No. 24-311

In the Supreme Court of the United States

PROTECT OUR PARKS, INC., ET AL., PETITIONERS

v.

PETE BUTTIGIEG, SECRETARY OF TRANSPORTATION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the National Park Service and the Federal Highway Administration did not act arbitrarily and capriciously in fulfilling their obligations under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq*., where the court found that the record supported the agencies' decision to prepare an environmental assessment instead of an environmental impact statement, and where the court found that the agency reasonably declined to consider alternatives to the proposed action that they lacked the statutory authority to implement.

2. Whether the court of appeals correctly rejected the contention that Section 4(f) of the Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 934 (49 U.S.C. 303(c)), required the Federal Highway Administration to explore alternative locations for a construction project, where the court found that the agency had no statutory authority to alter the location or forbid the construction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 97 F.4th 1077. A prior opinion of the court of appeals (Pet. App. 43a-65a) is reported at 39 F.4th 389. The opinions and orders of the district court (Pet. App. 66a-109a, 113a-164a) are available at 2021 WL 3566600 and 2022 WL 910641. Additional orders of the district court (Pet. App. 40a-42a, 110a-112a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2024. A petition for rehearing en banc was denied on June 10, 2024 (Pet. App. 165a-166a). The petition for a writ of certiorari was filed on September 9,

2024 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 2014, respondent the Barack Obama Foundation, a private not-for-profit organization, began considering locations for the Obama Presidential Center (Center). Pet. App. 3a. The foundation ultimately decided to construct the Center on the western edge of Jackson Park, a 551-acre park on Chicago's South Side. *Id.* at 6a; C.A. Supp. App. 81, 86. Respondent the City's decision to locate the Center in Jackson Park prompted related actions by respondents the National Park Service and the Department of Transportation, and the agencies prepared a joint environmental assessment in connection with those actions to fulfill their obligations under National Environmental Policy Act of 1969 (NEPA), Pub. L. No. 91-190, 83 Stat. 852 (42 U.S.C. 4321 *et seq.*). Pet. App. 8a.

a. The National Park Service reviewed the City's decision to locate the Center in Jackson Park on behalf of the Secretary of the Interior under the Urban Park and Recreation Recovery Act of 1978 (UPARR Act), 54 U.S.C. 200501 *et seq.* Pet. App. 8a, 48a-49a. The UPARR Act authorizes federal assistance for the rehabilitation of recreational facilities in economically-distressed urban communities. See 36 C.F.R. 72.72(a). The acceptance of federal funds under the UPARR Act generally requires a community to maintain the facility for recreational use unless the Park Service approves its conversion to non-recreational use. *Ibid.* If a community proposes a conversion of protected lands to non-recreational use, the Park Service "shall approve" the proposed conversion if the proposal (1) aligns with the then-current local park program, and (2) contains terms

that the Park Service determines will "ensure the provision of adequate recreation properties and opportunities of reasonably equivalent location and usefulness." 54 U.S.C. 200507.

In the 1980s, the City accepted two federal grants under the UPARR Act to improve recreational opportunities in Jackson Park, in exchange for which the City agreed to maintain most of Jackson Park for public recreational uses. Pet. App. 48a; see C.A. Supp. App. 30, 90-91. The City's decision to locate the Center in Jackson Park prompted the City to make a request under the UPARR Act to convert about ten acres of parkland to non-recreational uses. Pet. App. 49a. The City proposed to offset the loss of recreational lands by newly extending UPARR Act protection to closed roadways and lands in an area abutting Jackson Park known as the Midway Plaisance. *Ibid.* These replacement lands will result in a net gain of about 6.6 acres of recreational lands, which will be used for improvements, including pedestrian walkways and a new play area. *Ibid.*

After review, the Park Service concluded that the proposed replacement properties satisfied the UPARR Act. Pet. App. 49a. It therefore approved the partial conversion of UPARR-funded properties in Jackson Park. *Ibid.*

b. The Federal Highway Administration, an entity within the Department of Transportation, also performed a review in connection with the project. Pet. App. 8a. The City's decision to close portions of three roadways in Jackson Park in connection with the new Center prompted the Chicago Department of Transportation to propose using Federal-Aid Highway funding for new roadway construction and bicycle and pedestrian improvements in Jackson Park. *Id.* at 46a. This

proposal, in turn, required the Federal Highway Administration to determine whether the planned transportation project met all federal requirements, including Section 4(f) of the Department of Transportation Act (Transportation Act), Pub. L. No. 89-670, 80 Stat. 934 (49 U.S.C. 303(c)). See Pet. App. 46a.

Section 4(f) restricts the Department of Transportation's ability to approve transportation programs or projects "requiring the use of publicly owned land of," *inter alia*, "a public park [or] recreation area." 49 U.S.C. 303(c). Section 4(f) requires the Federal Highway Administration to determine whether there is a feasible and prudent alternative to the use of Section 4(f) properties and, if not, whether the project includes all possible planning to minimize harm to Section 4(f) properties. See *ibid.* The City's proposal to use federal highway funds to construct the new road and pathways implicated Section 4(f) because the planned transportation improvements would use small portions of four properties protected by Section 4(f), including Jackson Park. Pet. App. 46a.

The Federal Highway Administration found that Section 4(f)'s requirements were satisfied because there was no feasible and prudent alternative to the use of Section 4(f) properties. Pet. App. 47a. It explained that, because the City was closing other roads in Jackson Park to accommodate the Center (an action that did not require federal authorization), there would be unacceptable safety and operational outcomes if the City did not undertake the planned transportation improvements implicating the Section 4(f) properties, and the safety and operational problems could not be alleviated through congestion management strategies that would avoid the use of parklands. C.A. Supp. App. 495.

The Federal Highway Administration then considered how the use of Section 4(f) properties could be minimized by evaluating nine alternatives that incrementally added elements such as road widening or traffic light improvements to improve transportation operations. C.A. Supp. App. 500. The Federal Highway Administration found that only Alternative 9 avoided failing levels of service at all 26 intersections within the Park. *Id.* at 507; see Pet. App. 47a. To ensure the impact of that alternative would be minimized, the Federal Highway Administration used further design studies to generate sub-alternatives representing different ways to implement Alternative 9. C.A. Supp. App. 509; see Pet. App. 47a. The agency then found that Alternative 9B, which called for a combination of improvements along Lake Shore Drive, Hayes Drive and Stony Island Avenue, caused the least overall harm to Section 4(f) properties. C.A. Supp. App. 107, 522-524; see Pet. App. 47a.

c. The National Park Service and the Department of Transportation performed a joint environmental assessment under NEPA to evaluate the anticipated environmental impacts of their proposed federal actions in connection with the Center. Pet. App. 8a. The environmental assessment and its supporting expert reports explored the direct, indirect, and cumulative impacts of the proposed agency actions, and two alternatives (taking no federal action, or denying the use of federal highway funding). C.A. Supp. App. 108-147. The agencies considered the impacts of the proposal and the alternatives on various resources, including trees, wildlife, air and water quality, traffic, noise, and historic and cultural resources. *Ibid.* Based on that assessment, the agencies concluded that NEPA did not require them to

prepare an environmental impact statement, which would require more in-depth environmental analysis. *Ibid.* The agencies explained that an environmental impact statement was not necessary because the proposed federal actions would not have a significant effect on the environment. *Ibid.*; see 40 U.S.C. 4332(2)(C) (2018) (providing that agencies must prepare a "detailed statement" analyzing environmental effects in connection with "major Federal actions *significantly* affecting the quality of the human environment") (emphasis added).

2. In 2018, petitioner Protect Our Parks and several individuals sued the City of Chicago and its Park District seeking to stop the Center's construction in Jackson Park. Pet. App. 9a. The plaintiffs raised various state law claims as well as takings claims under the Fifth and Fourteenth Amendments of the Constitution. *Ibid.* The district court granted summary judgment to the defendants on all claims, and the court of appeals "affirmed summary judgment for the defendants on the constitutional claims but vacated judgment on the state law claims for lack of jurisdiction, because Protect Our Parks's claims amounted to little more than a policy disagreement with the City's decision to locate the Center in Jackson Park." 10 F.4th 758, 761; see Pet. App. 9a. This Court denied a petition for certiorari. 141 S. Ct. 2583.

Petitioner Protect Our Parks and others quickly returned to district court, filing a new complaint against the City, the Park District, the Foundation, the National Park Service, the Federal Highway Administration, and certain other federal agencies and individual federal officers. Pet. App. 9a-10a. Petitioners alleged a series of state and federal law claims against the state and private respondents. *Ibid.* They also asserted

federal claims under the Administrative Procedure Act (APA), 5 U.S.C. 701, *et seq.*, against the federal respondents—alleging, as relevant here, violations of NEPA and Section 4(f) of the Transportation Act. Pet. App. 10a-11a.

The district court denied petitioners' request for a preliminary injunction barring construction of the Center. Pet. App. 12a. The court of appeals rejected a request for an injunction pending appeal, 10 F.4th at 763, and this Court denied petitioners' requests for emergency relief. See 141 S. Ct. 2583, 142 S. Ct. 60. The court of appeals subsequently affirmed the district court's denial of a preliminary injunction. Pet. App. 43a-65a.

In affirming the denial of the preliminary injunction, the court of appeals held that petitioners were unlikely to succeed on any of their APA claims against the federal agencies. Pet. App. 56a-65a. The court rejected petitioners' assertion that it was arbitrary and capricious for the Park Service and Federal Highway Administration to decide "not to prepare a full-blown environmental impact statement." *Id.* at 12a; see *id.* at 56a-57a. The court held that the "record shows" the agencies "took the necessary hard look at the likely environmental consequences of the project before reaching their decisions." *Id.* at 56a; see *id.* at 12a. It also explained that, because the agencies had "thoroughly studied the project through the lens of the required regulatory factors," their decision "'implicates substantial agency expertise and is entitled to deference.'" *Id.* at 57a (citation omitted); see *id.* at 12a.

The court of appeals also determined that the agencies had not improperly segmented their NEPA analyses by considering the environmental effects of the

proposed land conversion under the UPARR Act and the approval of the federal highway funding under Section 4(f), without considering alternative locations for the Center. Pet. App. 58a-61a; see *id.* at 13a. The court explained that the City's decision to locate the Center in Jackson Park was not a federal action and therefore was not subject to NEPA, which requires the preparation of an environmental impact statement in connection with "major *Federal* actions significantly affecting the quality of the human environment," 40 U.S.C. 4332(2)(C) (2018) (emphasis added). Pet. App. 58a-59a; see *id.* at 13a-14a. The court further observed that the federal government "has no authority to choose another site for the Center or to force the City to move the Center," *id.* at 60a, and NEPA does not require agencies to consider environmental harms they have no power to prevent or to analyze alternative actions it "would be impossible for the agency to implement," *id.* at 61a. See *id.* at 13a.

The court of appeals further determined that petitioners' claims under Section 4(f) and other federal statutes "suffer[ed] from the same * * * problems as the NEPA claims." Pet. App. 61a; see *id.* at 13a. It was neither "arbitrary nor capricious," the court reasoned, for the Federal Highway Administration to omit the consideration of alternative locations for the Center in conducting its Section 4(f) review because the agency "could not have compelled the City to locate the Center at a different site." *Id.* at 62a; see *id.* at 14a.

After the court of appeals' decision affirming the denial of a preliminary injunction, the district court denied petitioners' motion for leave to amend their complaint under Federal Rule of Civil Procedure 15(a), finding that it would be futile for petitioners to add the breach-of-contract and unjust enrichment claims petitioners

sought to press against the City and the private foundation. Pet. App. 14a-15a. The court then dismissed the state law counts in the complaint, and it granted final judgment in favor of respondents on all of the remaining claims based on the parties' joint stipulation that no additional record development or briefing was necessary beyond what was submitted at the preliminary injunction stage. *Id.* at 15a.

3. Petitioners appealed, and the court of appeals again affirmed. Pet. App. 1a-39a. The court observed that, because the record and arguments on appeal were identical to the record and arguments it considered during the preliminary injunction appeal, the law-of-the-case doctrine foreclosed it from reconsidering the federal law issues. *Id.* at 22a-24a.

For the sake of completeness, however, the court of appeals summarized its "key findings" on those federal claims. Pet. App. 24a. It reaffirmed its conclusion that the federal respondents had satisfied their NEPA obligations, reiterating that the agencies had taken a "very thorough" look at the environmental consequences of their actions on resources such as trees and migratory birds. *Id.* at 25a (citation omitted). The court also reiterated its rejection of petitioners' arguments that it was arbitrary and capricious for the federal agencies to omit consideration of alternate locations for the Center in performing their reviews under NEPA, Section 4(f) of the Transportation Act, and other applicable statutes. *Id.* at 26a-28a. The court observed that the federal respondents had no obligation to consider alternate sites because the Center is a local initiative and the agencies had no control over where the Center would be built. *Ibid.*

The court of appeals also affirmed the district court's dismissal of the various state law claims against the non-federal respondents. Pet. App. 28a-39a. And the court of appeals further concluded the district court did not abuse its discretion in denying petitioners' motion to amend the complaint to add the state law breach-of-contract and unjust enrichment claims against the City and the private foundation. *Id.* at 15a-20a.

4. The court of appeals denied a petition for rehearing en banc, with no judge calling for a vote. Pet. App. 165a-166a.

ARGUMENT

The court of appeals correctly affirmed the district court's determination that the federal agencies did not act arbitrarily or capriciously in performing their analyses under NEPA and Section 4(f) of the Transportation Act. Petitioners nevertheless contend that this Court should grant review because the court of appeals' NEPA and Section 4(f) holdings conflict with this Court's decisions regarding agency deference and because the NEPA decision implicates the same issues that are pending before the Court in *Seven County Infrastructure Coalition.* v. *Eagle County*, No. 23-975 (argued Dec. 10, 2024). Both contentions are incorrect, and the petition for a writ of certiorari should be denied.[*]

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[*] Petitioners also ask this Court to consider questions regarding the disposition of their state law claims against the non-federal respondents and petitioners' motion for leave to amend to add additional state law claims against the non-federal respondents. See Pet. ii. The federal respondents have not taken a position on the state law claims or the motion to amend in this litigation, but the issues relevant to the state law claims as presented in the petition do not appear to satisfy the criteria for this Court's review. See Sup. Ct. R. 10.

1. The court of appeals correctly rejected petitioners' APA claims because the federal agencies did not act arbitrarily or capriciously in completing their reviews under NEPA and Section 4(f) of the Transportation Act.

a. The court of appeals held that it was not arbitrary and capricious for the Park Service and Federal Highway Administration to perform an environmental assessment, instead of completing a full-blown environmental impact statement, because the "administrative record show[ed]" that the agencies had thoroughly analyzed the potential environmental effects and concluded that "none would have a significant impact." Pet. App. 25a. That holding comports with the plain text of NEPA, which requires an environmental impact statement only in connection with major federal actions "significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C) (2018).

b. The court of appeals also held that NEPA did not require the federal agencies to consider alternative locations for the Center because the federal government lacked the power to control where the Center was located or to prevent the Center from being built. Pet. App. 26a-27a. That holding, too, was correct. As this Court has explained, NEPA does not require agencies to consider environmental consequences it "lacks the power to" prevent. *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 768 (2004). And while the statute requires agencies to consider "reasonable alternatives" to the proposed action, the court of appeals correctly held that an alternative is not "reasonable" where the federal agency lacks the power to implement it. Pet. App. 27a.

c. Similarly, the court of appeals correctly determined that the Federal Highway Administration was

not required to consider alternative locations for the Center in conducting its review under Section 4(f) of the Transportation Act. Pet. App. 27a-28a. As the court explained, the construction of the Center itself does not involve the use of federal highway funds, and Section 4(f) does not give the Federal Highway Administration the power to leverage its funding of a related roads project to exercise authority over the Center's location, nor does Section 4(f) require the Federal Highway Administration to consider alternatives it cannot require the City to implement. *Ibid.*

2. Petitioners assert that this Court should nonetheless grant review because the court of appeals' NEPA and Section 4(f) decisions conflict with this Court's decisions and implicate a pending case. Those contentions are incorrect.

First, petitioners contend (Pet. 21-28, 30-35) that the court of appeals' decision conflicts with *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 the court improperly deferred to administrative agencies. But *Loper Bright* concerned deference to agency interpretations of statutory text; no such interpretation is at stake here. The court simply upheld the agencies' application of NEPA's plain text to the particular facts of this case, applying the APA's familiar arbitrary and capricious standard. Pet. App. 25a. And while *Overton Park* concerns arbitrary and capriciousness review, the court of appeals did not misconstrue the APA standard here. To the contrary, it appropriately cited and applied this Court's instruction that, in the NEPA context, the court's role "is to insure that the agency has taken a 'hard look' at environmental consequences." *Kleppe* v. *Sierra Club*, 427

U.S. 390, 410 n.21 (1976) (citation omitted); see Pet. App. 25a (quoting *Highway J Citizens Grp.* v. *Mineta*, 349 F.3d 938, 953 (7th Cir. 2003) (quoting *Kleppe*, 427 U.S. at 410 n.21 (citation omitted), cert. denied, 541 U.S. 974 (2004)).

Second, petitioners contend (Pet. 29-30) that the court of appeals' determination that NEPA did not require the federal agencies to consider alternative locations for the Center implicates the same issues that are before the Court in *Seven County*, *supra* (No. 23-975). But *Seven County* does not implicate any dispute as to whether agencies must consider alternatives they lack the authority to implement; it concerns the extent to which agencies must consider the environmental effects of the proposed federal action itself. See Pet. at i., *Seven County*, *supra* (No. 23-975). And even then, no party disputes that an agency need not consider environmental effects it has no statutory power to prevent because in *Public Citizen*, this Court squarely held that an agency need not consider any effect it "has no ability to prevent * * * due to its limited statutory authority." See 541 U.S. at 770. No party in *Seven County* asks the Court to revisit that holding. Accordingly, there is no need for this Court to hold the petition pending the outcome of *Seven County*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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