Multiple Documents

Part	Description
1	4 pages
2	Exhibit 1

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

PROTECT OUR PARKS, INC.; CHARLOTTE ADELMAN; MARIA VALENCIA AND JEREMIAH JUREVIS;	)	
Plaintiffs,	)	Case No. 18 CV 3424
v.	)	Honorable Judge John R. Blakey
CHICAGO PARK DISTRICT AND CITY OF CHICAGO;	)	
Defendants.	)	

PROPERTY LAW PROFESSORS' MOTION FOR LEAVE
TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS

Proposed *amici curiae* property law professors, David A. Dana, Lee Anne Fennell, Nicole Stelle Garnett, Thomas W. Merrill, Nadav Shoked, Stephanie M. Stern, Lior J. Strahilevitz (collectively, "Property Law Professors"), by and through the undersigned counsel, respectfully move this Court for permission to file an *amici curiae* brief in support of the public trust arguments presented in Defendants' Rule 12(B)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction and, In the Alternative, Rule 12(C) Motion for Judgment on the Pleadings. [Dkt. No. 48]. In support of this motion, proposed *amici* state as follows:

1. Defendants have consented to the filing of this *amici* brief. Counsel for the foundation *amici* contacted Plaintiffs' counsel to ask if Plaintiffs would consent to the filing of the foundation and Property Law Professors' *amici curiae* briefs. As of the time of this filing, Plaintiffs' counsel has not responded.

2. This *amici curiae* brief is submitted on behalf of seven professors and academics who focus on property and real estate law:[1]

- David A. Dana is the Kirkland & Ellis Professor of Law at Northwestern Pritzker School of Law, and Professor of Real Estate at the Kellogg School of Management.[2] His teaching and research interests include environmental law, property, land use, and professional responsibility.
- Lee Anne Fennell is the Max Pam Professor of Law at the University of Chicago Law School. Her teaching and research interests include property, torts, land use, housing, social welfare law, state and local government law, and public finance.
- Nicole Stelle Garnett is the John P. Murphy Foundation Professor of Law at the Notre Dame Law School. Her teaching and research interests include property, land use, urban development, local government law, and education policy.
- Thomas W. Merrill is the Charles Evans Hughes Professor of Law at Columbia Law School. His teaching and research interests include property, administrative law, legislation, constitutional law, and torts.
- Nadav Shoked is Professor of Law at Northwestern Pritzker School of Law. His teaching and research interests include local government law, legal history, land use planning, and property law.
- Stephanie M. Stern is Professor of Law at Chicago-Kent College of Law. Her teaching and research interests include property and land use law, housing policy, and behavioral law and economics.

[1] Institutions of all signatories are for identification purposes only. The undersigned do not purport to speak for their institutions, and the views of proposed *amici* should not be attributed to these institutions.

[2] To proposed *amici*'s knowledge, Kirkland & Ellis LLP, which made a charitable donation to the Northwestern Pritzker School of Law to fund a chair that is now occupied by Professor Dana, is not involved in the present litigation. Professor Dana has no other affiliation with the firm.

- Lior J. Strahilevitz is the Sidley Austin Professor of Law at The University of Chicago Law School.[3] His teaching and research interests include property and land use, privacy, intellectual property, contracts, and law and technology.

3. Proposed *amici* have a strong interest in the proper application of precedent related to the public trust doctrine.

4. Proposed *amici* write to provide a historical overview of the public trust doctrine in the United States and in Illinois, and to help situate the present litigation within the Illinois precedent.

WHEREFORE, the Property Law Professors respectfully request that the Court grant leave to file the proposed *amici curiae* brief, which is attached hereto as Exhibit 1.

Dated: November 28, 2018

Respectfully submitted,

/s/Julia K. Schwartz

Julia K. Schwartz
MILLER SHAKMAN & BEEM LLP
180 North LaSalle Street, Suite 3600
Chicago, Illinois 60601
Tel: (312) 263-3700
jschwartz@millershakman.com

Counsel for Amici Curiae

[3] Sidley Austin LLP, which made a charitable donation to the University of Chicago Law School to fund a chair that is now occupied by Professor Strahilevitz, does legal work for the Obama Foundation. Professor Strahilevitz has never done legal work for the Foundation and has no other affiliation with the firm.

CERTIFICATE OF SERVICE

I, Julia K. Schwartz, hereby certify that I caused the foregoing PROPERTY LAW PROFESSORS' MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS to be served on all counsel of record to matter 18 C 3424 via ECF Filing on November 28, 2018.

Dated: November 28, 2018 */s/ Julia K. Schwartz*

EXHIBIT 1

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

PROTECT OUR PARKS, INC.; CHARLOTTE ADELMAN; MARIA VALENCIA AND JEREMIAH JUREVIS;	)	
Plaintiffs,	)	Case No. 18 CV 3424
v.	)	Honorable Judge John R. Blakey
CHICAGO PARK DISTRICT AND CITY OF CHICAGO;	)	
Defendants.	)	

BRIEF OF PROPERTY LAW PROFESSORS
AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS

David A. Dana
Kirkland & Ellis Professor of Law
Northwestern Pritzker School of Law
Professor of Real Estate
Kellogg School of Management

Lee Anne Fennell
Max Pam Professor of Law
University of Chicago Law School

Nicole Stelle Garnett
John P. Murphy Foundation Professor of Law
Notre Dame Law School

Thomas W. Merrill
Charles Evans Hughes Professor of Law
Columbia Law School

Nadav Shoked
Professor of Law
Northwestern Pritzker School of Law

Stephanie M. Stern
Professor of Law
Chicago-Kent College of Law

Lior J. Strahilevitz
Sidley Austin Professor of Law
University of Chicago Law School

Julia K. Schwartz
MILLER SHAKMAN & BEEM LLP
180 North LaSalle Street, Suite 3600
Chicago, Illinois 60601
Tel: (312) 263-3700
jschwartz@millershakman.com

Counsel for Amici Curiae

INTEREST OF *AMICI CURIAE*

This *amici curiae* brief is submitted on behalf of seven professors and academics who focus on property and real estate law. *Amici* write to provide a historical overview of the public trust doctrine in the United States and in Illinois, and to help situate the present litigation within the Illinois precedent. Appendix A lists all *amici*.

ARGUMENT

Amici legal scholars write because of this case's importance, not because of its difficulty. Constructing the Obama Presidential Center ("OPC") in Jackson Park furthers precisely the kinds of core uses of public land contemplated by the public trust doctrine. The doctrine was first recognized in *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387 (1892), where the Supreme Court held that the public's interest in navigable waters precluded the Illinois legislature from alienating land under Lake Michigan to a private entity for a private purpose. Consistent with the doctrine's origins, legislation authorizing transfers of lands submerged under Lake Michigan receives the closest scrutiny and the least deference from courts in determining whether the transfer serves a public interest. To date, this is the only form of transfer that any Illinois appellate court has held violates the public trust. A second category of legislative authorizations to transfer land—transfers of formerly submerged lands created by landfilling—receives substantial deference from courts. Illinois courts give the most deference to a third category of legislative judgments—transfers of never-submerged lands.

Here, the plaintiffs ask this federal Court to review legislative judgments by the state of Illinois and City of Chicago concerning a piece of solid, never-submerged land in Jackson Park—land that will not be transferred to a private entity but merely designated

for use. They ask the Court, in essence, to reject the legislative determination that the construction of a museum and center focused on the 44th President, and first African-American President, of the United States will serve the public interest.[1] The Plaintiffs' public trust arguments are inconsistent with Illinois precedents and with the important purposes furthered by the public trust doctrine. The Court should defer to the valid legislative authorization permitting the construction of the OPC in Jackson Park, and should grant Defendants' motion for judgment on the pleadings.

I. The Public Trust Doctrine Developed in the Context of Disputes Involving Lands Submerged under Navigable Waters.

Modern public trust doctrine provides that certain public assets are held in trust for the public, and may not be transferred to private entities for a purpose that would violate that trust. The doctrine emerged in the context of disputes regarding property rights in submerged lands under navigable waters. It traces its modern formulation to the U.S. Supreme Court's landmark decision in *Illinois Central*.

A. Historical Underpinnings of the Modern Public Trust Doctrine

The public trust doctrine traces its roots to Roman and English law concerning ownership of navigable waterways. The common law rule was that navigable waters, narrowly defined to include only waters subject to tidal forces, were owned by the King as sovereign. All other lands, including rivers and lakes not affected by tides, could be

[1] *Amici* assume the OPC site is public trust land because of the Illinois legislature's enactment of a statute in 1869 directing the South Park Commissioners to acquire what is now Jackson Park. Compl. ¶¶ 27–29, 90. There is, however, substantial debate concerning whether the public trust doctrine should apply to property that is not submerged under navigable waters. *See* Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799, 928 (2004) (hereafter "*Public Trust Doctrine*").

subject to private ownership.[2]

Before *Illinois Central*, American courts were divided as to how the English rule should be adapted in the United States. Some states applied the common law rule, holding that state ownership was limited to lands under tidal waters. Illinois originally fell into this category. *See City of Chicago v. Laflin*, 49 Ill. 172, 176 (Ill. 1868); *Middleton v. Pritchard*, 4 Ill. 510 (Ill. 1842); *see also* Kearney & Merrill, *Public Trust Doctrine*, *supra* at 828–29. Other states adopted a new approach, and held that submerged lands under all navigable waters were owned by the state. *See id.*

B. *Illinois Central Railroad Co. v. State of Illinois*

In the nineteenth century, uncertainty arose concerning the ownership of submerged lands that were not under tidal waters. This uncertainty led to a dispute over who owned the bed of Lake Michigan off the shores of downtown Chicago.[3]

In 1852, the City of Chicago reached an agreement with the Illinois Central Railroad Co. permitting the railroad to build tracks on trestles in Lake Michigan parallel to the city. The lake beneath the tracks was later landfilled. Years later, the city wanted to also grant the railroad title to 1,000 acres of submerged lands just off the shore of Chicago, to be used for the development of an outer harbor. To achieve that goal, the Illinois legislature enacted the Lake Front Act of 1869, which granted Illinois Central title to the submerged lands. Public outrage over the Lake Front Act swelled, however, and in 1873 the legislature repealed the statute. Litigation and appeals ensued over who owned the disputed land under Lake Michigan.

---

[2] Irrespective of ownership, all waters were subject to a public easement of free navigation. *See* Kearney & Merrill, *Public Trust Doctrine*, *supra* at 826–27.

[3] The background of the *Illinois Central* litigation is summarized in detail in Kearney & Merrill, *Public Trust Doctrine*, *supra*.

The Supreme Court decided that Illinois held title to the submerged land, but lacked the power to alienate that land to the railroad. This was because the state's title was "held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." *Illinois Central*, 146 U.S. at 452. The Court jettisoned the common law rule that the sovereign only owns land under tidal waters, because the Great Lakes were indistinguishable from tidal waters. *Id.* at 435–37.

The Court's invocation of the public trust concept was not a wholesale prohibition on the alienation of submerged land. The Court recognized the state's power to convey land under navigable waters for private uses, where the property would be "used in promoting the interests of the public" or could "be disposed of without any substantial impairment of the public interest in the lands and waters remaining." *Id.* at 453. What made the Lake Front Act problematic was the State's conveyance of the entire Chicago harbor and lakefront to the railroad, in essence granting the railroad a monopoly. *Id.* at 452–53.[4] In contrast to the city's grant of 1,000 acres of submerged lands, most of the railroad's existing developments on Lake Michigan—including the 200-foot right of way for its railroad tracks—were held to be consistent with the public trust. *Id.* at 444–45.

Three aspects of *Illinois Central* are worth noting: First, the decision was limited to land under navigable waterways. Second, it was based on what the Court perceived as the conferral of a monopoly on the railroad. Finally, the Court recognized that the state could convey submerged public trust land to private entities in certain circumstances.

C. The Public Trust Doctrine in Recent Decades

[4] For a criticism of the Court's assumption that Illinois granted a complete monopoly over Chicago's harbor, *see* Kearney & Merrill, *Public Trust Doctrine*, *supra* at 881–82.

In the decades following the *Illinois Central* decision, courts narrowly construed the public trust doctrine to be limited to land under navigable waterways. *See, e.g.*, *Appleby v. City of New York*, 271 U.S. 364, 394 (1926); *see also* Kearney & Merrill, *Public Trust Doctrine*, *supra* at 806. State courts began to take a more expansive view of the doctrine after the 1970 publication of an influential article by Professor Joseph L. Sax. Professor Sax argued that the public trust doctrine should apply beyond navigable waters to "situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals." Joseph Sax, *The Public Trust Doctrine*, 68 MICH. L. REV. 471, 556 (1970). To Sax, the doctrine would prevent sweetheart deals that redirected public lands towards narrow private interests. *Id*. at 482.

Courts around the country, including in Illinois, applied the public trust analysis outside of the context of navigable waterways. In *Paepcke v. Public Building Commission of Chicago*, 263 N.E.2d 11, 15–16 (Ill. 1970), the court assumed that the public trust doctrine applied to land in Washington and Douglas Parks having no connection to navigable waterways. *Accord Clement v. Chi. Park Dist.*, 449 N.E.2d 81, 84 (Ill. 1983) (holding that constructing a golf driving range in Jackson Park is consistent with the public trust doctrine). No Illinois appellate decision finds a violation of the public trust concerning never-submerged land.[5]

II. The Principles and Standards Underlying the Illinois Public Trust Doctrine

We view the Illinois cases as applications of the overarching goal of avoiding monopolization of unique, irreplaceable resources subject to a public trust by a private

[5] *See* Joseph D. Kearney & Thomas W. Merrill, *Private Rights in Public Lands: The Chicago Lakefront, Montgomery Ward, and the Public Dedication Doctrine*, 105 NW. U. L. REV. 1417, 1522 (2011) (hereafter "*Private Rights in Public Lands*").

entity for its own proprietary benefit. Courts essentially ask related questions. First, when "public trust lands" are at issue, courts ask (a) whether title to and control over public trust land is transferred to private ownership (a *public control* question), and (b) if so, whether there are plausible public benefits for the transfer (a *public interest* question).

Second, courts have used varying levels of deference to legislative judgments as to public interest based on how closely the property is linked to navigable waterways. In understanding how these cases have deferred to such legislative judgments, it is useful to categorize the property as falling into one of three tiers: land currently submerged under navigable waters; land formerly submerged under navigable waters but recently reclaimed by humans (*i.e.*, landfill); and land not reclaimed from navigable waters. (A) Momentous and ecologically irrevocable government actions that would diminish navigable waters by converting currently submerged land into landfill for private use are subject to a relatively demanding (although not insurmountable)[6] standard of review. That does not describe the OPC, which will be constructed on solid land and will not require any landfill. (B) Changes in the use of formerly submerged lands that became solid land through landfill are subject to substantial deference.[7] And (C) legislative decisions regarding ground that was never converted from submerged land to landfill are afforded the most deference.[8] Significantly, the only appellate decisions invalidating state

---

[6] Transfers of submerged lands have been upheld under the public trust doctrine. *See, e.g.*, *Fairbank v. Stratton*, 152 N.E.2d 569, 575 (Ill. 1958) (permitting construction of the McCormick Place convention center that required landfilling); *Bowes v. City of Chicago*, 120 N.E.2d 15, 22–25 (Ill. 1954) (permitting the construction of a water filtration plant in Lake Michigan); *People ex rel. Attorney General v. Kirk*, 45 N.E. 830, 836–37 (Ill. 1896) (upholding transfer of land to be filled for the construction of Lake Shore Drive).

[7] *See Friends of Parks v. Chicago Park Dist.*, 786 N.E.2d 161 (Ill. 2003) (permitting Soldier Field renovation); *Hickey v. Ill. Cent. R.R.*, 220 N.E.2d 415, 426–27 (Ill. 1966) (upholding railroad's interest in the air rights over terminal facilities on reclaimed land).

[8] *See Paepcke*, 263 N.E.2d at 21 (permitting use of public parks for schools). Never-submerged

statutes under Illinois' public trust doctrine involved the first tier—legislation to fill portions of Lake Michigan to convert currently submerged land into landfill.[9]

As discussed in Section III, the OPC produces an overlapping consensus among property law scholars: the OPC is consistent with the public trust doctrine and is an appropriate use of the Jackson Park site under any manner of applying that doctrine. With respect to any of the key questions described above—the degree of deference owed to the legislature, public control, and public interest—the OPC raises no concerns under the public trust doctrine. It is clear that the OPC will be situated on a portion of Jackson Park that has never been submerged beneath Lake Michigan, *see* Defs.' Mem. at 26 [Dkt. No. 49-1], and thus the most deferential standard to legislative judgments should apply here. The legislative judgments by the State of Illinois and the City of Chicago are explicitly set out in statutes, judgments that decide this case. And the City will have title to both the land and buildings of the OPC. All potential public trust concerns are thus easily answered under any approach.

A. The Public Trust Doctrine Mandates Deference To Legislative Authorizations In This Situation.

When the government transfers rights to solid ground, as opposed to submerged lakebed, courts do not weigh the public benefits anew, but instead determine whether the

---

land that necessarily must be traversed to enable public access to Lake Michigan could implicate weightier public trust concerns. *Cf. Raleigh Ave. Beach Ass'n. v. Atlantis Beach Club*, 879 A.2d 112 (N.J. 2005). The OPC site is not such a parcel, and we are unaware of any Illinois case that embraces this distinction.

[9] *See People ex rel. Scott v. Chi. Park Dist.*, 360 N.E.2d 773, 780–81 (Ill. 1976) (conveyance of submerged land for a steel plant violated the public trust, because of Lake Michigan's value as a natural resource and because "[a]ny benefit here to the public would be incidental" to the private purpose); *Illinois Cent. R. Co. v. City of Chicago*, 50 N.E. 1104, 1109 (Ill. 1898), *aff'd*, 176 U.S. 646 (1900) (declining to permit landfilling for railroad tracks between 25th and 27th Streets in Chicago, as the proposed use was not to aid navigation but was for the railroad's private use); *Illinois Cent. R. Co.*, 146 U.S. 387 (discussed above). *See also Lake Mich. Fed'n v. U.S. Army Corps of Eng'rs*, 742 F. Supp. 441 (N.D. Ill. 1990) (enjoining landfilling to expand lakefill on Loyola's Lakeshore Campus).

legislature specifically authorized the transfer and articulated a legitimate, plausible public purpose. And when that solid ground is land that was never submerged, the deference owed is at its zenith. Take, for example, the Illinois Supreme Court's decision in *Paepcke v. Public Building Commission of Chicago*, 263 N.E.2d 11 (Ill. 1970). Citing the Sax article, the court considered whether the public trust doctrine should be expanded to encompass any public decision to reallocate public resources "to more restricted uses or to subject public uses to the self interest of private parties." *Id.* at 16. But the court determined that the outcome was controlled by legislative authorization that allowed the use of two city parks for schools. *Id.* at 15–19. Instead of conducting a *de novo* analysis of the public benefits of building schools in a park, the court held that "[t]he resolution of this conflict in any given case is for the legislature and not the courts." *Id.* at 21.[10]

More recently, in *Friends of Parks v. Chicago Park Dist.*, 786 N.E.2d 161 (Ill. 2003), the court considered land that was once submerged but later filled in. There, the court considered legislation authorizing Illinois to enter into contracts to improve Soldier Field, under which the Chicago Bears would secure until 2053 the exclusive rights to use the field during football season. *Id.* at 163–64. The plaintiffs argued that the legislation violated the public trust doctrine by allowing the Bears to use and control Soldier Field for its private benefit without any public benefit. *Id.* at 169. The Illinois Supreme Court rejected that argument. First, the court observed that the Park District retained ownership

[10] This is consistent with the Illinois Supreme Court's decision in *People ex rel. Attorney General v. Kirk*, 45 N.E. 830, 834 (Ill. 1896), upholding the transfer of a substantial portion of submerged lands under Lake Michigan to private parties to fund the expansion of Lake Shore Drive. There, the court expressed its view that the legislature's policy choice was "unwise and detrimental to the best interest of the people of the state." Yet the court still held that the transfer was permissible, because the landfilling was expressly authorized by the legislature and did not interfere with navigation and fishing. *Id.* ("[U]nless an act passed by the legislature infringes upon some provision of our organic law, it is not the province of the courts to declare such legislation invalid.").

over Soldier Field and the surrounding park, thus distinguishing the case from *Illinois Central*. *Id.* at 169–70. Second, the court deemed decisive the legislature's determination that the stadium improvements would allow the public better access to the lakefront and to the stadium for athletic, artistic, and cultural events. *Id*. The court conceded that the renovation would benefit a for-profit entity, yet this private benefit was not dispositive given the simultaneous public benefits. *Id*.[11]

The decisions we have discussed can be distinguished from those in which appellate courts rejected land grants under Illinois' public trust doctrine, all of which involved plans to fill in Lake Michigan to convert submerged land to landfill for private uses. In *People ex rel. Scott v. Chicago Park Dist*., 360 N.E.2d 773 (Ill. 1976), the Illinois Attorney General sued to invalidate a state statute that authorized U.S. Steel Corporation to purchase a portion of Lake Michigan to expand its steel plant. The court stated, "[i]t is obvious that Lake Michigan is a valuable natural resource belonging to the people of this State in perpetuity," and announced that "any attempted ceding of a portion of it in favor of a private interest has to withstand a most critical examination." *Id*. at 780. Unlike decisions upholding landfilling in Lake Michigan for a water filtration plant (*Bowes*) and for McCormick Place (*Fairbank*), the court "perceive[d] only a private purpose for the grant." *Id.* at 781. The court concluded that the "claimed benefit here to the public through additional employment and economic improvement is too indirect, intangible and

[11] *Accord Bowes*, 120 N.E.2d at 25 (ordinance for water filtration plant in Lake Michigan "presumptively valid," because "[t]he legislative judgment is conclusive unless the ordinance is shown to be arbitrary, capricious and unrelated to the public good"); *Fairbank*, 152 N.E.2d at 575 (grant of submerged lands for the construction of McCormick Place did not violate the public trust doctrine, because "the facility here contemplated is in the public interest and has been approved by the proper authorities"). For a detailed discussion of Illinois public trust cases, *see* Thomas W. Merrill, *The Public Trust Doctrine: Some Jurisprudential Variations and Their Implications*, 38 U. HAW. L. REV. 261, 263–72 (2016) (hereafter "*Jurisprudential Variations*").

elusive to satisfy the requirement of a public purpose." *Id*. *Scott* is the only Illinois Supreme Court decision to invalidate an unambiguous and duly enacted Illinois statute under the public trust doctrine. The *Scott* court's application of what appears to be stricter judicial review can be explained by the fact that the case involved landfilling the lake for the benefit of a for-profit company. *See* Merrill, *Jurisprudential Variations*, *supra* at 271.

There are sound reasons why Illinois courts defer to legislative authorizations transferring solid land, including land that was formerly submerged. A contrary rule of *de novo* review would turn the courts into zoning review boards for any governmental actions involving public land. Every time the city builds a skateboard park or a dog run or places a public art installation in an existing park, plaintiffs could force the courts to weigh in on whether the new use of dry land is consistent with the court's understanding of the public trust. That is not how property law in Illinois works, as it would conscript the courts into making decisions that are best left to politically accountable actors. *See Wade v. Kramer*, 459 N.E.2d 1025, 1028 (Ill. App. 1984) (affirming the trial court's grant of a motion to dismiss public trust suit regarding the construction of a highway bridge over a navigable river in a county conservation area, while noting that "[n]ot every case which alleges a breach of the public trust doctrine requires a hearing on the merits"). Much of Chicago's present-day footprint arose as a result of transfers of public land for new, beneficial public uses. Many of the city's most popular museums were built on formerly submerged park lands—the Art Institute, the Field Museum, the Adler Planetarium, and the Shedd Aquarium to name a few.[12]

[12] *See* Kearney & Merrill, *Private Rights in Public Lands*, *supra* at 1438–39. In fact, large swaths of Chicago, including much of the Streeterville neighborhood, were once submerged lands but are no longer thought to be subject to the public trust doctrine. *See* Joseph D. Kearney & Thomas W.

Indeed, the Illinois Supreme Court has recognized the significant public benefits from situating a museum in a public park. *Furlong v. S. Park Comm'rs*, 151 N.E. 510 (Ill. 1926) concerned the issuance of public bonds to fund the reconstruction of the Fine Arts Building (now the Museum of Science and Industry) in Jackson Park—the same park where the OPC is slated to be built. In declining to enjoin the bond issuance, the court emphasized that "[p]ark purposes are not confined to a tract of land with trees, grass, and seats, but mean a tract of land ornamented and improved as a place of resort for the public, for recreation and amusement of the public," including through "[t]he construction and maintenance of a building for museums, art galleries, botanical and zoological gardens, and many other purposes, for the public benefit." *Id.* at 511.

In short, when the government seeks to transfer public trust solid ground to a private owner, the transfer should be permitted if the legislature expressly authorized the grant based on its determination it benefitted the public. As noted below, this principle strongly supports the OPC.

B. The Lucas Museum Case Is Distinguishable And Was Wrongly Decided.

We turn now to the federal district court's decision in *Friends of the Parks v. Chicago Park Dist.*, 160 F. Supp. 3d 1060 (N.D. Ill. 2016) ("*Lucas II*"). The district court considered agreements between the Chicago Park District and the Lucas Museum of Narrative Art to build a museum on formerly submerged park land on Chicago's lakefront. The OPC is readily distinguishable from the Lucas Museum for at least three independent reasons. First, there is a greater level of public control in this case: while the

---

Merrill, *Contested Shore: Property Rights in Reclaimed Land and the Battle for Streeterville*, 107 NW. U. L. REV. 1057 (2013). We do not know of any property scholar who believes that if a Streeterville parcel that was submerged but is now a parking lot becomes a condominium tower the public trust doctrine must be satisfied by the new use.

Lucas Museum would have had a 99-year leasehold pursuant to a ground lease, the agreement between the City and the Obama Foundation is a use agreement providing rights to use the site to operate the OPC, similar to the use agreements with other museums in Chicago parks. Under the use agreement, the City will retain title to the land under the Center and—unlike in *Lucas II*—will acquire the OPC buildings and improvements as soon as construction is complete. Second, the public interest in the OPC is greater here than in *Lucas II*: The OPC is operated by a non-profit entity with a public-spirited aim, and will house a branch of the Chicago Public Library and will memorialize an important chapter in the history of our city, nation, and world. *See* Ex. 5 to Defs.' Mot. [Dkt. No. 49-6], Operating Ordinance ("Ordinance") at 85876–80. Third, while the Lucas Museum would have sat on landfill covering formerly submerged land along the lakefront, the OPC will be on land that was not created by landfill of formerly submerged land. Every comparison of the Lucas Museum and the OPC favors the Center.

The Court therefore need not disclaim *Lucas II* to enter judgment for Defendants in the present case. Nevertheless, it is plain to us that key aspects of the *Lucas* decision are in tension with controlling precedents from the Illinois courts. First, despite language in the agreements between the Park District and the Lucas Museum stating that the District would retain ownership of the land on which the museum was to be located, the court credited the plaintiffs' claim that the lease was "in effect, a surrender of ownership" to the Lucas Museum. *Lucas II*, 160 F. Supp. 3d at 1068. This was inconsistent with Illinois decisions, which consider whether title to and control over public trust land is transferred to private owners. *E.g.*, *Friends of Parks*, 786 N.E.2d at 169–70.

Second, the court refused to afford the legislature any deference or recognize the obvious public benefits of the Lucas Museum, *see Lucas II*, 160 F. Supp. 3d at 1069, despite clear legislative authorization for a 99-year ground lease with the museum. *See* 70 ILCS 1290/1. Instead the court stated that "[p]laintiffs adequately plead that the amendment enacted by the General Assembly was not sufficient to transfer control of public-trust land to a private entity," *Lucas II* at 1065–66, without explaining the legal basis for disregarding the statute. The court's analysis was inconsistent with the Illinois cases affirming dismissals of public trust claims based on valid legislative authorizations. *See Friends of Parks*, 786 N.E.2d 161; *Paepcke*, 263 N.E.2d 11.

Had George Lucas waited for the judicial process to play itself out, our expectation is that the district court's opinion would have been reversed by the Seventh Circuit as inconsistent with Illinois law. To this day, *Lucas II* remains the *only* instance in which a court applying the Illinois public trust doctrine refused to defer to a legislative act that did not involve filling a part of Lake Michigan. Federal courts interpreting state law should not embrace previously unrecognized liability in the absence of a compelling reason to think that the state courts would reach the same result. *See Pisciotta v. Old Nat. Bankcorp*, 499 F.3d 629, 635–36 (7th Cir. 2007). The present dispute is quite different from *Lucas II*, but even were that not so, the Lucas decision stands on shaky ground.

III. The OPC Is Consistent With the Public Trust Doctrine.

No matter how one interprets the Illinois public trust cases, the OPC is plainly a permissible use of Jackson Park. As we have discussed, whether the use of land serves a public purpose is a question "for the legislature and not the courts." *Friends of the Parks*, 786 N.E.2d at 170 (quoting *Paepcke*, 263 N.E.2d at 21). Both the Illinois legislature and

the Chicago City Council have spoken clearly on the subject—and have affirmed the public purpose of the OPC. The Illinois Park District Aquarium and Museum Act, 70 ILCS 1290 *et seq.*, recognizes explicitly that locating museums—including "presidential centers"—in parks "serve[s] valuable public purposes, including . . . furthering human knowledge and understanding, educating and inspiring the public, and expanding recreational and cultural resources and opportunities." 70 ILCS 1290/1.

The ordinance unanimously passed by the Chicago City Council recognizes the benefits of locating the OPC in Jackson Park. The OPC will be dedicated to teaching the public about our nation's first African-American President and First Lady, and their historical connection to Chicago. *See* Ordinance at 85876. The institution will display archival artifacts and records, allowing visitors to learn about the history of the Obama Administration, while simultaneously providing programming and activities designed to advance civic engagement and community building. *Id.* at 85876, 85880. The nonprofit presidential center will include meeting spaces, venues for lectures and concerts, a Chicago Public Library branch, and recreational areas—open to all. *Id.* at 85880–81. Moreover, the OPC will add outdoor play areas for children, areas for family and friends to meet, and walking paths. *Id*. All of this—including both development and ongoing maintenance—will be paid for by the Obama Foundation. *Id.* at 85883. In short, if the lakefront's renovated Soldier Field produces enough public benefits to satisfy the public trust doctrine, the OPC certainly does.

Nor can there be any serious concern that the City has abdicated its control of any public land by authorizing the OPC. *See Friends of Parks*, 786 N.E.2d at 170. Under the Use Agreement between the City of Chicago and the Obama Foundation, approved by the

City in its October 31, 2018 Ordinance, the Obama Foundation will build expensive, permanent structures at its own cost and then hand over title to those structures to the City immediately upon their completion. Ordinance, Ex. D at §§ 2.1, 4.4. Thus, the city will retain ownership and substantial control over the space. Moreover, the OPC is required to offer 52 free admission days to the public per year. *See* 70 ILCS 1290/1. If the Obama Foundation were to fail to use the OPC site for the uses that have been found to benefit the public—namely, for operating a museum—the City would be free to terminate the Use Agreement. Ordinance, Ex. D at § 16.2. The Use Agreement thus ensures that the Obama Foundation will continue to use the site to benefit the public.

In short, one notices a pattern in the history of public trust litigation in the Illinois courts. The construction of museums, a convention center, a water treatment facility, a renovated football stadium, a public school, a golf driving range, a highway bridge, and a wider Lake Shore Drive were consistent with the public trust doctrine. In contrast, the construction of an expanded steel plant and a private harbor on the lake to benefit a private, for-profit railway corporation were not. A museum recounting the history and administration of the first African-American President obviously falls within the first category, not the second. Similarly, in every state appellate case involving the use of land that had either never been submerged or had been filled years previously the court deferred to legislative judgments. The OPC would not entail any reclamation of submerged lands. For all these reasons, the present case is both important and easy.

CONCLUSION

The OPC clearly satisfies the public trust doctrine. We urge this Court to reach the merits and dismiss the Plaintiffs' challenge to its construction in Jackson Park.

Dated: November 28, 2018

Respectfully submitted,

/s/ Julia K. Schwartz

Julia K. Schwartz
MILLER SHAKMAN & BEEM LLP
180 North LaSalle Street, Suite 3600
Chicago, Illinois 60601
Tel: (312) 263-3700
jschwartz@millershakman.com

Counsel for Amici Curiae

APPENDIX A

Proposed *Amici Curiae* Property Law Professors[13]

David A. Dana
Kirkland & Ellis Professor of Law
Northwestern Pritzker School of Law
Professor of Real Estate
Kellogg School of Management

Lee Anne Fennell
Max Pam Professor of Law
University of Chicago Law School

Nicole Stelle Garnett
John P. Murphy Foundation Professor of Law
Notre Dame Law School

Thomas W. Merrill
Charles Evans Hughes Professor of Law
Columbia Law School

Nadav Shoked
Professor of Law
Northwestern Pritzker School of Law

Stephanie M. Stern
Professor of Law
Chicago-Kent College of Law

Lior J. Strahilevitz
Sidley Austin Professor of Law
University of Chicago Law School

[13] Institutions of all signatories are for identification purposes only. The undersigned do not purport to speak for their institutions, and the views of proposed amici should not be attributed to these institutions.