV, and XV, which means that POP has forfeited any challenges to the district court's rulings on those theories. See *Klein v. O'Brien*, 884 F.3d 754, 757 (7th Cir. 2018).

POP devotes a little space to Count VII, which alleges an *ultra vires* claim against the City, and so, therefore,

will we. It describes three allegedly unlawful acts, but it does not identify a law that was violated or otherwise explain how the City acted unlawfully. Because POP's contentions in this connection are "unsupported by pertinent authority," *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991), they have been forfeited.

Last, we have Counts VIII, X, and XIII. The single sentence POP offers to support the first and last of these is representative of the way it treats all three: "as Plaintiffs' constitutional claims in Counts VIII and XIII rely upon the transfer and the sham nature of the 'use' agreement, it was erroneous for the [district court] to dismiss those claims for similar reasons." We do not know which "similar reasons" it intended to invoke, but that vagueness is not the only problem here. As we have said, "[a] skeletal 'argument', really nothing more than an assertion, does not preserve a claim. Especially not when the brief presents a passel of other arguments, as [POP's] did." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (*per curiam*) (citation omitted). Any arguments about the district court's disposition of these three theories have been forfeited.

VI. Conclusion

POP and its co-plaintiffs have opposed the City's plan to build the Center in Jackson Park from the start. When we last had this case before us, the plaintiffs were trying to secure a preliminary injunction against the entire project, but they failed to show that they were entitled to such extraordinary relief. Construction of

the Center is now well underway, and yet the plaintiffs demand that we put a stop to it and, we assume, order the defendants to restore the site. But they have failed to show that they are entitled to any relief relating to their overarching claim against the Center, no matter under what theory. The district court did not abuse its discretion by denying the plaintiffs' request for leave to amend. The court also properly ruled that the state-law counts had to be dismissed and, consistent with *POP III*, that the defendants were entitled to summary judgment on the federal-law counts.

The judgment of the district court is AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED NOVEMBER 3, 2022

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

Case No. 21-cv-02006
Hon. John Robert Blakey

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

Plaintiffs,

vs.

PETE BUTTIGIEG, *et al.*,

Defendants.

FINAL JUDGMENT IN FAVOR OF DEFENDANTS

Before the Court is the Parties' Stipulations and Proposed Order of Judgment, [138], which requests that the Court enter final judgment in favor of Defendants on all remaining counts before this Court, Counts I through V, X, and XIV (the "Seven Federal Counts"), as well as the Joint Supplemental Submission by All Parties in Support of Joint Stipulation [146]. The Parties have advised the Court that additional briefing beyond what they submitted in the preliminary injunction proceedings remains unnecessary; that no pertinent facts exist, other than what is contained in the Administrative Record,

which stands complete on the docket, [112]; and that no disputes of fact material exist concerning the disposition of the Seven Federal Counts.

Based on the Parties' stipulations and submissions, the record before the Court, and the Court's Memorandum Opinion denying Plaintiffs' request for preliminary injunction [94] ("Memorandum Opinion"), which found that the Plaintiffs failed to demonstrate a likelihood of success on the merits of the Seven Federal Counts, and which was affirmed on appeal, *Protect Our Parks, Inc. v. Buttigieg*, 34 F.4th 389 (7th Cir. 2022), the Court determines that no genuine disputes of material fact exist in connection with the Seven Federal Counts. Accordingly, Defendants are entitled to judgment by this Court as a matter of law, and judgment should be entered for Defendants on these counts pursuant to Fed. R. Civ. P. 56 for the reasons set forth in the Court's Memorandum Opinion.

In addition, Plaintiffs explicitly waive any arguments, claims, or theories as to the Seven Federal Counts not advanced in their motion for preliminary injunction and supporting memorandum. *See*, *e.g.*, *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) ("It is a well-established rule that arguments not raised to the district court are waived on appeal. Moreover, even arguments that have been raised may still be waived on appeal if they are underdeveloped, conclusory, or unsupported by law.") (citations omitted).

The remaining counts having been previously dismissed, see [119], the Clerk shall enter final judgment

for Defendants and against Plaintiffs on all counts. All set dates and deadlines are stricken. Civil case terminated.

Dated: November 3, 2022

ENTERED:

/s/ John Robert Blakey
John Robert Blakey
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED JULY 1, 2022

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 21-2449

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

Plaintiffs-Appellants,

v.

PETE BUTTIGIEG, SECRETARY OF TRANSPORTATION, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:21-cv-02006 — **John Robert Blakey**, *Judge.*

ARGUED NOVEMBER 30, 2021 DECIDED JULY 1, 2022

Before WOOD and HAMILTON, Circuit Judges.[1]

WOOD, *Circuit Judge.* In 2016, after a nationwide search, the Barack Obama Foundation decided to build

1. Circuit Judge Kanne died on June 16, 2022, and did not participate in the decision of this case, which is being resolved under 28 U.S.C. § 46(d) by a quorum of the panel.

the Obama Presidential Center in historic Jackson Park on Chicago's South Side. The City of Chicago and the Chicago Park District embraced the plan. But a group of residents, under the banner of an organization called Protect Our Parks, Inc., vehemently opposed it. Two years ago, we dismissed Protect Our Parks' first effort to enjoin the project. *Protect Our Parks, Inc. v. Chi. Park Dist.*, 971 F.3d 722, 738 (7th Cir. 2020) ("*Protect Our Parks I*"), *cert. denied sub nom. Protect Our Parks, Inc. v. City of Chicago*, 141 S. Ct. 2583, 209 L. Ed. 2d 600, 2021 U.S. LEXIS 2154, 2021 WL 1602736 (U.S. 2021). Protect Our Parks, along with several individual plaintiffs, responded with the present action against the City and the Park District (to which we refer collectively as the City), as well as various state and federal officers, arguing that environmental reviews performed by federal agencies in connection with the project were inadequate under the National Environmental Policy Act, 42 U.S.C. §§ 4331-47, section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, and other similar statutes.

Protect Our Parks' central theory is that these laws required the agencies to consider alternatives to the Jackson Park site in their evaluation of possible environmental harms. It correctly notes that the agencies, taking a different view of the law, did not do this. The problem with this argument is that none of the federal defendants had anything to do with the site selection—it was the City that chose Jackson Park, and the federal agencies had (and have) no authority to move the project elsewhere. Federal law does not require agencies to waste time and resources evaluating environmental effects that

those agencies neither caused nor have the authority to change. See *Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 756, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004). We thus affirm the order of the district court denying Protect Our Parks' motion for a preliminary injunction.[2]

I

In 2014, the Foundation began searching for a home for President Obama's presidential library. After evaluating several potential sites, it chose Jackson Park, a public park in the neighborhood where President Obama lived and began his career as a community organizer, law professor, and state senator. The Center will feature a museum, a public library, spaces for educational and cultural events, green space, and an archive commemorating the life and legacy of the nation's first Black President. Construction of the Obama Presidential Center (the Center) is wholly funded by the Obama Foundation.

After the Chicago City Council unanimously approved building the Center in Jackson Park, the City acquired the needed parkland from the Chicago Park District, signed a use agreement with the Foundation, and prepared to break ground. When completed, the Center will take up 19.3 acres, which amounts to about 3.5% of Jackson Park.

---

2. Although construction has already begun on the project, and so some of the harms Protect Our Parks wanted to avoid have already taken place (*e.g.*, the removal of trees), the overall effort is still in an early enough stage that more limited, but meaningful, injunctive relief is still possible. We are thus satisfied that the case has not become moot.

Appendix C

A

Although the federal government had no role in the Foundation's or Chicago's decision to house the Center in Jackson Park, the City's approval did trigger several federally mandated agency reviews. Protect Our Parks argues that these reviews were inadequate.

The U.S. Department of Transportation's Section 4(f) Review. The plans for the Center require the closure of portions of three roads within Jackson Park. To accommodate the resulting effect on traffic, the Chicago Department of Transportation has proposed using federal funding to build or improve other roads, bike paths, and pedestrian walkways in the park. To be clear, the plan to close portions of existing roads in the park did not require federal approval. See *Old Town Neighborhood Ass'n v. Kauffman*, 333 F.3d 732, 736 (7th Cir. 2003). What did give rise to the approval requirement was the plan to build replacement infrastructure using federal highway dollars. That brought the Federal Highway Administration (FHWA) into the picture; it was required to review the proposal under section 4(f) of the Department of Transportation Act of 1966 (codified at 49 U.S.C. § 303). Section 4(f) permits the Secretary of Transportation to approve transportation projects that have an impact on public parks or historic sites, so long as "(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the park ... resulting from the use." *Id.* § 303(c). The Center's proposal implicates four properties protected by section 4(f), including Jackson Park itself.

After a comprehensive analysis, the FHWA found that there was no feasible and prudent alternative to using section 4(f) properties for new transportation infrastructure, which was needed to substitute for the roads that would be eliminated. The agency then considered nine alternatives to determine how to minimize any negative impacts on the affected parks and historic areas. The FHWA's analysis concluded that only one alternative (Alternative 9) would meet the project's goals of accommodating traffic changes and improving pedestrian and bike access to Jackson Park. The agency then designed studies of two sub-alternatives (Sub-alternatives 9A and 9B) before concluding that 9B would cause the least damage to properties protected by section 4(f).

National Environmental Policy Act Environmental Assessment. The National Park Service and the Department of Transportation conducted a joint environmental assessment pursuant to the National Environmental Policy Act (NEPA). See 40 C.F.R. § 1501.4 (2019) (explaining that agencies may prepare a concise environmental assessment to determine if a more detailed environmental impact is required). The assessment explained that the City had decided to place the Center in Jackson Park, that the City would close portions of three local roads to accommodate the Center, and that the federal government had no say in those matters. The federal government did have a role, however, in approving the new use of the parkland and funding for new transportation infrastructure in the park (more on this later).

On that basis, the agencies assessed the environmental impact of three options: Option A, in which neither the Park Service nor the federal Department of Transportation approved the City's plan; Option B, in which only the Park Service approved it; and Option C, in which both did. The agencies prepared an exhaustive review of the direct, indirect, and cumulative effects of each option, including the potential consequences on trees, wildlife, water quality, air quality, traffic control, noise, and cultural resources. They found that Alternative C best met both agencies' goals. They also concluded that Alternative C would not have a significant impact on the environment, which meant that the agencies could move forward with only an environmental assessment, rather than a full-blown environmental impact statement. See *Public Citizen*, 541 U.S. at 757.

Urban Park and Recreation Recovery Act Review. The National Park Service also conducted a review under the Urban Park and Recreation Recovery Act (UPARR Act). See 54 U.S.C. §§ 200501-511. The UPARR Act, a grant program enacted in 1978, provided federal funds to local governments to improve urban parks and recreational facilities. Chicago received UPARR grants to rehabilitate Jackson Park in the 1980s. Any community that received a UPARR grant must maintain that land for public recreational use unless the Park Service approves converting the space for another purpose. The Park Service "shall approve" a proposed conversion if: (1) the conversion aligns with a local park-recovery action program, and (2) steps are taken to ensure that the community has "adequate recreation properties

and opportunities of reasonably equivalent location and usefulness." 54 U.S.C. § 200507.

Because Chicago wanted to dedicate about ten acres of parkland to non-recreational space to make room for the Center's buildings and related transportation improvements, the City sought the Park Service's approval of a partial UPARR conversion. Specifically, the City proposed replacing the lost parkland by turning property on the Midway Plaisance between Stony Island Avenue to the east, and the Metra Electric Railway to the west, into public recreational space. The replacement parkland borders (and effectively extends) Jackson Park's western border. Under the City's plan, the new space will include improvements such as pedestrian walkways and a play area. The plan would yield a net gain of about 6.6 acres of recreational space in Jackson Park. The Park Service considered the proposal, decided that the proposed replacement satisfied the UPARR Act's requirements, and approved a partial conversion to make way for the Center.

Army Corps of Engineers Permits. The City also needed to secure permits from the United States Army Corps of Engineers, which administers the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 401, and the Clean Water Act, 33 U.S.C. § 1251. The Rivers and Harbors Act regulates alterations to public works built by the United States to improve navigable waters. See 33 U.S.C. § 408. It bars such changes unless they comply with a safety-valve provision authorizing the Corps to allow an alteration or occupation that "will not be injurious to the public interest and will not impair the usefulness of" the

federal project. *Id.* The City's plan includes building road improvements on about 1.32 acres of land falling within the Great Lakes Fishery and Ecosystem Restoration area, a large Corps-administered ecological-restoration project.

In 2019, the Park District requested a section 408 permit to build the Center. The City proposed to ameliorate the impacts of the new transportation projects by restoring a lagoon overlook in a nearby part of the park and planting additional native plants. Its plan would result in a net gain of about 1.1 acres to the area included in the ecological-restoration project. After determining that building the Center would not impair the federal project, the Corps approved a section 408 permit.

The City also sought permits allowing construction access to two existing bridges, which would require temporarily filling less than an acre of navigable waters. The Clean Water Act authorizes the Corps in its discretion to issue permits for the "discharge of dredged or fill materials into [] navigable waters[.]" 33 U.S.C. § 1344(a). The Corps decided that the proposed activity qualified for a permit and signed off on the City's plan.

National Historic Preservation Act Review. The National Historic Preservation Act (NHPA) requires federal agencies to "take into account the effect" of an "undertaking on any historic property" before approving the use of federal funds. 54 U.S.C. § 306108. Regulations issued by the Advisory Council on Historic Preservation require agencies to "make a reasonable and good faith effort" to identify historic properties, 36 C.F.R. § 800.4(b)(1),

to assess adverse effects on such properties, *id.* § 800.5, and to consult certain stakeholders about potential alternatives that could mitigate harms to the properties, *id.* § 800.6(a).

The FHWA prepared an Assessment of Effects to Historic Properties related to the Center. The assessment found that the project would have an adverse effect on two historic properties: (1) the Jackson Park Historic Landscape District and Midway Plaisance; and (2) the Chicago Park Boulevard System Historic District. The Highway Administration then held several meetings with relevant stakeholders, including the Illinois State Historic Preservation Office, local parks advisory councils, and local historic preservation groups. In the end the agencies concluded that any effects from the project would not be significant.

B

The City's plan to build the Center in Jackson Park has been opposed from the start by Protect Our Parks, Inc., a non-profit organization started by Chicago residents who resist conversions of Chicago parkland. In 2018, Protect Our Parks filed its first lawsuit to stop construction of the Center. There it argued that building the Center in Jackson Park would violate state law, the Takings Clause of the Fifth Amendment, and the Due Process Clause of the Fourteenth Amendment. In *Protect Our Parks I*, we affirmed summary judgment for the defendants on the constitutional claims and dismissed the state-law claims for lack of standing, because the plaintiffs had

only a general policy objection to the City's decision, not a concrete injury. See 971 F.3d at 738.

Six months later, and just days before the City broke ground on the Center, Protect Our Parks launched a renewed effort to persuade the court to halt construction. This time, it brought claims under the Administrative Procedure Act against the City and Park District, the Foundation, and a group of federal and state officers. At present, the individual defendants (all of whom were sued in their official capacities) are Pete Buttigieg, the Secretary of Transportation; Stephanie Pollack, the Acting Administrator of the FHWA; Deb Haaland, the Secretary of the Interior; Charles F. Sams III, the Director of the National Park Service; Christine Wormuth, the Secretary of the Army; Scott A. Spellmon, the Commanding General of the U.S. Army Corps of Engineers; Arlene Kocher, the Administrator of the Illinois Division of the FHWA; Matt Fuller, the Environmental Programs Engineer of the Illinois Division of the FHWA; and Jose Rios, the Region 1 Engineer of the Illinois Department of Transportation.

Protect Our Parks' fifteen-count complaint asserts that the defendants violated the following laws by moving ahead with the Center: section 4(f) of the Department of Transportation Act; the National Environmental Policy Act; the Urban Park and Recreation Recovery Act; sections 106 and 110(k) of the National Historic Preservation Act; the Rivers and Harbors Act; and the Clean Water Act. It promptly moved for a preliminary injunction, but the district court denied the motion, reasoning that Protect Our Parks was unlikely to succeed on the merits because

its complaint simply repackaged the group's policy disagreements with the defendants' substantive decisions. Protect Our Parks then moved for an injunction pending appeal. We denied that motion because plaintiffs did not make a sufficiently strong showing that they were likely to succeed on the merits. See 10 F.4th 758, 763 (7th Cir. 2021). Protect Our Parks then appealed the district court's order denying the motion for a preliminary injunction. See 28 U.S.C. § 1292(a)(1).

II

To secure a preliminary injunction, Protect Our Parks must show that it is "likely to succeed on the merits, ... likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Protect Our Parks' primary problem stems from the first part of this test. The group argues that so long as it has even an ephemeral chance of winning on the merits, it has shown enough of a likelihood of success to secure an injunction. But Protect Our Parks' proposed standard cannot be reconciled with *Winter*'s reminder that the "likelihood of success" and "likelihood of irreparable harm" requirements have teeth. See *id.* at 22. A plaintiff need not prove beyond a preponderance of the evidence that it will win on the merits, but it must at least make a "strong" showing of likelihood of success. See *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762-63 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1754, 209 L. Ed. 2d 515 (2021). As we now explain, Protect Our Parks has

not made that showing here under any of the theories it has invoked.

A

The National Environmental Policy Act of 1969 requires federal agencies to prepare an environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Preparing an EIS is expensive and time-consuming: according to the agency charged with overseeing NEPA, the average environmental impact statement takes four and a half years to complete. Council on Env't Quality, Exec. Off. Of The President, Environmental Impact Statement Time-Lines (2010-2018). In some circumstances, however, agencies may instead conduct an environmental assessment (EA), a less burdensome form of preliminary review used to decide whether a proposed action will cause such significant harm to the environment that an EIS is necessary. See 40 C.F.R. § 1501.3 (2019); *Public Citizen*, 541 U.S. at 757; *Ind. Forest All., Inc. v. U.S. Forest Serv.*, 325 F.3d 851, 856 (7th Cir. 2003). With an environmental assessment in hand, an agency has two choices: proceed with the full EIS, or issue a "finding of no significant impact," generally referred to as a FONSI, explaining why the proposed federal action would not significantly affect the human environment. See 40 C.F.R. §§ 1501.3, 1508.9 (2019).[3] When reviewing

3. We cite the regulations in place when the challenged Environmental Assessment was prepared. Since then, the Council on Environmental Quality has twice issued updated NEPA regulations. See 85 Fed. Reg. 43,304 (July 16, 2020); 87 Fed. Reg. 23,453 (Apr. 20, 2022).

agency action under NEPA, we apply the APA's "arbitrary and capricious" standard. See *Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 952 (7th Cir. 2003) (citing 5 U.S.C. § 706(2)(A)).

NEPA is a procedural statute, not a substantive one. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S. Ct. 1835, 104 L. Ed. 2d 351 (1989) ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."). Thus, in reviewing an agency's compliance with the law, a court's "only role is to ensure that the agency has taken a hard look at environmental consequences" that may flow from a project, not to second-guess the agency's substantive judgment about how serious those consequences might be or what to do about them. See *Envtl. Law & Policy Ctr. v. United States NRC*, 470 F.3d 676, 682 (7th Cir. 2006).

As we noted above, the National Park Service and Department of Transportation conducted a joint environmental assessment, determined that no EIS was needed for the Obama Presidential Center project, and issued a finding of no significant impact. Protect Our Parks argues that the agencies' decision not to prepare an EIS was arbitrary and capricious, in part because the project requires the City to cut down about 800 trees and felling those trees may adversely affect certain migratory birds, and in part for historic preservation and other reasons noted earlier. But those are arguments about the agencies' response to the procedural steps they took, not arguments about their failure to adhere to the required process.

In fact, the agencies were very thorough. Their environmental assessment includes, for example, an exhaustive Tree Technical Memorandum, which catalogs the species of the trees that will be cut down and confirms that each tree lost will be replaced by a newly planted tree. The Memorandum concludes that the tree replacement plan will have an "overall neutral" impact and may even improve the park, because dying trees will be replaced with healthy ones. Similarly, the EA includes a detailed discussion of the project's effect on migratory birds. It considers the City's tree replacement plan, the hundreds of acres of Jackson Park that will remain untouched by the project, and the birds' nesting habits. NEPA requires no more: the record shows that the Park Service and Department of Transportation took the necessary hard look at the likely environmental consequences of the project before reaching their decisions.

Protect Our Parks also attempts to recast its substantive objections as procedural ones by arguing that the Park Service and the Department of Transportation did not adequately consider three of the ten factors set forth in the NEPA regulations in effect while the review was underway. See 40 C.F.R. § 1508.27(b) (2019) (listing factors). Whether or not a project "significantly" affects the environment turns on the project's context and the intensity of its effects. *Id.* § 1508.27(a)-(b).

Again, the administrative record amply shows that the agencies "consider[ed] the proper factors," ensuring that their decision is entitled to deference. See *Ind. Forest All.*, 325 F.3d at 859. Protect Our Parks faults the agencies

for ignoring the unique characteristics of Jackson Park, see 40 C.F.R. § 1508.27(b)(3) (2019), but the record shows otherwise. The environmental assessment did take into account the historical and cultural resources in the park before concluding that the Center's effects will be minimal. Protect Our Parks also contends that the agencies did not consider "[t]he degree to which" environmental harm from the project is "likely to be highly controversial." See *id.* § 1508.27(b)(4). Its evidence of controversy comes from extra-record declarations from neighbors who oppose the project. But the controversy factor is not about whether some neighbors do not support a project. See *Ind. Forest All.*, 325 F.3d at 857 (NEPA does not contain a "heckler's veto"). Rather, an agency must consider whether there are substantial methodological reasons to disagree about the "size, nature, or effect" of a project. *Id.*; see also *Hillsdale Env't Loss Prevention v. U.S. Army Corps. Of Eng'rs*, 702 F.3d 1156, 1181-82 (10th Cir. 2012).

Finally, Protect Our Parks accuses the agencies of failing to consider the "cumulatively significant impact" of the project. See 40 C.F.R. § 1508.27(b)(7) (2019). But the EA did so—it just reached a conclusion with which the plaintiffs disagree, when it determined that the cumulative effects would be "negligible, minor, or otherwise relatively small[.]" The Park Service and the Department of Transportation thoroughly studied the project through the lens of the required regulatory factors before reaching their decision that no environmental impact statement was required. Their conclusion thus "implicates substantial agency expertise and is entitled to deference." *Ind. Forest All.*, 325 F.3d at 859.

Appendix C

B

Protect Our Parks' next theory is that the Park Service and Department of Transportation sidestepped NEPA's reasonable-alternatives requirement by treating the City's decision to locate the Center in Jackson Park as a given. NEPA requires that agencies "study, develop, and describe appropriate alternatives" to major federal projects. 42 U.S.C. § 4332(2)(E); see also 40 C.F.R. § 1502.14 (2019) (agencies must "evaluate all reasonable alternatives" to the proposed action.). Protect Our Parks argues that NEPA required the agencies to evaluate alternative locations for the Center throughout Chicago. It sees the decision not to question the Jackson Park site as a form of "piecemealing or segmentation," which is a practice by which an agency unlawfully dodges its NEPA obligations by breaking up "an overall plan into smaller parts involving action with less significant environmental effects." *Mineta*, 349 F.3d at 962 (internal quotation marks omitted). Protect Our Parks asserts that the Park Service and the Department of Transportation improperly "segmented" two aspects of the overall project: the federal decisions to approve the UPARR conversion and to expand roads, bike lanes, and pedestrian paths; and the City's earlier decision to build the Center in Jackson Park. A proper assessment, Protect Our Parks urges, would also have examined a site in nearby Washington Park, about two miles to the west of Jackson Park.

The argument is fatally flawed for three reasons. First, NEPA reaches only major federal actions, not actions of non-federal actors. 42 U.S.C. § 4332(2)(C); see

40 C.F.R. § 1508.8 (2019) (defining "major Federal actions" as those "potentially subject to Federal control and responsibility."). As we stressed earlier, it was the City, not the federal government, that selected Jackson Park as the site of the Obama Presidential Center. The Supreme Court has stated that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Public Citizen*, 541 U.S. at 770. That describes this situation. The Center was not a federal project, and no federal agency had the authority to dictate to the Obama Foundation where the Center would be located. Agencies have no obligation to examine the effects of state and local government action that lies beyond the federal government's control. It follows that it was proper for the Park Service and the Department to confine their analysis to the portions of the project that are subject to federal review.

That brings us to causation. NEPA requires agencies to consider only environmental harms that are both factually and proximately caused by a relevant federal action. See *id.* at 767. We accept for present purposes the fact that the Park Service's approval was a but-for cause of the Center's placement in Jackson Park, in that the City could not move forward with construction without it. The problem is that but-for causation alone "is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." *Id.* Rather, an agency is on the hook only for the decisions that it has the authority to make. See *id.* at 768-70 (holding that an agency's trucking-safety regulations were not a

proximate cause of new applications by Mexican motor carriers to operate in the United States when the agency lacked authority to block those applications); see also *Sauk Prairie Conservation Alliance v. United States DOI*, 944 F.3d 664, 680 (7th Cir. 2019) (holding that the Park Service's decision to permit helicopter training was not a proximate cause of the training's environmental harms, "[b]ecause the National Park Service had no authority to end the helicopter training"). Here, the federal government has no authority to choose another site for the Center or to force the City to move the Center, and so no federal action was a proximate cause of any environmental harms resulting from the choice of Jackson Park. See *Scottsdale Mall v. Indiana*, 549 F.2d 484, 488 (7th Cir. 1977) (explaining that NEPA "does not infringe on the right of a state to select a project to be financed solely out of its own funds").

Although federal agencies' limited role in the project would be enough to defeat causation on its own, our conclusion is further bolstered by the mandatory language of the UPARR Act. 54 U.S.C. § 200507 says that NPS "shall" approve conversions of parkland so long as a local government's proposal meets statutory criteria. Because the agency found that Chicago's plan did so, it was obligated to approve the conversion. See *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320-21, 206 L. Ed. 2d 764 (2020) ("The first sign that the statute imposed an obligation is its mandatory language: 'shall.'").

Third, Protect Our Parks ignores the "reasonable" half of the reasonable-alternatives requirement. See 40

C.F.R. § 1502.14 (2019); see also *Mineta*, 349 F.3d at 960. It would be unreasonable to require agencies to spend time and taxpayer dollars exploring alternatives that would be impossible for the agency to implement. See *Public Citizen*, 541 U.S. at 765; *Latin Ams. for Soc. & Econ. Dev. v. Adm'r of the FHA*, 756 F.3d 447, 470 (6th Cir. 2014). It would be unreasonable to force an agency to consider alternatives that would frustrate the project's goals. See *Mineta*, 349 F.3d at 960-61; see also *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199, 290 U.S. App. D.C. 371 (D.C. Cir. 1991).

C

Most of Protect Our Parks' remaining arguments suffer from the same causation, scope of federal action, and deference problems as the NEPA claims we already have discussed. Each of the following points is a variation on the plaintiffs' theme that the agencies should have considered locations for the Center outside Jackson Park.

Their argument under section 4(f) of the Department of Transportation Act offers a good example. Under that statute, the Department may approve a "transportation program or project" in a public park only if "(1) there is no prudent and feasible alternative to using the land; and (2) the program or project includes all possible planning to minimize harm to the park[.]" 49 U.S.C. § 303(c). Protect Our Parks faults the Highway Administration for not evaluating alternative locations for the Center. This argument is no more likely to succeed under section 4(f) than under NEPA. No federal law prohibited the City from

building the Center in Jackson Park and closing roadways in connection with the project. See *Old Town*, 333 F.3d at 736 ("Entities that proceed on their own dime need not meet conditions for federal assistance or approval."). Because the Highway Administration could not have compelled the City to locate the Center at a different site, it was neither arbitrary nor capricious for that agency to take the City's decision to build the Center in Jackson Park as a given—not to mention the fact that choosing a site for and building the Center is not a transportation project.

Likewise, the UPARR Act claim turns on the theory that the Park Service should have considered alternative locations for the Center. The Act requires that the Park Service consider whether a proposal to convert parkland supported by a UPARR grant evaluated "[a]ll practical alternatives to the proposed conversion." 36 C.F.R. § 72.72(b)(1). Again, the Park Service has no authority to force the City to move the Center to a different location, and so its approval is not a proximate cause of the City's plans. In any case, the Park Service evaluated the City's UPARR conversion proposal, found that the City had considered practical alternatives, and explained that no practical alternatives existed in light of the City's goals. By doing so, the Park Service satisfied its statutory obligations.

Under section 106 of the National Historic Preservation Act (NHPA), agencies must "take into account the effect of the[ir] undertaking[s] on any historic property." 54 U.S.C. § 306108. Agencies must make reasonable efforts to identify historic properties affected by federal actions

and, with the input of consulting parties, "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects" on those historic properties. See 36 C.F.R. § 800.4-800.6. Like NEPA, the NHPA is a purely procedural statute. See *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 755, 355 U.S. App. D.C. 372 (D.C. Cir. 2003). Because the Highway Administration followed the procedure required by the NHPA, the agency's conclusions are entitled to deference. We add, for the sake of completeness, that the NHPA (like NEPA and section 4(f)) applies only to projects that require federal approval. See *Old Town*, 333 F.3d at 735-36.

In a final variation of the same argument, Protect Our Parks urges us to revoke the Army Corps of Engineers' permits, which were issued under the Clean Water Act and Rivers and Harbors Act, because (once again) of the failure to consider alternative locations for the Center. This argument fails for the same reasons it failed under NEPA, the NHPA, the DOTA, and UPARR. The Corps had no control over the City's decision to build the Center in Jackson Park and no authority to force the City to pick a different site.

D

Finally, Protect Our Parks brought an anticipatory demolition claim under section 110(k) of the National Historic Preservation Act. Section 110(k) of the NHPA bars federal agencies from issuing a permit or other assistance to applicants who "intentionally significantly

adversely affected a historic property to which the grant would relate" with "intent to avoid the requirements" of the NHPA. 54 U.S.C. § 306113. But the statute includes an exception when the agency "determines that circumstances justify granting the assistance." *Id.*

In 2018, the City began clearing trees in Jackson Park in preparation for the construction of a new track-and-field complex. When the Highway Administration learned about the tree clearing, it requested a written explanation from the City. The City explained that the Obama Foundation had donated funds to build a new track for the community, but that the track lay outside the proposed grounds of the Obama Presidential Center, that the funds came with no conditions related to the Center, and that the City had consulted with the Park Service, which assured the City that the track-and-field project was not subject to federal review. The Highway Administration investigated further and determined that the track should factor into the federal government's section 106 and NEPA review, but that the City never acted *with the intent* to avoid section 106's requirements. Protect Our Parks has not pointed to any evidence to undermine those conclusions, nor has it provided evidence that the City intended to avoid the NHPA's requirements, and so it cannot prevail on its anticipatory-demolition claim.

In a last-ditch effort, Protect Our Parks argues that the district court abused its discretion by not holding an evidentiary hearing about several declarants' statements that are not in the administrative record. Judicial review in APA actions is typically confined to the administrative

record, with several exceptions not relevant here. See *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573-74, 204 L. Ed. 2d 978. Because Protect Our Parks has not even attempted to make a "strong showing" that any exception to the general rule applies in this case, we limit our review to the ample administrative record and reject the call to supplement that record through an evidentiary hearing. *Id.*

III

We AFFIRM the district court's order denying plaintiffs' motion for a preliminary injunction.

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED MARCH 29, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 21-cv-2006
Judge John Robert Blakey

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

Plaintiffs,

vs.

PETE BUTTIGIEG, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

This dispute is the latest effort by Plaintiff Protect Our Parks, joined by various individuals and the Nichols Park Advisory Council to block the construction of the Obama Presidential Center ("OPC") in Jackson Park on the south side of Chicago. Plaintiffs sue the City of Chicago ("City"), the Chicago Park District ("Park District"), the Barack Obama Foundation ("Obama Foundation") and various federal agencies, bringing eight state law claims and seven federal claims. [1]. The City, Park District and

Obama Foundation move to dismiss all of the state law claims, [28]. For the reasons set forth below, the Court grants Defendants' motion [28] in its entirety.

I. Factual Background[1]

In 1869, the Illinois General Assembly passed "An Act to Provide for the Location and Maintenance of a Park for the Towns of South Chicago, Hyde Park and Lake." [1] ¶ 37; Private Laws, 1869, vol. 1, p. 358. The statute provided for the formation of a board of public park commissioners to be known as the "South Park Commissioners." *Id.* The Act authorized these commissioners to select certain lands, which, when acquired by said Commissioners, "shall be held, managed and controlled by them and their successors, as a public park, for the recreation, health and benefit of the public, and free to all persons forever." Private Laws, 1869, vol. 1, p. 360. Pursuant to this authority, the commissioners acquired the land now known as Jackson Park. [1] ¶ 37. The Illinois Legislature enacted the Park District Consolidation Act in 1934, which consolidated the existing park districts, including the South Park District, into the Chicago Park District. *Id.*; 70 ILCS 1505/1. The Park District therefore came to hold Jackson Park in the public trust.

---

1. The Court takes these facts from the Plaintiffs' Complaint and its attachments. Given the extensive history of this case, the Court assumes general familiarity with the factual background and this Court's prior orders (incorporated herein by reference as needed) and limits its factual recitation to a brief summary of those facts essential to the motion to dismiss now before it.

Appendix D

In March 2014, the Obama Foundation initiated a nationwide search for the future site of the OPC. [1] ¶ 39. Both the University of Chicago and the University of Illinois Chicago proposed potential locations in Chicago. *Id.* ¶ 40. In 2015, the City Counsel passed an ordinance ("2015 Ordinance") outlining a number of proposed sites for the OPC and authorizing the transfer of a portion of Jackson Park to the City, in the event the Obama Foundation was interested in building and operating the OPC in Jackson Park. *Id.* ¶ 111; [1-1], Ex. 1. The proposed Jackson Park site lies on the western edge of Jackson Park and includes existing parkland bounded by South Stony Island Avenue on the west, North Midway Plaisance on the north, South Cornell Drive on the east, and East Hayes Drive on the south. [1] ¶ 54; [29-1] ("Report to the Planning Commission") at 2.[2] Around the same time, the Illinois General Assembly also amended the Illinois Park District Aquarium and Museum Act ("Museum Act") to explicitly authorize cities and park districts to purchase, erect, and maintain museums, including presidential libraries, in public parks and to permit certain third parties to build, improve, maintain and operate these museums. *See* 70 ILCS 1290/1.

The Chicago Plan Commission and Chicago City Council reviewed the matter, held public hearings, and subsequently approved this inter-governmental transfer of a portion of Jackson Park. [1] ¶¶ 58-63; [1-1]. As part of its approval, the City Council passed an ordinance

2. Plaintiffs rely on the Planning Commission Report in their Complaint, [1] ¶ 60, so the Court may properly consider it on a motion to dismiss.

("2018 Ordinance") allowing the City to accept title to the Jackson Park site from the Park District and to enter into agreements governing the Obama Foundation's use of the site. [1] ¶¶ 63-66; [1-1], Ex. 2. One of the agreements authorized by the 2018 Ordinance—the 2018 Use Agreement—sets the terms by which the Obama Foundation may use the Jackson Park site for the OPC. [1-1], Ex. 2 (Ex. D). In addition to the various structures that will comprise the OPC, the site will include new parkland created by vacating portions of streets adjacent to existing parkland. [1] ¶¶ 54-57, 65-67, 73; [29-2] ("May 17, 2018 Report to the Chicago Plan Commission").[3]

II. Procedural Background

In May 2018, Plaintiff Protect Our Parks and several individuals sued the City of Chicago and the Chicago Park District seeking to stop the construction of the OPC in Jackson Park, bringing public use doctrine and *ultra vires* state law claims and multiple federal constitutional claims. This Court granted summary judgment to the defendants on all claims, *see Protect Our Parks, Inc. v. Chi. Park Dist.*, 385 F. Supp. 3d 662 (2019) (*POP I*); and plaintiffs appealed, *see Protect Our Parks, Inc. v. Chicago Park District*, 971 F.3d 722, 728 (7th Cir. 2020) (*POP II*), *cert. denied sub nom. Protect Our Parks, Inc. v. City of Chicago*, 141 S. Ct. 2583, 209 L. Ed. 2d 600, 2021 WL 1602736 (U.S. 2021). The Seventh Circuit affirmed summary judgment on the federal claims but vacated the ruling on the state law claims, finding that the plaintiffs

3. The Court may also rely on this Report because Plaintiffs rely on it in their Complaint, [1] ¶¶ 61-62.

failed to demonstrate Article III standing. *Id.* at 732. On remand, this Court dismissed the state law claims for lack of jurisdiction.

Undeterred, Protect Our Parks, along with new individuals and the Nichols Park Advisory Council (collectively "Plaintiffs") sue again to stop construction on the OPC. [1]. They again bring familiar public trust doctrine and *ultra vires* claims (Counts VI and VII), but add six new state law claims for: violation of Article VIII, Section 1 of the Illinois Constitution (Count VIII); violation of the Illinois Constitution Takings Clause (Count IX); improper delegation of authority (Count XI); violation of Article I, Section 2 of the Illinois Constitution (Count XII); violation of Article I, Section 16 of the Illinois Constitution (Count XIII); and violation of the Illinois State Agency Historic Preservation Resources Act (Count XV). *Id.* They also bring seven federal claims relating to the OPC project's federal regulatory review. Accordingly, in addition to suing the City, the Park District, and the Obama Foundation, they also sue numerous federal officials in their official capacities. *Id.*

Plaintiffs moved for a preliminary injunction based upon their federal claims, which the Court denied. [94]. An appeal of that decision remains pending.[4] The City,

4. Of course, this Court retains jurisdiction to decide Defendants' motion to dismiss notwithstanding the pending preliminary injunction appeal. *See, e.g., Wis. Mut. Ins. Co v. United States*, 441 F.3d 502, 505 (7th Cir. 2006) ("[A]n appeal taken from an interlocutory decision does not prevent the district court from finishing its work and rendering a final decision. This is so for appeals concerning preliminary injunctions." (citing *Kusay v. United*

Park District and Obama Foundation ("Defendants" for purposes of this opinion) also moved to dismiss all eight state law claims, [28], and is now ripe for decision.

Before the Court considers the merits of Defendants' motion [28], however, it pauses to address the binding effect of the rulings in the prior iteration of this dispute. This Court's prior summary judgment ruling on the state law claims does not implicate res judicata principles, nor does it constitute law of the case, since the Seventh Circuit found the plaintiffs lacked standing. *POP II*, 971 F.3d at 728. Of course, the Seventh Circuit's decision, however, does bind this Court and the parties, and constitutes law of the case.

III. Standard of Review

To survive a motion to dismiss under Rule 12(b)(6), "the complaint must provide enough factual information to state a claim to relief that is plausible on its face and raises

---

States, 62 F.3d 192, 193-94 (7th Cir. 1995)). Further, the Court finds no reason to delay decision on this motion to dismiss the state law claims pending outcome of Plaintiffs' injunction appeal, because Plaintiffs only sought a preliminary injunction based on their federal law claims. *Cf. May v. Sheahan*, 226 F.3d 876, 880 n.2 (7th Cir. 2000) (holding that even in those cases in which an interlocutory appeal may divest a district court of some aspects of a case, the district court has "authority to proceed forward with portions of the case not related to the claims on appeal, such as claims against other defendants or claims" that "cannot be (or simply are not) appealed."); *City of Chi. v. Sessions*, 321 F. Supp. 3d 855, 881 (N.D. Ill. 2018) (noting that, even if a district court retains jurisdiction to decide the merits of a case while an interlocutory injunction appeal remains pending, it "should use such power only in a manner that preserves the status quo and thus the integrity of the appeal.").

a right to relief above the speculative level." *Haywood v. Massage Envy Franchising, LLC*, 887 F.3d 329, 333 (7th Cir. 2019). It tests the sufficiency of the complaint, not the merits of the case. *See Gibson v. City of Chi.*, 910 F.2d 1510, 1520 (7th Cir. 1990). A court must accept as true all well-pled factual allegations; it need not accept mere legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Further, when an exhibit "incontrovertibly contradicts the allegations in the complaint, the exhibit ordinarily controls, even when considering a motion to dismiss." *Bogie v. Rosenberg*, 705 F.3d 603, 609 (7th Cir. 2013).

IV. Analysis

A. Standing

The Seventh Circuit's decision in *POP II* provided a strong reminder that, before a court can address the merits of any claim, it must assure itself of its jurisdiction. 971 F.3d at 729. Defendants summarily posit that Plaintiffs now sufficiently allege standing, [29] at 11, but the Court will nevertheless spend a moment on standing before proceeding to the merits.

To establish Article III standing, a plaintiff must show that it has suffered an "injury in fact" that is "fairly traceable" to the defendant's conduct and would likely be "redressed by a favorable decision." *Collins v. Yellen*, 141 S. Ct. 1761, 1779, 210 L. Ed. 2d 432 (2021) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). In *POP II*, the Seventh

Circuit held that the plaintiffs lacked Article III standing on their state law claims because they did not identify any injuries to their "separate concrete interests." 971 F.3d. at 731. The court also held that their status as municipal taxpayers did not confer standing because they failed to establish that the City spent any taxpayer monies on the allegedly illegal actions. *Id.* at 734.

Here, to establish standing, Plaintiffs newly allege that, for years, the individual Plaintiffs, as well as members of Protect Our Parks and NPAC, have used and enjoyed Jackson Park and the surrounding public areas and intend to continue using them for recreation and to, *inter alia*, study the architecture and enjoy the aesthetics and animal population. [1] ¶¶ 12-19. The Complaint also alleges that Plaintiffs have standing as municipal taxpayers. *Id.* ¶ 22

The allegations regarding Plaintiffs' use and enjoyment of the property suffice to demonstrate a concrete injury cognizable under Article III for their state law claims *See POP II*, 971 F.3d at 731 n.1 (noting that such injuries suffice to establish Article III standing but finding plaintiffs had failed to allege such injuries (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) and citing *Lujan*, 504 U.S. at 562-63 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing."))).[5] The Court now proceeds to the merits.

5. As in the last case, Plaintiffs again fail to establish standing for their state law claims based on their alleged status as municipal taxpayers. In *POP II*, the court held that Plaintiffs' municipal

B. Public Trust Violation (Count VI)

In *POP II* and again here, Plaintiffs' primary state law claim rests on the public trust doctrine. [1]. As the Seventh Circuit succinctly explained, "the public trust doctrine, established by American law in *Illinois Central Railroad Co. v. Illinois*, prohibits a state from alienating its interest in public lands submerged beneath navigable waterways to a private party for a private purpose." *POP II*, 971 F.3d 722, 729 (7th Cir. 2020). It may only alienate such public land to a private party "if the property will be 'used in promoting the interests of the public' or 'can be disposed of without any substantial impairment of the public interest in the lands and water remaining.'" *Id.* (quoting *Illinois C. R. Co.*, 146 U.S. at 453).

Although this original doctrine only applied to "navigable waterways," Illinois has extended the doctrine to other land such that, once the "land has been dedicated to a public purpose,...the government 'holds the properties in trust for the uses and purposes specified and for the benefit of the public.'" *POP II*, 971 F.3d at 730 (quoting *Paepcke v. Pub. Bldg. Comm'n of Chi.*, 46 Ill. 2d 330, 263

---

taxpayer status did not confer standing because they failed to identify both "an action on the city's part that is allegedly illegal" related to the City's monetary expenditures or "adequately show[] that city tax dollars will be spent on that illegal activity." 971 F.3d at 736. So too here, and thus *POP II* controls. Plaintiffs do not allege anything new on these points. Accordingly, even though they have standing for their state law claims (to the extent that the claims rest upon Defendants' alleged illegal use of Jackson Park), they do not have standing via any expenditure of City money related to the OPC site projects.

N.E.2d 11, 15 (Ill. 1970)). This is precisely how Jackson Park became public trust land pursuant to the Illinois Legislature's 1869 grant. *See* § I, *supra*.

1. The Standard of Review Applicable to Plaintiffs' Public Trust Claim.

In moving to dismiss Plaintiffs' public trust claim, Defendants argue that Illinois law affords different levels of deference to a legislature's reallocation of public trust land depending on whether the land constitutes never submerged, formerly submerged, or presently submerged land. [29] at 20. Defendants contend that the OPC site constitutes never submerged public land[6] and argue that Illinois law affords great deference to the legislature's reallocation of statutorily-created, never submerged land pursuant to *Paepcke*, 263 N.E.2d at 15-16. [29] at 20-21. According to Defendants, pursuant to *Paepcke*, the Court need only look to the Museum Act to determine whether it reflects the requisite "manifestation of legislative intent" to reallocate portions of Jackson Park here. [29] at 21.

Plaintiffs disagree. They do not dispute that Jackson Park constitutes never submerged land. Instead, they argue that Illinois law does not (or perhaps should not) adjust its level of scrutiny based on the type of land at issue. [69] at 20 (arguing that "[w]hether land was currently submerged, formerly submerged or never submerged has absolutely nothing whatsoever to do with

6. This was a hotly disputed issue in the prior case. *See POP I*, 385 F. Supp. 3d at 677-78 (discussing the parties' dispute and finding that Jackson Park constitutes never submerged land).

the appropriate level of deference"). Plaintiffs contend that the Court cannot look solely to the Museum Act because "[s]imple legislative authorization never satisfies the requisites of the public trust doctrine." *Id.* at 19. Plaintiffs argue that the Court must apply Wisconsin's five-part test, which Plaintiffs insist the *Paepcke* Court adopted as the standard to resolve public trust reallocation disputes. *Id.* at 22 (quoting *Paepcke*, 263 N.E.2d at 19 and discussing Wisconsin's five-part test set out in *City of Madison v. State*, 1 Wis. 2d 252, 83 N.W.2d 674 (Wis. 1957)).

Here, Defendants' approach prevails. Illinois applies the public trust doctrine using varying levels of deference, based upon the property's relationship to navigable waterways. *See, e.g.*, *Paepcke*, 263 N.E.2d at 15-19 (applying public trust doctrine to never-submerged park land); *Friends of the Parks v. Chi. Park Dist.*, 203 Ill. 2d 312, 786 N.E.2d 161, 169-170, 271 Ill. Dec. 903 (Ill. 2003) (applying public trust doctrine to formerly submerged land); *Lake Michigan Federation v. United States Army Corps of Engineers*, 742 F. Supp. 441, 444-46 (N.D. Ill. 1990) (applying public trust doctrine to presently submerged land). The Illinois Supreme Court in *Paepcke* recognized that the Illinois legislature enjoys significant control over allocation of statutorily created never-submerged public trust land. There, the court considered allowing Chicago's Public Building Commission, with the Park District's cooperation, to construct a school-park facility on never-submerged land within Washington Park. *Id.* at 14. As in this case, the land at issue derived from the 1869 Act. *Id.* at 13. The *Paepcke* Court affirmed the trial court's dismissal of plaintiffs' challenge under the public trust

doctrine because "sufficient manifestation of legislative intent" existed to "permit the diversion and reallocation contemplated" by defendants' plan. *Id.* at 18-19.

During oral argument on Defendants' motion, Plaintiffs insisted that "there is no hint in [*Paepcke*] of any deference that was given to the government." [113] at 46:7-8. Not so. The *Paepcke* Court held that "courts can serve only as an instrument of determining legislative intent as evidenced by existing legislation measured against constitutional limitations" and "[i]n this process the courts must deal with legislation as enacted and not with speculative considerations of legislative wisdom." *Id.* This language plainly underscores deference to legislative intent over reallocation of statutorily-created public use land.

Further, contrary to Plaintiffs' insistence, *Paepcke* did not adopt Wisconsin's five-factor approach to resolve reallocation disputes. [69] at 22. Although the *Paepcke* Court noted the approach that Wisconsin had taken in two cases, it explicitly held that the Wisconsin approach was "not controlling under the issues as presented in this case" because there existed a statute that evinced the requisite legislative intent. 263 N.E.2d at 19; *see also Friends of the Parks v. Chi. Park Dist.*, 14-cv-9096, 2015 U.S. Dist. LEXIS 30291, 2015 WL 1188615, at *5 (N.D. Ill. Mar. 12, 2015) (*Lucas I*) (noting that the "'Wisconsin test' . . . was not adopted as applicable in public trust cases, and the Illinois Supreme Court again declined to use the test in *Friends of the Parks*." (citing *Friends of the Parks*, 786 N.E.2d at 170)). Instead, the court merely commented

that Wisconsin's factors "might serve as a useful guide for future administrative action."[7] *Paepcke*, 263 N.E.2d at 19.

Notably, although Plaintiffs insist that *Paepcke* adopted the Wisconsin approach, they acknowledged in their brief, [69] at 23, and at oral argument, [113] at 30:15-21, 40:6-12, that the Seventh Circuit disagrees when it held:

> Once such land has been dedicated to a public purpose, the Illinois Supreme Court has explained, the government "hold[s] the properties in trust for the uses and purposes specified and for the benefit of the public." *Paepcke*, 263 N.E.2d at 15. Dedication to a public purpose isn't an "irrevocable commitment[]," *id.* at 16, and judicial review of any reallocation is deferential, particularly if the land in question has never been submerged. Nonetheless, the doctrine requires courts to ensure that the legislature has made a "sufficient manifestation

7. At most, *Paepcke* suggests that, if no authorizing legislation exists from which a court can infer legislative intent, then the Wisconsin factors may prove useful. For example, in *Clement v. O'Malley*, the Appellate Court affirmed dismissal of a public trust claim relating to the Park District's proposal to construct a golf driving range in Jackson Park. 95 Ill. App. 3d 824, 420 N.E.2d 533, 540-41, 51 Ill. Dec. 119 (Ill. App. Ct. 1981), *af'd sub nom. Clement v. Chi. Park Dist.*, 96 Ill. 2d 26, 449 N.E.2d 81, 84, 70 Ill. Dec. 207 (Ill. 1983). There, the court found that there did not exist any authorizing legislation from which the court could infer sufficient legislative intent, so instead it applied the Wisconsin approach to affirm dismissal. *Id.*

> of legislative intent to permit the diversion and reallocation" to a more restrictive, less public use. *Id.* at 18.

POP II, 971 F.3d at 730. Plaintiffs argue that the Seventh Circuit "inelegantly stitches together three disconnected statements" from *Paepcke* and "thus misstates" its logic. [69] at 23; *see also* [131] at 42:6-10, 48:20-49:2. Despite Plaintiff's unfounded criticism, however, the Seventh Circuit's interpretation controls here.

Finally, Plaintiffs also argue that this case requires a "heightened degree of scrutiny given both the lack of diligence and self-evident insider favoritism" that led to the "flawed transactions that the City and Park District have entered into with the Obama Foundation." [1] ¶ 235. According to Plaintiffs, this purported heightened scrutiny derives from the private trust context, which imposes fiduciary duties on trustees; and thus, public trusts impose (or perhaps, should impose) the same fiduciary obligations on government actors. [69] at 19-20. ("[A]ny trust over any kind of resource, whether public or private, imposes a standard set of fiduciary duties."). Because of these purported fiduciary duties, Plaintiffs argue, this Court must "second-guess" the "particular merits of legislative judgments" about reallocation of any public trust land to counter "the evident dangers of self-interest [*sic*] political actors." *Id.* at 21.

As Defendants rightly point out, [29] at 28, Illinois law does not impose public trust fiduciary duties analogous to those in the private trust context, nor does it recognize

some "heightened scrutiny" based upon the concept of public trust fiduciary duties. This Court, sitting in diversity, must apply Illinois law as it exists, not as Plaintiffs think it ought to be. As the Supreme Court instructs, "state law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law'." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237, 61 S. Ct. 179, 85 L. Ed. 139 (1940). Having done that above, the Court concludes that Illinois law affords considerable deference to reallocation of statutorily-created public use land. Courts need only examine whether there exists "'sufficient manifestation of legislative intent to permit the diversion and reallocation" at issue. *Paepcke*, 263 N.E.2d at 18). If it finds such an intent, then any public trust claim fails as a matter of law.

2. Legislative Intent and The Museum Act

The Court now looks to the legislative intent here. Defendants argue that the Museum Act's language reflects the requisite "manifestation of legislative intent." [29] at 23 (quoting 70 ILCS 1290/1). The Court agrees.

The Museum Act explicitly authorizes cities and park districts with control or supervision over public parks to:

> purchase, erect, and maintain within any such public park or parks edifices to be used as aquariums or as museums of art, industry,

> science, or natural or other history, *including presidential libraries, centers, and museums....*

70 ILCS 1290/1 (emphasis added). The Museum Act also permits the City to contract with private parties to build a presidential center:

> The corporate authorities of cities and park districts...[may] permit the directors or trustees of any corporation or society organized for the construction or maintenance and operation of an aquarium or museum as herinabove described to erect, enlarge, ornament, build, rebuild, rehabilitate, improve, maintain, and operate its aquarium or museum within an public park...*and to contract with any such directors or trustees of any such aquarium or museum relative to the erection, enlargement, ornamentation, building, rebuilding, rehabilitation, improvement, maintenance, ownership, and operation of such aquarium or museum.*

Id. (emphasis added).

Overall, this legislative directive states a clear, broad, comprehensive, and definite intention to allow the City to contract with directors or trustees of the museum (the Obama Foundation) to build a president center (the OPC) in a public park (Jackson Park). *See, e.g., People v. Pack*, 224 Ill. 2d 144, 862 N.E.2d 938, 940, 308 Ill. Dec. 735 (Ill. 2007) ("The best indication of legislative intent

is the statutory language, given its plain and ordinary meaning."). The above quoted language also reflects the legislature's determination that presidential centers, as a type of museum, remain consistent with a parcel's designation as public parkland. *See, e.g., Furlong v. S. Park Comm'rs.*, 320 Ill. 507, 151 N.E. 510, 511 (Ill. 1926) (declining to enjoin South Park Commissioner's efforts to issue bonds to renovate the Fine Arts Building to include a museum—now the Museum of Science and Industry—in Jackson Park, because park purposes "are not confined to a tract of land with trees, grass and seats, but mean a tract of land ornamented and improved as a place of resort for the public, for recreation and amusement of the public."); *Fairbank v. Stratton*, 14 Ill. 2d 307, 152 N.E.2d 569, 575 (Ill. 1958) (upholding construction of an exposition building and auditorium—now McCormick Place convention center—on submerged land under the public trust doctrine). Overall, the Illinois General Assembly, through the Museum Act, sufficiently authorizes the construction and operation of the OPC in Jackson Park.

Nonetheless, Plaintiffs argue that the reallocation here also violates the Public Trust Doctrine because the 2018 Use Agreement essentially gave the Obama Foundation the OPC site for free during which time the Obama Foundation will enjoy exclusive use of it and derive all economic value from it. [69] at 32-33. They argue that a trustee may never "transfer any property held in trust to a private party unless, at the very least, he or she receives full compensation for the property transferred." [69] at 32. Plaintiffs acknowledge that the Use Agreement does not explicitly grant the Obama Foundation exclusive use, but

instead insist that discovery must proceed to determine whether the Use Agreement is, in fact, a "lease in disguise and reflective of a transfer equivalent to a sale." [69] at 33. Overall, Plaintiffs argue that, if the Use Agreement constitutes a lease equivalent to a sale, then the Public Use Doctrine requires that the Obama Foundation pay the City "full compensation" for the sale. *Id.*

Plaintiffs rely heavily upon *Friends of the Park v. Chicago Park Dist.*, 160 F. Supp. 3d 1060, 1068 (N.D. Ill. 2016) (*Lucas II*), in which a court evaluated a Park District proposal to enter into a 99-year ground lease with the Lucas Museum of Native Arts under the Museum Act. [69] at 32-35. There, the court denied the plaintiffs' motion to dismiss public trust doctrine, due process and *ultra vires* claims, finding that, *inter alia*, the 99-year ground lease, by its terms, suggested the leaseholders were "owners" in a "constitutional sense" because it gave the leaseholders ownership rights over the museum facilities and other improvements, and "exclusive control over the construction, maintenance and operation, repair and management of the building." *Lucas II*, 160 F. Supp. 3d at 1062-63, 1068.

Even assuming that *Lucas II* was rightly decided (which this Court need not address), that ruling is inapposite. First, it involved formerly submerged land, rather than statutorily-created, never-submerged parkland, and thus the case involved a different level of deference. *Id.* at 1063. Second, the ground lease at issue there cannot be analogized to the 2018 Use Agreement here. The 2018 Use Agreement—which Plaintiffs attach

to the Complaint, [1-2], Ex. 2 (Ex. D)—unambiguously provides that the City retains ownership over the OPC site. *Id.* §§ 2.1-2.2, 4.4. Further, unlike the lease agreement with the private party in *Lucas II*, the Obama Foundation will bear the cost to construct the OPC facilities, and then must give the City ownership over the facilities upon completion. *Id.* Clearly, the City also does not give up control over the OPC site: if the Foundation ceases to use the OPC for its permitted purposes under the Use Agreement, the City may terminate the Agreement. *Id.* §§ 6.1-6.2. And, as Defendants point out, [29] at 24, the 2018 Use Agreement does not give the Obama Foundation the right to exclude the public from the OPC site but requires it to remain open to the public during Park District hours, [1-2] § 6.2(a)-(c).

Simply put, the 2018 Use Agreement is not a lease agreement giving the Obama Foundation effective "ownership" in the "constitutional sense." Plaintiffs' contrary allegations fail as a matter of law. *See Forrest v. Universal Sav. Bank, F.A.*, 507 F.3d 540, 542 (7th Cir. 2007) (holding that a court need not credit allegations contradicted by exhibits attached to a complaint).

Overall, the Court finds that the OPC does not violate the public trust doctrine as a matter of law, based upon the legislature's manifestation of intent in the Museum Act (which is all this Court must examine). Nonetheless, in the alternative, the Court next analyzes Plaintiffs' public trust claim based upon the level of scrutiny applicable to formerly submerged public trust land for clarity and finality.

3. Formerly Submerged Land: No Corresponding Benefits Test

The scrutiny used for formerly submerged land holds that a diversion of formerly submerged parkland violates the public trust only if it: (1) does not contain sufficient legislative authorization, pursuant to *Paepcke*; and (2) primarily benefits a private entity, with no corresponding public benefit. *See Friends of the Parks*, 786 N.E.2d at 169-70 (citing *Paepcke*, 263 N.E.2d at 21).

In *Friends of the Parks*, the Illinois Supreme Court examined a project to improve Burnham Park and Soldier Field and give the Chicago Bears football team certain use rights. *Id.* The plaintiffs argued that the project (and the legislation that permitted it) violated the public trust doctrine because it allowed a private party (the Bears) to use and control Soldier Field "for its primary benefit with no corresponding public benefit." *Id.* The court disagreed. It first noted that the City will continue to own Burnham Park and Soldier Field and did not abdicate control or ownership to the Bears. It also found that the legislature, through the Sports Facilities Authority Act, had manifested clear intent for the park's reallocation and renovations. And, finally, it found that the public will benefit from the improvements to Soldier Field and Burnham Park. *Id.* Notably, it also held that the project did not violate the public trust doctrine even if the Bears would also benefit from it. *Friends of the Parks*, 786 N.E.2d at 170.

The same holds true here as a matter of law. As discussed above, the City did not abdicate control or ownership of the OPC site to the Obama Foundation and the Museum Act manifests clear legislative intent for the OPC. Further, the Museum Act confirms that presidential centers, like the OPC here, confer a public benefit because they "serve valuable public purposes, including, but not limited to, furthering human knowledge and understanding, educating and inspiring the public, and expanding recreational and cultural resources and opportunities." 70 ILCS 1290.[8] This explanation of the OPC's public benefits aligns with well-established caselaw. *See, e.g.*, *Furlong*, 151 N.E. at 511 (Ill. 1926) (finding that because parks exist as places "of resort for the public, for recreation and amusement" the "construction and maintenance of a building for museums, art galleries...and many other purposes, for the public benefit" are legitimate park purposes."); *Fairbank*, 152 N.E.2d at 575 (upholding construction of an exposition building and auditorium on

8. While *Friends of the Parks* was decided on summary judgment, the court focused on the legislation and the government's stated purpose for the project, rather than engage in an independent analysis of the purpose. It also relied on *People ex rel City of Urbana v. Paley*, 68 Ill. 2d 62, 368 N.E.2d 915, 11 Ill. Dec. 307 (Ill. 1977) in which the Illinois Supreme Court found redevelopment of blighted public land conferred a public benefit after reviewing the government's stated public purpose for the redevelopment project. *See Friends of the Parks*, 271 Ill. Dec. at 910-11. Here, because the legislature set out the public benefit of presidential centers and also allowed the City to contract with third parties to construct, maintain and operate such a facility, Plaintiffs' public trust doctrine claim can be resolved as a matter of law on a motion to dismiss even under the heightened standard for formerly-submerged public trust land.

submerged land in Burnham Park because they were "in the public interest" and thus did not violate the public trust doctrine).

Plaintiffs insist the OPC primarily benefits the Obama Foundation because the 2018 Use Agreement gives to the Obama Foundation all "economic value" associated with it while the City (and public) get virtually nothing in return. [69] at 33. Even if the Court assumes that the Obama Foundation will enjoy all the "economic value"—even though that allegation finds no support in 2018 Use Agreement[9] —that does not invalidate it under *Friends of the Parks'* heightened scrutiny test. Plaintiffs' narrow focus on the OPC's "economic value" ignores the incontrovertible fact that public benefits are not measured merely in terms of "economic value." As set out above, the OPC will confer public benefits even if they are not "economic" in nature. And, as the *Friends of the Parks* Court made clear, private parties may enjoy private benefits from public land use without it running afoul of the public trust doctrine. 786 N.E.2d at 169-70.

---

9. The 2018 Use Agreement's terms demonstrate that the City will enjoy some "economic value." First, the Obama Foundation will bear the cost to construct the OPC, which it must then give to the City. This certainly constitutes a significant "economic value" for the City. It also provides that all the revenue the Obama Foundation collects shall go to the "the use, maintenance and management" of the OPC or shall be deposited into the Obama Foundation's Endowment whose sole purpose is to pay "the costs to operate, enhance and maintain" the OPC. [1-1], Ex. 2 (Ex. D § 6.9). Thus, the City will enjoy some of the "economic value" of revenue used to maintain property and facilities that it owns.

Accordingly, even accepting Plaintiffs' unsupported "economic value" allegation as true, the OPC does not violate the public trust doctrine under the *Friends of the Parks* heightened burden standard applicable to formerly-submerged lands. Accordingly, Plaintiffs' public trust doctrine claim still fails as a matter of law under the heightened (and inapplicable) standard.

C. *Ultra Vires* Claim (Count VII)

Plaintiffs also bring a claim that the City and Park District acted *ultra vires* based on multiple theories. First, Plaintiffs allege that the Park District's transfer of the Jackson Park site to the City violated the Illinois Property Transfer Act, 50 ILCS 605/1, and contravened law that prohibits "the Park District from a transfer to a nongovernmental entity without an 'exchange for other real property of substantially equal or greater value.'" *Id.* ¶¶ 239-40. Second, Plaintiffs allege that the 2018 Use Agreement violates the Museum Act, which "requires that a lease be utilized by the City." *Id.* ¶ 241. Third, in their Response, Plaintiffs contend that the City acted *ultra vires* during the federal review process, when it failed to review alternatives and "exerted improper dominance and control over" the process. [69] at 43.

In moving to dismiss, Defendants argue that a plain reading of the relevant statutes dispels Plaintiffs' theories. [29] at 23-24, 30-33. They also argue that Plaintiffs fail to allege how the City acted beyond its authority during the federal review process; and even if they could marshal such evidence, the City's actions during that process have

no bearing on whether the Park District could transfer the land to the City, or whether the Foundation may use the OPC site. [78] at 18. Again, the Defendants prevail on the record here.

1. The Property Transfer Act Authorizes the Park District's Transfer to the City.

Plaintiffs' *ultra vires* theory based upon the Property Transfer Act, 50 ILCS 605/1, rests on Section 2 of the Act, which provides:

> If the territory of any municipality shall be wholly within, coextensive with, or partly within and partly without the corporate limits of any other municipality . . . and the first mentioned municipality (herein called "transferee municipality"), shall by ordinance declare that it is necessary or convenient *for it to use, occupy or improve* any real estate held by the last mentioned municipality (herein called the "transferor municipality") in the making of any public improvement or for any public purpose, the corporate authorities of the transferor municipality shall have the power to transfer *all of the right, title and interest* held by it immediately prior to such transfer, in and to such real estate, whether located within or without either or both of said municipalities, to the transferee municipality upon such terms as may be agreed upon by the corporate authorities of both municipalities . . .

Id. at 605/2 (emphases added). Plaintiffs contend that this provision only authorizes the Park District to transfer the Jackson Park site if the transferee itself (here, the City) will "use, occupy, or improve" the site. [1] ¶¶ 239-40. Because, according to Plaintiffs, the City impermissibly "transferred exclusive possession to the Obama Foundation," the Park District's transfer violates the Property Transfer Act. *Id.*

First, to the extent Plaintiffs' claim rests on the theory that the 2018 Use Agreement gives the Obama Foundation "exclusive possession" of the OPC site, the Court already found that it does not. It only gives the Obama Foundation the right to use, maintain, operate and improve the OPC site. [1-1], Ex. 2 (Ex. D).

Second, Plaintiffs fail to read the relevant statutory provisions in context. The Property Transfer Act remains silent as to whether municipalities can contract with third parties to improve, operate or maintain transferred land. *See* 50 ILCS 605/2. But the Museum Act expressly authorizes the City to contract with third parties "to erect, enlarge, ornament, build, rebuild, rehabilitate, improve, maintain, and operate" a presidential center. 70 ILCS 1290/0.01. Further, Article VII, § 10(a) of the Illinois Constitution permits units of local government to "contract and otherwise associate with individuals, associations, and corporations" in any manner not prohibited by law. That same section also allows local governments to "transfer any power or function, in any manner not prohibited by law or ordinance" to other units of local government. Likewise, the Intergovernmental Cooperation Act, 5 ILCS 220/2-3, allows units of local

governments to exercise, combine, transfer, and "enjoy jointly" any of their "powers, privileges, functions, or authority," except where expressly prohibited by law. Read together with the Property Transfer Act, these provisions demonstrate that: (1) the Park District and City, as individual units of local government, can separately contract with third parties on land that they already own; and (2) either of them can transfer land to the other, along with their power to contract with third parties on that land.

Moreover, Plaintiffs' proposed reading of the Property Transfer Act would create the absurd result of prohibiting transferee municipalities from ever contracting with engineers, architects, or builders to improve or manage a site. This Court rejects Plaintiffs' approach, and instead reads each of the relevant provisions of Illinois law in context, together, and gives each statute effect according to its plain terms.[10] Accordingly, Plaintiffs fail as a matter of law to make out a claim that the Park District acted *ultra vires* when it transferred the property to the City.[11]

---

10. Even if the Property Transfer Act's silence could somehow be construed as ambiguous (which it is not), this Court would reach the same result by reading each provision and construing them together (Property Transfer Act, Museum Act, Intergovernmental Cooperation Act, and Article VII, section 10(a) of the Illinois Constitution). *People v. 1946 Buick, VIN 34423520*, 127 Ill. 2d 374, 537 N.E.2d 748, 750, 130 Ill. Dec. 419 (Ill. 1989) (Illinois recognizes the doctrine of *in pari materia*, but only to resolve statutory ambiguities).

11. Plaintiffs' Complaint also alleges that the Park District acted *ultra vires* because the Park District cannot transfer public property "to a non-governmental entity without an 'exchange for

2. The Museum Act Does Not Require A Lease

Plaintiffs next allege that the City acted *ultra vires* because the Museum Act requires the City to lease the site to the Obama Foundation. [1] ¶ 241.[12] Again, not so. The Museum Act states that the City "*may* enter into a lease for an initial term not to exceed 99 years . . . to erect, enlarge, ornament, build, rebuild, rehabilitate, improve, maintain, and operate" a presidential center "together with grounds immediately adjacent". 70 ILCS 1290/0.01 (emphasis added). But it does not require a lease. Instead, the Museum Act's prior sentence—not relating to leases—controls. It authorizes the City to "contract" with "the directors or trustees of any corporation or society organized for the construction or maintenance and operation of" a presidential center relative to its "erection, enlargement, ornamentation, building, rebuilding, rehabilitation, improvement, maintenance, ownership, and

---

other real property of substantially equal or greater value.'" *Id.* ¶¶ 239-40. The Complaint does not identify the legal basis for this allegation, and Plaintiffs fail to address it in their opposition. To the extent this refers to the Illinois Park District Code, 70 ILCS 1205/10-7, which includes the Complaint's quoted "exchange" language, *id.* § 10-7(b), Plaintiffs' theory fails as a matter of law because the Park District Code does not apply to the Chicago Park District. *See id.* § 1-2(d).

12. Of course, elsewhere Plaintiffs allege that the 2018 Use Agreement, in fact, constitutes a lease agreement (albeit an impermissible one). Because the Court found that the 2018 Use Agreement by its plain terms does not constitute a Lease Agreement, the Court will still consider Plaintiffs' *ultra vires* argument notwithstanding these inconsistent allegations.

operation." *Id* The 2018 Use Agreement constitutes such a "contract." Accordingly, as a matter of law, the City did not act *ultra vires* when it entered into it.

3. Plaintiffs Fail to Identify Any other *Ultra Vires* Actions.

The Court has now addressed Plaintiffs' *ultra vires* claims as set forth in their Complaint. [1] ¶¶ 239-41. Nonetheless, in their Response, Plaintiffs conclusorily state that their Complaint "identifies many activities that are *ultra vires*" including the City's conduct during the federal review process. [69] at 43. Specifically, Plaintiffs assert that the City failed to review certain alternatives and "exerted improper dominance and control over" the federal review process. *Id.* (citing [1] ¶¶ 74, 88-89, 190-92). With respect to its federal review process allegations, Plaintiffs fail to explain how such conduct, even if true, constitutes an *ultra vires* act.[13] To the extent Plaintiffs imply that the City's conduct during the federal review process rendered *ultra vires* the 2018 Use Agreement or land transfer, this too fails to state a plausible claim. As Defendants point out, the City's actions in the 2018 federal review process—undertaken after the Park District transferred the land to the City and after the City executed the 2018 Use Agreement—have no bearing on whether state law authorized the land transfer or the 2018 Use Agreement.

13. Plaintiffs bring separate federal claims based, in part, on these federal review process allegations. The Court offers no opinion here about the viability of those claims.

Finally, although Plaintiffs assert that the Complaint somehow "identifies many activities that are *ultra vires*," [69] at 43, the Court need not accept as true such conclusory allegations, nor will it attempt to divine other theoretical *ultra vires* acts from the Complaint's factual allegations that Plaintiffs have failed to develop in their briefing. In short, Plaintiffs' Complaint fails to allege a plausible *ultra vires* claim, and thus, it is dismissed without prejudice.

D. Illinois Constitution Article VIII, Section 1 (Count VIII)

Plaintiffs' Count VIII alleges that the 2018 Use Agreement also violates Article VIII, Section 1 of the Illinois Constitution. [1] ¶¶ 242-45. This provision, known as the Public Purpose Clause, states that "[p]ublic funds, property or credit shall be used only for public purposes." Ill. Const. Art. VIII, § 1(a). Plaintiffs allege that the Use Agreement violates this clause because it transfers public property to the Obama Foundation for its sole private benefit and at public expense. [1] ¶¶ 242-45.

In order to "proceed under article VIII, section 1(a) of the Illinois Constitution, facts must be alleged indicating that governmental action has been taken which directly benefits a private interest without a corresponding public benefit." *Empress Casino Joliet Corp. v. Giannoulias*, 231 Ill. 2d 62, 896 N.E.2d 277, 293, 324 Ill. Dec. 491 (Ill. 2008) (quoting *Paschen v. Vill. of Winnetka*, 73 Ill. App. 3d 1023, 392 N.E.2d 306, 29 Ill. Dec. 749 (Ill. App. Ct. 1979)). Yet, "what is for the public good and what are public purposes are questions which the legislature must in the

first instance decide." *Empress Casino*, 896 N.E.2d at 294. Thus, "the judgment of the legislature is to be accepted in the absence of a clear showing that the purported public purpose is but an evasion and that the purpose is, in fact, private." *Id.*

Defendants move to dismiss, arguing that the Museum Act and City's 2018 Ordinance, attached to the Complaint, evinces a clear "public benefit" and Plaintiffs fail to "make a threshold showing that the findings are evasive and that the purpose of the legislation is principally to benefit private interests." [29] at 33 (quoting *Friends of the Parks*, 786 N.E.2d at 166-67). In response, Plaintiff insist that their claim must proceed to discovery to determine "who is a primary beneficiary" of the OPC. [69] at 46. They also contend that the City clearly intended to benefit the Obama Foundation and the Complaint alleges numerous "dislocations involved in bringing the OPC to Jackson Park" that support their claim. *Id.* Once again, Defendants win the day.

First, Plaintiffs contend that the key question under the Public Purpose Clause is whether the "primary beneficiary" is the public or a private entity. *Id.* This implies that the test is comparative. Not true. Illinois law asks whether there exists a public benefit, and if the "purpose sought to be achieved by the legislation is a public one and it contains elements of public benefit, then the question of how much benefit the public derives is for the legislature, not the courts." *Empress Casino*, 896 N.E.2d at 295. Therefore, if the OPC site serves a public purpose, then it does not matter if the Obama Foundation will also enjoy a private benefit or precisely how much of a

benefit it may enjoy. *See, e.g., People ex rel. City of Urbana v. Paley*, 68 Ill. 2d 62, 368 N.E.2d 915, 921, 11 Ill. Dec. 307 (Ill. 1977) ("[I]f the principal purpose and objective in a given enactment is public in nature, it does not matter that there will be an incidental benefit to private interests." (collecting cases)).

As discussed above, the Museum Act clearly indicates that museums and presidential centers like the OPC have a public purpose and provide important public benefits. Here, Plaintiffs allege nothing to demonstrate that this legislative finding is evasive or deceptive.[14] That ends the matter. But Plaintiffs disagree, asserting that their Complaint purportedly contains numerous "dislocations involved in bringing the OPC to Jackson Park" that support the claim. [69] at 46. Plaintiffs do not explain what "dislocations" they mean by this undeveloped argument, but presumably they refer to the roadwork, environment remediation, and construction of other facilities around the OPC site. *See, e.g.*, [1] ¶¶ 67, 74, 222.

Nevertheless, such "dislocations" are not material to whether the OPC site has a public purpose.[15] Even if these

14. Plaintiffs also admit that the City's 2018 Ordinance outlined "extensive benefits" to the public, [1] ¶ 66, but allege that the City rubber-stamped the 2018 Ordinance and Use Agreement to benefit the Obama Foundation, *id.* ¶¶ 7, 44, 244. Regardless of these conclusory allegations, however, Plaintiffs fail to allege how the Museum Act's findings were, in fact, evasive or deceptive.

15. As the Seventh Circuit noted during its discussion of standing, the City's projects are not relevant to plaintiffs' claims over the transfer or use of the OPC site. *See POP II*, 971 F.3d at 735. The same reasoning applies equally here.

"dislocations" constitute costs, Plaintiffs fail to explain how they undermine the OPC's public purpose set out in the Museum Act. Plaintiffs fail to cite any legal authority that no public purpose exists if the record also includes incidental public costs,[16] or that the Public Purpose Clause requires that property be used for public purposes that confer the highest net public benefit (as defined by a court, rather than the legislature). Based upon the clear legislative determination that the OPC site has a public purpose and confers a public benefit, the Court denies Count VIII as a matter of law.

E. Violation of Illinois Constitution Takings Clause (Count IX)

In the prior case before this Court, the plaintiffs asserted a due process claim based upon the US Constitution's Fifth Amendment Takings Clause. This Court dismissed the claim on summary judgment, finding that it failed as a matter of law because the federal Takings Clause only applies to private property, not property that is already public. *POP I*, 385 F. Supp. 3d at 686. The Seventh Circuit affirmed, holding that: (1) the Takings Clause only applies to private property and under Illinois law, public trust beneficiaries do not have a private property interest in public trust land; and (2) regardless, the Takings Clause only calls for "just compensation" and the plaintiffs sought only declaratory and injunctive relief. *POP II*, 971 F.3d at 737.

16. Taking such a theory to its logical conclusion, the government would always violate the Public Purpose Doctrine when it used public funds because, by definition, any such use imposes public costs (*i.e.*, the money itself).

Unsatisfied, Plaintiffs seek another bite at the apple with their takings clause theory, but this time bring it under the Illinois Constitution's Takings Clause. [1] ¶¶ 246-50.[17] They allege that, as Illinois citizens, they "have a beneficial fractional ownership interest in such public trust property" and Defendants violated Illinois' Taking Clause as to them through its "giveaway and damage" of Jackson Park "without payment of any compensation, let alone just compensation." *Id.* ¶¶ 249-50. Again, they only seek declaratory and injunctive relief. *Id.* at 81-82.

Plaintiffs' new version of the old claim fares no better, and indeed, it runs directly contrary to the Seventh Circuit's findings in *POP II*. Like the federal Takings Clause, Illinois' Takings Clause states that "*[p]rivate property* shall not be taken or damaged for public use without just compensation as provided by law." Ill. Const. Art. I § 15 (emphasis added). As the Seventh Circuit held, "the Illinois cases make clear that the public trust doctrine

17. Of course, the Illinois' Takings Clause is coterminous with its federal counterpart generally, and coterminous specifically with respect to "what constitutes a taking." *Hampton v. Metro Water Reclamation Dist. Of Greater Chi.*, 2016 IL 119861, 405 Ill. Dec. 131, 57 N.E.3d 1229, 1240 (Ill. 2016). Nonetheless, Plaintiffs contend that their reassertion of a rejected claim possesses merit, notwithstanding the Seventh Circuit's clear ruling, because the Seventh Circuit noted that "even if the [public trust] doctrine conferred a property interest on members of the public, that interest would not necessarily qualify for protection under the [Federal] Constitution." [69] at 44 (quoting *POP II*, 971 F.3d at 737 n.5). The Seventh Circuit, however, also found that Illinois does not confer upon the public a property interest in public trust land. *See POP II*, 971 F.3d at 737. Thus, Plaintiffs fail to present any good-faith reason to revisit the Takings Clause issue, and their efforts at a "do-over" border on the frivolous.

functions as a restraint on government action, not as an affirmative grant of property rights." *POP II*, 971 F.3d at 737. As a matter of law, "absent a 'built in' cause of action and special property interest given by statute," Illinois citizens do not have a beneficial fractional ownership interest in public trust property. *Paepcke*, 263 N.E.2d at 17 (holding that owners of property adjacent to or in the vicinity of public use parks do not have a private property interest in those parks). Thus, Plaintiffs have no private property interest in Jackson Park. This proves dispositive of Plaintiffs' state Takings claim as a matter of law. The Court dismisses Count IX with prejudice.

F. Plaintiff's Procedural and Substantive Due Process Claim Pursuant to Illinois Constitution Article I, Section 2 (Count XII)

In the prior case before this Court, the plaintiffs also brought a federal procedural due process claim. The Seventh Circuit affirmed dismissal on summary judgment. *POP II*, 971 F.3d at 737-38. Now, Plaintiffs try again, this time bringing a state law procedural and substantive due process claim. [1] ¶¶ 259-63. They allege that the City and Park district violated their state due process rights by allowing the Obama Foundation to control decision-making, and "by rubber stamping" the Foundation's demands to transfer critical public trust land to it. *Id.* They also allege that the City accelerated the improper approval process during the ongoing coronavirus pandemic, which curtailed Plaintiffs' rights to meaningfully participate in the City's meetings and reviews. *Id.* ¶ 264. Defendants move to dismiss arguing the claim fails as a matter of law. [29] at 41-44.

Appendix D

Like its federal counterpart, Illinois due process protections "pertain to deprivations of life, liberty or property" and a procedural due process claim cannot succeed without a threshold showing that the government interfered with one of these protected interests. *See Big Sky Excavating, Inc. v. Ill. Bell-Tel. Co.*, 217 Ill. 2d 221, 840 N.E.2d 1174, 1186, 298 Ill. Dec. 739 (Ill. 2005) ("If no protected interest is present, due process protections are not triggered"). As discussed, Plaintiffs do not have a property interest in Jackson Park. Thus, Plaintiffs fail to allege a protected interest and their procedural due process claim does not get off the ground.

Regardless, even if Plaintiffs possessed a cognizable property interest, Plaintiffs fail to adequately allege any deprivation of that interest. The Court found above that the General Assembly—through the Museum Act—authorized the OPC. Further, Plaintiffs' Complaint agrees that the City took four separate votes to approve aspects of the OPC. [1] ¶¶ 42, 58-63. As the Seventh Circuit held in affirming dismissal of the federal due process claims in the last case, "legislative determination provides all the process that is due" and if "one legislative determination is enough, then *five* determinations are overkill." *POP II*, 971 F.3d at 738. The same holds true for Plaintiffs' state law procedural due process claim and it fails as a matter of law.[18]

18. Plaintiffs complain that the City's votes merely "rubber-stamped" the Obama Foundation's demands. But this characterization simply attacks the elected officials' internal reasoning in voting in favor of the OPC, not whether votes took place pursuant to a legislative process. Plaintiffs also assert, without support, that the

Turning to Plaintiffs' substantive due process claim, Defendants argue that the City's 2018 Ordinance approval must only meet the rational basis test. [29] at 43. Plaintiffs disagree, arguing that *Paepcke* requires a heightened showing because it would be pointless to confer standing to sue if "some low rational basis test" always applies. [69] at 42.

The Court already found that *Paepcke* affords significant deference to decisions involving statutorily-created public trust land. Nothing in that opinion indicates that courts should apply a heightened standard to a substantive due process claim over such legislative decisions. The rational basis test applies.

Under Illinois law, a rational basis exists if the Court can "hypothesize" one, even if it is "based on rational speculation unsupported by evidence or empirical data" and even if that basis did not actually motivate the legislative action. *People ex rel. Lumpkin v. Cassidy*, 184 Ill. 2d 117, 703 N.E.2d 1, 4, 234 Ill. Dec. 389 (Ill. 1998). Here, the Museum Act offers a rational basis for the 2018 Ordinance and the OPC: "furthering human knowledge and understanding, educating and inspiring the public, and expanding recreational and cultural resources and opportunities." 70 ILCS 1290/0.01. The 2018 Ordinance's findings also set out reasons. [1-1], Ex. 2. There also

---

coronavirus pandemic curtailed their ability to participate in the City's meetings about the OPC. But Plaintiffs fail to explain how the coronavirus pandemic could have any bearing on their ability to meaningfully participate in meetings and votes, especially ones which all occurred in 2018 or earlier.

exists a rational basis for the City to allow a third party to operate the OPC site where that third party's sole purpose relates to the OPC and where it will cover the cost to build the facilities (which the City will then own).

Of course, Plaintiffs believe that any public benefits that the OPC may provide do not compare, in their view, to the benefits that Jackson Park provided in its former glory. But as the *Paepcke* Court emphasized:

> [T]he issues presented in this case illustrate the classic struggle between those members of the public who would preserve our parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary, in good faith and for the public good, to encroach to some extent upon lands heretofore considered inviolate to change. The resolution of this conflict in any given case is for the legislature and not the courts.

Paepcke, 263 N.E.2d at 21. There exists a rational basis for the 2018 Ordinance. Thus, Plaintiffs' substantive due process claim fails as a matter of law.

G. Illinois Constitution—Improper Delegation of Authority (Count XI)

Plaintiffs' Count XI alleges that the City violated Article II, Section 1 of the Illinois Constitution because

it improperly delegated to the Obama Foundation its decision-making authority about the location and design of the OPC. [1] ¶ 256. To support this allegation, Plaintiffs rely on the following clause in the 2015 Ordinance:

> WHEREAS, While the City Council is confident in the quality and thoroughness of both UIC's and UChicago's proposals, the City defers to the sound judgment of the President and his Foundation as to the ultimate location of the Presidential Library.

Id. (quoting [1-1], Ex. 1 (2015 Ordinance)).

Defendants move to dismiss, arguing that the ordinances and laws at issue demonstrate, as a matter of law, that "only the appropriate legislative bodies have determined what the law shall be with respect to use of the Jackson Park site." [29] at 38.[19] Plaintiffs disagree, arguing that the 2015 Ordinance does not speak "in terms of mere 'advice' but of 'deference'" to the Obama Foundation and, therefore, it conferred "on a powerful private party an unfettered choice of location for its own private development." [69] at 37.

Article II, Section 1 of the Illinois Constitution provides: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly

19. Defendants also comment that Article II of the Constitution may not apply to home rule municipal governments like the City, but Defendants do not move to dismiss on that basis. [29] at 38 n.11.

belonging to another." [1] ¶ 258. Illinois has long held, however, that while the "legislature may not divest itself of its proper functions, or delegate its general legislative authority, it may still authorize others to do those things which it might properly, yet cannot understandingly or advantageously do itself." *Hamann v. Lawrence*, 354 Ill. 197, 188 N.E. 333, 335 (Ill. 1933).[20]

The 2015 Ordinance found that the City identified numerous locations proposed by University of Illinois—Chicago ("UIC") and University of Chicago ("UChicago"), and noted various benefits, risks and challenges as to each. [1-1], Ex. 2. Although the 2015 Ordinance states that "the City defers to the sound judgment of the President and his Foundation as to the ultimate location of the Presidential Library", this plainly refers to the Foundation's ongoing nationwide selection process and the City's desire to offer

20. Cases that consider nondelegation under the federal constitution reveal that Plaintiffs' nondelegation theory—which is sometimes referred to as the private nondelegation doctrine—may flow from concepts of due process rather than the provision on which they rely. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 311, 56 S. Ct. 855, 80 L. Ed. 1160 (1936) (relying on the Fifth Amendment's due process clause to invalidate a statute that gave a group of coal producers the right to set regulations to bind the coal industry). *But see Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 135 S. Ct. 1225, 1237-38, 1252-53, 191 L. Ed. 2d 153 (Alito, J. and Thomas, J. concurring) (implying that the private nondelegation doctrine is rooted in the Constitution's Vesting Clauses). Overall, the exact contours of this doctrine remain uncertain under both the U.S. Constitution and the constitutions of the states, but the Court need not enter into this ongoing constitutional debate, because the record shows that the City did not delegate its decision-making authority to the Obama Foundation.

proposals to the Obama Foundation that give "our City the greatest chance for selection" by the Foundation. *Id.* The 2015 Ordinance also makes clear that, if the Foundation likes a site located in a Chicago parkland, then the City will need to "introduce a separate ordinance authorizing the development construction and operation of the Presidential Center on the Selected Site." *Id.*

Read in full, the 2015 Ordinance did not abdicate the City's decision-making authority regarding public parkland use to the Obama Foundation. Instead, it reaffirmed its desire to have the OPC in Chicago and held that the City would consider and vote on a second ordinance if the Obama Foundation wished to build and operate the OPC on public parkland. And that is exactly what happened: the City considered and approved the Jackson Park site through the 2018 Ordinance. Simply put, Plaintiffs' claim fails as a matter of law because the 2015 and 2018 ordinances belie their allegations. The Court dismisses Count XI with prejudice.

H. Violation of Illinois Constitution Article I, Section 16 (Count XIII)

Count XIII alleges that the City's 2018 Ordinance, which approved the 2018 Use Agreement, violated Article I, Section 16 of the Illinois Constitution, which states: "No ex post facto law, or law impairing the obligation of contracts or making an irrevocable grant of special privileges or immunities, shall be passed." [1] ¶¶ 265-66 (quoting Ill. Const. Art. I, § 16). Plaintiffs maintain that the 2018 Use Agreement constitutes an "irrevocable grant

of special privileges" to the Obama Foundation because it transferred to it "perpetual and largely full control over a large portion of Jackson Park." *Id.* ¶ 266.

Plaintiffs' theory fails as a matter of law. As the Court already found, the 2018 Use Agreement did not transfer ownership of the OPC site to the Obama Foundation nor did it give the Foundation any irrevocable rights to it. Instead, it gives the Obama Foundation the right to use, maintain and build upon the land, provides that these rights expire after 99 years, and states that the City may revoke the Foundation's use early under certain conditions. Thus, the 2018 Use Agreement does not constitute an irrevocable grant of special privileges. *See, e.g., People v. Chi. Transit Auth.*, 392 Ill. 77, 64 N.E.2d 4 (Ill. 1945) (finding no "irrevocable grant of special privileges" for City ordinance that gave the Chicago Transit Authority certain rights); *People v. City of Chi.*, 349 Ill. 304, 182 N.E. 419 (Ill. 1932) (same regarding an Act relating to the City's right to grant permits to operate the local transportation system because the grant was terminable for misuse and did not grant exclusive street rights).

In addition, as Defendants correctly point out, Illinois law also states that a contract or law giving special privileges to a certain group does not violate Article I, Section 16 if there exists a "rational basis" for it. *See DiSabato v. Bd. of Trustees of State Emps.' Ret. Sys. of Ill.*, 285 Ill. App. 3d 827, 674 N.E.2d 852, 221 Ill. Dec. 59 (Ill. 1996) (finding that, even though the State Employees' Retirement System calculated benefits differently for police officers than other employees, this did not violate the

Special Privileges Clause because there existed a rational basis to do so). As discussed above, there exists a rational basis for the 2018 Use Agreement and any privileges that it affords the Obama Foundation. Accordingly, Plaintiffs' Count XIII fails as a matter of law.

I. Violation of Illinois State Agency Historic Preservation Act (Count XV)

Plaintiffs' final state law claim relies on Illinois State Agency Historic Preservation Act, 20 ILCS 3420. Plaintiffs allege the Defendants violated this act by failing to review alternatives to the OPC site project given its adverse effects on historic resources (here Jackson Park, Midway Plaisance, and Chicago Boulevard Historic District). [1] ¶¶ 280-88. Plaintiffs bring this claim as an alternative to their federal claims for violations of the Department of Transportation Act § 4(f) (Count I); National Environmental Policy Act (Count II); and National Historic Preservation Act, § 106 (Count IV). *Id.*

Defendants move to dismiss arguing that Illinois' State Agency Historic Preservation Act does not apply where there has been a federal Section 106 review, which occurred in this case. [29] at 46. In response, Plaintiffs agree that Illinois' State Agency Historic Preservation Act does not apply if a federal Section 106 process is applicable, but they insist their claim may still be viable because the "federal agencies improperly *declined* review of the adverse effects of the OPC based on what they claimed were purely 'local' issues associated with" it. [69] at 40. That is, Plaintiffs agree that their state law

claim fails if the federal review *improperly* declined to review alternatives, because then federal review will need to be reopened and will take precedence. *Id.* But, they argue, if the federal review *properly* avoided a review of alternatives, then the Illinois State Agency Historic Preservation Act applies. *Id.*

As a matter of law, the plain language of the Illinois State Agency Historic Preservation Act easily defeats Plaintiffs' theory. It states that, when an "undertaking is being reviewed pursuant to Section 106 of the National Historic Preservation Act of 1966, the procedures of this law shall not apply." 20 ILCS 3420/4(g). Plaintiffs identify no authority that conditions non-application on the findings and breadth of the Section 106 review. Instead, the law clearly states it does not apply to projects reviewed pursuant to Section 106, and even Plaintiffs' own Complaint admits that the "magnitude, location and funding of the proposed project has triggered several major federal reviews" including a Section 106 review. [1] ¶ 2; *see also id.* ¶¶ 75-85. Accordingly, the Illinois State Agency Historic Preservation Act does not apply, and Plaintiffs' Count XV fails as a matter of law.

V. Conclusion

For the foregoing reasons, the Court grants Defendants' motions to dismiss [28]. The Court dismisses with prejudice Counts VI, VIII, IX, XI, XII, XIII and XV and dismisses without prejudice Count VII.

Dated: March 29, 2022

Appendix D

Entered:

/s/ John Robert Blakey
John Robert Blakey
United States District Judge

APPENDIX E — NOTIFICATION OF DOCKET ENTRY IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, FILED JANUARY 6, 2022

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

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

PROTECT OUR PARKS INC, *et al.*,

Plaintiff,

v.

PETE BUTTIGIEG, *et al.*,

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, January 6, 2022:

MINUTE entry before the Honorable John Robert Blakey: The Court denies Plaintiffs' motion for leave to amend [107]. Plaintiffs seek to add two claims: Count XV, which alleges breach of the master agreement, and Count XVI, an unjust enrichment claim, also predicated on the alleged breach of the master agreement. The former claim would fail because Plaintiffs have no standing to sue for

breach of a contract to which they are not parties. The claims are futile. See Kaplan v. Shure Bros., 266 F.3d 598, 602 (7th Cir. 2001) (Under Illinois law, a cause of action based on a contract may be brought only by a party to that contract, by someone in privity with such a party, or by an intended third−party beneficiary of the contract.)(citing White Hen Pantry, Inc. v. Cha, 574 N.E.2d 104, 109 (Ill. App. Ct. 1991); Altevogt v. Brinkoetter, 421 N.E.2d 182, 18687 (Ill. 1981)); NHI−2, LLC v. Wright Prop. Mgmt., Inc., No. 15 C 7913, 2018 WL 1138542, at *2 (N.D. Ill. Mar. 2, 2018) ("the only parties that may bring a breach of contract claim under a contract are those that have signed the contract at issue") (citing W.W. Vincent and Co. v. First Colony Life Ins. Co., 814 N.E.2d 960, 967 (Ill. App. Ct. 2004)). And the latter is tied to the former and adds nothing new to the allegations already on file. See Benson v. Fannie May Confections Brands, Inc., 944 F.3d 639, 648 (7th Cir. 2019) (in Illinois, a request for relief based upon unjust enrichment is tied to the fate of the underlying claim). Plaintiffs argue that they have standing to sue and cite cases to support that argument; to the extent those cases support Plaintiffs' standing argument generally, they do not establish standing to sue for breach of contract, which is what Plaintiffs seek to do. E.g., Malec v. City of Belleville, 891 N.E.2d 1039, 1041 (Ill. Ct. App. 2008) (finding standing to assert claims alleging violations of the TIF Act, and certain provisions of the Illinois Municipal Code). Accordingly, and because the parties and the Court have already devoted significant resources addressing the current complaint, the Court declines to grant leave to amend. Mailed notice(gel,)

Appendix E

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov.***

APPENDIX F — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED AUGUST 12, 2021

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 21-cv-2006
Judge John Robert Blakey

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

Plaintiffs,

vs.

PETE BUTTIGIEG, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

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

on all claims, and the Seventh Circuit affirmed on the federal claims and held that the plaintiffs lacked standing to pursue their state-law claims.

Notwithstanding, six months after the Seventh Circuit's decision and just four months before groundbreaking, Plaintiff Protect Our Parks and several other new Plaintiffs have again sued to halt construction on the OPC. This time they sue not only the City and Park District, but also the Barack Obama Foundation and several federal and state agencies under a series of federal-and state-law theories, some old and some new. More recently, Plaintiffs moved for a preliminary injunction on their federal claims, asking this Court to enjoin the imminent groundbreaking at Jackson Park. [30]. In support of their motion, Plaintiffs argued that various federal agencies failed in performing statutorily mandated reviews concerning construction of the OPC and its effects on the environment, historical resources, and wildlife, among other things. If the agencies had adequately performed these reviews, Plaintiffs claimed, the agencies would have concluded that a superior site to Jackson Park exists to host the OPC. As explained further below, this Court denied the motion. [83].

I. Background

A. Procedural History

In May 2018, Plaintiff Protect Our Parks and several individuals sued the City of Chicago and the Chicago Park District under federal and state law seeking to stop the construction of the OPC in Jackson Park. This

Court granted summary judgment to the defendants on all claims, and the plaintiffs appealed. *See Protect Our Parks, Inc. v. Chicago Park District*, 971 F.3d 722, 728 (7th Cir. 2020) (*PoP II*), *cert. denied sub nom. Protect Our Parks, Inc. v. City of Chicago*, 141 S. Ct. 2583, 209 L. Ed. 2d 600, 2021 WL 1602736 (U.S. 2021). On appeal, the Seventh Circuit affirmed this Court's grant of summary judgment on the plaintiffs' two federal claims—that the defendants took their property in violation of the Fifth and Fourteenth Amendments. *Id.* at 736. The court of appeals vacated summary judgment, however, on the plaintiffs' claims under Illinois law, which alleged violations of the public trust doctrine and ultra vires actions, finding that the plaintiffs lacked Article III standing to sue on those claims. *Id.* at 732. On remand, this Court, consistent with the Seventh Circuit's holding, dismissed the state-law claims for lack of jurisdiction.

Undeterred, Plaintiff Protect Our Parks, along with Nichols Park Advisory Council (NPAC), and individuals Sid Williams, Stephanie Franklin, Bren Sheriff, Dr. W.J.T. Mitchell, and Jamie Kalvin have sued again seeking to halt construction on the OPC. [1]. Plaintiffs claim that the construction project has triggered several major federal regulatory reviews, specifically, those under: (1) § 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c) and 23 U.S.C. § 138(a); § 106 of the National History Preservation Act of 1966 (NHPA), 54 U.S.C. § 306108; the Urban Park and Recreation Recovery Act (UPARR), 54 U.S.C. §§ 200501-200511; and the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347. *Id.* at ¶ 2. According to Plaintiffs, these federal statutes require comprehensive reviews of alternatives to

determine how to address any adverse effects created by the OPC and to evaluate opportunities to avoid, minimize, or mitigate future adverse effects. *Id.* at ¶ 2. Defendants, Plaintiffs assert, have essentially ignored the regulatory frameworks requiring them to evaluate alternative sites to Jackson Park. *Id.* at ¶¶ 2-3.

As a result, Plaintiffs have now sued, in addition to Defendants the City of Chicago (the City), the Chicago Park District (the Park District), and the Barack Obama Foundation (the Foundation), Pete Buttigieg in his official capacity as Secretary of the Department of Transportation; Stephanie Pollack in her official capacity as Acting Administrator of the Federal Highway Administration (FHWA); Arlene Kocher in her official capacity as the Division Administrator of the Illinois Division of the FHWA; Matt Fuller in his official capacity as the Environmental Programs Engineer of the Illinois Division of the FHWA; Anthony Quigley, P.E., in his official capacity as the Deputy Director, Region 1 Engineer of the Illinois Department of Transportation; Deb Haaland in her capacity as the Secretary of the United States Department of the Interior; Shawn Benge in his capacity as Deputy Director of Operations of the National Park Service (NPS), exercising the delegated authority of the Director of the NPS; John E. Whitley in his capacity as Acting Secretary of the Army; and Paul Culberson in his capacity as Commanding Officer of the Army Corps of Engineers. *Id.* at ¶¶ 23-34.

The fifteen-count complaint asserts claims for: (1) violation of section 4(f) of the Department of Transportation Act against the federal and state transportation and

highway administration Defendants, the City, the Park District, and the Foundation (Count I); (2) violation of NEPA against all Defendants (Count II); violation of UPARR against the Interior Department, NPS, the City, the Park District, and the Foundation (Count III); violation of section 106 of the NHPA against all Defendants (Count IV); violations of Rivers and Harbor Act and Clean Water Act against the Army Corps Defendants, the City and the Park District (Count V); violation of the public trust doctrine against the City, the Park District, and the Foundation (Count VI); an ultra vires claim against the City and the Park District (Count VII); violation of article VIII, section 1 of the Illinois Constitution against the City, the Park District, and the Foundation (Count VIII); violation of the Illinois Constitution Takings Clause against the City, the Park District, and the Foundation (Count IX); improper delegation of authority under federal statutes against all Defendants (Count X); improper delegation of authority in violation of the Illinois Constitution against the City, the Park District, and the Foundation (Count XI), violation of article I, section 2 of the Illinois Constitution against the City, the Park District, and the Foundation (Count XII), violation of article I, section 16 of the Illinois Constitution against the City and the Foundation (Count XIII); violation of section 110(k) of the National Historic Preservation Act against all Defendants (Count XIV); and, in the alternative to Counts I, II, and IV, violation of the Illinois State Agency Historic Preservation Resources Act against all state officials, the City, the Park District, and the Foundation (Count XV).

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

Appendix F

B. Factual Background[1]

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

In 2014, the Foundation began a nationwide search for the future location of the Barack Obama presidential library. *PoP II*, 971 F.3d at 728. Eventually, it settled upon Jackson Park, a public park owned by the Chicago Park District, on Chicago's South Side as the site of the OPC. *Id.; PoP I*, 385 F. Supp. 3d at 668. The site selected for the OPC within Jackson Park comprises 19.3 acres, or 3.5% of the 551.52 acres that make up the Park. *PoP I*, 38 F. Supp. 3d at 668. The site lies on the western edge of Jackson Park and includes parkland bounded by South Stony Island Avenue to the west, East Midway Plaisance Drive North to the north, South Cornell Drive to the east, and South 62nd Street to the south. *Id.* The OPC site also includes land within the park currently existing as city streets: the portion of East Midway Plaisance Drive North between Stony Island Avenue and South Cornell Drive, and a portion of South Cornell Drive between Eastern Midway Plaisance Drive South and East Hayes Drive. *Id.* at 668-69. As part of the construction, these

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

street portions will be closed and removed to restore the landscape's connection to the lagoon and lake. *Id.* at 669. When built, the OPC will consist of a campus containing open green space, a plaza, and four buildings: the Museum Building; the Forum Building; a Library Building; and a Program, Athletic, and Activity Center. *Id.* at 669.

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

2. Declarations For and Against the Preliminary Injunction

At the parties' request, this Court set Plaintiffs' motion for preliminary injunction for oral argument on July 20, 2021; the parties declined to present any live witnesses, opting instead just to argue their respective positions. This Court therefore relies upon the arguments and evidence presented in the parties' briefs, including the various declarations submitted by each side and the administrative record.

a. Robbin Cohen for the Foundation

The Foundation submitted the declaration of Robbin Cohen, Executive Vice President — Obama Presidential Center, Strategy, and Technology. [48-1]. Cohen attests

that the federal reviews were completed in February 2021 and the OPC's construction start date is August 16, 2021. *Id.* at ¶¶ 4-5. Assuming construction stays on schedule, construction will take four years and two months and the OPC will open in Fall 2025. *Id.* at ¶ 5. The Foundation itself will pay for the construction and operation of the OPC, and the total project will cost approximately $700 million, paid for by donations to the Foundation. *Id.* at ¶ 6.

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

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

b. Plaintiffs' Declarations

Plaintiffs also submitted several declarations in support of their motion. One of their declarants, Plaintiff W.J.T. Mitchell, serves as a professor of English and Art History at the University of Chicago and lives in Hyde Park on Chicago's South Side. [31-1] at 8-14. Mitchell attests that he frequently visits Jackson Park as a place for rest and recreation, namely, for walking, biking, golfing, and tennis. *Id.* at 9. According to Mitchell, the proposed reconfiguration and destruction of Jackson Park land and the Midway Plaisance will "irreparably diminish and harm the aesthetic, recreational, environmental, and historic values" of those places. *Id.* at 10. Mitchell also believes that the placement of the OPC involves one of the most prized parts of Jackson Park—the Midway Plaisance, Woman's Garden, and the scenic woodland containing mature trees adjacent to Stony Island. *Id.* In particular, Mitchell states that the Midway Plaisance serves as a crucial east-west artery connecting South Side neighborhoods with Jackson Park and Washington Park, and that the OPC's plan to close the eastbound lane will have the effect of destroying the essential function of the historic space and crucial component of urban infrastructure. *Id.* at 12-13.

Another declarant, Plaintiff Stephanie Franklin, is a Hyde Park homeowner and has used and enjoyed the aesthetic benefits of Jackson Park and Midway Plaisance throughout her life. *Id.* at 20. Franklin serves as the president of Nichols Park Advisory Council (NPAC), another Plaintiff in this case. *Id.* According to Franklin, NPAC constitutes a park advisory council organization

that advises the Park District; she and the NPAC believe that the aesthetic and recreational values of Jackson Park will be irreparably diminished and harmed by the proposed OPC. *Id.* at 20-22.

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

3. Federal Reviews

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

a. UPARR Conversion

First, the City's decision to approve Jackson Park as the location of the OPC necessitated action by the NPS under the UPARR Act. Congress established the UPARR Act in 1978 to provide federal assistance for the rehabilitation of recreational facilities in economically distressed urban communities. *See* 54 U.S.C. §§ 200501-200511; 36 C.F.R. § 72.72(a) ("The UPARR program has made funds available for the renovation and rehabilitation of numerous urban parks and recreation facilities."); [61-10] at 7. The Act authorizes NPS to convert property assisted under UPARR to non-public recreation uses only

if it "finds it to be in accord with the then-current local park . . . and only on such conditions as [NPS] considers necessary to ensure the provision of adequate recreation properties and opportunities of *reasonably equivalent location and usefulness*." 54 U.S.C. § 200507 (emphasis added).

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

To balance those potential losses of Jackson Park land to non-recreational uses, the City identified a potential replacement area just outside of the Park to convert to recreational uses. [61-10] at 33. That replacement property sits on the east end of the Midway Plaisance between Stony Island Avenue and the Metra Electric Railway, just west of Jackson Park. *Id.* Per the City's proposal, the replacement property will be converted into a new play area and will include improved open space and rehabilitated walkways. *Id.* at 33-34. As conceived, the City's proposed replacement elements would amount to a *net gain* of approximately 6.6 acres of recreational uses in Jackson Park. *Id.* at 36. After

assessing the City's proposal, NPS concluded that the replacement properties satisfied regulatory requirements for the partial conversion of UPARR-funded properties in Jackson Park. *Id.* at 47.

b. FHWA's Section 4(f) Review

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

The proposed OPC location in Jackson Park implicated four section 4(f) properties (public parks and historic

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

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

c. USACE Permits

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

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

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

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

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

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

d. NEPA

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

Signed into law in 1970, NEPA establishes a national policy to "encourage productive and enjoyable harmony between man and his environment." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004) (quoting 42 U.S.C. § 4321)); *see also Highway J Citizens Grp. v. Mineta*, 349 F.3d 938, 953 (7th Cir. 2003) (observing that NEPA reflects a "broad national commitment to protecting and promoting the environment"). Under NEPA, federal agencies must "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official" on:

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

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

Under the operative regulations,[2] the EA is a "concise public document" that provides "sufficient evidence and analysis for determining whether to prepare" an EIS. *Pub. Citizen*, 541 U.S. at 757 (quoting 40 C.F.R. § 1508.9(a) (2019)). If, pursuant to an EA, an agency determines that the regulations do not require it to prepare an EIS, it must issue a "finding of no significant impact" (FONSI), which "briefly presents the reasons why the proposed agency action will not have a significant impact on the human environment." *Id.* at 757-58 (citing 40 C.F.R. §§ 1501.4(e), 1508.13 (2019)). Put simply, an agency's preparation of an EA leads either to a FONSI, or alternatively, to a finding that it must prepare an EIS. *Hoosier Env't Council, Inc. v. U.S. Army Corps of Eng'rs*, 105 F. Supp. 2d 953, 970 (S.D. Ind. 2000) (citing *Rhodes v. Johnson*, 153 F.3d 785, 788 (7th Cir. 1998)). In this case, the agencies did not prepare an EIS. Instead, they prepared an EA, *see* [61-22], and then a FONSI in which NPS and FHWA concluded that "there is no significant impact to the human environment associated with" the federal actions with respect to the OPC—namely, NPS' approval of the conversion of UPARR-assisted land in Jackson Park and the FHWA's authorization of funding for transportation improvements, [61-43] at 2.

NEPA also requires that agencies "study, develop, and describe appropriate alternatives" to major federal

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

projects. 42 U.S.C. § 4332(2)(C)(iii), (2)(E). Here, the EA examined three such alternatives: Alternative A, the no-action alternative, where NPS does not approve the UPARR conversion, the OPC is not built, and no roads are closed; Alternative B, where NPS approves the UPARR conversion, the OPC is built, and roads are closed, but the FHWA does not approve funding for the transportation improvements; and Alternative C, where the NPS approves the UPARR conversion and the FHWA approves funding of the transportation improvements identified in Alternative 9B of the FHWA's section 4(f) Evaluation. [61-22] at 27-28. After review, the agencies selected Alternative C as the "preferred alternative" because it best "meets the purposes and needs of both NPS and FHWA." *Id.* at 79-80. Those agencies concluded that the analysis in the EA demonstrated that the selected action would not have a significant impact on the environment. [61-42] at 2.

e. NHPA

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

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

f. The City's Tree Removal in 2018

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

In August 2018, the Advisory Council on Historic Preservation (ACHP)[3] notified FHWA that it became

3. The ACHP is the federal agency charged with administering the NHPA. *See Nat'l Min. Ass'n v. Fowler*, 324 F.3d 752, 755, 355 U.S. App. D.C. 372 (D.C. Cir. 2003).

aware that trees were being cleared in Jackson Park, which was then already undergoing section 106 review. *See* [61-7]; *see also* [61-6]. The FHWA then flagged this issue for the City, which subsequently provided a written explanation for its actions. [61-8]. The City explained that, in August 2018, the Park District began site preparation (including removing trees and grading the surface) for the building of a new track and field in Jackson Park. *Id.* at 2. The City further explained that the Foundation had agreed to donate the funds for the track and placed no conditions on the donation related to approval of the OPC. *Id.* at 3. The work, according to the City, lies entirely outside the area proposed for the OPC and outside the area where any proposed traffic improvements would be made; the work is intended to provide improved track and field and recreational opportunities in the Park, despite the eventual OPC construction. *Id.* The City also explained that it had consulted NPS prior to its work on the track and field and that it understood NPS agreed that the new track and field were not subject to federal review. *Id.* at 4. Nevertheless, the City agreed to cease construction until the completion of section 106 reviews. *Id.* at 2.

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

II. Legal Standard

A preliminary injunction constitutes "an extraordinary remedy" reserved for exceptional cases. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008); *LHO Chi. River, L.L.C. v. Rosemoor Suites, LLC*, 988 F.3d 962, 968 (7th Cir. 2021). A party seeking a preliminary injunction must establish it has a likelihood of success on the merits, that it has no adequate remedy at law, and that it will suffer irreparable harm if a preliminary injunction is denied. *Speech First, Inc. v. Killeen*, 968 F.3d 628, 637 (7th Cir. 2020), *as amended on denial of reh'g and reh'g en banc* (Sept. 4, 2020).

If the moving party meets these threshold requirements, this Court then "must weigh the harm the denial of the preliminary injunction would cause the plaintiff against the harm to the defendant if the court were to grant it." *Id.; see also Tully v. Okeson*, 977 F.3d 608, 613 (7th Cir. 2020), *cert. denied*, No. 20-1244, 141 S. Ct. 2798, 210 L. Ed. 2d 930, 2021 U.S. LEXIS 3247, 2021 WL 2519129 (U.S. June 21, 2021). To do so, this Court must also consider the public interest in granting or denying the injunction. *Speech First*, 968 F.3d at 637. This Court uses a "sliding scale approach" when weighing these considerations. *Cassell v. Snyders*, 990 F.3d 539, 545 (7th Cir. 2021).

III. Analysis

Before considering the merits of the claims, this Court summarizes the appropriate standard of review of the federal agencies' actions surrounding the OPC.

Plaintiffs ask this Court to review the agencies' actions under the Administrative Procedure Act (APA), which sets "forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905, 207 L. Ed. 2d 353 (2020). The APA directs a "reviewing court" to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Courts find an agency decision arbitrary and capricious if it "runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Dep't of Workforce Dev.-Div. of Vocational Rehab. v. U.S. Dep't of Educ.*, 980 F.3d 558, 565-66 (7th Cir. 2020) (quoting *Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 668 (7th Cir. 2016)). Judicial review under this standard is deferential, and "a court may not substitute its own policy judgment for that of the agency." *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158, 209 L. Ed. 2d 287 (2021). This Court's task "simply ensures that the agency has acted within a zone of reasonableness" and "has reasonably considered the relevant issues and reasonably explained the decision." *Id.* In reviewing an agency's decision under the arbitrary and capricious standard, this Court looks at the "entire record," and upholds the agency actions if it discerns a "rational basis for the agency's choice" even it disagrees with the agency's action. *Boucher v. U.S. Dep't of Agric.*, 934 F.3d 530, 547 (7th Cir. 2019) (quoting *Israel v. U.S. Dep't of Agric.*, 282 F.3d 521, 526 (7th Cir. 2002)).

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

A. NEPA Claim

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

1. Decision to Forego the EIS

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

a. Environmental Impacts

First, Plaintiffs posit that "entire swaths" of the EA ignore and understate environmental impacts. [31] at 20. They complain that the EA acknowledges that close to 1,000 mature trees must be cut to make way for the OPC and expansion of roadways, but "treats that massive transformation . . . as insignificant and fully mitigated" by the commitment to plant an equal number of saplings. *Id.*

at 20. Plaintiffs also take issue with the cutting of hundreds of trees on the eastern and western edges of Jackson Park due to the impact on air quality and migratory birds. *Id.* These complaints, however, amount to nothing more than disagreements about substantive decisions that the various Defendants made to address the environmental impacts caused by the OPC. NEPA "does not mandate particular results," and so long as "adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Mineta*, 349 F.3d at 953 (quotation omitted); *accord Indian River County v. U.S. Dep't of Transp.*, 945 F.3d 515, 522, 444 U.S. App. D.C. 437 (D.C. Cir. 2019) ("NEPA is not a suitable vehicle for airing grievances about the substantive policies adopted by an agency, as NEPA was not intended to resolve fundamental policy disputes."), *cert. denied sub nom. Indian River County v. Dep't of Transp.*, 141 S. Ct. 243, 208 L. Ed. 2d 142 (2020).

This Court thus does not evaluate whether the agencies made the "right" decisions, but rather whether in making those decisions they followed the NEPA procedures. *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 593 F. Supp. 2d 1019, 1024 (E.D. Wis. 2009), *aff'd sub nom. Habitat Educ. Ctr. v. U.S. Forest Serv.*, 609 F.3d 897 (7th Cir. 2010). And the agencies indisputably did so here with respect to trees and the impacts of cutting down the trees to migratory birds. The EA includes as Appendix D a 75-page "Tree Technical Memorandum" which identifies and discusses the impacts from the anticipated removal of trees to accommodate the OPC. [61-22] at 164-239.

Among other things, the Tree Memo identifies the species, size, and health of each tree that will be removed, *id.* at 179-81, and extensively details strategies to mitigate the effects of tree removal, including replacing each tree (on a 1:1 ratio) with 2.5-inch to 4-inch caliper trees that will complement the historic landscape of Jackson Park and that will serve functional purposes related to aesthetics, shade, sightlines, and access, *id.* at 183-86, *see also id.* at 42.

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

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

Based upon their assessments, the agencies concluded in the EA that its tree replacement plan would result in "long-term beneficial impacts to the overall tree population, tree species diversity, and anticipated tree canopy when the replanted trees reach maturity." *Id.* at 182. Upon examination of the EA, this Court finds that the agencies satisfied NEPA's requirements by analyzing the serious impacts from tree removal to the overall environment, air quality, and migratory birds. This Court thus lacks a basis to disturb their substantive judgment that the tree replacement project will result in a net benefit to Jackson Park. *See Boucher*, 934 F.3d at 547 (instructing

courts to defer to agencies as long as they can discern a "rational basis for the agency's choice").

b. Regulatory Factors

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

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

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

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

Unique Characteristics. First, this Court finds no merit to Plaintiffs' argument that the agencies failed to consider the unique characteristics of Jackson Park. *Contra* [31] at 21-22. In fact, the EA places great emphasis and focus upon the unique geographic characteristics of Jackson Park. For instance, the EA discusses in detail impacts: to water resources (Lake Michigan, the North and South Lagoons, a pond, and four wetlands), [61-22] at 42-43; archaeological resources, *id.* at 44; wildlife, *id.* at 40-42, and air quality, *id.* at 42. The EA further details mitigating measures the agencies would take to protect Jackson Park's unique characteristics, such as, for example, prohibiting tree removal through August 31 to

protect certain bird species during their breeding season. *Id.* at 41. Plaintiffs may not agree with the agencies' determination that the construction would not significantly impact the unique geographical characteristics of the area, but this Court cannot second-guess their substantive decisions *de novo*. *Ind. Forest*, 325 F.3d at 859.

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

To meet the first of these two prongs—the existence of a disagreement—Plaintiffs argue that a controversy exists about the construction's size, nature, and impact, including the disruption of traffic patterns, the destruction of trees, the size of the OPC building and its placement on the Midway Plaisance, the destruction of "key features" of Jackson Park, and the decision to place the OPC in a public park designed by Frederick Law Olmsted.[4] [31] at 22. In

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

support, Plaintiffs point to the declaration of Plaintiff W.J.T. Mitchell, a landscape historian and professor at the University of Chicago, whose declaration highlights some of these points of disagreement with the City, namely his belief that there exists "a mistaken idea that nineteen plus acres confiscated by the OPC plan do not represent a large part of Jackson Park," and that the planned closing of the east-bound lane of Midway Plaisance, which serves as an east/west artery connecting South Side neighborhoods with Jackson Park and Washington Park, will destroy both the effect of Midway Plaisance as a historical space and a crucial part of urban infrastructure, [31-1] at 12, 13. Yet the scope of this Court's NEPA review "is limited to the administrative record that was before the agency at the time it made its decision." *E. Band of Cherokee Indians v. U.S. Dep't of the Interior*, No. CV 20-757 (JEB), 534 F. Supp. 3d 86, 2021 U.S. Dist. LEXIS 73507, 2021 WL 1518379, at *25 (D.D.C. Apr. 16, 2021) (quoting *Rock Creek Pack Station, Inc. v. Blackwell*, 344 F. Supp. 2d 192, 201 (D.D.C. 2004)). Plaintiffs fail to demonstrate that Mitchell's views were before the agencies at the time they prepared the EA, and accordingly, may not use that piece of evidence to demonstrate a disagreement.

Regardless, even if Plaintiffs could demonstrate a genuine disagreement with the agencies about the impact to certain features of Jackson Park, that disagreement does not "render the defendants out of compliance under this [controversy] factor." *Mineta*, 349 F.3d at 957. Plaintiffs must also demonstrate the second step of the "controversy" inquiry—that their concerns were not addressed by the agencies in finding that the project would

not significantly affect the environment. *Ind. Forest*, 325 F.3d at 860. And Plaintiffs fall short on this second step too because the EA fully addresses these effects. *See* [61-22] at 24-26, 32-38 (change in traffic patterns), 164-239 (tree removal), 18-20 (size of the OPC building and relationship to Midway Plaisance), 61-67 (historic properties). In sum, because the record "is replete with scientific data addressing the concerns" which Plaintiffs raise, this Court cannot say (for the purposes of the instant motion) that the agencies acted arbitrarily and capriciously in finding no significant impact and not ordering an EIS. *Ind. Forest*, 325 F.3d at 861.

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

Cumulative effects. Plaintiffs also argue that the agencies improperly ignored a number of cumulative effects that will arise from the OPC's construction. [31] at 23-25. Not so. The EA addresses all of the effects Plaintiffs claim have been ignored. For instance, Plaintiffs

claim the construction involves not only the OPC building, but also the destruction of a road system and creation of a new roadway system that will narrow the park and expose Jackson Park to noise, fumes, dirt, and other types of pollution. *Id.* at 24. But the EA plainly considers the creation of a new roadway system and the effects stemming of this project. [61-22] at 13, 20-26. Plaintiffs also claim that the EA includes only a cursory cumulative impact analysis with respect to the GLFER area in Jackson Park, [31] at 24, yet the EA devotes an entire section to analyzing the impacts of the OPC's construction on GLFER, *see* [61-22] at 76-79. Finally, Plaintiffs complain that the EA "makes no reference" to a golf course that has been targeted for future destruction. [31] at 24. Contrary to this assertion, however, the EA discusses the golf courses within Jackson Park but notes that, at the time of the assessment, the rehabilitation of those golf courses was "not considered" because "final plans and design" for the courses had not yet been approved. [61-22] at 44-45. An agency does not act arbitrarily or capriciously by excluding from a cumulative impacts analysis "any project that cannot be meaningfully discussed at the time" the EA is issued. *Habitat Educ. Ctr.*, 673 F.3d at 527. Thus, in sum, none of Plaintiffs' objections to the EA's cumulative impacts analysis square with the record.

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

2. Inquiry Into Reasonable Alternatives

Plaintiffs also argue that the agencies failed to "study, develop, and describe appropriate" alternatives, as required under NEPA. [31] at 25-32. This inquiry into reasonable alternatives remains operative even if, as is the case here, the agency finds no significant environmental impact. *Mineta*, 349 F.3d at 960 (citing *River Rd. All., Inc. v. Corps of Eng'rs of U.S. Army*, 764 F.2d 445, 452 (7th Cir. 1985)); *see* 42 U.S.C. § 4332(2)(C)(iii), (2)(E). This Court's review "is not of the agency's substantive judgment, but of the sufficiency of the agency's consideration of the reasonable alternatives." *Mineta*, 349 F.3d at 960. The regulations require that an agency always study a no-action alternative. *Habitat Educ. Ctr.*, 593 F. Supp. 2d at 1027 n.13 (citing 40 C.F.R. § 1502.14(d) (2019)).

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

First, Plaintiffs devoted much of their briefing and oral argument to accusing the agencies of engaging in segmentation. *See* [31] at 26; [80] at 14-24. Segmentation refers to an improper practice by which an agency attempts to circumvent NEPA by dividing a federal action into smaller components to mask the overall impacts of the single action. *Mineta*, 349 F.3d at 962; *see also Louie v. Dickson*, 964 F.3d 50, 56, 448 U.S. App. D.C. 50 (D.C. Cir. 2020). The "classic example" of improper segmentation occurs where an agency builds small portions of a highway (and performs separate NEPA reviews of each portion) to avoid assessing the overall effects of the highway as a whole. *See Oak Ridge Env't Peace All. v. Perry*, 412 F. Supp. 3d 786, 832 (E.D. Tenn. 2019), *appeal dismissed*, No. 19-6332, 2021 U.S. App. LEXIS 15977, 2021 WL 2102583 (6th Cir. Jan. 14, 2021); *see also, e.g., Del. Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1318, 410 U.S. App. D.C. 137 (D.C. Cir. 2014) (concluding that an agency engaged in improper segmentation when it failed to consider the comprehensive effects of four related and connected pipeline projects).

Invoking this doctrine, Plaintiffs complain that the agencies engaged in "segmentation" by limiting their NEPA review of "reasonable alternatives" to those presuming that the OPC is either built on Jackson Park (Alternatives B and C) or not (Alternative A), without also assessing whether alternatives sites *outside of* Jackson Park also exist. *See* [31] at 26-28. The agencies' decision, so the argument goes, resulted in a flawed assessment of "reasonable alternatives" under NEPA because the agencies failed to evaluate allegedly superior substitute

sites *outside of* Jackson Park as alternatives. *Id.* at 28 (arguing that if "required reviews of possible alternatives had been properly performed, . . . at least one such site, located just to the west of Washington Park, would have been found to be not only prudent and feasible, but also superior to the Jackson Park site"); [80] at 22 (arguing that "Defendants carefully choreographed their narrowing of the scope of [their federal reviews], making it impossible to consider any site other than the one that was chosen").

Based on the record, Plaintiffs' improper segmentation theory fails. Improper segmentation occurs when an agency attempts to engage in piecemeal NEPA reviews "of projects that are 'connected, contemporaneous, closely related, and interdependent,' when the *entire project at issue is subject to federal review*." *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 50, 419 U.S. App. D.C. 416 (D.C. Cir. 2015) (emphasis added) (quoting *Del. Riverkeeper*, 753 F.3d at 1308). The decision to locate the OPC in Jackson Park was not itself subject to federal review. Rather, as discussed in *PoP I* and *PoP II*, and in the unrebutted declaration of the Foundation's Robbin Cohen, the City—together with the Foundation—made the decision to locate the OPC in Jackson Park, and there exists no evidence that this decision required federal review or involvement. Accordingly, there simply is no basis to conclude that the agencies engaged in improper segmentation when one of the alleged project "segments" does not actually fall under federal review.

Even when considered outside the contours of the anti-segmentation doctrine, Plaintiffs' argument that

the agencies should have considered sites outside of Jackson Park as part of their "reasonable alternatives" analysis fails under NEPA. NEPA does not "expand agency jurisdiction over land uses." *Quechan Indian Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, No. CV 07-0677-PHX-JAT, 2007 U.S. Dist. LEXIS 47974, 2007 WL 1890267, at *8 (D. Ariz. June 29, 2007); *see Scottsdale Mall v. State of Indiana*, 549 F.2d 484, 488 (7th Cir. 1977) (noting that NEPA "does not infringe on the right of a state to select a project to be financed solely out of its own funds"). NEPA only requires that agencies explore "reasonable alternatives," *Envtl. Law & Policy Ctr. v. U.S. Nuclear Regulatory Comm'n*, 470 F.3d 676, 685 (7th Cir. 2006), and agencies need not explore alternatives that "present unique problems, or are impractical or infeasible," *Latin Americans for Soc. & Econ. Dev. v. Adm'r of Fed. Highway Admin.*, 756 F.3d 447, 470 (6th Cir. 2014); *see also Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 217, 406 U.S. App. D.C. 275 (D.C. Cir. 2013) (noting, with respect to the plaintiffs' proposals of alternatives under NEPA, that "the short and dispositive answer to the [plaintiffs'] argument is that the agency lacks authority to impose the alternatives proposed by the [plaintiffs] and those alternatives would go beyond the scope of the pilot program"); *Nat. Res. Def. Council, Inc. v. F.A.A.*, 564 F.3d 549, 557 (2d Cir. 2009) (noting that NEPA does not require agencies to consider any alternatives that could only be implemented after changes in government policy or legislation) (citing *Nat. Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 93 (2d Cir. 1975)). Because the agencies have no authority to choose an alternative site to Jackson Park, or to force the City to build the OPC in Washington Park, they acted neither

arbitrarily nor capriciously by confining their review of "reasonable alternatives" to those involving Jackson Park.

Plaintiffs also rely upon *Openlands v. United States Department of Transportation* to support their argument that the agencies engaged in a flawed study of alternatives. 124 F. Supp. 3d 796 (N.D. Ill. 2015). In *Openlands*, the district court considered the adequacy of an EIS studying the environmental impacts of a proposed interstate tollway project. *Id.* at 804-05. The court found that the agencies preparing the EIS acted arbitrarily and capriciously in considering alternatives under NEPA. *Id.* at 806-08. More specifically, the agencies included a "fatally flawed" no-action alternative that assumed that the project would be built already. *Id.* at 806. Here, in contrast, the no-action alternative—Alternative A—assumes that the OPC is *not* built and that the federal government takes no actions. [61-22] at 27-28. *Openlands* therefore does not apply.

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

In sum, Plaintiffs have pointed to no errors in the agencies' consideration of alternatives. On the contrary, the agencies "followed required procedures, evaluated

relevant factors and reached a reasoned decision." *Envtl Law & Policy Ctr*, 470 F.3d at 685. Thus, this Court finds it unlikely that Plaintiffs will succeed on the merits of their claim that the agencies failed to adequately consider reasonable alternatives under NEPA.

B. Section 4(f) Claim

Plaintiffs also seek a preliminary injunction on their section 4(f) claim. Section 4(f) of the Transportation Act provides that the Secretary of Transportation may only approve a "transportation program or project" "requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance" if "(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use." 49 U.S.C. § 303(c).

As with their NEPA claim, Plaintiffs argue that the Secretary of Transportation failed to consider "feasible alternatives" to the road closures and the decision to place the OPC in Jackson Park. [31] at 32-33. This argument fares no better under section 4(f) than under NEPA. To reiterate, the City made the decision to use Jackson Park as the site of the OPC. Moreover, neither the OPC's construction nor its operation requires federal funding or approval, and the OPC itself is not a transportation project. Because § 4(f) applies only to transportation projects requiring federal approval, 49 U.S.C. § 303(c),

the FHWA had no jurisdiction over the City's decision to situate the OPC within Jackson Park and no authority to evaluate alternatives to the *site* itself; neither the FHWA nor this Court can compel the City to force the OPC to build its compound in Washington Park instead of Jackson Park. Accordingly, it was neither arbitrary nor capricious for the FHWA not to consider sites outside of Jackson Park in its "feasible alternatives" analysis.

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

The record confirms that the FHWA adequately performed these statutory duties. As to the first of those duties to confirm that there exists no feasible and prudent alternative to using § 4(f) land, as stated in the § 4(f) report, because the project area "is surrounded by 4(f) properties," only two avoidance alternatives exist: (1) the no-action alternative, which presumes that the OPC site is located in Jackson Park, that the City closes certain roadways within Jackson Park, and that no roadway improvements are completed in response to the closed roadways; and (2) so-called "congestion management

process strategies," which involve ways to reduce congestion that do not involve major construction. [61-35] at 51-57. But, as the report concludes, neither avoidance alternative is feasible and prudent. *Id.* Specifically, the report states that a traffic analysis revealed that the no-action alternative is not feasible and prudent because it does not provide sufficient pedestrian and bicyclist accommodations to improve access and circulation to Jackson Park. [61-35] at 52. And similarly, the report finds that the "congestion management process strategies" are not feasible and prudent because a traffic analysis shows that the strategies would have limited effectiveness in improving traffic operations. *Id.* at 55.

Plaintiffs suggest that the FHWA failed to meet its second duty under the statute—to ensure that the roadway improvements project included all possible planning to minimize harm to the Park. [31] at 33; *see* 49 U.S.C. § 303(c). Plaintiffs fail to specifically articulate how the agencies failed in this regard, and therefore waive this argument. *See M.G. Skinner & Assocs. Ins. Agency, Inc. v. Norman-Spencer Agency, Inc.*, 845 F.3d 313, 321 (7th Cir. 2017) ("Perfunctory and undeveloped arguments are waived, as are arguments unsupported by legal authority.").

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

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

C. NHPA Section 106 Claim

Next, this Court considers Plaintiffs' likelihood of success on their section 106 claim under NHPA. The NHPA comprises a "series of measures designed to encourage preservation of sites and structures of historic, architectural, or cultural significance." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 108 n.1, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978); *see Maudlin v. Fed. Emergency Mgmt. Agency*, 138 F. Supp. 3d 994, 1000 (S.D. Ind. 2015) ("The NHPA reflects Congress's longstanding interest in historic preservation."). Section 106 of the NHPA provides:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.

54 U.S.C. § 306108. Under NHPA, a federal agency must make a reasonable and good faith effort to identify historic

properties, 36 C.F.R. § 800.4; assess the adverse effects of the undertaking on any eligible historic properties, *id.* § 800.5(a); and, with the input of consulting parties, "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects" on those historic properties, *id.* § 800.6(a).

In moving for a preliminary injunction on their NHPA claim, Plaintiffs again assert that the FHWA precluded such review by engaging in "segmentation"—that is, by failing to include the OPC project itself in its review, and instead focusing upon only the effects to Jackson Park adjacent to the project. [31] at 34. This argument is baseless. As discussed, the OPC itself is not a federal project, and thus the doctrine of segmentation is simply not applicable in this context. Moreover, Plaintiffs' contention that the FHWA focused only upon effects adjacent the project, as opposed to effects caused by the project itself, is unsupported. After FHWA determined that the historical properties that would be adversely affected by the OPC's construction included Jackson Park, Midway Plaisance, and the CPBS Historic District, [61-13] at 45-63, it then analyzed in great detail the effects the OPC's construction and placement in Jackson Park would have on historic properties, including the destruction of roadways, *id.* at 55, and removal and replacement of certain parts of the historical landscape (such as the Perennial Garden/ Women's Garden) to accommodate the OPC, *id.* at 56-60. Defendants have thus unquestionably addressed the adverse effects created by the OPC project itself.

Ostensibly, Plaintiffs also argue that the law required Defendants to consider alternatives to Jackson Park itself

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

Plaintiffs' claim also fails to the extent that they believe section 106 compels a certain result. It does not. Section 106 is merely a procedural statute requiring a federal agency to take certain steps prior to beginning a project. *Narragansett Indian Tribe ex rel. Narragansett Indian Tribal Historic Pres. Office v. Nason*, No. CV 20-576 (RC), 2020 U.S. Dist. LEXIS 129299, 2020 WL 4201633, at *2 (D.D.C. July 22, 2020) (citing *See Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 755, 355 U.S. App. D.C. 372 (D.C. Cir. 2003)); *see also see also Dine Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 846 (10th Cir. 2019) (emphasizing that the section 106 process "does

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

D. UPARR Claim

Next, this Court considers the likelihood of success on the merits of Plaintiffs' UPARR claim. The UPARR Act focuses upon providing recreational opportunities in economically distressed urban communities. *See* 54 U.S.C. §§ 200501-200511; 36 C.F.R. § 72.72(a) ("The UPARR program has made funds available for the renovation and rehabilitation of numerous urban parks and recreation

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

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

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

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

Plaintiffs' sole argument on this claim posits that NPS failed to evaluate other practical alternatives and focused solely upon the eastern end of the Midway Plaisance as the replacement recreation site for the conversion. [31]

at 35-36. This argument fails for two reasons. First, the regulations do not require the NPS itself to consider alternatives *to the replacement recreation sites*. Instead, the regulations state that NPS "will only consider conversion requests" if the applicant (here, the City) has demonstrated that "All practical alternatives *to the proposed conversion* have been evaluated." 36 C.F.R. § 72.72(b) (emphasis added). The *proposed conversion* is the conversion of Park land to accommodate the OPC. And NPS did consider whether the City evaluated practical alternatives to this *proposed conversion*. In the NPS' final UPARR Stewardship Review, NPS evaluated the City's considerations of alternatives to the conversion and concluded that it appropriately ruled out alternatives to the actual converting actions. [61-47] at 3. More specifically, NPS noted that the proposed conversions "were necessary to avoid serious traffic impacts," and thus, as corroborated by FHWA's section 4(f) analysis, no practical alternatives exist as to the conversion of strips of parkland along certain roadways. *Id.* Similarly, NPS explained that it found that the City's UPARR conversion proposal appropriately evaluated other alternatives against the backdrop of its objectives—locating the OPC in a community where the former President worked and lived, for example—and ultimately concluded that no practical alternatives to the conversion existed. *Id.* In short, NPS did what the regulations required by ensuring that the City demonstrated that it considered all practical alternatives to the conversion. 36 C.F.R. § 72.72(b).

Second, to the extent Plaintiffs suggest that Defendants failed to fully consider replacement recreational sites, that assertion similarly lacks any basis in fact or law. While

the regulations require that NPS consider conversion requests only if the proposal "assures the provision of adequate recreation properties and opportunities of reasonably equivalent usefulness and location," 36 C.F.R. § 72.72(b)(3), the record demonstrates that the City's proposal meets this prerequisite. The City considered seven potential replacement sites, including the eastern end of the Midway Plaisance (which it ultimately chose), Harold Washington Park, and five other vacant sites located between 57th and 71st streets in Chicago. [61-10] at 41-43. The City ruled out Harold Washington Park and the vacant lots because none of them are: (1) close to the conversion area in Jackson Park; (2) designed by Olmsted, the designer of Jackson Park; or (3) listed on the National Register of Historic Places. *Id.* at 42. Four of the vacant sites, the City noted, also are not wholly owned by the City, and therefore using them would have required the City to acquire those unowned portions. *Id.* The eastern end of the Midway Plaisance, on the other hand, checked more of the City's boxes because it sits directly across the street from the OPC conversion area, is well suited for diverse forms of recreation like the areas to be converted, and is designed by Olmsted. *Id.* NPS considered this information from the City in approving its conversion request, finding that the City demonstrated the replacement area would provide adequate recreation properties and opportunities of reasonably equivalent usefulness and location. *See* [61-47] at 3-4. Contrary to Plaintiffs' argument, the NPS had no further duties under UPARR to examine any alternative properties or to itself consider alternatives to conversion. Thus, Plaintiffs are unlikely to succeed on the merits of their UPARR claim.

E. USACE Permits

This Court next considers Plaintiffs' claims implicating the USACE. The RHA makes it unlawful to "alter, deface, destroy, move, injure . . . or . . . impair the usefulness of any . . . work built by the United States . . . for the preservation and improvement of any of its navigable waters, but also authorizes the USACE to "grant permission for the alteration or permanent occupation or use of" a public work "when in the judgment of the Secretary such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work." 33 U.S.C. § 408. The CWA authorizes the USACE to issue permits for the "discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). Plaintiffs advance two arguments for why they believe USACE acted arbitrarily and capriciously when granting permits under the RHA and CWA, but neither has merit.

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

Second, Plaintiffs complain that the RHA permit allows the GLFER to be modified despite it being an "interconnected system that cannot be pulled apart and

relocated." *Id.* at 38-39. Despite their dismay about the fact that GLFER will be altered, however, Plaintiffs do not address any statutory criteria governing the USACE's issuance of a section 408 permit; nor do they explain why they believe the USACE's actions were arbitrary or capricious.

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

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

F. Anticipatory Demolition

Finally, Plaintiffs move for a preliminary injunction on their "anticipatory demolition" claim. Section 110(k) of the NHPA prohibits federal agencies from issuing a loan, permit, license, or other assistance to an applicant who, "with intent to avoid the requirements [of section

106 of NHPA], has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur." 54 U.S.C. § 306113.

Invoking this provision, Plaintiffs argue that the City and Park District intentionally removed trees and demolished an athletic field to accommodate the OPC, and that this action amounts to a violation of section 110(k) precluding FHWA and USACE from granting their respective funding and permits. [31] at 39. In making this argument, Plaintiffs assume the fact that the City removed the trees makes it automatically liable for anticipatory demolition under § 110(k) such that the agencies erred by granting funding and permits. [31] at 41 (arguing that the "acts taken by the City, Park District and Foundation, both in regards to the destruction of the trees and in regards to the development of OPC, involve adverse effects that constitute anticipatory demolition in violation of Section 110(k)"). But as with many of their other claims, Plaintiffs fail to focus correctly on the appropriate statutory inquiry—in this case, whether a federal agency has found that the City, "*with intent to avoid the requirements*" under NHPA, has "significantly adversely affected a historic property." 54 U.S.C. § 306113 (emphasis added).

In this case, the FHWA accepted the City's explanation that it believed the construction work on the track and field did not implicate federal review, thus concluding that the City did not undertake that work with the intent to avoid NHPA review under section 106. [61-9] at 4-5.

The FHWA acted neither arbitrarily nor capriciously in reaching this conclusion. The City explained the reasons it began the track and field work while section 106 review remained pending, including that the work lies entirely outside the area affected by the OPC, that the track and field would provide recreational opportunities to counter those lost due to the OPC's construction, and that it had consulted with NPS, which indicated the track and field itself was not subject to federal review. *See* [61-8]. This record supports the conclusion that the City engaged in this early construction *not* with the intent to avoid section 106 review, but because it genuinely believed the construction did not implicate federal review. Plaintiffs argue that FHWA engaged in a "blanket acceptance of the City's explanation that it did not intend to circumvent the Section 106 review process," [80] at 27, suggesting a naivete; yet they offer nothing to undermine the City's explanation. Therefore, this Court cannot say that FHWA acted arbitrary and capriciously in accepting the City's reasonable explanation of its actions and subsequently concluding that the City did not engage in an anticipatory demolition. This Court accordingly finds it unlikely that Plaintiffs will succeed on their anticipatory demolition claim.

G. Plaintiffs Fail to Meet a Threshold Preliminary Injunction Element

To obtain a preliminary injunction, Plaintiffs must establish some likelihood of success on the merits, that they lack an adequate remedy at law, and that without an injunction they will suffer irreparable harm. *GEFT*

Outdoors, LLC v. City of Westfield, 922 F.3d 357, 364 (7th Cir. 2019), *cert. denied sub nom. GEFT Outdoor L.L.C. v. City of Westfield*, 140 S. Ct. 268, 205 L. Ed. 2d 137 (2019). This Court must deny the injunction if they fail to meet any of these threshold elements. *Id.* (citing *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008)). Plaintiffs have failed to demonstrate that any of their federal claims are likely to succeed, and thus, this Court denies their motion for preliminary injunction for failure to meet this threshold element. In light of this finding, this Court need not address the other requisite elements.

IV. Conclusion

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

Dated: August 12, 2021

Entered:

/s/ John Robert Blakey
John Robert Blakey
United States District Judge

APPENDIX G — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED JUNE 10, 2024

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

June 10, 2024

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 22-3190

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

Plaintiffs-Appellants,

v.

PETE BUTTIGIEG, SECRETARY OF TRANSPORTATION, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division

No. 1:21-cv-02006

John Robert Blakey,
Judge.

Appendix G

ORDER

Plaintiffs-Appellants filed a petition for rehearing and rehearing *en banc* on May 22, 2024. No judge[1] in regular active service has requested a vote on the petition for rehearing *en banc*, and all members[2] of the original panel have voted to deny panel rehearing.

The petition for rehearing and rehearing *en banc* is therefore DENIED.

1. Circuit Judge Joshua P. Kolar did not participate in the consideration of this petition.

2. Circuit Judge Diane P. Wood retired effective May 1, 2024, and did not participate in the consideration of this petition, which is being resolved by a quorum of the panel under 28 U.S.C. § 46(d).