IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-15277

HONOLULUTRAFFIC.COM; et al.,

Plaintiffs-Appellants,

v.

FEDERAL TRANSIT ADMINISTRATION; et al.,

Defendants-Appellees,

and

FAITH ACTION FOR COMMUNITY EQUITY; et al.,

Defendants-Intervenors-Appellees

On Appeal from the United States District Court
For the District of Hawaii
Civil No. 11-00307 AWT

AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS

Elizabeth S. Merritt, Deputy General Counsel
National Trust for Historic Preservation
1785 Massachusetts Ave., NW
Washington, DC 20036
Telephone: (202) 588-6026 | Fax: (202) 588-6272
Email: emerritt@savingplaces.org
Attorney for the National Trust for Historic Preservation

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* hereby certifies that it does not have a parent corporation, and has not issued any stock, so no publicly held corporation owns 10% or more of any such stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTERESTS OF *AMICUS CURIAE*

The National Trust for Historic Preservation ("National Trust") was chartered by Congress in 1949 as a private non-profit organization to further the historic preservation policies of the United States, and to facilitate public participation in the preservation of our nation's heritage. 16 U.S.C. § 468.[1] With the support of almost 200,000 members around the country, the National Trust works to protect significant historic sites and to advocate for historic preservation as a fundamental value in decisions that affect our national heritage at all levels of government. The National Trust has a history of influencing the development of the rule of law in cases involving Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c).[2] In addition, the National Trust has a record of

---

[1] Pursuant to Fed. R. App. P. 29(c)(5), the National Trust states that no counsel for any party authored this brief in whole or in part; no party or counsel for any party contributed money that was intended to fund preparing or submitting this brief; and no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

[2] *See, e.g.*, *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368 (D.C. Cir. 1999); *Coalition Against a Raised Expressway, Inc. (CARE), et al. v. Dole*, 835 F.2d 803 (11th Cir. 1988); *Druid Hills Civic Ass'n, et al. v. Federal Highway Admin.*, 772 F.2d 700 (11th Cir. 1985); *Citizen Advocates for Responsible Expansion, Inc. (I-CARE), et al. v. Dole*, 770 F.2d 423 (5th Cir. 1985); *Benton Franklin Riverfront Trailway & Bridge Comm., et al. v. Lewis*, 701 F.2d 784 (9th Cir. 1983); *Reichert, et al. v. Pena*, Nos. 96-35884, 96-35652 (9th Cir., argued Dec. 12, 1996) (appeal dismissed after mediated settlement to preserve a historic bridge, Apr. 7, 1998); *City of So. Pasadena, et al. v. Slater*, 56 F. Supp. 2d 1106 (C.D. Cal. 1999) (preliminary injunction still in place); *Merritt Parkway Conservancy, et al. v. Mineta*, 424 F. Supp. 2d 396 (D. Conn. 2006).

involvement in the Project at issue in this case, submitting numerous comment letters during the administrative process, participating in consultation under Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, 36 C.F.R. Part 800, and participating as *amicus curiae* before the district court.

I. INTRODUCTION

This appeal addresses the failure of the Federal Transit Administration ("FTA") to comply with Section 4(f) of the Department of Transportation Act—among other serious legal deficiencies—in connection with the permitting of the Honolulu High-Capacity Transit Corridor Project ("Project"). This massive elevated rail project will cut through the historic core of Honolulu and will adversely affect numerous historic properties and districts along its 20-mile length, including the Pearl Harbor National Historic Landmark District, the Chinatown Historic District, the Merchant Street Historic District, the Dillingham Transportation Building, the Makalapa Navy Housing District, Aloha Tower, and numerous historic bridges and historic parks. Through the Programmatic Agreement adopted pursuant to Section 106 of the National Historic Preservation Act, the FTA acknowledged that a total of 33 historic resources (including several historic districts) would be adversely affected. In addition, the Section 4(f) Evaluation acknowledged that more than a dozen properties will be "used" by the

project.[3]

Unlike other federal historic preservation laws, such as the National Historic Preservation Act and the National Environmental Policy Act, Section 4(f) contains a substantive prohibition on the construction of transportation projects requiring the "use" of historic sites, park and recreational areas, and wildlife and waterfowl refuges, unless (1) there is no prudent and feasible alternative to using the protected resources, and (2) the project includes "all possible planning to minimize harm." 49 U.S.C. § 303(c); 23 C.F.R. Part 774.

Neither of these prongs has been satisfied here. Among other things, the Defendants never fully identified all historic resources prior to approving the Project. As a result, it was simply not possible for the FTA to certify, in January 2011, that it had avoided and minimized harm to all of the historic resources and parks "used" by the Project, as required by Section 4(f). For the following reasons, this Court should reverse the decision of the district court.

II. ARGUMENT

This A*micus Curiae* Brief will describe how the Defendants' failure to avoid the use of sites protected under Section 4(f) will result in severe damage to

[3] In fact, the FTA acted arbitrarily and capriciously by undercounting the number of sites that would be "used" by the Project. A clear example of this undercount is shown in the district court's decision noting that the Section 4(f) Evaluation failed to consider the "constructive use" of Mother Waldron Park. Order on Cross-Motions for S.J., at 19-21, 44 (Nov. 1, 2012) (hereafter "SJ Opinion").

important historic resources in downtown Honolulu, including the Chinatown Historic District and the Dillingham Transportation Building. The brief will also address specific ways in which the FTA violated Section 4(f). For example, the Defendants failed to consider feasible and prudent alternatives that would avoid the use of protected historic resources by unlawfully restricting the Project's purpose and need and failing to follow the mandatory review standards. The Defendants also improperly deferred the full identification of all Native Hawaiian burials until after the Project's approval, just as the district court found that the Defendants had unlawfully deferred the identification of Traditional Cultural Properties until after Project approval. As a result, the FTA simply cannot substantiate the conclusion—made *without* that crucial information—that the Project will avoid the use of any additional historic resources.

A. The Strict Standard of Section 4(f) Substantively Constrains the Agency's Discretion.

Section 4(f) of the Department of Transportation Act is one of the two most stringent federal environmental statutes ever enacted by Congress. Only the Endangered Species Act ranks with it. As an historic preservation measure, Section 4(f) stands alone. The statute explicitly *prohibits* the Secretary of Transportation from approving any project that requires the "use" of historic sites or parkland, *unless* (1) there is no "prudent and feasible" alternative to the use of

the sites, *and* (2) "all possible planning" has been taken to minimize harm to the sites. 49 U.S.C. § 303(c).

In contrast to the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA"), whose mandates are ultimately "procedural," Section 4(f) imposes a substantive constraint on the exercise of agency discretion. Section 4(f) operates as a "plain and explicit bar to the use of federal funds" for transportation projects that would use historic sites and parks; "only the most unusual situations are exempted." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411 (1972). Indeed, the language of Section 4(f) shows that Congress intended the protection of parks and historic sites to be given "paramount importance" in the planning of federal transportation projects. *Id*. at 412-13.

Although minor changes to Section 4(f) have occurred since it was established, federal courts have repeatedly validated the importance of this policy goal and the need for compliance with Section 4(f)'s substantive mandates. *See, e.g., North Idaho Community Action Network v. United States Department of Transportation*, 545 F.3d 1147, 1158-59 (9th Cir. 2008); *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1447 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985); *Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis*, 701 F.2d 784, 787-88 (9th Cir. 1983).

The circumstances under which an alternative can be rejected as not "feasible and prudent" have been very narrowly defined by the Supreme Court in the *Overton Park* case. The Secretary is not permitted to "engage in a wide-ranging balancing of competing interests." 401 U.S. at 413. An alternative is "infeasible" only if it cannot be built "as a matter of sound engineering." *Id*. at 411. And in order to find an alternative "not prudent" under Section 4(f), the Secretary must find that "truly unusual factors" are present, or that "alternative routes present unique problems," or that the "cost or community disruption" resulting from the alternative would reach "extraordinary magnitudes." *Id*. Without such a showing, even the asserted "need" for the project cannot suffice to rule out alternatives that would avoid using protected sites. See *Stop H-3 Ass'n v. Dole*, 740 F.2d at 1450-58.

When deciding whether a protected site will be "used," the Ninth Circuit construes the term broadly. *Adler v. Lewis*, 675 F.2d 1085, 1092 (9th Cir. 1982); *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 445, 452-53 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976) (6-lane highway passing within 100-200 feet of a historic petroglyph rock would result in constructive "use").

Because of the substantive mandate imposed by the statute, the role of the reviewing court under Section 4(f) differs fundamentally from the role of the reviewing court under NEPA. *See Stop H-3 Ass'n v. Dole*, 740 F.2d at 1461;

Druid Hills Civic Ass'n v. Federal Highway Administration, 772 F.2d 700, 713 n.15 (11th Cir. 1985). This Court must do more than merely assure itself that the agency has complied with the applicable procedures, considered the alternatives, and taken a hard look at the consequences of its action. *Stop H-3 Ass'n v. Dole*, 740 F.2d at 1461. Rather, the court must find a substantive relationship between the content of the record and the conclusion reached by the agency. The court must evaluate whether the agency's reasons for rejecting each alternative are legally sufficient under Section 4(f), and whether those reasons are supported by the record in light of a "thorough, probing, in-depth review." *Overton Park*, 401 U.S. at 415; *Druid Hills*, 772 F.2d at 714. If there is a feasible and prudent alternative to the destruction of Section 4(f) resources, the project may not be approved. *See Stop H-3 Ass'n v. Dole*, 740 F.2d at 1461.

As the following discussion will show, the FTA has failed to comply with either the letter or the spirit of Section 4(f).

B. Significant Historic Resources Will be Harmed Due to the Defendants' Failure to Consider Alternatives that Would Avoid the Use of Those Resources.

In issuing the Record of Decision ("ROD") approving the Project, the FTA failed to satisfy the stringent legal mandate of Section 4(f). As a result, the chosen alternative will result in substantial harm to numerous historic resources, by imposing a dramatic visual intrusion that interferes with protected views, by

disrupting settings that are crucial to the unique character of these resources, and by encouraging incompatible development. The negative impacts caused by the use of these protected sites could have been avoided if the FTA had considered feasible and prudent alternatives that would have avoided or minimized harm, as Section 4(f) mandates. Instead, the FTA dismissed alternatives, including a Managed Lanes Alternative ("MLA") and a Bus Rapid Transit ("BRT") system, without applying the stringent evaluation required by Section 4(f). [4]

The cultural resources at risk as a result of the FTA's failure to comply with the requirements of Section 4(f) are unique and exceptional. The negative impacts will be substantial, and will extend well beyond the obvious harm caused simply by the direct taking of land or construction within the Project's footprint. Furthermore, the Project will cause long-term harm that will increase in scale over time as the Defendants implement the stated goal of using the Project to spur development along the transit corridor. No amount of new development can adequately compensate for the loss, or degradation that these sites will suffer as a result of the massive scale of this Project. This type of permanent, irreplaceable cultural loss damages Honolulu residents as well as visitors. These impacts would be avoided if the Defendants had complied with Section 4(f) requirements and

[4] *See generally* Appellants' Brief at 40-46, where FTA's failure to consider available "feasible and prudent alternatives" that would avoid the use of these resources is discussed in full.

considered feasible and prudent alternatives. To illustrate and understand the impacts of the Project, the following sections describe in detail the value and importance of the Chinatown Historic District and the Dillingham Transportation Building as representative examples of the Project's negative impacts on historic resources.

1. Chinatown Historic District

The Chinatown Historic District contains approximately 36 acres along Honolulu Harbor next to Downtown. The majority of the district's contributing structures are of a vernacular "Main Street America" masonry façade and were constructed from 1900-1920, following a series of destructive fires.[5] The district has a high level of continuity, with building stock that is largely of similar scale, age, use, form, materials and texture, which lends the district a harmonious sense of place. The buildings are made out of brick, stone, wood, concrete and tile, and the facades are eclectic in style including decorated parapets, cornices with classic details, arched door and window openings with articulated frames, columns and patterns marked directly into the concrete. Chinatown is possibly the largest defined physical environment in Honolulu that has maintained a continuous architectural and historic character. The most evident element of this continuity is

[5] *See generally* National Register of Historic Places Inventory Nomination Form for Chinatown Historic District, available at http://nrhp.focus.nps.gov/natreghome.do?searchtype=natreghome.

the uninterrupted street façade along the sidewalk and the consistent use of awnings along the second floor that create an almost continuous shade along the sidewalk.

The vernacular architectural styles found in the Chinatown district are not the only source of its historic and cultural significance. Instead, its importance derives from the sense of identity as a community that the district has maintained through the years. Its location along the harbor allowed Chinatown to develop as the earliest trading center in Honolulu. The majority of shops were run by Chinese immigrants, which gave rise to the community's name. Chinatown served as the principal cultural hub for Hawaii's Asian immigrant community. The source of Chinatown's historic and cultural significance includes its architectural resources, sense of community, and sense of place and atmosphere that has been retained by preserving the district's resources over the years.

In addition to its listing in the National Register, the significance of the Chinatown district is reaffirmed by its designation by the City and County of Honolulu as a Special Design District. In establishing the Special Design District, the city noted that Chinatown's "location adjacent to the central business district continues to produce pressures to redevelop the area to a higher density." Revised Ordinances of Honolulu (ROH) § 21-9.60(b). Development pressure, including the pressure to allow demolitions, issue character-destroying variances, and permit the

construction of incompatible new density and height, will increase substantially with the construction of the new transit Project.

The dramatic visual intrusion that the transit line will impose through Chinatown can hardly be overstated. The Project's elevated guideway is planned to be three to four stories tall. In contrast, the majority of the buildings in Chinatown are two to three stories tall. The scale of the elevated track will dwarf the scale of the majority of the buildings in the District. The resulting visual and aesthetic impact of the project in Chinatown will be to create a massive wall-like structure that diminishes the human scale of the District's resources. The unique look and feel of Chinatown will be damaged as the numerous, large overhead support columns become the historic District's new dominant visual element. The Defendants attempted to dismiss the magnitude of this impact and instead focused on the fact that the Project's guideway and station would not *entirely* block views of architecturally significant buildings. FEIS, at 5-39. While many of Chinatown's buildings will still be visible, this focus downplays the overall negative visual impact that this hugely out-of-scale project will have on the historic district.

In addition to the direct visual impact on the historic district itself, the Defendants similarly downplayed the negative impacts of the Project on the views of Honolulu Harbor from Chinatown. The character-defining views of the Harbor will be replaced by views of support columns that directly interfere with

Chinatown's historic view planes. The local guidelines applicable to the Chinatown Special Design District indicate the significance of these view planes, based on "the historic link between Chinatown and the harbor." ROH § 21-9.6-1. The National Register nomination similarly acknowledges the importance of the district's connection with Honolulu Harbor when it identifies the district's close proximity to the harbor as the "major reason for its early development and continuous history as a commercial area." The Project will permanently impair this historic visual link between Chinatown and the harbor.

The permanent changes that the transit Project will cause are especially disturbing in light of the unusually high degree of visual integrity retained by the Chinatown Historic District, which will be permanently diminished. As a result of this Project, the experience of living in, working in, or simply walking through the Chinatown Historic District will be substantially compromised, visually and historically. The FTA's failure to consider alternatives that would avoid the use of these resources is a violation of Section 4(f).

2. The Dillingham Transportation Building

The Dillingham Transportation Building was built in 1929 in memory of Benjamin Franklin Dillingham, the founder of the Dillingham Corporation. The business's first major project was the establishment of the Oahu Railway & Land Company (OR & L) to build the state's first railroad. The railroad was completed

in 1906 and served primarily as a means to transport agricultural products, like sugarcane and pineapple, and other types of commercial freight. The railroad also played an integral role in transportation during World War II. Notably, the company was hired in its early years by the federal government to dredge Pearl Harbor. Mr. Dillingham's business ultimately expanded from its beginnings in Hawaii and grew into a major engineering and construction firm building high profile projects around the world, until it was forced to file for bankruptcy in 2003.

The Dillingham Transportation Building itself is a four-story Italian Renaissance structure composed of three connected wings. Its Spanish tile roof, arches, and attractive landscaping provide a striking exterior view. It is a fine example of Mediterranean revival architecture, and is a widely recognized landmark in Honolulu's downtown area. It is listed on the National Register of Historic Places under criterion A for its association with the commercial history of Honolulu, and under criterion C as a quality example of Italian Renaissance Revival architectural style on the exterior, with an Art-Deco interior.[6]

While the Project will not require the demolition of the historic Dillingham building, or damage its structural integrity, it will permanently damage the public's ability to view and appreciate the building. The overhead guideway will be located

[6] *See generally* National Register of Historic Places Inventory Nomination Form for Dillingham Transportation Building, available at http://nrhp.focus.nps.gov/natreghome.do?searchtype=natreghome.

25 to 40 feet from the building at a height of 40-45 feet above grade. Historic Effects Report, p. 335. This will create an awning-like effect along the building that obscures the view of its façade for all but closely passing pedestrians. It will also give building occupants a primary view that will be dominated by the massive support columns and the transit station.[7] Additionally, the transit station is sited so close to the building that a portion of land within the NRHP boundary will be acquired to construct an entrance, escalator and elevator shaft.

3. Additional Impacts on Historic Resources

Evidence of the FTA's failure to consider a full range of uses caused by development spurred by the Project can be seen in the much abbreviated discussion of the Project's impacts on the character of specific neighborhoods. The Defendants acknowledged that "Redevelopment, and specifically [Transit Oriented Development, or "TOD"], will occur in neighborhoods and communities where stations are planned." FEIS, at 4-229. Then, without providing an explanation or evidence to support this conclusion, the FEIS goes on to state that, despite this increase in development, "in areas such as Chinatown, Downtown, and Waikiki, TOD will not likely change neighborhood character. In other areas, TOD could

[7] For further discussion of negative impacts to the Dillingham Building's sense of association, feeling, setting and location, see Historic Resources Report, at 335-40.

have an effect." *Id*. There is absolutely no evidence cited to support this statement and facts on the ground since issuance of the FEIS point to a different conclusion.

In sum, severe damage to protected historic resources will result from the FTA's failure to consider feasible and prudent alternatives that would avoid and minimize the adverse direct, indirect, and cumulative impacts from their use. This failure is arbitrary, capricious, an abuse of discretion, and in direct violation of the legal requirements of Section 4(f).

C. The Defendants Unlawfully Failed to Consider Feasible and Prudent Alternatives That Would Avoid and Minimize Harm to Historic and Cultural Resources.

Instead of giving "paramount importance" to the protection of historic resources, as required by Section 4(f) (*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 412-13), the FTA has done the opposite, using an outcome-determinative decisionmaking process to avoid considering feasible and prudent alternatives. First, in addition to the FTA's failure to identify historic resources prior to choosing a preferred alternative—a problem the District Court acknowledged when it found that the Defendants unlawfully failed to identify Traditional Cultural Properties (SJ Opinion, at 10-12)—the FTA improperly defined the purpose and need of the Project by stating it in a way that precluded essentially all alternatives. Second, the FTA failed to apply the appropriate

Section 4(f) standards in approving the Project, as required under applicable regulations and guidance. These arguments are set forth more fully below.

1. The Defendants Unlawfully Defined the "Purpose and Need" of the Project so Narrowly as to Preclude Any Alternatives Other Than the "Locally Preferred" Alternative.

As the U.S. Court of Appeals for the Seventh Circuit has observed, in NEPA and Section 4(f) cases, the

> "purpose" of a project is a slippery concept, susceptible of no hard-and-fast definitions. One obvious way for an agency to slip past the structures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will.

Simmons v. United States Army Corps of Eng'rs, 120 F.3d 664, 669 (7th Cir. 1997). *See also Davis v. Mineta*, 302 F.3d 1104, 1118-19 (10th Cir. 2002) (the agency's "pre-judgment" and impermissibly narrow statement of purpose and need unlawfully precluded an analysis of reasonable alternatives).

Here, the FTA unlawfully defined the purpose and need of the Project so narrowly that it precluded full consideration of alternatives other than the one it approved: elevated heavy rail transit. The plain language of the Environmental Impact Statement makes this clear. The Final EIS states the "purpose" of the Project as follows:

> The purpose of the Honolulu High-Capacity Transit Corridor Project is to provide high-capacity rapid transit in the highly-congested east-west

> transportation corridor between Kapolei and UH Manoa. . . . The project is intended to provide faster, more reliable public transportation service than can be achieved with buses [and] as an alternative to private automobile travel.

FEIS, at 1-21. In other words, before making any attempt to study whether buses could be used to meet the goal of providing high-capacity transit, the Defendants rejected out of hand the consideration of buses as an alternative. By defining the purpose so narrowly that neither buses nor cars could be considered, the de facto purpose of the Project became limited exclusively to providing elevated heavy rail transit. Rail transit became the only transportation alternative considered, and thus was obviously the alternative ultimately approved after the FTA's NEPA and 4(f) review process.

After narrowly defining the purpose of the Project to eliminate using any mode of transportation other than an elevated rail line, the FTA amplified its error by defining "need" as the need to eliminate congestion in the identified corridor only by considering rail that runs along that precise corridor. Other rail alignments could have met the need of eliminating congestion within the corridor, but alternative alignments were not considered. See FEIS, at 1-21 to 1-22 (showing an absence of needs other than the perceived need to build the Project the FTA approved).

The FTA did not engage in the type of thoughtful, reasonable decision-making that Congress intended when it passed NEPA and Section 4(f) requiring agencies to fully consider alternatives and make best efforts to avoid the use of historic resources. In fact, the FTA did exactly the opposite. It narrowly restricted the purpose and need to ensure that the only alternative that could fulfill the Project's goals was an elevated heavy rail transit along the very transportation corridor it identified. The FTA also made this purpose and need determination prior to the identification of any historic resources, thus making it impossible that any meaningful effort was made to avoid them. In other words, the statement of purpose and need served as a fait accompli that ruled out any alternative other than the project the FTA ultimately approved. This is exactly the type of conduct that the Ninth and Tenth Circuits have specifically disapproved in cases such as this. *See, e.g.*, *Simmons*, 120 F.3d at 669; *Davis*, 302 F.3d at 1118-19. The FTA's decision was clearly arbitrary and capricious, and therefore, should be set aside by this Court.

2. The Defendants Failed to Apply the Proper Analysis Under Section 4(f) in Rejecting Alternatives.

The Department of Transportation has adopted regulations and guidance regarding Section 4(f) in an effort to implement a consistent interpretation and to provide notice to the public of its official policies for construing the statute. *See* 23

C.F.R. Part 774; Section 4(f) Policy Paper, 77 Fed. Reg. 42,802 (July 20, 2012). In this case, the FTA failed to comply with those regulations and policies, and thus its decision cannot be upheld by this Court.

First, the Section 4(f) Policy Paper emphasizes the importance of ensuring that an adequate range of alternatives is available under Section 4(f), and even reiterates that alternatives dismissed under other analyses (i.e., those governed by merely procedural standards) "*may need to be reconsidered*," or new alternatives or variations may need to be developed:

> The alternatives screening process performed during the scoping phase of NEPA is a good *starting point* for developing potential section 4(f) avoidance alternatives and/or design options. . . . It may be necessary, however, to look for additional alternatives if the planning studies and the NEPA process did not identify Section 4(f) properties and take Section 4(f) requirements into account. *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*. In addition, *it is often necessary to develop and analyze new alternatives, or new variations of alternatives rejected for non-Section 4(f) reasons* during the earlier phases.

77 Fed. Reg. at 42,808 (emphasis added). The Defendants failed to do so.

Instead, the Defendants are retroactively concocting a forbidden "*post hoc* rationalization," based on the theory that, if the agency can frame its grounds for rejecting an alternative based on a "purpose and need" rationale, then the mandate to reconsider previously-rejected alternatives may be weaker. This argument must

fail because, with respect to the Managed Lanes Alternative, the agency *never actually articulated* the *post hoc* rationalization it now attempts to bootstrap in an effort to weaken the standard under Section 4(f). This purpose and need rationale was based exclusively on words put into the agency's mouth *by the district court*. *See* SJ Opinion, at 23-24. Additionally, the Section 4(f) regulations themselves do not support the Defendants' interpretation of the law.[8]

On its face, the record is wholly inadequate to support the Defendants' rejection of the MLA under Section 4(f), because the FTA failed to include findings in the record that the MLA would not meet the purpose and need of the Project. In reviewing an agency decision, a court must limit its review solely to the grounds that the agency relied on in reaching its decision. The validity of the agency's decision "must stand or fall on the propriety of that finding." *Camp v.*

[8] Contrary to Defendants' apparent theory, the Section 4(f) regulations do *not* treat a parroted "purpose and need" rationale as automatically lowering the bar for rejecting alternatives that would avoid or minimize harm. Instead, an alternative can only be rejected as imprudent under Section 4(f) if the alternative "*compromises the project to a degree that it is unreasonable to proceed* with the project in light of its stated purpose and need." 23 C.F.R. § 774.17 (*Feasible & prudent avoidance alternative,* at (3)(i)) (emphasis added). To justify rejecting an avoidance alternative as not being prudent and feasible, the regulations specifically require a documented showing that the "magnitude" of the "severe problems" "*substantially outweighs the importance of protecting the Section 4(f) property*," *id*. §§ 774.7(a), 774.17 (*Feasible & prudent avoidance alternative,* at (1)) (emphasis added). With respect to the MLA, that showing was simply not articulated by the agency at the time of its decision. The Court is forbidden from upholding the agency's action based on an assumption that the agency *might have* used such a rationale.

Pitts, 411 U.S. 138, 142-43 (1973).

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action *solely by the grounds invoked by the agency*. If those grounds are inadequate or improper, *the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis*.

Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 196 (1947) (emphasis added), *quoted in Druid Hills Civic Ass'n*, 772 F.2d at 714; *see also Stop H-3 Ass'n v. Dole*, 740 F.2d at 1450.

In this case, the district court erred when it did exactly what the U.S. Supreme Court has long prohibited in *SEC v. Chenery* and *Camp v. Pitts*. With respect to the Managed Lanes Alternative, which would have avoided or dramatically reduced harm to protected properties under Section 4(f), the court acknowledged that "the defendants did not *explicitly* state in the FEIS or the ROD that the MLA was imprudent because it did not meet the purpose of the Project." SJ Opinion at 23 (emphasis in original). But instead of requiring the agency's decision to "stand or fall" on its own grounds, *Camp v. Pitts*, 411 U.S. at 142-43, the district court improperly substituted "what it consider[ed] to be a more adequate or proper basis" for rejecting the MLA, *SEC v. Chenery*, 332 U.S. at 196, and found the alternative "imprudent *by implication*." SJ Opinion at 24 (emphasis added).

> The mere presence in the record of documents from which [the agency] *might* have concluded that the requirements of [Section 4(f)] had been met does not allow the Court to infer that [the agency] in fact so concluded. . . . [B]efore the Court can defer to the agency, "the agency must provide an adequate explanation for its actions, . . . [and] the explanation must show a rational connection between the facts found and the choice made," and "the required explanation must be articulated by the agency at the time of its action." *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 350 (4th Cir. 2001). As one district court has aptly noted, "[t]o require the Court to take on the task of reviewing the entire record in order to discover an adequate explanation for the agency's decision not only presents an undue burden but . . . creates a risk that the Court may rely on evidence that the [agency] . . . did not in fact rely upon." [citation omitted].

Merritt Parkway Conservancy, et al. v. Mineta, 424 F. Supp. 2d at 420 (emphasis in original). The district court clearly erred by manufacturing a rationale to fill in the blanks to support the FTA's decision. The FTA's determinations must be set aside.

D. The Defendants Unlawfully Deferred the Evaluation of Significant Impacts and Protected Resources Until After Approving the Project.

The FTA used an unlawful approach to evaluating project impacts, which essentially precluded the consideration of alternatives that would otherwise avoid or minimize harm to protected resources as required by law. In particular, the FTA's approach will result in adverse effects on Native Hawaiian burials and Traditional Cultural Properties ("TCPs"), which the FTA failed to consider prior to approving the Project. By deferring the identification of these resources until after the preferred alternative was already chosen, the FTA could not accurately certify

that all resources protected by Section 4(f) had been considered and that all possible planning to minimize harm was completed prior to approving the Project.

The impact to Native Hawaiian burials is likely to occur in the downtown segment of the Project—the last segment proposed to be built—because the proposed alignment is within an area that has an extremely high likelihood of burials. AR 247 at 645 (determination of "high likelihood" resources). Notwithstanding this likelihood, the City refused to conduct a survey prior to the final decision on the Project, a decision the FTA never challenged. AR 124858 at 124858-59 (National Trust's letter objecting to deferral of studies); AR 000030 at 000085, 000092-95; AR 247, at 645. This deferral of the identification of historic resources was improper and unlawful. *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368 (D.C. Cir. 1999). As a result, Section 4(f) bars the Project's funding and approval. *Citizens to Preserve Overton Park*, 401 U.S. at 411.

The City's and FTA's deferral of identification efforts violated Section 4(f) in the same way as the approach rejected by the court in *Corridor H*. In *Corridor H*, the D.C. Circuit held that an agency violates Section 4(f) when it postpones determining whether sites used by a planned project qualify for Section 4(f) protection until after the project is approved.[9] Because the FTA failed to identify

[9] Significantly, the *Corridor H* court found that, even though a programmatic agreement using a phased or deferred approach for identifying historic resources

all historic resources prior to approval of the Project, the FTA cannot assert or substantiate that it attempted all feasible and prudent alternatives to avoid these sites, or that it incorporated all possible planning to minimize harm.

The FTA's behavior in this case is especially absurd following the D.C. Circuit's ruling in *Corridor H*, where the court specifically instructed the FHWA that it must consider all historic resources prior to approving the highway project. *Corridor H*, 166 F.3d at 373; *see* 23 C.F.R. §§ 774.9(a), (b). The Department of Transportation has been on notice for well over a decade that avoiding Section 4(f)'s requirements through deferral is unlawful. Moreover, *Corridor H* is important for this Court to consider because it forms the basis for the Ninth Circuit's ruling in *North Idaho Community Action Network v. United States Department of Transportation*, 545 F.3d 1147, 1158-59 (9th Cir. 2008) ("We hold, consistently with the decision in *Corridor H*, that an agency is required to complete the § 4(f) evaluation for the entire Project prior to issuing its [Record of Decision].")[10]

---

may be sufficient to satisfy Section 106 of the National Historic Preservation Act, such an approach does *not* satisfy the substantive mandate of Section 4(f). *Corridor H*, 166 F.3d at 372.

[10] *See also D.C. Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1239 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972) (expectation that future planning may minimize harm to historic properties does not relieve the agency of its responsibility for complying with Section 4(f) prior to approving the project).

Additionally, the Section 4(f) regulations do not allow the FTA to intentionally defer identifying protected resources that would be "used" by the Project until after the Project has already been approved.[11] 23 C.F.R. §§ 774.9, 774.11. To read the regulations to allow the deferred identification of resources would be to defeat Section 4(f)'s preservation purpose. Thus the FTA's decision in this case to defer the identification of burials and TCPs until after project approval violated Section 4(f). Consequently, the FTA's decision to eliminate alternatives is not entitled to deference. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (While deference is normally due an agency's interpretation of its own rules, that is not the case where "an alternative reading is compelled by the regulation's plain language.") (internal quotation marks omitted) (quoted in *Corridor H Alternatives v. Slater*, 166 F.3d at 373).

Here, in direct contravention of *Corridor H*, *North Idaho Community Action Network*, and the related regulations, the FTA violated Section 4(f) by failing to identify and evaluate Native Hawaiian burials and other traditional cultural

[11] "With respect to historic and cultural properties, the regulation establishes an affirmative responsibility of the administrative agency and the applicant to identify historic properties on or eligible for the National Register of Historic Places. This *is to be done early in the . . . compliance process; thus, it is not expected that there will be late identification of historic [resources]*." 52 Fed. Reg. 32,646 (Aug. 28, 1987) (emphasis added). "[I]f it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section." 23 C.F.R. § 774.13(c).

properties prior to construction. Native Hawaiian burials, or *iwi kapuna*, may be eligible for listing in the National Register of Historic Places and therefore qualify as Section 4(f) resources. 23 C.F.R. §§ 774.11(e), 774.17 (definition of *Historic Site*); 36 C.F.R. § 60.4 (eligibility criteria). TCPs are resources eligible for inclusion in the National Register because of their association with cultural practices or beliefs of a living community that are rooted in the community's history and are important to that community in maintaining the cultural identity of its members. PATRICIA L. PARKER & THOMAS F. KING, NAT'L PARK SERVICE, DEP'T OF THE INTERIOR, NATIONAL REGISTER BULLETIN 38: GUIDELINES FOR EVALUATING & DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 11-12 (1998), available at http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf. The FTA's ignoring the impacts on these resources in making its decision is especially egregious because the Project's Section 106 Programmatic Agreement expressly recognizes the historic nature and profound cultural value of Hawaiian burials[12]

[12] The Programmatic Agreement ("PA") developed for the Project under Section 106 of the National Historic Preservation Act included provisions addressing the Project's impacts on Native Hawaiian burials and TCPs. For example, the PA required the City to develop an Archaeological Inventory Survey ("AIS") Plan, for all areas of direct ground disturbance in each construction phase. PA at 6-7. Pursuant to the PA, any Native Hawaiian burials discovered during the AIS "shall be treated as previously identified burial sites." PA at 6. As was the case in *Corridor H*, however, it is important to note that the Section 106 PA allowing identification of these resources *after* the ROD is only sufficient for compliance

and traditional cultural properties and the need to protect them. The deferred identification FTA engaged in here is not allowed under Section 4(f), as stated above, *Corridor H Alternatives*, 166 F.3d at 372-74, and thus the district court held that the Defendants violated Section 4(f) by failing to identify TCPs prior to approving the Project.[13]

III. CONCLUSION

For the reasons stated above, the Court should reverse the district court's decision, and conclude that the FTA violated Section 4(f) of the Department of Transportation Act. In addition, the Court should require a full assessment of impacts on historic resources and all other Section 4(f) sites so that FTA can determine prudent and reasonable alternatives and engage in planning to minimize harm.

---

with Section 106, not for meeting the more stringent substantive requirements of Section 4(f).

[13] Perhaps the district court felt it unnecessary to rule that the deferral of Native Hawaiian burials was unlawful, since the Hawaii Supreme Court had already issued a strong opinion declaring that practice unlawful under state law. *Kaleikini v. Yoshioka*, 283 P.3d 60 (Haw. 2012).

DATED: May 22, 2013

Respectfully submitted,

/s/ Elizabeth S. Merritt

ELIZABETH S. MERRITT,
Deputy General Counsel
National Trust for Historic Preservation
1785 Massachusetts Ave., NW
Washington, DC 20036
Telephone: (202) 588-6026
Email: emerritt@savingplaces.org

CERTIFICATE OF COMPLIANCE

The undersigned certifies that, according to the word count provided by Microsoft Word 2007, the body of the foregoing brief contains 6,663 words, exclusive of those parts excluded by Fed. R. App. P. 32(a)(7)(B)(iii), which is less than the word limit permitted for *amicus curiae* briefs by Fed. R. App. P. 29(d). The text of the brief is in 14-point Times New Roman typeface, which is proportionately spaced. See Fed. R. App. P. 32(a)(5), (6).

/s/ Elizabeth S. Merritt

ELIZABETH S. MERRITT, Deputy General Counsel
National Trust for Historic Preservation
1785 Massachusetts Ave., NW
Washington, DC 20036
Telephone: (202) 588-6026
Email: emerritt@savingplaces.org

CERTIFICATE OF SERVICE

I hereby certify that, on the dates and methods noted below, a true and correct copy of:

1. The National Trust for Historic Preservation's Motion for Leave to File an *Amicus Curiae* Brief in Support of Plaintiffs-Appellants; and

2. The National Trust for Historic Preservation's *Amicus Curiae* Brief in Support of Plaintiffs-Appellants

were served on all parties electronically through CM/ECF.

DATED: May 22, 2013

/s/ Elizabeth S. Merritt

ELIZABETH S. MERRITT, Deputy General Counsel
National Trust for Historic Preservation
1785 Massachusetts Ave., NW
Washington, DC 20036
Telephone: (202) 588-6026
Email: emerritt@savingplaces.org