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

PROTECT OUR PARKS, INC., NICHOLS PARK ADVISORY COUNCIL, STEPHANIE FRANKLIN, SID E. WILLIAMS, BREN A. SHERIFF, W. J. T. MITCHELL, and JAMIE KALVEN, Plaintiffs, v. PETE BUTTIGIEG, Secretary Of The U.S. Department Of Transportation, STEPHANIE POLLACK, Acting Administrator Of The Federal Highway Administration, ARLENE KOCHER, Division Administrator Of The Federal Highway Administration, Illinois Division, MATT FULLER, Environmental Programs Engineer, Federal Highway Administration, Illinois Division, DEB HAALAND, Secretary Of The U.S. Department Of The Interior, SHAWN BENGE, Deputy Director, Operations, Exercising The Delegated Authority Of The Director Of The National Park Service, JOHN E. WHITLEY, Acting Secretary Of The Army, PAUL B. CULLBERSON, Commanding Officer Of The Army Corps Of Engineers, Chicago District, THE CITY OF CHICAGO, THE CHICAGO PARK DISTRICT, and THE OBAMA FOUNDATION, Defendants.	)	Case No. 21 CV 2006 Hon. John Robert Blakey

PLAINTIFFS' BRIEF
IN SUPPORT OF THEIR PRELIMINARY INJUNCTION MOTION

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Plaintiffs here – both organizations and individuals – have brought this complaint challenging the outcome of the federal reviews and other statutory actions undertaken by the various Defendants, all of whom have approved the construction of the Obama Presidential Center ("OPC)" in Jackson Park. The Defendants' joint position is largely contained in three separate documents:

(1) "Environmental Assessment: Federal Actions In and Adjacent to Jackson Park: Urban Park and Recreation Recovery Amendment and Transportation Improvements, Jackson Park, City of Chicago, Illinois," prepared by the National Park Service, Federal Highway Administration, and the Illinois Department of Transportation (the "EA" or "Report" attached as Exhibit 10 to Plaintiffs' Complaint);

(2) "Mobility Improvements To Support The South Lakefront Framework Plan, City of Chicago, Cook County, Illinois," which was also prepared by the Federal Highway Administration, under Section 4(f) of the Transportation Act. (Exhibit 8 to Plaintiffs' Complaint); and

(3) "Memorandum of Agreement Among Federal Highway Administration, Illinois State Historic Preservation Officer, Advisory Council on Historic Preservation, Regarding Projects In Jackson Park In Chicago, Cook County, Illinois," (Exhibit 7 to Plaintiffs' Complaint).

Plaintiffs bring this motion seeking a preliminary injunction to stop the extensive "groundbreaking" scheduled to make way for the construction of the OPC, now set to commence as early as mid-August 2021. Its prime objective is to excavate an area of some 19.2 acres in the heart of Jackson Park to make way for the OPC. That work will require the clear-cutting of nearly 1,000 trees, scheduled to begin on September 1, 2021. At imminent risk are established historic, cultural, and environmental resources, including the trees, vistas, and other key elements of Frederick Law Olmsted's Jackson Park. In good Orwellian fashion, the Barack Obama Foundation ("Foundation"), the City of Chicago ("City"), the Chicago Park District ("Park District") and the federal agencies, speaking in unison, call these destructive actions "improvements"—as reflected in the title of both the EA and the Section 4(f) Report. Only a preliminary injunction can halt this

work in order to protect the status quo until the District Court has reviewed the merits of the plaintiffs' claims.

As set forth in this memorandum, Plaintiffs are likely to succeed on the merits of their claims challenging the various federal reviews and actions, which were deficient in numerous ways.[1] In providing approvals, the reports prepared by the various federal agencies utilized an improperly narrow scope and mode of analysis in reaching those conclusions. This is demonstrated by statements made by the Federal Highway Administration and the National Park Service in the EA (Complaint, Ex. 10), which rely on a scope that is unlawfully truncated, fractured, and segmented. Through a self-administered blindfold, the agencies state: "The decision to site the OPC in Jackson Park, the design of the OPC campus, and the related closure of roadways in Jackson Park do not require federal approval or funding." (Complaint, Ex. 10, EA at ¶2.3, page 6.) This completely ignores the inextricably interconnected "but-for" relationship of these different components of the project, and also ignores the requirement to consider cumulative impacts. Exactly that same theme is repeated in the Section 4(f) Report, which offers an identical excuse for not conducting any of the necessary statutory reviews:

> 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 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 ¶ 2.1, at page 2.

[1] Plaintiffs also believe that they are likely to succeed on their state law claims but with the understanding that the Defendants are filing motions to dismiss the state law claims, this Motion focuses on the Plaintiffs' federal claims.

These two federal reviews reflect a concerted plan by the relevant agencies to improperly narrow their inquiry so that the initial stages of what is an integrated and closely related project that involves the destruction of key portions of Jackson Park escapes any and all federal review. The three explanations offered by the federal defendants for this unprecedented position are lame at best. The first point begs the question. The second point is absurd. The destruction of several well utilized roads (also considered a component of parkland for National Register purposes given their role and import in Olmsted's design), thus requiring the noisy and dirty expansion of two other roads to replace their function, requiring incursions into parkland, inescapably constitutes a transportation project. When the FHWA funds the replacement of a historic bridge, it would be equally improper to suggest that the demolition of the historic bridge is not a transportation project, while construction of a new bridge on a different alignment *is* a transportation project, and therefore, if the state is playing a proverbial shell game with the federal funds by channeling them all to new construction, as is being done here, Section 4(f) would supposedly not apply to the demolition of the historic bridge. Yet that is exactly the unfounded argument being advanced here. The FHWA's third point also fails. It purposefully avoids the codependent relationship between the components of the OPC project, and ignores the simple point that the entire project has, and is known to have, profound effects on transportation within and through Jackson Park and the surrounding areas.

These reports also skew the legal analysis. By adopting their segmented analysis, both the EA and the Section 4(f) reviews specifically, and the federal reviews and actions as a whole, avoid addressing the key question for analysis under the relevant statutory framework, which asks whether there is a "prudent or feasible" alternative to the Jackson Park site that would avoid or minimize its adverse impacts to environmental, historic, cultural, and recreational resources.

Indeed, the statutory phrase "prudent and feasible" is largely ignored by the Defendants, other than in reference to the expansion of roadways necessitated by, and based upon, only one baseline assumption: the proposed OPC being placed in Jackson Park with its commensurate destruction, for which no alternatives were considered. In so doing, these officials have turned a conscious blind eye to every environmental, traffic and historical value which this trio of statutes is intended to protect. Defendants' statutory construction has been rejected by the Supreme Court's authoritative decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), which required the U.S. Department of Transportation under Section 4(f) to explore feasible and prudent alternatives to building a major interstate highway through Overton Park in Memphis, Tennessee.

Other elements of the federal review process were predetermined, and short-circuited the necessary and appropriate steps, which should have included the preparation of an Environmental Impact Statement, a step avoided by an improperly derived Finding of No Significant Impact ("FONSI"). As Plaintiffs are likely to succeed on the merits of their claims associated with various federal reviews raised in their Complaint, as well as other federal claims raised therein, and the Defendants' proposed actions threaten irreparable injury in the meantime. Plaintiffs request that their motion for preliminary injunctive relief be granted.

RELEVANT BACKGROUND

The object of the Foundation and the City is construction of the OPC's vast campus covering 19.2 acres at the heart of Jackson Park, coupled with the destruction of additional acreage to make way for the proposed expansions of Lake Shore Drive and Stony Island Avenue on the east and west sides of Jackson Park respectively, as a partial offset to the lost roadways and vistas.

Given the Foundation's insistence on this project in this location (decisions that have been abdicated to it by the City and Park District), various federal reviews were necessitated.

On or around February 2021, the Federal Highway Administration ("FHWA") and National Park Service ("NPS") issued a FONSI based upon an Environmental Assessment ("EA") that concluded their review under the National Environmental Policy Act ("NEPA"). (Complaint, Exs. 10 & 11)[2] The NEPA review relied upon and incorporated other federal reviews under Section 4(f) of the Department of Transportation Act (Complaint, Ex. 8) and Section 106 of the National Historic Preservation Act (Complaint, Ex. 6), as well as a review by the National Park Service under the Urban Park and Recreation Recovery Act ("UPARR") (54 U.S.C. §§ 200501-200511).

In April 2021, the City and the Foundation discussed a generalized fall groundbreaking for the proposed OPC campus. That "groundbreaking" begins with the City's roadwork on Hayes Drive, destroying an important part of Olmsted's original plan. (*See* Ex.1 hereto, Declaration of Dr. W.J.T. Mitchell, ¶¶ 6-9, 13 (Ex. 2 hereto), and Declaration of Michael Rachlis, ¶ 6 (Ex. 3 hereto)) That work will involve incursions into Jackson Park on both the western and eastern edges, although extensive tree removals have been delayed until after September 1, 2021 (*see* Complaint, Ex. 11, FONSI at 4), with additional phases of other roadwork to follow. (*See* Ex. 3, Rachlis Declaration, ¶ 6) Cornell Drive, a main component of Olmsted's Jackson Park, will be subject to closure and work later after work on Hayes Drive is completed, involving huge dramatic changes and adverse impacts on historic and environmental resources. (Ex. 2, Mitchell Declaration, ¶ 13) Identified by the Foundation as part of its immediate plan for "groundbreaking"

[2] The exhibits referenced herein to Plaintiffs' complaint ("Complaint, Ex. __") are to publicly available material for which judicial notice can be taken. *See Rowe v. Gibson,* 798 F.3d 622, 628-629 (7th Cir. 2015) (noting the ability of courts to take judicial notice of publicly available information).

is the general destruction and excavation of the 19.2 acres where the proposed OPC is to be located, which will specifically include early in the process the demolition of the historic Women's Garden (*see* Ex. 3, Rachlis Declaration, ¶ 7).

> Implementation of the OPC will affect the overall site/cultural landscape of the Jackson Park Landscape District and Midway Plaisance, including the Perennial Garden/Women's Garden, the English Comfort Station, and the Western Perimeter Playground (E. 62nd Street playground) …. Changes to the cultural landscape directly north of the proposed OPC buildings but within the project footprint remove physical features that contribute to the significance of the historic property. A new garden will replace the historic Perennial Garden/Women's Garden, designed in 1936 by May McAdam, Chicago Park District's first female architect.

(Complaint, Ex. 3 at 50-51)

The demolition of the Women's Garden is "not consistent" with SOI [Secretary of the Interior] guidelines that stipulate the need to preserve contributing historic features and discourage "placing a new feature where it may cause damage to, or be intrusive in spatial organization and land patterns." (Complaint, Ex. 3 at 52)

Both the City and the Foundation have agreed to delay clear-cutting of these trees until September 2021 in order to avoid disrupting migratory bird flights down the Mississippi flyway and the nesting of various birds in old growth trees. (Complaint, Ex. 11, FONSI at 4 ("the City commits to prohibit tree removal during the breeding season, between March 1 and August 31.")) That six-month moratorium only delays the inevitable destruction but does not eliminate it for all future years.[3] Also treated in largely perfunctory fashion are many of the other adverse environmental impacts from the OPC project, including noise, air quality, and traffic impacts on

[3] This tepid response is in contrast with the general actions of the Biden administration, which is prepared to restore penalties for deaths of migratory birds by wind power, but ignores the same risk to migratory birds along the Mississippi flyway. Katy Stech Ferek, Expanding Wind Power While Killing Fewer Migratory Birds Is Biden's Quandary, June 5, 2021, https://www.wsj.com/articles/expanding-wind-power-while-killing-fewer-migratory-birds-is-bidens-quandary-11622885401?st=pbjoznf107r7kah&reflink=article_email_share

the Paul Douglass Bird Sanctuary, and the Great Lakes Fishery Ecological and Restoration Project, a project that has been the subject of years of work and millions of dollars of funds. (Complaint, Ex.10 at 29-34, 66)

Indeed, this work is being forged ahead despite numerous clear statements in the various federal reviews of what are significant adverse impacts to historic, cultural and environmental resources. For example, multiple adverse impacts identified in federal reports issued by these same federal Defendants state as follows about Jackson Park:

> The overall historic property conveys the character present during the period of significance from 1875-1968 and currently possesses historic integrity of location, design, setting, materials, workmanship, feeling, and association. **The undertaking diminishes the historic property's integrity of design, materials, workmanship, and feeling. (Emphasis added).**

Complaint, Ex. 4 at 22.

Further, the same report acknowledges that the changes "concentrated in the western perimeter of Jackson Park and the eastern Midway Plaisance impact adjacent park areas including the Lagoons, Fields, and Lake Shore, which in turn diminish the historic property's overall integrity by altering historic, internal spatial divisions that were designed as a single entity." Furthermore, "new materials with modern functions differ from historic materials at a scale and intent that does not conform to the Secretary of the Interior's Standards," as "the size and scale of new buildings within the historic district diminish the intended prominence of the Museum of Science and Industry building and alter the overall composition and design intent of balancing park scenery with specific built areas." Taking a somewhat broader view, **"**implementation of the new garden physically damages this part of the site (cultural landscape) that contributes to the historic property," which will in turn distort the relationship between what happens inside the park with what happens on its perimeter. (Complaint, Ex. 4, Report at 22-23)

ARGUMENT

I. Groundbreaking For The Construction Of The OPC Project Must Be Enjoined Pending Resolution Of The Merits Of Plaintiffs' Complaint.

An injunction is appropriate in order to "prevent a threatened wrong or any further perpetration of injury, or the doing of any act pending the final determination of the action whereby rights may be threatened or endangered, and to maintain things in the condition in which they are in at the time and thus to protect property or rights from further complication or injury until the issues can be determined after a full hearing." *Benson Hotel Corp. v. Woods*, 168 F.2d 694, 697 (8th Cir. 1948) (discussing standard and affirming grant of preliminary injunction).

Plaintiffs meet all the legal requisites for preliminary injunctive relief, by making the standard fourfold showing: (i) a likelihood of success on the merits; (ii) a likelihood of irreparable harm in the absence of injunctive relief; (iii) that the balance of equities weighs in favor of an injunction; and (iv) that the public interest favors injunctive relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Cook Cty., Ill. v. Wolf,* 962 F.3d 208 (7th Cir. 2020) (affirming grant of injunctive relief while review of agency action was in place). Sometimes, these factors may cut in different directions, but that is not the case here.

A. Plaintiffs Are Likely To Succeed On The Merits Of Their NEPA, Section 4(f), Section 106, And Other Federal Claims.

Plaintiffs are likely to succeed in establishing that the FHWA and NPS violated NEPA, Section 4(f), Section 106 and UPARR, whose actions are reviewable under the Administrative Procedure Act ("APA"), which directs the courts to "hold unlawful and set aside" agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2).

Agency action is arbitrary and capricious if the agency has "failed to consider an important aspect of theproblem," if the agency's explanation for its decision "runs counter to the evidence before the agency," or if the result "is so implausible that it could not be ascribed to a difference in view orthe product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

Although the arbitrary and capricious standard often appears narrow, it nonetheless requires a "thorough, probing, in-depth review" of agency decision-making in those cases where an agency has given its approval to a particular project. *Overton Park*, 401 U.S. at 415-16 (1971); *Friends of the Earth, Inc. v. U.S. Army Corps of Eng'rs*, 109 F. Supp. 2d 30, 36 (D.D.C. 2000). Courts do not substitute their judgment for that of agencies, but neither do they "rubber stamp" agency decisions. *Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d 8, 18 (D.D.C. 2007); *Gov't of Province of Manitoba v. Norton*, 398 F. Supp. 2d 41, 54 (D.D.C. 2005). Furthermore, an agency's decision may only be upheld on the basis articulated in the decision itself. *Motor Vehicle,* 463 U.S. at 43. Courts may not "make up for such deficiencies" in an agency decision by "supply[ing] a reasoned basis for the agency's action that the agency itself has not given." *Id*.

By this standard, the EA and FONSI, the Section 4(f) Report and Memorandum of Agreement Entered After the Section 106 Review under the NHPA and its UPARR review are so woefully inadequate that Plaintiffs are likely to succeed on the merits of their claims that various federal reviews and actions fell short of meeting the applicable federal statutes and regulations. Preliminary injunctive relief in these circumstances is appropriate. *See, e.g., Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978 (8th Cir. 2011) (affirming grant of preliminary injunction related to FONSI); *Richland/Wilkin Joint Powers Authority v. U.S. Army Corps of Eng'rs,* 2015 WL 2251481 (D. Minn. May 13, 2015) (granting preliminary injunction related to FONSI).

1. Plaintiffs Are Likely To Succeed On The Merits Of Their NEPA Claims.

NEPA is our nation's "basic national charter for protection of the environment." 40 C.F.R. § 1500.1 (1978).[4] Its purposes are to "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment," and to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." *Id*. To implement those objectives, NEPA imposes requirements demanding that federal agencies must identify, evaluate, disclose, and consider reasonable alternatives to the environmental consequences of their proposed actions. 40 C.F.R. § 1501.1(a). To comply with these action-forcing requirements federal agencies must prepare a comprehensive, public Environmental Impact Statement ("EIS"), on any proposed action or plan that *may* significantly impact the human environment. *Id*.; 42 U.S.C. § 4332(2)(C); *see also, e.g., Sierra Club v. Watkins*, 808 F. Supp. 852, 858-59 (D.D.C. 1991). That can only be avoided if a short-form Environmental Assessment or "EA" is performed that reveals *no* potential for significant environmental impacts, and approves the proposed action with Finding of No Significant Impact. 40 C.F.R. § 1501.3.

If the EA does reveal that the proposed action *may* significantly impact the environment, an EIS must be prepared before the proposed action can proceed. 42 U.S.C. § 4332(2)(C) (EIS required for any action "significantly affecting" the environment); 40 C.F.R. § 1508.3 ("affecting" means "will *or may* have an effect on") (emphasis added). In evaluating whether a proposed action may significantly affect the environment, agencies must analyze both the context and the intensity

[4] The environmental reviews performed and at issue here began and were well underway prior to the recent amendments to regulations implementing NEPA that became effective in September 2020. Accordingly, those regulations in place prior to the amendments are referenced and cited herein as they were in place and utilized by the federal agencies for their review.

of potential impacts. 40 C.F.R. § 1508.27. NEPA's implementing regulations dictate that the analysis of intensity involves weighing ten different factors. *Id.* § 1508.27(b). An EIS must be prepared if these factors are present, even if the agency believes that on balance the proposed action will be beneficial. *Id*. Indeed, the presence of even one such factor "should result in an agency decision to prepare an EIS." *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 218-19 (D.D.C. 2003); *see also Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*., 538 F.3d 1172, 1220 (9th Cir. 2008) (action may be significant if one of these factors is present).

As explained below, Plaintiffs are likely to succeed in their claims that the flaws in the EA FONSI are of such a nature that the conclusions are arbitrary and capricious.

a) The Plaintiffs are likely to succeed in showing that an EIS should have been prepared.

The Plaintiffs are likely to succeed in their claim that an EIS should have been ordered by the federal agencies for at least these reasons. First, entire swaths of the current EA largely ignore and understate present and significant impacts. For example, the EA acknowledges that close to 1,000 mature trees must be cut to make way for the proposed OPC and for the related expansion of the roadways. (Complaint, Ex. 10 at 30) But thereafter it inexplicably treats that massive transformation of landscape as insignificant and fully mitigated, as if an equal number of saplings were the functional and aesthetic equivalents of the majestic trees they would replace. (Complaint, Ex. 11, FONSI at 4) The clear-cutting of the 19.2 acres is doubly significant, when those acres are located in critical portions of the park. (Ex. 2, Mitchell Declaration, ¶ 8). Further, the severe cutting on the eastern and western edges – home to hundreds of trees in Jackson Park – is equally significant given its impact on air quality and migratory birds. (*Id.,* ¶¶ 8-9) It is flatly wrong to claim both insignificance and successful mitigation by pretending that one-to-one planting of a

single sapling after the fact makes up for the loss of a mature tree 1000 times its size. (*See* Complaint, Ex. 11, FONSI at 4 (discussing one on one tree replacement))

To exemplify the point, of the 417 trees to be removed to allow for the expansion of Lake Shore Drive and Stony Island Avenue, 242 trees vary in diameter from 6 to 19 inches, and 97 trees have a diameter between 20 and 59 inches. According to its tree memorandum (Appendix D of the EA, attached as Ex. 6 at 12), the City's proposed replacements are a motley mix of far smaller (especially in biomass) 2.5- and 4-inch caliper trees, many of which may not survive to maturity. (*Id.* at 17). These replacements fail to mitigate the enormous losses in tree coverage that remain. Yet the EA makes no assessment of environmental impacts, relying instead on the overstated one to one replacement as a solution. (*See* Ex. 2, Mitchell Declaration, ¶¶ 8-11, 15) These reports turn the same blind eye toward the significance of the OPC project on migratory birds, noise and air quality, limiting review of the various issues. (Complaint, Ex. 10 at 29-34) When the Defendants unilaterally postpone tree cutting during the current breeding season, they necessarily concede that they have no strategy to combat what is a permanent destruction of the landscape, nesting and migratory paths, and the environmental benefits of such, which is a continuing harm in perpetuity thereafter.

Even beyond these issues, the record reflects that the proposed action incorporated in the project "may" significantly impact the environment, requiring an EIS, as it is already clear that at least four of the regulatory significance factors are present here:

Unique Characteristics of the Geographic Area. Impacts to "[u]nique characteristics of the geographic area" such as "historic or cultural resources, park lands…wild and scenic rivers,or ecologically critical areas" indicate the kind of significance that is found everywhere in Jackson Park, which is listed on the National Register of Historic Places along with the Midway Plaisance,

and the Chicago Boulevard Historic District. All will suffer permanent adverse impacts if construction is allowed to take place as of September 2021. *See generally*, Ex. 2, Mitchell Declaration, ¶¶ 6-13. For legal authority, *see* 40 C.F.R. §1508.27(b)(3); *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 58 (D.D.C. 2010), *aff'd in part, rev'd in part on other grounds,* 661 F.3d 1147 (D.C. Cir. 2011); *see also Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 589 (4th Cir. 2012).

Controversy. Significance also exists where "the effects on the quality of the human environment are likely to be highly controversial," 40 C.F.R. § 1508.27(b)(4), when there is "a substantial dispute" about the action's size, nature, or impact (*Friends of the Earth, Inc.*, 109 F. Supp. 2d at 32, citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)), including the disruption of traffic patterns, the destruction of trees, the mammoth size of the main OPC building and its awkward placement on the Midway Plaisance, the destruction of key features of Jackson Park, and the fierce and loud dispute over the wisdom of locating the OPC in an Olmsted public park, when his unique and important public spaces are not treated in such a fashion. *See* Ex. 4, Declaration of Stephanie Franklin; Ex. 2, Mitchell Declaration, ¶ 14. *See* List of Olmsted Parks, https://en.wikipedia.org/wiki/List_of_Olmsted_works. This situation cries out for an EIS. *See Nat'l Parks Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001) (450 comments on EA, most opposing the Project); *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1998) (outside expert reports disputed agency's methodology and conclusions); *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1229 (10th Cir. 2002) (substantial dispute regarding significance of project impacts).

Effects on Historic Sites, Districts, or Highways. Adverse effects on "districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic

Places" are another indicator of significance (40 C.F.R. § 1508.27(b)(8)). This project, without dispute, will adversely affect three National Register historic resources, including Jackson Park, the Midway Plaisance and the Chicago Boulevards Historic District, as well as other unique and irreplaceable features of Jackson Park. For example, the Women's Garden is a unique historic feature, and its removal, which is indicated to start as part of the groundbreaking, is a permanent and irreparable action. The fact that another will be built elsewhere does not make its loss temporary. (Ex. 2, Mitchell Declaration, ¶ 7) Impacts to such resources cannot be fully mitigated by making acontextual improvements elsewhere.

As this demonstrates, the EA and FONSI's findings and conclusions just ignore these issues on the grounds that what it characterizes as local matters are excluded from the scope of their federal review. (*See* Complaint, Exs. 3 and 4 at 1) Yet all these impacts on unique features and historic resources *are explicit elements of the regulatory definition of significance*. 40 C.F.R. §§ 1508.27(b)(3), 1508.27(b)(8). *See, e.g., Sierra Club v. Van Antwerp*, 719 F. Supp. 2d at 66 (unique characteristics require EIS); *Fund for Animals*, 281 F. Supp. 2d at 218-19 (presence of one significance factor should result in EIS); *Nat'l Wildlife Fed'n v. Norton*, 332 F. Supp. 2d 170, 181 (D.D.C. 2004) (single factor may establish significance).

Cumulative Effects. An EIS is also required "if it is reasonable to anticipate a cumulatively significant impact on the environment." 40 C.F.R. §1508.27(b)(7). Cumulative impacts result from "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency (Federal or Non-Federal) or person undertakes such other actions." *Id.* § 1508.7. Significant cumulative impacts may occur even if individual actions are minor. *Id*. ("Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time").

Of course, the OPC Project is far from minor; instead it requires not only the construction of the OPC, but also the destruction of a well-established road system, coupled with the creation of a new roadway system that will narrow the park by destroying about 10 additional acres on the east and west ends of Jackson Park, thereby increasing the exposure of the heart of Jackson Park to noise, fumes, dirt and other forms of pollution. These cumulative effects were improperly ignored by the unprecedented segmentation analysis adopted by the federal agency Defendants here, who developed a contrived rationale to dismiss them as a "local" issue outside their jurisdiction, even as the destruction of the park and the construction of the OPC are, and have always been, conceived as an intertwined, unitary project. To allow this segmentation would eviscerate all environmental protection. Relatedly, the EA includes a cursory cumulative impact analysis in reference to the Great Lakes Fishery Ecological and Restoration ("GLFER") Area in Jackson Park — but again ignores that the GLFER web of interdependent ecological elements that comprises a system, which took more than five years to implement, and will be permanently disrupted by the OPC Project, but yet is identified in these reports only as "temporary." (Complaint, Ex. 10, EA at 64-66; *see also* Group Ex. 7 (certain objections related to GLFER issues))

Additionally, the EA makes no reference to the Jackson Park golf course that sits adjacent to one of the Jackson Park roadways, Marquette Drive, which has been targeted for future destruction. Any adequate NEPA report should thoroughly examine the interactive effects between a present and a proposed future action, but the blinkered response of the agency EA ignores the matter entirely despite the Marquette Drive issues. (*Id.,* at 32-34; Ex. 2, Mitchell Declaration, ¶ 9)

Finally, it is impermissible for the EA to claim incorrectly that various adverse impacts on trees, traffic, noise, birds, water, gardens, and other resources can be mitigated in isolation, without once looking at their dramatic cumulative effects. Bland assertions do not meet the hard look requirement of an EA under NEPA. *See, e.g., Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 340-41 (D.D.C. 2002) (EA must provide a "hard look" at potential impacts); *Humane Soc'y v. Dep't of Commerce*, 432 F. Supp. 2d 4, 18-19 (D.D.C. 2006) (conclusory EA inadequate); *Am. Oceans Campaign v. Daley*, 183 F. Supp. 2d 1, 18-20 (D.D.C. 2000) (invalidating multiple EAs for failure to specifically address relevant significance factors); *Friends of the Earth*, 109 F. Supp. 2d at 42-43 (conclusory EA inadequate); *Ctr. for Biological Diversity*, 538 F.3d at 1223 (invalidating EA that "shunted aside significant questions with merely conclusory statements").

b) The defendants' failure to evaluate less-damaging project alternatives was arbitrary and capricious.

NEPA also requires that EAs discuss alternatives to the proposed federal action. 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9. This is "an independent requirement of an EA, separate from its function to provide evidence that there is no significant impact." *Sierra Club v.Watkins*, 808 F. Supp. at 870. To comply, an agency must evaluate a reasonable range of alternatives in a manner that demonstrates reasoned decision-making. *Id.* at 871-72. Applicable guidance provides that "reasonable alternatives include those that are *practical* or *feasible* from the technical and economic standpoint and using common sense, ratherthan simply *desirable* from the standpoint of the applicant." 46 Fed. Reg. 18026-01 (Mar. 17, 1981) (emphasis original). An alternative may be excluded from consideration "only if it would be reasonable for the agency to conclude that the alternative does not bring about the ends of the federal action." *Pub. Emps. For Envtl. Responsibility v. U.S. Fish & Wildlife Serv.*, 177 F. Supp. 3d 146, 154 (D.D.C. 2016) (citing *City of Alexandria, Va. v. Slater*, 198 F.3d 862, 867 (D.C. Cir.1999)).

The FONSI and the EA upon which it relies failed to look at all prudent and feasible alternatives. Instead, the FONSI and EA are products of the illegal practice of segmentation, described as follows:

> "Segmentation" or "piecemealing" is an attempt by an agency to divide artificially a "major Federal action" into smaller components to escape the application of NEPA to some of its segments. "As a general rule under NEPA, segmentation of highway projects is improper for purposes of preparing environmental impact statements." *Piedmont Heights Civic Club, Inc. v. Moreland,* 637 F.2d 430, 439 (5th Cir. Unit B 1981). Segmentation becomes suspect in light of an investigation to determine whether the project (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects.

Save Barton Creek Ass'n v. Federal Highway Admin., 950 F.2d 1129, 1139-41 (5th Cir. 1992).

Here, the EA separated out the OPC and its construction from the remainder of the work needed to repair the damage wrought by the construction of the OPC — even though both jobs are part of the same unitary "undertaking." The federal agencies have recognized that the project as a whole involves in total "the potential effects to historic properties from the Obama Presidential Center (OPC) project and certain related Federal actions in and near Jackson Park (collectively, the proposed "undertaking")." (*See* Complaint, Ex. 3, January 16, 2020 Assessment of Effect Report at 1) That properly reflects the fact that the roadwork involving the expansion of Lake Shore Drive and Stony Island is "related" — indeed necessitated by — the OPC, and that the undertaking includes "the construction of the OPC in Jackson Park by the Obama Foundation, the closure of roads to accommodate the OPC and to reconnect fragmented parkland, the relocation of an existing track and field on the OPC site to adjacent parkland in Jackson Park, and the construction of a variety of roadway, bicycle and pedestrian improvements in and adjacent to the park." *Id.*; *see also* Complaint Ex. 10 at 12 (discussing FHWA role; "The need for the FHWA action arises as a result of changes in travel patterns caused by the closed roadways.")

Implementing its scope of review, the EA limits its analysis to performance of a review of alternatives relative to the roadwork on the eastern and western edges of Jackson Park, which are necessitated by the placement of the OPC, but does so by using an improper baseline for purposes of its comparison of alternatives. Here, the key to understanding this blunder is evidenced in how the EA describes its three alternatives. (*See* Complaint, Ex. 10, EA ¶ 4.0, at 15-16) Alternative A is the status quo ante, which means that the OPC is not constructed in Jackson Park; alternative B is misleadingly called the "No-build" Alternative but it explicitly says the opposite: "Under this Alternative, the proposed roadway closures occur and the OPC is constructed, but no additional transportation improvements are made." Alternative C presupposes the construction of the OPC (exactly what is included in Alternative B), and then superimposes the so-called "improvements" need to fill out the rest of the roadwork to replace the roads that will be destroyed in order to build the OPC. The Report conducts *no* analysis of the key shift from Alternative A to Alternative B, which is where all the damage to Jackson Park takes place. Instead, Section 4 of the EA thus posits two, and only two, states of the world and focuses exclusively upon Alternatives B and C, and all without ever reviewing either the environmental impacts of constructing the OPC at its proposed location, or the removal of all current roadwork needed to complete the proposed plan.

This transparent ploy lets the EA purposefully avoid reviewing any meaningful alternatives to the construction and destruction within Jackson Park—a fatal flaw in the analysis. Here, the obligatory reference to Alternative A is itself recognition that it has a role, but the EA here makes that role illusory. Throughout, the EA focuses its analysis upon scenarios that assumed the OPC was already built in Jackson Park, making the baseline Alternative B, which was expressly created for purposes of comparison with Alternative C. However, the true "no build" alternative is Alternative A, the status quo in Jackson Park, not Alternative B where the OPC is built and the

landscape, roadwork and integrity of the park are destroyed. Alternative B, along with other possible plans including Alternative C, must then be compared with Alternative A. That analysis never took place, as the Report only compares Alternative C with Alternative B, and even that is largely predetermined. The EA may show that that C is better than B, but there are other alternatives to B that were never considered and never compared to A or C. The use of a faulty baseline guts the entire environmental analysis by allowing the most destructive actions to take place without even the most rudimentary review of any relevant (and indeed, superior) alternatives.

If these required reviews of possible alternatives had been properly performed, publicly revealed, and generally discussed, at least one such site, located just to the west of Washington Park, would have been found to be not only prudent and feasible, but also superior to the Jackson Park site. Located at the intersection of Martin Luther King Drive and Garfield Avenue; that site is directly over the Green Line, and near to the Red Line; it has readily available public bus transportation; it is situated at a safe distance from the Mississippi flyway; and it is not perched near the rising waters of Lake Michigan, which may require extensive 24/7 pumping just to keep the site dry. That would have been consistent with the regulations, which provide that a proper EA must rigorously explore and objectively evaluate the impacts, both positive and negative, of all reasonable alternatives to the no action alternative. 49 C.F.R. § 1502.14(a).

The agency's artificially truncated analysis is a form of bootstrapping that has already rejected by courts in other NEPA cases, including *Openlands v. U.S. Dept. of Transp.,* 124 F. Supp. 3d 796, 807 (N.D. Ill. 2015). In that case, the District Court held that the EIS—the EA was not deemed sufficient— for the proposed Illiana Corridor did not comply with either NEPA or with Section 4(f) of the Transportation Act. That case involved the same sleight of hand used in this case. There the agency's alternative A, or "no-build" baseline, presumed the building of the Illiana

Corridor, and thus compared two different routes, without first asking whether or not the project should be built at all, which would have been a bona fide no-build scenario: "Without such an analysis, it is impossible to determine the extent to which building the Corridor will increase traffic on existing roads and the impact such increased traffic may have on the study area. Thus, absent a supported no build analysis, the EIS does not comply with NEPA's directive to analyze the project's direct impacts." *Id.* at 808.

As the District Court concluded: "In short, the purpose and need for the Illiana Corridor identified in the EIS are derived directly from the faulty 'no build' analysis. Because that analysis does not substantiate the purpose and need, the FHWA's approval of the ROD [record of decision] and final EIS is arbitrary and capricious and in violation of NEPA." *Id.* at 807. "[A]bsent a supported no build analysis, the EIS does not comply with NEPA's directive to analyze the project's direct impacts." *Id.* at 808.

The concerns raised in *Openlands* are, if anything, more urgent in this case. The analysis supplied in *Openlands* found that even an exhaustive EIS fell short. A *fortiori*, the simple EA here that never discusses relevant alternatives cannot support a FONSI, but must give way to a complete EIS that addresses the multiple alternatives to the OPC. The huge omissions in the current case, by comparison with *Openlands*, shows emphatically that the Plaintiffs in this action are likely to succeed on the merits. The current state of affairs in Jackson Park is the touchstone for any proper analysis of alternatives. The required "hard look" starts with the current state of affairs in Jackson Park, not a contrived "no build" fiction that incorporates the real project into the distorted baseline. *See, e.g., Idaho v. Interstate Commerce Comm'n*, 35 F.3d 585, 595-96 (D.C. Cir. 1994) (lead agency may not delegate its responsibilities to project proponent); *S. Utah Wilderness Alliance v. Norton*, 237 F. Supp. 2d 48, 52-54 (D.D.C. 2002) (lead agency has a "duty to conduct an

independent analysis of alternatives"); *Sierra Club v. Watkins*, 808 F. Supp. at 871-72 (agency's efforts to address alternatives must be reasonable).

The EA and FONSI further err in their conclusions that mitigation measures will reduce the OPC Project's impacts on historic resources to a level of insignificance. This is seen by the faulty analysis advanced in regards to mitigation of the adverse effects created by the massive tree removal, where the EA wrongly claims that mitigation of the severe adverse impacts is magically achieved by the purported 1-to-1 replacement of the trees, when in fact hundreds of mature, old growth trees will be replaced with tiny saplings. (*See* Ex. 2, Mitchell Declaration, ¶¶ 8-11, 15)

The issue of alternative sites and mitigation measures here stand in sharp contrast to virtually every other legal dispute that arises when environmental, historical, and cultural resources are pitted against legitimate issues in safety and economic well-being. Virtually all these disputes involve difficult trade-offs in which the preferred alternative of the federal statutes—avoidance—is rarely obtainable. It is not easy to plop down an airport, a pipeline, a dam, mine, a road or a railroad station at some ideal location. The places where these major facilities may be situated is sharply limited by the distribution of population, topography, natural resources, weather patterns and much more. Dams must be built on rivers; airports located near population centers; mines dug where minerals are buried. Long and skinny facilities like pipelines, highways and railroads must be organized into interlinked grids that pass across state, county, and local lines, each with its own distinctive set of rules. The location of any given segment or node of these projects can often be shifted only if the entire system is substantially redesigned and rerouted.

There are even fewer degrees of freedom in the repair and replacement of *existing* facilities that have become dangerous or inefficient with the passage of time, the improvement of

technology, and with the discovery of new dangers that need redress. In all of these cases, the project owner has few degrees of freedom. They cannot, with a snap of the fingers, move airports, harbors, railway stations, major intersections to new location. So for example, the renovation of the historic terminal at Union Station in Washington DC has to take place at that fixed location, which was no mean feat for the 107-year old terminal, which is the busiest transportation hub in the nation. For a massive project of that sort, avoidance is just not a viable option, but it helps in cases of this sort that the new structure occupies the footprint of the old one to minimize the harms in question. And it further helps in mitigation of damages to avoid cutting trees that might be damaged during the construction phase. So, in sharp contrast to this case, even though all these practices were scrupulously followed, the Secretary of Transportation ordered the Federal Railroad Administration to "reconsider and revise" its multibillion plan for the renovation of Union Station, because the plan was "too car-centric", after receiving a request from Congresswoman Eleanor Holmes Norton, some four days before. *See* Press Release: After Norton Opposed Original FRA Union Station Project Proposal, FRA Decides to 'Review and Refine' Project, Nonprofit News Matters, February 9, 2021, available at https://thedcline.org/2021/02/09/press-release-after-norton-opposed-original-fra-union-station-project-proposal-fra-decides-to-review-and-refine-project/. The goal of the revision is to eliminate up to over 1,000 parking car spaces from the original 1,500, in order to encourage ride-sharing, and greater use of rental bikes and scooters. The delays in this instance will surely run into the tens of millions of dollars.

The situation with the OPC could not be more different. There is no current facility that needs renovation or improvements. The OPC is not a transportation hub through which tens of thousands of people move. It does not replace any existing facility that is either dirtier or more dangerous than itself. Instead, much of the supposed cost of the new project comes from wrecking

parkland, a road system and cutting down trees. And the unfortunate delays in construction all stem from the Foundation's and City's stubborn decision to refuse to consider any alternative site on the South Side of Chicago where construction could have begun earlier. Thus by every relevant metric, the OPC is a conspicuous outlier from virtually every other project subject to NEPA (and Section 4(f)) review for two reasons: First, the dislocations that it causes are immediate, massive and permanent. Second, the avoidance strategy dominates any other strategy that might take place, but yet was ignored. *See*, Richard A. Epstein, *Evaluation of the Proposed CEQ Rule Updating NEPA: Prepared on Behalf of ConservAmerica*, March 20, 2020, at 9-11 available at https://documentcloud.adobe.com/link/track?uri=urn%3Aaaid%3Ascds%3AUS%3A95d953d9-6c71-46eb-ae28-7c462fe67fca#pageNum=2. The federal agencies' actions in this case are not only inconsistent with the statutory purposes of NEPA, but they adopt an interpretation that is so constrained that, if applied generally, it would cripple environmental enforcement nation-wide.

2. Plaintiffs Are Likely To Succeed On The Merits Of Their Claims In Regards To Their Section 4(f) Claim.

Plaintiffs are also likely to succeed on the merits of their Section 4(f) claim. As the Supreme Court noted in the seminal *Overton Park* case:

> Section 4(f) of the Department of Transportation Act and §138 of the Federal-Aid Highway Act are clear and specific directives. Both the Department of Transportation Act and the Federal-Aid to Highway Act provide that the Secretary 'shall not approve any program or project' that requires the use of any public parkland 'unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park * * *. . . This language is a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted.

Overton Park, 401 U.S. at 411-413.

Plaintiffs are likely to succeed in establishing that the FHWA acted arbitrarily and capriciously by refusing even to consider whether any feasible and prudent alternatives to the use

of Jackson Park for the OPC were available, as well as a failure to meet the statutory obligation that all possible planning to minimize harm to the park be performed. As was done with the EA, a specific effort was made to avoid consideration of any alternatives to the OPC's proposed placement and construction that would actually avoid or minimize its adverse impacts, but instead, the only alternatives were those that might mitigate the massive damage and destruction after the fact. (Complaint, Ex. 8 at 43, note 19) ("The "No-Action" Alternative for the Section 4(f) Evaluation is consistent with Alternative B in the Environmental Assessment (EA)."). Ignoring road closures and the gratuitous destruction of 19.2 acres of parkland even less acceptable under Section 4(f) than under NEPA. (*See* Complaint, Ex. 10, EA at 69 (discussing all matter segmented out of review)) The consciously truncated analysis in the Section 4(f) report, which ignores the destruction of critical elements of Jackson Park, epitomizes the failure to "include all possible planning to minimize harm to such park" that is statutorily required.

Moreover, the use of the wrong baseline is no more acceptable under Section 4(f) than under NEPA. In this regard, *Openlands* speaks as much to Section 4(f) as it does to NEPA. Here too, courts have issued preliminary injunctive relief when such issues regarding a defective Section 4(f) review have been raised. *See, e.g., City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106 (C.D. Cal. 1999); *Hatmaker v. Georgia Dep't of Transp.*, 973 F. Supp. 1047 (M.D. Ga. 1995).

3. Plaintiffs Are Likely To Succeed On The Merits Of Their Section 106 Claim.

Section 106 of the NHPA established a process by which federal agencies must "take into account" the impact of their undertakings on any site listed on or eligible for listing in the National Register. 54 U.S.C. § 306108. The applicable regulations provide that agencies must consult with other parties to determine whether a proposed undertaking will have an adverse effect on historic

properties and, if so, to discuss ways to avoid, minimize, or mitigate such effects. 36 C.F.R. §§ 800.4-800.6.

It is undisputed that the OPC Project will adversely affect Jackson Park, the Midway Plaisance and the Chicago Boulevard Historic District, which are all on the National Register of Historic Places (*See, e.g.,* Complaint, Ex. 3 at 57) It is also undisputed that the roadwork that is being planned will further destroy various parts of Jackson Park in order to expand Stony Island Avenue and Lake Shore Drive, both of which are the reasonably foreseeable (indeed inevitable) consequence of the construction of the OPC. (*Id.*) In the face of this unambiguous history, the record is clear that the City, Park District and FHWA have ignored all statutory requirements requiring review of measures of avoidance, minimization and mitigation to resolve the adverse effects created by the OPC.

As an initial matter, the FHWA precluded such review by engaging in segmentation, expressly stating that any review would expressly not include the OPC Project itself, despite it being part of the overall undertaking whose construction has reasonably foreseeable (indeed inevitable) effects, of the very type for which agency review is strictly required. (*See, e.g.,* Complaint, Ex. 3 at 1)

Further, the skimpy review that was performed was wholly inadequate from the start. From the beginning, mitigation measures were the only game in town – not avoidance or minimization –assuming the destruction of Jackson Park was a done deal. This sad truth was demonstrated as early as August 2019, when in a public meeting City and federal officials discussed how they would sidestep dealing with the adverse effects to Jackson Park by referencing nothing but minimal and useless proposed mitigations. (Complaint, Exs. 5 & 6) The decision to focus solely on acts of mitigation requires the reopening of the Section 106 process in order to ensure that the

public and the consulting parties have a meaningful opportunity to comment on measures to avoid and minimize harm to Jackson Park.

Once again, courts facing such issues under the NHPA have granted preliminary injunctive relief to preserve the status quo. *See, e.g., Kammeyer v. Oneida Total Integrated Enterprises*, 2015 WL 5031959 (C.D. Cal. Aug. 24, 2015); *Brooklyn Heights Ass'n, Inc. v. Nat'l Park Service*, 777 F. Supp. 2d 424 (E.D.N.Y. 2011); *Nat'l Trust for Historic Preservation v. F.D.I.C*, 1993 WL 328134 (D.D.C. May 7, 1993).

4. Plaintiffs Are Likely To Succeed On The UPARR Claim.

The NPS was responsible for the review and approvals under the Urban Park and Recreation Recovery Act ("UPARR") (54 U.S.C. §§ 200501-200511). This review was necessitated because federal funds were previously provided to support improvements in Jackson Park, which carried with it restrictions that land in Jackson Park – including the exact land selected by the OPC for its campus – be used solely for recreational purposes. The construction of the OPC and its encroachment upon certain recreational land in Jackson Park and the Midway Plaisance entailed a "conversion" of such land to non-recreational uses. *Id.* § 200507. In such circumstances, the approval of NPS is required as a precondition to the conversion and to locate new "adequate recreation properties and opportunities of reasonably equivalent usefulness and location." 36 C.F.R. § 72.72(b)(3). Further, NPS is required to comply with Section 106 and NEPA prior to authorizing any such conversion.

The governing regulations require the NPS to consider and address many issues, including, but not limited to, demanding that the applicant demonstrate that "*all* practical alternatives to the proposed conversion have been evaluated." *Id.* § 72.72(b)(1) (emphasis supplied). That did not occur here. The record, as reflected with the other reviews discussed above, shows that the sole

focus was the eastern end of the Midway Plaisance, which as noted is a unique historic resource selected in predetermined fashion. As occurred with the other federal reviews, the record does not reflect that the NPS and others performed or enforced the requirement to consider all practical alternatives. To the contrary, the eastern end of the Midway Plaisance was included by the City of Chicago in its October 2018 Ordinance approving the current proposal for the OPC (Complaint, Ex. 2 at 85885), and then in the July 2019 that was part of the Section 106 review and the aforementioned public meeting on August 5, 2019 that occurred thereafter, reflecting the predetermined and sole focus of the City, and as such, precisely reflects a lack of review. Furthermore, while a decision to designate the eastern end of Midway Plaisance as replacement land and alter the 1010 boundary was made, no specific Section 106 review was itself performed in connection with that new designation and its inclusion in a new boundary, despite its historic significance.

Plaintiffs will be likely to succeed on establishing this claim, and such a failure will require a reopening of this review, and forecloses the proposed work that the OPC requires for its project as it relies upon the usage of these protected recreational spaces for the Project. An injunction pending the review of these types of issues in analogous circumstances (albeit under different statutory schemes) where issues of restrictions on conversion of land to other than recreational use has been found appropriate. *See, e.g., Brooklyn Heights Association Inc. et al. v. National Park Service,* 2011 WL 1356758 (E.D.N.Y. 2011) (granting preliminary injunction in matter involving grant by NPS under Land and Water Conservation Fund pending review of issues regarding various conversion of properties).

5. The Plaintiffs Are Likely To Succeed On Their Claims Regarding Army Corps Permitting.

Based upon the work necessitated by the OPC in Jackson Park, certain amendments and modifications to permits issued by the Army Corps of Engineers ("Army Corps") under Section 404 of the Clean Water Act and Section 408 of the Rivers and Harbors Act were required:

> The proposed roadway work would require authorization under Section 404 of the CWA (33 U.S.C. 1251 *et seq*.). The City's proposal to widen Lake Shore Drive involves expanding the 59th Street bridge abutment. This work would result in a discharge of fill material and require a Section 404 permit. Second, the City's proposal to dewater the portion of the lagoon under Hayes Drive to complete bridge improvements would result in a discharge of fill material and would require a Section 404 permit. Further, the City's proposal to improve the east end of the Midway Plaisance for replacement recreation anticipates alterations to the existing wetland on the site, although that work may only be subject to state requirements. The construction of the OPC would also result in temporary and permanent impacts to the GLFER project in Jackson Park. This proposed alteration requires USACE permission pursuant to Section 14 of the Rivers and Harbors Act (RHA) of 1899 (33 U.S.C. 408), commonly referred to as "Section 408."

Complaint, Ex. 10 at 15.

Initially, Plaintiffs are likely to succeed in having these permits and modifications voided because the underlying work that requires the modifications is itself subject to reversal based on the reasons discussed above which show no modifications are necessary at all given the possibility of prudent and feasible alternatives that would eliminate the need for any such modifications, none of which were reviewed through the faulty process described earlier.

In any event, Plaintiffs are likely to succeed on their showing that the permit amendments and modifications were arbitrary and capricious. *See generally Sackett v. E.P.A.,* 566 U.S. 120 (2012) (plaintiffs can bring challenge to Clean Water Act under APA). Fundamentally, the amendments and modifications that are necessitated by the proposed OPC negatively and severely disrupt the GLFER project from which these permits arise. The GLFER project serves "to restore ecological health to natural areas of Jackson Park while preserving the historical and cultural

integrity of the Park." (Complaint, Ex. 13, Application 19-17 at 2) Those goals are undermined by the OPC project, leaving the project injurious to the public and impairing its usefulness.

The GLFER project was five years in the making, and designed to strike a balance between the historic significance and preservation of the Olmsted design, and ecological concerns. As the Army Corps of Engineers has recognize itself in a March 2021 story on the project:

> The Jackson Park ecosystem restoration project was completed and turned over to the nonfederal sponsor, the Chicago Park District, in 2020. The park resides between 56th Street to the north and 67th Street to the south. The study area consists of various natural area parcels, all owned by the Chicago Park District, within Jackson Park. The feasibility study was approved in June 2014, a Project Partnership Agreement signed in August 2014, and a five-year construction contract awarded in September 2014. The collaboration between USACE, Chicago Park District, Project 120 (a nonprofit), Illinois Historic Preservation Agency (merged into IDNR in 2017), Heritage Landscapes (an Olmsted expert), and community representatives enabled a successful Jackson Park GLFER ecosystem restoration project of Olmsted Park.

https://www.dvidshub.net/news/390668/usace-chicago-district-started-completed-20-restoration-projects-date-with-great-lakes-restoration-initiative

To start, the GLFER project's promotion of ecological health is undermined by the massive clear cutting of the existing mature trees described earlier that is necessitated by the roadwork expansion and the OPC. Furthermore, the construction of the OPC demands modification to the GLFER project through the road expansion of Lake Shore Drive and Stony Island, which admittedly creates permanently disruptions to both those historic preservation concerns and the ecological concerns through, *inter alia*, the destruction of the roadway system which was part of the historical fabric that was consciously considered, removal of berms, plantings, meadows, savannas, woodlands, sedge lawns, and transition prairies. (*See* Complaint, Ex. 10, EA at 66 ("The widening of southbound Lake Shore Drive to the west would have permanent and temporary impacts to the restored GLFER areas from grading and utility work. Along the west side of Lake Shore Drive, there would be impacts to dunes and meadows. The proposed pedestrian underpasses

near the intersections of Lake Shore Drive and Hayes Drive as well as Cornell Drive and Hayes Drive would also result in permanent and temporary impacts. The GLFER impacts along Cornell Drive and Hayes Drive include meadows, savannas, woodlands, sedge lawns, and transition prairies.”))

If this were not enough, the mitigation scheme adopted to obtain approvals was based on the idea that the removal of a GLFER design element can be mitigated by merely relocating the element without consideration of its impact on the system as a whole and not act as impairment. However, such statements are conclusory and unsupported as it ignores that the GLFER is an interconnected system which cannot be pulled apart and relocated – issues raised by many objections (*see, e.g.,* Group Ex. 7), but not addressed.

6. Plaintiffs Are Likely To Succeed On Their Anticipatory Demolition Claim.

Under what is commonly referred to as Section 110(k) of the National Historic Preservation Act, it is incumbent upon all federal agencies who receive requests for funds, permits and licenses to ensure that no funds or permits are awarded to applicants who commit or allow acts of anticipatory demolition. The applicable statute provides as follows:

> Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant that, with intent to avoid the requirements of Section 306108 of this title, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant.

54 U.S.C. § 306113.

The City, Park District and Foundation have requested federal funding for roadwork from the Federal Highway Administration in the amount of at least $175 million, as well as federal permits from the Army Corps of Engineers.

> [T]he City proposes to make certain roadway improvements in Jackson Park using Federal-Aid Highway Program funds and to make bicycle and pedestrian improvements for better access to Jackson Park. Authorizations required by the United States Army Corps of Engineers (USACE) arise principally from the proposed transportation improvements by the City.

Complaint, Ex. 10 at 1.

Since December 2017, the federal reviews for the OPC have been ongoing, starting with the review under Section 106 of the NHPA. The City, the Park District, and the Foundation were well aware of and participating in these federal reviews, and further recognized that no adverse actions were to be taken against historic and environmental resources that were under review.

Nonetheless, not later than August 6, 2018, the City and the Park District in fact took such actions, which involved not only the intentional destruction of trees but the intentional demolition of an athletic field in Jackson Park, which were performed to accommodate the OPC. (*See* Complaint, Ex. 16) The trees and field that were intentionally destroyed were within the 19.2 acres devoted to the proposed OPC which is within the Jackson Park Historic Landscape District and Midway Plaisance, and listed in the National Register of Historic Places. (Complaint, Ex. 3 at 1; Ex. 2, Mitchell Declaration, ¶ 14). Additionally, the work performed is within what is referred to as the Section 1010 boundary created under UPARR, the area in which review by NPS (referenced above) was ostensibly being performed so as to obtain its approval. (Complaint, Ex. 3 at 3 ("The OPC site is located within the Section 1010 boundary established by the grants. Under Section 1010 of the UPARR Act (54 U.S.C. §200507) . . . no property improved or developed with UPARR assistance can be converted to other than public recreation uses without NPS approval.")).

The work performed by the City and the Park District in this regard was unquestionably for the benefit of the Obama Foundation and to advance the OPC Project despite the fact that the federal review process for approvals and permits from the FHWA, the NPS and Army Corps of

Engineers had not only recently been initiated. The acts of demolition were discussed as well as part of a "Donation Agreement" dated February 26, 2018 between Chicago Park District and the Obama Foundation (Complaint, Ex. 17). The Donation Agreement provided, *inter alia:*

> WHEREAS, the Foundation is tasked with finding, planning and construction of the Obama Presidential Center ("OPC") in Jackson Park on land owned by the Park District that will be transferred to the City of Chicago pursuant to Park District Board and City Council approval, in recognition of the long-standing ties the former President has with the community and;
>
> WHEREAS, the site selected for the OPC would necessitate the relocation of an existing multi-use artificial turf field with a running track (the "Original Field"), and; [. . . .]
>
> WHEREAS, the Foundation has agreed to fund the construction of a replacement Field on the Field Site (the "Project"), as further described in the plans set forth in Exhibit B, attached and incorporated by this reference, and;
>
> WHEREAS, The Foundation agrees to donate an amount not to exceed $3,500,000.00 to the Park District to assist with the construction of the Project; . . .

Id. at 1.

The Donation Agreement goes on to detail the work that the Park District will perform to demolish the existing track and field in Jackson Park and to build a new track and field, all solely to accommodate the Obama Center.

These acts taken by the City, Park District and Foundation, both in regards to the destruction of the trees and in regards to the development of OPC, involve adverse effects that constitute anticipatory demolition in violation of Section 110(k). *See generally* Complaint, Ex. 3 (final report which concludes that OPC project will have adverse effect on Jackson Park and Midway Plaisance)

> The OPC will transform the cultural landscape within the project footprint and affect some contributing features beyond the footprint. The project site overlays part of the western perimeter of the historic property. The proposed design replaces contributing landscape characteristics, which include spatial organization, topography, vegetation, and circulation, with new features. While location of

> proposed partially underground buildings, development of green roofs on three of the buildings, and planting new trees reduces the visibility of new buildings within the landscape and provides the appearance of green space, its implementation will change the character of the historic landscape. In particular, the addition of the Museum Building and other buildings will alter the historic design principles of the prominence of landscape scenery, unified composition, and orchestration of use within the historic open space of the project footprint. This is not consistent with the *Secretary of the Interior's Standards* that state: "When alterations to a cultural landscape are needed to assure its continued use, it is most important that such alterations do not radically change, obscure, or destroy character-defining spatial organization and land patterns or features and materials.

Id. at 51.

Having engaged in such conduct, the FHWA is precluded from providing approvals for the federal funds requested for the roadwork, "unless the agency, after consultation with the [Advisory Council on Historic Preservation], determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant." 54 U.S.C. § 306113. Any such approval is to be performed pursuant to a special consultation process, which includes the following:

> [T]he agency official shall notify the Council and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the property. This documentation shall include any views obtained from the applicant, SHPO/THPO, an Indian tribe if the undertaking occurs on or affects historic properties on tribal lands, and other parties known to be interested in the undertaking.

36 C.F.R. § 800.9(c)(2).

No such process was followed, as the FHWA did not invoke this process at any time, leaving the FHWA's approval of authorization of federal transportation funding for the project is unlawful in violation of Section 110(k).

Similarly, the Army Corps is also precluded from authorizing any permits relating to the OPC project unless and until the Army Corps goes through the special consultation process spelled out in the regulations. The Army Corps did not invoke the special consultation process, and thus

any permits issued by the Corps related to components of the OPC project are unlawful in violation of Section 110(k) of the NHPA. *See Committee to Save Cleveland's Huletts v. Army Corps of Engineers,* 163 F. Supp. 2d 776, 792. 793 (N.D. Ohio 2001) (commenting on Section 110(k): "This section provides only that a federal agency may not grant a permit to an applicant who has *already* adversely affected historic property—i.e., it is a prohibition against granting permits to applicants who have committed anticipatory demolition. Section 470h–2(k) works to punish those who would seek to manipulate the § 106 process by denying them access to post-demolition permits."). Based on the statutes and regulations, the Plaintiffs have established that they are likely to succeed in regards to the violation of Section 110(k).

B. Plaintiffs Are Likely To Suffer Irreparable Harm Absent A Preliminary Injunction.

Plaintiffs are likely to suffer irreparable harm in the absence of a preliminary injunction prohibiting construction of the OPC in Jackson Park. *Winter*, 555 U.S. at 20. When, such as here, "a procedural violation of NEPA is combined with a showing of environmental or aesthetic injury, courts have not hesitated to find a likelihood of irreparable injury." *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24 (D.D.C 2009); *see also Fund for Animals*, 281 F. Supp. 2d at 222 (irreparable aesthetic injuries). Indeed, "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987).

Here, construction and operation of the OPC will impose three categories of irreparable harm on Plaintiffs and their members, each of which, standing alone, is sufficient to justify injunctive relief: (1) injury to Plaintiffs and Plaintiffs' members interests and activities observing, enjoying, studying, and protecting the wildlife, flora, scenery, peace and solitude, and historical and cultural resources of the Jackson Park and its historic surrounds, including the Women's

Garden, historic landscapes in the park, birding, enjoying the trees, and other elements. (Ex. 2, Mitchell Declaration, ¶¶ 4-5; Ex. 4, Franklin Declaration, ¶¶ 3-4; Ex. 5, Caplan Declaration, ¶¶ 6-7) Jackson Park also supports professionally related uses and educational activities (Ex. 2, Mitchell Declaration, ¶¶ 4-5); (2) harm to the organizational missions and programs of Plaintiff Protect Our Parks and Nichols Park Advisory Council; and (3) procedural harm arising from the FHWA and NPS's failure to comply with environmental laws.

1. Plaintiffs And Their Members Will Suffer Irreparable Injury.

The historical, cultural and environmental resources in Jackson Park are all unique and irreplaceable, so that it is almost a truism that their destruction constitutes an irreparable harm to Plaintiffs and Plaintiffs' members, which is why no adverse actions be taken while the federal reviews are ongoing. This motion properly asks an extension of that process, by preserving the status quo while the Court reviews these matters, given that the start of full-scale construction will necessarily abruptly and decisively end these and other uses by removing key elements of the Park and deploying heavy construction equipment that will create obstruction, noise and pollution.

2. Plaintiffs Will Suffer Irreparable Injury To Their Organizational Missions And Programs.

A plaintiff organization suffers irreparable injury if actions taken by the defendant will "perceptibly impair" the organization's programs. *See League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016) (citations omitted). The courts have articulated a two-part test for organizational injury. First, has the defendant's conduct "made the organization's activities more difficult"? *Nat'l Treasury Emps. Union v. U.S.*, 101 F.3d 1423, 1430 (D.C. Cir. 1996). Second, do the defendant's actions "directly conflict with the organization's mission"? *Id.* Here, the answer to both questions is clearly "yes."

POP was founded in 2007 to protect and enhance usage of Chicago's parks and their resources, and to facilitate public participation in its activities. Given its fundamental mission, POP also advocates for such parks and open space at all levels of government. POP has staff time, programmatic funding, and educational outreach programs to advance its position in Jackson Park. (Ex. 5, Caplan Declaration, ¶¶ 3-7)

Similarly, Nichols Park Advisory Council has significant interests in protecting South Side parkland, including projects in Jackson Park. Given proximity and geographic location of Nichols Park, what happens in Jackson Park is vital to the Advisory Council. To promote that interest, the Nichols Park Advisory Council served as a consulting party to the federal review process, submitting comments and participating in meetings. (*See* Ex. 4, Franklin Declaration, ¶¶ 3-5)

Construction of the Project directly conflicts with these organizational purposes rendering Plaintiffs' activities more difficult. *See, Nat'l Treasury Emps. Union*, 101 F.3d at 1430.

3. Plaintiffs Will Suffer Procedural Harm.

Because the FHWA and NPS have failed to discharge their numerous NEPA, NHPA, and Department of Transportation review obligations (discussed *supra* and in Plaintiffs' Complaint), Plaintiffs will suffer irreparable procedural harm when groundbreaking of the OPC Project begins. An agency's duty under NEPA "is more than a technicality; it is an extremely important statutory requirement to serve the public and the agency before major federal actions occur." *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.D.C. 1985). And while a procedural violation of NEPA, standing alone, is generally insufficient to constitute irreparable harm, the combination of Plaintiffs' injuries (described above) and the federal agencies' failure to comply with mandatory environmental review procedures does create irreparable harm. *Brady Campaign,* 612 F. Supp. 2d at 24-25; *see also Fund for Animals*, 281 F. Supp. 2d at 222 (procedural harm of NEPA "does

bolster plaintiff's case for a preliminary injunction"); *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C.1998) (procedural harm coupled with environmental injury warrants injunction). "[T]he harm at stake is …the added *risk* to the environment that takes place when government decisionmakers make up their minds without having before them a[] [proper] analysis." *Sierra Club v. Marsh,* 872 F. 2d 497, 500 (1st Cir. 1989) (emphasis original).

C. The Balance Of The Equities Favors A Preliminary Injunction.

If construction of the Project is allowed to proceed, Plaintiffs (and the public interest) will suffer multiple irreparable harms, identified above. (*See also,e.g.*, Ex. 2, Mitchell Declaration ¶¶ 6-15; Ex. 4, Franklin Declaration, ¶ 5) The cutting of trees and the demolition of roadways cannot be reversed. Nor can the integrity of this historic Olmsted park be restored once destroyed.

In contrast, the Defendants will suffer little in the way of harm, apart from some necessary delay of weeks or months against a construction cycle that is planned to last for four or more years. To that end, as of the time of filing, the City has not yet allotted the contracts for the various phases of roadwork on Hayes which is the first phase, nor have they for the later phases of work that will involve Cornell and Marquette Drives. (Ex. 1; *see also* Ex. 3, Rachlis Declaration, ¶ 6) As to the Foundation, the Obama Foundation still can proceed with its mission at other sites that it could rent or lease in the City, just as it has done to date. And it could use the time to work to also seriously consider multiple alternatives to Jackson Park. Any further losses that the Foundation faces result from its decision[5] to push the envelope by seeking development in Jackson Park, knowing of the relevant statutory requirements and difficulties created by its decisions.

[5] The City expressly abdicated decision-making control over location to the private foundation: "***the City defers to the sound judgment of the President and his Foundation as to the ultimate location of the Presidential Library.***" (Complaint, Ex. 1, "Whereas" Clause on Page 4); emphasis supplied)

If not enough, harm to environmental resources normally outweighs a project proponent's financial interests. *See, e.g., Overton Park*, 401 U.S. at 412-13; *S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009). That is true even where the Project proponent has already expended considerable resources in the permitting process, which is almost always the case. *See, e.g., Quechan Tribe of the Ft. Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1121 (S.D. Cal. 2010) ("While the court is sympathetic to the problems Defendants face, the fact that they are now pressed for time and somewhat desperate after having invested a great deal of effort and money is a problem of their own making and does not weigh in their favor.")

D. Injunctive Relief Is In The Public Interest.

Finally, the public interest supports entry of a preliminary injunction pending resolution of the merits. In weighing the public interest, the courts look to the intent of the statutes at issue. *See, e.g., Marshall v. Barlow's, Inc.*, 436 U.S. 307, 331 (1978) (holding that in the first instance the court looks to the statutes enacted by Congress rather than to its own analysis of desirable priorities). Here, the relevant statutes establish environmental protections for the resources now threatened by the City's and Foundation's imminent construction of the OPC. The public interests codified in those statutes would be well-served by temporarily enjoining construction pending resolution, on a full administrative record, of the merits of Plaintiffs' claims.

Furthermore, the courts have long recognized that "there is an overriding public interest…in the general importance of an agency's faithful adherence to its statutory mandate." *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977). Thus, there is "a separate, compelling public interest" in favor of injunctive relief pending full agency compliance with the specific environmental requirements here at issue. *In re Medicare Reimbursement Litig.*, 309 F.

Supp. 2d 89, 99 (D.D.C. 2004); *see also Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 326-27 (D.C. Cir. 1987) (public interest in NEPA compliance). The public interest in compliance with environmental law is particularly important here because Defendants' violations of law are not minor technicalities or harmless oversights. On the contrary, they go to the heart of Congressional mandates requiring federal agencies to fully and accurately evaluate the potential impacts of their actions on environmental and historic resources, and to pursue less-damaging alternatives, and involve the public. *See, e.g., Found. on Econ. Trends*, 756 F.2d at 158 (holding that failure to prepare proper NEPA review is not merely a technical violation).

The Eighth Circuit's decision in *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d at 982-83 is instructive. That case involved (i) a project intended to increase the efficiency, security, and reliability of the regional electric grid, *id*. At 983, 990; (ii) a decision by a federal agency to issue the permits for a major project without first preparing an EIS, *id*. at 990-91; and (iii) a request to preliminarily enjoin a portion of the project's construction pending resolution on the merits.

The federal defendants and the private-sector project proponent opposed the request for injunctive relief, arguing that an injunction would delay important improvements in regional grid reliability. *Id*. at 997. The district court found that these public interests were outweighed by the importance of ensuring that federal agencies comply with environmental law: "an injunction was in the public interest because it would convey to the public the importance of having its government agencies fulfill their obligations and comply with the laws that bind them." *Id*. The Eighth Circuit agreed, holding that "[t]he environmental dangers at stake in this case are serious and the public interests that might be injured by a preliminary injunction, such as temporary loss of jobs or delays in increasing energy output in the region, do not outweigh the public interests

that will be served." *Id*. at 997-98. The OPC presents no pressing public necessity remotely close to the improvement of the electric grid, and merits the same conclusion.

II. A Substantial Bond Is Unwarranted.

Federal Rule of Civil Procedure 65(c) confers broad discretion to waive the normal requirement to post a bond in connection with injunctive relief. *See Natural Res. Defense Council, Inc. v. Morton*, 337 F. Supp. 167, 168 (D.D.C. 1971); *People of State of Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985). In public interest cases like this one, where plaintiffs seek to enforce public rights conferred by statute, the courts traditionally exercise that discretion to not impose or strictly limit the amount of any bond imposed. *See, e.g., Scherr v. Volpe,* 466 F.2d 1027 (7th Cir. 1972) (affirming district court decision to not impose bond in public interest case); *Van De Kamp*., 766 F.2d at 1325- 26; *see also Sierra Club v. Block,* 614 F. Supp. 488, 494 (D.D.C. 1985) ($20 bond)*; Envtl. Defense Fund, Inc. v. Corps of Eng'rs of U.S. Army*, 331 F. Supp. 925, 927 (D.D.C. 1971) ($1 bond). After all, "Congress made clear that citizen groups are not to be treated as nuisances or troublemakers, but rather as welcomed participants in the vindication of environmental interests." Plaintiffs respectfully submit that in light of the public interests animating Plaintiffs and their claims, no substantial bond is warranted here.[6]

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that their Motion for Preliminary Injunction be granted consistent with their request in Paragraph 7 of their Motion.

[6]While Plaintiffs' net assets are not relevant here (because the exception to standard bond requirements is based on the public interest nature of this litigation rather than the indigence of the parties), it should be known, for example, that Nichols Park Advisory Council has little as seen by way of its annual report. *See, e.g.,* Ex. 4, Franklin Declaration, ¶ 7. Same is true for Protect Our Parks. (Ex. 5, Caplan Declaration, ¶ 9) The other plaintiffs are individuals.

Dated: June 15, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael Rachlis, an attorney, hereby certify that on this 15th day of June, 2021, I caused a copy of the **Plaintiffs' Brief in Support of Their Motion for Preliminary Injunction** to be electronically filed with the Clerk of the United States District Court for the Northern District of Illinois using the CM/ECF system, which will send notification of such filing to all parties that have appeared in this action.

/s/ Michael Rachlis