**Appeal No. 21-2449**

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

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

v.

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

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

# PLAINTIFFS-APPELLANTS PROTECT OUR PARKS, INC., *ET AL.*'S REPLY BRIEF

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## INTRODUCTION

The three voluminous briefs filed by the City,[1] the Obama Foundation, and the Federal Defendants reveal multiple deficiencies in their coordinated defense of the plans to destroy large and critical swathes of Jackson Park solely to make way for the construction of a transportation project that completely reworks the Park's roadways and allow the construction of and provide service to the 235-foot tower and three other buildings that comprise the OPC on a 19.3 acre site in the heart of Jackson Park. Those efforts will destroy much of an Olmsted masterpiece.

The errors here are all of a piece. The facts advanced contain key ambiguities designed to make the project appear less intrusive and destructive of Jackson Park than it is, pretending that its radical departure from previous park arrangements are acts of preservation, when the contrary is manifestly true. Thereafter Defendants seek to characterize these major transactions as local matters neither related nor dependent on the use or support of federal funds, and thus beyond the scope of any meaningful review under various federal environmental or preservation statutes. However, Defendants ignore the standard of review for new programs or projects under both NEPA and the Transportation Act, by writing as if *Citizens to Preserve Overton Park, Inc. v. Volpe* 401 U.S. 402 (1971) had never been decided. Their inaccurate and skewed description of the facts lets them claim that the well-established segmentation doctrine is swallowed up in a sea of endless discretion,

[1]This reply brief will use the abbreviations from the Plaintiffs' Opening Brief (which is referred to as "Plaintiffs at ___"). References to Defendants' briefs will be to "City at ___," "Foundation at ___," and "Federal at ___" as appropriate.

when in fact its proper interpretation raises questions of law subject to *de novo* review.

Further, there are questions in connection with particular harms, of both long or short duration, which Defendants defend based on their internal reviews and that they claim cannot be questioned, without offering sound reasons why the multiple issues and objections raised on the face of the reports, by others during the review, or as part of the motion for preliminary injunction, should be dismissed as subjective preferences entitled to no weight whatsoever, particularly when no environmental impact statement ("EIS") was performed. The words "temporary" and "deference" are used as improper barriers to any challenge, so that massive losses receive no weight, while their promises for repair, replacement, and renaissance are portrayed as certainties, not the contingencies that they are.

Defendants point to no precedent that has countenanced the wholesale destruction of trees, the massive demolition of a world class historical site, dangerous interferences with traffic, and the all-around confusion that arises from large construction without at a minimum the preparation of an EIS. The District Court applied a uniquely lax standard to the former President and his Foundation, the City and the Federal Defendants that permits liberties with the law that would never be tolerated were this a traditional private developer. The grant of the preliminary injunction is a necessary corrective against such favored treatment.

## I. THE APPLICABLE STANDARD OF REVIEW.

There are of course many different formulations of the burden that a plaintiff must carry to obtain a preliminary injunction. The canonical statement in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008) runs as follows:

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

In this case, the District Court (and now Defendants) have concentrated their fire on the first issue, dealing with the likelihood of success on the merits. In light of *Winter*, the Seventh Circuit

> recognizes that, at such a preliminary stage, the applicant need not show that it definitely will win the case. A "strong" showing thus does not mean proof by a preponderance—once again, that would spill too far into the ultimate merits for something designed to protect both the parties and the process while the case is pending. But it normally includes a demonstration of how the applicant proposes to prove the key elements of its case.

*Illinois Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020).

When, as here, this Court reviews a district court's denial of a preliminary injunction, it does so in three ways: first, by asking whether the district court's findings of fact were clearly erroneous; second, by reviewing its balancing of factors for an abuse of discretion; and third, by reviewing its legal conclusions *de novo*. *Meridian Mut. Ins. Co. v. Meridian Ins. Group, Inc.* 128 F.3d 1111, 1114 (7th Cir. 1997) (reversing denial of motion for preliminary injunction) (citations omitted).

In this matter, such standards will be applied to a key issue in this case—the proper application of the segmentation doctrine. That issue largely involves legal questions which are reviewed *de novo*. As to factual matters, the proper standard comes from *Overton Park,* arising from a Section 4(f) dispute where the applicable language reads:

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

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

Hoping to avoid a thorough, probing, in-depth review, neither the Federal Defendants nor the Foundation cites *Overton Park*. The City's brief treatment of the case omits from its rendition the words, "thorough, probing, in-depth review." Instead, its garbled account (City at 28) provides "the Court merely explained that the 'presumption of regularity' accorded agency decisions does not relieve the court of its responsibility to conduct a "substantial inquiry." Of course, "the court is not empowered to substitute its judgment for that of the agency," 401 U.S. at 416, but that is not what Plaintiffs seek. Instead, they seek the "thorough, probing, in-depth review" on all the relevant facts and proper review of questions of law in the case, which if performed, establishes that the standards have been met and require supports reversal of the District Court's denial of the preliminary injunction.

Notably, *Overton Park* never uses the term "deference," because any supposed deference utterly guts any thorough, probing, in-depth review. This Court therefore erroneously insisted when addressing Plaintiffs' motion to stay pending appeal, that Plaintiffs' position "fails to take into account the deference courts owe to agencies with respect to relevant scope of a project," [A.056; *Protect Our Parks, Inc., et al. v. Buttigieg*, 10 F.4th 758, 763 (7th Cir. 2021) ("*POP*")] citing *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976), which likewise never uses the term "deference." Additionally, any newly minted deference standard is peculiarly inappropriate on the key segmentation issue in this case, *i.e.*, "the relevant scope of a project," because the segmentation goes to the jurisdiction of the reviewing court, whose efforts will be negated if an agency is entitled to break a single federal project into two or more parts. To guard against illicit segmentation, 23 C.F.R. § 771.111(f)(1)-(3) states that the evaluation in question must "(1) Connect logical termini and be of sufficient length to address environmental matters on a *broad* scope;" (emphasis added) which the deferential standard applied by the District Court precludes.

Defendants fail to cite any legal authority that directly bears on improper segmentation. Instead, the Federal Defendants sow confusion by observing "'[s]teps taken by the applicant that do not require Federal approvals . . . are not subject to this part.' 23 C.F.R. § 771.109." (Federal at 25 n.8) But those jurisdictional issues involving the permitting work of the Corps and the Park Service's efforts on UPARR are not directly at issue in regards to the segmentation question. The Federal Defendants' observation does not change the fact that information collected as part

of any Department of Transportation inquiry is relevant to the NEPA inquiry as well. Thus, it is stated:

> **(2) (i)** The information and results produced by or in support of the transportation planning process may be incorporated into environmental review documents in accordance with 40 CFR parts 1500 through 1508, 23 CFR part 450, 23 CFR part 450 Appendix A, or 23 U.S.C. 139(f), 168, or 169, as applicable.

23 C.F.R. § 771.111.

Instead, Defendants side step the key issue by repeatedly stating that "segmentation refers only to the situation that arises when an agency arbitrarily separates related *federal* actions from one another." [*See* A.057; *POP*, 10 Fed 4th at 763] While that is the correct legal standard, its proper application depends on a careful analysis of the structure and scope of the project under review which, as discussed in Plaintiffs' Opening Brief and below, has not occurred.

Plaintiffs note here that the Federal Defendants' effort to circumvent review by arguing "law of the case" based on this Court's stay decision (Federal at 23-24) is erroneous. On this argument, the Ninth Circuit recently rejected that argument and ruled in favor of the federal government finding that a negative ruling on a motion to stay was not law of the case on the later review of an appeal from a preliminary injunction decision noting, *inter alia,* the limited review and role of the motion to stay panel as compared to the merits panel who conducts a different inquiry, namely looking at the likelihood of success of the actual litigation. *See East Bay Sanctuary Covenant v. Biden,* 993 F.3d 640, 660-61 (9th Cir. 2021). The Federal Defendants themselves note there is a gaping exception to the doctrine in cases where "a good

reason is shown to depart from it" (Federal at 23), and it is just the full set of good reasons that the Plaintiffs advance which addresses the likelihood of success of the litigation.

## II. THE PROPER SCOPE OF THE FEDERAL REVIEWS.

### A. The Defendants Improperly Truncate the Basic Requirements Under NEPA, the Transportation Act, and the National Historic Preservation Act.

The Federal Defendants significantly narrow the scope they give to the disputed federal project when they entitle their final report "Finding of No Significant Impact: Federal Actions In and Adjacent to Jackson Park: Urban Park and Recreation Recovery Amendment and Transportation Improvements." The reference to "improvements" smuggles in a disputable moral judgment, given that most of these changes hamper the operation of the transportation system in and around Jackson Park. The proof of the pudding here is that no one ever, or anywhere, suggested that these massive road changes would make any sense were it not for the construction of the OPC. The Federal Defendants admit as much:

> Here the Highway Administration's evaluation found no feasible and prudent alternative to the use of Section 4(f) properties because the City's underlying decision to close the roads in the Park—which was not subject to federal oversight or approval—created unacceptable safety and operational outcomes, which could not be alleviated through congestion management strategies that would avoid the use of park lands.

Federal at 7-8.

Federal Defendants' brief concedes that the decision of the City to close the roads in Jackson Park (including Cornell Drive) created an unsafe condition, which

itself points to the Plaintiffs' strong likelihood of success because it is clear that the entire project sought to remedy the unsafe condition. A project cannot separate the creation of a dangerous situation from its correction; the two go hand and hand, so that the construction of new roads and the closure of old ones are part of the same large project—the construction of the OPC in Jackson Park.

Defendants' reliance upon the word "local" is offered without any account of what that term means. It is agreed on all sides that "NEPA applies only to major Federal actions," 42 U.S.C. § 4332(C), which by regulation covers only those actions "which are *potentially* subject to Federal control and responsibility," 40 C.F.R. § 1508.18 (2019) (emphasis added), which is clearly the case with the development in Jackson Park. No one would ever authorize the new road project—irrespective of calling it "local"—in order to create an intolerable situation with "unacceptable safety and operational outcomes," which would cost at least some $200 million to correct (*see* Plaintiffs at 6) that is *inferior to* the existing highway pattern—*unless* the OPC was going to be located inside Jackson Park as part of a single integrated project. Yet Defendants insist that this so-called highway improvement is, like the OPC proper, a separate project from the corrective roadwork on Stony Island and Lake Shore Drive.

In order to strengthen that image, Defendants repeat the mantra that the new program simply "closes" Cornell Drive. Federal Defendants write that "[t]he City's decision to close portions of three roadways in Jackson Park in conjunction with the Center led the Chicago Department of Transportation to propose use of Federal-Aid

Highway funding for roadway construction and bicycle and pedestrian improvements within the Park. SA 92." (Federal at 7; *see also* City at 6, Foundation at 11, 20) This Court's decision on the motion to stay advanced a similar point, providing: "The City was free to close these local roads without federal approval, but when it proposed widening other streets to make up for the closures and sought federal funds to do so the Highway Administration stepped in under Section 4(f) of the Transportation Act of 1966." [A.053; *POP*, 10 F.4th at 762]

The use of the term "close," however, contains a latent and fatal ambiguity. In one sense, it could mean that the physical features of Cornell Drive remain in their original condition, so that only access to it in both directions is cut off by a decision of the City to divert traffic elsewhere. That decision, however unwise, could be made at no expense at all, and thus arguably without triggering any kind of federal review. However, Defendants do not propose to close Cornell Drive and the other roads comprising the transportation system within Jackson Park in a vacuum. They will be demolished, and, as the City and the Foundation acknowledge, restructured into a bicycle and pedestrian promenade, all of which costs money whether that be for the demolition *or* in dealing with the foreseeable consequences of the demolition – namely creation of other roadways including to facilitate traffic to the OPC. The demolition of Cornell Drive and the other elements of Jackson Park's transportation system to accommodate the OPC because of the road closures created both the need to destroy parkland and create new access roads as part of this planned and coordinated transportation project.

As such, the case no longer fits into the pattern of *Old Town Neighborhood Ass'n v. Kauffman*, 333 F.3d 732, 735-736 (7th Cir. 2003), because there the separation of the local road in the center of Goshen, Indiana from Route 33 was complete, it had been established that no federal funds were used, or would be used or had any relationship to the local street widening project or to any other foreseeable road work. (*See* Plaintiffs at 28-29) In this case, Defendants' reliance upon *Kauffman* fails because extensive federal funds are planned for, at a minimum, the foreseeable back end of the project whose integrated nature is captured by the fact that without the roadway expansion, there could be, and would be, no OPC project in that location. The OPC development from its conception involved the use of federal monies for the expansion of the roads necessitated by OPC which, as *Kauffman* teaches, identifies the project as federal and therefore improperly segmented from review. This is also consistent with applicable precedent providing that federal money is held to cover a *whole* project even if it has only been spent on its initial stages. *Scottsdale Mall v. State of Indiana*, 549 F.2d 484 (7th Cir. 1977). Any funding of part of a single unit brings the whole project under Section 4(f), NHPA, and NEPA and requires a review of feasible and prudent alternatives which indisputably did not occur.

Defendants' misreading of *Kauffman* is mirrored by their cursory treatment of *Delaware Riverkeeper Network v. FERC,* 753 F.3d 1304, 1313 (D.C. Cir. 2014) and *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 49-50 (D.C. Cir. 2015) (*e.g.,* Federal at 26) (discussed in Plaintiffs at 35-37). Defendants use these cases as a cudgel to argue that the segmentation doctrine only applies to two actions under

federal control. But as noted above, the entire development here was structured as subject to federal control and monies. Furthermore, the decisive point from *Delaware Riverkeeper* is, like here, that segmentation could not be allowed when the failures at one segment of the pipeline impacted flows throughout the pipeline as a whole. The interaction of traffic on all these roads in and near Jackson Park shreds the denial of any segmentation.

When all is said and done, the issue here is whether the substantial sums of federal money that go into the road expansion project are properly confined to the two items listed in the title to the FONSI prepared by the FHWA and Park Service, or whether they cover the entire road project. The answer to the question is evidenced by the Federal Defendants' description of the underlying project, which is found in the Assessment of Effects Report created as part of the federal Section 106 review:

> The "undertaking" is defined to include "the construction of the OPC in Jackson Park by the Obama Foundation, the closure of roads to accommodate the OPC and to reconnect fragmented parkland, the relocation of an existing track and field on the OPC site to adjacent parkland in Jackson Park, and the construction of a variety of roadway, bicycle and pedestrian improvements in and adjacent to the park."

*See* Dkt. 1-1, Compl. Ex. 3 (January 16, 2020 Report) at 1.

Thereafter, the Report drives home the point about the project scope when it writes:

> The "undertaking" created adverse effects on Jackson Park, the Midway Plaisance "because it will alter, *directly or indirectly*, characteristics of the historic property that qualify it for inclusion in the National Register."

*Id*. at 40, § 3.5.2.1 (emphasis added).

Even if one were to suggest that this broad statement be viewed narrowly and solely applicable to Section 106, the Section 4(f) report similarly admits the unified nature of the OPC development, which described the expansion of Lake Shore Drive and Stony Island Avenue, and the closure of other roads, as the necessary and foreseeable consequences of placing the OPC exactly where the Foundation demanded that the City place it and necessitating the road closures. [Dkt. 1-2, Compl. Ex. 8 at 2] Further, *all* of these were adopted in the EA performed under NEPA.

These passages are not some clever attempt by Plaintiffs to put words into the Defendants' mouths, but instead reflect the Federal Defendants' own analysis, itself enough to create the strong likelihood that Plaintiffs will prevail on the merits, no matter what efforts Defendants use to explain away these passages. But the Defendants do not even try to square the circle, largely washing their hands of the whole problem by making at most oblique references to the admitted scope of this project. However, it is clear that the "closure of roads" mentioned in these passages both contemplated and required the demolition of Cornell Drive and other roads within Jackson Park, and such actions are no worse than being indirectly funded by $200 million of federal monies used to clean up the mess created by such destruction. The City reluctantly concedes as much when it states that one of two actions that "triggered NEPA was (2) FHWA's review of the City's request to be eligible to use federal funds for *roadway*, bicycle, and pedestrian improvements under the DOT Act." (City at 18 (emphasis added)) It is flatly inconsistent to then somehow conclude that

only Stony Island Avenue and Lake Shore Drive are covered by that statement when the roadway "improvements" [sic] include the closing of Cornell Drive, even though, by design, it was not mentioned by name. Nor does it matter whether the parties sought to steer federal dollars away from the Cornell Drive segment of the project, so long as that work is integrated, as it surely is, with the rest of the roadway work in Jackson Park. Accordingly, the City's assertion that "Plaintiffs cite no evidence that any federal funds will be used to construct the OPC or close roads" (City at 31) is utterly inaccurate.

It is well established that neither a federal agency nor the City should ever be in a position to define its project so narrowly as to evade federal review under NEPA and the Transportation Act. Thus, *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)—a case upon which the City relies (City at 18-20, 29-30)—cautioned: "Yet an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality."

Indeed, just that risk was heightened in this Court's motion to stay decision, which foretold that "[t]he City's objective was to build the [OPC] in Jackson Park, so from the Park Service's perspective, building elsewhere was not an alternative, feasible or otherwise." [A.058; *POP*, 10 F.4th at 764] But that definition makes the entire federal regulatory framework a dead letter, invoking a definitional ploy to avoid examining *any* alternatives to the OPC in Jackson Park. As such, it runs afoul

of *Busey*, which, as the City notes (at 29), was a case in which "the city of Toledo listed as one of its objectives helping to launch a new cargo hub in Toledo." *Busey*, 938 F.2d at 198. Hence, Defendants' case collapses in an instant if it uses the parallel definition of seeking to locate the OPC on the South Side of Chicago, at which point the inquiry has at least to consider alternatives that are within easy walking distance of Jackson Park.

The Plaintiffs' approach follows the basic point in *Busey* that, in the effort to define the scope of a particular project, an agency "need follow only a 'rule of reason' in preparing its EIS." *Id.* at 196. But in this case the Federal Defendants adopted a categorical stance that is utterly unreasonable insofar as the project covers selectively only some of the roadwork inside Jackson Park. As previously noted, dollars are "fungible," so that it hardly matters that the City took—if it is possible to segregate out all project costs—some of the federal dollars for the widening of Stony Island and Lake Shore Drive while having other funds for other parts of the project. (Plaintiffs at 26) Accounting tricks like this one cannot be used to subvert a regulation that rightly applies to federal funding for all *or part* of a given project.

### B. The Defendants Use an Improper Baseline That Allows Them to Ignore All Prudent and Feasible Alternatives.

At this point, it should be clear that ripping down and repurposing critical roads inside Jackson Park, which necessitated using other parts of Jackson Park for roadway expansion, is part of a unified federal project that was planned, foreseeable and supported directly and/or indirectly by substantial federal funding. So, even before the OPC is taken into account, the inquiry must expand to cover the full extent

of the federal project. Accordingly, it is improper for Defendants to claim that the no-action alternative begins only after the four "local" roads in Jackson Park have been torn up or reconfigured. Recognizing this, the Federal Defendants suggest they rely upon two no-action scenarios. (Federal at 31-32) Alternative A is "where the Park Service does not approve the UPARR Act conversion, the Center is not built, and no roads are closed." Thereafter, "Alternative B assumed that the Park Service approved the UPARR Act conversion, that the Center is being built, and that roads are closed." And last, Alternative C is the plan advocated by the Foundation and City to further tear up Jackson Park through road expansion. The Federal Defendants insist that "it was legally sufficient for the agency to compare Alternative B with Alternative C when considering the impacts of its proposed action" because they also included Alternative A. (Federal at 33)

However, Alternative A was not utilized – its simple mention is not enough. This outcome cannot be regarded as sufficient given that starting with Alternative A, it becomes necessary to explain why keeping the status quo ante is somehow worse than using major federal funds to embark on a project that "created unacceptable safety and operational outcomes." Put differently, it is necessary to compare Alternative A to other plans that would not create "unacceptable" outcomes, and that would require looking at alternatives outside of Jackson Park. That exercise must be undertaken if Alternative A is actually a real alternative, and not some sham reference included as window-dressing.

Recall that the basic statutory framework under Section 4(f) specifically provides, "the policy of the United States Government [is] that *special* effort" be made to protect public parks, that a transportation project can be approved "only if" there is no prudent and feasible alternative to using the land and all possible planning to minimize harm to the park is included. 49 U.S.C. § 303(c) (emphasis added). (*See* Plaintiffs at 26) Once the government's undertaking defines the scope of the federal project, it becomes impossible for them to categorically ignore any discussion of any alternative site outside Jackson Park. It is thus wholly insupportable for the City to claim (City at 13) "that the agencies should have considered alternatives to locating the OPC in Jackson Park – is a non-starter; the agencies have no authority over the siting of the OPC and cannot mandate that the City place the [sic] it elsewhere." That proposition is itself a non-starter once the correct definition of the project is given. It is a non-answer to claim that it is impermissible to consider sites outside Jackson Park when NEPA, the Transportation Act, and the NHPA require such assessments. It is wholly beside the point that the federal agencies have no ability to mandate the use of a particular site, circumstances not atypical in NEPA, DOT, and NHPA cases or required by those statutes. It is perfectly permissible for the federal review process to end with an evaluation of alternatives which the City and Foundation reject but which leads to a denial of federal funding (or permits), and then to the abandonment of the proposed site even though such agencies cannot order the Foundation to build the OPC elsewhere. By any metric, the site outside Washington Park must be, but was not, considered to meet the requirements of NEPA and the Transportation Act.

This glaring omission again points to the strong likelihood that Plaintiffs will prevail on the merits. This Court notes in its motion to stay ruling that the Court of Appeals reviews a federal agency's finding of no significant impact (FONSI) determination under NEPA under Administrative Procedure Act's (APA) "arbitrary and capricious" standard, and asks only if an agency's decision was "based on consideration of relevant factors and whether there has been clear error of judgment." [A.058; *POP*, 10 F.4th at 764]

Plaintiffs have established that relevant factors have not been not considered and that there has been an error of judgment necessitating the requested preliminary injunction. Here, the reconfiguration of the roads has been done solely to allow for the construction of the OPC, which is a factor that cannot be ignored when it is not only foreseeable, but the raison d'etre and inevitable consequence of the OPC project. The standard rules of project definition include not only the area occupied by the project, but also its indirect effect. This Court noted that: "In any event, the agencies did consider the full environmental impact of the Center's construction (as an "indirect" effect of the Park's Service's decision to approve conversion) and concluded that it was not "significant."" [A.048; *POP*, 10 F. 4th at 764] The same reference to indirect effects is found also in the Assessment of Effects Report quoted earlier, providing that the OPC "will alter, directly or indirectly, characteristics of the historic property that qualify it for inclusion in the National Register." *Supra* at 11. Yet at no point do Defendants adequately explain why the inclusion of the word "indirect" is itself accurate, nor how it does not answer the segmentation question decisively in

favor of the Plaintiffs, given that the only reason to incur the costs, disruption of these so-called "improvements" is quite literally to pave the way for the construction of the OPC and create a transportation system to service it. The use of the term "indirect" is advanced in order to have manufactured a scenario to help avoid what is required directly here—a review of all reasonable and prudent alternatives and the development of EIS. In any event, these purported effects implicate the last three *Winter* factors—irreparable harm, balance of equities, and public interest.

## III. THE DEFENDANTS FAIL TO UNDERMINE PLAINTIFFS' ARGUMENTS REGARDING IRREPARABLE HARM, BALANCE OF EQUITIES, AND PUBLIC INTEREST, WHICH SUPPORT PRELIMINARY INJUNCTIVE RELIEF.

### A. The Plaintiffs Have Made Out a Strong Case That Continuation of the OPC Project Will Result in Irreparable Harm.

Defendants misleadingly suggest that they considered the full environmental impact of the project. But they do so under the crabbed position of their narrow scope of review, without even supplying an EIS, as is routinely done in cases of this difficulty and scope. (Plaintiffs at 47-48) And they use their conclusory rhetoric to assert propositions which the Plaintiffs and others have vigorously contested. *Overton Park's* injunction for "a thorough, probing, in-depth review" cannot be satisfied with the standard of deference imposed by the District Court. This problem is rife throughout the case, but a few prominent instances of this abuse are set forth below.

*1. Trees, saplings and migratory birds.*

In dealing with these three precious resources, Defendants take the position that they gave a "hard look" to all of these issues. But again, the only evidence that we have for this is their astonishing assertion that replacing at least 800 trees with saplings on a one-to-one ratio will not cause significant losses in the short run and may present some long-term benefits. But at no point do the Defendants address the obvious objections to this position, including those of Plaintiff and others presented during the review. [*See* Dkt. 61-49, Ex. 30; *see also* https://openlands.org/2021/09/09/tree-loss-obama-presidential-center/][2] There have been a plethora of NEPA cases that have had to deal with the loss of trees in the service of some new project which are deemed irreparable. [*See, e.g.,* Dkt. 80, Reply Brief In Support of Preliminary Injunction Motion, at 25-26] In most of these cases, the physical constraints on the project—the repair of an existing bridge or terminal—necessarily precludes moving the project elsewhere. In some of these cases, the removal of trees is thought to be an acceptable if regrettable necessity. But Plaintiffs are aware of no case, regulation, statement from the last three administrations or independent analysis that takes the incredible position that tiny saplings are as good as or better than trees, particularly without the performance of an EIS.

The same is true of migratory birds that depend on large measure of mature trees for nesting and resting. [*See* Dkt. 61-49, Ex. 30 at 7-8] The Foundation

[2] Impacts of trees on the human environment is discussed in Professor Teresa Horton's *amicus curiae* submission [Appeal Dkt. 49], but which was denied [Appeal Dkt. 50].

dismisses the issue by saying that they are "no more than 'disputes with the agencies' substantive judgement,' which courts 'do not second guess.'" (Foundation at 17) But it is far more than that. It is an attack on a process that allows the federal agencies in this case to make statements and decisions with great impacts but indisputably without the benefit of full study necessitated by the huge number of trees removed, which is a form of unilateral decision-making that is wholly inconsistent with the dictates of *Overton Park*. Indeed, it is precisely the type of issue that mandates an EIS, not the end of the inquiry. (*See* Plaintiffs at 47-48)

*2. The Olmsted Plan.*

The Foundation insists that Plaintiffs' primary contention that the network of roads, including Cornell Drive, form an integral part of the Olmsted design, is belied by the agencies' careful study in the Historic Properties Identification Report ("HPI"). (Foundation at 12) "The HPI found that over the last century (particularly in the 1960s and 1980s), Cornell Drive and the other roadways have undergone significant changes, including being widened so as to reduce parkland and negatively impact the historic character of the landscape area. Dkt. 61-5 at 80–81 (HPI). By contrast, the plan to close Cornell Drive to car traffic and replace it with a bicycle and pedestrian promenade revitalizes important characteristics of Olmsted's plan." (Foundation at 19-20)

But this is an incomplete representation of the record. Its conclusion that the new plans are no different in kind from the changes made between the 1960s and 1980s is self-evidently false as seen by the fact that the initial Assessment of Effects

Report of July 2019 directly acknowledged the destruction of the historic roadways caused by this development. [Dkt. 1-1, Compl. Ex. 4 at 22-23] Olmsted and landscape expert Professor W.J.T. Mitchell reiterated such matters in his declarations. [A.061-67; A.091-96] As he noted, expanding a road to meet increased traffic is the kind of incremental change that is required to meet Olmsted visions that the hardscape of roads are important to deal with both matters of view and transportation. Knocking out an essential portion of the basic plan is no way to realize the Olmsted vision, when it is easy to locate additional bicycle paths and promenades elsewhere in Jackson Park without gutting the entire structure. Worse still, the Foundation's defense of its project ignores Olmsted's fundamental vision to create widespread public access by avoiding the construction of large buildings like the OPC that resemble the closed English parks with their large mansions.[3] [A.064 at ¶ 8]

*3. The Women's Garden.*

With the denial of the motion to stay, the Women's Garden, a long-time distinctive feature of today's Jackson Park, was leveled as part of the Foundation's initial foray into Jackson Park. Defendants make light of this action. The Foundation states "although the Women's Garden has been temporarily removed for purposes of construction—it will be rebuilt at its original site, and the plantings, pathways, and seating of the rebuilt garden will incorporate [the] design and material elements of

[3] Indeed, during the federal reviews, entities such as the National Association of Olmsted Parks, Preservation Chicago and Jackson Park Watch (and others) raised competing accounts of historic and ecological issues to those advanced by the Defendants; *amicus* submissions from these organizations were submitted [Appeal Dkts. 51, 53] but denied [Appeal Dkt. 54].

the existing garden," with the added gain of universal accessibility. (Foundation at 20; *see also* City at 2)

These superficial positions ignore that a replica of the original garden is not the same as the original, any more than a perfect reproduction of a Vermeer is not the equivalent of the original. In any event, there is no replica to be created as it will be different both in substance and setting as it is no longer nestled among large trees that alter the patterns of light in the garden. Defendants do not give any time table for how long the reconstruction will take place, and the "restoration" plans are nebulous. The so-called "temporary" loss of access will be for at least five years, at which point there is long-term damage that cannot be corrected by the future actions. This is also complicated by the lack of evidence of an endowed fund to meet the budgetary requirements of that new project, which are themselves unstated.

*4. Failure to hold a hearing.*

Consistent with Defendants' position of eliminating review, they argue that no hearing is appropriate or necessary, either based on the issues raised or purported waiver. As an initial matter, the issues raised do not remove the necessity of a hearing. Indeed, were that the case, the Foundation would not have submitted a lengthy declaration of Robbin Cohen as evidence to be heard by the Court, nor would the City have inserted lengthy declarations that attempt to feed the narrative that Jackson Park is simply an everchanging landscape. [*See* Cohen Decl., A.068-A.079; Cox Decl., Dkt. 47-1, Ex. A; Kelly Decl., Dkt. 47-1, Ex. B] Plaintiffs also submitted declarations, including counter-declarations to Defendants' submissions. [*See* A.061-

A.067; A.080-A.096]. Moreover, the Cohen Declaration – cited often by the District Court (and the Foundation in its response brief here) – created, at a minimum, numerous issues of fact based on the statements and omissions therein, further highlighted by counter-declarations that were themselves ignored but which necessitated a hearing. *See, e.g., Ty, Inc. v. GMA Accessories, Inc.,* 132 F.3d 1167, 1171 (7th Cir. 1997) (holding when genuine issues of material fact are raised by the opposition to a motion for a preliminary injunction, a hearing is required).

By way of example, the District Court ignored the statements in the Cohen Declaration which admitted that the Foundation has insufficient funds towards completing construction of the OPC as it identified that it was far short of having $700 million for the building of the OPC: "To date, the Foundation has raised over $200 million in donations and pledges explicitly dedicated for use in the development of the Presidential Center as it has been planned and publicly described." [A.076, ¶¶ 39-40] In order to accomplish the transfer of the land from the City to the OPC, there are requirements for funding. The Master Agreement between the Foundation and the City, which was included in the 2018 City Ordinance, allows for the transfer of possession of Jackson Park to the Foundation only upon certification that gifts or funds received by the Foundation exceed the costs of construction. [*See* Dkt. 1-1, Compl. Ex. 2, p. 85959 (Master Agreement, Paragraph 12(j))] Earlier this year, the Foundation's Certification to the City listed the total amount of cash and pledges to the Foundation at approximately $485 million. [*See* Dkt. 80, Ex. 13] Under such circumstances, the declaration demonstrated that a condition precedent to the

transfer of the property to the Foundation had not been met, which should have disallowed any work by the Foundation on the site and supported the injunction request.

Finally, there was no waiver. Plaintiffs' reply brief in support of preliminary injunction expressly provided that in light of the Cohen Declaration and counter-declarations submitted [A.080-A.096] (consistent with the schedule for submission), factual disputes were presented that would necessitate a hearing. [Dkt. 80 at 39-40]

**B. The Balance of Equities Favors Plaintiffs.**

In light of what has been said above, Plaintiffs have established that the wanton destruction of Jackson Park and the impacts on the natural and human environment constitute irreparable harm. In opposition, Defendants claim harm from any delay, with the Foundation claiming an injunction will cost them an asserted two million dollars per month. However, such claims were speculative and unsupported; the Cohen Declaration provides no support for the statements made such as a construction schedule or in regards to specific losses, which Plaintiffs raised and contested [A.080-A.090; A.091-A.096], and would typically necessitate a hearing to resolve.

In any event, costs associated with delay are part and parcel of any NEPA or Transportation Act review, and there is nothing which distinguishes this case, except for the immediacy and irreversibility of the harm that is caused. [*See* discussion Dkt. 80 at 37-42] Private developers await the performance of proper reviews and an EIS (consider all of the pipeline development cases nationwide), and repetitive citation to

the term "temporary" and invocation of unlimited deference is not, nor should it be, enough to allow for the selective enforcement of the environmental laws.

**C. The Public Interest Factor Favors Plaintiffs.**

Defendants make many claims that the OPC will enhance Jackson Park by "reconnecting the Presidential Center site to the rest of Jackson Park, expanding the overall parkland space, and providing new indoor and outdoor recreational facilities for community residents," as well as promising to enhance economic development by "catalyzing investment in the surrounding communities." (*See e.g.*, Foundation at 12)

Such assertions are incomplete or in dispute, or both. [*See discussion* Dkt. 80 at 42-45] Beyond being based on largely outdated pre-pandemic assumptions, those so-called benefits are advanced irrespective of traffic, trees and bird issues. There is nothing that locating the OPC in Jackson Park can do to help "surrounding communities" (versus other South Side locations). Indeed, the better access to public transportation by train, bus and car could increase the impact of a relocated OPC at not just a prudent and feasible alternative—but a superior one. Over and over, the Foundation and City overclaim dubious net benefits of immediate construction. Those types of public benefits exist any time any development begins, but are subsumed by competing and pressing public interests such as environmental concerns at issue here (and which require an EIS). A delay in the start of construction is truly temporary, but the damage on the natural and human environment permanent. The hard-look needed under *Overton Park* has been replaced by a blind eye, and the impending tragedy of Jackson Park left unexplained.

## CONCLUSION

The District Court's decision must be reversed and the Motion for Preliminary Injunction granted, or alternatively, the matter should be remanded for a hearing on such Motion.

Respectfully Submitted,

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**Type-Volume Certification**

The undersigned counsel hereby certifies that this brief complies with the type-volume limitations of Circuit Rule 32(a), (b), and (c) of this Court, because the brief contains 6992 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

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**Certificate of Service**

I hereby certify that on November 10, 2021, I electronically-filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in these consolidated appeals are registered CM/ECF users and that service will be accomplished by and through the CM/ECF system.

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