

# **Amy Coney Barrett Ruled Against Clean Water Act Protections For Wetlands Found To Reduce Pollutions, Flooding, And Help Wildlife**

*Case at Issue: Orchard Hill Building Company v. United States  
Corps of Engineers (No. 17-3403)*

ACCOUNTABLE 

## **Amy Coney Barrett And Ruled In Favor Of Residential Construction Near Land Repeatedly Determined To Be Protected Under The Clean Water Act**

### **The Army Corps Of Engineers Repeatedly Determined A Real Estate Developer's Purchase Of Wetlands Would Harm Nearby Waters Of The U.S., Yet Barrett And The Court Dismissed The Findings As Unsubstantial, Dismissing Precedent**

**Orchard Hill Building Company Spent 12 Years Challenging An Army Corps Decision That 13 Acres Of Wetland Purchased By The Company For Residential Construction Were Jurisdictional Waters Of The United States (WOTUS).** "This case concerns just shy of 13 acres of wetlands, which lie in a south-suburban plot of land called the Warmke parcel. Orchard Hill Building Company purchased the Warmke parcel in 1995 with plans for a large-scale residential development. Not wanting to run afoul of the Clean Water Act, Orchard Hill requested a determination from the United States Army Corps of Engineers that the wetlands (or the "Warmke wetlands") were not jurisdictional "waters of the United States." The Corps decided that they were, and Orchard Hill has spent the last 12 years challenging that decision." [*Orchid Hill Building Co V United States Army Corps Of Engineers*, No. 17-3403, 7<sup>th</sup> Circuit, [06/27/18](#)]

**The Clean Water Act Gives The Army Corps Of Engineers And The EPA Authority To Determine What Constitutes A Water Of The U.S. To Help "Restore And Maintain The Chemical, Physical, And Biological Integrity Of The Nation's Waters."** "Congress enacted the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One of the Act's primary means to that end is its general prohibition on polluting "navigable waters," which it defines as "waters of the United States." [...] Yet the Act does not define what constitutes "waters of the United States." [...] That job falls to the Corps of Engineers and the Environmental Protection Agency." [*Orchid Hill Building Co V United States Army Corps Of Engineers*, No. 17-3403, 7<sup>th</sup> Circuit, [06/27/18](#)]

**The Army Corps Reevaluated The Wetlands After A Supreme Court Ruling, But The Corps Again Determined It Had Jurisdiction As WOTUS.** "In light of *Rapanos*, the Corps' division engineer remanded the 2006 jurisdictional determination of the Warmke wetlands for further review. Between 2008 and 2010, the district engineer reviewed the wetlands' soil composition, and in March 2010, he made a site visit. There, the district engineer observed an "intermittent flow" of water from the Warmke wetlands to the Midlothian Creek. The district engineer did not test or sample the Warmke wetlands' composition, but based on the observed hydrological connection, he again concluded that the Corps had jurisdiction over the wetlands." [*Orchid Hill Building Co V United States Army Corps Of Engineers*, No. 17-3403, 7<sup>th</sup> Circuit, [06/27/18](#)]

- **The 7<sup>th</sup> Circuit Used Justice Anthony Kennedy's Concurrence To Determine This Case Even Though The Supreme Court Did Not Produce A Majority Opinion.** "Rapanos did not produce a majority opinion, and without one to definitively answer the question, we have held that Justice Anthony Kennedy's concurrence

controls. [...] Justice Kennedy decided that a wetland's adjacency to a tributary of a navigable-in-fact water is alone insufficient to make the wetland a water of the United States." [*Orchid Hill Building Co V United States Army Corps Of Engineers*, No. 17-3403, 7<sup>th</sup> Circuit, [06/27/18](#)]

**A 2013 Report Made The Final Determination That The Wetlands Has A "Significant Nexus" To The Nearby WOTUS, Impacting Pollutions, Flooding, And Wildlife.** "On remand, in July 2013, the district engineer supplemented his findings with an 11-page report. [...] The supplement further explained the significant flooding problems the Tinley Park area had faced in recent years, and, relying on scientific literature and studies, detailed how wetlands help reduce floodwaters. It also described the effect of wetlands generally on reducing pollutants in downstream waters, and the wildlife that inhabited the Warmke wetlands. The supplement's conclusion ultimately mirrored the earlier determination: the Warmke wetlands, alone or in combination with the area's other wetlands, have a significant nexus to the Little Calumet River." [*Orchid Hill Building Co V United States Army Corps Of Engineers*, No. 17-3403, 7<sup>th</sup> Circuit, [06/27/18](#)]

- **The Army Corps Cited Precedent From A 4<sup>th</sup> Circuit Case That The Court Should Defer To The Corps' Findings, But The 7<sup>th</sup> Circuit Dismissed This Claiming The Corps' Report Lacked Support.** "The Corps nonetheless claims we owe its findings deference, citing *Precon* for support. Courts, however, extend no deference to agency decisions that lack record support or explanation" [*Orchid Hill Building Co V United States Army Corps Of Engineers*, No. 17-3403, 7<sup>th</sup> Circuit, [06/27/18](#)]
- **Barrett And The 7<sup>th</sup> Circuit Dismissed The Army Corps' Findings As Unsubstantial.** "We find that the Corps has not provided substantial evidence of a significant nexus to navigable-in-fact waters, and therefore vacate and remand with instructions that the Corps reconsider its determination." [*Orchid Hill Building Co V United States Army Corps Of Engineers*, No. 17-3403, 7<sup>th</sup> Circuit, [06/27/18](#)]
- **The Court Argues Accepting The Army Corps' Determination That The Wetlands Were In Significant Nexus With The Nearby Waters Of The U.S. Would Be Jurisdictional Overreach.** "On the merits, the Corps argues that it need not show or explain how each of the 165 wetlands is adjacent to the Midlothian Creek. But accepting this argument, especially on this record, would invite jurisdictional overreach. [...] Whatever the degree to which the Corps must defend each and every wetland it considers, its approach according to the record was plainly deficient." [*Orchid Hill Building Co V United States Army Corps Of Engineers*, No. 17-3403, 7<sup>th</sup> Circuit, [06/27/18](#)]

# **Amy Coney Barrett Ruled Against Environmentalists Who Opposed A Development On Public Park Land In Chicago**

*Case at Issue: Protect Our Parks, Inc. v. Chicago Park District,  
Nos. (Nos. 19-2308 & 19-3333)*

ACCOUNTABLE<sup>.US</sup>

## **Amy Coney Barrett Ruled Against A Group Of Citizens Fighting The Obama Presidential Center In Chicago, Arguing They Had No Standing**

### **Environmentalists Sued To Stop The Development Of The Obama Presidential Center In Jackson Park, Chicago. Amy Coney Barrett Sided With The Developer**

**The Barack Obama Foundation Decided Jackson Park In Chicago Would Be The Future Location Of The Obama Presidential Center.** “In 2014, the Barack Obama Foundation began a nationwide search for the future location of the presidential library for the 44th President. Eventually, the Foundation selected Jackson Park on Chicago’s South Side to house the Obama Presidential Center. The City of Chicago acquired the 19.3 acres necessary from the Chicago Park District, enacted the ordinances required to approve the construction of the Center, and entered into a use agreement with the Obama Foundation to govern the terms of the Center’s construction, ownership, and operation. The Jackson Park location, the Foundation believed, would be best situated to ‘attract visitors on a national and global level’ and would ‘bring significant long term benefits to the South Side.’” [United States Court of Appeals for the Seventh Circuit, *Protect Our Parks, Inc. v. Chicago Park District*, Nos. 19-2308 & 19-3333, [08/21/20](#)]

**Environmentalists Sued The City Park District, Arguing It Couldn’t Make The Parkland Available For The Project.** “When Charlotte Adelman was a student at the University of Chicago, the nearby parks became a refuge for her, a sprawling expanse of green where she could escape the concrete urban landscape. It was then, many decades ago, that Adelman began her journey to becoming a fighter for environmental justice. [...] Now, Adelman, 81, has set her sights on her biggest target yet — to block the Obama Presidential Center from being built in Jackson Park. Adelman, along with her fellow advocates Maria Valencia, Jeremiah Jurevis and the advocacy group Protect Our Parks, have filed suit against the presidential center. They contend that the city and Park District do not have the authority to make public parkland available for the project. Jackson Park, they say, must remain untouched.” [*Chicago Tribune*, [08/03/18](#)]

- **As Multiple Trees Would Have To Be Removed, The Protect Our Parks Group And Several Residents Sued To Halt Construction.** “But construction of the Center will require the removal of multiple mature trees, as well as the closure and diversion of roadways. It will also require the City to shoulder a number of big-ticket expenses. Unhappy with the environmental and financial impact of the project, the group Protect Our Parks and several individual Chicago residents sued both the City and the Park District to halt construction of the Center.” [United States Court of Appeals for the Seventh Circuit, *Protect Our Parks, Inc. v. Chicago Park District*, Nos. 19-2308 & 19-3333, [08/21/20](#)]
- **They Claimed The Public Trust Doctrine Limited The Ability Of The Government To Transfer Control Or Ownership Of Public Land To Private Parties.** “First and

foremost, they claimed that the defendants violated Illinois's public trust doctrine. Briefly stated, the public trust doctrine limits the government's ability to transfer control or ownership of public lands to private parties. The plaintiffs argued that the City violated the doctrine by transferring control of public parkland to the Obama Foundation for a purely private purpose." [United States Court of Appeals for the Seventh Circuit, *Protect Our Parks, Inc. v. Chicago Park District*, Nos. 19-2308 & 19-3333, [08/21/20](#)]

- **The Plaintiffs Claimed That City And Park District Did Not Have The Authority To Enter An Agreement With The Foundation.** "Next, the plaintiffs claimed that under Illinois law, the defendants acted ultra vires – in layman's terms, beyond their legal authority – in entering the use agreement with the Foundation. Specifically, the plaintiffs maintained that the use agreement between the City and the Foundation violates Illinois law because, among other things, it delegates decisionmaking authority to the Foundation, grants the Foundation an illegal lease in all but name, 70 ILCS 1290/1, exchanges the property for less than equal value, 70 ILCS 1205/10-7(b), and fails to require the City to "use, occupy, or improve" the land transferred to it from the Park District, 50 ILCS 605/2." [United States Court of Appeals for the Seventh Circuit, *Protect Our Parks, Inc. v. Chicago Park District*, Nos. 19-2308 & 19-3333, [08/21/20](#)]

### **Barrett Affirmed The District Court's Decision To Allow The Development To Move Forward Due To Lack Of Standing**

**Barrett Wrote The Court Was Not "Convinced" It Had Jurisdiction.** "We'll start with the plaintiffs' appeal from the district court's grant of summary judgment on the state law claims. Before we can address the merits, though, we have 'an obligation to assure ourselves' of our jurisdiction. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006) (citation omitted). And jurisdiction – specifically, the plaintiffs' standing to bring their state claims in federal court – proves to be a problem here. We asked the parties to address this issue in supplemental briefing, and while both the plaintiffs and the defendants assure us that the plaintiffs have standing, we aren't convinced." [United States Court of Appeals for the Seventh Circuit, *Protect Our Parks, Inc. v. Chicago Park District*, Nos. 19-2308 & 19-3333, [08/21/20](#)]

**Barrett Wrote That While Illinois Courts Have Recognized Public Injury From A Violation Of The Public Trust Doctrine, The Plaintiffs Have "Misapprehend The Doctrine Of Standing."** "Illinois courts have long recognized the public's injury from a violation of the public trust doctrine as sufficient to create a justiciable controversy. See *Paepcke*, 263 N.E.2d at 18. Thus, the plaintiffs insist, they have suffered a sufficient injury in fact to establish their standing in federal court. In other words, the plaintiffs claim that the existence of a justiciable controversy in state court demonstrates that there is one in federal court too. The plaintiffs misapprehend the doctrine of standing, which is a corollary of Article III's limitation of the 'judicial power' to the resolution of 'cases' and "controversies." U.S. CONST. art. III, § 2, cl. 1 (capitalization omitted). The requirement limits the power of federal courts and is a matter of federal law. It does not turn on state law, which obviously cannot alter the scope of the federal judicial power. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (asserting that standing in federal court "does not depend on [a] party's ... standing in state court"). At the same time, federal law does not dictate the scope of state judicial power. Article III does not

apply to the states, so ‘state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability.’ *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989). Unencumbered by these limitations, the states can empower their courts to hear cases that federal courts cannot – and many states have done just that. See, e.g., F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 65–75 (2014) (cataloguing the variations between federal justiciability doctrines and those in state courts); JEFFREY S. SUTTON ET AL., *STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE* 790–816 (3d ed. 2020) (excerpting examples from state court decisions).” [United States Court of Appeals for the Seventh Circuit, *Protect Our Parks, Inc. v. Chicago Park District*, Nos. 19-2308 & 19-3333, [08/21/20](#)]

### **Amy Coney Barrett Said The Lower Court Should Have Dismissed All The Environmentalists’ Claims Due To A Lack Of Jurisdiction...**

**Barrett Wrote That Even If The Center Were To Cause Damage To Jackson Park, The Plaintiffs “Can’t Repackage An Injury To The Park As An Injury To Themselves.”** “The plaintiffs have an alternative argument: they argue that they have standing because Jackson Park will suffer an injury in fact as a result of the defendants’ violations of state law. On this theory, the City’s plan to turn part of Jackson Park into the Obama Presidential Center will cause irreparable ‘damage to Jackson Park’ that is ‘fairly traceable to the construction project.’ The alleged damage includes, for example, departing from Frederick Law Olmsted’s original plan for the landscape of Jackson Park and jeopardizing the Park’s listing on the National Register of Historic Places. But this argument fares no better than the last.” [*Chicago Park District*, Nos. 19-2308 & 19-3333, [08/21/20](#)]

**Barrett Criticized The District Court For Not Dismissing The Other Claims Due To A Lack Of Jurisdiction.** “While we affirm the grant of summary judgment on the Fifth and Fourteenth Amendment claims, we vacate the grant of summary judgment on the public trust and ultra vires claims. We hold that the plaintiffs lack standing to bring those latter claims in federal court, and therefore that the district court should have dismissed them for lack of jurisdiction. We also affirm the denial of the motion for relief from the judgment under Rule 60(b).” [United States Court of Appeals for the Seventh Circuit, *Protect Our Parks, Inc. v. Chicago Park District*, Nos. 19-2308 & 19-3333, [08/21/20](#)]

### **...Potentially Undermining One Of Justice Ginsburg’s Environmental Legacies: Lessening Standing Requirements To Make It Easier For Citizen To Sue To Protect Public Land**

**Ginsburg Wrote A Majority Opinion That Made It Easier For Citizens To Have Standing In Environmental Cases.** “Ginsburg also led a 7-2 court in an important 2000 ruling that eased the court’s precedent on environmental standing, the constitutionally required threshold a person or organization needs to clear to be able to bring lawsuits. Before then, anyone filing a ‘citizen suit’ to enforce an environmental law like the Clean Water Act had to meet a fairly high bar to prove there is a concrete ‘injury in fact’ rather than a speculative harm, and to show that a favorable ruling could redress that injury.” [*Politico*, 09/21/20]



- **Ginsburg’s Ruling In Friends Of The Earth v. Laidlaw Said That Plaintiffs In Environmental Cases Only Have To Prove Harm To Themselves.** “Ginsburg's ruling in Friends of the Earth v. Laidlaw Environmental Services cited the unique characteristics of environmental laws to ease the standing requirements. The plaintiffs did not have to prove harm to the environment, which can be difficult, but instead just prove harm to themselves — in this case, that excess discharge from a wastewater treatment facility meant area residents could not use a river for recreation. That has increased the ability of environmental groups to sue polluters in recent decades. Ginsburg's ruling also established that such cases are not mooted just because a facility returns to compliance.” [Politico, 09/21/20]

**Barrett Even Cited Ginsburg’s Opinion When She Ruled Against The Environmentalists, Claiming They Tried To “Sue On Behalf Of The Park.”** “Even if the Obama Presidential Center will damage Jackson Park, ‘[t]he relevant showing for purposes of Article III standing ... is not injury to the environment but injury to the plaintiff.’ Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000). The plaintiffs can’t repackage an injury to the park as an injury to themselves. Nor can they sue on behalf of the park, which is what they seem to be trying to do.” [United States Court of Appeals for the Seventh Circuit, *Protect Our Parks, Inc. v. Chicago Park District*, Nos. 19-2308 & 19-3333, [08/21/20](#)]