Appeal Nos. 19-2308 and 19-3333
(Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PROTECT OUR PARKS, INC., CHARLOTTE ADELMAN,
MARIA VALENCIA, JEREMIAH JUREVIS,
Plaintiffs-Appellants,

v.

THE CITY OF CHICAGO AND THE CHICAGO PARK DISTRICT,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
Hon. John Robert Blakey
No. 18-cv-3424

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLANTS PROTECT OUR PARKS, INC. AND MARIA VALENCIA PURSUANT TO THE PANEL'S MAY 21, 2020 ORDER

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Table Of Contents

Table Of Authorities

Federal Statutes And Regulations

Federal Rules Of Civil Procedure

State Statutes

Other Authority

SUPPLEMENTAL BRIEF

After the close of oral argument in this consolidated appeal captioned *Protect our Parks, Inc., et al. v. City of Chicago, et al.*, the panel for the Seventh Circuit asked both sides to "file supplemental briefs addressing whether the Plaintiffs-Appellants have Article III standing to bring their public trust doctrine claim in federal court." Here is the answer of the Plaintiffs to this question.

I. STANDING FOR PUBLIC TRUST CLAIMS UNDER ARTICLE III HAS BEEN PREVIOUSLY FOUND BY COURTS DIRECTLY ADDRESSING THE STANDING QUESTION.

The question of whether or not the federal courts had standing to deal with stand-alone public trust cases was addressed at the trial level in two District Court cases in the Northern District of Illinois. *Friends of the Parks v Chicago Park District,* 2015 WL 1188615 (N.D. Ill, No. 14-cv-09096, Mar. 12, 2015) (*FOTP*); *Protect Our Parks, Inc. v. Chicago Park District*, 368 F.Supp.3d 1184 (N.D. Ill 2019) (*POP I*). Both of those decisions cited to *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992). Both courts explicitly applied the three-part test in *Lujan* in holding that the plaintiffs had standing under Article III of the United States

Constitution to present public trust claims. The result should be no different in the circumstances at bar.

The arguments in *FOTP* and in *POP I* proceeded along parallel paths. The key precedent that was cited to explain why the plaintiffs had a cognizable interest was *Paepcke v. Public Building Commission*, 263 N.E.2d 11, 18 (Ill. 1970). Thus in *FOTP*, Judge Darrah cited *Paepcke* when he held that the plaintiffs had standing to contest the proposed construction because they are beneficiaries of lands held in the public trust:

> 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. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time. The conclusion we have reached is in accord with decisions in other jurisdictions, *see e.g., Robbins v. Department of Public Works*, 355 Mass. 328, 244 N.E.2d 577, and *Gould v. Greylock Reservation Com.*, 350 Mass. 410, 215 N.E.2d 114, wherein plaintiffs' rights as residents in a trust of public lands were enforced without question.[1]

[1] *Robbins* held that "public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion is now firmly established in our law." 244 N.E.2d 577, 579 (Mass. 1969). *Gould* held that a lease to transfer 4,000 acres in a State Park of 8,000 acres "covered an excessive area and thus was not authorized by the statutes" which limited amounts transferred to purposes "reasonably related" to the permissible statutory end. 215 N.E.2d 114, 123-24 (Mass. 1966).

FOTP, 2015 WL 1188615 at *3.

The relevant passages on the standing question in *POP I* read as follows:

> To establish Article III standing, a plaintiff must show that: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Silha*, 807 F.3d at 173 (citations omitted); *Lujan*. The party invoking federal jurisdiction bears the burden of establishing the elements of Article III standing. *Lujan.*

POP I, 384 F.Supp.3d at 1191.

The Court continued:

> 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." *See FOTP* (citing *Paepcke* (holding that a group of taxpayers who sued to prevent the implementation of plans to construct facilities on public parks had standing under the public trust doctrine)). Therefore, alleging that "rights under the public trust doctrine are being deprived without procedural due process ... so as to violate the federal Constitution," sufficiently establishes Article III standing. *Id.* In other words, plaintiffs alleging that "lands held in the public trust are imminently in danger of being altered by the actions of defendants" have identified a "concrete injury" that can be "redressed by a favorable court decision." *Id.* (citing *Lujan*).
>
> Here, Individual Plaintiffs allege that Defendants have placed Jackson Park—land held in the public trust—in

> imminent danger of alteration, and thus that Defendants are depriving them of their rights under the public trust doctrine without procedural due process. Therefore, Individual Plaintiffs, as Illinois taxpayers and beneficiaries of the public trust, have established Article III standing as to their Due Process claim under the public trust doctrine.

Id. at 1193.

Plaintiffs submit that those authorities and their application of *Lujan* to public trust claims was properly applied to the issue of standing in public trust contexts, and support the determination of Article III standing in response to the question raised by this panel.

II. THE PLAINTIFFS SHOULD HAVE STANDING CONSISTENT WITH THE PRINCIPLES OF *LUJAN* AND OTHER SUPREME COURT AUTHORITY.

During the course of oral argument, counsel for the Plaintiffs cited to the relevant decision in *Paepcke*, which held that all citizens of Chicago possessed an undivided interest in public trust property sufficient to challenge the merits of any decision of the Defendants, in order to give "meaning and vitality" to the obligations of public trustees. There was no reference in *Paepcke* to an individualized grievance of any particular citizen. The POP complaint does not argue that any particular citizen of Chicago had some special or distinctive interest in visiting Jackson Park, but it does argue that the fractional ownership

by taxpayers or residents is adversely impacted by the giveaway of such property, which will be imminently altered and destroyed if the proposed demolition and construction on the Jackson Park site is not done by the City or State for their own purposes, but is instead expressly delegated to the whims, and for the benefit, of a private party. [Docket No. 91 (Amended Complaint), *e.g.,* ¶¶ 52-55, 77-86, 88-96] A similar question was mooted in *Lujan* as the justices were deeply divided on the question of whether standing was conferred on the District Court because two members of the Defenders of Wildlife, Joyce Kelly and Amy Skilbred, had made some past visits to examine the overseas habitat, and had from time to time expressed a generalized intention to renew such connection at some time in the future. *Lujan,* 504 U.S. at 563-65 (per Scalia, J.); *id.* at 579 (per Kennedy, J.); *id.* at 584 (per Stevens, J.).

In light of this record, the issue raised by the panel was, while recognizing that the undivided interest properly gives standing in Illinois state court, whether such an interest is sufficient to provide standing in federal court under *Lujan.* The Court also drew attention to the sharp difference between *Paepcke* and *Illinois Central Railroad v.*

Illinois, 146 U.S. 387 (1892). The Illinois Central Railroad surely had standing in that case because of its asserted interest in the property that Illinois sought to repossess from it. Consistent with this distinction, key passages in *Lujan* stress, in the words of Justice Scalia, that all injuries must be "concrete and particularized," which is part of the "irreducible constitutional minimum" for cases brought in connection with Article III jurisdiction. *Lujan*, 504 U.S. at 560.

In the instant case, Plaintiffs submit that the requirements of standing under *Lujan* are satisfied. If the OPC is allowed to be built, any harm it causes will be actual or imminent. In addition, the damage to Jackson Park is surely fairly traceable to the construction project and the improper approvals and delegation which underlie it, for which injunctive relief is an effective remedy. The only possible objection to standing under the *Lujan* formulation is whether the harms in question are *particular* to the plaintiffs. The explication of that test in *Lujan* referred back to *Massachusetts v. Mellon*, 262 U.S. 447 (1923), where it is said that "[t]he party who invokes the power [of judicial review] must be able to show, not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury

as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally...." *Id.* at 488. *Mellon* involved a challenge to the Maternity Act, 2 Stat. 224, c. 135, which authorized payments to the states for them to conduct efforts to reduce maternal and infant mortality. *Id.* at 478. Neither the state of Massachusetts, Mrs. Harriet A. Frothingham, nor any of its citizens, were able to challenge this legislation.

However, unlike *Mellon,* the challenge in this case was to specific actions taken by the State of Illinois, the Chicago City Council, and the Chicago Park District with respect to a particular parcel of land. Here, the fractional ownership of the unique parcel of particularized land is in fact subject to injury through its taking by the Defendants and its destruction and transfer to a private party (the Obama Foundation). This injury is not so indefinite that it fails to meet the direct harm threshold.[2]

[2] Further evidence of the harm is included in the AOE Report [excerpts at A.294-320] which was the basis for Plaintiffs' Rule 60 motion which the district court denied (despite allowing only extraordinarily limited discovery), which decision has also been appealed and is one of the two consolidated appeals at bar (Appeal No. 19-3333). That AOE Report is an in-depth discussion of the adverse impacts on Jackson Park, the Midway and other historic resources, and was prepared for the National Park Service, the Federal Highway Administration, and the Illinois Department of Transportation, first published in July 2019, and now in final form

Such harm is further demonstrated by the improper delegation of authority that expressly occurred here from the governmental entity to a private party that permitted the taking of the property that is the subject of this suit. The City Council here expressly, unequivocally and without limitation, stated by ordinance that the decision on the location and land taken was solely that of the private party: "While the City Council is confident in the quality and thoroughness of both UIC's and UChicago's proposals, ***the City defers to the sound judgment of the President and his Foundation as to the ultimate location of the Presidential Library."*** [A.109 (emphasis supplied)] Individual actors have been found to have standing in raising challenges to such actions:

> **Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions**. [citation omitted]. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. **When government acts in excess of its lawful powers, that liberty is at stake**. The limitations that federalism entails are not therefore a matter

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[referred to as the Second Report, excerpts at A.365-400]. *See* https://www.chicago.gov/content/dam/city/depts/dcd/supp_info/jackson/final_aoe.pdf] *See also* Chicago Department of Planning & Development, Section 106 Consulting Parties Final AOE Overview, January 23, 2020, https://www.chicago.gov/content/dam/city/depts/dcd/supp_info/jackson/final_aoe_webinar.pdf.

> of rights belonging only to the States. States are not the sole intended beneficiaries of federalism.

Bond v. United States, 564 U.S. 211, 222 (2011)(finding standing for individual to bring Tenth Amendment claim)(emphasis supplied).

The letter and spirit of these authorities are the foundation for why federal courts support the provision of a forum for vindication of the Plaintiffs' interests when it is alleged, as here, a home rule jurisdiction like the City in conjunction with the State are violating the rights of its citizens by an individual order that applies in a particular case. Indeed, just recently in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), which was not a standing case, the Supreme Court held that actions to vindicate federal constitutional rights did not have to first be brought in state court, whose decisions could have a *res judicata* effect that would thereafter prevent a federal court from passing on a federal claim. Instead it held that "someone whose property has been taken by a local government has a claim under § 1983 for a 'deprivation of [a] right[ ] ... secured by the Constitution' that he may bring upon the taking in federal court," without first exhausting all state court remedies. *Id.* at 2172. *See also Patsy v. Board of Regents of Florida,* 457 U.S. 496, 507 (1982)(noting the settled law is that "exhaustion of

state administrative remedies is *not* a prerequisite to an action under [42 U.S.C] § 1983.") (emphasis supplied). The initial vindication of Plaintiffs' federal rights is as important here as it was in *Knick*, notwithstanding their different contexts.

Separately, and as raised by counsel for Plaintiffs at oral argument, standing in cases of a public trust is appropriately treated as though they were suits in equity comparable to derivative actions of the sort that are explicitly authorized under the Federal Rules of Civil Procedure, Rule 23.1(a), which provides as follows:

> PREREQUISITES. This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce.

In the standard derivative action, the class representative can seek damages paid to the corporation, an injunction against the illegal distribution of corporate assets in an unbalanced transaction where the corporation does not receive equal value from the third party with whom the transaction is offered, or the unraveling of an impermissible transaction. For discussion, *see* John C. Coffee Jr. & Donald E. Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 COLUM. L. REV. 261 (1981).

Doctrinally, it is clear that standing in the context of derivative actions does not carry the same meaning that it does in constitutional discourse, insofar as it only "denotes a requirement that minority shareholders must satisfy in order to sue despite the opposition of the board of directors." *Id.* note 8, at 262-263. In these derivative actions, moreover, it is impossible to show a particularized injury to any individual shareholder relative to all the others. Nonetheless in all of these cases it is easy to demonstrate all of the standing prerequisites, namely a financial loss, clear causation and an effective remedy. And no one thinks that the assertion of equitable jurisdiction violates or threatens some notion of separation of powers between the courts and the two political branches. At most, this may reflect the difference between courts of law and those of equity, which in many states, have now merged. Plaintiffs believe that remedies of this sort make sense for any federal claim including, as alleged here, those based on violation of the constitutional protections of procedural due process. *See* Richard A. Epstein, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 125-42 (2014), for a sustained criticism of *Lujan* and its progeny.

CONCLUSION

For the reasons set forth above, the Plaintiffs believe that they have Article III standing to raise their public trust claims in federal court.

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

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Type-Volume Certification

The undersigned counsel hereby certifies that this brief complies with the type-volume limitations of Circuit Rule 32 (a), (b)and (c) of this Court, because, in accordance with the panel's May 21, 2020 Order, it contains 12 pages, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

/s/ Richard Epstein

Certificate Of Service

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