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.*,

Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

After several extensions, the Defendants have filed two fact and analysis-free responses that never address any of the many specific issues raised in support of Plaintiffs' petition including, *inter alia,* the massive giveaway for $10 of vital public lands in world-class Jackson Park for the private development of the Obama Presidential Center (OPC). Worse, those illegal actions have been blessed by an unbroken series of erroneous decisions in the Seventh Circuit and the Northern District of Illinois. We start with the glaring deficiencies in the response submitted by the Federal Defendants, and then turn to the arguments by the City of Chicago and Obama Foundation in regards to the financial and business irregularities for funding the OPC and related issues that should be heard on certiorari.

Federal Defendants. The correct application of both the National Environmental Policy Act (NEPA) and the Transportation Act (TA) depends on the proper definition of the joint project undertaken by the City of Chicago, the Park District and the Obama Foundation. The Federal Defendants' Response Brief ("Fed. Br.") limits that project solely to a revision of the roadwork in and around Jackson Park. It treats the City's prior approval of the OPC in Jackson Park as outside the scope of federal review under either statute. That audacious rewriting of history ignores the initial project definition which stated that "the undertaking comprises the construction of the OPC in Jackson Park by the Obama Foundation, the closure of roads to accommodate the OPC." [Dkt. 1, Complaint, Ex. 3 thereto (Assessment of Effects to Historic Properties: January 2020) at 1 (Page ID #226)] But on February 8, 2021, long after the public hearings were concluded, the

Federal Defendants rewrote that description to exclude any reference to the OPC, such that the project covered only work "along Lake Shore Drive, Stony Island Avenue, Hayes Drive, and other roadways in Jackson Park." [Notice of Final Federal Agency Action on Proposed Transportation Project in Illinois, 86 Fed. Reg. 8677 (Feb. 8, 2021)]

That illegal compression in project scope represented the Federal Defendants' interpretation and application of NEPA, the TA and other related statutes and ripped the guts out of all the Plaintiffs' environmental objections to the project. Before that improper definitional ploy, the statutory requirement was to be sure that "no prudent and feasible alternative" was available for the entire OPC project, which could never have been done by looking solely at changing roadwork in Jackson Park. It would have required looking to other sites on the South Side of Chicago that could accommodate the OPC without the massive destruction to Jackson Park, including the killing of at least 800 old-growth trees, which the City and the Park District began chopping down on August 21, 2021, just one working day after the parties had completed the illegal transfer of possession of 19.3 prime acres of Jackson Park land to the Foundation, without conducting (let alone passing) the due diligence required at closing under the Memorandum of Agreement between the two sides.

But with the fake project redefinition in place, it became equally obvious that improving roadwork in Jackson Park could not be achieved by moving the OPC to a far superior site, i.e., on non-public trust property just to the west of Washington Park, as illustrated by award-winning design plans which the Plaintiffs had

offered gratis, prepared by the Chicago architect Grahm Balkany. Construction at that site west of Washington Park posed no risk of damage to Lake Michigan, sharply reduced the destruction of trees, and left undisturbed vital lakefront habitat for migratory birds. The alternative site is located near blighted communities that could have benefitted from proximity to the OPC, and offered far better transportation access by sitting over public elevated train transit (the Green Line, and near to the Red Line), just a short distance east of the Kennedy Expressway.

Unfortunately, all these Defendants cleverly insulated the project from review by claiming "their expertise implicates substantial agency expertise and is entitled to deference." (Fed. Br. at 7) But they ignored the authoritative standard set out in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), that recognizes that while "under § 706 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." *Id.* at 415.

The level of judicial scrutiny was recently heightened in *Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244 (2024), overruling *Chevron Inc. v. NRDC*, 467 US 837 (1984), which the Federal Defendants feebly seek to sidestep by holding that *Loper Bright* only "removes deference to agency interpretations of statutory text; no such interpretation is involved here." Not so. As explained in the Petition (at 21-24), the Federal Defendants' review was dominated by statutory interpretations (deferred to and accepted by the Seventh Circuit), whether in the form of how to define the project, to findings that the massive alterations in Jackson Park merited a FONSI (finding of

no significant impact) in the teeth of 40 C.F.R. § 1508.18 (2003), which states a major federal action "includes actions with effects that may be major, and which are *potentially* subject to Federal control and responsibility." Thus, Section 4(f) of the TA specifically provides that the U.S make a "special effort" to protect public parks, such that a transportation project can be approved "only if" there is no prudent and feasible alternative to using the land and all possible planning to minimize harm to the park is included. 49 U.S.C. § 303(c). The process for the OPC's approval cannot meet that standard.

Similarly, the lower courts flatly ducked looking at the initial Environmental Assessment (EA) of September 2020, by ignoring a plethora of adverse impacts as temporary, insignificant and/or mitigated [Dkt 1-2, Compl. Ex. 10], including its preposterous claim of one-to-one parity between the destroyed old growth trees and small replacement saplings five years from today *if* the OPC is then completed, *if* the budget is made available and *if* they take root. The Federal Defendants insist that the courts below gave the necessary "hard look" analysis to OPC, but only on the wrong question of what kinds of ground cover should replace the imminent destruction of the trees and the Women's Garden. The needed hard look was whether the construction of the OPC should be allowed to wreck the masterful design of the Frederick Law Olmsted Jackson Park, and of alternatives to such an environmentally and historically destructive plan.

To support that indefensible conclusion, the Seventh Circuit accepted the Federal Defendants' interpretation that "the City's decision to locate the Center in Jackson Park was not a federal action and therefore was not

subject to NEPA." (Fed. Br. at 8) The statement is an opportunistic half-truth, for while the federal government has no power to dictate where the City should place the OPC, let alone to tell the City whether to build it, the entire federal regulatory scheme would become a dead letter if the federal government's comprehensive powers under both NEPA and the TA could not veto the site selection of any city or state. It must be able to do so, at which point, the Federal Defendants have to satisfy the statutory anti-segmentation requirement needed to make sure that no private or government applicant could circumvent the proper administrative review by breaking it up into two or more parts, to make it easier for the composite project to pass muster.

All the many cases that deal with this issue, except this one, have followed a strict two-part procedure, *see Highway J Citizens Grp. v. Mineta,* 349 F.3d 938, 953, (7th Cir. 2003) providing: "[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." Remember the "if": that deference cannot be stipulated, it has to be earned. Thus, in *Mineta* the Seventh Circuit undertook a detailed factual examination to ensure that any work that was done on Highway J would not have any adverse physical effects on the Ackerville Bridge. But rather than deal with the substantive issues, the federal government just cites *Kleppe v. Sierra Club* 427 U.S. 390, 40, n.21 (1976) for its endorsement of the hard-look test that was misapplied with the OPC. But *Kleppe* only held that it was not necessary to run a comprehensive environmental review covering five States—Montana, Wyoming, South

Dakota, North Dakota, and Nebraska—to approve any localized project. The clear negative inference is that a single project concentrated in Jackson Park cannot be segmented as if it were a large regional project. *Kleppe* is a fitting capstone to the Federal Defendants' response that stumbles on every question of law and fact with the sole purpose of privileging the OPC from the EIS (and other scrutiny) that is long overdue. Certiorari review is vital.

City/Obama Foundation Defendants. *Denial of Motion for Leave to Amend.* The City and Obama Foundation argue this Court has "no work to do here" after the Seventh Circuit affirmed the District Court's hasty denial of Plaintiffs' leave to amend under Fed R. Civ Pro. 15(a)(2) ("Rule 15"). That preemptory decision obliterates the procedural protections that Rule 15 confers upon all plaintiffs.

This Court has often granted certiorari to review decisions that depart from established judicial norms on key issues of federal procedure. *See Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers,* 357 U.S. 197, 203 (1958) (granting certiorari to address "important questions as to the proper application of the Federal Rules of Civil Procedure"); U.S. Sup. Ct. Rule 10(a) ("[H]as so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power" *i.e.,* certiorari); *see also Union Pac. R. Co. v. Bhd. of Locomotive Engineers & Trainmen Gen. Comm. of Adjustment, Cent. Region,* 558 U.S. 67, 81 (2009) (granting certiorari to "reduce confusion" that had "cloud[ed] court … decision[s]" with respect to application of federal law).

Plaintiffs' certiorari petition demonstrates that the District Court's hurried and groundless denial of Plaintiffs' single request for leave to amend was improper and cries out for review. It was made only months after the original complaint was filed, when in August 2021 the Plaintiffs learned of the transfer under the Master Agreement and first obtained reliable information on the Foundation's weakened financial position. It created no prejudice because it was filed before any answer was issued, discovery undertaken or trial date set. Fed. R. Civ. Pro 15(a)(2) mandates that such leave be granted to "freely give leave when justice so requires." Thus, this Court in *Foman v. Davis* reversed the lower courts' refusal to allow an amended complaint after judgement was entered, because Rule 15 freely "afford[s] an opportunity to test . . . claim[s] on the merits." 371 U.S. 178, 182 (1962). Both courts, moreover, relied on a wholly manufactured argument the Plaintiffs were suing as third-party beneficiaries so that their claims were thereby barred under clause 34 of the contract. But the proposed amended complaint explicitly disavowed any such cause of action, and relied on *Malec v. City of Belleville*, 891 N.E.2d 1039, 1042 (Ill. 2008), which explicitly authorizes such direct or derivative taxpayers' suits.

The City/Obama Foundation's reference to "futility" (Response at 10) is wholly *ad hoc*, and in any event cannot immunize the Seventh Circuit or District Court's decision from review, solely to keep the grim details of these financial transactions hidden from view, ostensibly "because the parties and the Court have already devoted significant resources addressing the current complaint. . .." (Appendix E at 111a)

Instead the District Court used its incorrect "futility" analysis to bury the abject failure of both the City of Chicago and the Obama Foundation to meet the explicit and strict conditions precedent of the Master Agreement for the transfer of Jackson Park to the Obama Foundation (see Section 13(iv)) which did not have adequate funds *in hand* to meet express conditions before the Foundation could take possession of the public trust property upon which they are now building the Obama Presidential Center—sufficient funds *both* to complete construction of the OPC and establish an endowment for operations and maintenance. The Master Agreement stipulates that the only remedy for the City is to delay, without penalty, groundbreaking until the needed funds were raised. Instead, the financial shortfall has only grown. The latest figures for the summer of 2021 put the cost of building the Center at $700 million and of funding the endowment at $470 million. This past year the Foundation's Form 990 (available at https://assets.ctfassets.net/l7h59hfnlxjx/7xdCD898BljkYqNz3N$87MmqR/b6974ee75c9eb5b4978955252e8ed5d7/The_Barack_Obama_Foundation_Form_990_Public_Disclosure_Copy_TY23.pdf) showed that it raised only a paltry $129.3 million, of which some $87.5 million is devoted to salaries and other expenses. The form then goes on to list total assets at $986.6 million, much of which is either illiquid (e.g. infrastructure in place) or pre-committed (grants for other projects). According to the Foundation's 990, its total liabilities are about $24.3 million, but the 990 curiously does not include the remaining expenditures on the building, which are at least $300 million (equal to the cost estimate of $700 million in 2021 less the $393.3 million incurred on construction through the end of 2023), nor the $469 million on the endowment, which according to the

Foundation's 2023 financial report (¶ 9) still contains only the $1 million contributed in June of 2021. Put differently, the lowball estimate of unfunded liabilities is at least $770 million.

Given these discrepancies in the OPC's finances, the proposed amended complaint was far from futile, and "if a proposed amendment is *not* clearly futile, then the denial of leave to amend is improper." Wright and Miller, Federal Practice and Procedure § 1487 (emphasis supplied); *Glover v. Carr*, 949 F.3d 364 (7th Cir. 2020) (reversing denial of motion for leave to amend).

Public Trust. The City and Obama Foundation's superficial response does not address a single case cited by the Plaintiffs in asking this Court to review the Seventh Circuit's rejection of their public trust and improper delegation claims which were either ignored or misread by the Seventh Circuit. The audacious terms of the initial 2015 deal called for the City to turn over 19.3 acres of prime real estate in Jackson Park for 99-years in exchange for an initial payment of $10. Knowing full well that this long lease is subject to review under the public trust doctrine (*see Friends of the Parks v. Chicago Park District,* 160 F. Supp.3d 1060, 1065 (N.D. Ill 2016), requiring such review for the Lucas Museum, later moved to Los Angeles), they relabeled the agreement from a lease to a use agreement, without any change in any of its substantive terms. This ploy was intended to allow the City to avoid the duties of loyalty and care that it owes to the public. These duties demand at a minimum that the City receive "a full and perfect compensation for the property taken", just as the Takings Clause requires the same level of compensation when the government takes

private property from its owners. *See Monongahela v. United States*, 148 U.S. 312, 326 (1893).

By insisting that that the only thing that matters is a clear expression of legislative intention to enter into such a one-sided deal (*see* Illinois Museum Act (70 ILCS 1290)), the Seventh Circuit flouts *Illinois Central v. Illinois*, 146 U.S. 387 (1892) which incorporated the public trust doctrine as part of Illinois law. More recently, the Illinois Supreme Court's decision in *Paepcke v. Public Building Commission of Chicago*, 263 N.E.2d 11 (Ill. 1970) made it clear that "[i]f the 'public trust' doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it." 263 N.E.2d at 18. *Paepcke* further sets out detailed conditions for allowing transfers between government agencies *(id.* at 19), making it perfectly clear that more stringent conditions must be satisfied in public-to-private transfers. See *Lake Michigan Federation v. U.S. Army Corps of Engineers*, 742 F. Supp. 441 (N.D. Ill. 1990) (invalidating transfer to Loyola University). And it also emphasized that any exercise of legislative power must be "measured against constitutional limitations." *Id.* at 21. The Seventh Circuit and the District Court ignored all these strictures by allowing for excessive delegation to the Obama Foundation, whose decisions were rubber-stamped by the City Council immediately after rapid-fire hearings, without further deliberation.

In any event, the Seventh Circuit's interpretation of Illinois law on both public trust and improper delegation do not reflect settled law. Accordingly, at a minimum, certification on these following questions remains

appropriate: (1) whether a fake "use" transfer of public trust property to a private party is constitutional under *Paepcke* so long as it is blessed by a legislative declaration; and (2) whether any ordinance that provides full discretion to a private party to decide the location for such development on public lands is, under the Illinois Constitution, Illinois law, and the Due Process clause of the Fourteenth Amendment, an improper delegation of legislative authority.

CONCLUSION

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

Respectfully submitted,

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