No. 20-

IN THE SUPREME COURT OF THE UNITED STATES

PROTECT OUR PARKS, INC. AND MARIA VALENCIA,
Petitioners,

v.

THE CITY OF CHICAGO AND THE CHICAGO PARK DISTRICT,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the Plaintiffs possess Article III standing to bring their takings and due process claims in light of the Seventh Circuit's application of *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) and similar authorities of this Court?
2. If standing exists, whether the City of Chicago violated Plaintiffs' Fifth and Fourteenth Amendment rights on their takings and due process claims?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioners are Protect Our Parks, Inc. and Maria Valencia.

The Respondents are the City of Chicago and the Chicago Park District.

Petitioner Protect Our Parks, Inc. is a non-profit corporation with no parent entities that does not issue stock.

RELATED PROCEEDINGS

Protect Our Parks, Inc. v. Chicago Park District, et al, No. 18-cv-03424, U.S. District Court for the Northern District of Illinois. Judgment entered June 11, 2019 (Motion for Summary Judgment) and November 6, 2019 (Rule 60 Motion).

Protect Our Parks, Inc. v. Chicago Park District, et al, Nos. 19-2308 and 19-3333 (Consolidated), U.S. Court of Appeals for the Seventh Circuit. Judgment entered on August 21, 2020; rehearing denied on October 8, 2020 (amended October 13, 2020).

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The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Protect Our Parks, Inc. v. Chicago Park District, et al,* 971 F.3d 722 (7th Cir. 2020). (Appendix A) The Seventh Circuit opinion affirmed in part and vacated in other part the decisions of the United States District Court for the Northern District of Illinois (Appendices B, C), reported at 385 F. Supp. 3d 662 (N.D. Ill. 2019).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

The Seventh Circuit's opinion was issued on August 21, 2020. The Seventh Circuit denied a Petition for Rehearing on October 8, 2020 (amended on October 13, 2020). This petition is timely based on the Supreme Court's March 19, 2020 Order extending deadlines to 150 days.

STATUTORY PROVISIONS INVOLVED

The United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The United States Constitution, Fourteenth Amendment:

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C § 1983:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of

Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

1. Based upon the complaint and record before it, the Seventh Circuit Court of Appeals held that Plaintiffs Protect Our Parks, Inc. and Maria Valencia lacked standing in federal court to raise their state law claims that, *inter alia,* both the City of Chicago and the Chicago Park District violated the Illinois public trust doctrine when, for a total consideration of $10 received, they gave away nearly 20 acres of public parkland and public monies to a private entity, the Obama Foundation. The Seventh Circuit, interpreting *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), determined that Plaintiffs' state law claims—which were based upon an undivided interest in public trust land which the Illinois Supreme Court adopts for establishing standing under Illinois law—did not satisfy Article III's standing requirement because of a lack of a particularized and concrete injury. In that same opinion, however, the Seventh Circuit reversed field to hold that the want of any particularized and concrete injury was no bar under Article III to prevent adjudication of Plaintiffs' federal takings and due process claims in federal court. After retaining jurisdiction on those federal claims, the Seventh Circuit affirmed the district court's grant of summary judgment on the merits of both federal claims.

2. The history of this case begins in 1869 when the State of Illinois enacted a statute that conveyed Jackson Park to a public commission to hold the property in

trust for its citizens. That grant provides that the property "**shall be held, managed and controlled by [the Commissioners] and their successors as a public park, for the recreation, health and benefit of the public, and free to all persons forever.**" **(emphasis supplied)** The Illinois General Assembly deeded the real estate comprising Jackson Park to what would become the Chicago Park District subject to the above referenced restrictions, binding on successors, in perpetuity delineating the purposes for which the property may be used. From its 1869 dedication until 2018, Jackson Park was held in public trust by the South Park Commission and its successor the Chicago Park District.

3. The Obama Foundation (the "Foundation") is a private, non-governmental entity which, in approximately 2014, began its search for a home for a presidential library for the 44thth President of the United States. Three related proposals presented by the University of Chicago were to locate the presidential library on the City of Chicago's South Side, including in Jackson Park and another near Washington Park. The University offered existing University-owned land and, if necessary, acquiring additional lands. (*See* Appeal Docket No. 24, A.087-088) Economic studies provided that the Washington Park site "would most amenably accommodate new businesses and investment that might come into the area due to the presence of a presidential library." (District Court Docket No. 129-1 at CITY_007881) Based on that information, the Washington Park site was ranked highest by the Foundation as the location for the presidential library. (Appeal Docket No. 24 at A.094, A.097, lines 8-16)

4. Defendants City of Chicago and Chicago Park District did not take any part in the Foundation's initial efforts to site the OPC. Instead, the City Council adopted an ordinance in 2015, which stated that the City understood that the Foundation was looking to locate a presidential library in Chicago, and further stipulated that the City would leave the choice entirely to the Foundation as to where to locate that project and what to build. The City performed no report or analysis that set forth the considerations and/or difficulties in regards to selecting Jackson Park—the required road closings, the disrupted traffic patterns, the mass destruction of mature trees, and the impact of the new construction on the visual and operational integrity of Jackson Park. Nor did this, or indeed any other report, consider the site's physical ability to accommodate the proposed library, given that it abuts the West Lagoon in Jackson Park whose close connection to Lake Michigan and its rising waters poses serious risks of construction and maintenance of the OPC at that location. Nor did these reports compare the pros and cons of the Jackson Park site with sites located in or near Washington Park (or other locations), so no comparisons or evaluations were made in order to determine which locations were superior in terms of access to public transportation, potential for economic growth, reduction in environmental damage, and cost effectiveness. (Appeal Docket No. 24 at A.102, lines 20-23; A.103, lines 15-19; A.104, lines 13-22)

5. Facing no barriers or opposition from the City, the Foundation chose to abandon its plan to build a presidential library. The Foundation unilaterally redesignated its project as a presidential center which was done in part to avoid

statutory restrictions on the size of presidential libraries imposed under the National Archives and Record Act. *See* 44 U.S.C. § 2101, *et. seq*. By calling the proposed campus a "presidential center" those limitations, and others, no longer applied. Put explicitly, the decision to build high and as large as desired inside Jackson Park was made by the Foundation solely and for *its* own benefit. The upshot is that, with the blessing of the City, the Foundation now hopes to place a 235-foot tall tower, a huge forum building, a branch of a public library, and an athletic field on the Jackson Park site. It is planned to cut to the ground nearly 1000 mature trees and close major vistas and thoroughfares which have peacefully coexisted since the Park's 1869 dedication. Not only does the City wish to give this tract of land—arguably the most valuable land inside Jackson Park—to the Foundation, but under their deal about 10 additional acres are slated to be lost to public use by expanding roadways on the east and west edge of Jackson Park to offset, but only in minor part, the loss of four key roads inside Jackson Park.

6. Petitioner Protect Our Parks ("POP") is an Illinois not-for-profit charitable corporation registered under 501(c)(3). POP is comprised of individuals who, as residents and taxpayers, enjoy access to and use of Chicago's dedicated public parks, including historic Jackson Park, and share in common the need and public interest in enforcing the existing park protection laws and regulations to preserve and protect Chicago's public parks, including but not limited to protection from being diverted to private interests. Maria Valencia is a Chicago resident, and uses public parks in Chicago, including Jackson Park. They filed suit raising both state law

claims, including violation of public trust and *ultra vires*, as well as federal claims alleging both taking and due process violations. Critically, both the state and federal claims were based on the same fundamental argument that the Plaintiffs maintained a beneficial and undivided interest in Jackson Park, which is recognized as public trust property.

7. The trial court granted the City's and Park District's motion for summary judgment and denied Plaintiffs' motion for summary judgment on all of state and federal claims. 385 F. Supp. 3d 662 (N.D. Ill. 2019).

8. POP and Valencia filed a timely appeal from the district court's judgment to the United States Circuit Court of Appeals for the Seventh Circuit. (Appeal No. 19-2308) While that appeal was pending, certain new findings were included within a special report that was prepared as part of ongoing statutorily required reviews for the Foundation's project, called an "assessment of effects" report prepared pursuant to Section 106 of the National Historic Preservation Act. (Appeal Docket No. 24 at A.294-320) Those exhaustive findings conclusively demonstrated the significant and severe adverse effects associated with the proposed OPC project, and, the Plaintiffs contended, established undisputable facts that ran counter to the district court's summary judgment rulings. Plaintiffs then filed a Federal Rule of Civil Procedure 60 motion advising the court of those adverse findings, and then asked for post-judgment relief by re-opening the record on the strength of new information not previously available to the district court. (District Court Docket No. 156) The district court refused on the ground that the Defendants met the standard

of care under the public trust doctrine, by showing that their paperwork for the ordinance complied with all formal requirements, or, failing that, demonstrating at least one public benefit, which controlled no matter how many objections could be raised to it. The district court's Rule 60 decision was then appealed (Appeal Case No. 19-3333), and the two appeals were consolidated. (Appeal Docket No. 28)

9. On August 21, 2020, the Seventh Circuit issued its opinion in this matter. As to Plaintiffs' state law claims, the Seventh Circuit reversed the district court's summary judgment finding that there was no subject matter jurisdiction, holding that there was no Article III jurisdiction for those claims. The Seventh Circuit stated, for example, that the Plaintiffs' "public trust and ultra vires claims each allege only that the government has failed to follow the law." In fact, Plaintiffs' state law claim made no such wishy-washy statement, but was to the contrary solidly based upon the Plaintiffs' undisputed, undivided beneficial interests in public land as set forth in *Paepcke v. Public Building Comm'n of Chicago*, 263 N.E.2d 11, 18 (Ill. 1970). Against this incorrect characterization, the Seventh Circuit interpreted and applied this Court's precedent in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) to dismiss the state law claims for lack of subject matter jurisdiction.

10. But thereafter, the Seventh Circuit held the Plaintiffs' undivided beneficial interest allowed the court to retain jurisdiction over Plaintiffs' federal claims, claiming that it did in fact allege a concrete and particularized interest, and proceeded to affirm the district court's summary judgment ruling on the merits of Plaintiffs' claims that the Defendants' actions violated both the Due Process and

Takings Clauses of the Fifth Amendment. In so doing, the Seventh Circuit offered two distinct characterizations of the Plaintiffs' interest in its state and federal claims. More specifically, it held that "the federal claims do allege a cognizable injury: "the deprivation of a property right." 971 F.3d at 736. In a footnote, the Seventh Circuit added that "the mere fact that the alleged right is widely shared does not defeat standing. Being deprived of one's property is a concrete and particularized injury, even if the property is intangible or one's ownership is fractional." *Id.* at 737, n.4 (*citing Spokeo Inc. v. Robins*, 136 S.Ct. 1540, 1548-49 (2016) and *Warth v. Seldin*, 422 U.S. 490, 501 (1975)), for the proposition that an injury can be "distinct and palpable ... even if it is an injury shared by a large class of other possible litigants"). It then continued by saying "the alleged property right—a beneficial interest in a public park—is highly unusual, and one might be immediately skeptical about whether it exists." *Id.* at 736. The Seventh Circuit further held that the Plaintiffs' federal claims were defective not only because of "the lack of a property interest," but also because their claim for injunctive relief "suggests that their complaint is that the Center does not qualify as a 'public use' rather than that the City has failed to pay them 'just compensation.'" *Id.* at 737. It then held the Plaintiff's claims failed on the merits by noting that "even if the doctrine conferred a property interest on members of the public, that interest would not necessarily qualify for protection under the Constitution." *Id.* at 737, n.5. As to the procedural due process claims, the Seventh Circuit affirmed the district court providing that the "City enacted four separate

ordinances approving various aspects of the Center," and that a "legislative determination provides all the process that is due." *Id.* at 738.

11. The Seventh Circuit also affirmed, in largely conclusory fashion, the district court's denial of Plaintiffs' Rule 60 motion. *Id.*

12. A petition for rehearing was filed by the Plaintiffs on September 4, 2020, which was subsequently denied on October 8, 2020 (which was then amended on October 13, 2020).

REASONS FOR GRANTING THE WRIT

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT CREATED BY THE SEVENTH CIRCUIT'S DECISION ON ARTICLE III STANDING.

It is beyond controversy that under federal law, no party is entitled to bring either a federal or state claim in federal court unless they can meet the requirements for Article III standing, which require that the underlying claim involves a "concrete" and "particularized" injury. In light of the Seventh Circuit's application of *Lujan* to dismiss Plaintiffs' state law claims for lack of subject matter jurisdiction, the Seventh Circuit's finding that there was standing for the federal due process and takings challenges runs afoul of well-established precedent from this Court.

Under *Lujan*, the focus of a standing inquiry must be on the party, and not the claim, as a "'fundamental aspect of standing' is that it focuses primarily on the party seeking to get his complaint before the federal court rather than 'on the issues he wishes to have adjudicated.'" *U.S. v. Richardson,* 418 U.S 166, 174 (1974) (*citing*

Flast v. Cohen, 392 U.S. 83, 99 (1968)). [1] Further, on this issue, the Supreme Court maintains a strict separation between standing and the merits. Thus, in *Richardson*, the plaintiff, as a member of the general public, could not obtain taxpayer standing in order to require the Secretary of the Treasury to make a public accounting of the receipts and expenditures of the Central Intelligence Agency. And once that point was recognized, the Supreme Court reached its inevitable conclusion that these actions must be dismissed.

> *We need not and do not reach the merits* of the constitutional attack on the statute; our inquiry into the 'substantive issues' is for the limited purpose indicated above. The mere recital of the respondent's claims and an examination of the statute under attack demonstrate how far he falls short of the standing criteria of *Flast* and how neatly he falls within the Frothingham [v. Mellon, 262 U.S. 447 (1923)] holding left undisturbed. . . .

Richardson, 418 U.S. at 174-75 (emphasis added).

The Seventh Circuit's decision to retain jurisdiction over Plaintiffs' federal law claims, in light of its application of *Lujan* to dismiss Plaintiffs' state law claims. cannot be reconciled with similar authorities from this Court. Longstanding principles established by this Court demand consistency in regards to issues of Article III standing. Here, the Seventh Circuit held that even though the Plaintiffs' undivided beneficial interest in public lands did *not* allow it to establish standing on the state law claims, that *identical* interest *did* allow it to dismiss their federal law

[1] *Flast* created a narrow exception for establishment clause claims from the general rule that denies taxpayer or citizen standing to enjoin government action on the ground that it exceeds federal power, which was in turn limited in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464 (1982).

claims on the merits. *See* 971 F.3d 937, note 4. In so doing, the Seventh Circuit's decision departs from the basic standing rules under Article III, whose uniform standard of a discrete and particular interest applies to federal and state law claims alike. Thus, in the one breath the Seventh Circuit held that the Plaintiffs did allege a property interest under state law, only in the next to state that the Plaintiffs "lacked" any property interest.

This jarring disjunction on the standing issue was both unprecedented and unjustified. The same undivided interest was in play on both the state law public trust claim and the federal takings claim. The only difference is that under the public trust doctrine, the remedy for the conversion of the undivided interest is a decision to block the transfer if as yet unmade, or to require the return of the property plus interest accrued or profit obtained (whichever is larger) if the transfer has in fact been made. In contrast, under the Takings clause the transfer can go forward so long as it is for a public use, but only if just compensation is made. Hence, the difference between the two claims lies solely in the choice of remedies to vindicate the property interest in question. These remedial differences, however, have nothing whatsoever to do with the citizens' standing to pursue such claims in both cases.

The Seventh Circuit sought to deny this simple proposition by erroneously insisting that the Plaintiffs' added a "twist" to their public trust claim, which it mischaracterized as alleging "only that the government has failed to follow the law." But that thin description is inaccurate as well as far too vague to be of any use, for it is equally consistent with any charge that the government has not followed any

number of constitutional, statutory or regulatory duties, all without making any specific reference to the public trust doctrine. In fact, the complaint for breach of the public trust doctrine rested on the explicit view that the duties of a public trustee and a private trustee were identical, and that the duties owed by private trustees to private beneficiaries paralleled those that public trustees owed to their beneficiaries—loyalty, care, and candor.

Thus, although the Seventh Circuit's interpretation of *Lujan* was limited *only* to the state law claims, with respect to the federal takings and due process claims, the Seventh Circuit applied a different standard:

> Neither of these claims can get off the ground unless the plaintiffs prove that they have a private property interest in Jackson Park. To accomplish that, the plaintiffs return to the public trust doctrine and add a twist: they argue that the public trust doctrine not only curtails a state's ability to transfer public land to a private party but also confers a private property right on members of the public. Analogizing to the law of trusts, the plaintiffs insist that they are "beneficiaries" of Jackson Park, which the defendants hold in trust on the public's behalf. And, according to the plaintiffs, this "beneficial interest" is private property that is protected by the United States Constitution. . . . To be sure, the alleged property right—a beneficial interest in a public park—is highly unusual, and one might be immediately skeptical about whether it exists. But when the existence of a protected property interest is an element of the claim, deciding whether the interest exists virtually always goes to the merits rather than standing. *Booker-El v. Superintendent, Ind. State Prison*, 668 F.3d 896, 900 (7th Cir. 2012).

Protect Our Parks, 971 F.3d at 736.

But this gloss is wholly inaccurate because the use of the term "beneficiary" to describe a member of the public, was not invented by the Plaintiffs, but explicitly lay at *Paepcke's* core when the Illinois Supreme Court unambiguously wrote: "If the 'public trust' doctrine is to have any meaning or vitality at all, the members of the

public, at least taxpayers who are the *beneficiaries* of that trust, must have the right and standing to enforce it." *Paepcke*, 263 N.E.2d at 18 (emphasis added). Nor is this use of the term beneficiary in any way exceptional. Throughout much of this nation's history the federal government has entered into treaties with various Indian tribes that call for the creation of reservations administered by the federal government. These statutory arrangements are explicitly called public trusts, and the members of the various tribes are beneficiaries of those trusts. The law was succinctly stated in *U.S. v. Mitchell*, 463 U.S. 206, 226 (1983): "[T]he existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust."

This standard and accurate use of the term "beneficiary" follows inexorably from the evolution of the public trust doctrine. Thus, even before the ratification of the United States Constitution, both courts and commentators noted the close parallelism between public and private fiduciaries. John Locke wrote that the social contract required "*that the government had a fiduciary obligation to manage properly what had been entrusted to it.*" Robert G. Natelson, *Legal Origins of the Necessary and Proper Clause, 52, 53, in* Gary Lawson et al., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (2010) (*citing* John Locke, THE SECOND TREATISE OF GOVERNMENT: § 136 (1690) (emphasis added). Natelson then identified six standard fiduciary duties, all of which were violated by the City in this case: A. The Duty to Follow Instructions and Remain Within Authority; B. The Duties

of Loyalty and Good Faith; C. The Duty of Care; D. The Duty to Exercise Personal Discretion; E. The Duty to Account, and F. The Duty of Impartiality. Natelson, *Legal Origins:* 57-60. All of these are implicated in this case. Elsewhere Natelson has written: "I have not been able to find a single public pronouncement in the constitutional debate contending or implying that the comparison of government officials and private fiduciaries was inapt. The fiduciary metaphor seems to rank just below 'liberty' and 'republicanism' as an element of the ideology of the day." Natelson, *The Constitution and the Public Trust,* 52 BUFF. L. REV. 1077, 1086 (2004). Yet, these passages, quoted in Plaintiffs' Opening Brief (Appeal Docket No. 23 at 30-32) were wholly ignored in the decision below.

Furthermore, the remaining case law relied upon by the Seventh Circuit fails to support its jurisdictional decision in regards to the federal claims. For example, the Seventh Circuit errs in relying in this context on *Booker-El v. Superintendent, Indiana State Prison*, 668 F.3d 896 (7th Cir. 2012) for the proposition that "finding the existence of a property goes to the merits and not to standing." *Protect Our Parks*, 971 F.3d at 736.

Context counts for everything, and the cases cited by the Seventh Circuit were all far removed from the public trust context. For instance, in *Booker-El* the plaintiff alleged that, as a prisoner, he had under Indiana law a beneficial interest in a trust fund dedicated to prisoners' well-being, which had been appropriated for other purposes by prison officials. In dealing with the standing issue, the court properly held that the class of prisoners had a colorable claim to those proceeds. Since this

was a small and determinate class, at no point in its discussion of either standing or the merits did the court discuss whether an undivided interest could support a citizen or taxpayer claim under Article III. Instead, the court noted that "[h]ere, the main issue for standing purposes is whether Booker-El has suffered an injury in-fact," 669 F.3d at 899, which it properly did, since it was a virtual certainty that "Booker-El would have a high probability of receiving benefits under a properly administered recreation fund. Because Booker-El would face a substantial risk in losing benefits to which he was entitled, misappropriation of these funds thus creates a substantial risk of harm." *Id*. The court then held that the applicable statute did not create a property interest in the plaintiff, so, even assuming the accuracy of that standing determination, the case was rightly dismissed on the merits after standing was independently established.

Booker-El does not provide support for the Seventh Circuit's decision or to abandon this Court's precedents as discussed *supra*. First, Illinois law has clearly held that the Plaintiffs do have an undivided equitable interest in public lands, which the Seventh Circuit's application of *Lujan* has found insufficient to establish standing under Article III. In contrast, Booker-El had standing because he was a member of a particularized class of prisoners who had the specialized interest needed to establish standing that citizens and taxpayers do not. *Booker-El* so clearly satisfied the requirement of particularized injury that the case necessarily proceeded to the merits stage, where recovery was denied because the plaintiff's colorable interest in the prison funds may have established standing, but it did not as a matter of Indiana

law create any substantive property interest. Put differently, Booker-El had Article III standing but no property interest. In contrast, the Plaintiffs here have a property interest but no Article III standing based on the record before the Seventh Circuit and its interpretation regarding the state law public claims; their property interest is protected under both the Takings and Due Process clauses as applied to the states, but at least based upon the pleading before the Seventh Circuit, did not present standing in federal district court. The Seventh Circuit erred when it inconsistently and under a separate standard maintained jurisdiction over the federal claims.

The Seventh Circuit's opinion is further muddied by its inaccurate rendition of *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016) and *Warth v. Seldin*, 422 U.S. 490 (1975), neither of which involved either taxpayer or citizen suits. For example, in *Spokeo*, plaintiffs brought a class action under the Fair Credit Reporting Act of 1970, claiming Spokeo generated false and misleading profiles of individual prospective employees. The Supreme Court held that the Ninth Circuit had not engaged in the necessary two-part analysis under which "the injury-in-fact requirement requires a plaintiff to allege an injury that is both "concrete *and* particularized" as called for by *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (emphasis added [by Supreme Court]). *See Protect Our Parks*, 971 F.3d 731 n.1. But even though any question of taxpayer or citizen standing was absent in *Spokeo,* the Seventh Circuit cited the case for the following proposition (*Id.* at 736 n.4): "The mere fact that the alleged right is widely shared does not defeat standing. Being deprived of one's property is a concrete and particularized injury,

even if the property is intangible or one's ownership is fractional." *See Spokeo*, 136 S. Ct. at 1548-49. However, *Spokeo's* reference to an interest that is "widely shared" only refers to the undisputed proposition that individual plaintiffs in a class action have standing to bring their respective claims for their individual losses, regardless of their size. It does not support the Seventh Circuit's inconsistent application of its determination that the state law claim of an undivided interest in public lands does not confer standing under Article III but does so under the Plaintiffs' federal claims.

II. IF THE PLAINTIFFS HAVE STANDING TO ASSERT THEIR FEDERAL CLAIMS UNDER ARTICLE III, THEN THE SEVENTH CIRCUIT ERRED IN HOLDING THAT THE LOSS OF THESE INTERESTS DID NOT CREATE EITHER A TAKINGS OR A DUE PROCESS VIOLATION.

In order to invoke either the Takings or the Due Process Clause on their behalf, the Plaintiffs must show that they have been deprived of a property interest that they have in public lands. In light of the unambiguous decision in *Paepcke*, it is clear that under Illinois law, the Plaintiffs' undivided interest in public trust lands triggers the property requirement for both the Takings and the Due Process claims. Furthermore, this Court held that these takings violations are remediable under 42 U.S.C. § 1983. *See Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162, 2167 (2019) ("The Civil Rights Act of 1871, after all, guarantees 'a federal forum for claims of unconstitutional treatment at the hands of state officials….'"); *Mathews v. Eldridge,* 424 U.S. 319 (1976) (statutory property interests protected by Fifth Amendment); *Patsy v. Bd. Of Regents of State of Florida*, 457 U.S. 496, 501 (1982). Accordingly, it is appropriate for any court to evaluate those claims on their merits.

The Seventh Circuit ignored these precedents as it equivocated on public trust claims as seen by the standing discussion above, leading it to erroneously affirm the trial court's summary judgment decision against Plaintiffs' federal claims. Thus, at one point, the Seventh Circuit offers a false contrast between the Plaintiffs' federal and state claims when it writes: "Unlike the state claims, the federal claims do allege a cognizable injury: the deprivation of a property right. To be sure, the alleged property right—a beneficial interest in a public park—is highly unusual, and one might be immediately skeptical about whether it exists." But later, the Seventh Circuit expresses doubt that there is really any property right at all when it writes that "[t]he lack of a property interest is the most fundamental defect in both of the plaintiffs' federal claims."

But there is no reason to be either skeptical about the Plaintiffs' property rights claims or to deny their existence. As noted earlier, the use of the term "beneficiary" to describe the interest of a Chicago resident comports with standard usage on this question. It is standard logic under modern constitutional law, moreover, that the characterization of property rights claims is a matter that is in the first instance left to state statutory and common law. Thus, in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), this Court laid down the rule that "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire" and "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. In addition, entitlements are, "'of course, . . . not created by the Constitution. Rather, they are

created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Paul v. Davis,* 424 U.S. 693, 709 (1976).

It is perfectly clear that the Plaintiffs' undivided interest in public property is not just an abstract need or desire. Rather it is an equitable interest in public lands that may be protected by either injunctive relief, damages or some combination thereof. It follows necessarily that the Seventh Circuit improperly downgraded the Plaintiff's interest in these public trust lands when it wrote: "Although the plaintiffs wish it were otherwise, the Illinois cases make clear that the public trust doctrine functions as a restraint on government action, not as an affirmative grant of property rights." 971 F.3d at 737. Quite simply, the one reason why the public trust doctrine functions as a restraint on government action is that the plaintiffs are beneficiaries who have an explicit right to enforce the public trust obligations under Illinois law pursuant to *Paepcke*.

The Seventh Circuit then makes a number of incorrect arguments to denigrate the importance of these property rights which then manifest themselves into a conclusory—but erroneous—affirmance of the district court grant of summary judgment on Plaintiffs' federal claims. For instance, the Seventh Circuit misconstrued the breadth of the public trust doctrine contained in *Paepcke*. In particular, the Seventh Circuit added unnecessary confusion into the law when it failed to articulate the correct relationship between legal and equitable claims that can arguably arise out of any given transaction. In *Paepcke*, the plaintiff held

property that was adjacent to Washington Park, four acres of which the City wished to convert to a public school. As a neighbor, the plaintiff had no chance to stop the construction of that school on the grounds that it constituted a common law nuisance, that is, an operation that the Restatement defines as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts §821D. These nuisances typically involve invasions by noises, smells, vibrations, or filth, or other activities "injurious to health." *See, e.g.* California Civil Code § 3479. An ordinary public school built on non-park land would not be a nuisance to its neighbors, and so too one that is built on park land.

Because the plaintiff in *Paepcke* understood that she could not succeed on a nuisance claim, she argued that the transfer of four acres of parkland from one public use to another was a violation of the public trust doctrine. That claim could be brought by *any resident* of the city regardless of where he or she lived. The Seventh Circuit misapprehended the legal situation when it asserted this nonsequitur by insisting that "[i]f adjacent landowners have no protected interest in public land, then the plaintiffs don't have one either." 971 F.3d at 737. But *Paepcke* only held that there was no *nuisance* claim *at law* in her capacity as neighbor. It then held that under the public trust doctrine the plaintiff could seek to vindicate her rights to stop this transaction: "If the 'public trust' doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it." *Paepcke,* 263 N.E.2d at 18.

The Illinois Supreme Court then considered that claim on the merits and held that the transfer of public park land to another public use did not constitute a violation of the public trust violation. In so doing, it had to make peace with the notion that the original terms of the 1869 grant could be read as imposing a complete ban on any and all construction on public trust lands. But it then invoked a long line of cases from multiple jurisdictions that indicated that some shifts in public use were permissible notwithstanding the literal language of the grant. *Id.* at 16-18.

By the same token, however, the terms of that grant did impose key limitations on the kinds of changes that could be made, which were typically for narrow government purposes such as the construction of a firehouse or railroad spur on public lands, all of which are wholly distinct from the outright transfer from the Defendants via the "use" agreement of a huge chunk of Jackson Park to the Foundation. In addition, *Paepcke* left undisturbed the earlier decision in *South Park Commissioners v. Montgomery Ward & Co.,* 93 N.E. 910 (1910), where the Illinois Supreme Court held that the 1869 grant precluded Illinois from the exercise of its eminent domain power to allow for the construction of new buildings in Grant Park. At that time, the Illinois Supreme Court observed that "the settled law of this state is that if the owner of private property offers to donate it to the public for a specified public use, and the offer is accepted, and the property devoted to such use, the state cannot change the use and apply the property to some other use inconsistent with the dedication." *Id* at 913.

Elsewhere in its opinion, the Seventh Circuit suggested that the decision to respect the holding of *Roth* was in some sense discretionary when it cited to this Court's decision in *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 757 (2005). To that end, the Seventh Circuit wrote in a cryptic footnote that "even if the [pubic trust] doctrine conferred a property interest on members of the public, that interest would not necessarily qualify for protection under the Constitution," citing to *Gonzales* and for this proposition: "Although the underlying substantive interest is created by 'an independent source such as state law,' *federal constitutional law* determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." (emphasis in the original). *Protect Our Parks*, 971 F.3d 737 n.5.

That quotation must, however, be set in proper context. In *Gonzales* the Supreme Court held that "a state-law restraining order" did not create a constitutional property interest under the Due Process Clause when state authorities recklessly failed to respond to her request for assistance after her husband had violated the order. In holding that this novel claim was not protected under the Due Process Clause, the Court explicitly affirmed the general rule in prior case law, by explicitly distinguishing both *Roth* and *Paul* and affirming their general validity. *Id.* at 757.

It is abundantly clear that the beneficial interest in a trust, as defined under *state* property law, is as protected under the constitution as are ordinary contract rights. There is no exotic issue that requires a further inquiry as to whether a novel

claim, such as the right to a protective order, creates a property interest, for that question is conclusively and authoritatively resolved in *Paepcke* in line with the overwhelming weight of authority.

Once the property issue is properly resolved, the failures of the Seventh Circuit to follow the precedents of this Court are evident. The fair value of the property transferred to the Foundation by the sham 99-year "use" agreement over nearly 20 acres of prime parkland in Jackson Park was far greater than $10. The test for just compensation is strict: "There can, in view of the combination of those two words [just and compensation], be no doubt that the compensation must be a full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). That requirement of a "full and perfect equivalent" is not met here. And the rapid-fire number of official hearings for a project of this magnitude and complexity totaling four (two occurring in May 2018 (District Court Docket No. 124, ¶¶ 15-18)) and the others in October 2018 (Appeal Docket No. 24 at A.149-51) (noting a committee meeting on October 11, 2018 and City Council passage on October 31, 2018) offered no meaningful opportunity to challenge a predetermined result and does not count as the provision of due process.

In addition, the record makes it clear that the creation of any private center, even for an ex-President, does not qualify as a public use. For example, in *Lake Michigan Federation v. U.S. Army Corps of Engineers*, 742 F. Supp. 441, 445 (N.D. Ill. 1990), the district court held that the public trust doctrine barred the transfer of some portion of the Lake Michigan lakebed to Loyola University on the ground that

the transaction violated the public trust doctrine. The facts of that case were far more favorable to Loyola, which covered the costs of its operation, created new usable public spaces, and contemplated no construction on the land reclaimed for private use. Nonetheless, in holding that the public trust doctrine under Illinois law blocked this transaction, the district court distilled three propositions that doom the creation of OPC on the ground that it creates an impermissible private use of public trust lands:

> First, courts should be critical of attempts by the state to surrender valuable public resources to a private entity. Second, the public trust is violated when the primary purpose of a legislative grant is to benefit a private interest. Finally, any attempt by the state to relinquish its power over a public resource should be invalidated under the doctrine. *Illinois Central Railroad v. Illinois.*

Id. at 445 (citations omitted).

Hence it follows that if an asserted transfer of a property interest took place, it failed *both* the just compensation and the public use requirements of the Takings Clause as applied to the states through the Fourteenth Amendment. The Seventh Circuit erred in holding otherwise, contrary the settled law and sound policy.

CONCLUSION

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

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 19-2308 & 19-3333

PROTECT OUR PARKS, INC.,
and MARIA VALENCIA,

Plaintiffs-Appellants,

v.

CHICAGO PARK DISTRICT
and CITY OF CHICAGO,

Defendants-Appellees.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:18-cv-3424 — **John Robert Blakey**, *Judge*.

ARGUED MAY 21, 2020 — DECIDED AUGUST 21, 2020

Before MANION, BARRETT, and BRENNAN, *Circuit Judges*.

BARRETT, *Circuit Judge*. This case is about the plaintiffs' quest to halt construction of the Obama Presidential Center in Chicago's Jackson Park. First developed as the site for the Chicago World's Fair in 1893, Jackson Park has a storied place in Chicago history, and as public land, it must remain dedicated to a public purpose. The City made the judgment that hosting

a center devoted to the achievements of America's first African-American President, who has a longstanding connection to Chicago, fit that bill. Vehemently disagreeing, the plaintiffs sued the City of Chicago and the Chicago Park District to stop the project. They brought a host of federal and state claims, all asserting variants of the theory that the Obama Presidential Center does not serve the public interest but rather the private interest of its sponsor, the Barack Obama Foundation.

The district court granted summary judgment to the defendants across the board, and the plaintiffs appeal. We affirm the district court's judgment as to the federal claims, but we hold that it should have dismissed the state claims for lack of jurisdiction. Federal courts are only permitted to adjudicate claims that have allegedly caused the plaintiff a concrete injury; a plaintiff cannot come to federal court simply to air a generalized policy grievance. The federal claims allege a concrete injury, albeit one that, as it turns out, the law does not recognize. The state claims, however, allege only policy disagreements with Chicago and the Park District, so neither we nor the district court has jurisdiction to decide them.

I.

In 2014, the Barack Obama Foundation began a nationwide search for the future location of the presidential library for the 44th President. Eventually, the Foundation selected Jackson Park on Chicago's South Side to house the Obama Presidential Center. The City of Chicago acquired the 19.3 acres necessary from the Chicago Park District, enacted the ordinances required to approve the construction of the Center, and entered into a use agreement with the Obama Foundation to govern the terms of the Center's construction, ownership, and operation. The Jackson Park location, the

Foundation believed, would be best situated to "attract visitors on a national and global level" and would "bring significant long term benefits to the South Side."

But construction of the Center will require the removal of multiple mature trees, as well as the closure and diversion of roadways. It will also require the City to shoulder a number of big-ticket expenses. Unhappy with the environmental and financial impact of the project, the group Protect Our Parks and several individual Chicago residents sued both the City and the Park District to halt construction of the Center.

The plaintiffs raised four claims that are relevant here. First and foremost, they claimed that the defendants violated Illinois's public trust doctrine. Briefly stated, the public trust doctrine limits the government's ability to transfer control or ownership of public lands to private parties. The plaintiffs argued that the City violated the doctrine by transferring control of public parkland to the Obama Foundation for a purely private purpose.

Next, the plaintiffs claimed that under Illinois law, the defendants acted ultra vires—in layman's terms, beyond their legal authority—in entering the use agreement with the Foundation. Specifically, the plaintiffs maintained that the use agreement between the City and the Foundation violates Illinois law because, among other things, it delegates decision-making authority to the Foundation, grants the Foundation an illegal lease in all but name, 70 ILCS 1290/1, exchanges the property for less than equal value, 70 ILCS 1205/10-7(b), and fails to require the City to "use, occupy, or improve" the land transferred to it from the Park District, 50 ILCS 605/2.

The plaintiffs' final two claims arise under federal law. They argued that, by altering the use of Jackson Park and handing over control to the Foundation, the defendants took the plaintiffs' property for a private purpose in violation of the Takings Clause of the Fifth Amendment. In the same vein, the plaintiffs asserted that the defendants deprived them of property in a process so lacking in procedural safeguards that it amounted to a rubberstamp of the Foundation's decision and violated their rights under the Due Process Clause of the Fourteenth Amendment.

The district court granted summary judgment to the City and the Park District on all four of these claims, and the plaintiffs appealed from that decision. While the first appeal was pending, the federal government issued a provisional report about the potential effects of the project, including its effects on the environment. The plaintiffs then moved for relief from the judgment under Federal Rule of Civil Procedure 60(b), alleging that the report was new, material evidence that undermined the district court's decision. The district court denied the motion, and the plaintiffs appealed again. We consolidated the two appeals.

II.

We'll start with the plaintiffs' appeal from the district court's grant of summary judgment on the state law claims. Before we can address the merits, though, we have "an obligation to assure ourselves" of our jurisdiction. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006) (citation omitted). And jurisdiction—specifically, the plaintiffs' standing to bring their state claims in federal court—proves to be a problem here. We asked the parties to address this issue in supplemental briefing, and while both the plaintiffs and the

defendants assure us that the plaintiffs have standing, we aren't convinced.

The requirement of standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Its elements are familiar: "the plaintiff must allege an injury in fact that is traceable to the defendant's conduct and redressable by a favorable judicial decision." *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 333 (7th Cir. 2019). The first requirement—injury in fact—is "the '[f]irst and foremost' of standing's three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (alteration in original) (citation omitted). It requires a plaintiff to demonstrate that she "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560). The parties insist that the plaintiffs have adequately alleged that they will suffer an imminent, concrete injury as a result of the defendants' alleged violations of Illinois law.

To understand the arguments that the parties make to support this point, one must first understand the public trust doctrine, which is the basis of the plaintiffs' primary state law claim. Here's the nutshell version: the public trust doctrine, established in American law by *Illinois Central Railroad Co. v. Illinois*, prohibits a state from alienating its interest in public lands submerged beneath navigable waterways to a private party for private purposes. 146 U.S. 387, 455–56 (1892). Instead, a state may only alienate publicly owned submerged land to a private party if the property will be "used in promoting the interests of the public" or "can be disposed of

without any substantial impairment of the public interest in the lands and waters remaining." *Id.* at 453.

In the time since *Illinois Central*, some states, including Illinois, have applied the doctrine to land other than navigable waterways—which is important here because Jackson Park is not a navigable waterway. In fact, despite the doctrine's underwater origins, most of the recent Illinois cases deal with dry land. *See Friends of the Parks v. Chi. Park Dist.*, 786 N.E.2d 161, 169–70 (Ill. 2003) (applying the doctrine to Chicago's Soldier Field, built on parkland reclaimed from Lake Michigan); *Paepcke v. Pub. Bldg. Comm'n of Chi.*, 263 N.E.2d 11, 15–16 (Ill. 1970) (applying the doctrine to Chicago's Washington and Douglas parks); *Fairbank v. Stratton*, 152 N.E.2d 569, 575 (Ill. 1958) (applying the doctrine to the reclaimed land that now houses Chicago's McCormick Place convention center). Once such land has been dedicated to a public purpose, the Illinois Supreme Court has explained, the government "hold[s] the properties in trust for the uses and purposes specified and for the benefit of the public." *Paepcke*, 263 N.E.2d at 15. Dedication to a public purpose isn't an "irrevocable commitment[]," *id.* at 16, and judicial review of any reallocation is deferential, particularly if the land in question has never been submerged. Nonetheless, the doctrine requires courts to ensure that the legislature has made a "sufficient manifestation of legislative intent to permit the diversion and reallocation" to a more restrictive, less public use. *Id.* at 18.

In this case, the plaintiffs argue that the defendants' use agreement with the Obama Foundation violates the public trust doctrine because it transfers control of public land in Jackson Park to the private Foundation for a purely private purpose. And, drawing an analogy to private trust law, they

argue that the transaction could not have been in the public interest because it was inconsistent with the defendants' "fiduciary duties." In their telling, the public trust calls for heightened scrutiny of a transaction if it was "tainted by self-dealing, favoritism or conflicts of interest." They argue that the use agreement here fits that description for many reasons, including that the City negotiated with the Obama Foundation under the leadership of Mayor Rahm Emmanuel, who, as President Obama's former chief of staff, was eager to give the Foundation a sweetheart deal.

The parties offer three reasons why the plaintiffs have adequately alleged an injury in fact stemming from these alleged violations of state law. (While their focus is on the public trust doctrine, their arguments also apply to the plaintiffs' allegation that the City and Park District violated the statutes regulating the management of public land.) First, the plaintiffs assert that they have standing in federal court because their injury would be recognized in Illinois state court. Second, the plaintiffs suggest that they have standing to stop injury to Jackson Park. And finally, the defendants—though notably, not the plaintiffs themselves—argue that the plaintiffs have standing as municipal taxpayers. We address each argument in turn.

A.

Illinois courts have long recognized the public's injury from a violation of the public trust doctrine as sufficient to create a justiciable controversy. *See Paepcke*, 263 N.E.2d at 18. Thus, the plaintiffs insist, they have suffered a sufficient injury in fact to establish their standing in federal court. In other words, the plaintiffs claim that the existence of a justiciable

controversy in state court demonstrates that there is one in federal court too.

The plaintiffs misapprehend the doctrine of standing, which is a corollary of Article III's limitation of the "judicial power" to the resolution of "cases" and "controversies." U.S. CONST. art. III, § 2, cl. 1 (capitalization omitted). The requirement limits the power of *federal* courts and is a matter of *federal* law. It does not turn on state law, which obviously cannot alter the scope of the federal judicial power. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (asserting that standing in federal court "does not depend on [a] party's … standing in state court"). At the same time, federal law does not dictate the scope of state judicial power. Article III does not apply to the states, so "state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989). Unencumbered by these limitations, the states can empower their courts to hear cases that federal courts cannot—and many states have done just that. *See, e.g.*, F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 65–75 (2014) (cataloguing the variations between federal justiciability doctrines and those in state courts); JEFFREY S. SUTTON ET AL., STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE 790–816 (3d ed. 2020) (excerpting examples from state court decisions).

This case presents a prime example. The Illinois Supreme Court has specifically held that a plaintiff can bring suit under the public trust doctrine without showing that she "will suffer special damage, different in degree and kind from that suffered by the public at large." *Paepcke*, 263 N.E.2d at 18; *see id.* (overruling the prior, contrary rule). Instead, the Illinois

Supreme Court said, "If the 'public trust' doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of [the public] trust, must have the right and standing to enforce it." *Id.* In other words, Illinois has adopted precisely the *opposite* of the injury-in-fact requirement of federal standing, which demands that every plaintiff prove that he "seek[s] relief for an injury that affects him in a 'personal and individual way.'" *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (citation omitted); *see also Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1621 (2020) ("[T]he 'assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.'" (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982))).

While Illinois is free to conclude that "plaintiffs' rights as residents in a trust of public lands" may be "enforced without question," *Paepcke*, 263 N.E.2d at 18, Article III doesn't give us the same leeway. To sue in federal court, a plaintiff must also demonstrate an injury to her "separate concrete interest."[1] *Lujan*, 504 U.S. at 572. The plaintiffs have failed to do that here: their public trust and ultra vires claims each allege only that the government has failed to follow the law. All residents of

[1] We note that the plaintiffs did not allege the kind of concrete injury that many plaintiffs bringing environmental challenges do: "that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). That kind of injury is cognizable under Article III. *Id.*; *see also Lujan*, 504 U.S. at 562–63 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing."). The plaintiffs, however, made no such claim.

Chicago—indeed, advocates for good government everywhere—desire that the government follow the law. But recognizing standing based on such an "undifferentiated" injury is fundamentally "inconsistent" with the exercise of the judicial power. *Id.* at 575; *see also Hollingsworth*, 133 S. Ct. at 2662 ("[A] 'generalized grievance,' no matter how sincere, is insufficient to confer standing."); *Valley Forge Christian Coll.*, 454 U.S. at 482–83. For Article III purposes, the plaintiffs are nothing more than "concerned bystanders," and concerned bystanders are not entitled to press their claims in federal court. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973). The fact that Illinois would permit them to do so in state court is irrelevant to the Article III inquiry.

B.

The plaintiffs have an alternative argument: they argue that they have standing because Jackson Park will suffer an injury in fact as a result of the defendants' violations of state law. On this theory, the City's plan to turn part of Jackson Park into the Obama Presidential Center will cause irreparable "damage to Jackson Park" that is "fairly traceable to the construction project." The alleged damage includes, for example, departing from Frederick Law Olmsted's original plan for the landscape of Jackson Park and jeopardizing the Park's listing on the National Register of Historic Places.

But this argument fares no better than the last. Even if the Obama Presidential Center will damage Jackson Park, "[t]he relevant showing for purposes of Article III standing … is not injury to the environment but injury to the plaintiff." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). The plaintiffs can't repackage an injury to the

park as an injury to themselves. Nor can they sue on behalf of the park, which is what they seem to be trying to do. In limited circumstances, the doctrine of "third-party standing" permits a plaintiff to sue to vindicate the rights of someone else. *See, e.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (noting that the "Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights" (emphasis and citation omitted)). Here, though, the plaintiffs are trying to raise the rights of *something* else. Among the many problems with this maneuver is the fact that Jackson Park has no rights of its own to assert. *Cf.* ECUADOR CONST. tit. II, ch. 7, art. 71 (granting rights to nature).

C.

Finally, the defendants—but, notably, not the plaintiffs—argue that the plaintiffs have standing as municipal taxpayers of the City of Chicago.[2] The defendants took precisely the

[2] The defendants vaguely argue that "among the plaintiffs … are Chicago taxpayers." We take their argument to refer to plaintiff Maria Valencia, the only individual plaintiff remaining in the case. The record reflects that Valencia is a resident and taxpayer of the City of Chicago. But the record is silent as to Protect Our Parks—though as a nonprofit group, it presumably is not a municipal taxpayer. As an organization, then, Protect Our Parks would only have standing to the extent that "its members would otherwise have standing to sue in their own right." *Friends of the Earth*, 528 U.S. at 181. But the record is silent, too, on the group's membership. We thus proceed on the understanding that the municipal taxpayer standing argument hinges on Valencia. *See Chi. Joe's Tea Room, LLC v. Village of Broadview*, 894 F.3d 807, 813 (7th Cir. 2018) (noting that Article III is satisfied if "there is at least one individual plaintiff who has demonstrated standing" (citation omitted)).

opposite position in the district court, where they raised the plaintiffs' lack of municipal taxpayer standing as one reason why the district court should dismiss the state-law claims on jurisdictional grounds. In response, the plaintiffs asserted that they had municipal taxpayer standing, and the district court accepted that argument.

Things have changed on appeal. The plaintiffs' supplemental brief doesn't even mention municipal taxpayer standing, while the defendants now champion it as the basis for jurisdiction. It is not obvious why the plaintiffs have failed to embrace a district court decision in their favor, but the reason for the defendants' change of heart is easy to see—having secured a judgment on the merits, they'd prefer an affirmance to a dismissal. Still, the defendants were right the first time around: municipal taxpayer standing does not justify federal jurisdiction over these state-law claims.

Municipal taxpayer standing is a bit of a relic in the modern landscape of standing. It derives from *Crampton v. Zabriskie*, in which the Supreme Court held that "there is at this day no serious question" about "the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay." 101 U.S. 601, 609 (1879). The Court cited *Crampton* approvingly a half-century later in *Frothingham v. Mellon*, which rejected the proposition that standing to sue the federal government could be based merely on a plaintiff's status as a federal taxpayer. 262 U.S. 447, 487–88 (1923). En route to that holding, the Court distinguished between municipal taxpayers, who have a "peculiar relation … to the [municipal] corporation,

which is not without some resemblance to that subsisting between stockholder and private corporation," and federal taxpayers, any one of whom shares her "interest in the moneys of the treasury … with millions of others." *Id.* at 487. It thus left undisturbed "the rule, frequently stated by this court, that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation." *Id.* at 486.

The rule remains undisturbed, but it has grown increasingly anomalous. *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 221–23 (6th Cir. 2011) (en banc) (Sutton, J., concurring) ("While the municipal-taxpayer standing doctrine has stood still, … standing principles have moved on."). Although the Court has not actually relied on municipal taxpayer standing in decades, it has continued to assume the doctrine's validity. *See, e.g.*, *DaimlerChrysler*, 547 U.S. at 349. Meanwhile, it has developed a substantial body of law vigorously enforcing the principle that injuries cognizable under Article III cannot be "generalized," *Lujan*, 504 U.S. at 575–76, "undifferentiated," *United States v. Richardson*, 418 U.S. 166, 177 (1974), or insufficiently "particularized," *Spokeo*, 136 S. Ct. at 1548. It has also repeatedly emphasized that neither state nor federal taxpayers can satisfy this standard in a suit against the government for the illegal expenditure of taxpayer funds.[3]

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[3] Since *Frothingham*, the Court has only acknowledged standing for federal taxpayers in one substantive area—Establishment Clause cases. *See Flast v. Cohen*, 392 U.S. 83, 102–04 (1968). Even then, it has been reluctant to find *Flast*'s requirements satisfied. *See, e.g.*, *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007) (plurality opinion) (denying federal taxpayer standing in an Establishment Clause challenge because the allegedly illegal expenditures were made from general executive branch appropriations rather than specific congressional appropriations); *Valley*

See DaimlerChrysler, 547 U.S. at 345. Yet it has never explained why municipal taxpayers are differently situated—and it might find that difficult to do. *Frothingham* suggested that the city or county resident has a "peculiar relationship" with her local government, while the state or federal citizen has only a "minute" or "remote" tie to hers. 262 U.S. at 487. Maybe that's true in Grover's Corners. *See* THORNTON WILDER, OUR TOWN (1938). But why is a suit brought by one of Chicago's 2.6 million residents any more particularized than a suit by any of the 579,000 citizens of Wyoming? *QuickFacts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/WY,chicagocityillinois/PST045219 (last visited Aug. 20, 2020).

There's reason to think that the Court has recognized this reality—at least one opinion has hinted that municipal taxpayer standing should be brought into line with modern standing doctrine. *ASARCO*, 490 U.S. at 613 (plurality opinion) ("We have indicated that the same conclusion *may not hold* for municipal taxpayers, *if it has been shown* that the 'peculiar relation of the corporate taxpayer to the municipal corporation' makes the taxpayer's interest in the application of municipal revenues '*direct and immediate*.'" (emphasis added)). But undertaking that task is the Court's job, not ours. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (explaining that lower courts are not free to "conclude [that] more recent cases have, by implication, overruled an earlier precedent" but must instead "follow [a] case which directly controls" (citation and internal quotation marks omitted)). So, in analyzing whether the plaintiffs' injury is cognizable, we will not ask whether it is concrete and particularized. Instead, we will ask

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Forge Christian Coll., 454 U.S. at 479–80 (denying federal taxpayer standing in an Establishment Clause challenge to executive action).

only whether the elements of municipal taxpayer standing have been satisfied.

Municipal taxpayer standing has two threshold requirements. First, and most obviously, the plaintiff must actually be a taxpayer of the municipality that she wishes to sue. *Freedom from Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1470 (7th Cir. 1988). Second, the plaintiff must establish that the municipality has spent tax revenues on the allegedly illegal action. *Id.* The second requirement comes from the Supreme Court's decision in *Doremus v. Board of Education*, which requires a plaintiff to show that "the taxpayer's action … is a good-faith pocketbook action." 342 U.S. 429, 434 (1952). The plaintiff must be able to show that she has "the requisite financial interest that is, or is threatened to be, injured by" the municipality's illegal conduct. *Id.* at 435.

The burden of establishing standing is on the plaintiffs. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411–12 (2013). As we've already mentioned, though, the plaintiffs aren't the ones who have invoked municipal taxpayer standing—the defendants are. And despite their support of this theory now, the defendants' earlier argument against it was better. As the defendants told the district court, the record doesn't support the conclusion that the plaintiffs have suffered a direct pocketbook injury from the conversion of part of Jackson Park into the campus of the Obama Presidential Center. That is so for several reasons.

For one thing, a plaintiff who asserts municipal taxpayer standing "must show that the municipality has actually expended funds *on the allegedly illegal elements* of the disputed practice." *Nichols v. City of Rehoboth Beach*, 836 F.3d 275, 282 (3d Cir. 2016) (emphasis added). Here, the plaintiffs argue

that the "allegedly illegal elements"—which is to say, the elements of the defendants' actions that violate the public trust doctrine—are the construction and operation of the Obama Presidential Center. But the Obama Foundation—not the City—will bear the project's costs. The City's agreement with the Foundation provides that the cost of initially constructing the Center, of operating the Center once it is built, and of maintaining the Center going forward will all be the Foundation's responsibility. Thus, no tax dollars will be spent to build or operate the Center. And "if no tax money is spent on the allegedly [illegal] activity," then "[a] plaintiff's status as a municipal taxpayer is irrelevant for standing purposes." *Freedom from Religion Found.*, 845 F.2d at 1470.

To be sure, the City is set to spend millions of dollars to prepare the Jackson Park site for construction of the Center, even though it isn't paying for the Center itself. Specifically, the City will pay for three projects: alteration and rerouting of roadways, including removing Cornell Drive and converting the roadway into parkland; environmental remediation and utilities work; and construction of athletic facilities. But the plaintiffs have not claimed that those three projects themselves violate the public trust doctrine or are otherwise beyond the City's power to undertake. That means that those projects cannot be the allegedly offending elements of the defendants' actions, which in turn means that the City's spending on those projects is beside the point for municipal taxpayer standing. *Cf. Gonzales v. North Township*, 4 F.3d 1412, 1416 (7th Cir. 1993) (rejecting municipal taxpayer standing to challenge the display of a crucifix in a public park because the city did not pay to acquire, display, or maintain the crucifix itself). If the allegedly illegal conduct is the construction and operation of the Center, and taxpayer dollars aren't being

spent on that conduct, then that alone is enough to defeat the plaintiffs' municipal taxpayer standing.

But even if we accepted that the City-funded projects are relevant, there is yet another problem—there has been no showing that the City will pay for those projects with municipal taxes. *See Amnesty Int'l USA*, 568 U.S. at 411–12 (noting that "at the summary judgment stage," a plaintiff "can no longer rest on … 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts'" supporting standing (citation omitted)). It is not enough to simply allege that the City is spending money; the existence of municipal taxpayer standing depends on where the money comes from. The parties fail to grapple with the possibility that the relevant funds come from a source other than tax dollars. And that possibility isn't remote—nearly a third of the City's revenue comes from nontax sources. *See* CITY OF CHICAGO, 2020 BUDGET OVERVIEW 38, https://www.chicago.gov/content/dam/city/depts/obm/supp_info/2020Budget/2020BudgetOverview.pdf (last visited Aug. 20, 2020) (noting that 32.9% of the City's budget was derived from nontax revenue). These nontax sources are as varied as licensing fees, parking tickets, concessions contracts, and federal and state grants. *Id.* at 37–38 (cataloguing the sources of city revenue); *id.* at 48 (noting that the City received $1.66 billion in grants during its 2019 fiscal year and projecting that grants will account for 14% of the budget for the 2020 fiscal year). It would be far too simplistic to conclude that the City is spending *tax* money on a project simply because it is spending *some* money on a project.

Municipal taxpayers have standing to sue only when they have both identified an action on the city's part that is allegedly illegal and adequately shown that city tax dollars will be

spent on that illegal activity. *See Cantrell v. City of Long Beach*, 241 F.3d 674, 683–84 (9th Cir. 2001). Here, neither prong is satisfied. Thus, the plaintiffs' status as municipal taxpayers is insufficient to confer Article III standing.

III.

We now turn to the plaintiffs' two federal claims: that the defendants took their property in violation of the Fifth and Fourteenth Amendments. *See* U.S. CONST. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation."); U.S. CONST. amend. XIV, § 1, cl. 3 ("[N]or shall any State deprive any person of … property, without due process of law."). Neither of these claims can get off the ground unless the plaintiffs prove that they have a private property interest in Jackson Park. To accomplish that, the plaintiffs return to the public trust doctrine and add a twist: they argue that the public trust doctrine not only curtails a state's ability to transfer public land to a private party but also confers a private property right on members of the public. Analogizing to the law of trusts, the plaintiffs insist that they are "beneficiaries" of Jackson Park, which the defendants hold in trust on the public's behalf. And, according to the plaintiffs, this "beneficial interest" is private property that is protected by the United States Constitution.

Unlike the state claims, the federal claims do allege a cognizable injury: the deprivation of a property right. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) (explaining that standing "often turns on the nature and source of the claim asserted"). To be sure, the alleged property right—a beneficial interest in a public park—is highly unusual, and one might be immediately skeptical about whether it exists. But when the existence of a protected property interest is an element of the claim,

deciding whether the interest exists virtually always goes to the merits rather than standing. *Booker-El v. Superintendent, Ind. State Prison*, 668 F.3d 896, 900 (7th Cir. 2012) ("Were we to require more than a colorable claim [to a property interest], we would decide the merits of the case before satisfying ourselves of standing."). So, for example, in *Booker-El*, we held that a plaintiff had standing to assert a procedural due process claim against prison administrators for mismanaging a general recreation fund held for the benefit of inmates, even though we concluded, on the merits, that Indiana law did not give the plaintiff a protected property interest in the fund. *Id.* at 900–01.[4] As cases like *Booker-El* illustrate, it is not unusual for the distinction between standing and the merits to cause conceptual trouble when a plaintiff alleges the deprivation of a dubious property or liberty interest. *See id.* at 899 (noting that an argument that the plaintiff lacked standing because he lacked a protected property interest "conflates standing with the merits"); *cf. Matushkina v. Nielsen*, 877 F.3d 289, 292 (7th Cir. 2017) (noting that when a "plaintiff does not have a legal right enforceable in a federal court … it is not always obvious … whether the problem is a lack of standing or lack of a viable claim on the merits"). Yet as we have explained before, to say that a claim "is not worth anything" is a determination "that concerns the merits rather than … jurisdiction.

[4] In this case, the plaintiffs claim a shared property right, insofar as they claim that they, along with other members of the public, have a beneficial interest in Jackson Park. The mere fact that the alleged right is widely shared does not defeat standing. Being deprived of one's property is a concrete and particularized injury, even if the property is intangible or one's ownership is fractional. *See Spokeo*, 136 S. Ct. at 1548–49; *Warth*, 422 U.S. at 501 (noting that an injury can be "distinct and palpable … even if it is an injury shared by a large class of other possible litigants").

Otherwise every losing suit would be dismissed for lack of jurisdiction." *Owsley v. Gorbett*, 960 F.3d 969, 971 (7th Cir. 2020) (citation omitted).

And so we turn to the merits, which are easily dispatched. To show that they are similarly situated to beneficiaries of a private trust, the plaintiffs emphasize the word "trust" in "public trust doctrine" and quote cases describing public parkland as being held "in trust" and "for the benefit of the public." *Paepcke*, 263 N.E.2d at 15; *see also Ill. Cent.*, 146 U.S. at 452 (referring to the state's ownership of submerged land as "a title held in trust for the people of the state"). Their argument disintegrates, however, when one reads more than the snippets they cite. *Paepcke* is particularly devastating: in that case, the Illinois Supreme Court held that those owning land adjacent to or in the vicinity of a public park possess no private property right in having the parkland committed to a particular use. 263 N.E.2d at 16; *see also Petersen v. Chi. Plan Comm'n of City of Chi.*, 707 N.E.2d 150, 155 (Ill. App. Ct. 1998) (rejecting a procedural due process claim based on the expansion of the Museum of Science and Industry on the ground that the plaintiffs had no protectible property interest in Jackson Park). If adjacent landowners have no protected interest in public land, then the plaintiffs don't have one either. Although the plaintiffs wish it were otherwise, the Illinois cases make clear that the public trust doctrine functions as a restraint on government action, not as an affirmative grant of property rights.[5]

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[5] And even if the doctrine conferred a property interest on members of the public, that interest would not necessarily qualify for protection under the Constitution. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 757

The lack of a property interest is the most fundamental defect in both of the plaintiffs' federal claims, yet it is by no means the only one. With respect to the takings claim, the plaintiffs seek injunctive relief but not money damages. Although the plaintiffs don't spell out their argument, the request for injunctive relief suggests that their complaint is that the Center does not qualify as a "public use" rather than that the City has failed to pay them "just compensation." U.S. CONST. amend. V. This is a losing argument. Even assuming that the City's use agreement with the Foundation qualifies as a transfer to a private party, the Supreme Court held in *Kelo v. City of New London* that a transfer to a private owner can still be constitutional if it is done for a "public purpose." 545 U.S. 469, 483–84 (2005). What's more, the City's judgment that a particular transfer and use has a public purpose is entitled to deference. *Id.* at 488–89. It's hard to see, then, how we could "second-guess the City's determination[]" that building the Center—with its museum, public library branch, auditorium, athletic center, gardens, and more—is a use with public benefits. *Id.* at 488.

The plaintiffs' procedural due process claim also has problems beyond the lack of a protected property interest. For this claim to succeed, the plaintiffs must establish that the procedures they received fell short of minimum constitutional requirements, *Doe v. Purdue Univ.*, 928 F.3d 652, 659 (7th Cir. 2019), and the plaintiffs have failed to identify what greater process they were due. The City enacted four separate

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(2005) ("Although the underlying substantive interest is created by 'an independent source such as state law,' *federal constitutional law* determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." (citation omitted)).

ordinances approving various aspects of the Center. The votes on those ordinances came after multiple public hearings at which residents could raise their concerns about the City's intended plans. And the Illinois General Assembly amended the Illinois Park District Aquarium and Museum Act to explicitly authorize cities and park districts to erect, operate, and maintain "presidential libraries, centers, and museums" in public parks. 70 ILCS 1290/1. We have noted that a "legislative determination provides all the process that is due." *Dibble v. Quinn*, 793 F.3d 803, 809 (7th Cir. 2015) (citation omitted). If one legislative determination is enough, then *five* determinations are overkill.

In short, the plaintiffs' Fifth and Fourteenth Amendment claims fail on the merits, and we affirm the grant of summary judgment on both.

IV.

We have one final bit of housekeeping. The plaintiffs also challenge the district court's denial of their motion for relief from the judgment under Federal Rule of Civil Procedure 60(b). Rule 60(b) permits a district court to grant "relief from a judgment or order" for a number of specified reasons. In their motion, the plaintiffs suggested two reasons why the district court should revisit its resolution of their public trust claim. First, the plaintiffs argued that "new and material evidence" had come to light. *See* FED. R. CIV. P. 60(b)(2). This argument was based on a provisional report completed by the National Park Service and the Federal Highway Administration as part of assessing whether federal roadway projects or other alterations connected to the construction of the Center would have an "adverse effect" on Jackson Park's listing on the National Register of Historic Places, *see* 54 U.S.C. § 306108;

36 C.F.R. § 800.5, or qualify as a "major federal action" subject to the National Environmental Policy Act, *see* 42 U.S.C. § 4332(C). And second, the plaintiffs argued that the continued application of the district court's judgment was inequitable. *See* FED. R. CIV. P. 60(b)(5).

As we've explained, however, the plaintiffs lack Article III standing to bring the public trust claim in the first place. That pulls the rug out from under their arguments in favor of Rule 60(b) relief. Whatever the merits of those arguments, both we and the district court lack jurisdiction to resolve the plaintiffs' public trust claim. That puts to rest any contention that the district court should have revisited its holding on that count. We thus affirm the denial of the motion, albeit on different grounds.

* * *

While we affirm the grant of summary judgment on the Fifth and Fourteenth Amendment claims, we vacate the grant of summary judgment on the public trust and ultra vires claims. We hold that the plaintiffs lack standing to bring those latter claims in federal court, and therefore that the district court should have dismissed them for lack of jurisdiction. We also affirm the denial of the motion for relief from the judgment under Rule 60(b).

The judgment is AFFIRMED in part and VACATED in part, and the case is REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PROTECT OUR PARKS, INC., CHARLOTTE ADELMAN, MARIA VALENCIA, and JEREMIAH JUREVIS, Plaintiffs, v. CHICAGO PARK DISTRICT and CITY OF CHICAGO, Defendants.	Case No. 18-cv-3424 Judge John Robert Blakey

ORDER

On June 11, 2019, this Court granted Defendants' motion for summary judgment and denied Plaintiffs' cross-motion for summary judgment, terminating this case. [144] [145]. On August 7, 2019, Plaintiffs Protect Our Parks, Inc. and Maria Valencia filed a motion to vacate this Court's summary judgment order and reopen the case under Rules 60(b)(2), (b)(5), and b(6), based upon a draft report issued by two federal agencies as part of the "Section 106" process, originating from Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108. [156].[1] Because this case remains on appeal, Plaintiffs also request an indicative ruling pursuant to Rule 62.1, so that Plaintiffs may ask the Seventh Circuit to remand jurisdiction to

[1] Plaintiffs' motion challenges only this Court's ruling on Count II of Plaintiff's amended complaint, which alleged a breach of the public trust under Illinois law. [91]; [156-1] at 1–2.

this Court for purposes of deciding the Rule 60 motion. *Id.* Defendants filed a response on 8/15/19. [159].

Rule 62.1(a) provides:

> If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

LAJIM, LLC v. GE, 917 F.3d 933, 948 (7th Cir. 2019) (citing Fed. R. Civ. P. 62.1(a)(3)). This Court denies Plaintiffs' motion.

Rule 60(b) provides that a court may relieve a party from a final judgment, order, or proceeding for a variety of reasons, including newly discovered evidence. As an initial matter, relief under Rule 60(b) serves as "an extraordinary remedy . . . granted only in exceptional circumstances." *Id.* (citing *Davis v. Moroney*, 857 F.3d 748, 751 (7th Cir. 2017)). Here, the Section 106 process remains far from exceptional; in fact, Plaintiffs' original complaint, filed in May 2018, demonstrates that they knew about the Section 106 process since the filing of this suit. [1] ¶ 48. Nevertheless, Plaintiffs proceeded forward with no mention of any need to wait for the Section 106 process. For example, on August 20, 2018, Plaintiffs' counsel moved to lift this Court's stay on MIDP and Defendants' deadline to answer the complaint, arguing:

> The prejudice is that [Defendants are] delaying our case by a year when we filed it in May and they're looking to get some type of [ruling] even

> addressing the complaint on the merits maybe in 2019. That's prejudice in and of itself . . . justice delayed is justice denied, your Honor.

[27] at 9. Consistent with the interests of justice, this case has been resolved without undue delay. For these reasons, this Court finds disingenuous Plaintiffs' assertion that the draft report constitutes "some of the most important and relevant factual evidence in this case." [156-1] at 2.

Moreover, Rule 60(b)(2), upon which Plaintiffs primarily rely in their motion, permits vacatur based upon "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial." *Anderson v. Catholic Bishop of Chi.*, 759 F.3d 645, 653 (7th Cir. 2014) (citing Fed. R. Civ. P. 60(b)(2)). And to prevail under Rule 60(b)(2), Plaintiffs must show that the draft report, as newly discovered evidence, constitutes "material" evidence that "would probably produce a new result" if considered by this Court. *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 732 (7th Cir. 1999); *Harris v. Owens-Corning Fiberglas Corp.*, 102 F.3d 1429, 1434, n.3 (7th Cir. 1996). This Court states, with certainty, that it would not.

In its summary judgment decision, this Court delineated the three standards under which Illinois courts must apply the public trust doctrine, based upon the property's relationship to navigable waterways. [145] at 23. The OPC site sits upon never-submerged land. *Id.* at 21–22. As such, courts facing public trust claims over never-submerged, statutorily designated parkland must ask only whether sufficient legislative intent exists for a given land reallocation or diversion. *Id.* at 24 (citing *Paepcke v. Public Bldg. Com.*, 263 N.E.2d 11, 19 (Ill. 1970)). This Court found that

sufficient legislative intent exists based upon the Park District Aquarium and Museum Act, 70 ILCS 1290/1. [145] at 24–30. The draft report fails to alter this Court's interpretation of the Museum Act's plain language. Therefore, it will not produce a new result if this case were reopened.

In the alternative, this Court found that even under the heightened levels of scrutiny applied to formerly submerged and presently submerged land, the OPC still does not violate the public trust. *Id.* at 30–35. In arriving at this conclusion, this Court considered whether: (1) the OPC primarily benefits a private entity, with no corresponding public benefit; and (2) whether the OPC's primary purpose benefits the public, rather than private interests. *Id.* This Court answered both questions affirmatively, based upon well-established case law concerning public stadiums and the longstanding importance of museums to the general public. *Id.* (citing *Friends of the Parks v. Chi. Park Dist*, 786 N.E.2d 161; *Furlong v. South Park Comm'rs*, 151 N.E. 510, 511 (Ill. 1926); and *Fairbanks v. Stratton*, 152 N.E.2d, 569, 575 (Ill. 1958)).

In its own words, the draft report "documents the assessments of effect to National Register of Historic Places (NRHP) listed and eligible historic properties associated with" the proposed OPC undertakings. [156-3], § 1.0. According to the Federal Highway Administration, the report serves as only one step in the broader Section 106 process, which culminates in a consultation between a variety of federal, city, and state offices to "avoid, minimize or mitigate" any adverse effects. *Id.* at 2. As such, this Court cannot find that an unfinished review of the OPC's potential effects on *historic properties* shows that the *public* will receive no public benefit

whatsoever from the OPC. Nor can the draft report alter the longstanding legal precedence regarding museums' role in serving the public interest. Thus, it will not produce a new result, even under the public trust doctrine's heightened levels of scrutiny.

Plaintiffs also move for relief under Rules 60(b)(5)—permitting relief from a final judgment when applying the judgment is no longer equitable—and Rule 60(b)(6)—permitting relief for any other justifiable reason. *New Century Mortg. Corp. v. Roebuck*, No. 01 C 3591, 2003 WL 21501780, at *4–5 (N.D. Ill. June 25, 2003) (citing Fed. R. Civ. P. 60(b)(5)–(6)). Because this Court finds that the draft report fails to alter or otherwise impact its public trust analysis, applying this Court's summary judgment decision remains equitable. Plaintiffs have shown no other reason to justify relief in this case.

In short, this Court will not reopen a claim, decided under Illinois law and with deference to the Illinois legislature, to evaluate a draft federal report, which Plaintiffs: (1) concede is part of a still-ongoing federal review process, [156-1] at 3–4; and (2) have known about since the filing of this suit in May 2018, [91] ¶ 48.

Therefore, this Court denies Plaintiffs' motion to vacate its final judgment order under Rule 60(b), pursuant to Rule 62.1(a)(3), [156]. This case remains closed.

Dated: November 6, 2019

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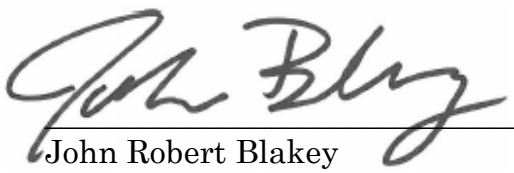

John Robert Blakey
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PROTECT OUR PARKS, INC., CHARLOTTE ADELMAN, MARIA VALENCIA, and JEREMIAH JUREVIS,	
Plaintiffs,	Case No. 18-cv-3424
v.	
CHICAGO PARK DISTRICT and CITY OF CHICAGO,	Judge John Robert Blakey
Defendants.	

MEMORANDUM OPINION AND ORDER

This dispute arises out of the City of Chicago (City) and the Chicago Park District's (Park District) efforts to bring the Obama Presidential Center (OPC) to the City's South Side. Plaintiffs sue to prevent construction of the OPC on a specific site within Jackson Park. [91] ¶ 1. Following this Court's ruling on Defendants' Rule 12(b)(1) motion to dismiss, [92], the parties completed full discovery and filed cross-motions for summary judgment, [112] [122]. On June 11, 2019, this Court held a hearing, and heard oral argument only on those issues and counts which required consideration beyond the briefs.

This order addresses the merits of the case. In doing so, this Court faces the same challenge presented to the Illinois Supreme Court in *Paepcke v. Public Building Commission of Chicago*, 263 N.E.2d 11 (Ill. 1970). As they put it:

> [T]his court is fully aware of the fact that the issues presented in this case illustrate the classic struggle between those members of the public who would preserve our parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary, in good faith and for the public good, to encroach to some extent upon lands heretofore considered inviolate to change. The resolution of this conflict in any given case is for the legislature and not the courts. The courts can serve only as an instrument of determining legislative intent as evidenced by existing legislation measured against constitutional limitations. In this process the courts must deal with legislation as enacted and not with speculative considerations of legislative wisdom.

Id. at 21. With this principle in mind and for the sound reasons set forth below, this Court grants Defendants' motion for summary judgment, [122], and denies Plaintiffs' motion for summary judgment, [112]. The facts do not warrant a trial, and construction should commence without delay. This case is terminated.

I. Background

The following facts come from Plaintiffs' Rule 56.1 statement of facts, [112-1], Defendants' Rule 56.1 statement of facts, [124], Plaintiffs' statement of additional material facts, [136], and Defendants' statement of additional material facts, [139].[1]

A. The Parties

Plaintiff Protect Our Parks, Inc. is a nonprofit park advocacy organization located in Chicago. [112-1] ¶ 1; [124] ¶ 1. Its members include individuals who reside in the City of Chicago and pay taxes to the City. *Id.* Plaintiff Adelman resides in

[1] Both parties submitted their responses to each other's statements of material facts and their own statements of additional facts within the same docket number. *See* [136] [139]. Unless otherwise noted, all cites to [136] and [139] in this opinion refer to the parties' statements of additional facts.

Wilmette, Illinois. *Id.* Plaintiffs Valencia and Jurevis reside in the City of Chicago. *Id.*

Defendant Park District exists as a body politic and corporate entity established by Illinois law, pursuant to the Chicago Park District Act, 70 ILCS 1505/.01, *et seq*. [112-1] ¶ 2; [124] ¶ 2. Defendant City is a body politic and municipal corporation. [112-1] ¶ 3; [124] ¶ 3.

B. Selecting the OPC Site

In March 2014, the Barack Obama Foundation (Foundation) initiated a search for the future site of the OPC. [112-1] ¶ 4. Both the University of Chicago and the University of Illinois Chicago (UIC) proposed potential locations. *Id.* ¶¶ 5, 19. UIC proposed two sites, generally located at: (1) the North Lawndale neighborhood; and (2) the east end of the school's campus. *Id.* ¶ 19; [126-2] at 105098. The University of Chicago proposed three sites, generally located at: (1) the South Shore Cultural Center[2]; (2) Jackson Park; and (3) Washington Park. [112-1] ¶ 5; [126-2] at 105098. At this time, the Park District owned both the Jackson Park and Washington Park parkland identified in the University of Chicago's proposal. [126-2] at 105098.

In addition to these sites, nine entities from several locations throughout the country submitted proposals for the OPC, resulting in a total of 14 potential sites. [112-1] ¶ 25. The Foundation performed an analysis of the proposals from all submitting entities, evaluating the sites based upon the following criteria:

- Project Site and Access: desirability of site, surrounding community, control of site, local accessibility, global accessibility

[2] The City and Park District later eliminated the South Shore site from consideration as a potential location. [112-1] ¶ 7.

- Project Execution: education impact, tourism impact, economic development impact, enhancements to the physical environment
- Community Engagement: engagement plan, quality/breadth of partners, means of engagement
- Indications of Support: partnership structure, alignment of mission, financial capacity.

Id.; [117-5] at 5. The Foundation assigned numerical scores to each site based upon the above evaluation criteria, and ranked the sites based upon these scores. [112-1] ¶ 26; [117-5] at 8–9. The Washington Park Site received the highest score at 122 out of 150; the Jackson Park site received the second highest score at 121 out of 150; and the UIC's proposed locations received a combined score of 120 out of 150, putting it in third place. *Id.*

On July 29, 2016, the Foundation issued a press release announcing that it chose Jackson Park as the OPC site. [124] ¶ 13; [114-16].

C. The OPC Site

i. Site Location

The site selected for the OPC within Jackson Park comprises 19.3 acres, or 3.5 percent of the 551.52 acres comprising Jackson Park. [124] ¶ 6. It lies on the western edge of Jackson Park and includes existing parkland bounded by South Stony Island Avenue to the west, East Midway Plaisance Drive North to the north, South Cornell Drive to the east, and South 62nd Street to the south. *Id.* ¶ 7. The OPC site also includes land within the park that currently exists as city streets: the portion of East Midway Plaisance Drive North between Stony Island Avenue and South Cornell

Drive, and a portion of South Cornell Drive between East Midway Plaisance Drive South and East Hayes Drive. *Id.* As part of the OPC construction, these street portions would be closed and removed "to restore" the landscape's connection to the Lagoon and Lake." *Id.* ¶¶ 7, 40.

The site lies approximately half a mile from Lake Michigan, separated by: (1) six-lane Cornell Drive; (2) the lagoons and Wooded Island of Jackson Park; (3) Jackson Park's golf driving range and other grounds; (4) Lake Shore Drive; and (5) a pedestrian and bike path. *Id.* ¶ 7. It sits entirely above ground, although the parties dispute whether the site formerly sat beneath Lake Michigan. *Id.* ¶ 9; [136] ¶ 9 (Plaintiffs' response).

ii. Site Components

The OPC will consist of a campus containing open green space, a plaza, and four buildings: (1) the Museum Building; (2) the Forum Building; (3) a Library Building; and (4) a Program, Athletic, and Activity Center. [124] ¶¶ 23, 26. It will also include an underground parking garage. *Id.* ¶ 23.

[91] ¶ 50.

The Museum will comprise the OPC's principal building and "central mission." [124] ¶ 24. It seeks to "tell the stories of the first African American President and First Lady of the United States, their connection to Chicago, and the individuals, communities, and social currents that shaped their local and national journey." *Id.* ¶ 25. In doing so, the Museum will feature artifacts and records from President Obama's presidency, including items on loan from the National Archives and Records Administration (NARA). *Id.* ¶¶ 24–25; [125-5] (Exhibit D, Recital J).

The Forum Building will contain collaboration and creative spaces, including an auditorium, meeting rooms, recording and broadcasting studios, and a winter garden and restaurant. [124] ¶ 27.

The Library Building will include a branch of the Chicago Public Library and a President's Reading Room, featuring curated collections and displays of archival

material, including digital access to Obama Administration records. *Id.* ¶ 28; [125-5] (Exhibit D, (Sub) Exhibit "C").

The Program, Athletic, and Activity Center will host public programs such as "presentations, events, athletics, and recreation." [124] ¶ 29; [125-5] (Exhibit D, (Sub) Exhibit "C").

The OPC's green space will include features such as: (1) play areas for children; (2) "contemplative spaces for young and old"; (3) a sledding hill; (4) a sloped lawn for picnicking, recreation and community and special events; (5) walking paths; and (6) a nature walk along the lagoon. [124] ¶ 30. The Foundation will also "preserve and enhance" the existing Women's Garden and Lawn, keeping it open and available as green space. *Id.*

iii. Site Accessibility

According to the Use Agreement between the City and Foundation, discussed in detail below, the OPC buildings must "be open to the public at a minimum in a manner substantially consistent with the manner in which other Museums in the Parks are open to the public." *Id.* ¶ 26; [125-5] (Exhibit D, § 6.2(a)(i)). All other portions of the OPC, such as the green space, must remain open to the public during regular Park District hours. [124] ¶ 30; [125-5] (Exhibit D, § 6.2(a)(ii)).

The OPC will charge fees for entry into the Museum and for the parking garage. [112-1] ¶ 43. It will, however, provide free public access to many interior spaces within the OPC, including portions of the garden and plaza levels in the Museum Building and the top floor of the Museum Building. [124] ¶ 26. Moreover,

the Foundation must operate the OPC in accordance with the free admission requirements of Illinois' Park District Aquarium and Museum Act, which mandates free admission to all Illinois residents at least 52 days out of the year and to all Illinois school children accompanied by a teacher. *Id.* ¶ 37. The admission fee policy for members of the public who are City residents, or low-income individuals and their families participating in the Supplemental Nutrition Assistance Program (or equivalent program), must also be "substantially consistent with comparable general admission fee policies" for such individuals maintained by "other Museums in the Park." [125-5] (Exhibit D, § 6.10).

D. OPC Municipal Approval Process

i. Jackson Park's Creation

In 1869, the General Assembly passed "An Act to Provide for the Location and Maintenance of a Park for the Towns of South Chicago, Hyde Park and Lake" (1869 Act). [112-1] ¶ 17; Private Laws, 1869, vol. 1, p. 358. The statute provided for the formation of a board of public park commissioners to be known as the "South Park Commissioners." *Id.* The Act authorized these commissioners to select certain lands, which, when acquired by said commissioners, "shall be held, managed and controlled by them and their successors, as a public park, for the recreation, health and benefit of the public, and free to all persons forever." Private Laws, 1869, vol. 1, p. 360. Pursuant to this authority, the commissioners acquired the land now known as Jackson Park. [112-1] ¶ 17; [139] ¶ 17 (Defendants' response). The Illinois Legislature enacted the Park District Consolidation Act in 1934, which consolidated

the existing park districts, including the South Park District, into the Chicago Park District. 70 ILCS 1505/1.

ii. Transfer From the Park District to the City

In early January of 2015—before the Jackson Park site selection—the Foundation expressed "concerns regarding the City's lack of control" over the proposed Jackson and Washington Park sites and indicated that "consolidating ownership of the sites and local decision-making authority in the City was a prerequisite to a successful bid." [126-2] at 105098–99.

Subsequently, in February 2015—in an open meeting during which members of the public spoke and submitted written comments—the Park District's Board of Commissioners voted to approve the transfer of "approximately 20 acres of property" located in Washington Park or Jackson Park to the City. [124] ¶ 11; [125-4] at 4, 11. Following this meeting, the OPC site's boundaries within Jackson Park shifted to the north and east. [124] ¶ 11.

In February 2018, after a public meeting, the Board of Commissioners confirmed authority to transfer the reconfigured site to the City. *Id.*

In March 2015, the City Council enacted an ordinance "authorizing the execution of an intergovernmental agreement between the City of Chicago and the Chicago Park District necessary to acquire selected sites in order to facilitate the location, development, construction and operation" of the OPC. [124] ¶ 12; [126-2] at 105096. In October 2018, following the Jackson Park selection, the City Council passed an ordinance finding it "useful, desirable, necessary and convenient that the

City acquire the OPC site from the Park District" for the "public purpose" of constructing and operating the OPC. [124] ¶ 12; [125-5] at 85886 § 2.

iii. City Council Approval

In January 2018, the Foundation applied to the City for a zoning amendment to build the OPC on the Jackson Park site as a "planned development"—a designation required for certain institutional and campus-oriented projects. [124] ¶ 13; [126-3]. The Foundation also applied for approval under the City's Lake Michigan and Chicago Lakefront Protection Ordinance (LPO). [124] ¶ 13. The City's Department of Planning and Development (DPD) subsequently reviewed both applications and prepared a report (DPD Study) as required by the City's Municipal Code. *Id.* The DPD Study recommended approving both applications. *Id.*

On May 17, 2018, the Chicago Plan Commission—which reviews proposals involving planned developments and the Lakefront Protection Ordinance within the City—held a public hearing on the Foundation's application for a planned development zoning amendment and for approval under the LPO. *Id.* ¶ 14; [126-5]. Representatives from the City and the Foundation testified at the hearing, and over 75 members of the public commented on the proposals. [124] ¶ 14. The presentation from DPD staff included a slideshow depicting various renderings of the OPC proposal. *Id.*

At the conclusion of this hearing, the Plan Commission found that the OPC project conformed with the LPO and approved the Foundation's application under the LPO. *Id.* ¶ 15. In doing so, the Plan Commission adopted the DPD Study as its

findings of fact. *Id.* Under the City's Municipal Code, the Plan Commission serves as the final decisionmaker as to whether a project complies with the Lakefront Plan of Chicago and the purposes of the LPO. *Id.*; Municipal Code of Chicago (MCC) § 16-4-100(e).

Also at the May 17 hearing, the Plan Commission recommended approval of the Foundation's application for a zoning amendment. [124] ¶ 16. Again, the Plan Commission adopted the DPD Study as the Commission's own findings of fact. *Id.* Under the City's Municipal Code, after considering a zoning amendment application, the Plan Commission must refer the application to the City Council, which serves as the final decisionmaker on the amendment. *Id.*; MCC § 17-13-0607.

Accordingly, on May 22, 2018, the City Council's Committee on Zoning, Landmarks and Building Standards held a public hearing to consider the zoning amendment. [124] ¶ 17. Following testimony from City and Foundation representatives and public comments, the Committee voted to recommend approval. *Id.* The next day, the full City Council approved the amendment, enacting an ordinance that authorized construction of the OPC as a Planned Development; this ordinance controls the size and layout of the OPC's buildings. *Id.* ¶ 18.

In October 2018, the City Council considered and approved two additional ordinances for the OPC project. *Id.* ¶ 19. First, it considered the Operating Ordinance, which allows the City to accept title to the Jackson Park site from the Park District and to enter into agreements with the Foundation governing the Foundation's use of the site. *Id.* On October 11, 2018, the City Council's Committee

on Housing and Real Estate held a public hearing on the Operating Ordinance, during which City and Foundation representatives testified about the ordinance and members of the public commented. *Id.* The Committee voted unanimously to recommend adopting the Operating Ordinance, and the full City Council unanimously approved it on October 31, 2018. *Id.*

Second, the City Council considered an ordinance authorizing the City to vacate portions of East Midway Plaisance Drive South and Cornell Drive within Jackson Park for conversion into parkland as part of the OPC site. *Id.* ¶ 20. On October 25, 2018 the City Council's Committee on Transportation and Public Way held a public hearing on the ordinance, during which City and Foundation representatives again testified, and members of the public commented. *Id.* The Committee voted unanimously to recommend adopting the ordinance, and the full City Council unanimously approved it on October 31, 2018. *Id.*

iv. The Use Agreement

One of the agreements authorized by the Operating Ordinance includes the Use Agreement, which sets out the terms by which the Foundation may use Jackson Park for the OPC. *Id.* ¶ 21; [125-5] (Exhibit D). The Use Agreement does not transfer ownership of the OPC site, nor does it lease the site to the Foundation. *See generally* [125-5] (Exhibit D); [112-1] ¶ 46. Rather, section 2.1 of the Use Agreement provides the Foundation with the following rights with respect to the OPC site for a 99-year term:

> (a) the right to construct and install the Project Improvements[3] (including the Presidential Center);
>
> (b) the right to occupy, use, maintain, operate and alter the Presidential Center Architectural Spaces[4]; and
>
> (c) the right to use, maintain, operate and alter the Presidential Center Green Space and Green Space.[5]

[125-5] (Exhibit D, §§ 2.1–.2).

The Foundation will construct the OPC's buildings at its own expense and upon completion, transfer ownership of the buildings and other site improvements to the City at no charge. *Id.* §§ 2.1, 4.4; [124] ¶ 34. The Foundation will also maintain the OPC site and buildings at its sole expense for the entire life of the Use Agreement. [124] ¶ 35; [125-5] (Exhibit D, §§ 2.2, 7.1). The City is not required to enter into the Use Agreement until the Foundation establishes an endowment for the OPC and the site, and confirms that it has funds or commitments sufficient to pay the projected construction costs. [124] ¶ 36.

As to consideration, the Use Agreement provides:

> The consideration for this Agreement is Ten and 00/100 Dollars ($10.00) payable by the Foundation on the Commencement Date, the receipt and

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[3] The Use Agreement defines "project improvements" as the Presidential Center Architectural Spaces and all other improvements constructed, installed, or located on the OPC site by the Foundation in accordance with the Use Agreement. [125-5] (Exhibit D, Art. I). The "Presidential Center" includes the "Presidential Center Architectural Spaces" and the "Presidential Center Green Space," as well as all other improvements and fixtures constructed, installed, or located by the Foundation in accordance with the Use Agreement. *Id.*

[4] "Presidential Center Architectural Spaces" includes the Museum Building, the Forum Building, the Library Building, the Program, Athletic and Activity Center, the Underground Parking Facility, the Plaza, and all "other facilities and improvements ancillary to any of the foregoing," such as loading/receiving areas and service drives. [125-5] (Exhibit D, Art. I).

[5] "Presidential Center Green Space" means all portions of the Presidential Center other than the Presidential Center Architectural Spaces. [125-5] (Exhibit D, Art. I). "Green Space" means all portions of the OPC site excluding the Presidential Center. *Id.*

> sufficiency of which, when taken together with the construction, development, operation, maintenance and repair of the Presidential Center and the other Project Improvements by the Foundation, the vesting of ownership of the Project Improvements by the Foundation in the City (as contemplated herein), as well as the material covenants and agreements set forth herein to be performed and observed by the Foundation, are hereby acknowledged by the City.

[125-5] (Exhibit D, Art. III).

With respect to operating the OPC, the Use Agreement prohibits the Foundation from using the OPC for political fundraisers or in any manner inconsistent with its status as a tax exempt entity under Section 501(c)(3) of the Internal Revenue Code. *Id*. at § 6.3(d); [124] ¶ 21. The Foundation must use revenues collected from general and special admission fees, parking and other visitor services, third-party use fees, food and beverage sales, and retail sales for the OPC's operations and maintenance, or deposit such revenues into an endowment for those purposes. [124] ¶ 21; [125-5] (Exhibit D, § 6.9).

In addition, the Foundation must provide the City with an annual report on the OPC's operations, and in conjunction with the City, form an Advisory Operations Committee to address ongoing operational issues related to the OPC and any concerns arising from nearby and adjacent areas of Jackson Park. [124] ¶ 21; [125-5] (Exhibit D, §§ 17.3–.4). If the Foundation ceases to use the OPC for its permitted purposes—essentially, operating the OPC—under the Use Agreement, the City may terminate the Agreement. [124] ¶ 21; [125-5] (Exhibit D, §§ 6.1, 16.2).

E. OPC Studies

The City did not perform a comparative analysis of the economic or other community impact on the City as a result of building the OPC at one particular location versus another. [112-1] ¶¶ 28–29. Rather, the DPD Study looked at the Jackson Park site specifically, while studies performed by private institutions analyzed the impact of generally placing the OPC in Chicago and the State of Illinois. [124] ¶¶ 13, 55–56.

The DPD Study first looked at the environmental and community impact of placing OPC on Jackson Park. Generally, it concluded that the OPC would increase recreational opportunities on the South Side of Chicago, bring more visitors to Jackson Park and the surrounding communities, increase the use of surrounding open space, and improve safety. *Id.* ¶ 53. Specifically, it found that by closing certain streets within Jackson Park, and by expanding or reconfiguring other streets in and around Jackson Park, the OPC would, for example: (1) improve access by pedestrians through the park, across the lagoons to the lake, *id.* ¶ 39; (2) offer unimpeded pedestrian and bike access to the Museum of Science and Industry from the South Side," *id.* ¶ 40; (3) replace some of the land currently occupied by Cornell Drive with a "restful Woodland Walk," *id.* ¶ 41; (4) create new pedestrian access points and ADA compliant design features, *id.* ¶ 42; and (5) reduce air and noise pollution, improve existing bird habitats, and attract new wildlife to the OPC site area, *id.* ¶ 47. In total, the DPD Study found that the roadway work conducted in connection with the OPC

will create a net gain of an additional 4.7 acres of publicly available park space throughout Jackson Park. *Id.* ¶ 45.

The DPD Study also addressed the OPC's economic benefits. It found that the OPC would create nearly 5,000 new, local jobs during construction, and more than 2,500 permanent jobs once the OPC opens. *Id.* ¶ 54. Deloitte Consulting LLP similarly completed a report, commissioned by the Chicago Community Trust,[6] assessing the OPC's economic impact on the State of Illinois and City, as well as the South Side. *Id.* ¶ 55. It projected that the OPC's construction and operation would create an increase of $11.3 million in revenue generated on an annual basis from state and local taxes within Cook County. *Id.* A study commissioned by the University of Chicago and conducted by Anderson Economic Group also projected that by building the OPC on the South Side, tax revenue for the City and for Chicago Public Schools would increase by a combined $5 million annually. *Id.* ¶ 56.

F. OPC Costs

The City has estimated the costs for roadway alterations and other infrastructure work in Jackson Park at $174 million to $175 million. [112-1] ¶ 33; [127-5] at 22–23. According to Defendants, portions of this estimated cost will go towards infrastructure improvements in areas of Jackson Park not adjacent to the OPC to further the Park District's broader South Lakefront Plan. [139] ¶ 33 (Defendants' response); [128-4] at 012159. A traffic impact study conducted by Sam Schwartz Engineering, DPC demonstrates that the Washington Park site would have

[6] The Chicago Community Trust serves as a "community foundation dedicated to making the Chicagoland region more vibrant through service." [128-5] at 5.

also required substantial roadway alterations, although it did not estimate a specific cost. [139] ¶ 1; [139-4].

In 2015, the City estimated costs for environmental remediation to the OPC site within Jackson Park at $1,246,083 to $1,852,831. [112-1] ¶ 34; [114-9] at 011749. Comparably, the City estimated environmental remediation costs for the proposed Washington Park site at $2,506,836 to $6,959,946. *Id.* Other estimated costs related to constructing the OPC in Jackson Park include: $3,285,843 for relocating utilities, [112-1] ¶ 35; $367,800 for relocating a water main and fire hydrant, *id.* ¶ 36; and $4,972.72 for architectural/engineering services, *id.* ¶ 37.

F. Procedural History

On February 19, 2019, this Court granted in part and denied in part Defendants' motion to dismiss based upon lack of subject matter jurisdiction. [92].[7] Plaintiffs' remaining claims assert: (1) a violation of due process under 18 U.S.C. § 1983 (Count I); (2) breach of the public trust under Illinois law (Count II); (3) *ultra vires* action under Illinois law (Count III); (4) a request for declaratory judgment as to the inapplicability of the Illinois Museum Act (Count IV); and (5) a special legislation claim under Illinois law (Count V). [91].

[7] This Court previously granted six motions for leave to file briefs as *amici curiae* in relation to Defendants' motion to dismiss or for judgment on the pleadings [48]. *See* [77]. Following the parties' cross-motions for summary judgment, the *amicus* authors requested that this Court consider their original briefs at the summary judgment stage. *See* [113] [131] [132] [134]. This Court has carefully considered all *amicus* briefs in relation to the parties' cross-motions for summary judgment, [54-1] [56-1] [61-1] [69-1] [73] [75].

Following full discovery, the parties filed cross-motions for summary judgment on May 3, 2019, [112] [122], their responses on May 17, 2019, [137] [138], and their replies on May 24, 2019, [141] [143].

II. Legal Standard

Summary judgment is proper where there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute as to any material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment has the burden of establishing that there is no genuine dispute as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In determining whether a genuine issue of material fact exists, this Court must construe all facts and reasonable inferences in the light most favorable to the non-moving party. *See CTL ex rel. Trebatoski v. Ashland Sch. Dist.*, 743 F.3d 524, 528 (7th Cir. 2014). The non-moving party has the burden of identifying the evidence creating an issue of fact. *Harney v. Speedway SuperAmerica, LLC*, 526 F.3d 1099, 1104 (7th Cir. 2008). To satisfy that burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, a mere "scintilla of evidence" supporting the non-movant's position does not suffice; "there must be evidence on which the jury could reasonably find" for the non-moving party. *Anderson*, 477 U.S. at 252.

Cross-motions for summary judgment "do not waive the right to a trial;" rather, this Court treats "the motions separately in determining whether judgment should be entered in accordance with Rule 56." *Marcatante v. City of Chicago, Ill.*, 657 F.3d 433, 438–39 (7th Cir. 2011).

III. Analysis

Defendants move for summary judgment on all five of Plaintiffs' remaining claims. [123-1]. Plaintiffs, on the other hand, move for partial summary judgment on their due process (Count I), public trust doctrine (Count II), and *ultra vires* (Count III) claims. [120] at 15.[8] This Court analyzes each remaining count in turn, beginning with Plaintiffs' public trust claim.

A. Count II: Breach of the Public Trust

i. Public Trust Origins

The public trust doctrine traces its roots back to English common law, during the time when "the existence of tide waters was deemed essential in determining the admiralty jurisdiction of courts in England." *Ill. Cent. R.R. Co. v. State of Illinois*, 146 U.S. 387, 435 (1892); *see also Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 454–55 (1852). In England, no navigable stream existed "beyond the ebb and flow of the tide," nor were there any locations, outside of tide-waters, "where a port could be established to carry on trade with a foreign nation, and where vessels could enter or

[8] Even though Plaintiffs' motion for summary judgment lists Count IV in its motion for summary judgment, Plaintiffs later fail to address the merits of that count, and thus, waiver applies. *Compare* [112] (moving for summary judgment on Count IV) *with* [120-1] at 15 (memorandum of law excluding Count IV from the claims upon which Plaintiffs move for summary judgment); *See generally* [120-1].

depart with cargoes." *Propeller Genesee*, 53 U.S. at 454–55. Accordingly, the public maintained an interest in the use of tide-waters, and only the crown could "exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest." *Ill. Cent.*, 146 U.S. at 436. Non-tide waters, however, could be privately owned. *Id*.

The Supreme Court offered the "classic statement" of how U.S. courts should apply this common law principle in *Illinois Central Railroad*. *Lake Michigan Fed'n v. United States Army Corp. of Eng'rs*, 742 F. Supp. 441, 444 (N.D. Ill. 1990). In 1869, the Illinois legislature granted Illinois Central Railroad, in fee simple, title to over 1,000 acres of submerged land extending into Lake Michigan about one mile from a portion of Chicago's shoreline, and authorized the railroad to operate a rail line over the property. *Ill. Cent.*, 146 U.S. at 444. After the railroad improved the property and began operations, the legislature repealed the enabling legislation and revoked its original grant. *Id*. at 438.

In rejecting the railroad's challenge to the State's action, the Court first held that the common law distinction between tide and non-tide waters no longer applied; the Great Lakes, while unaffected by the tide, still facilitated commerce "exceeding in many instances the entire commerce of States on the borders of the sea." *Ill. Cent.*, 146 U.S. at 436. Accordingly, the public trust doctrine, founded upon "the necessity of preserving to the public the use of navigable waters from private interruption and encroachment," applied equally to "navigable fresh waters," including the Great Lakes. *Id*. at 436–37.

Second, the Court found that while the State owned the submerged land, it could not transfer that land to the railroad because the State's title was "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." *Id.* at 452–53. Thus, the Court concluded that "the control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining." *Id.* at 453.

ii. The OPC Site Sits Upon Never-Submerged Land

As an initial matter, the parties dispute whether under the public trust doctrine, the OPC site constitutes land that was never submerged under Lake Michigan or land that was formerly submerged under the Lake. As is discussed below, this determination directs what level of deference this Court gives to the State in applying the public trust doctrine under Illinois law.

Both parties concede that as early as 1822, and at the time the state authorized the creation of Jackson Park in 1869, the OPC site sat above Lake Michigan. [124] ¶¶ 8–9; [136] ¶ 9 (Plaintiffs' response); [124-5] (Excerpt of 1822 Map of Federal Township, including Far West Section 13 in which the OPC site is located). Nevertheless, Plaintiffs contend that the OPC site constitutes formerly submerged land, based solely upon an Illinois State Archaeological Survey (ISAS) Technical Report. [136] ¶ 9 (Plaintiffs' response). Plaintiffs fail to note, however, that the map

to which they site in the ISAS report documents the "Late Pleistocene and early Holocene lake levels." [136-3] at 10. In other words, Plaintiffs invite this Court to find that because the OPC site may have been submerged approximately 11,000 years ago, it constitutes "formerly submerged" land for purposes of the public trust doctrine. [136-3] at 7–10.

Respectfully, this Court declines Plaintiffs' invitation. The Illinois Supreme Court has held that the date of Illinois' admission into the Union serves as the date it "became vested with the title to the beds of all navigable lakes and bodies of water within its borders." *Wilton v. Van Hessen*, 94 N.E. 134, 136 (Ill. 1911). Put differently, this Court must ask whether land was submerged as of the date Illinois achieved statehood.

Defendants' map, obtained from the Illinois State Archives, demonstrates that as early as 1822, the OPC site sat above Lake Michigan. [124] ¶ 9; [124-5]. Plaintiffs fail to offer any evidence or argument to demonstrate that just four years earlier—when Illinois entered the Union—the OPC site sat beneath the Lake. *See generally* [137]. In fact, the page to which Plaintiffs cite in the ISAS report includes a map from the "Early Nipissing" period showing that as recently as 4,000 years ago, Jackson Park sat above ground. [142] ¶ 9; [136-3] at 10.[9] As such, the factual record confirms that the OPC site constitutes never-submerged land under the public trust doctrine. This Court now turns to the merits of the parties' public trust arguments.

[9] Plaintiffs conceded this point at oral argument.

iii. The Public Trust Doctrine Applies to the OPC Site

Defendants first argue that because *Illinois Central* referred only to "navigable waters," and because the OPC site sits upon never-submerged land, the OPC cannot fall within *Illinois Central*'s application of the public trust doctrine. [123-1] at 18.

But Illinois courts have extended the public trust doctrine to Chicago parkland, including land within Jackson Park, because of the 1869 Act's directive that such land "shall be held, managed and controlled by them and their successors, as a public park, for the recreation, health and benefit of the public, and free to all persons forever." *See Clement v. Chi. Park Dist.*, 449 N.E.2d 81, 84 (Ill. 1983) (affirming lower court's approval of a golf driving range in Jackson Park under a public trust doctrine analysis); *Paepcke*, 263 N.E.2d at 15–19 (Ill. 1970) (applying public trust doctrine to park land in Washington and Douglas Parks). Thus, consistent with prior caselaw, this Court analyzes the OPC site under the public trust doctrine.

iv. Deference

Next, Plaintiffs argue that this Court should apply a general level of "heightened scrutiny" when analyzing the OPC site under the Illinois public trust doctrine. [120-1] at 16–17. Not so. Illinois public trust cases require courts to apply the doctrine using varying levels of deference, based upon the property's relationship to navigable waterways. *See, e.g.*, *Paepcke*, 263 N.E.2d at 15–19 (applying public trust doctrine to never-submerged park land); *Friends of the Parks v. Chicago Park Dist.*, 786 N.E.2d 161, 169–170 (Ill. 2003) (applying public trust doctrine to formerly submerged land); *Lake Michigan Fed'n*, 742 F. Supp. at 444–46 (applying public trust

doctrine to presently submerged land). In fact, Plaintiffs recognize that such levels of deference exist when asserting that the OPC site sits upon formerly submerged land. *See, e.g.*, [136] ¶ 9; [91] ¶ 45.

The below analysis, therefore, finds that the OPC does not, as a matter of law, violate the public trust under the level of scrutiny applied to never-submerged lands. In the alternative, this Court also finds that, even under the heightened levels of scrutiny (applied to formerly submerged and submerged lands), the OPC still does not violate the public trust.

a. Never-Submerged Land: *Paepcke* Requires Deference to the Illinois Legislature

The Illinois Supreme Court recognizes that Illinois legislators retain significant control over never-submerged land they themselves choose to designate within the public trust; and thus, when applying the public trust doctrine to land that is not—and never has been—submerged, reviewing courts must ask only whether sufficient legislative intent exists for a given land reallocation or diversion. *See Paepcke*, 263 N.E.2d at 19.

In *Paepcke*, the court considered allowing Chicago's Public Building Commission, with the Park District's cooperation, to construct a school-park facility on never-submerged land within Washington Park. *Id.* at 14. As in this case, the land at issue derived from the 1869 Act. *Id.* at 13. There, the court affirmed the trial court's dismissal of plaintiffs' challenge under the public trust doctrine because "sufficient manifestation of legislative intent" existed to "permit the diversion and reallocation contemplated" by defendants' plan. *Id.* at 18–19. In finding the requisite

legislative intent under the Public Building Commission Act and related statutes, the court warned that "courts can serve only as an instrument of determining legislative intent as evidenced by existing legislation measured against constitutional limitations" and in "this process the courts must deal with legislation as enacted and not with speculative considerations of legislative wisdom." *Id*. at 21. Thus, courts facing public trust claims over statutorily designated parkland must ask only whether legislation "is sufficiently broad, comprehensive and definite to allow the diversion" at issue. *Id*. at 19 (citing *People ex rel. Stamos v. Public Building Com.*, 238 N.E.2d 390 (Ill. 1968)).

Here, as in *Paepcke*, sufficient legislative intent exists to permit diverting a portion of Jackson Park for the OPC. The relevant piece of legislation—the Park District Aquarium and Museum Act (Museum Act)—explicitly states that cities and park districts with control or supervision over public parks have authorization to:

> purchase, erect, and maintain within any such public park or parks edifices to be used as aquariums or as museums of art, industry, science, or natural or other history, *including presidential libraries, centers, and museums* . . .

70 ILCS 1290/1 (emphasis added).

Moreover, the Museum Act permits the City to contract with private entities to build a presidential center:

> The corporate authorities of cities and park districts . . . [may] permit the directors or trustees of any corporation or society organized for the construction or maintenance and operation of an aquarium or museum as hereinabove described to erect, enlarge, ornament, build, rebuild, rehabilitate, improve, maintain, and operate its aquarium or museum within any public park . . . *and to contract with any such directors or trustees of any such aquarium or museum relative to the erection,*

> *enlargement, ornamentation, building, rebuilding, rehabilitation, improvement, maintenance, ownership, and operation of such aquarium or museum*.

Id. (emphasis added).

This clear legislative directive states a broad, comprehensive and definite intention to allow the City to contract with directors or trustees of a museum (the Foundation) to build a presidential center (the OPC) in a public park (Jackson Park). *See also People v. Pack*, 862 N.E.2d 938, 940 (Ill. 2007) ("The best indication of legislative intent is the statutory language, given its plain and ordinary meaning."). In other words, the Museum Act reflects the legislature's determination that presidential centers, as a type of museum, remain consistent with a parcel's designation as public parkland. *See also Furlong v. South Park Comm'rs*, 151 N.E. 510, 511 (Ill. 1926) (declining to enjoin South Park Commissioners' efforts to issue bonds to renovate Fine Arts Building to include a museum—now the Museum of Science and Industry—in Jackson Park, because park purposes "are not confined to a tract of land with trees, grass and seats, but mean a tract of land ornamented and improved as a place of resort for the public, for recreation and amusement of the public."); *Fairbanks v. Stratton*, 152 N.E.2d 569, 575 (Ill. 1958) (upholding construction of an exposition building and auditorium—now the McCormick Place convention center—on submerged land under the public trust doctrine).

1. The Museum Act Authorizes the OPC

Nevertheless, Plaintiffs argue that the Museum Act fails to "authorize the [OPC] transaction" because the Act fails to specifically cite to Jackson Park. [120-1]

at 32–33; [137] at 19–20; [143] at 11.[10] They rely upon *Friends of the Parks v. Chicago Park Dist.*, 160 F. Supp. 3d 1060, 1064–65 (N.D. Ill. 2016) (*Lucas II*), in which the court evaluated a Park District proposal to enter a 99-year ground lease with the Lucas Museum of Narrative Art under the Museum Act. [120-1] at 33. There, plaintiffs' due process and *ultra vires* claims alleged that the legislature failed to specifically reference the land subject to the ground lease; and the court denied defendants' motion to dismiss both claims. *Friends of the Parks*, 160 F. Supp. 3d at 1064–65.

Even assuming that the *Lucas II* case was rightly decided (which this Court need not address), that ruling does not apply here. First, that case involved formerly submerged land, rather than never-submerged parkland held in trust due to a legislative enactment, and thus warranted a different level of deference. *Id*. at 1063. Second, *Lucas II* involved a long-term lease, and therefore a different portion of the Museum Act. *Id*. at 1068. Third, the court considered whether sufficient legislative authorization existed only in relation to plaintiffs' procedural due process and *ultra vires* claims, instead of their public trust claim. *Id*. at 1064–66. And fourth, the court evaluated the issue of legislative authorization only at the motion to dismiss stage, rather than on the merits at summary judgment:

> Plaintiffs . . . plead that the General Assembly, in enacting the [Museum Act] purportedly transferring control of the property, did not "refer

[10] Plaintiffs make their detailed comments regarding the absence of proper legislative authorization with respect to their due process claim [120-1] at 32–33, but they also contend that courts must apply the "heightened scrutiny" standard to all types of land in evaluating a public trust claim as well [120-1] at 16. Because this Court finds proper legislative authorization relevant to its analysis of both the due process and the public trust doctrine claims, this Court considers Plaintiffs' authorization arguments under both counts.

> specifically to the alienation, forfeiture or disposition of the land that is subject of the ground lease." Plaintiffs have alleged that, by failing to provide specific approval for the transfer of the subject land, the General Assembly has acted in violation of Plaintiffs' right to due process. Construing the allegations in Plaintiffs' favor, Plaintiffs have sufficiently stated a procedural due-process claim under the Fourteenth Amendment.

Id. at 1064–65; *see also id.* at 1065–66 (articulating the same reasoning in relation to plaintiffs' *ultra vires* claim).

Most importantly, in *Paepcke*, the Illinois Supreme Court explicitly rejected plaintiffs' argument that the "legislature must clearly and specifically state with reference to the park or parks in question explicit authority to divert to new public uses." 263 N.E.2d at 19. *Paepcke* insists that courts should consider whether the legislature stated sufficiently broad, comprehensive, and definite intent. *Id.* (adopting analysis in *Stamos*, 238 N.E.2d at 398). Here, as in *Paepcke*, this Court finds that the Museum Act evinces that intent, and therefore sufficiently authorizes construction of the OPC in Jackson Park.

Plaintiffs also assert that even if the Museum Act authorizes the transaction, it cannot "release the restriction" contained in the 1869 Act that Jackson Park must remain "a public park, for the recreation, health and benefit of the public, and free to all persons forever." [120-1] at 20, 33. Plaintiffs argue that Defendants seek to reallocate "open, free public park to a more restrictive use by authorizing the Foundation to erect numerous building[s] that will not be open and free, and will have restricted and paid access." *Id.*

Certainly, the Museum Act does not lift the 1869 Act's "restriction." *See generally* 70 ILCS 1290/1. But, Illinois courts have time and again made clear that

museums and other structures—including those with fees—fall within permissible public park purposes and thus do not violate the 1869 Act. *Furlong*, 151 N.E.2d at 511 (recognizing the "construction and maintenance of a building for museums, art galleries, botanical and zoological gardens, and many other purposes, for the public benefit," as legitimate park purposes); *Clement v. O'Malley*, 420 N.E.2d 533, 540–41 (Ill. App. Ct. 1981) (approving construction of golf course in Jackson Park, in part because the "mere fact that a fee is charged for the use of special facilities does not as such render the facility closed to the public, provided such fees are reasonable for the general population of the community.") (internal citation omitted), *aff'd sub nom.*, *Clement v. Chi. Park Dist.*, 449 N.E.2d at 84. Moreover, the same terms of the Museum Act apply to the Museum of Science and Industry, also located in Jackson Park. [124] ¶ 31.

And even if the Museum Act did violate the 1869 Act, the *Paepcke* court—upholding construction of a school building not open to "all persons forever"—made clear that the state legislature, having created the parkland, could reallocate its use. *See* 263 N.E.2d at 18 ("[A]s far as the rights of the public in public trust lands are concerned," it would be "contrary to well established precedent" to hold that "the legislature could never, by appropriate action, change or reallocate the use in any way."); *see also Choose Life Ill., Inc. v. White*, 547 F.3d 853, 858 n.4 (7th Cir. 2008) ("It is axiomatic that one legislature cannot bind a future legislature.").

The Illinois General Assembly, through the Museum Act, sufficiently authorizes the construction and operation of the OPC in Jackson Park. As such, this

Court cannot find, as a matter of law, that the OPC violates the public trust doctrine. Nonetheless, in the alternative, this Court next analyzes the OPC site under the remaining levels of public trust scrutiny for clarity and finality.

b. Formerly Submerged Land: No Corresponding Public Benefit Test

The next level of scrutiny (used for formerly submerged land) under the public trust doctrine also requires a finding in Defendants' favor. Under this standard, a diversion of formerly submerged parkland violates the public trust only if it: (1) does not contain sufficient legislative authorization, pursuant to *Paepcke*; and (2) primarily benefits a private entity, with no corresponding public benefit. *Friends of the Parks*, 786 N.E.2d at 169–70 (citing *Paepcke*, 263 N.E.2d at 21).

In *Friends of the Parks*, the Illinois Supreme Court considered a section of the Illinois Sports Facilities Authority Act, which permitted public financing of physical improvements to Soldier Field. *Id*. at 163. The land at issue occupied formerly navigable, or submerged, water of Lake Michigan. *Id*. at 163. There, plaintiffs argued that the Sports Facilities Authority Act violated the public trust doctrine because it allowed a private party (the Bears) to use and control Soldier Field "for its primary benefit with no corresponding public benefit." *Id*. at 169.

In upholding the lower court's grant of summary judgment, the court first distinguished two cases—both of which involve submerged land—which Plaintiffs here also rely upon: *Illinois Central* and *People ex rel. Scott v. Chicago Park District*, 360 N.E.2d 773 (Ill. 1976):

> There is little similarity between *Illinois Central* or *Scott* and the case before us. The Park District is, and will remain, the owner of the Burnham Park property, including Soldier Field. Neither the Act, the implementing agreements, nor the project documents provide for a conveyance of the Soldier Field property to the Bears. There is no abdication of control of the property to the Bears. The Park District will continue in its previous capacity as landlord under a lease agreement with the Bears and will continue in its existing role as owner of the remainder of the Burnham Park property.

Id. at 170. Here too, the City will retain ownership over the OPC site, as well as the OPC buildings once constructed by the Foundation. Exhibit D, §§ 2.1–.2, 4.4. And the City will not abdicate control over the site: if the Foundation ceases to use the OPC for its permitted purposes under the Use Agreement, the City may terminate the Agreement. [124] ¶ 21; [125-5] (Exhibit D, §§ 6.1, 16.2).

Second, the court invoked *Paepcke*'s language regarding legislative intent, finding it "equally applicable" that the General Assembly had authorized public financing for renovating government-owned stadiums under the Sports Facilities Authority Act. 786 N.E.2d at 170. Here, this Court again notes that such clear authorization exists in the form of the Museum Act.

And finally, the court noted that through improvements to Soldier Field, the public would enjoy "athletic, artistic, and cultural events" as well as better access to the stadium, museums, and the "lakefront generally" due to improved parking. *Id*. Because of these public benefits, the project proposal did not violate the public trust doctrine, even though the court acknowledged that the Bears, as a private entity, would also benefit from the project. *Id*. As such, even if this Court considers a for-profit sports team comparable to a non-profit foundation seeking to build a

presidential center, *Friends of the Parks* confirms that any benefits the Foundation receives from the OPC do not render the OPC violative of the public trust doctrine. Rather, diverting formerly submerged parkland violates the public trust only if it primarily benefits a private entity with "no corresponding public benefit." *Id.* at 169–70.

And the OPC surely provides a multitude of benefits to the public. It will offer a range of cultural, artistic, and recreational opportunities—including an educational museum, branch of the Chicago Public Library, and space for large-scale athletic events—as well as provide increased access to other areas of Jackson Park and the Museum of Science and Industry. *See* [124] ¶¶ 25–30, 39–47. In short, if improvements to a football stadium sufficiently benefit the public, the OPC must, too. Accordingly, the OPC does not violate the public trust doctrine under the level of scrutiny applied to formerly submerged lands, as articulated in *Friends of the Parks*.

c. Submerged Land: Primary Purpose Standard

Finally, an analysis of those cases in which courts have considered presently submerged land further demonstrates that the OPC does not violate the public trust doctrine. Under the public trust test applicable to such land, courts ask whether the "primary purpose" of a legislative grant is "to benefit a private interest." *Lake Michigan Fed'n*, 742 F. Supp. at 445; *Scott*, 360 N.E.2d at 781 (finding a public trust violation where the court could "perceive only a private purpose for the grant.").

In *Scott*, for example, the Illinois Attorney General sued to invalidate a statute authorizing U.S. Steel Corporation to purchase a portion of Lake Michigan to expand

its steel plant. 360 N.E.2d at 779–80. The relevant authorizing legislation stated that the additional facility would "result in the conversion of otherwise useless and unproductive submerged land into an important commercial benefit development to the benefit of the people of the State of Illinois." *Id.* at 781. Further, defendant steel company argued that the facility would serve the public by creating jobs and boosting the city and state economy. *Id.* The court invalidated the statute, holding that while "courts certainly should consider the General Assembly's declaration that given legislation is to serve a described purpose," the "self-serving recitation of a public purpose within a legislative enactment is not conclusive of the existence of such purpose." *Id.* (internal citation omitted). Rather, to "preserve meaning and vitality in the public trust doctrine, when a grant of submerged land beneath waters of Lake Michigan is proposed . . . the public purpose to be served cannot be only incidental and remote." *Id.*

Even if the OPC falls within the standard of review applicable to presently submerged land (which it does not), this Court cannot find the Museum Act's explanation of presidential centers' public benefits "self-serving" or "incidental and remote." The Museum Act states that presidential centers, as a type of museum, further "human knowledge and understanding, educating and inspiring the public, and expanding recreational and cultural resources and opportunities." 70 ILCS 1290/1. This explanation of the OPC's public benefits aligns with well-established caselaw. *See, e.g.*, *Furlong*, 151 N.E. 510 at 511 (finding that because parks exist as places "of resort for the public, for recreation and amusement" the "construction and

maintenance of a building for museums, art galleries . . . and many other purposes, for the public benefit" are legitimate park purposes); *see also Fairbank*, 152 N.E.2d at 575 (upholding construction of an exposition building and auditorium on submerged land in Burnham Park because they were "in the public interest" and thus did not violate the public trust doctrine). And the OPC's primary purpose matches this legislative directive, as its principal building and "central mission"—the Museum—seeks to educate the public by telling "the stories of the first African American President and First Lady of the United States, their connection to Chicago, and the individuals, communities, and social currents that shaped their local and national journey." [124] ¶¶ 24–25.

Unconvincingly, Plaintiffs attempt to twist this public benefit into a private purpose, arguing that the Museum's mission merely "seeks to preserve and enhance the legacy of the former President and his wife" rather than benefit the public. [120-1] at 24; [137] at 13. But this Court cannot accept such a mischaracterization; under Plaintiffs' theory, any museum with which a select group of individuals disagree could violate the public trust. This Court will not, as the *Paepcke* court cautioned against, transform itself into a legislature or zoning board and then rewrite the educational merits of any given museum or presidential center built on public trust land. 263 N.E.2d at 21; *see also Friends of the Parks*, 786 N.E.2d at 165 (where plaintiffs submitted an economics professor's affidavit to argue that authorizing legislation benefited a private interest, rather than serve the declared public objectives

announced in the Act, the trial court correctly considered the affidavit irrelevant and declined to inquire "into the merits or accuracy of the legislative findings").

The case before this Court does not involve proposals to use public trust land to expand railroad tracks, *Illinois Central*, 146 U.S. at 436–37, a steel plant, *Scott*, 360 N.E. at 775, or even a private university, *Lake Michigan Fed'n*, 742 F. Supp. at 443. Rather, Defendants seek to contract with the Foundation to build facilities such as a museum, branch of the Chicago Public Library, and outdoor recreational areas—all of which the City will own. [124] ¶¶ 23–30, 34. This project involves a public park, not a forest preserve. Accordingly, this Court relies upon controlling caselaw, constitutional limitations, the City Council's determinations, and the Museum Act in finding that the OPC's primary purpose benefits the public, rather than private interests. As such, this Court finds that the OPC survives the (inapplicable) level of scrutiny provided to presently submerged lands under the public trust doctrine.

v. The OPC Withstands Scrutiny Under the Wisconsin Factors

In *Paepcke*, the Illinois Supreme Court found "it appropriate to refer to the approach developed by the courts of our sister State, Wisconsin, in dealing with diversion problems." 263 N.E.2d at 19. The court proceeded to list the five factors used under Wisconsin's interpretation of the public trust doctrine:

> (1) that public bodies would control use of the area in question, (2) that the area would be devoted to public purposes and open to the public, (3) the diminution of the area of original use would be small compared with the entire area, (4) that none of the public uses of the original area would be destroyed or greatly impaired and (5) that the disappointment of those wanting to use the area of new use for former purposes was

> negligible when compared to the greater convenience to be afforded those members of the public using the new facility.

Id. The court then noted that while "not controlling under the issues as presented in this case we believe that standards such as these might serve as a useful guide for future administrative action." *Id.*; *see also Friends of the Parks*, 2015 WL 1188615, at *5 (N.D. Ill. Mar. 12, 2015) (*Lucas I*) (noting that the "'Wisconsin test' . . . was not adopted as applicable in public trust cases, and the Illinois Supreme Court again declined to use the test in *Friends of the Parks*.") (citing *Friends of the Parks*, 786 N.E.2d 161).

In *Clement*, the Illinois appellate court approved the Park District's proposal to construct of a golf driving range in Jackson Park under a public trust analysis. 420 N.E.2d at 540–41. But unlike in *Paepcke*, no state authorizing legislation existed from which the court could infer sufficient legislative intent. As such, the court analyzed the Jackson Park driving range according to the five Wisconsin factors:

> The property will still be controlled by the Park District. The mere fact that a fee is charged for the use of special facilities does not as such render the facility closed to the public, provided such fees are reasonable for the general population of the community. In this respect, we note nothing in the record to indicate the charges were unreasonable. Moreover, the designation of 11 acres as a driving range is small compared to the approximately 570 total acres in Jackson Park, and the public uses of the original area have not been destroyed or greatly impaired since picnicking, casual play activities, jogging, and meadow bird nesting are still possible elsewhere in the park. Finally, due to the small amount of land taken up by the driving range relative to total park acreage, the disappointment of those wanting to use the area for former purposes is likely to be slight – particularly since the range now offers the same convenience to south area public which has been provided in the north area for many years in Lincoln Park.

Id. at 541 (internal citations omitted). Although this Court need not apply the Wisconsin factors here, both parties discuss them here in relation to the OPC. *See* [137] at 4; [141] at 4. As such, this Court finds, as did the *Paepcke* court, that they provide helpful guidance under the public trust doctrine.

An analysis of the OPC under the Wisconsin factors requires the same result as in *Clement*. If the Foundation ceases to use the OPC for its permitted purposes under the Use Agreement, the City may terminate the Agreement. [124] ¶ 21; [125-5] (Exhibit D, §§ 6.1, 16.2). Only a portion of the OPC will require an entrance fee, and the Use Agreement and Museum Act require: (1) free admission to all Illinois residents at least 52 days out of the year; (2) free admission for Illinois school children accompanied by a teacher; and (3) an admission fee policy for City residents and certain low-income individuals "substantially comparable" to those maintained by other museums in Jackson Park. [124] ¶ 37; [125-5] (Exhibit D, § 6.10). The OPC will comprise only 19.3 acres, or 3.5 percent of Jackson Park's total 551.52 acres. [124] ¶ 6. As in *Clement*, the site will not destroy or greatly impair the land's original use; activities such as picnicking, jogging, and meadow bird nesting will not only be accessible in other areas of the park, but also within certain parts of the OPC site. *Id.* ¶¶ 30, 47. And here, too, the small amount of land taken up by the OPC site relative to total park acreage means the disappointment of those wanting to use the area for former purposes remains slight, particularly given: (1) the OPC's proposed green space areas; and (2) that the Museum of Science and Industry already exists

within the park. *Id.* ¶ 31. Here, as in *Clement*, this Court finds that the OPC satisfies the Wisconsin factors.

vi. Plaintiffs' Alternative Legal Theories Fail

Plaintiffs offer two alternative public trust theories in support of their motion for summary judgment: (1) a comparative, benefit-maximization analysis demonstrates that the choice to locate the OPC in Jackson Park constitutes an "arbitrary" or "unreasonable" legislative decision; and (2) the Foundation will not pay "fair market value" for use of the OPC site. [120-1] at 17–28. Neither theory exists under Illinois law.

First, Plaintiffs argue that the City failed to perform an analysis of whether locating the OPC on public trust park land "provides any benefit whatsoever over locating the Presidential Center on non-public trust property," and thus that the decision to locate the OPC within Jackson Park remains "arbitrary" and unreasonable." [120-1] at 17–20. In other words, Plaintiffs dispute whether Jackson Park is "the best" location for the OPC. *Id.* at 10, 18. But Plaintiffs fail to cite to any instance in the public trust jurisprudence in which courts have required government entities to pick "the best" location, much less require courts to review such assessments *de novo*. Quite simply, Illinois law imposes no obligation upon this Court to revisit the cost-benefit assessments of state and local lawmakers or otherwise sift through impact studies on its own to determine whether the UIC proposed sites, Washington Park, or Jackson Park constitutes the best location for the OPC. *See, e.g.*, *River Park v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994) ("Federal

courts are not boards of zoning appeals."). Rather, as is discussed above, courts need only look to the relevant authorizing legislation and cited public benefits for a given project within the lawmakers' own analysis; in other words, "value dependent assessment[s] of the best use of the property" are "highly subjective" and "irrelevant to an analysis of the propriety of a grant of public land." *Lake Michigan Fed'n*, 742 F. Supp. at 446.

Second, Plaintiffs argue that the Foundation's $10.00 payment, which forms part of its consideration for the Use Agreement, [125-5] (Exhibit D, Art. III), violates the public trust doctrine based upon a "line of cases involving Mississippi's treatment of public trust property known as 'sixteenth section lands.'" [120-1] at 24. According to Plaintiffs, these cases require the City to charge a "reasonable rent" with due regard" for leases of public trust property. *Id*. at 24–28. This theory is also unavailing because, in short, Illinois law controls this case. Plaintiffs do not offer any Illinois court that has cited to Plaintiffs' line of Mississippi cases or adopted those cases' reasoning or analysis. Accordingly, without addressing the possible implications of Mississippi's approach here, this Court declines to ignore controlling Illinois law in favor of an unprecedented rule. *See, e.g.*, *Insolia v. Phillip Morris, Inc.*, 216 F.3d 596, 607 (7th Cir. 2000) ("Though district courts may try to determine how the state courts would rule on an unclear area of state law, district courts are encouraged to dismiss actions based on novel state law claims."); *MindGames, Inc. v. Western Publishing Co., Inc.*, 218 F.3d 652, 655–56 (7th Cir. 2000) ("The rule is that in a case in federal

court in which state law provides the rule of decision, the federal court must predict how the state's highest court would decide the case, and decide it the same way.").

For all of these reasons, this Court grants Defendants' motion for summary judgment as to Plaintiffs' public trust claim (Count II) and denies Plaintiffs' motion for summary judgment as to Count II.

B. Count I: Violation of Due Process

Plaintiffs originally based their due process claim upon three theories: (1) aesthetic and environmental harm pursuant to *Sierra Club v. Morton*, 405 U.S. 727 (1972); (2) the public trust doctrine; and (3) the Fifth Amendment's Takings Clause. *See* [65-1] at 14; [91] ¶¶ 82–83, 85. This Court's prior motion to dismiss opinion found that Plaintiffs failed to establish standing based upon their aesthetic or environmental harm theory, but found that Plaintiffs established standing based upon the public trust doctrine. [92] at 11–14. Because Defendants' 12(b)(1) motion to dismiss did not challenge Plaintiffs' Takings Clause theory based upon subject matter jurisdiction, this Court did not consider it. *Id.* at 8–9. Therefore, only Plaintiffs' Takings Clause and public trust theories of due process remain.

i. Plaintiffs' Takings Clause Theory

As an initial matter, Plaintiffs' Takings Clause theory, to the extent it is included within Count I, fails as a matter of law. The Fifth Amendment states, in relevant part: "nor shall *private* property be taken for public use, without just compensation." U.S. Const. amend. V. (emphasis added). By the clause's plain language, no unconstitutional taking can occur where, as here, the relevant property

is already public. *See, e.g.*, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) ("In sum, the Takings Clause bars *the State* from taking private property without paying for it"); *see also Reichelderfer v. Quinn*, 287 U.S. 315, 323 (1932) (finding "[p]roperty was not taken" when legislation authorized constructing a fire house on public parkland; rather, the "taking occurred when the lands were condemned for the park."). Plaintiffs concede that Jackson Park exists as public parkland. [112-1] ¶ 15. Therefore, Plaintiffs' takings clause theory cannot survive summary judgment.

ii. Plaintiffs' Public Trust Theory

A procedural due process claim requires: (1) a cognizable property interest; (2) a deprivation of that interest; and (3) inadequate process. *Price v. Bd. of Educ.*, 755 F.3d 605, 607 (7th Cir. 2014); *Palka v. Shelton*, 623 F.3d 447, 452 (7th Cir. 2010). Here, Plaintiffs' public trust due process theory fails for two reasons. First, the parties spend considerable time disputing whether, under the public trust doctrine, Plaintiffs hold a sufficient property interest in the Jackson Park site to satisfy a procedural due process claim. *See* [120-1] at 28–34; [123-1] at 31–34.[11] But even assuming Plaintiffs hold a cognizable property interest, Plaintiffs' due process claim fails because they fail to demonstrate a deprivation of that interest.

[11] In doing so, Plaintiffs rely heavily upon this Court's prior motion to dismiss opinion, which found that they established standing for purposes of their federal due process claim, [93] at 12. [120-1] at 29. But this Court's finding that Plaintiffs have standing does not equate to success on the merits at summary judgment. *See, e.g.*, *Booker-El v. Superintendent, Ind. State Prison*, 668 F.3d 896, 899–900 (7th Cir. 2012) ("[S]tanding and entitlement to relief are not the same thing.").

In particular, Plaintiffs argue that Defendants deprived them of adequate process because the "Illinois legislature has not authorized the transactions at issue between the Park District, the City and the Foundation, nor has the Illinois legislature released the restriction on the Jackson Park Site." [120-1] at 28. But, as discussed in detail above with respect to Plaintiffs' public trust claim under *Paepcke*, the General Assembly—through the Museum Act—has authorized the OPC; the Museum Act need not refer specifically to the alienation or disposition of the Jackson Park site itself. *See Paepcke*, 263 N.E.2d at 19. Moreover, this Court has already determined that neither the OPC nor the Museum Act violates the 1869 Act's restriction upon public parkland. *See Furlong*, 151 N.E.2d at 511; *Clement v. O'Malley*, 420 N.E.2d at 540–41. Thus, Plaintiffs fail to establish a deprivation of any interest under their procedural due process claim. For this reason alone, their public trust theory fails as a matter of law.

Second, Plaintiffs cannot base their federal due process claim solely upon violations of state statutes.[12] *See Hebert v. Louisiana*, 272 U.S. 312, 316–17 (1926) ("The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires"); *Tucker v. City of Chicago*, 907 F.3d 487, 495 (7th Cir. 2018) ("[F]ederal due process protection is not a guarantee that state governments will apply their own laws accurately.")

[12] Plaintiffs' response memorandum also argues that Defendants' deprived them of adequate process because the Illinois Property Transfer Act does not authorize the Park District's Sale. [137] at 20. As discussed below, this Court finds that the Property Transfer Act authorizes the Park District's sale. And regardless, this argument fails to establish a deprivation of any due process interest because it relies solely upon an alleged violation of a state statute.

(citing *Simmons v. Gillespie*, 712 F.3d 1041, 1044 (7th Cir. 2013)); *see also Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) (holding that a "violation of state law is not a denial of due process law" where plaintiffs' due process claim sought review of Board of Trustees' zoning decision under state law). Absent a cognizable due process claim separate and apart from alleged violations of the Museum Act and 1869 Act, Count I fails as a matter of law.

Accordingly, this Court grants Defendants' motion for summary judgment as to Count I, and denies Plaintiffs' motion for summary judgment as to Count I.

C. Count III: *Ultra Vires* Action

Plaintiffs' *ultra vires* action claim, alleging that the Park District and City engaged in *ultra vires* actions for which they have no authority, rests upon two theories. [91] ¶ 99. First, Plaintiffs make the astounding argument that the OPC violates the Museum Act because it contains outdoor green spaces, in addition to buildings. [120-1] at 34. Second, Plaintiffs argue that because the City itself will not use the OPC site for the term of the Use Agreement, the Park District's transfer of land violates the Illinois Property Transfer Act. *Id.* at 40. Defendants argue that a plain reading of the relevant statutes dispels Plaintiffs' claim. [123] at 37–39. This Court agrees with Defendants.

i. The Museum Act Authorizes the OPC's Green Space

Plaintiffs' first theory proceeds in two parts, as follows. The Museum Act contains two provisions. The first states that the corporate authorities of cities and park districts have authorization to:

> purchase, erect, and maintain within any such public park or parks *edifices* to be used as aquariums or as museums of art, industry, science, or natural or other history, including presidential libraries, centers, and museums, such aquariums and museums consisting of all facilities for their collections, exhibitions, programming, and associated initiatives …

70 ILCS 1290/1 (emphasis added). In the same sentence, the Act clarifies that cities and park districts may also contract with directors or trustees relative to the building and operation "of such aquarium or museum." *Id.*

The second sentence then begins:

> Notwithstanding the previous sentence, a city or park district may enter into a lease for an initial term not to exceed 99 years, subject to renewal, allowing a corporation or society as hereinabove described to erect, enlarge, ornament, build, rebuild, rehabilitate, improve, maintain, and operate its aquarium or museum, *together with the grounds immediately adjacent to such aquarium or museum, and to use, possess, and occupy grounds surrounding such aquarium or museum* as hereinabove described for the purpose of beautifying and maintaining such grounds in a manner consistent with the aquarium or museum's purpose . . .

Id. (emphasis added).

Based upon this second provision, Plaintiffs argue that the Museum Act only authorizes the City to allow the Foundation to build and operate the OPC, together with the grounds immediately adjacent to the OPC, if the City leases the OPC site to the Foundation. [120-1] at 37. Because the Use Agreement does not create a lease between the City and Foundation, Plaintiffs maintain that the OPC site cannot contain any grounds surrounding the building "edifices," and thus that the Use Agreement authorizing OPC green space constitutes *ultra vires* activity. *Id.*; [112-1] ¶ 46.

Essentially, Plaintiffs ask this Court to find that a statute authorizing the construction of a presidential center within a green space prohibits preserving green space within such a center. This Court rejects such an absurd and bizarre reading of the statutory text and context. The Museum Act's first sentence—not relating to leases—defines museums to include presidential centers. 70 ILCS 1290/1. The plain language then goes on to clarify that museums include "all facilities for their collections, exhibitions, programming, and associated initiatives." *Id*. Reading the Museum Act according to its express language, as this Court must, does not allow this Court to limit "facilities" to just buildings. *See, e.g.*, *Williams v. Staples*, 804 N.E.2d 489, 493 (Ill. 2004) (The plain language of the statute serves as "the most reliable indicator of the legislature's objectives in enacting a particular law.") (internal quotations omitted); *Lawson v. FMR LLC*, 571 U.S. 429, 440 (2014) (courts must give "the words used their ordinary meaning"); *Facility*, *New Oxford American Dictionary* 610 (3d ed. 2010) ("facility" defined as "space or equipment necessary for doing something," as in "facilities for picnicking, camping, and hiking.").

The Foundation's design for the OPC green space includes purposeful features such as: (1) play areas for children; (2) contemplative spaces; (3) a sledding hill; (4) a sloped lawn for picnicking, recreation and community and special events; (5) walking paths; and (6) a nature walk along the lagoon. [124] ¶ 30. According to the Museum's mission statement, these "outdoor facilities" will "beautify and enhance the recreational opportunities on the site, creating a fun, safe environment for visitors to enjoy in all seasons." [125-5] (Exhibit D, (Sub) Exhibit "C"). These features thus

comprise part of the OPC's facilities for programming and associated initiatives. Therefore, given the complete absence of any textual support for Plaintiffs' novel statutory construction, this Court cannot find that the Use Agreement, by authorizing the OPC's use of green space, constitutes *ultra vires* activity.

ii. The Illinois Property Transfer Act Authorizes the OPC

Plaintiffs' second theory argues that the Illinois Local Government Property Transfer Act, 50 ILCS 605/0.01 *et seq.*, does not authorize the Park District's transfer of the Jackson Park site to the City.[13] Section 2 of the Property Transfer Act provides:

> If the territory of any municipality shall be wholly within, coextensive with, or partly within and partly without the corporate limits of any other municipality . . . and the first mentioned municipality (herein called "transferee municipality"), shall by ordinance declare that it is necessary or convenient *for it to use, occupy or improve* any real estate held by the last mentioned municipality (herein called the "transferor municipality") in the making of any public improvement or for any public purpose, the corporate authorities of the transferor municipality shall have the power to transfer *all of the right, title and interest* held by it immediately prior to such transfer, in and to such real estate, whether located within or without either or both of said municipalities, to the transferee municipality upon such terms as may be agreed upon by the corporate authorities of both municipalities . . .

Id. at 605/2 (emphasis added). Based upon this language, Plaintiffs contend that the Park District maintains authority to transfer the Jackson Park site to the City only if the City itself will "use, occupy, or improve" the site for the OPC. [120-1] at 41. Because the Use Agreement provides the Foundation with the right to occupy, use,

[13] Plaintiffs also argue that the Park District violates section 2(b) of the Property Transfer Act, which governs the transfer of municipality-owned land limited by restrictions. [137] at 22. This section only applies if transferee municipalities desire the use of the land "free from" the relevant restriction. 50 ILCS 605/2(b). This Court has already found that the Museum Act and OPC do not violate the 1869 Act's restriction on public parkland. Therefore, Plaintiffs' section 2(b) argument fails under Count III as well.

maintain, operate, and alter the OPC, Plaintiffs argue that the Park District's transfer constituted an *ultra vires* activity. Defendants, on the other hand, maintain that: (1) the Property Transfer Act does not prohibit the acquiring municipality from contracting with third parties to assist in improving the transferred land; and (2) the Museum Act, Intergovernmental Cooperation Act, and Article VII, section 10(a) of the Illinois Constitution authorize such a contract. This Court agrees with Defendants.

First, Article VII, section 10(a) of the Illinois Constitution permits units of local government to "contract and otherwise associate with individuals, associations, and corporations" in any manner not prohibited by law. Further, that same section allows local governments to "transfer any power or function, in any manner not prohibited by law or ordinance" to other units of local government. Likewise, the Intergovernmental Cooperation Act, 5 ILCS 220/2–3, allows units of local governments to exercise, combine, transfer, and "enjoy jointly" any of their "powers, privileges, functions, or authority," except where expressly prohibited by law. Thus, read together with the Property Transfer Act, these provisions demonstrate that: (1) each Defendant, as an individual unit of local government, can separately contract with third parties on land that they already own; and (2) either Defendant can transfer land to the other, along with their power to contract with third parties on that land.

Plaintiffs contend that none of these provisions apply, because they only allow transfers not prohibited by law. *See, e.g.*, [91] ¶¶ 63, 67. But Plaintiff fails to point

to any law that prohibits such transfers. For instance, the Property Transfer Act is silent as to whether municipalities can contract with third parties to improve transferred land. [14, 15] *See* 50 ILCS 605/2; *see also Wittman v. Koenig*, 831 F.3d 416, 425 (7th Cir. 2016) ("Legislative silence is ordinarily a weak indication of legislative intent."). And the Museum Act clearly authorizes the City to contract with the Foundation in constructing and operating the OPC. 70 ILCS 1290/1. Moreover, Plaintiffs' reading of the statute would create the nonsensical result of prohibiting transferee municipalities from ever contracting with engineers, architects, or builders to improve a site. This Court rejects Plaintiffs' theory and instead reads each of the relevant provisions of Illinois law within context together and gives each statute effect according to its plain terms.[16] Accordingly, this Court cannot find that

[14] Plaintiffs also argue that the Park District's transfer of the OPC site violates the Illinois Park District Code, 70 ILCS 1205/10-7, which governs the terms by which park districts may sell, lease, or exchange realty. [137] at 21. But the Park District Code explicitly states that it does not apply to the Chicago Park District. 70 ILCS 1205/1-2(d). Accordingly, Plaintiffs' *ultra vires* claim cannot succeed based upon this theory.

[15] Plaintiffs' amended complaint references Article VIII, Section I(a) of the Illinois Constitution in relation to their *ultra vires* claim. [91] ¶ 64. Article VIII, Section 1(a) provides that public funds, property or credit shall be used only for public purposes. Plaintiffs make no such argument in their motion for summary judgment, and thus they have waived the argument. *See generally* [120-1]. In any event, this Court finds, consistent with its public trust analysis, that the OPC's educational and recreational benefits serve a public purpose. *See, e.g.*, *Friends of the Parks*, 786 N.E.2d at 168–69 (finding that Soldier Field "has served public purposes since its dedication in 1924" and would "continue to do so after the completion of the Burnham Park project as authorized by the Act."); *Paschen v. Winnetka*, 392 N.E.2d 306, 310 (Ill. App. Ct. 1979) (under article VIII, section 1(a), courts must ask whether "governmental action has been taken which directly benefits a private interest without a corresponding public benefit").

[16] Even if the Property Transfer Act's silence could somehow be construed as ambiguous (which it is not), this Court would reach the same result by reading each provision and construing them all together (Property Transfer Act, Museum Act, Intergovernmental Cooperation Act, and Article VII, section 10(a) of the Illinois Constitution). *People v. 1946 Buick, VIN 34423520*, 537 N.E.2d 748, 750 (Ill. 1989) (Illinois recognizes the doctrine of *in pari materia*, but only to resolve statutory ambiguities).

the Park District's transfer of the Jackson Park site to the City constitutes an *ultra vires* act under the Property Transfer Act.

This Court grants Defendants' motion for summary judgment as to Count III and denies Plaintiffs' motion for summary judgment as to Count III.

D. Count IV: Declaratory Judgment As to Inapplicability of the Illinois Museum Act

Plaintiffs' theory as to Count IV also falls short. Ostensibly, Plaintiffs contend that the portions of the Museum Act amended in 2016 constitute retroactive changes, and therefore seek a declaratory judgment that the Museum Act cannot authorize the OPC. [91] ¶¶ 100–103.

Specifically, Plaintiffs' allegations as to Count IV proceed as follows:

> 101. The 2016 Amendment to the Museum Act states on its face that it is not retroactive. The temporal reach of the 2016 Amendment states that the amendment is "declaratory of existing law," and therefore the substance of the 2016 Amendment cannot be made retroactive.
>
> 102. However, the 2016 Amendment is not declaratory of existing law. Existing law at the time of the 2016 Amendment does not [ ] allow aquariums and museums on formerly submerged lands, does not allow undefined "edifices" for "presidential libraries and centers" on park land, and does not allow the gifting of park land to private entities by allowing multiple 99 year leases of park land to a private entity – all of which were added in the 2016 Amendment to the Museum Act.
>
> 103. On information and belief, the Defendants will contend that the Illinois Museum Act allows a Presidential Center to be constructed on the Jackson Park Site. Therefore, an actual and justiciable controversy exists between the Plaintiffs and the Defendants related to the applicability of the Museum Act to the Presidential Center.

Defendants move for summary judgment on this claim, arguing that: (1) the 2016 amendment had no retroactive effect on the Operating Ordinance, as the City

Council enacted it in 2018; and (2) in any event, the General Assembly can lawfully apply the amendment retroactively. [123-1] at 39–40. Plaintiffs, however, fail to address Count IV in their response memorandum. *See generally* [137]. Failure to respond to an argument results in waiver, and thus justifies granting Defendants' motion for summary judgment as to Count IV. *See Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010).

Nevertheless, this Court also agrees with Defendants that the Museum Act cannot retroactively apply to the OPC. To the extent Plaintiffs allege in their amended complaint that the Museum Act "cannot be made retroactive," the City did not enact the Operating Ordinance, which authorized the City to accept the OPC site from the Park District and enter into the Use Agreement, until two years after the 2016 amendment. [124] ¶ 19. Therefore, no record exists from which this Court can find the 2016 amendment to the Museum Act constituted an unlawful retroactive provision as applied to the OPC. This Court grants Defendants' motion for summary judgment as to Count IV.

E. Count V: Special Legislation

Count V seeks to void the Museum Act under the Illinois Constitution's Special Legislation Clause, which prohibits a "special or local law when a general law is or can be made applicable." Ill. Const. 1970, art. IV, § 13. According to Plaintiffs, the 2016 amendment to the Museum Act "expressly" allowed a presidential center, and thus constitutes special legislation. Defendants move for summary judgment as to

Count V because the 2016 amendment does not create an exclusionary classification. This Court agrees.

As an initial matter, Plaintiffs spend the vast majority of their amended complaint and summary judgment briefing arguing that the Museum Act fails to authorize the OPC because it lacks specificity. In the same breadth, with respect to Count V, Plaintiffs also claim that the General Assembly acted in an improperly specific manner when it included "presidential centers" within the Act. [91] ¶ 109. Count V falls, however, for the simple reason that it fails to survive Illinois courts' two-part test for special legislation claims.

The special legislation clause prohibits the General Assembly from conferring "a special benefit or privilege upon one person or group and excluding others that are similarly situated." *Crusius v. Illinois Gaming Board*, 837 N.E.2d 88, 94 (Ill. 2005). While the legislature maintains broad discretion to make statutory classifications, the special legislation clause prevents it from making classifications that arbitrarily discriminate in favor of a select group. *Id.*; *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 840 N.E.2d 1174, 1183 (Ill. 2005). Illinois courts thus apply a two-part test to determine whether a law constitutes special legislation: (1) whether the statutory classification at issue discriminates in favor of a select group and against a similarly situated group; and (2) if the classification does so discriminate, whether the classification is arbitrary. *Id.*

Here, Plaintiffs object to the portion of the Museum Act which defines museums to *include* "presidential libraries, centers, and museums." [137] at 25; 70

ILCS 1290/1. But this language does not discriminate in favor of a select group or against a similarly situated group, nor does it create any unlawful classification whatsoever. Rather, the Act merely enumerates traditional examples of museums for purposes of the Act. *See* [91-3]; 70 ILCS 1290/1. As such, the amendment does not exclude any entity wishing to operate a museum in a public park under the Museum Act, and therefore fails the two-part test. *See, e.g.*, *Elem. Sch. Dist. 159 v. Schiller*, 849 N.E.2d 349, 363–64 (Ill. 2006) (finding no special legislation where law did not exclude any entity from a benefit received by a property owner pursuant to it). Accordingly, this Court grants Defendants' motion for summary judgment as to Count V.

IV. Conclusion

For the reasons explained above, this Court grants Defendants' motion for summary judgment as to Counts I through V, [122], and denies Plaintiffs' motion for summary judgment as to Counts I through III, [112]. The Clerk shall enter judgment for Defendants and against Plaintiffs. All set dates and deadlines are stricken. Civil case terminated.

Dated: June 11, 2019

Entered:

John Robert Blakey
United States District Judge

APPENDIX D

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

AMENDED October 13, 2020
October 8, 2020

Before

DANIEL A. MANION, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

Nos. 19-2308 & 19-3333

PROTECT OUR PARKS, INC., and MARIA VALENCIA,
Plaintiffs-Appellants,

v.

CHICAGO PARK DISTRICT and CITY OF CHICAGO,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 1:18-cv-3424

John Robert Blakey,
Judge.

O R D E R

On September 4, 2020, Plaintiffs-Appellants filed a petition for rehearing en banc. The judges on the panel have voted to deny rehearing, and no judge in regular active service has requested a vote on the petition for rehearing en banc.[*]

Accordingly, it is ordered that the petition for rehearing en banc[**] is DENIED.

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[*] Circuit Judge Barrett was a member of the panel when this case was decided on August 21, 2020, and she voted against the panel rehearing this case. The petition for rehearing en banc is resolved by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

[**] Judge Flaum and Judge Rovner did not participate in the consideration of this petition.