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)

OPENING 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

Trial judge(s), and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

- Christian, James, Division Administrator of the Florida Division of the Federal Highway Administration, appellee
- Collins, Brian, Esq., counsel for appellees
- Doughty, Rachel S., counsel for appellants
- Duffy, Sean, Esq., counsel for appellees
- Foxx, Anthony, in his official capacity as Secretary of the Department of Transportation, appellee
- Fumero, John, counsel for *amicus curiae* City of Port St. Lucie
- Goldstein Siegel, Azalina, Esq., counsel for *amicus curiae* City of Port St. Lucie
- Hartsell, Robert N., Esq., counsel for appellants
- Hayter, Sarah M., Esq., counsel for appellants

- Hyden, Gregory, counsel for *amicus curiae* City of Port St. Lucie
- Mendez, Victor M., Administrator of the Federal Highway Administration, appellee
- Middlebrooks, Donald, Trial Judge
- City of Port St. Lucie, applicant for federal transportation funding at issue in case
- Conservation Alliance of St. Lucie County, appellant
- Federal Highway Administration, appellee
- Treasure Coast Environmental Defense Fund a/k/a Indian Riverkeeper, appellant
- United States Department of Transportation, appellee

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to F.R.A.P. Rules 34(a) and (f), and Eleventh Circuit Local Rules 28-1(c), 34-3(c), Appellants respectfully request oral argument and represent that oral argument is warranted and will aid the Court's decisional process. This case involves multiple issues of law and fact and an extensive record. Appellants submit that oral argument will assist the Court in addressing the issues presented.

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ACRONYMS AND ABBREVIATIONS

AP - Aquatic Preserve

APA – Administrative Procedure Act

CAMA – Coastal and Aquatic Managed Areas

Dkt. – Docket, used in reference to items docketed in the district court matter from which this case is appealed.

DEIS – Draft Environmental Impact Statement

FDEP – Florida Department of Environmental Protection

FDOT – Florida Department of Transportation

FEIS - Final Environmental Impact Statement

FHWA - Federal Highway Administration

FWCC – Florida Fish & Wildlife Conservation Commission

FWS – Fish and Wildlife Service

LPA - Locally Preferred Alternative

NEPA - National Environmental Policy Act

NFSLR - North Fork of the Saint Lucie River

NMFS – National Marine Fisheries Service

ROD - Record of Decision

SPSP - Savannas Preserve State Park

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The basis for the District Court's jurisdiction is 28 U.S.C. § 1331 because the matter at hand involves exclusively questions arising under federal law: Section 4(f) of the Department of Transportation Act (23 U.S.C. § 138; 49 U.S.C. § 303) ("Transportation Act") [1] and the Administrative Procedure Act (5 U.S.C. §§ 701-706) ("APA"). This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The District Court issued its final judgment on November 5, 2015, granting Defendants-Appellees motion for summary judgment. *Conservation Alliance of St. Lucie County v. U.S. Dept. of Transportation*, No. 2:14-cv-14192-DMM, Docket Entry ("Dkt.") 57.[2] Plaintiffs-Appellants filed their Notice of Appeal on December 29, 2015. Dkt. 59. This appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

a) Whether the FHWA abused its discretion in agreeing to fund construction of a road through public lands protected by Section 4(f)

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[1] Section 4(f) of the Department of Transportation Act of 1966 was technically repealed in 1983 when it was codified without substantive change at 49 U.S.C. § 303 ("Transportation Act"). A provision with the same meaning is found at 23 U.S.C. § 138 and applies only to FHWA actions. The policies Section 4(f) engendered are widely referred to as "Section 4(f)" matters, and "Section 4(f)" will be used as shorthand for 49 U.S.C. 303 and 23 U.S.C 138 in this brief.

[2] The use of the abbreviation "Dkt." Herein shall be exclusively for reference to docket entries in the District Court of the matter on appeal.

of the Transportation Act because there exists a feasible and prudent alternative route to avoid all such use.

b) Whether the FHWA abused its discretion in failing to minimize harm to public land resources protected by Section 4(f) of the Transportation Act.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On May 12, 2014, Plaintiffs-Appellants filed a Complaint in the United States District Court for the Southern District of Florida ("District Court") against Defendants-Appellees (collectively referred to herein as the "FHWA") challenging the Federal Highway Administration's decision to approve the construction of a six-lane bridge across two public lands recognized as falling under the protection of Section 4(f): the North Fork St. Lucie River Aquatic Preserve ("Aquatic Preserve") and the Savannas Preserve State Park ("Savannas Preserve") (collectively "the Preserves"). Dkt. 1. Plaintiffs-Appellants sought declaratory and injunctive relief under the Transportation Act and the APA. Dkt. 1.

On March 16, 2015, Plaintiffs-Appellants moved for summary judgment, and on May 12, 2015, the FHWA filed a cross motion for summary judgment. Dkt. 39 and 45.

On November 5, 2015, the District Court issued a ruling on the parties' cross motions for summary judgment denying Plaintiffs-Appellants'

Motion for Summary Judgment and granting Defendants-Appellants' Motion for Summary Judgment. Dkt. 56.

On January 4, 2016, Plaintiffs-Appellants' filed its notice of appeal to this Court. Dkt. 59.

On January 5, 2016, this Court docketed Plaintiffs-Appellants' civil appeal.

II. STATEMENT OF FACTS

On February 24, 2014, the FWHA signed a Record of Decision ("ROD") that released federal funding for the construction of a six-lane highway and bridge ("Crosstown Parkway Extension") for a project of the City of Port St. Lucie, Florida ("City"). The route approved by the FHWA for the Crosstown Parkway Extension, "Alternative 1C" located in "Corridor 1C," would require the use of two public lands: the Savannas Preserve State Park ("Savannas Preserve") and the North Fork of the Saint Lucie River Aquatic Preserve ("Aquatic Preserve" and, collectively, the "Preserves").[3] ROD (AR032573-AR032595).

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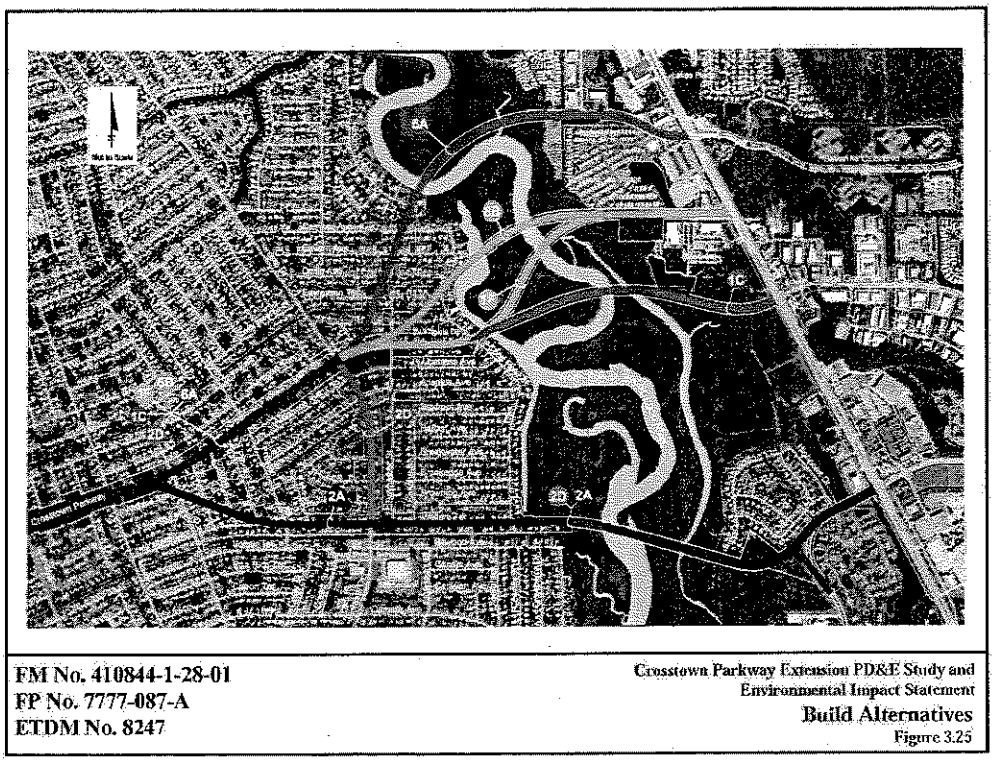
[3] It would also require elimination of a popular hiking area—the Halpatiokee Canoe and Hiking Trail. 2003 FDEP Memo p. 5 (SUPP-AR000059).

Figure 1: Map of Build Alternatives
(FEIS Figure 3.25; AR022360)



In support of its ROD, the FHWA prepared a "Section 4(f) Evaluation" of the impacts of the proposed Crosstown Parkway Extension on the Preserves, which are protected from incursion by federally funded transportation projects in all but the most extraordinary of circumstances.[4] Section 4(f) Evaluation (AR022687-AR022748). The Section 4(f) Evaluation named and

[4] The Section 4(f) Evaluation is included in the Final Environmental Impact Statement ("FEIS") which was required pursuant to the National Environmental Policy Act ("NEPA").

rejected various alternatives to Alternative 1C. Among rejected routes was an alternative located in another corridor—"Corridor 6A"—that when constructed using a spanning technology referred to as spliced beam would avoid all use of Section 4(f) Resources ("Alternative 6A Spliced").[5] Dkt. 19, ¶ 42 ("Defendants admit that Alternative 6A, if constructed using the pretested post tensioned (spliced) beam bridging option, would avoid all use of the Savannas Preserve and the Aquatic Preserve."). If constructed using the same technology as Alternative 1C—pile bent method-- "Alternative 6A" would use substantially fewer 4(f) Resources than Alternative 1C. *See* Table 1.

Table 1: 4(f) Resource Use by Alternative

	1C	**6A Pile Bent**	**6A Spliced**
Total 4(f) Resources	2.23 acres[6]	0.01 acres[7]	None

[5] Despite the administrative record, throughout the briefing in the District Court, the FHWA made contradictory statements regarding this fact, which led to significant confusion for the District Court. For example, in its Response brief the FHWA state, "Combined these alternative would enable alternative 6A to avoid using Section 4(f) land." Dkt. 45-1 at 28. Later, on page 10 of the Reply they state "None of the bridge alternatives avoid all Section 4(f) land [...]" Dkt. 48 at 10.

[6] FEIS 6.41 (AR022727).

[7] FEIS 6.42 (AR022728). However, a Draft Environmental Impact Statement ("DEIS"), including a draft Section 4(f) Evaluation, was released for public comment in September 2011. The DEIS reported that Alternative 6A avoids all impacts to Section 4(f) Resources. DEIS, 6.32 (AR003000); *See also* FDOT Letter, June 19, 2012, (AR049804) ("Alternative 6A would

A. THE CHARACTER OF THE SECTION 4(F) RESOURCES

The 4(f) Resources at issue in this case are part of a complex of publically-owned conservation lands treasured by the People of Florida for their wild character and because of the protection they afford the downstream St. Lucie River Estuary and Indian River Lagoon, an Estuary of National Significance. Public preservation of wetlands ecosystems in this Treasure Coast region is tremendously important.

> The [Aquatic Preserve] and the [Savannas Preserve] represent one of the few remaining expanses of natural habitat within a highly urbanized region. These lands provide important habitat for a variety of fish and wildlife species including American alligators, West Indian manatees, river otters, wood storks, little

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avoid the use of lands from all Section 4(f) properties."). The Everglades Law Center submitted comments on the DEIS, explaining that a feasible and prudent avoidance alternative would have to be selected over any alternative using Section 4(f) Resources, including Alternative 1C. Letter from Jason Totoiu, Everglades Law Center, Inc. to Ray LaHood, Secretary of the U.S. Department of Transportation and Victor M. Mendez, Federal Highway Administrator (Apr. 16, 2012) (AR032689-93). Instead of responding by selecting Alternative 6A as an avoidance alternative, the FHWA revised the DEIS to arrive at a FEIS indicating 0.01 acres (approximately 400 square feet) of Section 4(f) Resource use by Alternative 6A. FEIS 6.42 (AR022728). Ignoring the option of using spliced beam technology, the FEIS went on to decline to consider Alternative 6A as an avoidance alternative, citing the newly discovered 0.01 acres of impacts. FEIS 6.18-6.19 (AR022704-05) (dismissing Alternative 6A because of "impact [to the Aquatic Preserve] precluding its consideration as an avoidance alternative."). It is unclear where these 0.01 acres of impacts are located, but the FHWA later declined to apply all mitigation measures to each alternative in its Least Harms Analysis until after Alternative 6A was eliminated from Consideration. *See* Argument, Section III.A, commencing at p. 35.

> blue herons, brown pelicans, neotropical migrant birds, snook, and the opossum pipefish. The [Aquatic Preserve] also offers a variety of recreational opportunities to the public including fishing, boating, hiking, bird watching, and wildlife observation.

Letter from Joyce Stanley, U.S. Fish and Wildlife Service to Beatriz Caicedo-Maddison, Florida Department of Transportation (Oct. 3, 2011) ("October 2011 FWS Letter"), (AR009189-AR009191). Many of the valued recreational and ecological features continue to exist only because of their protected status. For example, a majority of the remaining mangroves lie within the borders of public lands. Comments of the National Marine Fisheries Service from Final Programming Screen (Oct. 6, 2008) (AR003251).

> Due to local urban and suburban growth, accompanied by seawalls, dredge and fill operations, wetland drainage or impounding, herbicide and fertilizer applications we are losing the very vegetative structure that insures the survival of this extraordinary fish diversity. This aquatic area can ill afford additional loss and alteration of aquatic habitat, submerged vegetation, mangroves, and wetlands that will occur with the construction of a bridge through one of the healthiest, largest and least disturbed areas of the ... Aquatic Preserve, Evans Creek, and the wetlands of the Halpatiokee Trails section of SPSP.

Letter from R. G. Gilmore, Jr., Ph.D., Estuarine, Coastal and Ocean Science, Inc., to V. M. Mendez, FHWA (Oct. 28, 2013), p. 5 (AR05154) (Emphasis in original).

1. North Fork of the Saint Lucie River Aquatic Preserve

The Aquatic Preserve was established in 1972 and provides protection for 2,972 acres of submerged lands. Letter from Donald R. Progulske, U.S. Fish and Wildlife Service to Beatriz Caicedo-Maddison, Florida Department of Transportation (September 19, 2011) ("September 2011 FWS Letter") (AR044099). The Aquatic Preserve protects the North Fork, which is considered a "major tributary of the St. Lucie River Estuary, the Indian River Lagoon Aquatic Preserve, and the Atlantic Ocean." 2003 Florida Department of Environmental Protection ("FDEP") Memo ("2003 FDEP Memo"), p. 6 (SUPP-AR000060). It is managed by the FDEP to "maintain and enhance the existing wilderness condition for the enjoyment of future generations and for the propagation of fish and wildlife and public recreation." FEIS, 6.6 (AR022692).

The Aquatic Preserve was among the first places in Florida to receive the designation of "preserve state park," when in 1972 it was "specifically selected for its superb environmental quality." Letter from Joyce Stanley (Fish and Wildlife Service, "FWS") to Beatriz Caicedo-Maddison (Florida Department of Transportation, "FDOT") (Oct. 3, 2011) (AR009189, AR009190-AR009191). As an Aquatic Preserve and an Outstanding Florida Water—designations reserved for the most treasured of the state's aquatic

Resources, Aquatic Preserves are intended by Florida's legislature to "be set aside forever . . . for the benefit of future generations" because of their "exceptional biological, aesthetic, and scientific value." Fla. Stat. § 258.36 (2014). Likewise, the North Fork's "Outstanding Florida Water" designation is recognition that it is worthy of special protection because of its natural attributes. Fla. Admin. Code r. 62-302.700.9.h.28, 62-302.200.26. FDEP has designated the North Fork as a Paddling Trail Priority. Sociocultural Effects Report, 4-18 (AR002446).

2. Savannas Preserve State Park Buffer Preserve

The Savannas Preserve consists of 5,000 acres of public land located along a 10-mile stretch of the North-Fork of the St. Lucie River ("NFSLR"). Comments of the U.S. Fish and Wildlife Service from Final Programming Screen (Oct. 6, 2008) ("2008 FWS Comments") (AR003255). "These public lands were purchased to protect the valuable natural ecosystem of the NFSLR for the benefit of all the citizens of the state." September 2011 FWS Letter (AR044099). Part of this state park is what is called the Savannas Preserve State Park Buffer Preserve ("Buffer Preserve"), the purpose of which is to "protect the valuable natural ecosystem of the NFSLR for the

benefit of all the citizens of the state.[8] The Buffer Preserve also represents one of the last areas of natural habitat remaining in a highly urbanized area." 2008 FWS Comments (AR003255). The portion at risk from Alternative 1C is a 1,071-acre parcel of Buffer Preserve located west of U.S. Highway 1 along the North Fork. September 2011 FWS Letter (AR044099). Within the context of expansive urban development in Port St. Lucie and its contribution to river and estuary habitat and water quality degradation, "in many places, the narrow BP is the only buffer" that remains between the Aquatic Preserve and developed areas. *Id.*

Within the City's limits, the Savannas Preserve "provides approximately 8 miles of natural riverfront for the North Fork," and is "the only continuous natural corridor "left in the City and one of the few in St. Lucie County, which is rapidly losing green space because of development. 2003 FDEP Memo (SUPP-AR000059); Memorandum from Larry Nall, Bureau of Coastal and Aquatic Managed Areas to Tom Butler, Bureau of Public Lands Administration ("1999 CAMA Memo"), p. 2 (SUPP-

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[8] The original nine parcels of BP lands were purchased in 1994 through the Conservation and Recreation Lands (CARL) program of Preservation 2000, both of which received their funding though the Land Acquisition Trust Fund. 1999 CAMA Memo, p. 1 (SUPP-AR000046).

AR000047). The Buffer Preserve is exceptionally biodiverse, hosting twelve different Florida Natural Areas Inventory communities or habitat types: depression marsh, mesic flatwoods, scrub, scrubby flatwoods, blackwater stream, baygall, floodplain marsh, hydric hammock, and tidal swamp, as well as the open riverine system. As of 2003, surveys indicated the existence of "179 plant species – including 12 listed species – and 370 animals - of which 19 are listed species." 2003 FDEP Memo, p. 5 (SUPP-AR000059).

B. SELECTION AND RELATIVE IMPACTS OF LOCALLY PREFERRED ALTERNATIVE

The FHWA arrived at its Preferred Alternative for Section 4(f) purposes in substantial reliance upon the evaluation performed by the City to identify its own "locally preferred alternative [("LPA")]." FEIS 6.48 (AR022734). To select the LPA, the City performed a weighted analysis scoring five criteria for a possible 50 points for each alternative:

- Meeting purpose and need of the project (0-20 points)
- Social/community impacts (0-10 points)
- Natural environment impacts (0-10 points)
- Physical impacts (0-5 points)
- Project cost (0-5 points)

FEIS 3.150 (AR022430); Crosstown Parkway Extension: Selection of a Preferred Alternative ("LPA Process") p. 5 (AR008202).[9] Scorers allegedly "looked at the totality of information on each alternative for each criterion using data and information from the DEIS, agency and public comments, the Public Hearing and best professional judgment." City of Pt. St. Lucie slide show (August 2012) (AR046064, AR046065). However, this "totality of information" did not give any weight whatsoever to Section 4(f) impacts. As clearly stated in the FEIS,

> "the potential use of Section 4(f) lands for a given build alternative was not assigned points during the evaluation of alternatives."

FEIS 3.150 (AR022430).

The City, which is not obligated to perform a 4(f) Evaluation or inform its selection of the LPA in light of Section 4(f)'s statutory purpose,

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[9] Points were assigned by scorers from the City's private contractor, K&S, and by a panel consisting entirely of construction- and transportation-focused state and city employees (the City Engineer, the City's Project Manager, FDOT's Senior Project Manager, and the St. Lucie County Transportation Planning Organization's Executive Director, collectively herein the "Panel"). LPA Process at 27 (AR008224).

Cathy Kendall, an environmental specialist for the FHWA was present for the scoring by the Panel, but did not participate directly in the actual scoring. LPA Process at 27 (AR008224), Letter from Gustavo Schmidt, FDOT to Martin Knopp, FHWA (July 16, 2012) (SUPP-AR000019).

has described both Alternatives 1C and 6A as achieving the project purpose, practicable, and viable, and stated that Alternative 1C was selected as the LPA because it was the most "beneficial." *See* Letter from Garett Lipps, U.S. Army Corps of Engineers to Kristine Stewart (Aug. 7, 2012) (AR019983). The scores ultimately assigned to Corridor 6A and Corridor 1C by the City and its contractors show little difference in the non-4(f) Resource impacts between the two alternatives. Of the 50 possible points, the City's panel assigned Corridor 1C a score of 39 and Corridor 6A a score of 36—a difference of just 3 points or 6% of the possible points.[10] City of Port St. Lucie slide show (August 2012) (AR046067).

Despite the fact that the FHWA never performed an explicit evaluation of the prudency of Alternative 6A or 6A Spliced, many of the impacts of these routes can be cobbled together from information in the record.

Table 2: Comparison of Impacts of 1C and 6A Spliced

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[10] The City's panel consisted of the City Engineer, the City's Project Manager, FDOT's Senior Project Manager, and the St. Lucy County Transportation Planning Organization's Executive Director.

	1C	6A Spliced (6A)[11]	Comparison
Wetland Impacts[12] (direct)	10.10 acres	7.69 acres	1C uses more wetlands than 6A Spliced
Wetland Impacts[13] (temporary)	0.24 acres	(0.07) acres	
Wetland functional loss[14]	11 acres	(7.64) acres	
Upland Impacts (direct) [15]	3.95 acres	0.15 acres	1C uses substantially more uplands than 6A
Regional Cohesion[16]	Improved	(Improved)	Similar impacts
Shared-use pathways increasing access[17]	Yes	(Yes)	Similar impacts

[11] Where impacts of Alternative 6A Spliced were not disclosed in the 4(f) Evaluation or FEIS, disclosed impacts of Alternative 6A, which shares a corridor with Alternative 6A Spliced, are provided in parentheses.

[12] ROD, p.10 (AR032582); FEIS 3.82 (AR002713). Impact for Alternative 1C is reduced to 6.83 acres if the bridge profile is narrowed. As this mitigation could be applied to any bridge profile, but was not (*see* Argument, Section III.A below, commencing at p. 35), it is not presented in this table to avoid an unfair comparison.

[13] *Id.*

[14] ROD, p. 10 (AR 032582) FEIS 3.82 (AR002713); The loss is reduced to 8.34 functional loss units for Alternative 1C if the bridge profile is narrowed. However, for the same reason offered above, the chart does not include this reduction.

[15] ROD, p. 10 (AR 032582); FEIS 3.82 (AR002713); Again, with a narrower bridge profile, 2.96 acres.

[16] FEIS 5.5 (AR022529).

[17] FEIS 5.23 (ARO22546).

Improved traffic circulation, including during peak hours[18]	Yes	(Yes)[19]	Similar impacts, Corridor 6A slightly better
Change local traffic patterns (cul-de-sacs, redirected roads, and restricted access)[20]	Requires changes to local neighborhood streets	(Requires changes to local neighborhood streets)	Similar impacts
La Buona Vita Retirement Community[21]	None	Access road moved from front to rear of community	Record does not indicate whether road relocation is a net positive or negative
Purpose and need[22]	Meets	Meets	Similar ability to meet purpose and need

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[18] *Id.*

[19] Use of Corridor 6A results in less delayed traffic than Alternative 1C, albeit by an insignificant amount. The Design (2037) year system traffic performance measures for the two alternatives indicates that selection of Alternative 6A will result in a morning peak average speed that is only 0.14 mph slower than 1C, but with a delay of 0.01 minutes per mile less than 1C, and an afternoon speed that is actually 0.24 mph *faster* than 1C while maintaining the 0.01 minutes per mile delay advantage over 1C. FEIS, Design Traffic Technical Memorandum, pp. x, xix, (AR023832, AR023841). In other words, Alternative 6A performs *better* than Alternative 1C.

[20] FEIS 5.23 (AR022547).

[21] FEIS 3.159, 5.11, 5.13 (AR022439, AR022535, AR022537).

[22] Letter from Garett Lipps, U.S. Army Corps of Engineers to Kristine Stewart (Aug. 7, 2012) (AR019983); FEIS 3.152 (AR022432).

Reduce sprawl development model[23]	No	No	Similar impacts
Emergency service response time improvement[24]	Yes	Yes	Similar impacts
Residential Relocations[25]	140	(158)	6A requires 18 additional property relocations compared to 1C
Commercial Relocations[26]	0	(10 (plus 2 vacant))	6A requires 10 active commercial relocations; 1C none
Impacted Noise Receptors[27]	10	(42)	6A has 32 more noise receptors than 1C
Cost[28]	$161.5 million	($126.03 million)	6A is significantly cheaper than 1C
Points assigned in City's LPA Analysis (out of 50)[29]	39	(36)	6 % difference in project route preference

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[23] FEIS 3.154 (AR022434).

[24] For improved emergency response time as compared to the no build alternative, Alternatives 1C and 6A are nearly identical, with 6A providing slightly better service from Crosstown Parkway and 1C doing slightly better at Port St. Lucie Boulevard. FEIS 3.155 (AR022435).

[25] FEIS 3.82 (AR022362).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] FEIS 3.169 (AR022449).

III. STANDARD OF REVIEW FOR EACH CONTENTION

This Court reviews *de novo* the District Court's evaluation of agency action, as to questions of law. *Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth.*, 464 U.S. 89, 97, n. 7. (1983). Congress provided for such review under the APA. 5 U.S.C. § 702(A). The APA provides that this Court "shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Although this standard of review is deferential, ultimately this Court "must undertake a thorough, probing, in-depth review and a searching and careful inquiry into the record." *Penobscot Air Servs. v. Fed. Aviation Admin.*, 164 F.3d 713, 720 (11th Cir. 1999) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16) (internal quotation marks omitted). This Court cannot substitute its judgment for that of Defendant-Appellee Secretary of the Department of Transportation Anthony Foxx ("the Secretary"), but that judgment cannot be baseless. This Court must reverse the Secretary's decision to fund the project at issue here if its review reveals that the Secretary failed "to examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Sierra Club v. Martin*, 168

F.3d 1, 5 (11th Cir. 1999) (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (emphasis added).

A three-part test is used to review the Secretary's compliance with Section 4(f) of the Transportation Act.

> First, we ask whether the Secretary acted within the scope of his authority: **did he construe his authority** to approve projects to be **limited** to situations where no feasible and prudent alternatives to the use of 4(f) property existed, and could he have reasonably believed that no such alternatives existed. [*Druid Hills Civic Ass'n v. Fed. Highway Admin.*, 772 F.2d 700, 714 (11th Cir. 1985).]
>
> Second, we inquire whether the Secretary's ultimate decision was arbitrary, capricious, or an abuse of discretion. *Id.*
>
> Third, we ask if the Secretary followed the necessary procedural requirements. *Id.*

Citizens for Smart Growth v. Sec'y of the Dept. of Transp., 669 F.3d 1203, 1216 (11th Cir. 2012) (emphasis added). Thus, the scope of the Secretary's authority to use 4(f) Resources for transportation purposes is limited to situations where no feasible and prudent alternatives to the use of the 4(f) Resources in fact existed, the Secretary could have reasonably believed that no such alternative exists, and the Secretary followed the necessary procedural requirements to reach his decision.

"Courts must overturn agency actions which do not scrupulously follow the regulations and procedures promulgated by the agency itself."

Martin, 168 F.3d at 4 (*quoting Simmons v. Block*, 782 F.2d 1545, 1550 (11th Cir. 1999)). An agency "cannot ignore the requirements" of its own policies and procedures. *Id.* Additionally, although the APA standard of review is deferential, reversal of an agency policy position in order to forward a litigation position is not entitled to deference. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (no deference owed an agency's "convenient litigating position").

SUMMARY OF THE ARGUMENT

"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."[30] 49 U.S.C. § 303(a) (emphasis added). To that end, Congress has prohibited the FHWA from funding any transportation project requiring the use of 4(f) Resources except where "(1) there is no prudent and feasible

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[30] Florida voters apparently share this value. Last year they voted to pass Amendment 1, which Funds the Land Acquisition Trust Fund to acquire, restore, improve, and manage conservation lands including wetlands and forests; fish and wildlife habitat; lands protecting water resources and drinking water sources, including the Everglades, and the water quality of rivers, lakes, and streams; beaches and shores; outdoor recreational lands; working farms and ranches; and historic or geologic sites, by dedicating 33 percent of net revenues from the existing excise tax on documents for 20 years. *See* Fla. Const. art. 10, § 28.

alternative to using that land ["Feasibility and Prudency Analyses"]; and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use ["Least Harms Analysis"]." *Id.* at § 303(c). Here the FHWA funded a route for the Crosstown Parkway Extension—Alternative 1C—that traverses two Section 4(f)-protected public lands and forsakes a feasible alternative which would avoid all use of these 4(f) Resources—Alternative 6A Spliced. Alternative 6A Spliced is prudent; the record establishes that the impacts of this route are of entirely ordinary type and extent for a road project and do not rise to a level of "truly unusual factors" or "extraordinary magnitudes" that would overcome the Congressional bar to funding road construction in 4(f) Resources. *Overton Park*, 401 U.S. at 413. The FHWA did not reach this conclusion, however, because it failed to identify the existence of a feasible avoidance alternative and therefore failed to perform a proper Prudency Analysis. The FHWA then went on to eliminate from consideration an alternative engineering of a bridge using Corridor 6A that would have minimized impacts to 4(f) Resources because it misapplied Section 4(f)'s Least Harms Analysis. Because of these failures of procedure and substantive statutory mandate, FHWA's funding of

Alternative 1C was beyond its jurisdictional authority, arbitrary, capricious, and an abuse of discretion.

ARGUMENT

I. SECTION 4(F) ESTABLISHES AN UNAMBIGUOUS AND SUBSTANTIVE MANDATE THAT THE FHWA GO TO EXTRAORDINARY LENGTHS TO AVOID FUNDING TRANSPORTATION PROJECTS THAT WILL USE PUBLIC LANDS.

Section 4(f) of the Transportation Act is a "plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted." *Overton Park*, 401 U.S. at 411. There is no ambiguity to this "clear and specific directive[]." *Id.* Specifically, Section 4(f) provides that:

> The Secretary may approve a transportation program or project . . . requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance . . . only if –
>
> (1) there is no prudent and feasible alternative to using that land; and
>
> (2) the program or project includes all possible planning to minimize the harm . . . resulting from the use.

49 U.S.C. § 303(c) (emphasis added). Simply stated, the intent of the statute, and the policy of FHWA, is first to avoid funding the use of significant public parks, recreation areas, wildlife and waterfowl refuges and historic sites, and then, only where such avoidance is not feasible and prudent, to

minimize the use of 4(f) Resources by federally funded projects. Section 4(f) mandates a two-step analysis, with both steps occurring independently and sequentially. Step one, the Section 4(f)(1) analysis, consists of a "Feasibility Analysis" and a "Prudency Analysis" for each alternative. Step two consists of the Section 4(f)(2) analysis, or the "Least Harms Analysis."

The Prudency Analysis has proved to be the most contentious component of Section 4(f), as project proponents have tried repeatedly to argue that ordinary road construction impacts rise to the level of imprudence so that they may use public lands for road projects. Of particular relevance to cases (like this one) where such arguments are made, is the Supreme Court's treatment of the argument that:

> the requirement that there be no other 'prudent' route requires the Secretary to engage in a wide-ranging balancing of competing interests. [Proponents of this approach] contend that the Secretary should weigh the detriment resulting from the destruction of parkland against the cost of other routes, safety considerations, and other factors, and determine on the basis of the importance that he attaches to these other factors whether, on balance, alternative feasible routes would be 'prudent.'

Overton Park, 401 U.S. at 411. The Supreme Court soundly rejected this "balancing" approach, stating that "no such wide-ranging endeavor was intended" by Congress. *Id.* In rejecting the weighing approach, the Supreme Court reasoned that:

> It is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible. Although it may be necessary to transfer funds from one jurisdiction to another, there will always be a smaller outlay required from the public purse when parkland is used since the public already owns the land and there will be no need to pay for right-of-way. And since people do not live or work in parks, if a highway is built on parkland no one will have to leave his home or give up his business. Such factors are common to substantially all highway construction. Thus, if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes.

Id. at 411-412. Thus, recognizing that there will always be strong incentives to build highways through parks due to the obvious lower cost and reduced community disruption, the Court emphasized the 'paramount importance' of the preservation of parkland, thereby placing strong restrictions on the Secretary's authority to fund projects that use 4(f) Resources.

Legislative affirmation and subsequent case law further edify the Supreme Court's *Overton Park* interpretation of Section 4(f)'s exceptional barrier to use of public park and conservation lands. *See, e.g., City of Dania Beach v. Fed. Aviation Auth.*, 628 F.3d 581, 587 (D.C. Cir. 2010) ("the § 4(f) context requires exceptional agency push-back if the resources are to have any chance.") (emphasis added); *Monroe Cnty. Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 700 (2d Cir. 1972) ("a road must not take parkland, unless a prudent person, concerned with the quality of the human

environment, is convinced that there is no way to avoid doing so.") (emphasis added); *see also*, S. Rep. No. 1340, 90th Cong., 2d Sess., U.S. Code Cong. & Ad. News, pp. 3482, 3500 (1968) ("everything possible should be done to insure [parklands] being kept free of damage or destruction by reason of highway construction.") (emphasis added). If Section 4(f) is to have "any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems." *Overton Park*, 401 U.S. at 413 (emphasis added); *see also*, *Defenders of Wildlife v. N.C. Dept. of Transp.*, 762 F.3d 374, 400 (4th Cir. 2014) ("Imprudence may not provide cover for using Section 4(f) land unless there are truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reach extraordinary magnitudes.") (emphasis added), *Hickory Neighborhood Def. League v. Skinner*, 893 F.2d 58, 61 (4th Cir. 1990) (Determination of imprudence requires a finding of "unique problems or that the disruption associated with the alternatives reached extraordinary magnitudes.") (internal quotations and citations omitted)).

Subsequent to *Overton Park* and two decades of its progeny, and following on the FHWA's attempt to clarify the definition of a "feasible and prudent avoidance alternative," Congress passed a statute–the Safe,

Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for the Users[31] ("SAFETEA-LU")–which directed 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, 2008). The express intent of this legislative exercise was to bolster--not change--the legal standard established in *Overton Park.* The Conference Report stated:

> In order to address inconsistent guidance and regional interpretations of the *Overton Park* decision, subsection 1514(b) directs the Secretary to issue regulations to clarify the factors to be considered and the standards to be applied in determining whether alternatives are 'prudent and feasible' under [Section 4(f)]. The fundamental legal standard contained in the *Overton Park* decision for evaluating the prudence and feasibility of avoidance alternatives will remain as the legal authority for these regulations, however, the Secretary will be able to provide more detailed guidance on applying these standards on a case-by-case basis.

H.R. Rep. No. 109-203, at 1057-58 (Conf. Rep.) (emphasis added).

Later, during rulemaking, the FHWA recognized Congress' intent to firmly establish *Overton Park* as the correct interpretation of Section 4(f):

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

> "Congress made clear that the U.S. DOT must set forth factors to be considered and the standards to be applied when determining whether an avoidance alternative is prudent and feasible, and that the factors must adhere to the legal standard set forth in *Overton Park*."

4(f) Rulemaking, 73 Fed. Reg. at 13392 (citing H.R. Rep. No. 109-203, at 1057-58 (Conf. Rep.)) (emphasis added). Furthermore, 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).

In short the unambiguous mandate of Section 4(f), as reinforced by a considerable body of case law and regulatory scheme, requires the FHWA to go extraordinary lengths to avoid funding projects which use public lands.

II. THE FHWA DID NOT PERFORM A LEGALLY ADEQUATE SECTION 4(F)(1) ANALYSIS.

A. THE FHWA ARBITRARILY REMOVED ALTERNATIVE 6A SPLICED FROM BOTH THE FEASIBLITY AND PRUDENCY ANALYSES.

As a threshold matter, it is undisputed that Alternative 6A Spliced avoids all use of Section 4(f) Resources. FEIS 6.16 (AR022702) (avoids use of SPSP), 6.22 (AR022706) (avoids use of AP), 6.26 (AR022712),[32] and therefore should have been analyzed for both feasibility and prudency. Review of the record, however, shows that Alternative 6A Spliced was not fully analyzed for prudency. Although the Section 4(f) Evaluation repeatedly recites the conclusion that the use of Corridor 6A would result in "severe social impacts," the record does not support a finding of impacts of sufficient magnitude or uniqueness to establish imprudence for Section 4(f) purposes. *See, e.g.*, FEIS 6.26 (AR 022712) (eliminating Alternative 6A Spliced with a bare recitation regarding social impacts). These alleged non-Section 4(f) Resource impacts were, however, not discussed in any detail as part of a Section 4(f)(1) Prudency Evaluation for Alternative 6A Spliced.

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[32] Plaintiffs-Appellants submit that the record should be more clear on this fact, especially since it is the crucial fact driving the inquiry under a Section 4(f)(1) analysis. However the reality of this 4(f) Statement is that several pages must be examined in order to determine whether 6A Spliced avoids all Section 4(f) lands.

Specifically, the "Evaluation of Alternatives" section of the 4(f) Evaluation, FEIS 6.40 (AR022726), ignores Alternative 6A Spliced altogether, stating that "all build alternatives, including the Preferred Alternative, use at least one Section 4(f) property; therefore, no feasible and prudent avoidance alternative exists."[33]

However, circularly, the section of the 4(f) Evaluations that identified feasible build alternatives declined to include Alternative 6A Spliced because of alleged prudency issues. FEIS 6.26 (AR022712) ("this bridging option is not a prudent avoidance alternative for Alternative 6A since it would result in severe social impacts on both sides of the [North Fork].") These conclusions combined together allowed the FHWA to circumvent a thorough 4(f) Evaluation of the full range of avoidance alternatives – including Alternative 6A Spliced. Pursuant to the statutory directive, the Secretary's task is to determine, **for each potential avoidance option**, whether avoiding the 4(f) Resource is both "feasible" and "prudent."

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[33] The FHWA accomplished this feat of avoidance by eliminating Alternative 6A Spliced from its Feasibility Analysis in the bridging section of its 4(f) Evaluation because of alleged non-Section 4(f) impacts (in other words, prudency), and then eliminating Alternative 6A Spliced from its Prudency Analysis in the evaluation of alternatives section claiming that there was no existing avoidance alternative to evaluate (in other words feasibility). FEIS 6.40 (AR022726).

Therefore, having acknowledged that Alternative 6A Spliced in fact avoids all 4(f) Resources, the FHWA was required to evaluate Alternative 6A Spliced as an avoidance alternative under Section 4(f)(1), and failure to do so was arbitrary and capricious. Approving use of Alternative 1C without first performing a 4(f) Evaluation including a Prudency Analysis of 6A Spliced exceeded the Secretary's jurisdiction.

B. THE FHWA IMPROPERLY RELIED FOR ITS PRUDENCY ANALYSIS UPON THE CITY'S DETERMINATION OF THE LOCALLY PREFERRED ALTERNATIVE.

The FHWA erred by placing too much weight on the City's selection of the LPA—a process that need not and does not incorporate Section 4(f)'s preservation mandate. *See* FEIS 6.48 (AR022734). The FHWA's policy guidance in cases such as this, where the FHWA begins its 4(f) analysis using the work that has been performed for other purposes, is that "[c]are must be taken when making determinations of feasibility and prudence not to forget or de-emphasize the importance of protecting the Section 4(f) property." Dkt. 39-2, Doughty Decl., Ex. 1: FHWA, *Section 4(f) Policy Paper* (July 20, 2012), p. 13. "If Section 4(f) avoidance alternatives were eliminated during the earlier phases of project development for reasons unrelated to Section 4(f) impacts or a failure to meet the project purpose and need, they may need to be reconsidered in the Section 4(f) process." *Id.* at

12. Here the LPA was selected as the preferred alternative for purposes of compliance with NEPA.[34] FEIS 6.48 (AR022734). In the City's LPA determination analysis, Alternatives 6A and 6A Spliced were not evaluated through the prism of Section's 4(f) purpose as "Section 4(f) was not part of the NEPA scoring process." *Id.* While the FHWA recites that "[n]evertheless, Section 4(f) was an important part of the decision-making process and provided a final screening of the scored alternatives," the Record does not support this assertion. *Id.* Instead, all evidence demonstrates that the FHWA simply carried over the LPA from the City's process into the NEPA analysis and never performed a legally adequate Section 4(f) Prudency Analysis. *See supra*, Statement of Case, Section II.B, commencing at p. 11) (discussing perfunctory dismissal of Alternative 6A Spliced based on undefined "social impacts.").

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[34] The 4(f) Evaluation correctly states that:

> The standards for evaluating and eliminating alternatives under Section 4(f) are different than those under NEPA . . . Under NEPA . . . [a]ny alternative may be selected or rejected as long as it is sufficiently documented and justified. However, under Section 4(f), the use of land determined to be a Section 4(f) resource may not be approved unless there is no feasible and prudent alternative to such use.

FEIS 6.47 (AR022733).

C. A VALID 4(F) EVALUATION WOULD HAVE IDENTIFIED CORRIDOR 6A AS PRUDENT.

The Record fails to establish that Corridor 6A is imprudent. *See* Table 2; Statement of the Case, Section II.B, commencing at p. 11, (discussion of non-Section 4(f) impacts).

> "[U]nder *Overton Park* . . . that an alternate alignment which avoids taking section 4(f)-protected property is more costly and requires greater commercial and residential severance than does an alignment which takes the protected property does not establish that the former is imprudent. Such differences are a *question of degree*, and, in accordance with *Overton Park*, such a difference must be of extraordinary magnitude if it is to justify the taking of section 4(f) -protected property."

Wade v. Dole, 561 F. Supp. 913, 952 (N.D. Ill. 1983). The Record, and the 4(f)(1) Analysis in particular, fails to establish that there are "truly unusual factors present" for Alternative 6A Spliced. Nor does the record establish that "the cost or community disruption resulting" from selection of that alternative reach "extraordinary magnitudes, [or] present unique problems." *Druid Hills*, 772 F.2d at 715 (quoting *Overton Park*, 401 U.S. at 413); *see also* Table 2.

The impacts of Alternative 6A Spliced are entirely ordinary within the context of major road construction, and, in fact, are quite similar to the impacts of selected Alternative 1C in type and scope. *See* Table 2; Statement of the Case, Section II.B, commencing at p. 11. The only element where

there is any significant diversion in scope of impact between Corridor 6A and 1C is with regard to Section 4(f) Resources, upon which Corridor 1C is the clear loser because it uses 4(f) Resource, while Alternative 6A Spliced does not. *See* Table 1.

If one assumes, for the sake of argument, that the FHWA's apparent total reliance on the LPA was proper, the LPA actually demonstrates that Alternative 6A Spliced is a prudent avoidance alternative. In other words, FHWA has failed to show in the Record how an objective difference of only 6% between Corridor 6A and 1C, *before taking into account impacts to 4(f) Resources,* could possibly or logically rise to the level of "extraordinary magnitude" and "unique problems" as required to overcome the *Overton Park* bar to federal funding of public park and conservation land destruction for road purposes. Here the FHWA has fallen into the exact trap that the Supreme Court warned against in *Overton Park*, as reinforced by Congress' passage of SAFETEA-LU, and carried out in the FHWA's adoption of its own regulations regarding evaluation of prudency—it has improperly placed preservation of Section 4(f) Resources "on equal footing" (or even below) considerations of community disruption. *Overton Park*, 401 U.S. at 411-12.

To place the above impacts and the Prudency Test application in context, it is helpful to look at factual scenarios considered by both appellate

and district courts in the years following *Overton Park*. In 1976, the Fifth Circuit Court of Appeals reviewed *Louisiana Environmental Society, Inc. v. Coleman*, wherein bridges were proposed across a lake at one of its widest and deepest points. 537 F.2d 79, 84 (5th Cir. 1976) ("*Louisiana Envtl. Soc'y*"). The *Louisiana Envtl. Soc'y* court held that two feasible alternatives were improperly rejected as imprudent on the basis of displacements. The first alternative required displacing 120 single dwellings, 100 single apartment units (1 apartment project), 900 persons, 7 businesses, 1 church, and 1 lodge. The second alternative required displacing 377 single families, 1,508 persons, 21 businesses, and 2 churches. *Id.* at 87 n.6. Despite the fact that the avoidance alternative more than doubled the number of displacements—already greater than those required for the project at issue in this case--the Court held these "displacements [] cannot be found to be of an extraordinary magnitude." *Id.* at 87. In addition, the Court held that a delay of 10 years required to approve an alternative route resulting from the mis-analysis did not rise to the level of "unique within the meaning of *Overton Park*." *Id.* at 85.

In 1984, the Ninth Circuit Court of Appeals, in *Stop H-3 Association v. Dole*, reviewed a Section 4(f) challenge by three environmental and community groups to a planned Interstate highway project that required the

taking and using of land from "two public parklands: (1) Ho'omaluhia Park, a major regional park; and (2) Pali Golf Course Park, and in doing so affirmed *Overton Park* and offered its own additional views on the scope of Section 4(f). 740 F.2d 1442, 1451 (9th Cir. 1984) ("*Stop H-3*"). In *Stop H-3*, an avoidance alternative existed, but was dismissed by the agency based upon prudency. *Id.* The avoidance alternative "require[d] the dislocation of one church, four businesses and 31 residences . . . increase noise, air quality and visual impacts to residences in the general vicinity; require additional costs due to the need for the viaduct structure ($42 million additional); and require construction to lesser design geometric standards." *Id.* at 1451-52. Regarding displacements, the Ninth Circuit held that the Secretary could not have reasonably concluded that the community displacements resulting from the avoidance alternative (Makai Realignment) rose to the level required to find imprudency by *Overton Park*. *Id.* Regarding increased noise, air quality and visual impacts, the court held that "there [wa]s nothing in the record to show that this factor represents a disruption of extraordinary magnitude. *Id.* at 1452. *Overton Park* amply made clear that only in the most exceptional circumstances may parkland be taken solely to prevent highways from adversely affecting areas that are already developed." *Id.* at 1452 (internal citations omitted). Ultimately, the Court held that these impacts "do not

satisfy the stringent *Overton Park* standards that we must apply," and rejected the agency's finding of imprudence. *Id.*

The Fourth Circuit has similarly held that the inability to finance an avoidance alternative because of state restrictions on the use of bonds for that particular route is not a valid reason to conclude the route is not a feasible and prudent alternative. *Coal. for Responsible Regional Dev. v. Brinegar*, 518 F.2d 522, 525 (4th Cir. 1975).

Lastly, relocation of an elementary school along with potential for greater traffic hazard for school busses was not found to rise to the level required to demonstrate imprudence under *Overton Park. Ass'n Concerned About Tomorrow, Inc. v. Dole*, 610 F. Supp. 1101, 1116-17 (N.D. Tex. 1985).

Even if the FHWA properly evaluated the impacts of Alternative 6A Spliced, it is clear that the impacts Appellants have been able to cobble together into Table 2 from various parts of the record do not approach those necessary to surmount Section 4(f)(1) and *Overton Park*'s clear and extraordinary barrier to the use of park and conservation lands. To summarize, while achieving the project's purpose and need, **Alternative 6A Spliced avoids all use of 4(f) Resources** and Alternative 1C does not; Alternative 6A Spliced is far more protective of non-Section 4(f) natural

resources such as wetlands and wetlands functions, and presents a route that is tens of millions of dollars cheaper. While it does require the relocation of 158 residential properties, as compared to Alternative 1C's 140, as well as the relocation of 10 commercial operations, these are not "unique" impacts in the context of a transportation project, nor are they of "extraordinary magnitude," as demonstrated by the myriad of cases applying Section 4(f). Importantly, SAFETEA-LU, in which Congress affirmed the *Overton Park* interpretation of Section 4(f), was passed in 2008-after the interpretation of *Overton Park* presented in each of the cases discussed above in this section. In short, the FHWA's refusal to uphold its nondiscretionary duty to avoid funding a project destroying 4(f) Resources where a feasible and prudent avoidance alternative exists was arbitrary and capricious and outside of its scope of authority under Section 4(f).

III. DEFENDANTS MISAPPLIED THE FHWA'S LEAST HARM REGULATIONS.

Because Alternative 6A Spliced is a feasible and prudent avoidance alternative, the FHWA should have never engaged in a Section 4(f)(2) Least Harms Analysis. However, even if one were to compare Alternative 6A (which uses the same post beam technology as Alternative 1C) to Alternative 1C using a valid Least Harms Analysis, Alternative 6A must be selected over Alternative 1C. The FHWA's regulations provide seven

factors to guide the agency in selecting among potential Least Harms alternatives. If, and only if, the Section 4(f)(1) Analysis identified no feasible and prudent avoidance alternative, then the Defendants may approve, from among the remaining alternatives that use Section 4(f) property, "only the alternative that . . . Causes the least overall harm in light of the statute's preservation purpose." 23 C.F.R. § 774.3(c) (emphasis added). The least overall harm is determined by balancing seven factors, the first four of which directly address protection of 4(f) Resources:[35]

> i. The ability to mitigate adverse impacts to each Section 4(f) property (including any measures that result in benefits to the property);

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[35] FWHA recognizes this in the 4(f) Evaluation in theory, even though it neglected to apply the principle. It states "[t]he first four of these factors relate to the net harm that each alternative would case to the Section 4(f) property. The final three factors take into account any substantial problems on issues beyond Section 4(f)." FEIS 6.43 (AR022729) (emphasis added).

Plaintiff does not concede that the FHWA's regulations are consistent with Section 4(f) or its implementing case law, particularly to the degree they imply any sort of equal footing for impacts to Section 4(f) Resources and non-Section 4(f) Resources, as the FHWA seemed to argue to the District Court. Transcript of proceedings below at 49. As discussed above, the Supreme Court has specifically rejected a balancing approach to the protection of park and conservation lands. Other courts have held that a "route may be rejected because it does not minimize harm only for reasons relevant to the quantum of harm which will be done to the [Section 4(f) Resources]. If it does minimize harm, a route may be rejected only for truly unusual factors other than its effect on the [Section 4(f) Resources]." *Louisiana Envtl. Soc., Inc. v. Coleman*, 537 F.2d at 86 (emphasis added).

ii. The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;

iii. The relative significance of each Section 4(f) property;

iv. The views of the official(s) with jurisdiction over each Section 4(f) property;

v. The degree to which each alternative meets the purpose and need of the project;

vi. After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and

vii. Substantial differences in costs among the alternatives.

Id. at § 774.3(c)(1). Here, if the FHWA's own regulatory Least Harms Analysis guidelines are used, Alternative 6A is by far the preferred route over Alternative 1C.

A. IMPACTS TO 4(F) RESOURCES ARE SIGNIFICANTLY GREATER FOR ALTERNATIVE 1C THAN FOR ALTERNATIVE 6A.

Adverse impacts of the selected Alternative 1C to Section 4(f) Resources are significantly greater than Alternative 6A. *See* Table 1. The Defendants' attempt to characterize the impacts of both alternatives to 4(f) Resources as "modest" (Dkt. 45-1, FHWA Memo ISO MSJ, p. 27) is unsupported by the record and misleading. Alternative 6A uses none of the

Savannas Preserve and *may* use 0.01 acres of the Aquatic Preserve.[36] FEIS 6.42 (AR022728). Alternative 1C, on the other hand, *directly* uses 2.23 acres and is located where it will have maximum negative impact on the environment and recreation. Table 1; 1999 CAMA Memo, p. 2 (May 25, 1999) (SUPP-AR000047) ("**It is unlikely that a location with greater environmental or recreational impact [than Alternative 1C] could be chosen.**") (emphasis added). Alternative 1C is located at "the widest part of the aquatic/buffer preserve complex (4200') impacting public lands to the greatest possible extent." *Id.* at p. 3 (SUPP-AR000048).

It is important to note that anticipated harm to 4(f) Resources for Alternative 1C is greater than that anticipated for Alternative 6A *even though* mitigation measures which were applied to Alternative 1C were never applied to Alternative 6A, and so the mitigated impacts of the two alternatives were never compared. *See* FEIS 6.48 (AR022734) ("*Following* the selection of the Preferred Alternative, additional avoidance and minimization measures were developed" (emphasis added)); ROD, pp. 6, 10 (AR032578, AR032582). The FHWA concurred in the selection of Alternative 1C as the preferred alternative on July 30, 2012 but did not

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[36] *See* footnote 7 regarding the dubious origins of the claim that Alternative 6A uses 0.01 acres of 4(f) Resources.

completed coordinated avoidance and mitigation studies in conjunction with other federal resource management agencies until September 2012. This misapplication of mitigation precluded a fair comparison among alternatives of the first two elements of a Least Harms Analysis: the *relative* adverse impacts to 4(f) Resources, and the *relative* harm to the 4(f) Resources. ROD, p. 11, 13 (AR032583, AR032585) (application of *post-selection* mitigation measures reduced the use of Section 4(f) properties.).[37] Thus, factor vi. clearly weighs in favor of the selection of Alternative 6A over Alternative 1C.

B. THE AGENCIES WITH JURISDICTION OVER THE PRESERVES HAVE REPEATEDLY AND VIGOROUSLY EXPRESSED A PREFERENCE FOR ALTERNATIVE 6A OVER ALTERNATIVE 1C.

As the 4(f) Evaluation states, "the FDEP (the agency with jurisdiction) has expressed a preference for the placement of piers in the [Aquatic Preserve] rather than have additional impacts to the [Savannas Preserve], and the SFWMD has expressed a preference for piers in the

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[37] It is unclear whether application of these bridge-narrowing mitigation measures would have allowed Alternative 6A, which reportedly used just 0.01 acres of 4(f) Resources, to avoid all such use. *See supra*, footnote 7.

[Aquatic Preserve] over additional impacts to any adjacent wetlands."[38] FEIS 6.26 (AR 022712). Alternative 6A requires direct use of only 0.01 acres of the Aquatic Preserve, while Alternative 1C requires direct use of both Preserves and total 4(f) Resource use of 2.23 acres. DEIS 6.37 (AR022723). By any measure (direct, temporary, and functional loss), Alternative 1C destroys more wetlands than Alternative 6A and it uses 2.21 acres of the Savannas Preserve while Alternative 6A uses none of the Savannas Preserve. As a result, Alternative 6A is far more desirable according to the jurisdictional agencies' preference formulation recited in the 4(f) Evaluation itself. Furthermore, the FDEP has unambiguously stated that "[Alternative 1C] contains the [Aquatic Preserve]'s most sensitive and diverse habitat in terms of community types and native flora and fauna."[39] 2003 FDEP Memo (SUPP-AR000059).

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[38] The Lower Court erroneously accepted the Water Management District's approval of mitigation as a tacit endorsement of the highly controversial route 1C. Dkt. 56 at 9.

[39] The FHWA argues that the ultimate willingness, after years of dissent, by the FDEP to provide the City with an easement for Alternative 1C is somehow indicative of its preference for that alternative over one using Corridor 6A. *See* Dkt. 45-1, p. 27. This quote clearly dismisses any notion that eventual acquiescence indicates endorsement of Alternative 1C as a preferred route.

In addition, the U.S. Fish and Wildlife Service ("Service"), with jurisdiction over impacts to threatened and endangered species, classifies the project as having a "substantial" degree of effect. Letter from John. M. Wrublik to Richard Young (Nov. 28, 2012) (AR019900). It is noted that among build alternatives "**it appears that Alternative 6A results in the least direct loss of wildlife habitat**"—a claim that was not disputed by the FDOT. Letter from Gustavo Schmidt, Florida Department of Transportation to Larry Williams, U.S. Fish and Wildlife Service (June 19, 2012) (AR49794) (emphasis added). The Service admonished the FDOT to avoid construction of roads through Section 4(f) Resources because:

> except under extraordinary circumstances, the Service believes that construction of new roadway projects within lands protected for conservation purposes is not an appropriate use of those lands. We note that highways constructed within public conservation lands can result in the loss and degradation of wildlife habitat, disturbance and mortality to wildlife, and significantly affect the aesthetic values of these lands to the public. Moreover, we find that highway projects located within conservation lands are contrary to reasons the lands were originally acquired. As such, we strongly urge the Florida Department of Transportation to avoid public conservation lands when designing and siting future roadway projects.

Letter from John. M. Wrublik to Richard Young (Nov. 28, 2012) (AR019900).

The National Marine Fisheries Service, with jurisdiction over Essential Fish Habitat, recommended selection expansion of existing bridges

in combination with multimodal transportation alternatives and Transportation System Management over any build alternative, but preferred build Alternative 6A to build Alternative 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.**" Response to Comments of the National Marine Fisheries Service of September 30, 2011 (AR019998) (emphasis added).

The U.S. Corps of Engineers, with jurisdiction over wetlands under the Clean Water Act, has to date refused to endorse the City's Alternative 1C as the "Least Environmentally Damaging Practicable Alternative" ("LEDPA") despite the City's entreaties to do so. *See, e.g.*, Letter from Garett Lipps to John Krane (Dec. 21, 2012) (AR019896). In fact, the Corps described Alternative 1C as the "**MOST environmentally damaging practicable alternative**" in terms of wetlands regulated pursuant to the Clean Water Act. Letter from Garett Lipps to John Krane (August 7, 2012) (AR019983) (bold emphasis added, all caps emphasis original). Thus, factor iv. clearly weighs in favor of the selection of Alternative 6A over Alternative 1C.

C. IMPACTS OF 6A TO NON-SECTION 4(F) RESOURCES ARE ORDINARY IN SCOPE AND TYPE.

Of the three remaining elements that may be considered in a Section 4(f)(2) Least Harms Analysis, two weigh in favor of Alternative 6A when they are viewed "in light of the statute's preservation purpose" as the FHWA's regulations (and the statute and *Overton Park*) require. 23 C.F.R. § 774.3(c). First, as discussed above, Statement of the Case, Section II.B (commencing p. 11), Alternatives 1C and 6A both meet the purpose and need of the project, and therefore offer no support for the the FHWA's preference for 1C. Second, the FHWA argues that there are no substantial differences in costs among the alternatives. FHWA MSJ, p. 28. On the contrary, Alternative 6A is significantly *less* expensive than Alternative 1C. FEIS 3.82 (AR022362). The $35 million difference, which the FHWA calls non-substantial, represents a 30% increase in cost to the public. *Id.*

Furthermore, assuming the FHWA properly complied with the Least Harms Analysis with respect to Alternative 6A, it could not be dismissed for imprudency because the non-section 4(f) impacts do not cause unique problems or social impacts of extraordinary magnitude, even as calculated by the project's proponent—the City. *See* Statement of the Case, Section II.B, commencing p. 11.

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 manner when it failed to perform a proper Prudency Analysis for Alternative 6A Spliced, and when it then misapplied the Least Harms Analysis by, among other matters, failing to apply mitigation measures as part of the evaluation and adding them to Alternative 1C only after completion of the 4(f)(2) analysis.

For all of the foregoing reasons, the Court should reverse the District Court's granting of Appellee's Motion for Summary Judgment and remand the matter to the District Court with instructions to grant Appellant's Motion for Summary Judgment and to enjoin the FHWA's funding of Alternative 1C.

Respectfully submitted this 29th day of February 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 11328 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Rachel S. Doughty
Rachel S. Doughty

CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2016, I caused this Opening 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.

/s/ Rachel S. Doughty
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