Case No. 15-15791

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CONSERVATION ALLIANCE OF ST. LUCIE COUNTY, a Florida Not-for-Profit Corporation, and TREASURE COAST ENVIRONMENTAL DEFENSE FUND a/k/a INDIAN RIVERKEEPER

Plaintiffs – Appellants,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ANTHONY FOXX, in his official capacity as Secretary of the Department of Transportation; FEDERAL HIGHWAY ADMINISTRATION, VICTOR M. MENDEZ, Administrator of the Federal Highway Administration; and JAMES CHRISTIAN, Division Administrator of the Florida Division of the Federal Highway Administration

Defendants- Appellees,

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA (NO. 2:14-cv-14192-DMM) (HONORABLE DONALD M. MIDDLEBROOKS, JUDGE)

REPLY BRIEF OF APPELLANTS CONSERVATION ALLIANCE OF ST. LUCIE COUNTY and TREASURE COAST ENVIRONMENTAL DEFENSE FUND a/k/a INDIAN RIVERKEEPER

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellants hereby certify that the certificate contained in the Opening Brief of Appellants Conservation Alliance of St. Lucie County and Treasure Coast Environmental Defense Fund a/k/a Indian Riverkeeper, filed on February 29, 2016, is complete.

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ACRONYMS AND ABBREVIATIONS

CAMA – Coastal and Aquatic Managed Areas

FEIS - Final Environmental Impact Statement

FHWA - Federal Highway Administration

LPA - Locally Preferred Alternative

NFSLR - North Fork of the Saint Lucie River

INTRODUCTION

Rarely is the law so clear as it is in the case of whether the Federal Highway Administration may fund transportation projects that use public conservation and park lands ("Section 4(f) Resources"). Since 1966, the Secretary of the FHWA has been barred from funding any projects that use Section 4(f) Resources unless (1) no feasible and prudent alternative to the use of the land exists, *and* (2) the project includes all possible planning to minimize harm to the property. In 1971 the Supreme Court held that an alternative is prudent "unless there are truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971). In 2005, Congress endorsed *Overton Park* in the adoption of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for the Users ("SAFETEA-LU"),[1] directing the Secretary of Transportation to promulgate regulations clarifying the factors to be considered and the standards to be applied in determining whether an alternative to the use of 4(f) Resources is prudent and feasible. *See* Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites ("4(f) Rulemaking"), 73 Fed. Reg. 13368 (March 12,

[1] Pub. L. 109-59, 119 Stat. 1144, § 6009(b) (2005).

2008). The Secretary did so, and expressly cited *Overton Park*'s admonition that "Congress intended the protection of parkland to be of paramount importance. The Court also made clear that an avoidance alternative must be selected unless it would present 'uniquely difficult problems' or require 'costs or community disruption of extraordinary magnitude.'" *Id.* at 13368 (emphasis added, quoting *Overton Park*, 401 U.S. at 411-21). Despite this exceptionally clear direction from Congress, the Supreme Court, and the FHWA itself, Appellees (herein collectively referred to as "FHWA") spend much of their brief trying to persuade this Court that some lesser standard or balancing test applies in this Circuit when evaluating the prudency of an alternative route under Section 4(f)(1), or that the FHWA's rules implementing Section 4(f)(1) somehow set a lower bar for the use of Section 4(f) Resources. However, there has been no congressional, judicial, or regulatory undermining of *Overton Park*, which, at nearly 50 years old, remains the unambiguous and clear direction regarding national policy on transportation uses of Section 4(f) Resources. Furthermore, despite the FHWA's best efforts through the prolific use of adjectives to characterize feasible and prudent Alternative 6A Spliced as imprudent, the Administrative Record ("Record") simply does not support (and in fact

directly contradicts) the FHWA's characterization of the impacts of this avoidance route.

In short, the unambiguous mandate of Section 4(f), as reinforced by a considerable body of case law, Congress, and the FHWA administration itself, requires the FHWA to go extraordinary lengths to avoid funding projects which use public lands. There is no reasonable interpretation of the Record in this case that supports the FHWA's decision to fund a bridge through the "the widest part of the aquatic/buffer preserve complex (4200') impacting public lands to the greatest possible extent." SUPP-AR000048.

ARGUMENT

I. NO CASE LAW SUPPORTS THE FHWA'S INVITATION TO THIS CIRCUIT TO ERODE *OVERTON PARK*'S PRUDENCY STANDARD.

Relying heavily upon *Citizens for Smart Growth v. Secretary of the DOT*, 669 F.3d 1203 (11th Cir. 2012), the FHWA argues that some standard less than *Overton Park*'s "unique problems," "truly unusual factors," and "extraordinary magnitudes" applies in this Circuit. FHWA Br. p. 17 (suggesting no need to point to extraordinary or unique circumstances to establish imprudence—stating that "many factors. . . can render an alternative imprudent"), p. 18 ("alternatives may be rejected as imprudent for a variety of reasons"). Improperly assuming that lesser standard,

Appellees went on to reject Alternative 6A Spliced based upon (1) the diagonal cut of road, (2) alleged "severe" disruption to the community that "could" fall disproportionately on minority and low income populations, and (3) the impacts of larger spliced beam footings on the environment. FHWA Br. p. 16.

Appellees' reliance upon *Citizens for Smart Growth* to undermine *Overton Park* is completely backwards. Citing a litany of case law, this Court held that a Section 4(f) Analysis need not contain the magic words "unique" or "extraordinary" in order to be substantively sufficient where the actual impacts of an alternative in fact rose to the level of unique or extraordinary. *Citizens for Smart Growth*, 669 F.3d at 1217-18. Nevertheless Appellees here attempt to rely on the use of magic words in the face of a deficient record—applying adjectives like "severe" to conclusions regarding impacts that are not supported by the Record. The reality is that the impacts cited by the FHWA for Alternative 6A Spliced, *where they exist at all*, fall far short of those necessary to establish imprudence under *Overton Park*, *Citizens for Smart Growth*, and the FHWA's own regulations. *See* below, Section III.

None of the other cases cited by the FHWA (or Amicus) even purports to overturn *Overton Park* and none stands for an erosion of the

standard established by the Supreme Court, endorsed by Congress in its adoption of SAFETEA-LU, and further established in the FHWA's adoption of its own regulations. *See* Appellants' Opening Brief ("Alliance Br.") p. 24-26. In each case, the court required a finding of circumstances that were "truly unique" or reaching "extraordinary magnitudes" before allowing use of Section 4(f) Resources. *Druid Hills Civic Asso. v. Fed. Highway Admin.*, 772 F.2d 700, 715 (11th Cir. 1985) ("An alternative is prudent unless there are 'truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reache[d] extraordinary magnitudes,' or the alternative routes present 'unique problems.'"); *Louisiana Envtl. Soc., Inc. v. Coleman*, 537 F.2d 79, 86 (5th Cir. 1976) (explaining that if a route minimizes harm, it may be rejected "only for truly unusual factors other than its effect on the recreational area"); *Comm. to Preserve Boomer Lake Park v. Dep't of Transp.*, 4 F.3d 1543, 1550 (10th Cir. 1993) ("4(f) requires the problems encountered by proposed alternatives to be 'truly unusual' or 'reach[] extraordinary magnitudes' if parkland is taken. . . . Thus, although costs and community disruption should not be ignored in the balancing process, the protection of parkland is of paramount importance."); *Hickory Neighborhood Def. League v. Skinner*, 893 F.2d 58 (4th Cir. 1990) (remanding case to district court upon finding

the administrative record deficient as to whether Secretary analyzed for prudency under *Overton Park* after explaining that Section 4(f) Resources cannot be used unless "truly unusual factors are present" or community disruption costs from alternatives reach "extraordinary magnitudes"); *Eagle Found., Inc. v. Dole*, 813 F.2d 798, 805 (7th Cir. 1987) (holding that while "[a] cumulation of small problems may add up to a sufficient reason to use § 4(f) lands . . . the Secretary must start with a strong presumption against turning chlorophyll cloverleafs in the parks into concrete ones"); *Safeguarding the Historic Hanscom Area's Irreplaceable Res. v. FAA*, 651 F.3d 202, 208-09 (1st Cir. 2011) ("Without question, section 4(f) imposes significant obligation upon a reviewing agency"). In short, far from "uniformly" holding that alternatives may be rejected as imprudent under circumstances which are not unique, FHWA Br. p. 18, courts applying *Overton Park* have abided closely by its original language requiring extraordinary circumstances to justify intrusion into park lands held by the public.

II. THE FHWA MAY NOT CONTORT ITS INTERPRETATION OF ITS REGULATIONS TO OVERRIDE SUPREME COURT AND CONGRESSIONAL INTENT.

The FHWA argues that its regulations implementing Section 4(f):

> allow the [FHWA] to reject an alternative as imprudent not only where it presents "unique" problems, but where –as in this case—it causes severe "disruption to established communities," severe and "disproportionate impacts to minority or low income populations," or severe "impacts to environmental resources protected under other Federal statutes."

FHWA Br. p. 21. Appellants (also, "Alliance") do not disagree with this characterization of the FHWA's regulations. However, to the extent that the FHWA interprets these clear words to imply that the prudency standard of *Overton Park* has been diminished or diluted, Alliance heartily, and wholeheartedly, disagrees. *See, e.g.,* FHWA Br. p. 21 (arguing that congressional use of the term "prudent" rather than "unique" in directing FHWA to undergo rulemaking as well as congressional directives to generally enhance environmental protection somehow diminishes the *Overton Park* standard). In fact, the FHWA's regulations expressly preserve and advance the high standard of *Overton Park*.[2] *See*, e.g., 4(f) Rulemaking at 13368).

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[2] The regulations actually borrow terms from the *Overton Park* opinion that emphasize the magnitude of impact required to override the paramount importance of parkland preservation. *See* 23 C.F.R. § 774.17

("A feasible and prudent avoidance alternative avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property.") (emphasis added).

The FHWA cites to several passages from its analysis of its own 4(f) Rulemaking for the proposition that other concerns may be elevated to the level of protection of parkland in a prudency analysis. FHWA Br. pp. 21-22. However, the cited sections address the section of the FHWA's regulations which establish standards for a Least Harms Analysis (Section 4(f)(2)), not a Prudency Analysis (Section 4(f)(1)). Alternative 6A Spliced avoids all use of Section 4(f) Resources—as was conceded by the FHWA (Br. p. 10)—and therefore it should have been evaluated through a Prudency Analysis. 4(f) Rulemaking at 13373; *see* Alliance Br. pp. 27-29. The weighing of other statutory obligations urged by the Appellee (e.g., "threatened and endangered species, prime farmland, and wetlands of national importance") is appropriate only "when it is not possible to avoid using Section 4(f) property." *Id*.

Citing *Chevron*, the FHWA argues that it is owed deference in its interpretation of 4(f) and its implementing regulations, FHWA. Br. p. 21, however Section 4(f) is unambiguous, making *Chevron* inapplicable. In *Chevron*, the Supreme Court clearly held that, "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). The

Supreme Court held in *Overton Park* that Section 4(f) is not ambiguous but a "clear and specific directive[]." 401 U.S. at 410. Its language "is a plain and explicit bar to the use of federal funds for construction of highways through parks -- only the most unusual situations are exempted." *Id.* Thus, the FHWA cannot, and does not, dispute the fact that, per Congress' directive, the *Overton Park* prudency standard remains the "legal authority" for the FHWA's regulations. H.R. Rep. No. 109-203, at 1057-58 (Conf. Rep.) Furthermore, the FHWA cannot and does not dispute that the agency itself recognized this intent during rulemaking. 4(f) Rulemaking at 13392 (citing the same Conference Report) ("… the factors must adhere to the legal standard set forth in *Overton Park*."); *See also*, Alliance Br. pp. 25-26. The FHWA's discussion accompanying the adoption of a regulatory definition of the term "prudent" (23 C.F.R. § 774.17) clearly expresses the agency's intention to incorporate the *Overton Park* standard into the regulations:

> In *Overton Park*, the Court articulated a very high standard for compliance with Section 4(f), stating that Congress intended the protection of parkland to be of paramount importance. The Court also made clear that an avoidance alternative must be selected unless it would present 'uniquely difficult problems' or require 'costs or community disruption of extraordinary magnitude.'"

Id. at 13368 (emphasis added, quoting *Overton Park*, 401 U.S. at 411-21, 416). Because there is no ambiguity regarding the interpretation of Section

4(f) or its implementation, the FHWA's belated litigation interpretation is owed no deference. *See also, Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 213 (1988) (no deference owed an agency's "convenient litigating position").

III. THE SECRETARY HAD NO REASONABLE BASIS TO BELIEVE THAT NO PRUDENT AVOIDANCE ALTERNATIVES EXIST TO USE OF SECTION 4(F) RESOURCES.

The FHWA argues that Alternative 6A Spliced:

> causes severe "disruption to established communities," severe and "disproportionate impacts to minority or low income populations," or severe "impacts to environmental resources protected under other Federal statutes."

FHWA Br. p. 21. In fact, the Record contains no facts nor explanation to support a conclusion of severe social or environmental impacts resulting from Alternative 6A Spliced that would allow for the use of Section 4(f) Resources. In fact, the Record demonstrates *minimal* difference between Alternative 6A Spliced and the selected Alternative 1C, and so the FHWA was required by the simple and unambiguous direction of Section 4(f) and the Supreme Court to deny federal funding of any alternative that would not preserve Section 4(f) Resources.

The Secretary is obligated to make a finding that any avoidance alternative is imprudent prior to releasing federal funds to a project that

destroys park and conservation land. When a statute requires an agency to make a finding as a prerequisite to action, it must do so. Merely "[r]eferencing a requirement is not the same as complying with that requirement." *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97 (2002). "Stating that a factor was considered. . . is not a substitute for considering." *Getty v. Federal Savings and Loan Ins. Corp.*, 805 F.2d 1050, 1055, 1057 (D.C.Cir.1986) We must make a "searching and careful" inquiry to determine if the [agency] considered it." *Id.* (holding that a "conclusory recitation" failed to satisfy a statutory requirement that the agency "consider" a specified factor) (*citing Overton Park*, 401 U.S. at 416); *see also Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) (holding "perhaps most substantively, the requirement of a detailed statement helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug. A conclusory statement unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind not only fails to crystallize issues, but affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives. Moreover, where comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have

fully evaluated the project and its alternatives, these comments may not simply be ignored. There must be good faith, reasoned analysis in response." (internal citations omitted).) The FHWA fails to credibly point to any evidence in the Record to support its argument of disproportionate impact of Alternative 6A Spliced. In fact, even a passing look at the Record demonstrates that Alternative 6A Spliced is a prudent alternative to Alternative 1C's use of public conservation and park lands.

A. Alternative 6A's displacement of minority and low-income households are not severely disproportionate.

The first factor that the FHWA argues renders Alternative 6A Spliced imprudent is "severe disruption to the community that could fall disproportionately on minority and low-income populations." FHWA Br. p. 16. The Record dismantles this argument. The Sociocultural Effects Report (AR 2495) states "the displacement of minority populations for each alternative ranges from 17% to 14.00%, and does not exceed the overall percentage of minorities in St. Lucie County of 25.82% for any alternative. **The degree of effect [on displacement of minority populations] is none**." (emphasis added). With regard to other impacts, the FEIS states that **"[n]one of the build alternatives, including the Preferred Alternative, will disproportionately impact low-income populations or affect the**

demographic make up of the residential communities." *Id*. at AR 22527 (emphasis added).

B. Neighborhood cohesion impacts of Alternative 6A Spliced west of the bridge are not severe.

The conclusion that the neighborhood cohesion impacts are of a degree of severity rendering Alternative 6A imprudent are not supported by the Record. In fact, the FEIS presents *all* build alternatives, including the 6A corridor, as net-positive with regard to improvement to community cohesion at the regional level: "All build alternatives . . . would enhance regional cohesion by providing a connection across the physical barrier of the NFSLR." [3] Sociocultural Effects Report, AR022529. The neighborhood

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[3] Likewise, beneficial impacts on traffic are similar as between Alternatives 1C and 6A, despite the FHWA's attempt to characterize the difference otherwise. FHWA Br. p. 32. For Alternative 1C:

> The Design (2037) year system performance measure base on CORSIM for Alternative 1 C indicates 29.03 mph average speed and 0.86 min/mi of delay in the AM peak hour and 24.53 mph and 1.22 min/mi in the PM peak hour. The AM and PM peak-hour system-wide average speed improved by 22.8 percent and 32.7 percent, respectively, as compared to the No Build Alternative. The AM and PM peak-hour system-wide delay decreased by 32.8 percent and 39.0 percent, respectively, as compared to the No Build Alternative.

FEIS 3.120 (AR022401). For Alternative 6A Spliced:

> The Design (2037) year system performance measure base on CORSIM for Alternative 6A indicates 28.89 mph average speed and 0.85 min/mi of delay in the AM peak hour and 24.76 mph

cohesion impacts that might be perceived as negative are shared by all build alternatives. Constructing either Alternative 6A Spliced or Alternative 1C will "introduce a 6 lane alignment to what currently is an area of 2 lane streets of low and medium density residential area." *Id.* at AR 2487). "[A]ll build alternatives, including the Preferred Alternative, would change local traffic patterns through the established communities in the study area, creating a number of cul-de-sacs, redirected roads, and restricted access." *Id.* at AR 22547. In fact, Alternatives 6A and 1C "traverse the same alignment. . . up to Floresta Drive" intersection where "full access (left turns, through movements, and right turns from all directions) to the Crosstown Parkway Extension would be provided." *Id.* at AR 22537.

"Construction of [Alternative 6A] would require the same geometric improvements at the Floresta Drive intersection as [Alternative 1C], resulting in the same right in and right out conditions for Chaloupe Avenue and Albatross Avenue." *Id.* The routes for Alternatives 1C and 6A Spliced diverge west of the bridge only after the Floresta Drive intersection. At that

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> and 1.21 min/mi in the PM peak hour. The AM and PM peak-hour system-wide average speed improved by 22.2 percent and 34.0 percent, respectively, as compared to the No Build Alternative. The AM and PM peak-hour system-wide delay decreased by 33.6 percent and 39.5 percent, respectively, as compared to the No Build Alternative.

FEIS 3.148 (AR022428).

point, 6A traverses diagonally across six residential streets, while Alternative 1C progresses along West Virginia Drive. FEIS 5.13 (AR 22537). All divergent impacts in this area are to local neighborhood streets, not to regional connectivity. FEIS 4.9 (AR022469). The differences in this area of divergence are small, not severe, and do not render Alternative 6A Spliced imprudent. Figure 4.4, FEIS 4.10, (AR 022470).

Additionally mitigating against a finding of imprudence, is the pattern of past road construction in this community. Modifications of traffic flow east of the Floresta Drive intersection, including for the existing Crosstown Parkway, are similar to those proposed here. *See* Sociocultural Effects Report, 4-54 (AR002482) (image of multi-purpose path from the existing Crosstown Parkway Section). Measured by value of homes, the presence of the Crosstown Parkway does not appear to be a negative factor to the surrounding community:

> Overall, the results of the analyses do not indicate there is a significant difference between the values of residential properties immediately adjacent to the roadways and the values of residential properties located one and two lots away from the roadway. In the case of the existing Crosstown Parkway section, there appears to have been a small increase in the value of properties immediately adjacent to the West Virginia Drive as they were being acquired to construct the existing section, and no significant change in the adjacent properties that were not acquired is evident.

Sociocultural Effects Report, AR002472. Thus, the FHWA elimination of Alternative 6A Spliced from consideration for community cohesion and local mobility impacts is not supported by the Record.

C. Alternative 6A Spliced's disruption to La Buona Vita Village community (East of the bridge) are not severe.

The Record similarly does not support the conclusion that the social impacts on the La Buona Vita community on the eastern side of the bridge span in the Alternative 6A Corridor are severe. The FEIS concedes that, on the east side of the NFSLR, where La Buona Vita Village is located, "the cohesion between established communities is less affected because the project [regardless of alternative] does not bisect or fragment communities." FEIS 5.7 (AR022531). Moreover, Alternative 6A would require no residential relocations in the Buona Vita community. AR023076. The only impact of Alternative 6A Spliced to this community appears to be "the relocation of the access road into La Buona Vita community from its current location along U.S. 1 to the Crosstown Parkway Extension."[4] FEIS 6.47 (AR022733). And there are simply no facts in the Record that show that relocating an entrance from US-1 to Crosstown Parkway would change

[4] The community might have to close its private sewer and connect into the public facility (AR023076), but this is presented as a positive because it should improve water quality (AR023078).

internal traffic patterns significantly or negatively, or that the La Buona Vita residents prefer their access to be located on US-1 instead of on the proposed Crosstown Parkway.

The FHWA's citation to the Record (AR022428, 023076) claiming "extreme hardship" is entirely misleading. FHWA Br. p. 25. Regarding La Buona Vita, AR022428 states only that Alternative 6A "would require relocation of the access road into La Buona Vita community from the current location along U.S. 1 to the proposed Crosstown Parkway Extension. The new access road would change traffic flows within the community, increasing noise and visual impacts in the vicinity of the new access road." It does not state the effect of the changes on traffic flows or good or bad and does not address the noise and visual impacts in the vicinity of the access road to be abandoned. AR023076 is taken from the June 2008 Crosstown Parkway Corridor Extension, which states that "[s]ince this is a retirement community, most of the residents are on a fixed income and any increase in their budgeted monthly expenses will create *extreme hardships* to the retired residents." This concern was raised in relation to other route alternatives (e.g., 1F) which would displace residents of this cooperative community thereby increasing the costs for the smaller number of remaining members. But the record explicitly states *on the very same page cited by the FHWA*,

that "no residential relocatons are anticipated with Alternative 6A." AR023076.

Finally, the conclusion that 6A would result in "noise impacts" (FHWA Br. p. 34) is also arbitrary and capricious to the extent that this suggests that Alternative 6A is substantially more harmful than the chosen alternative. Again, all build alternatives traverse through established residential neighborhoods. All build alternatives, consequently, will result in noise and visual impacts to neighborhoods.

D. The FHWA misstates the natural resource impacts of Alternative 6A Spliced established in the Record.

The FHWA (and Amicus) continues to state that the environmental impact of Alternative 1C is somehow less than that of Alternative 6A Spliced. This is directly and repeatedly contradicted by the Record and has no basis in fact. *See*, e.g., FHWA Memorandum (Sept. 1, 2013) (AR045701) ("The preferred 6-lane bridge crossing alternative (Alternative 1C) has greater impacts to the natural environment (including wetlands, an aquatic preserve, and State park) than other alternatives."); Alternatives Report (June 2008) (AR023064, AR023076) (Alternative 6A has "[l]owest upland impacts within the river corridor [and] [s]mallest wetland impacts" among alternatives, and Alternative 1C has the "highest impacts to wetlands [. . .] high impacts to uplands [. . .] [h]ighest habitat diversity; therefore, highest

potential for impact to threatened and endangered species [. . . and] [h]ighest impact to State-owned lands"); 1999 CAMA Memo regarding proposed easement across the North Fork of the St. Lucie River (SUPP-AR000047-48) ("It is unlikely that a location with greater environmental or recreational impact could be chosen…The location is the widest part of the aquatic/buffer preserve complex (4200'), impacting public lands to the greatest possible extent."); *see also* Alliance Br. p. 38-43.

The FHWA argues that selection of Alternative 6A Spliced "would avoid using 0.01 acres of the Aquatic Preserve, but only at the expense of neighboring wetlands. These impacts on the neighboring wetlands would be severe in comparison to the tiny amount of park land (0.01 acres) that they would preserve." FHWA Br. p. 27. Similarly, Amicus characterizes the impacts of Alternative 6(A) Spliced as having a "tremendous deleterious effect on neighboring wetlands."[5] Amicus Br. p. 8. **This is an extremely**

[5] This characterization is not in line with that of agencies tasked with managing natural resources in Florida. The National Marine Fisheries Service preferred build Alternative 6A to 1C because 6A "would have the least amount of direct impacts to [Essential Fish Habitat] and because Alternative 6A would avoid impacting Savannas Preserve State Park." (AR019998); the U.S. Corps of Engineers has to date refused to endorse the City's Alternative 1C as the "Least Environmentally Damaging Practicable Alternative," (AR019896), and described Alternative 1C as the "MOST environmentally damaging practicable alternative" in terms of wetlands regulated pursuant to the Clean Water Act. (AR019983).

misleading reading of the Record. FHWA's own Section 4(f) Analysis shows Alternative 6A uses fewer acres of wetlands than selected Alternative 1C, regardless of the spanning technology used. *See* Alliance Br. p. 14; Table 2, below. The direct wetlands impact for Alternative 1C are 10.10 acres, 2.23 acres of which are Section 4(f) Resources. AR022362, AR032582. Alternative 6A Spliced directly impacts 7.69 acres of wetlands, none of which are Section 4(f) Resources. (AR032582, AR002713). The FHWA argues that spliced beam construction requires larger footings and therefore "69 times more" land than pile bent construction.[6] FHWA Br. p. 27. This is a red herring. While the spliced beam technology uses more land than the pile bent *within* each alternative, the route traversed by Alternative 1C requires the use of substantially more land than that of Alternative 6A, dwarfing any difference caused by the selected spanning technology. *See* Table 2, below. In other words, if 0.1012 acres of wetlands impacts are added to Alternative 6A's 7.69 acres of wetlands use to accommodate avoiding Section 4(f) Resources through use of spliced beam spanning technology, the result is still far less wetlands use than the 10.10 acres required for Alternative 1C. *See* Tables 1 and 2, below; *see also* Alliance

[6] *See also* Alliance Br. pp. 5-6, n. 7 (discussing the origin, but not the location, of the alleged 0.01 acres of wetlands impacts by Alternative 6A.

Brief, Table 2. This reality, drawn from the FHWA's own Section 4(f) Analysis, is irrefutable and completely undermines the FHWA conclusion that Alternative 6A results in severe environmental impacts. In other words, if avoiding wetlands use is the objective, Alternative 6A using either technology out-performs Alternative 1C.

Table 1: Wetlands Acres Impacted by Pilings Based on Spanning Technology (Source: AR0022713)

	Alternative 1C	Alternative 6A
Pile Bent	0.0154 acres	0.0015 acres
Spliced Beam	0.5188 acres	0.1012 acres

Table 2: Total Wetland Acres Impacted by Alternative (Pile Bent)

	Alternative 1C	Alternative 6A
Direct Impacts	10.10 acres	7.69 acres
Temporary Impacts	0.24 acres	0.07 acres

Moreover, the Alternatives Report itself, Section 3.0 of the FEIS, lists the quantity of wetlands impacts as an *advantage* of Alternative 6A. (AR022318) ("The advantages of Alternative 6A included: … the least impact of all build alternatives to the NFSLR Aquatic Preserve (Sovereignty Submerged Lands);…impacting a moderate acreage of wetlands among build alternatives…") It isn't reasonable or rational to conclude that an

increase of 0.1 acres of impacts by 6A spliced would convert this advantage into a disadvantage.

E. The Locally Preferred Alternative scores demonstrate that the FHWA's conclusions were not reasonable.

The FHWA argues that "it cannot have been 'arbitrary and capricious' for the [FHWA] to choose the alternative that scored the highest" in the LPA analysis. FHWA Br. p. 33. This ignores the premium placed on protection of Section 4(f) Resources. In evaluating whether the FHWA's conclusion was arbitrary and capricious, "the court must consider whether the decision was based on a consideration of the relevant factors." *Overton Park*, 401 U.S. at 416. The Secretary is limited "in his authority to approve the use of parkland [. . .] to situations where there are no feasible alternative routes or where feasible alternative routes involve uniquely difficult problems." *Id.* The fact that the LPA (1C) scored very similarly to Alternative 6A Spliced, *without even taking into account Section 4(f) Resources*, demonstrates that it was not reasonable for the Secretary to conclude that Alternative 6A Spliced could be selected, viewed through the lens of the preservation purpose of the statute. *See* 4(f) Rulemaking at 13371 ("The preservation purpose of Section 4(f) is described in 49 U.S.C. 303(a), which states: 'It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands,

wildlife and waterfowl refuges, and historic sites.'") Nor was it reasonable where the impacts of the two alternatives was so similar for the Secretary to determine that Alternative 6A Spliced presented "unique problems." *Overton Park*, 401 U.S. at 413.

The Secretary's ultimate conclusion that Alternative 6A Spliced is imprudent was arbitrary and capricious as it runs entirely counter to the evidence in the record. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). There simply is no evidence in the record to show that the social or environmental impacts of Alternative 6A Spliced rise to the level of severity required by law to allow federal funding of the destruction of public park lands.

IV. OBJECTIONS TO AMICUS BRIEF

Conservation Alliance now responds to the *amicus curiae* brief of the City of Port St. Lucie ("City"). The City's brief consists primarily of factual claims of harm, "[f[rom the City's perspective." Amicus Br. p. 7. These are not appropriate subject matter for an *amicus* party to raise. "The term '*amicus curiae*' means friend of the court, not friend of a party." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997), citing *United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir. 1991). Further, "an amicus who argues facts should rarely be welcomed." *Strasser*

v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970; *Smith v. Pinion*, 2013 WL 3895035 at *1 (M.D. N.C. July 29, 2013) ("[T]he Court questions the propriety of permitting a non-party to present evidence. [] Though the scope and extent of amicus participation is within the discretion of the Court, the Committee is not a named party or a real party in interest to this litigation, and it should not be accorded the right to present evidence or otherwise participate in an adversarial fashion.") (citing *United States v. Michigan*, 940 F.2d at 166). In the Section 4(f) context, measured caution regarding the influence of local officials over factual allegations is particularly in order, as degradation of the nation's public lands should not be left to the political will of local officials who may feel compelled to sacrifice the larger good offered by public lands for the immediate needs of their limited and local constituency. *Named Individual Members of San Antonio Conservation Soc. v. Texas Highway Dep't*, 446 F.2d 1013, 1026-27 (5th Cir. 1971) ("Clearly, Congress did not intend to leave the decision whether federal funds would be used to build highways through parks of local significance up to the city councils across the nation.")

Accordingly, the factual assertions made by the City should not be considered. See, e.g., Amicus Br. at 1 ("bridge. . . is central to the alleviation of severe traffic congestion n the City's two existing bridges.") To the extent

the Court does consider the City's amicus briefing, like the FHWA's, it is in nearly every instance misleading, unsubstantiated, or contradicted by the Record.[7] In addition, it includes allegations for which no citation, to the Record or otherwise, is offered. *See e.g.,* Amicus Br. p. 8 ("Alternative 6(A) Spliced will have a tremendous deleterious effect on neighboring wetlands.") Likewise, the City's arguments regarding the impact of *Citizens for Smart Growth* are contradicted by the actual holding of that case. In short, the City's cursory legal arguments add nothing to the arguments presented by the FHWA, which have been adequately addressed in the existing briefing.

V. CONCLUSION

The FHWA should not have authorized funding of Alternative 1C for the Crosstown Parkway Extension because it is not possible that the Secretary could have reasonably believed that Alternative 6A Spliced was not a feasible and prudent alternative to the use of 4(f) Resources required for construction of Alternative 1C. In approving the funding of Alternative 1C the FWHA abused its discretion and acted in excess of its jurisdiction. Furthermore, the FHWA acted in an arbitrary, capricious, and unlawful

[7] Interestingly, Amicus argues against its own scoring of the LPA. Amicus Br. p. 8.

manner when it failed to perform a proper Prudency Analysis for Alternative 6A Spliced.

For all of the foregoing reasons, and those discussed in Alliance's opening brief, Appellants respectfully requests this Court to reverse the District Court's granting of the FHWA's Motion for Summary Judgment and remand the matter to the District Court with instructions to grant Appellants' Motion for Summary Judgment and to enjoin the FHWA's funding of Alternative 1C.

Respectfully submitted this 21st day of July, 2016.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,580 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Professional Edition 2016 in 14 points Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2016, I caused this Reply Brief of Appellants Conservation Alliance of St. Lucie County and Indian Riverkeeper to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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