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

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

PLAINTIFFS' MOTION TO FILE BRIEF IN EXCESS OF FIFTEEN PAGES

Plaintiffs respectfully request leave to submit a brief in excess of page limits set forth in Local Rule 7.1 and in support thereof state as follows:

1. Plaintiffs submitted a motion for preliminary injunction and memorandum in support on June 15, 2021. (Docket Nos. 30 & 31) This Court granted Defendants' request to submit response briefs in excess of page limits, allowing briefs of forty pages to be filed in response to Plaintiffs' motion for preliminary injunction. (*See* Docket No. 38) Three separate briefs were filed by three separate groups of defendants, with each brief being forty pages in length (not including exhibits). Additionally, various briefs were submitted by *Amici Curiae.*

2. Plaintiffs have prepared a reply in support of their motion for preliminary injunction, attached hereto as Exhibit A. Plaintiffs' reply is an effort to respond to approximately 160 pages of argument presented by the Defendants and *Amici Curiae* in opposition to Plaintiffs' motion for preliminary injunction.

3. Plaintiffs recognize this Court's prior order providing that briefs are to be in compliance with Local Rule 7.1. (Docket No. 38) Given the volume of argument contained in

the Defendants' and *Amici's* response briefs, as a matter of fairness and equity, Plaintiffs believe that they should be allowed to present a brief in excess of the fifteen pages and therefore seek leave of this Court to file an oversized brief in the form attached hereto as Exhibit A.

4. Counsel for the moving Defendants have informed counsel for Plaintiffs that they do not object to Plaintiffs' request.

WHEREFORE, Plaintiffs respectfully request that they be allowed to submit a brief in excess of the limits set forth in Local Rule 7.1, in the form attached hereto as Exhibit A.

Dated: July 30, 2021

Protect Our Parks, Inc.; Nichols Park Advisory Council; Stephanie Franklin; Sid E. Williams; Bren E. Sheriff; W.J.T. Mitchell; and Jamie Kalven

By: /s/ Michael Rachlis
One of their attorneys

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EXHIBIT A

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

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

PLAINTIFFS' REPLY
IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs' motion for preliminary injunction ("Motion") centers on their claims associated with the interconnected operation of three federal statutes: Section 106 of the National Historic Preservation Act (54 U.S.C. § 306108, 36 C.F.R. Part 800)("NHPA"), the National Environmental Policy Act (42 U.S.C. § 4332(2)(C))("NEPA"), and Section 4(f) of the Department of Transportation Act of 1966 (23 U.S.C. § 138(a), 49 U.S.C. § 303(c))("Section 4(f)"). In support of their Motion, the Plaintiffs pointed to serious violations by the Defendants to the requirements of each of these three statutes, as well as addressed the other relevant factors supporting the request for interim relief. In response, the three groups of Defendants each submitted a separate brief of 40 pages. The Federal Defendants focused almost exclusively on issues regarding likelihood on the merits, while the City Defendants and the Foundation took aim at irreparable injury and the balance of harms. But at no point do any of these briefs offer remotely adequate responses to the Plaintiffs' preliminary injunction motion.

Under any of the applicable standards, the Plaintiffs have met all of the requirements for the issuance of a preliminary injunction in the matter at bar. Importantly, this circuit does apply a sliding scale to the factors evaluated for injunctive relief:

> In the final analysis, the district court equitably weighs these factors together, "seeking at all times to 'minimize the costs of being mistaken.'" We have often referred to this process as a "sliding scale" approach. "The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor." "Where appropriate, this balancing process should also encompass any effects that granting or denying the preliminary injunction would have on nonparties (something courts have termed the 'public interest')."

Cassell v. Snyders, 990 F.3d 539, 545 (7th Cir. 2021) (internal citations omitted). *See also*, *Valencia v. City of Springfield, Illinois,* 883 F.3d 959, 966 (7th Cir. 2018) (affirming grant of preliminary injunction). Under this approach, an injunction here is necessary and consistent with the law as that is the only result that will "minimize the costs of being mistaken."

As set forth in the opening motion and further discussed below, the Federal Defendants engaged in the practice of segmentation as they divided the project associated with the development of the OPC and its related roadway closures and expansions into a variety of projects so as to allow the construction of the OPC and related roadway work to avoid the required review of feasible and prudent alternatives. Such a failure implicates the reviews under Section 4(f), NEPA and NHPA as well as other activities and actions associated with related reviews under the Urban Parks and Recreation Recovery Act ("UPARR"), the Clean Water Act, and the River and Harbor Act.[1]

Beyond these issues, the Plaintiffs established irreparable harm consistent with the law including that set forth in *Cassell* and other authorities, given the immediate and certain harms and/or threat of harm upon the Plaintiffs. As to the balance of harms and the public interest, while the Defendants rely upon generic notions of delay, economic benefit and/or financial concerns which are largely speculative, unsupported, or are of the type that would support almost any development and deserve little weight, and all of which pale in comparison to the harm and havoc created through the utter manhandling of the historic, environmental and parkland concerns, such considerations also deserve less weight given the Plaintiffs' likelihood of success on the merits and application of the sliding scale.

I. The Plaintiffs Are Likely To Succeed On The Merits.

A. *At no point did the Federal Defendants make any attempt to meet the explicit requirements of a hard-look review under the Transportation Act, NEPA, or NHPA.*

[1] Plaintiffs continue to advance that they are entitled to a preliminary injunction associated with the violations of those statutes as set forth in their opening motion for preliminary injunctive relief for the reasons previously stated, but due to space constraints will focus this reply brief on the three statutes (NEPA, NHPA and Section 4(f)).

A central issue on the motion is whether Plaintiffs have established some likelihood of success on the merits relative to the Defendants' compliance with the requirements of these three regulatory statutes that were subject to federal review. The fatal weakness on the merits is that the Federal Defendants failed to perform any of the work required of them under either the Transportation Act, NEPA, or the NHPA. That much is evident from the heading of the Section 4(f) report, "Federal Actions In and Adjacent to Jackson Park: Urban Park and Recreation Recovery Amendment and Transportation: Jackson Park, City of Chicago, Illinois" which addresses only the second-order (but still important issues) in connection with UPARR, without even mentioning the key statutory provisions on which this case turns. The heart of NEPA is the requirement that federal agencies

> "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).

That comprehensive list is consistent with the bold objectives of the Transportation Act as stated in 49 U.S.C. § 303:

> 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.

The standards under NEPA are incorporated into the studies that are required under Section 4(f) of the Transportation Act, as 49 U.S.C. § 303(e)(1)(A) requires the Secretary of Transportation to "align, to the maximum extent practicable, the requirements of this section [§ 303] with the requirements of [NEPA] and section 306108 of title 54, including implementing regulations." These substantive commands are not self-enforcing, so it is critical to understand at the outset the distribution of power between the administrative agencies in charge of a particular project and the courts charged with overseeing their activity.

The basic legal standard in this area calls for a hard-look review by the agency under the arbitrary and capricious standard embodied in Section 706 of the Administrative Procedure Act. The applicable standard is found in such established Supreme Court precedents as *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360 (1989), which upheld a "controversial decision to construct a dam at Elk Creek in the Rogue River Basin in southwest Oregon." *Id.* at 363. In dealing with this question, *Marsh* concluded: "It is also clear that, regardless of its eventual assessment of the significance of this information, the Corps had a duty to take a hard look at the proffered evidence," *id*. at 385, which it had done in the exhaustive studies it had prepared in an initial EIS examining various approaches to the dam construction. The same standard was articulated in in the companion case *Robertson v. Methow Valley Citizens Council,* 490 US 332 (1989): "The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of 'action-forcing' procedures that require that agencies take a "'hard look' at environmental consequences,'" Kleppe, 427 U. S., at 410, n. 21." *Id.* at 350. In addition, it is also established that "even though no formal impact statement is thought to be necessary, NEPA requires an agency to develop affirmatively a reviewable environmental record....Without such a record it is

impossible for a district court to determine whether or not the agency has complied with ... NEPA." *Simmans v. Grant*, 370 F.Supp. 5, 17 (S.D.Tex. 1974).

It is critical to note that these basic rules do *not* require any court to perform a *de novo* review of the complex evidence that is presented. See *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971) (rejecting the *de novo* standards under Section 4(f)). *Id*. at 415. But by the same token, the Court made clear that the determinations and conclusions an agency reaches in the Section 4(f) process are subject to "a thorough, probing, in-depth review" by the Court. *Id*. Here, such a review by this Court reveals that the government defendants in this case utterly failed to perform the needed review, so their conclusion on key issues cannot be accepted. Agency determinations must be reversed when they are "plainly erroneous or inconsistent with the regulation." *United States v. Larionoff,* 431 U.S. 864, 872 (1977) (quoting *Bowles v. Seminole Rock Co.,* 325 U.S. 410, 413–14 (1945)). Indeed, if the Defendants were simply to deny that they had to address the segmentation issue, that decision would as a matter of law call for *de novo* review. *Michigan v. U.S. Army Corps. Of Engineers*, 667 F.3d 765, 769 (7th Cir. 2011) ("As usual, we review questions of fact for clear error and questions of law *de novo.*").

B. *The impermissible segmentation of the OPC project is a violation of the Transportation Act, NEPA, and NHPA.*

The strong grounds for attacking on the merits the reviews undertaken by the Federal Defendants start with the undisputed fact that these Defendants (at the behest and encouragement of the other Defendants) have taken the ostrich-like position that they need not address with so much as a single word the single most salient issue in the case—the comparison of feasible and prudent alternatives to the proposed OPC in Jackson Park with other alternatives, including *inter alia* an 18.25-acre site located just to the west of Washington Park. Throughout all the various proceedings the Defendants have collectively stonewalled repeated requests throughout the entire

review process asking them to undertake these comparative studies, which means that their Finding of No Significant Impact (FONSI) must be rejected and a full Environmental Impact Statement (EIS) be prepared for the entire OPC project. Similarly, the reports and Memorandum of Agreement performed under the NHPA also failed to perform such comparative studies, which in turn requires remand. And the flawed Section 4(f) review also suffers from the same failure, and thus requires setting aside those findings and reopening that process so that feasible and prudent alternatives can be properly performed.

Throughout the lengthy hearing process, the Defendants have refused to consider the OPC and the surrounding road closures and work in Jackson Park as the project or proposal needing review under the various statutes. Instead they have insisted, as the title of the Section 4(f) Report—Federal Actions In and Adjacent to Jackson Park: Urban Park and Recreation Recovery [UPARR] Amendment and Transportation Improvements Jackson Park, City of Chicago, Illinois—confirms, that the only relevant proposed actions for which the Federal Defendants were concerned involved only two components of the larger OPC project: first, the removal of several acres of recreational land in Jackson Park that requires substitute land under the UPARR; and second, the widening of both Lake Shore Drive on the east and Stony Island on the west, which will narrow Jackson Park by removing approximately eleven acres of parkland.

The Federal Defendants make excuses for their audacious truncation in their Section 4(f), NEPA and NHPA reports, by insisting that all the activities in Jackson Park associated with the OPC are somehow "local" issues of no concern to the federal authorities, because all the land is owned and operated by the City. The Defendants' major mention of this key issue reads in full as follows:

> "The roadway closures and the decision to locate the OPC in Jackson Park are local land use and land management decisions by the City and are not under the jurisdiction of FHWA. These actions **are not** subject to Section 4(f) because:
>
> (1) These actions do not require an approval from FHWA in order to proceed
>
> (2) These actions are not transportation projects
>
> (3) These actions are being implemented to address a purpose that is unrelated to the movement of people, goods, and services from one place to another (i.e., a purpose that is not a transportation purpose)."

Complaint, Ex. 8, Section 4(f) Report at 2 (emphasis in original). Immediately, thereafter, in its discussion of UPARR, the Section 4(f) Report makes the equally categorical statement that "[t]he UPARR decision is not a transportation project," because "it has a purpose unrelated to the movement of people, goods and services from one place to another." *Id.*

The Federal Defendants do not cite to any statute, regulation or case to support these bold propositions, which in this skimpy form necessarily ignores the key principle of **segmentation**, which the regulations and case law make central to the operation of the regulatory framework at issue. In order to ensure meaningful evaluation of alternatives and to avoid commitments to transportation improvements before they are fully evaluated, FHWA regulations require that each action evaluated "under NEPA as a categorical exclusion (CE), environmental assessment (EA), or environmental impact statement (EIS) must:

> (1) Connect logical termini and be of sufficient length to address environmental matters on a broad scope;
>
> (2) Have independent utility or independent significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements are made; and
>
> (3) Not restrict consideration of alternatives for other reasonably foreseeable transportation improvements."

23 C.F.R. § 771.111(f)(1)-(3).

The purpose of these rules is to ensure the structural integrity of the basic process: "'Piecemealing' or 'segmentation' allows an agency to avoid the NEPA requirement that an EIS be prepared for all major federal action with significant environmental impacts by segmenting an overall plan into smaller parts involving action with less significant environmental effects." *City of West Chicago, Ill. v. United States Nuclear Regulatory Comm'n,* 701 F.2d 632, 650 (7th Cir. 1983). Under an arbitrary and capricious, or indeed any other, standard Plaintiffs are likely to succeed on their attack of the Federal Defendants' segmented analysis under these statutes. The Federal Defendants' first argument of the "local" nature of the project is a conclusory assertion, without any justification, that the federal statute does not apply. It is also nonsensical, for under that logic, any major project will go through some local municipal review, and under the Defendants' logic could be treated as "local," and thus always escape the required federal reviews.

The focus of Federal Defendants' opposition (and at oral argument) is its position that there is no transportation project involved, a baseless position and mysterious given the massive roadwork involved in the OPC project. The case the Federal Defendants rely upon for this odd proposition is *Nat'l Trust For Historic Preservation In the U.S. v. Dole,* 828 F.2d 776 (D.C. Cir. 1987) in which the Court of Appeals held that constructing suicide prevention barriers was not a transportation project that required the Department of Transportation to examine some prudent or feasible alternative. While the *Nat'l Trust v. Dole* case is inapposite to the circumstances at bar, the decision is instructive because it makes clear that any connection between certain actions makes it both necessary and appropriate to consider those actions as a single transportation project which is precisely the situation in the matter at bar. Even if suicide barriers have nothing to do with traffic and flow over the road where they are placed, that cannot be said here. In this case, the OPC project involves the closure of four roads which must be included in the basic reviews of

the total roadwork. Such a matter is not only true because of the necessity of having to address the flow of traffic elsewhere (which is created by the OPC), but is further tied to the operations of the OPC project which by its nature demands the ability to address traffic concerns given, *i.e.* its projection that it will serve 700,000 visitors per year. (*See* Exhibit 8 (an op-ed from the Foundation's president which articulates that yearly visitors figure) (note that exhibit numbering continues from Plaintiffs original motion).) No matter how narrowly the Defendants try to define their project, the OPC and its related road closures cannot be excluded from any review of feasible and prudent alternatives in light of the overall requirement that an agency "[n]ot restrict consideration of alternatives for other ***reasonably foreseeable transportation improvements***." 23 C.F.R. § 771.111(f)(1)-(3) (emphasis supplied).

The only conceivable argument for the Defendants is the odd assertion that both Section 4(f) and NEPA only apply to the construction of new roads, not to the removal of old ones that necessitate the new roads, which is a pinched reading wholly inconsistent with these statutes' broad perspective on the protection of environmental and historic resources announced in Section 303, *supra* at 3. It is precisely this form of impermissible segmentation which dooms the Section 4(f), NEPA and NHPA reports and analyses because of this failure to link this particular project to "other reasonably foreseeable" government action, including the rest of the planned operation in Jackson Park. The expansion of Lake Shore Drive and Stony Island Avenue were not only foreseeable, but a known certainty that was baked into the OPC project at its earliest stages. The position that this is not a transportation project because it ripped out roads instead of putting them into place is implausible, factually false and legally unsupported.

Given their blinders on the segmentation issue, the Federal Defendants made no effort to comply with the terms of 23 C.F.R. § 771.111(f)(1)-(3), *supra* at 7, which is required for the

meaningful evaluation of alternatives. None of the reports prepared involved the selection of a logical termini of sufficient length, which would have allowed them to address these environmental matters "on a broad scope." Nor do these two discrete elements of this integrated project have any "independent utility or independent significance," for all work done on Lake Shore Drive and Stony Island Avenue are contingent on what happens to Cornell Drive, the Midway Plaisance, Hayes and Marquette Avenues. And finally, there is no way to examine "other reasonably foreseeable transportation improvements" when given their total exclusion from review in the various federal reviews, in light of constructive use provisions that are part of the applicable regulations towards Section 4(f) and which read as follows:

> **§ 774.15 Constructive use determinations.**
>
> A constructive use occurs when the transportation project does not incorporate land from a Section 4(f) property, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the property are substantially diminished, including areas not occupied by the roads or the OPC.

23 C.F.R. § 774.15. Put differently, the federal reviews are not to be confined to the lands taken and occupied for a particular project, but also those which have been subjected to nuisance-like actions by those activities within the perimeter of the project.

Further, the Federal Defendants insist that this is a "local" project outside the scope of federal review, even if it is a transportation project, because it is not a project related to the movement of people, goods and/or services. The sole case the Defendants advance to support this proposition is *Old Town Neighborhood Ass'n Inc. v. Kauffman*, 333 F.3d 732 (7th Cir. 2003), which the Defendants cite for the position that "these federal laws, [including Section 4(f)] do not apply to local projects funded by tax revenues." (Fed. Br. at 27) But that seriously misleading characterization wholly ignores the central role that segmentation played in the overall analysis.

At issue in *Old Town* was a decision by the Town of Goshen, Indiana to widen Third Street in ways that posed a threat to buildings of historic or architectural significance. The District Court held that "Plaintiffs have shown a substantial likelihood ... that the Third Street project has been improperly "segmented" from a major federal undertaking — improvement of U.S. Highway 33 through downtown Goshen — that is subject to environmental and historic impact review," given that these two segments were continuous with each other. *Old Town*, 333 F.3d at 734, citing 2002 U.S. Dist. LEXIS 23510 at *3-4, 2002 WL 31741477 (S.D. Ind. Nov. 15, 2002). The segmentation issue was uppermost in everyone's mind, when, in order to avoid being caught by the federal statute, the City agreed not to accept any federal funds for the completion of the work inside the city. Judge Easterbrook held that NEPA did not apply:

> "Because no federal official has prepared a 'recommendation or report' on any proposal concerning Route 33, the time for an environmental impact statement has not arrived. Once a federal proposal has been made and an environmental assessment of some kind is required, a court may need to determine which subjects it must cover; this is the 'segmentation' question, to which the district court devoted much attention."

Id. at 735 (citations omitted).

The Court similarly concluded that Section 106 of the National Historic Preservation Act also did not apply until some official action was taken. At this point, the Seventh Circuit adopted a novel form of temporal segmentation to guard against the risk that the City would seek to circumvent these statutes by doing its own demolition and only thereafter apply for federal funds for the project. To stop that evasion "a court may combine the stages, after the fashion of the step-transaction doctrine in tax law, into a sequence." As such, in that situation, the Seventh Circuit observed that the district court chose an overbroad remedy to address a valid concern:

> This means that the district court afforded plaintiffs the wrong relief. Instead of enjoining all construction work on Third Street until the federal government has

> jumped through the hoops needed to fund a federal project, the district court should have enjoined Goshen from seeking or accepting federal reimbursement.

Id. at 736. Judge Easterbrook also then cites to both *Marsh* and *Robertson*, thereby adopting their version of the hard-look rule (*id*. at 735). *See Old Town*, 333 F.3d at 335.

Old Town is precedent squarely against the Defendants' position. In this matter, NEPA reports have been filed; Section 4(f) reviews have been performed; reports under the NHPA have been issued, as has a Memorandum of Agreement; federal funds have been applied for and granted; there is, moreover, no physical separation between some hypothetical local project and interstate roads, including Cornell Drive and the Midway Plaisance. The anti-segmentation rule, which was found inapplicable in *Old Town* under the facts set forth therein, applies with full force here.

The Defendants also cite to *Highway J Citizens Group v. Mineta*, 349 F.3d 938 (7th Cir. 2003), which also conducts a segmentation analysis under a hard-look standard. *Id.* at 952. In *Highway J,* the Seventh Circuit addressed the question of whether the County J/Highway 164 Project was improperly segmented from the Ackerville Bridge Project. Under the standard set out above, the Seventh Circuit concluded that the two could indeed be properly separated, as the roadwork project "will not have any substantial effect [sic] on the existing pattern of groundwater flow, concentration of contaminants, nor cause any increase in health risks due to ground water contamination in the vicinity." *Id*. at 946.

Highway J then gave a detailed review of the exhaustive studies done below, which showed how that given segmentation was justified. Yet nothing remotely comparable to that process occurred here. Indeed, the utter failure of any of the Defendants to address the segmentation issues was the only way for them to maintain total silence on the question of alternatives to the construction of the OPC in Jackson Park. To repeat, the purpose of the Transportation Act as set out in Section 303, provides that "[i]t 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." To accomplish this policy, the Secretary of the Department of Transportation can *only* approve a transportation project that requires the use of publicly owned land of a public park *if* "there is no prudent and feasible alternative to the use of that land" and "the program includes all possible planning to minimize harm to the park . . . or historic site resulting from the use." *Id.*

To meet that burden on the first test, the government is normally required to look at multiple sites, which it failed to do with respect to Jackson Park. But even the analysis is confined solely to the site to the west of Washington Park, it becomes manifestly clear that there is at least one prudent and feasible alternative, which is indeed *superior* to Jackson Park in all relevant particulars as has been described in more detail by the Plaintiffs in ¶¶ 39-42, 129 of their complaint.

The Defendants carefully choreographed their narrowing of the scope of a Section 4(f), NEPA, and NHPA review, making it impossible to consider any site other than the one that was chosen. It was of course a reasonably foreseeable, indeed a certain, effect that the closure of four main roads in Jackson Park would create a traffic mess of epic proportions, particularly when the OPC itself is purportedly adding traffic to precisely those roads. It is of course idle thinking, not backed by any effort to perform a hard look, that two new lanes, one on each side of Jackson Park, could compensate for the loss of roads through the heart of Jackson Park. But the Defendants are surely correct that there is no other location apart from Lake Shore Drive and Stony Island Avenue to try to offset by the massive closures of Cornell Drive, the Midway Plaisance going east, Hayes and Marquette Avenues—*if* their narrow definition of some wholly local project is accepted.

This puts into focus an additional and fatal error performed by the Federal Defendants in regards to their failure to choose a proper baseline for various view of alternatives included in the

environmental assessment and Section 4(f) report. (*See* Plaintiffs' Br. at 18-20) As explained therein, while references were made to Alternative A, which represents the current status quo, the Federal Defendants further admit that this was not utilized in any effort to determine reasonable or prudent alternatives in comparison to Alternative B (assuming the OPC is built) and Alternative C (OPC built and Lakeshore Drive and Stony Island Expanded). (Fed. Br. at 7, 24-26); the only alternatives that were created involved comparisons between Alternatives B and C. The inclusion of Alternative A is nothing short of an admission that the current status of the park must be considered for purposes of the analysis for reasonable and prudent alternatives under all of these regulatory frameworks, but the clear hope and expectation of the Defendants was that by referencing it, compliance is achieved (*i.e.,* it is in the report, so we complied). As the decisions in *Openlands v. U.S. Dept. of Transp.,* 124 F. Supp 3d 796 (N.D. Ill, 2015) and *Old Town* as well teach, consistent with Supreme Court's decision in *Overton Park,* that is not enough under Section 4(f) and NEPA.

Finally, at oral argument the Defendants invited the court to review what was characterized as a real segmentation example, *Delaware Riverkeeper Network v. Federal Energy Regulatory Comm'n,* 753 F.3d 1304 (D.C. Cir. 2014), seeking to differentiate that case from the circumstances at bar. If anything, *Delaware Riverkeeper* demonstrates the strength of Plaintiffs' position. In that case, the D.C. Circuit found that the Federal Energy Regulatory Commission, which was responsible for the review of pipeline construction, had issued a generalized statement that four geographically distinct legs of a pipeline upgrade were impermissibly segmented elements of a single project undertaken by the Tennessee Gas Pipeline Project. The Court refused to allow the segmentation, even though the different legs of the project were slated for construction at somewhat different times. It then looked at the cumulative effects of the various stages that some

version of the step-transaction doctrine used in *Old Town* applied. "Given the self-evident interrelatedness of the projects as well as their temporal overlap, the Commission was obliged to consider the other three other Tennessee Gas pipeline projects when it conducted its NEPA review of the Northeast Project." *Id.* at 1308. In the matter at bar, the construction of the OPC is bound more tightly by time and by space than the Tennessee Pipeline construction, which points again to the high level of certainty that the Plaintiffs will prevail on the segmentation issue and therefore on the merits of their claims under Section 4(f), NEPA and the NHPA.

C. *The Federal Reviews under NEPA, NHPA and the Transportation Act apply even though the Federal Government does not have the power to authorize the use of the alternative sites that must be examined under the avoidance prong.*

The Federal Defendants also make the extreme argument that somehow "the agencies' lack authority to preclude the OPC from being constructed in Jackson Park," and therefore there is no reason to review alternatives. (Fed. Br. at 11) That statement is mystifying because it just flatly ignores the explicit statutory requirement of performing the necessary reviews and allowing public participation and input in that regard. For example, as to the Section 4(f) review, the Federal Highway Authority has the right not to approve a project and therefore not allow use of federal monies. Beyond those issues, there are requirements under the Transportation Act whereby the Secretary must withhold his consent for the completion of the project until the various requisites of the various reviews are met. Similarly, under NEPA and the NHPA, the construction cannot take place until the adequate disclosures and reviews on all relevant points have been satisfactorily made. To deny these propositions is to say that none of these statutes carry any bite at all, which is an improper act of rewriting the statutory text.

Rather than deal with these clear statutory commands, however, the Federal Defendants invoke the Supreme Court decision in *Department of Transportation v. Public Citizen*, 541 U.S.

752 (2004), when they intersperse their own language into the original opinion by writing that "'no rule of reason worthy of the title' would require an agency to prepare environmental analysis that 'would serve no purpose.' Here it would have been a pointless exercise for the agencies to examine an alternative that placed the OPC outside of Jackson Park when they have no authority to dictate the location of the OPC." (Fed. Br. at 24) The argument has to be wrong as a general matter because if it applied to the OPC in Jackson Park, it would apply to any and all projects that come within the purview of NEPA, which makes no sense given its explicit statutory requirement that alternatives be considered (which is also required under the NHPA in order to address adverse effects on historic resources).

Nothing in the distinctive circumstances in *Public Citizens* requires rewriting the basic statutory scheme, congressionally created and approved, and which expressly calls for the consideration of feasible and prudent alternatives. At issue in *Public Citizen* was a challenge to a presidential order pursuant to NAFTA that lifted the prohibition against Mexican motor carriers operating in the United States on Mexican licenses. *Public Citizen* insisted that approval was in violation of NEPA for ignoring the impact of additional emissions these Mexican motor vehicles would have on overall pollution levels (thereby overlooking the possible offset from having fewer American trucks on the road). Yet under the statute, the President had final say over whether the prohibition should be lifted, after which the Supreme Court wrote:

> We hold 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. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a "major Federal action." Because the President, not FMCSA [Federal Motor Carrier Safety Administration] could authorize (or not authorize) cross-border operations from Mexican motor carriers, and because FMCSA has no discretion to prevent the entry of Mexican trucks, its EA did not need to consider the environmental effects arising from the entry.

Public Citizen, 541 U.S. at 770.

Given this carefully circumscribed language, the Defendants have not shown any reason why the requirement of asking federal agencies to review and rule out the possibility of alternative sites (along with the required and commensurate public input), including one outside of Washington Park, is not sustainable. That alternative site has all the signs of being both prudent and feasible. First, the site is located at the corner of two major cross streets, Garfield Boulevard and Martin Luther King Drive, each of which is wide but not well traveled. The site sits right above the Green Line and a short walk from the Red Line. In addition, the Dan Ryan expressway is nearby so that bus and vehicular traffic can easily approach the center through there and also for many other points from the City. Additional bus lines can be added without any environmental dislocation. The Biden administration everywhere else has stressed the importance of reducing reliance on fossil fuels and vehicular traffic (*see discussion* of Union Station in Pl. Br. at 22). The alternative site can deliver on that promise.

D. *The Plaintiffs are likely to prevail on their anticipatory demolition claim, which involve the same pattern of circumvention used to avoid compliance with NEPA and the Transportation Act*.

The anticipatory demolition claim is a miniature prequel of the systematic circumvention of an explicit statutory command similar to the pattern used with NEPA and the Transportation Act. This incident arose in August 2018 from having the City remove approximately 40 trees consistent with an agreement between it and the Foundation to build a new track and field area as the old track and field was slated to become part of the new OPC. (Complaint Ex. 17 (Agreement Between City and Foundation)) That work predated the initial Assessment of Effects report of the summer of 2019, and predated the final MOA by over two years, but was nine months after the City's involvement in the Section 106 process began in December 2017. (See Fed. Defs. Exs. 6

& 8). The City rubber stamped its boost to the Foundation even before the City Council had similarly approved the land transfer to the Foundation in October 2018. The Defendant Federal Highway Administration sought to explain this admitted irregularity by accepting the City's denial of intent to circumvent the Section 106 process (Fed. Br. at 37-39; City Br. at 25-26). But the largely unrebutted evidence presented above shows that the City's actions did in fact violate Section 110(k) of the NHPA.

Indeed, the only defense offered by the Federal Defendants to this apparent statutory violation was a blanket acceptance of the City's explanation that it did not intend to circumvent the Section 106 review process. (See Fed. Defs. Ex. 9 ("The FHWA accepts the City's explanation for the actions it took . . . . ").) The City's lame "explanation" for moving forward with its demolition included that its actions did not predispose them to an outcome (Fed. Defs. Ex. 8, at 2-3), a blatantly inaccurate statement when this was being done as part of the OPC project and being funded by the Foundation; there could not be a greater way of saying that this development is happening. The City further argues that the property remained recreational, but the only reason for the actions at all was the Foundation's taking the area of the prior field for non-recreational purposes; put differently, the removal of these trees and related work was necessitated by the conversion demanded by the Foundation of land from recreational to non-recreational use for the OPC. Also problematic, it was a consulting party, The Cultural Landscape Foundation, that advised the Advisory Council for Historic Preservation instead of the federal agencies when this matter arose (*see* Fed. Defs. Exs. 6 & 7), even though the National Park Service stood by and was apparently aware of these various developments while the FHWA (who was the lead agency on Section 106) was somehow left out of the picture (Fed. Defs. Ex. 8 at 3). The circumstances here

at a minimum establish that Plaintiffs have a more than negligible likelihood of success on their anticipatory demolition claim.

II. The Failure To Issue A Preliminary Injunction Will Result In Irreparable Harm To Jackson Park And To The Many People Who Use It.

It is beyond credible dispute that the irreparable harms that will stem from the combined actions of these Defendants will be both numerous and intense. Procedurally, therefore, the Defendants were duty bound to respond to the serious adverse effects acknowledged by the Assessment of Effects Report of January 2020 (Complaint Ex. 3 at 40):

> ***The undertaking will have an adverse effect to Jackson Park Historic Landscape District and Midway Plaisance because it will alter, directly or indirectly, characteristics of the historic property that qualify it for inclusion in the National Register***.

Yet, in the two years following that report, all of the Defendants systematically relied on an illicit form of segmentation analysis to duck the issue altogether.

It is easy to identify the significant adverse impacts on Jackson Park (note that language above does not limit such impact to a sliver of Jackson Park or a few acres of the Midway Plaisance) that constitute irreparable harm—the cutting of trees, the danger to migratory birds, the disruption of traffic patterns, as well as the destruction of a unique and prized historic resource. These are all recognized and noted by the supporting declarations submitted by Plaintiffs, which properly and more fully set forth such harms. (*See, e.g.,* Ex. 2, Mitchell Declaration, ¶¶ 5-6 (noting use of Jackson Park, its roadways, the Midway, the landscapes, birding and Women's Garden all permanently harmed); Ex. 4, Franklin Declaration, ¶ 5; Ex. 5, Caplan Declaration, ¶ 6; Ex. 11, Mitchell Supplemental Declaration, ¶ 4)

The analysis that follows looks at each of these elements separately, but the correct analysis demands that these shortfalls be reviewed cumulatively, further echoing the concerns of how artificial segmentation undermines these environmental statutes:

> (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.

See 40 C.F.R. § 1508.27(b).

Trees. The protection of mature trees is a strong priority under NEPA and of the Biden administration. Recently, Secretary of Interior Deb Haaland, one of the named Defendants in the case, stated flatly that " . . . 'achieving net zero by 2050 will not be possible without nature' by which she meant the extraordinary ability of forests, farmlands, and oceans to draw down and store large amounts of carbon from the atmosphere. . . ." (Ex. 9, "Joe Biden's Monumental Environmental Gambit," Editorial New York Times, July 18, 2021 Sunday Review at 8)

In this odd reversal, by defending this case as it has, the Biden administration sends the unmistakable message that this broad pronouncement does not apply to the trees in Jackson Park—solely, it appears, to help its powerful political allies to secure the right to construct the OPC in Jackson Park.

The mature trees in Jackson Park have taken 100 years or longer to reach full size. (Ex. 11, Mitchell Supplemental Declaration, ¶ 11). Such large trees are capable of providing safe nests to local and migratory birds. They absorb large amounts of water that help stabilize the local environment, and they remove large amounts of carbon dioxide from the air. Countless recent studies speak to the critical role that these trees play in the maintenance of 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.").

These observations are 100 percent in keeping with the basic objectives of NEPA and the Transportation Act. At no point do any of these Defendants deny that the destruction of trees can, and ordinarily does, create some irreparable harm to Jackson Park. What the Defendants do is engage in an extended form of sophistry by treating the destruction of at least 800 mature trees in Jackson Park, or a figure approaching 20% of the total, as "insignificant" because many other trees still remain. The Defendants, to be sure, lack the courage of their convictions because they have agreed to hold off cutting the trees until the end of *this, but only this,* migratory bird season: September 1, 2021.

At no point, however, do the Defendants offer any explanation as to why the loss of these trees today will not matter in future years, when the danger will be even greater due to the immediate and certain destruction of these environmental assets, especially given the extensive construction work in and around Jackson Park will surely create noise and dust that will not only delay plantings, but also drive these birds away from the nearby trees. Under the constructive use guidelines, *supra* at 9, the additional harms to these trees are required to be added to the total damage.

The identical constructive use principle was applied in *Citizen Advocates for Responsible Expansion, Inc. (I-Care) v. Dole*, 770 F.2d 423 (5th Cir. 1985)—yet another segmentation case. The Fifth Circuit relied on *Overton Park* to find that the planned, so-called "Overhead" expansion of the highway system in Fort Worth, Texas constituted an unnecessary constructive use of the unique local landmark, Water Garden, and other historic sites, "since feasible and prudent

alternatives superior to the appellees' proposed expansion plans existed." *Id*. at 430. The Fifth Circuit "construed broadly" the constructive use provisions of section 4(f), and held that the Overhead "impair[ed] substantially" the value of that site, undermining the consent obtained from the Secretary of Transportation and requiring an EIS, even though the area in question was subject to acute traffic jams at the center of Fort Worth. *Id*. at 441. Unfortunately, the studies prepared by the Federal Defendants did not address any of these use issues consistent with applicable regulatory framework, whether direct or constructive, outside of the two narrow projects identified by the Defendants, namely the UPARR claim and the widening of Lake Shore Drive and Stony Island Avenue. The Defendants do not escape the obligation simply by mentioning the OPC in the reports that are prepared, because that is not the equivalent of looking at feasible and prudent alternatives and applying such statutory requirements to a project or undertaking. The total refusal to look at the project as a whole -- and ensure that feasible and prudent alternatives are prepared and examined as is required by Section 4(f), NEPA and NHPA -- represents a "no look," not the hard-look baked into the arbitrary and capricious standard.

Not only do the Defendants ignore constructive use, but they also quickly pivot to a range of arguments. They insist these trees are not in good condition, claiming that forty percent of the current trees are in a "declining" condition, without once asking whether they can be rehabilitated with the appropriate care—again at a tiny fraction of the cost of ripping up all the roadwork in Jackson Park. In any event, these claims are largely addressed by the report relied upon and prepared by the government, which purports to identify the trees being removed; when adding up the totals of trees identified as **in good or fair condition,** that yields a figure of 92% within those categories. (Fed. Defs. Ex. 17, Part 1, pp. 189-202) Notably, this figure does not include those

trees already removed as part of the anticipatory demolition (the vast majority of which were also healthy).

At a minimum, the number removed is at least 17% of the tree population in the entire park, which the Defendants suggest is insignificant. That figure however is significant and material, particularly for a City which is in fact *tree poor*. (Ex. 10, Mark Rivera, "Chicago tree canopy dwindling; calls for equity, tree planting in underserved communities," June 30, 2021; *see also* Ex. 2, Mitchell Declaration, ¶¶ 8-9 and Ex. 11, Supplemental Declaration, ¶ 11) In fact, even if the Defendants' tree count is correct (there are indeed questions that figure is higher), their characterizations remain beside the point. Suppose that Jackson Park were smaller, such that all of its trees were destroyed; or larger so that only an infinitesimal portion of the trees were removed. Neither of these ratios matters. What matters is that the total destruction of trees, and their negative environmental impacts, remain the same no matter how many trees remain anywhere else. The destruction of that huge number of trees cannot be dismissed as "de minimis" under NEPA or the Transportation Act, so that the percentages to some degree are irrelevant.

Next, the Defendants insist that fewer than 20 percent of the trees are "mature" and in good condition, such that the short-term negative consequences from removing these trees will "ultimately result in long-term beneficial impacts on tree population, tree species diversity and anticipated tree canopy when the replanted trees reach maturity." (Foundation Br. at 16) That 20% number is also contested — the report relied upon by the Federal Government identifying all of the trees that will be removed also identifies those trees as mature or semi-mature trees, and looking at those listings yields a number of mature or semi-mature trees that comprises 93% of the total tree population being removed. (*See* Fed. Defs. Ex. 17, Part 1, pp. 189-202)

But, even if taken at face value, what that statement does not reveal is the length of time that it takes to reach maturity. For starters, no new trees can be replanted at the site during the course of construction, which the Foundation estimates at a minimum four years and two months, given the expected OPC opening in the fall of 2025. (*See* Declaration of Robbin Cohen ¶ 5, attached to Foundation Br.) But, that timeline does not allow for any glitches caused by storms, floods, strikes, accidents at their site, and depends upon coordination with the extensive roadwork that will have to take place at the same time. (*See* Ex. 12, Declaration of Grahm M. Balkany, ¶¶ 9-12) The inevitable vagaries in construction could easily lead to a five to ten year delay before *any* new trees can be planted. And these trees will take a long time to reach maturity. The one-caliper trees are more likely to take root, but will take decades to mature. The four caliper trees are less likely to take root, despite being able to mature sooner. Thus, the return to the current tree population could easily take several generations, even assuming that local conditions remain conducive to their growth. To call these massive dislocations insignificant and "temporary effects," (e.g. City Br. at 27), is to exercise an enormous liberty with the English language. (*See also* Ex. 11, Mitchell Supplemental Declaration, ¶¶ 5-9, 11) This work does not constitute the "in depth" study that all EAs and EISs must meet.

For its part, the City of Chicago notes that hundreds of trees were indeed cut down in the 1950s to make way for a Nike anti-aircraft system installed in Jackson Park, in the effort to argue Jackson Park is the home of never-ending change. (*See* City Br. at 4) Such arguments are false, as the fundamental structure of Jackson Park remains intact. (*See* Mitchell Supplemental Declaration, ¶¶ 5-6) Further, the Defendants fail to note that the entire affair was regarded with deep public hostility, and removed. (*See* Mitchell Supplemental Declaration, ¶ 10) Nor does it

once ask whether the same kind of activity would ever be allowed under the current environmental laws, none of which were in place at the time.

The case law, moreover, shows that the loss of any trees is treated as irreparable, not temporary harm. Thus, in Committee of 100 On the Federal City v. Foxx, 87 F.Supp.3d 191 (D.D.C. 2015) plaintiffs sought a preliminary injunction to block the construction of a new seven-block stretch of underground track in the heart of Washington D.C. In addressing the issue of trees, the District Court, after some hesitation, agreed that the removal of some 200 trees "would inflict a sufficiently severe and irreversible injury to Ms. Harrington and other residents to clear the bar of irreparable harm." *Id.* at 205. Tellingly, it noted that "even if the mature trees were replaced with saplings, it would take years for them to grow to the size of the current ones." *Id*. at 204. In other cases, the number of trees sacrificed can be far fewer. *Saunders v. Washington Metropolitan Area Transit Authority*, 359 F. Supp. 457, 462 (D.D.C. 1973), for example, held that "[p]laintiffs would suffer irreparable injury in the removal of trees from their neighborhood." The total tree count was three in one location, and a few others in a nearby location where "[t]wo serrated metal surface grates, five by fifty feet, would displace the trees and grass in public space between the curb and sidewalk on both sides of the street." *Id.* at 460 note 16. On any fair reading of the case law, the loss of 783 trees constitutes irreparable harm. *See also, e.g., Sequoia Forestkeeper v. U.S. Forest Serv.*, No. 1:21-cv-01041-DAD-BAM, 2021 U.S. Dist. LEXIS 137902 at * 19, 2021 WL 3129630 (E.D. Cal. July 23, 2021) (granting a TRO and permitting further briefing whether the court's conclusion should be adopted for a preliminary injunction against removal of trees along forest roads; "Plaintiffs argue that . . . the removal of trees from the landscape would constitute irreparable harm. Plaintiffs describe how their members would be unable to view, experience or use the land nor could members conduct research or recreational

pursuits absent an injunction."; *see also Id.* at *27-*28. "Having considered the arguments of the parties, the court concludes that the balance of hardships tips in favor of the granting of injunctive relief . . . and is bolstered by the fact that plaintiffs' requested relief accounts for and allows for the removal of imminently dangerous trees. Moreover, the court is not persuaded that the economic impact that USFS would face due to any delay created by complying with NEPA tips the balance against granting injunctive relief."); *Hatmaker v. Ga. DOT*, 973 F. Supp. 1047, 1057 (M.D. Ga. 1995) (granting a preliminary injunction to protect a historic tree; "There is no question that if the Friendship Oak is wrongfully removed no monetary sum could adequately compensate for its loss. As discussed above, Congress has promulgated an explicit national policy that the loss of 'historic sites' is to be avoided at all reasonable costs. . . . Therefore, the second prong of the preliminary injunction has been met.")

Migratory birds. Defendants' cavalier treatment of Jackson Park's trees applies with equal force to the migratory birds who use those trees and Jackson Park for nesting and rest. Clearly, any reduction in the number of trees reduces Jackson Park's ability to accommodate those creatures, and if conditions are as chaotic as expected, even the trees that remain will be less hospitable than before. In addition, the construction of the 235-foot OPC perched close to the Mississippi flyway presents a new and additional obstacle that will remain so long as the OPC stands. During oral argument, counsel for the Federal Defendants took the position that the trees that were removed are far from the lakefront, which the migratory birds are more likely to use. However, much more is demanded under NEPA given the significance of the impacts, and precisely why an environmental impact statement is necessary. It is of course, not possible to identify with particularity the losses for the many bird species that will be harmed by the construction of the OPC. But the possible range of losses is surely far greater by the Mississippi

flyway than elsewhere, so that it is not possible to dismiss the risk of systematic loss without further study, including its interaction with both the trees and the relevant highways and structures. *See* 40 C.F. R. § 1508.27(b)(8).

Sadly, the action of the Defendants speaks louder than words. They are willing to postpone cutting the trees until this season's migration is over, and they recognize that "construction is constrained by the need to protect migratory birds by avoiding tree cutting for half the year—between March 1 and August 31" (Cohen Declaration ¶ 21), without recognizing that any cutting that takes place the other times of the year will necessarily reduce the stock of available trees for subsequent seasons.

Such posturing by the Federal Defendants in particular is extremely odd given that the Biden Administration has removed, to great acclaim, the Trump-era proposal M-37041, or the Tompkins Opinion, named after the Solicitor in the Department of Interior who issued it. The Tompkins Opinion sought to strip the protection given to migratory birds from any and all actions that were not specifically intended to kill them, even if the property owners knew of the certain destruction—say of taking down a barn known to have protected owls within it, all of whom would be killed.

In *NRDC v. U.S. Dep't of Interior*, No. 1:2018cv0496 – Document 53 (S.D.N.Y July 31, 2019), the District Court upheld a challenge to the Trump Administration reinterpretation of the Migratory Bird Treaty Act of 1918, (MBTA) Pub.L. No. 74-728, 49 Stat. 1555)) which limited the applicability of the Act "activities specifically aimed at birds," thereby adding a strong *mens rea* requirement to the statute. The Biden administration removed that order with great fanfare, U.S. Fish & Wildlife Service, Interior Department Takes Steps to Revoke Final Rule on Migratory Bird Treaty Act Incidental Take, May 6, 2021, available at

https://www.fws.gov/news/ShowNews.cfm?ref=interior-department-takes-steps-to-revoke-final-rule-on-migratory-bird-&_ID=36902: ("We have heard from our partners, the public, Tribes, states and numerous other stakeholders from across the country that it is imperative the previous administration's rollback of the MBTA be reviewed to ensure continued progress toward commonsense standards that protect migratory birds.") It is utterly inexplicable how the Biden administration could forcefully resist that damage to migratory birds, but do nothing to stop the construction of the OPC in favor of a more detailed study and analysis that is part of EIS, which is certain to cause the death of many birds that use the Mississippi flyway. The destruction of migratory birds, in conjunction with other activities of the three Defendants surely amounts to a form of irreparable harm. *See also Wash. Cty., N.C. v. U.S. Dep't of the Navy*, 317 F. Supp. 2d 626, 635 (E.D.N.C. 2004) (granting a preliminary injunction against the Navy's construction of a landing field; "[I]f a preliminary injunction does not issue the environment could be irreparably harmed. This harm includes irreparable harm to the numerous tundra swans and snow geese. . . . Plaintiffs presented compelling evidence . . . that the construction of [a landing field] would irreparably harm the natural habitat of hundreds of thousands of waterfowl and would negatively affect the bird population through the increased noise that would be produced by the Super Hornets, the loss of essential nourishment for the birds through the loss of neighboring farmland, and the increased danger of utilizing the various lakes and refuges by the birds through the threat of a collision with the planes. Although Plaintiffs may not have demonstrated exactly how many birds would be effected or precisely how drastic the harm would be, the Court finds that Plaintiffs did demonstrate irreparable harm."); *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1260-61 (10th Cir. 2003) (reversing a denial of a preliminary injunction because of a finding of irreparable harm: "[T]here will be direct effects to bald eagles and their habitats in association

with *construction* of the Canyon Club golf course and housing development. *Disturbances associated with construction* would be in the form of *noise, human activities, ground disturbance, and tree removal*.")

Road construction and traffic patterns: The massive alterations to the road system in Jackson Park will cause irreparable harm to every aspect of its cultural, historical, and environmental life. The declarants have all stated that they use the road system in Jackson Park in order to take advantage of the historical and environmental benefits of Jackson Park. (Ex. 2, Mitchell Declaration, ¶ 5; Ex. 11, Mitchell Supplemental Declaration, ¶ 9; Ex. 4, Franklin Declaration, ¶ 5; Ex. 5, Caplan Declaration, ¶ 6) The road closures necessarily permanently compromise the use of the roadway system, and impact all activities throughout the park throughout the construction period and beyond. (Ex. 11, Mitchell Supplemental Declaration, ¶¶ 5-9, 11) The elaborate network of roads forms, as is the case many Olmsted landscapes, an integral part of the overall system (*see* Ex. 2, Mitchell Declaration, ¶¶ 9, 12) both for its scenic vistas and its transportation function. *See, e.g. Today's IV, Inc. v. Fed. Transit Admin.*, Nos. LA CV13-00378 JAK (PLAx), LA CV13-00396 JAK (PLAx), LA CV13-00453 JAK (PLAx), 2014 U.S. Dist. LEXIS 151185 at *62 (C.D. Cal. Sept. 12, 2014) (granting injunctive relief in part to allow a full NEPA review with plaintiff's input before continuing with construction of a new subway: "Moreover, Plaintiffs have submitted the declaration of an expert witness who opines that C/C construction 'creates extreme disruption . . . due to *noise, dust, air pollution and traffic and circulation effects*.' . . . [A]bsent an injunction that bars C/C construction pending the completion of a supplemental NEPA analysis, Plaintiffs would be denied the opportunity to participate in a meaningful, good faith process through which Defendants would consider alternatives."); *N.Y. v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1, 4-5 (E.D.N.Y. 2003) (granting a preliminary

injunction against the building of a casino; "The State and Town have shown likely irreparable harm resulting from the construction of a gambling casino. . . . First and foremost, the construction of a casino like the one proposed by Defendants would cause incredible traffic congestion in the surrounding community. The local roads in the area are not sufficient to handle the present traffic congestion, much less the number of vehicles estimated to travel to the proposed gambling facility. This increased traffic would not only effect [sic] the quality of life of residents in an already crowded area, it is also likely to drastically heighten air pollution along Routes 25 and 27.")

The scope of irreparable harm also includes the list of world-class historical monuments, such as the Woman's Garden, that have to be removed (and then "replaced")—but only after long waits in order to complete the OPC. As an initial matter, the use again of the word "temporary" is abused, and under that definition any action – the destruction of the Washington Monument for example – is temporary as long as another monument called the "Washington Monument" is built. In any event, any upgrades that could be done on a new site in the future could be done at lower cost today, without any interruption of service.

The Foundation points to the conclusions by certain state historic preservation individuals, but does nothing to justify them. (Foundation Br. at 20-22) Indeed, it is flatly wrong to say that the changes are only "small in scale" because less than three percent of Jackson Park is occupied by the Center. (Ex. 12, Balkany Declaration, ¶ 4 and Ex. A thereto) Clearly the visual elements extend far beyond the occupied lands, and the effort to create a huge building at the center of Jackson Park is flatly inconsistent with Olmsted's democratic rejection of the English model of a closed park surrounding a large manor house is necessarily destroyed in this fashion. (Ex. 2, Mitchell Declaration, ¶ 4; Ex. 11, Mitchell Supplemental Declaration, ¶ 6; see also Balkany Declaration, ¶ 4) The study, moreover, points to no other Olmsted Park that has been uprooted in

this fashion. (*See* Ex. 2, Mitchell Declaration, ¶ 15)[2] Indeed, disagreement is not just between the Defendants and Professor Mitchell, for the Obama Foundation conveniently overlooks the extensive aesthetic objections to the OPC in Jackson Park raised by the Assessment of Effects (Complaint Exs. 3 & 4) that stressed the adverse impact of the new OPC on the visual and aesthetic integrity of the Park, which the Federal Defendants occasionally acknowledge but have ignored through their segmentation gambit. *See W. Watersheds Project v. Bernhardt*, 392 F. Supp. 3d 1225, 1258 (D. Or. 2019) (granting a preliminary injunction against the issuance of a grazing permit; "[T]h[e] loss of the ability to view, experience, and use a forested area in its undisturbed state, even though there were significant other forested areas available, sufficed to allege irreparable harm for a preliminary injunction. . . Because the Court has found grazing at the permitted level is likely to cause irreparable harm to the allotments, Plaintiffs have shown a likely irreparable harm from the loss of their ability to view, experience, use, and enjoy the allotments if grazing is allowed at the level in the Permit.")

In addition, the entire traffic grid will suffer irreparable harm because these roads must be ripped up, at the explicit request of the Foundation no less to meet the space demands of the OPC. In order to deny the irreparable harm, the Defendants make too much of the defects of the current system. They say that crossing Cornell Drive at certain locations is "dangerous," (Foundation Br. at 19) without noting that it is possible to add new signage, different signals, underpasses or overpasses (such as the two recently built over Lake Shore Drive) to deal with the issue at a fraction of the over $200 million of federal, state, and local money needed to build the new road system—

[2] The Foundation takes to deprecation of Professor Mitchell by speaking of his "subjective opinions, and by accusing him of offering a "so-called" professional opinion," despite his qualifications as a landscape historian and expert on Olmsted landscapes and Jackson Park, who teaches on these matters at the University of Chicago.

a huge figure never once mentioned by the Defendants in their briefs. The Foundation compounds its error by making a crude distortion of the historical record by arguing that Cornell Drive's growth is evidence of constant change, and that the removal of Cornell Drive counts as an "improvement." The arguments are just factually wrong, as Cornell Drive not only represents an original Olmstead vista, but is a hardscape that is a constant motif of all large Olmsted Parks, which are themselves considered integral parkland, and its growth is not a substantial alteration (*see* Ex. 11, Mitchell Supplemental Declaration, ¶¶ 8-9). Similarly, the Defendants note that a new Women's Garden could be accessible to disabled individuals, but ignore the ability to add the same improvements at the current location.

In addition, the entire euphemistic talk about traffic "improvements" must not be allowed to conceal the irreparable losses that come from closing the Midway Plaisance going east, another critical feature that is permanently lost. (Ex. 11, Mitchell Supplemental Decl., ¶¶ 5, 7-8) That closure will not make it easier (in the noise and din) to walk from one side to the other of a (shrunken) Jackson Park. But it will create vehicular chaos in and around Jackson Park, by cutting in two the lifeline connecting the South Midway and the University of Chicago to Washington Park and points beyond. The Defendants nowhere mention that the source of these massive dislocations stem from Chicago's decision to defer to the Obama Foundation's wish to maintain maximum visibility of the OPC in the premier region of Jackson Park, even though siting the OPC several hundred feet south could have avoided the massive disruption of the traffic patterns, which again present some mix of direct and constructive uses of Jackson Park.

The Foundation also asserts that the irreparable harm suffered by Plaintiffs is diminished because of the supposed delay by the Plaintiffs in bringing this suit. *See* Foundation Br. at 11-12. But there is nothing to the point. Until February 1, 2021, a stay was in place against any

construction at the site because of the ongoing environmental, parkland and historic resource revies mandated by federal law, recognized by the Defendants themselves.

> "Indeed, even apart from the City Council approvals at issue here, the project could not commence until various federal reviews are concluded as well, such as reviews by the National Park Service and the Federal Highway Administration."

See Docket No. 19 in Case No. 19 CV 3424, ¶ 8.

Defendants well knew that the Plaintiffs would continue to pursue their suit, which they filed on April 15, 2021. Based on the express terms set forth in the FONSI, there was an agreement in place that no actions in regards to the trees could be taken prior to September 1, 2021. That left time for the parties to discuss a standstill agreement, which did occur, and when no such agreement could be reached, the parties discussed and agreed upon a schedule to present the motion. (Docket No. 25; *see also* Ex. 3, Rachlis Declaration, ¶¶ 4-9) The City was and remains in the process of dealing with requests for proposals on roadwork. (Ex. 3, Rachlis Declaration, ¶ 6) The Plaintiffs submitted all their motion papers in accordance with the schedule and opted for an argument date of July 20, 2021 to expedite the procedures, and have finished their briefing as of July 30, 2021. There was no delay, and any such suggestion is unfounded[3]. The Defendants have suffered no harm through this process, for not a single activity has been delayed or impacted by the motion, precisely because the parties discussed and agreed upon such timing.

III. The Balance Of Equities Tips In Favor Of Not Building The OPC In Jackson Park.

A. *The traditional balancing tests require that the defendant offer some justification for inflicting irreparable environmental harm or the sort not present with the OPC.*

[3] The Foundation misleadingly cites *Shaefer v. Globe Protection*, 721 F. 2d 1121 (7th Cir. 1983), which involved discrimination claims and monetary relief which the court held was inconsistent with irreparable harm, and further critiqued movants for not seriously pursuing injunctive relief. That cannot be seriously considered here. Similarly, *Jones v. Qualkinbush,* 842 F. 3d 1053 (7th Cir. 2016) dealt with policies and issues associated with obtaining injunctive relief where there are election challenges, a unique type of litigation.

When evaluating requests for injunctive relief, courts will consider whether the balance of equities tips in favor of the party seeking a preliminary injunction. The point of this requirement is to allow a defendant to explain why some irreparable harm it has created has to be tolerated in order to avoid some greater social harm. In many cases, a defendant can show powerful constraints that cannot be if its project is to be undertaken at all. Just this pattern, for example, arose in *Winter v. Nat. Res. Def. Council,* 555 U.S. 7 (2008), where the NRDC sued to block conducting naval tests in waters off the coast of Southern California, when the vibrations emitted during its study caused harm to multiple marine species inhabiting that space. The Supreme Court concluded that even though such irreparable harm was likely, the balance of equities tipped the balance against allowing the injunction in light of the paramount military importance in developing antisubmarine warfare. Accordingly, the Court vacated the injunction imposed by the lower courts: "While we do not question the seriousness of these [environmental] interests, we conclude that the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy." *Id*. at 368. For a similar, pre-*Winter* determination of a countervailing interest, *see Wisconsin v. Weinberger*, 745 F.2d 412, 425-27 (7th Circ. 1984) (refusing to order a supplemental environmental impact statement to block a naval program designed to develop low frequency communications).

These same patterns were at work in many other cases. Thus, in *Foxx*, *supra* at 23, avoidance of irreparable harm was not an option because the seven-block stretch of out-of-date underground track in the heart of Washington D.C. was in a fixed location in desperate need of repair. Hence the best that the project developers could do was to take a combination of minimization and mitigation, which in turn led the Court to allow for the destruction of some 200 trees.

Similarly, in *Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Engineers,* 702 F.3d 1156 (10th Cir. 2012), the Army Corps examined seven sites for the potential location of a new rail/truck terminal for the Burlington Northern Santa Fe (BNSF), to be located outside Kansas City, Kansas. The facility was a hub through which various goods would move so that its placement "required the site to be close to existing rail tracks and highways, large enough to handle the projected volume of freight, and within 30 miles of BNSF's existing intermodal facility at the Argentine Yard." *Id*. at 1163. The effort to avoid certain levels of interference with "about 490 acres of primarily agricultural land, containing 28,000 linear feet of streams and nearly 8 acres of wetlands" was a given. *Id*. In that context, avoidance was impossible so the inquiry necessarily turned in sequence to the next two stages, namely minimization and mitigation of the level of irreparable harm, which is why the third factor tipped the balance in favor of that project.

Similarly, in *Michigan v. U.S. Army Corps of Engineers*, 667 F. 3d 765 (7th Cir. 2011) (referenced by all Defendants), the Seventh Circuit rejected Michigan's request for a preliminary injunction that would require the Army Corps of Engineers and the municipal water reclamation district to put in place additional physical barriers through the Chicago Area Waterway System in order to prevent an invasive non-native species of carp from entering the Mississippi water basin. *Id.* at 771, 788. The court had "little doubt" that the predator fish created irreparable harm, but nonetheless refused to grant the desired remedy because of weighty considerations on the other side. *Id.* at 789-94. The imposition of that barrier carried with it serious adverse consequences as well, for the separation of the Great Lakes from the Mississippi Water System would actually harm industry, commercial transportation, and recreation. Worse still, the added precautions might not achieve their desired ends given the complexity of the problem, such that the lesser means already in place might produce a better overall result. The case was a classic insistence of environmental

risk v. environmental risk, which is exactly the type of consideration that should be the focus of the considerations when balancing equities.

The Foundation also cites to *Save Our Parks v. Kempthorne,* 2006 WL 3378703 (S.D.N.Y. Nov. 15, 2006), because the project required the cutting of about 400 trees. But surrounding circumstances showed that the necessary expansion of Yankee Stadium could not be moved anywhere else. The trees cut were not part of a historic park, and they could be planted at once, not after years of delay. In addition, these trees did not provide any habitat for migratory birds, as does the Mississippi flyway. The larger project, moreover, improved parking and traffic flow, so that the choice to forego the entire improvement of the park to save the trees was illogical. In the context of the OPC, none of these complex factors in the cases above are operative. In fact, the logic and the cited cases all support the balance of harms tipping in favor of Plaintiffs. The OPC is not yet in existence, so the Foundation faces no constraint on trying to work with the renovation of an existing project within some confined space. An injunction ultimately allows a full EIS to be performed and proper review of feasible and prudent alternatives, while in the meantime preserving the environmental and historic resources of Jackson Park without creating any alternative environmental risk. Nor is the proposed OPC a part of any network, or even expanded project, that limits the choices where it can be sited. For instance, the alternative site outside of Washington Park presents at most minor environmental impacts in comparison with construction in Jackson Park, but, as noted, the segmented analysis blocked that inquiry. There is in a word in this case no offset to the extensive irreparable harm that the OPC will impose on Jackson Park. Moreover, there is certainty that the injunction is needed to prevent the immediate, certain, and irreparable harms discussed above to the history, culture and environmental integrity.

B. *Matters of delay and cost to the Foundation and City cannot, as a matter of both law and fact, constitute an offsetting equity in terms of an irreparable harm to the Foundation.*

The City and the Foundation claim that the balance of harms cuts their way by focusing generally upon these factors: (i) harm from disruption of schedules and delays and related costs; (ii) alleged public benefits from jobs will be delayed; (iii) general delay in benefits to the public; and (iv) interference with "sovereign decisions to approval the use of their land for the presidential center."

First, as a matter of law, these claims for harms from the costs of delay to the Foundation do not involve any added environmental risk; nor does a preliminary injunction impose any threat to the environmental, cultural and historical unities in Jackson Park. Indeed, if these losses were added to the balance, any supposed harm to the Foundation from requiring an EIS is miniscule compared to the wholesale devastation of Jackson Park in both a historic and environmental sense. In addition, the Defendants do not cite—and we know of—no statutory or caselaw support for the proposition that the dislocations and delay solely from any EA or EIS constitutes an irreparable harm. The construction of the OPC does create early and irreversible losses due to every aspect of their project, which if this analysis is correct, are far greater than the financial losses to the Foundation, all of which could have been averted if they had opted originally for some alternative site, such as that west of Washington Park, where the burden of federal and state reviews would have been negligible.

The Foundation seeks to bolster its case that its financial costs go into the equation by referring to *Sierra Club v. United States Army Corps. of Engineers*, 990 F.Supp.2d 9 (D.D.C. 2013), which involved a NEPA challenge to the completion of a 589-mile Flanagan South Pipeline,

of which about 60 acres were on private lands. The Defendants cobble together this one sentence extract from that decision—note the quotation marks and brackets— which reads as follows:

> The "time and effort that [the Foundation] has already put in to the project" as well as the "major resources" it has committed to the projects shows that the Foundation "will suffer harm if the [Presidential Center] is indefinitely delayed.

(Foundation Br. at 27)

The bracketed term replaces Enbridge, the pipeline project owner, who had already started construction on the pipeline in August 2013, when the case was decided on November 13, 2013. But the backstory of the two cases are entirely different. The passage in question related to the balance of equities in such cases, and the full passage from which it was extracted reads as follows:

> With respect to the balance of harms, the record as it currently stands shows that Enbridge has committed major resources to the FS Pipeline project over the last 18 months, including engaging in an intensive effort to comply with the myriad state and federal environmental regulations that the pipeline project implicates. The evidence of the time and effort that Enbridge has already put in to the project lends credence to Enbridge's argument that it will suffer harm if the pipeline is indefinitely delayed. Plaintiffs, by contrast, have failed to demonstrate the harms that they allege with specificity in regard to the FS Pipeline in particular, relying instead on general harms they have identified by analogizing this project to other pipelines. *Id.* at 43.

None of the delay costs referenced there had to do with the litigation before the District of Columbia Court. It all pertained to having *successfully* concluded environmental proceedings *elsewhere*. The Foundation quotes from that opinion that Enbridge would have "to 'de-mobilize' and then 're-mobilize' its construction efforts," but it did not mention for Enbridge the costs of construction were large so that a preliminary injunction would impose high costs, "including up to $262 million in additional construction costs if it is required to "de-mobilize" and then "re-mobilize" its construction efforts," which were well underway. *Sierra Club*, 990 F. Supp.2d at 42. The balance of equities with the OPC is wholly different. The Plaintiffs allege specific and immediate harms, and the Defendants have incurred no costs elsewhere in their successful effort

to get the project approved. The balance of equities here is utterly different from that in the pipeline case.

Even if these financial dislocations to the OPC matter, however, the Foundation still comes up short. The City identifies no specific work that is being interrupted or delayed through an injunction. Indeed, there is in place a moratorium on any tree removal before September 1, 2021, and it was widely agreed that there simply cannot be "harm" to environmental resources before that date. Thus the Foundation is left to restyle as irreparable harm any purported delay in construction and the attendant financial costs of having to redo arrangements on subcontractors, donors, and potential visitors. All of these claims rest solely on the Declaration of Robbin Cohen, who offers not one single document or other shred of evidence tending to show these delays will amount to more than $2 million per month. (Foundation Br., Ex. A, Cohen Declaration, ¶ 37)

The objections to Cohen's position are decisive and well-grounded. (*See*, e.g., Ex. 12, Balkany Declaration, ¶ 13) Thus, at one point (Cohen Declaration, ¶ 21), she announces a time table of 50 months for completion of the OPC, which makes no allowance or contingencies for delay, which is hugely problematic. (Balkany Declaration, ¶ 12) At another she treats the 50 month period as a *minimum* (¶ 27) before noting the obvious construction risks that could cause immense delays, wholly independent of this law suit, in building 40% percent of the structure underground on that difficult site (¶ 28). (Balkany Declaration, ¶¶ 10-11) She offers no critical path or construction schedule, just generalized claims without any factual basis, and then offers an unanalyzed and unsupported number of $2.2 million per month as a dollar figure associated with delay. (Balkany Declaration, ¶¶ 8-9) Such conclusory statements are inadmissible and unreliable as a legal matter. *See, e.g. FTC v. Publ'g Clearing House, Inc*., 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence,

is insufficient to create a genuine issue of material fact."); *Voile Mfg. Corp. v. Dandurand*, 551 F. Supp. 2d 1301, 1307 (D. Utah 2008) ("[A] conclusory affidavit is not enough to demonstrate irreparable harm here. Courts require more than unsupported factual conclusions to support such a finding. . .") To the extent the Court were to admit and/or rely upon such a declaration that contains no evidentiary support for the assertions set forth therein, such matters would necessitate a hearing to allow Plaintiffs to further address what are disputed matters of fact. *See, e.g., Ty, Inc. v. GMA Accessories, Inc.,* 132 F.3d 1167, 1171 (7th Cir. 1997) (if genuine issues or material fact are created by the response to a motion for a preliminary injunction, a hearing is required) (*citing Medeco Security Locks, Inc. v. Swiderek,* 680 F.2d 37, 38 (7th Cir.1981) (per curiam) and other authorities).

The Foundation also claims that the $70 million it spent on site selection between 2016 and the conclusion of the federal reviews on February 1, 2021 may be lost. (Cohen Declaration, ¶ 18) However, such outlays were self-inflicted expenses, spent during times before approvals by the City or federal agencies. If anything, her Declaration shows that the Foundation bears sole responsibility if its own fundraising efforts have fallen far short of its new $700 million target, perhaps by as much as $500 million, depending on the default rate on pledges: "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." (Cohen Declaration, ¶¶ 39-40) Neither the City nor the Foundation can resist the issuance of this injunction when they solely on their own motion selected the most troublesome, difficult (and inappropriate) site for the OPC.

Importantly, the $200 million figure identified by Cohen as the monies set aside for the development of the OPC appears additionally problematic. 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, 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* Complaint, Ex. 2, p. 85959 (Master Agreement, Paragraph 12(j).) Earlier this year, the Foundation's Certification to the City of Chicago listed the total amount of cash and pledges to the Foundation at approximately $485 million. (*See* Exhibit 13 attached hereto) That figure is obviously different from the $200 million number that is now provided as of July 15, 2021 as a basis to avoid the injunction. In any event the $485 million is less than the $700 million and $500 million figures all referenced in the declaration. As such, it does not appear that a condition precedent to the transfer of the property has been met, which should disallow any work whatsoever on the property and eliminates any claim of harm by the Foundation or City.

Furthermore, the cases cited by the Foundation in the effort to boost their public interest and balance of harms arguments are inapposite (Foundation Br. at 33-34), as those cases primarily involve situations where courts reviewed the likelihood of success factor, and when that was found against a moving party, found the public interest factors weighed in favor of the non-movant. Such cases did not involve situations where the public interest factors factors overrode there likelihood of success on the merits.

For its part, the City and Park District also wrongly claim to suffer "harm" because their sovereignty is compromised by the inability to devote the use of "their" land for the OPC (City Br. at 35). But that land is not "their" land, but land that the City and Park District hold in trust for the people of Chicago—a sovereignty that it has expressly and impermissibly delegated to a private party. The 1996 unpublished *Hinson* decision cited by the City (attached as Exhibit G to its brief)

involving the City's decision not to renew the lease associated with Meigs Field is of no relevance (other than of a reminder of the City's propensity to take acts such as the destruction of the runways that are analogous to the anticipatory demolition acts taken by the City in this matter).

IV. The Public Interest Factors Favor An Injunction.

The various amicus briefs submitted, and the declarations of Department of Planning and Development's Maurice Cox and the Park District's Mike Kelley, trumpet the supposed economic benefits from building the OPC. But such comments are based largely on speculation. There is nothing specific or concrete that is included in the Declarations submitted by the City, and nothing that ties such economic development to a location in Jackson Park (versus the South Side generally). It is just wrong to accept the implicit premise that if the OPC is not in Jackson Park, it will not be on the South Side at all, which overlooks at the very least the alternative outside Washington Park, among others South Side locations, all of which are far better positioned to deliver the promised economic development. Put differently, the public interest of having the OPC on the South Side is not dependent upon it being in Jackson Park and encumbered by its historical, environmental, and community-related obstacles.

There are, for example, as many construction jobs for the construction of the OPC at an alternative site. And as for as job creation, the operation of the OPC in any South Side location will create the same number of jobs, many of which are already located in Hyde Park. The Washington Park site has infinitely better transportation connections to the rest of the world. The traffic jams from putting the OPC in Jackson Park will reduce the attractiveness of both the OPC and the GMSI, could well reduce economic activity on the South Side of Chicago as a whole below those that would be attained if no OPC were built at all that location. The Foundation's statement that "an injunction would make it impossible to *inspire* concurrent investment in the community"

(Foundation Br. at 32) is just what it sounds like—a conclusory and speculative platitude—not a form of harm. At best, the only sure type of job creation – construction jobs – will occur upon the completion of proper studies and reviews, a process that the City and Foundation embarked upon years ago in selecting this site. All of the other "benefits" are years away if not more (evidenced by the fact that even the unsupported Cohen Declaration acknowledges that the completion of the OPC campus is more than four years out), with no such benefits to the City from paying taxes or sharing revenues. Were the Foundation's mission focused "to promote economic development on the South Side" (Foundation Br. at 3) a location that would have been selected where that could have been in place long ago – the delay to this point has been created by the Foundation and City, and should not now be used as an excuse to properly and meaningfully review the circumstances that have been created by the Defendants.

In a further effort to bolster their case against a preliminary injunction, the Defendants rely on their highly speculative economic development figures, which project some 700,000 visits to the OPC in Jackson Park. (See Ex. 8) That number works out to about 1,900 visitors per day every day, which requires 190 people per each hour of a ten-hour day to walk through a narrow entryway that is ill-suited for such heavy use. The entrance to the OPC in Jackson Park has to be at or below grade in a cul-de-sac that must be used for multiple purposes, including delivery, security (high for a presidential center), personnel, inspections, repairs, and the like. Within this constrained setting, a single breakdown could shut the entire OPC down. No public transportation now serves the area, and none could be introduced to service a location that remote. The traffic flows are further complicated because the OPC must share its key entry way—off a narrowed Midway Plaisance—with the far larger Griffin Museum of Science and Industry, which despite its large size has never generated any economic benefits for Hyde Park or any other South Side community.

Once these nettlesome particulars become public knowledge, these logistical nightmares will discourage visits to the OPC and the Griffin MSI. Nor can the Foundation claim a promised boost in construction jobs and other services, because these are not tied to Jackson Park, but will be available at any South Side where the OPC is built.

In addition, the public interest strongly supports Plaintiffs' advocacy for full and proper processes under the various regulatory schemes, so that after proper consideration alternative locations on the South Side can be identified for the Presidential Center and at the same time preserving the benefits of the unique historic and environmental resource that is Jackson Park for the community. It is impossible to ignore that the public interest is advanced by properly using these procedures to protect the environment, parkland, humans and wildlife. Significant pipeline projects, which cannot be relocated, are often halted because of some remote risk of future leaks or failure. Surely, then, it is not too much to halt a project such as the OPC, which promises immediate and certain losses on a huge scale.

Importantly, it should also be recognized that the preliminary injunction would not last indefinitely. This matter has been proceeding quickly, and the Plaintiffs are prepared to move as expeditiously as practicable to have this matter presented and resolved on the merits while an injunction is in place, further mitigating against the notions of harm by delay advanced by certain of the Defendants.

For similar reasons the Federal Defendants are also wrong to claim that it is in the public interest to proceed with the construction of a presidential center. (Federal Br. at 39-40) The desire for a presidential center does not excuse lowering the protections of environmental laws or public parklands. To the contrary, as seen by the litigation involving the Presidential Center for former president Jimmy Carter, the laws can and should apply to those developments, as the Eleventh

Circuit found that there were significant questions relative to issues associated with the evaluation of alternatives under an environmental impact statement and section 4(f). *See, e.g. Druid Hills Civic Ass'n Inc. v. Federal Highway Administration,* 772 F.2d 700, 718-19 (11th Cir. 1985).

Nor is the matter any different if view from the point of public morale. The Foundation treats the OPC as a welcoming South Side beacon. But putting the OPC in Jackson Park also has an ominous reminder of "Chicago politics"—exemplifying how powerful private interests can orchestrate and avoid the governance structures for their own partisan advantage. As one of the plaintiffs, long-time Chicago resident Jamie Kalven has written in a pointed criticism of Valerie Jarrett, the President of the Foundation in his Op-ed: Obama Presidential Center. Right project, wrong location, Chicago, Tribune July 19, 2021, available at https://www.chicagotribune.com/opinion/commentary/ct-opinion-obama-presidential-center-jackson-park-kalven-20210719-dosdxevymfhwba7vvhmhnjeo7q-story.html

> In view of Chicago's history of rapacious real estate exploitation, it's nothing short of miraculous that the glorious archipelago of Frederick Law Olmsted parks — Washington and Jackson parks, linked by the Midway Plaisance — has been preserved. At least until now. . . .
>
> In a departure from the tradition of landscape gardens as enclaves of privilege, Olmsted conceived of his parks as "democratic spaces." Jarrett, however, sees the need for an upgrade. "When it comes to Jackson Park," she writes, "our goal is to restore the grandeur to its fading beauty and strengthen its vitality." By cutting down hundreds of full-growth trees? By disrupting traffic patterns? By appropriating 20 acres in order to construct a monumental building on a footing that could be compromised by the encroachment of Lake Michigan due to climate change?
>
> To date the Defendants have stonewalled Kalven's questions at their peril.

V. Conclusion.

For the reasons set forth herein, in Plaintiffs' opening brief and at oral argument, the motion for preliminary injunction should be granted and the "groundbreaking" activities which involve adverse impacts on historic and environmental resources in Jackson Park including excavation of

land and roads in Jackson Park, historic resources such as the Women's Garden, as well as removal of its trees, must be enjoined until the Court can hear the entire case on the merits.

Dated: July 30, 2021

Respectfully submitted,

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Exhibit 8

The Obama Presidential Center is coming. The South Side will reap the benefits.

By Valerie Jarrett

When the Obama Presidential Center was initially proposed several years ago, several cities competed for the honor of being the final site. But in their hearts, the Obamas knew there could only be one home: Chicago.

Former first lady Michelle Obama was born and raised here and is a proud graduate of Whitney Young High School. The Obamas' careers started here. Their family started here. President Barack Obama was elected to his first public office by the people of the South Side. The Obamas see the Obama Presidential Center as their opportunity to give back to a community that shaped their lives and has given them so much.

As we recover from a pandemic that has decimated the health and vitality of South Side communities, the build out and ultimate presence of the Obama Presidential Center will help kick-start the local economy with jobs, tourism and hospitality, as well as stronger markets for small businesses. That's why we have partnered with Emerald South, a new nonprofit that is working to increase access to jobs as well as access to generational wealth creation.

Indeed, the center is projected to bring 700,000 visitors to the South Side every year. We're developing partnerships and designing the experience in ways that ensure these visitors stay to get a cup of coffee at the Currency Exchange cafe, stop by The Silver Room to do some shopping or grab a drink at South Shore Brewery. All told, a study by Deloitte estimated the center will generate more than $3 billion in economic activity for the city through construction and its first decade of operations.

And this activity is starting now. Our subcontractors — 50% of whom will be diverse — are busy preparing for the long-awaited groundbreaking this fall.

Across the country, we are having national conversations about what it means to invest in and develop Black communities. But this is what it looks like in action. In fact, this is the first significant development on the South Side specifically designed with economic equity and anti-gentrification top of mind.

When it comes to Jackson Park, our goal is to restore the grandeur to its fading beauty and strengthen its vitality. That's why the team building the Obama Presidential Center includes world-class architects and a landscape architect who has designed some of the most beautiful parks in the country, including our very own

Maggie Daley Park. (It's also the first Presidential Center to be designed by a female architect.)

Unfortunately, a few voices outside of the community are trying to stand in the way of something that will genuinely transform the South Side and the people who live there today. This group believes their individual opinions should matter more than those of everyone who supported the Obama Presidential Center. Those supporters include the representatives elected by Chicagoans to run the city, the federal agencies who approved the project, and the vast majority of South Side and Chicago residents who see the Obama Presidential Center as a symbol of what we collectively accomplished when we elected the first Black president.

But I know the Obamas, and they don't back down from a debate just because of a few loud and persistent voices. They're quite used to opponents trying to block progress, whether it's about making health care more affordable and accessible for all Americans, securing important climate change agreements or trying to bring investment to Chicago's South Side.

The bottom line is this: The Obama Presidential Center is coming to Chicago. We're bringing it home. And we can't wait to get started.

Valerie Jarrett is president of the Obama Foundation.

Exhibit 9

The New York Times https://www.nytimes.com/2021/07/17/opinion/biden-climate-change.html

THE EDITORIAL BOARD

Joe Biden's Monumental Environmental Gambit

July 17, 2021

By The Editorial Board
The editorial board is a group of opinion journalists whose views are informed by expertise, research, debate and certain longstanding values. It is separate from the newsroom.

It is hard to overstate the joy of the environmental community when Joe Biden ascended to the White House. In place of a man who called climate change a hoax, it got someone who saw global warming for the grave threat it is, and who spoke, at his inaugural, of the world's duty to respond to "a cry for survival" that "comes from the planet itself." It got someone who saw government regulations not as "job killers" but as appropriate levers to achieve cleaner air and water. It got someone who viewed the public lands not as a resource to be exploited by commercial interests but as nature's gift to future generations. A worthy custodian, in short, to the environmental ethic of Teddy Roosevelt, Jimmy Carter and Bill Clinton. And someone who would spend trillions to make it all happen.

We are now at the midpoint of Mr. Biden's first year. How has he done? In simplest terms, given the deep ideological divide in Congress, he has accomplished a good deal more than his chattering critics on the left wing of his party give him credit for, but still well short of his own hopes.

Those hopes were high. Unlike his predecessor, Mr. Biden took seriously the scientific consensus that the world needs to keep global temperatures from rising more than 1.5 degrees Celsius above preindustrial levels in order to avert irreversible planetary damage — including, but not limited to, die-offs of coral reefs, sea level rise, drought, famine, wildfires and floods. Mr. Biden pledged to cut America's emissions in half by 2030, eliminate fossil fuel emissions from power plants by 2035 and zero out all greenhouse gas emissions by midcentury, which is pretty much what scientists recommend for the entire world.

That, in turn, would require a vastly different energy landscape — massive investments in wind and solar power, a rebuilt electric grid, millions of electric vehicles. In recent weeks, the chances of this happening at the required scale looked dim as Congress and the White House wrangled over an infrastructure bill. The bill contains useful climate-related provisions, including money for charging stations for electric cars, and communities that wanted to fortify themselves against climate-related disasters. This was less than Mr. Biden wanted, but his critics reacted as if there were nothing there at all, sending protesters to the White House and Capitol Hill. "No climate, no deal," they said — and accused the White House of "climate denialism."

"Democrats are once again throwing the climate justice movement under the bus," declared Friends of the Earth last month. Hardly.

Climate Fwd A new administration, an ongoing climate emergency — and a ton of news. Our newsletter will help you stay on top of it. Get it sent to your inbox.

Last Wednesday came some good news: The White House and top Democrats agreed in principle to a $3.5 trillion budget package that includes many of the important climate provisions that did not make it into the infrastructure bill. The package is only a blueprint. Individual committees will make legislative recommendations that will then be bundled into a giant budget reconciliation bill. If properly drawn up, budget reconciliation measures can be approved with only 51 votes, thus avoiding a Republican filibuster and providing a political pathway for not only Mr. Biden's climate policies but also a range of expensive programs involving health care, education and immigration.

There are two key climate provisions in the package. One is billions in tax incentives for electric cars and renewable energy sources like wind and solar. The other is a national clean electricity standard, a mandate requiring electric utilities to steadily reduce emissions. Unanswered so far is what that standard should look like. Moderates think the standard should be technology neutral, allowing utilities to use not only wind and solar but also nuclear power as well as a technique known as carbon capture and sequestration, which strips off harmful greenhouse gases and buries them in the ground. However, many climate activists, the very ones who have been on Mr. Biden's neck, reflexively hate nuclear power, though it is carbon-free, and they argue heatedly that carbon capture simply throws a lifeline to fossil fuels like coal and natural gas. In sum, another fight is brewing.

In any accounting of Mr. Biden's environmental record, the negotiations over climate, with their big ambitions and big numbers, occupy center stage. But other important initiatives deserve mention. In May, for instance, in response to a congressional directive, the Environmental Protection Agency proposed regulating hydrofluorocarbons, man-made chemicals used in refrigeration and air-conditioners that are many times more potent than carbon dioxide in warming the planet. Earlier this year, Congress voted to reinstate an Obama-era rule designed to clamp down on emissions of methane, another powerful greenhouse gas, from new drilling wells. Mr. Biden aims to go further, directing his E.P.A. administrator to write new rules in the coming months requiring oil and gas companies to control methane leaks from existing drilling sites.

The administration is also expected to reinstate Obama-era rules mandating reductions in tailpipe emissions of greenhouse gases (vehicles are now the nation's largest source of climate-warming emissions) and then begin work on even more ambitious rules that could force automakers to move more swiftly to a largely electric fleet.

Also worthy of note is the Biden administration's attentiveness to what are loosely known as "nature-based" approaches to climate change, which also have the salubrious side effect of preserving valuable landscapes and helping endangered species. Climate scientists have long argued that the world cannot meet its increasingly ambitious climate targets without a lot of help from forests, fields and oceans. Interior Secretary Deb Haaland stated flatly during April's online summit with world leaders that "achieving net zero by 2050 will not be possible without nature," by which she meant the extraordinary ability of forests, farmlands and oceans to draw down and store large amounts of carbon from the atmosphere.

With that in mind, Mr. Biden, in May, unveiled an ambitious conservation agenda that, despite its hokey name ("America the Beautiful"), would align the United States with more than 50 other countries that have pledged to work toward preserving 30 percent of the world's lands and oceans in their natural or close-to-natural state by 2030. (At the moment, roughly 12 percent of the land mass in the United States and 26 percent of its ocean waters enjoy some level of official protection.) In what could be seen as a down payment on that pledge, Mr. Biden on Thursday restored environmental protections for the Tongass National Forest in Alaska, one of the world's largest intact temperate rain forests that is not just home to an astonishing variety of wildlife but is also a vital sink for carbon dioxide emissions.

The environmental community eagerly awaits what it hopes will be Mr. Biden's formal endorsement of Ms. Haaland's recommendation that he restore protections for three sprawling national monuments, protections removed by Mr. Trump as part of his four-year campaign to pillage the public estate in service of a misbegotten strategy of "energy dominance." The three monuments include Grand Staircase Escalante and Bears Ears, established, respectively, by Presidents Bill Clinton and Barack Obama, both in Utah and both greatly reduced in size by Mr. Trump; and the Northeast Canyons and Seamounts off the New England coast, established by Mr. Obama, which Mr. Trump opened up to commercial fishing.

Saving these monuments will also present Mr. Biden with an important teaching moment. The legal basis for establishing them is the little-known Antiquities Act, one of President Theodore Roosevelt's many environmental legacies, which gives presidents unilateral authority to set aside threatened land and marine areas when it becomes clear that the danger is imminent and Congress is unlikely to act. Mr. Roosevelt created 18 national monuments in the course of protecting 230 million acres of public lands, and subsequent presidents have added to the inventory.

Apart from its distinguished pedigree, the act will be important in meeting the conservation goals of the 30x30 preservation effort. The act has critics in Congress who believe that protecting public lands is exclusively their responsibility. Mr. Biden should use the occasion to educate the public about its importance and legitimacy.

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Correction: July 18, 2021

A previous version of this editorial misstated the scientific consensus on the need to limit global warming. It is that the world needs to keep global temperatures from rising more than 1.5 degrees Celsius above preindustrial levels, not that greenhouse gases themselves need to be kept to a certain temperature.

A version of this article appears in print on , Section SR, Page 8 of the New York edition with the headline: Joe Biden's Environmental Gambit

Exhibit 10

ENVIRONMENT

Chicago tree canopy dwindling; calls for equity, tree planting in underserved communities

Under-resourced neighborhoods often have lowest tree canopy

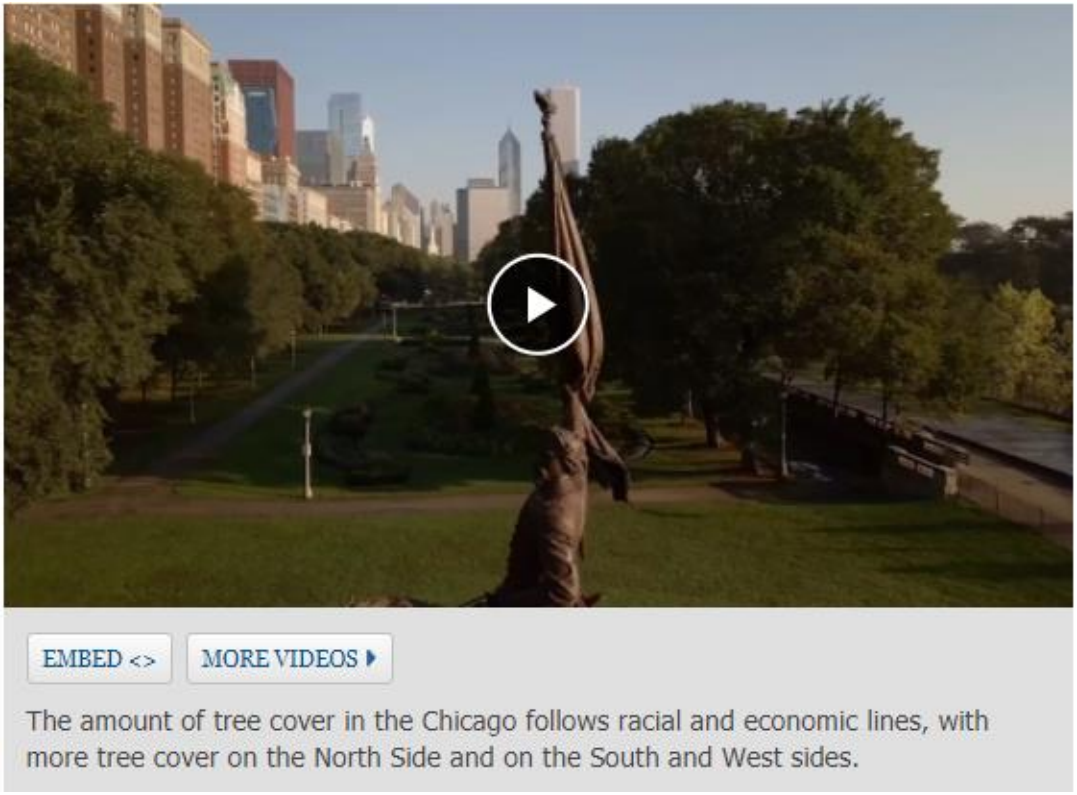
By Mark Rivera

Wednesday, June 30, 2021

CHICAGO (WLS) -- Are there trees outside your window? Chances are if you live on the southwest side, you have more sun than shade.

City leaders and experts say that's a problem with equity. Our partners at National Geographic just released an issue focusing on the importance of trees and shade in cities around the country.

WATCH | Chicago tree cover follows racial, economic lines



ABC 7 explains the cost to health, and your wallet, without a robust tree canopy in Chicago.

"I've gone around the neighborhood, I've been asking everybody if they want trees," said West Lawn resident Rosalba Bernal.

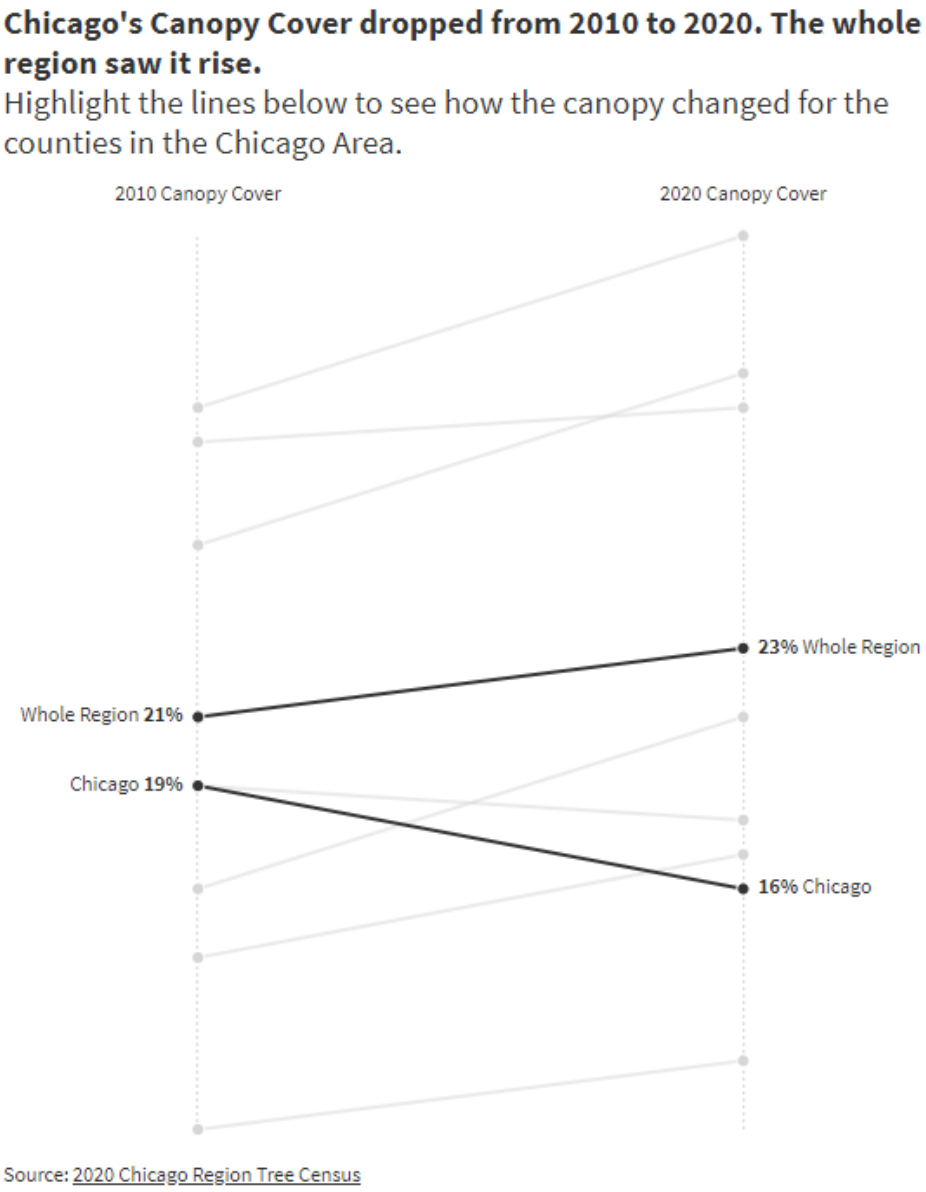
Bernal lives on the city's Southwest Side. She just planted a tree in front of her home a few weeks ago and says she's desperate to convince her neighbors to do the same.

"On the South Side, we have a lot of factories, and a lot of pollution," Bernal said. "Our air is really bad out here. I mean there's days where the smell because of the factories is so bad, you don't even want to come out of the house. So the more trees we get out here, the cleaner our air is going to be."

So Bernal has convinced eight people to sign up for a free tree through Openlands, an environmental advocacy organization working to add more trees in underserved communities throughout the city.

"We're talking to communities that are facing other issues whether it's financial, whether it's immigration, whether it's housing," said Jen Idrovo, Openlands Community Outreach Coordinator. "Folks are fighting all sorts of different kinds of battles. So it's understandable for trees and the environment not to be top of mind."

Idrovo is working to plant trees and show people how they can help with a range of those issues. With a robust tree canopy she said energy costs can be reduced as you try and cool your home during the summer time, storm water runoff is reduced as trees absorb excess liquid, trees even clean the air you breathe.



For Southwest Collective Greenspaces lead Rolando Favela, the trees and plants he's watering in Strohacker Park are part of his efforts to designate the southwest side park

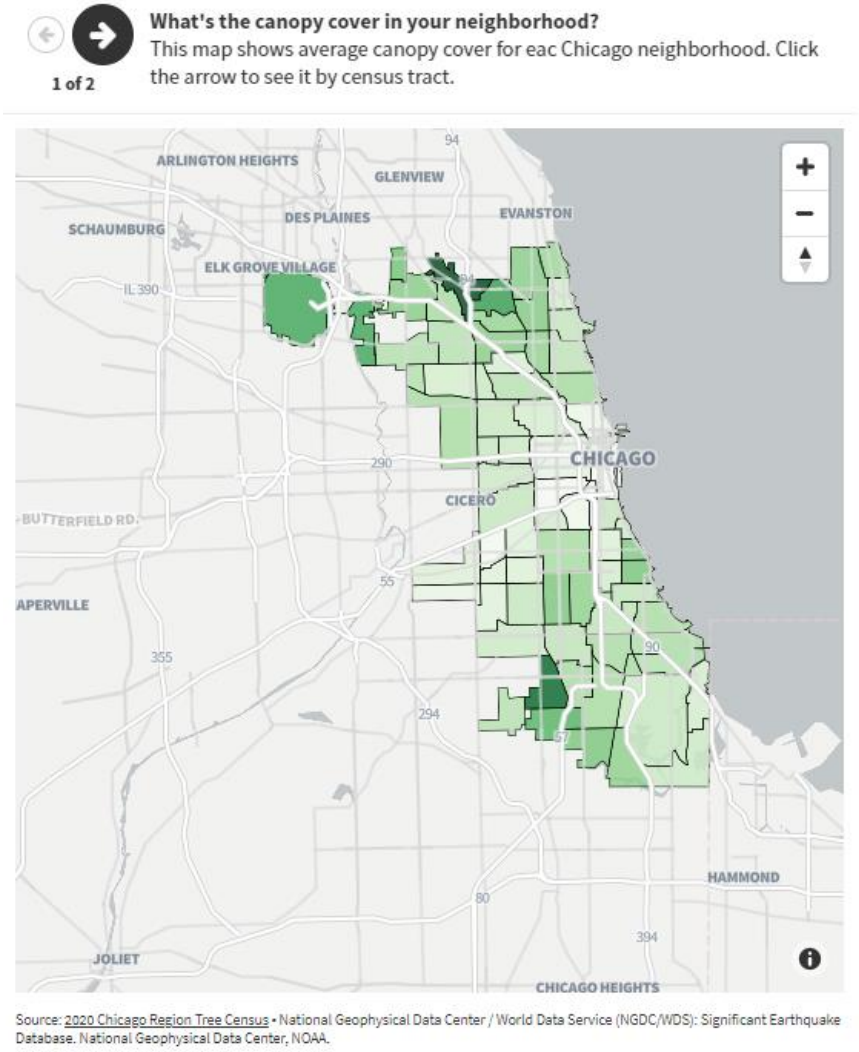
as an arboretum.
"There is some tree canopy there so if we can amplify that if we can add to the existing tree canopy, I think it'd be a great model for citywide," Favela said.

He said much of the southwest side is what he calls a "sacrifice zone."

"The space is there for trees, for green, unfortunately it's all paved over, used for industry, used for transportation. We have a lot of catching up to do in that regard," he said.

Data from the latest tree census through the Chicago Region Trees Initiative at the Morton Arboretum shows Chicago's tree canopy needs help.

Their data shows in the past 10 years, Chicago's tree canopy has gone down from 19% to 16% with areas of concern interconnected to Chicago's history of poverty, racism, the environment, and health.



The neighborhoods with the lowest canopy are on the south and west sides, some with less than 10 percent coverage, while neighborhoods with the highest canopy tend to be to the north of the city, with Forest Glen - 46% tree canopy - at the top of the list.

The areas of Chicago with the lowest average canopy cover today were given the lowest grade under historic redlining.

"The average canopy cover in a metropolitan area is about 29%. And Chicago now being 16% is significantly lower. The other thing we know is under-resourced neighborhoods are often the neighborhoods with the lowest canopy," said Lydia Scott, Chicago Region Trees Initiative Director.

Scott said the region has lost millions of ash trees due to the invasive emerald ash borer, but more needs to be done to bring equity to tree canopy in the city. That lines up with National Geographic reporting.
"Neighborhoods that tend to have fewer trees tend to be the places where people of color live and have seen historic discriminatory practices," said Alejandra Borunda, National Geographic Reporter.

But experts and families say, the future is in our hands by planting a tree.

"If we don't have any trees, then what type of atmosphere are we going to have for our children? What type of environment?" Bernal said.

The Chicago Department of Streets and Sanitation Bureau of Forestry said in a statement to ABC7:

"The Department of Streets and Sanitation (DSS) Bureau of Forestry is dedicated to maintaining and protecting the City's landscape and urban tree canopy. While trees undoubtedly enhance Chicago's beauty, they will also reduce the "Urban Heat Island Effect," attenuate storm water, and cleanse the air. DSS has worked with various tools and data to ensure all communities are getting the benefits of the urban canopy and is grateful for community partners that support these efforts to target tree planting in areas previously underserved."

The DSS and Chicago Department of Transportation plan to plant 7,580 trees this year

in neighborhoods across Chicago. And they are partnering with the Morton Arboretum and CRTI to plant trees in neighborhoods underserved by the tree canopy, including the Woodlawn and Lawndale neighborhoods.

To ask for a free tree to be planted in your community, head here:

https://openlands.org/2021/04/30/how-to-get-trees-planted-in-your-chicago-neighborhood/

https://www.chicago.gov/city/en/depts/streets/provdrs/forestry/svcs/tree_planting.html

Report a correction or typo

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Exhibit 11

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

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

SUPPLEMENTAL DECLARATION OF W.J.T. MITCHELL

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

1. My name is Dr. W.J.T. Mitchell. I am one of the Plaintiffs in the above referenced matter.

2. I submit this supplemental declaration based on personal knowledge and could competently testify on the matters set forth below if called. This is submitted in support of the motion for injunctive relief filed by Plaintiffs in this matter, and in rebuttal to the response of the City and Park District and the declarations submitted by Maurice Cox and Mike Kelly by the City of Chicago and Chicago Park District, as well certain assertions by Robbin Cohen from the Obama Foundation.

3. Those documents suggest that Jackson Park has been the subject of a "long history of change" and that it has "constantly evolved over a century to suit the needs of the community." The Defendants argue that "the park was changed in numerous ways that deviated from the 1895 plan, including changes to accommodate traffic." (Brief from City Defendants at 4) References are made to the expansion of Cornell Dive, and the installation of a Nike anti-aircraft missile

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Further declarant sayeth not.

W.J.T. Mitchell

Exhibit 12

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

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

DECLARATION OF GRAHM MATHEW BALKANY

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

1. My name is Grahm Mathew Balkany.

2. I submit this declaration based on personal knowledge and could competently testify on the matters set forth below if called. This is submitted in support of the motion for injunctive relief filed by Plaintiffs in this matter, and specifically to counter the declaration of Ms. Robbin Cohen, submitted by one of the Defendants in opposition to the request for a preliminary injunction, as well as other statements made in the submissions of the Defendants in opposition to the Plaintiffs' request for injunctive relief.

3. I am architect with approximately 20 years of experience, licensed in the State of Illinois. I have a significant history in designing and consulting on developments of various types and scale, including several large-scale engagements in residential, commercial, hospital, and institutional sectors throughout the United States. In my practice, I routinely work with owners, general contractors, and clients in the construction and budgeting of projects. I attended Rice University, and hold two degrees from the Illinois Institute of Technology, the first in architectural engineering, the second a five-year professional degree in architecture with a minor in civil

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

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

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

a. My figures generally agree with those of Ms. Cohen concerning the overall size of Jackson Park. She states that the park is 551 acres, while I have calculated it to be 557 acres (a difference of just 1.07%). This is most likely due to my inclusion of piers and the somewhat variable measurements of irregular shorelines. In any case, the 557-acre figure is more conservative regarding the following results.

b. Per my tabulations, the leased site of Jackson Park to the Obama Foundation is 19.8 acres. In the immediate vicinity of the proposed Presidential Center, there is additional impacted land that is eliminated from the park, retained by the City of Chicago and not subject to the lease. Therefore, I feel that the 19.3-acre figure stated is neither factual nor fully representative of the Presidential Center's impact on its immediate surroundings.

c. Taken as a whole, Jackson Park consists of 83.4 acres (15.0%) water. Another 132.0 acres (23.74%) is currently hardscape (paving, playgrounds, or sporting equipment) or buildings, leaving only 341.6 acres. However, much of the green space in Jackson Park is of a limited-access nature, including the golf course and fenced harbors. Free-access, unencumbered park spaces are relatively scarce within the park, totaling only 201.1 acres (36.16%). Considered in this fashion, the 19.8 acres directly lost to the Obama Foundation's lease and site clearance are quite substantial, representing a figure of near 9.8%.

d. As mentioned prior, the 19.8 acres directly leased to the Obama Foundation is by no means the full extent of historic green space impacted by the Foundation's actions. Taking into account road expansion on Lake Shore Drive, Stony Island Avenue, and Hayes Drive (conservatively understood to be 4.6 acres); a relocated running track (3.6 acres); and new pathways (conservatively estimated at 1.5 acres), the total parkland known to be impacted rises to 29.5 acres. This figure is assuredly conservative, as there will be damaged areas due to construction, and there are many additional probable detriments, such as the likely relocation of displaced athletic facilities, and pedestrian underpasses that have been suggested in the City of Chicago's final traffic study.

e. Elimination of functional and well traveled public roads, and a certain amount of other hardscape, is quickly offset by other road expansion and the extensive amount of hardscape in the new plan, by virtue of traditional (non-vegetated) roofs and numerous pathways present for the OPC. Furthermore, most gains are due to the elimination of roadways south of the OPC site, not in the vicinity of the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. The land taken from Jackson Park for private enterprise is no longer a part of the public green space.

b. The "restored green space" cannot be considered to any substantial extent as such due to the fact that most of the plantings will be above occupied structures, or raised, based on information previously provided during discovery, as much as 32 feet above the street by means of artificial implements. This land is not *terra firma* and will, by functional requirements of contemporary construction, have limited depth and engineered content. It is in no way a substitute for true earth, where full-growth plantings and real ecosystems can develop. Most trees, by example, require substantially more depth to fully mature. Further, the biodiversity, maturity, harmonized inter-species relationships, and organic response of said plantings in this artificial context cannot reach the same levels that are found in nature.

c. Any plantings placed above functioning structures, which require maintenance, repair, and replacement, can only be considered provisional. Compared to native Midwest trees, which typically do not reach maturity for at least 50 or 60 years, or to true ecosystems, which take hundreds of years to establish and develop, the lifespan of any human construct is comparably less. The average lifespan of a premium roofing system in the United States is routinely stipulated and warrantied at no more than 30 years. Therefore, the "restored" (Cohen Declaration, ¶ 26) landscapes will be in a constant state of destruction and reset, and cannot be considered a replacement in-kind.

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

terms.

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

Further declarant sayeth not.

Grahm Mathew Balkany, AIA

Park Space Allocation as a Function of Total Park Area

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

Exhibit

A

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Exhibit 13

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OBAMA FOUNDATION

City of Chicago
Department of Planning & Development
121 North LaSalle Street, Room 1000
Chicago, Illinois 60602
Attn: Commissioner
E-mail: Maurice.Cox@cityofchicago.org

City of Chicago Department of Law
121 North LaSalle Street, Suite 600
Chicago, Illinois 60602
Attn: Real Estate and Land Use Division
E-mail: Lisa.Misher@cityofchicago.org

March 12, 2021

Dear Commissioner Cox:

This letter is to certify that The Barack Obama Foundation has received funds and written gift pledge commitments in the aggregate that exceed the Projected Total Construction Costs (as such phrase is defined in the Master Agreement) of the Obama Presidential Center as of January 31, 2021. In addition, please see the Agreed Upon Procedures letter issued by Deloitte & Touche LLP.

DocuSigned by:
Ralph Leslie
025C7B408A7749D...

Ralph Leslie
Chief Financial Officer, The Barack Obama Foundation

THE BARACK OBAMA FOUNDATION
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E. info@obama.org T. +1 (773) 420-1700
www.obama.org

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The Barack Obama Foundation
Obama Presidential Center
Unaudited Schedule of Construction Funds
As of January 31, 2021

	January 31, 2021	
Cash:		
Cash Bank Balance	214,683,111	
Less: Program Restricted Cash	-5,572,700	
Total	209,110,411	
Written Gift Pledge Commitments:		
Unaudited Pledges Receivable	240,150,537	
Unaudited Written Commitments	36,000,000	(Note 1)
Total	276,150,537	
Total Cash and Written Gift Pledge Commitments	485,260,948	
Projected Total Construction Costs	482,012,931	

Note 1: Unaudited Written Commitments are not recognized, but disclosed in accordance with GAAP.

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OBAMA PRESIDENTIAL CENTER TOTAL CONSTRUCTION BUDGET

Total Estimated Construction Costs:

Museum Building	$ 145,206,368	
Forum & Library Buiildings	$ 117,562,286	
Garage	$ 31,453,038	
Site Improvements & Landscaping	$ 58,775,940	
PAAC	$ 20,257,626	
Combined General Requirements For Above	$ 14,833,014	
Combined General Conditions For Above	$ 32,363,413	
Combined Site Security For Above	$ 4,226,036	
Combined Contractor's Fee/Profit For Above	$ 10,157,389	
CCIP Insurance For Entire Project	$ 15,286,351	
Contractor's Construction Contingency For Entire Prject	$ 10,514,022	
Allowance For Future Cost Escalation For Entire Project	$ 21,377,448	
Total Estimated Construction Costs		**$ 482,012,931**

Issued By Foundation: January 31, 2021

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Deloitte.

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February 26, 2021

INDEPENDENT ACCOUNTANTS' REPORT ON APPLYING AGREED-UPON PROCEDURES

To Mr. Ralph Leslie
Chief Financial Officer
The Barack Obama Foundation
5235 S. Harper Court
Chicago, IL 60615

We have performed the procedures enumerated below, which were agreed to by The Barack Obama Foundation (the "Foundation"), on the Unaudited Schedule of Construction Funds (the "Schedule"). The Foundation is responsible for the Schedule. The sufficiency of these procedures is solely the responsibility of the parties specified in this report. Consequently, we make no representation regarding the sufficiency of the procedures enumerated below either for the purpose for which this report has been requested or for any other purpose.

The procedures performed and related findings are detailed below:

AGREED-UPON PROCEDURES

1. We obtained the Schedule as of January 31, 2021 and mathematically checked it with no exceptions.

2. We obtained a listing of the Foundation's operating cash accounts (the "Cash Detail") as of January 31, 2021 from the Foundation and performed the following:
    a. We independently confirmed each bank balance included in the Cash Detail as of January 31, 2021 with the respective financial institution.
    b. We compared the cash balance confirmed by the financial institution to the amount included in the Cash Detail with no exceptions.
    c. We mathematically checked the Cash Detail with no exceptions.
    d. We agreed the total amount of cash from the Cash Detail to the "Cash" amount on the Schedule with no exceptions.

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3. We obtained a Schedule of Restricted Cash as of January 31, 2021 from the Foundation and performed the following:
    a. We mathematically checked the Schedule of Restricted Cash with no exceptions.
    b. We agreed the total amount of restricted cash from the Schedule of Restricted Cash to the "Restricted Cash" amount on the Schedule with no exceptions.

4. We obtained a schedule of unaudited pledges receivable restricted for the Obama Presidential Center as of January 31, 2021 (the "OPC Pledge Listing") from the Foundation and performed the following:
    a. We mathematically checked the OPC Pledge Listing with no exceptions.
    b. We agreed the total amount of pledges receivable from the OPC Pledge Listing to the "Unaudited Pledges Receivable" amount on the Schedule with no exceptions.
    c. We selected all pledge receivable balances individually equal to or above $8,000,000 USD, which represents 63% of the population from the OPC Pledge Listing, and obtained the corresponding written, executed agreement between the donor and the Foundation. For each selected pledge receivable balance, we performed the following:
        i. We inspected the executed agreement for indication of the pledge amount with no exceptions.
        ii. We compared the original pledge amount from the executed agreement to the amount reported as a pledge receivable on the OPC Pledge Listing to determine that the original pledge amount is greater than or equal to the amount on the OPC Pledge Listing with no exceptions.

5. We obtained a schedule of unaudited written commitments restricted for the Obama Presidential Center as of January 31, 2021 (the "OPC Commitments Listing") from the Foundation and performed the following:
    a. We mathematically checked the OPC Commitments Listing with no exceptions.
    b. We agreed the total balance of written commitments from the OPC Commitments Listing to the "Unaudited Written Commitments" amount on the Schedule with no exceptions.
    c. We selected all written commitments individually equal to or above $8,000,000 USD, which represents 69% of the population from the OPC Commitments Listing, and obtained the corresponding written, executed agreement between the donor and the Foundation. For each selected written commitment, we performed the following:
        i. We inspected the executed agreement for indication of the commitment amount with no exceptions.
        ii. We compared the commitment amount from the executed agreement to the amount reported on the OPC Commitments Listing to determine that the commitment amount from the executed agreement is greater than or equal to amount on the OPC Commitments Listing with no exceptions.

This agreed-upon procedures engagement was conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants. We were not engaged to and did not conduct an examination or review, the objective of which would be the expression of an opinion or

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conclusion, respectively, on the Unaudited Schedule of Construction Funds. Accordingly, we do not express such an opinion or conclusion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

This report is intended solely for the information and use of The Barack Obama Foundation, and is not intended to be, used by anyone other than the specified parties.

Deloitte & Touche LLP

February 26, 2021