UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

COMMITTEE TO SAVE THE DERRY RAIL TRAIL TUNNEL, *et al.*

Plaintiffs,

v.

SHAILEN BHATT, FEDERAL HIGHWAY ADMINISTRATION, ADMINISTRATOR, *et al.*

Defendants.

Civil Action No. 1:24-cv-262-AJ

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND/OR RELIEF UNDER 5 U.S.C. § 705

Plaintiffs Committee to Save the Derry Rail Trail Tunnel and Rails to Trails Conservancy submit this memorandum of law in support of their motion for preliminary relief to protect an important New Hampshire historical resource, the Manchester and Lawrence Railroad Historic District ("M&L Railroad Historic District"), and to halt the impending construction of a major road (Folsom Road) across the district. Defendants have failed to comply with their statutory obligation to include "all possible planning to minimize harm" to this historic site. *See* 23 U.S.C. § 138(a)(3). Permitting Defendants to move forward with their plans while this case is pending would irreparably harm Plaintiffs' continued use and enjoyment of the M&L Railroad Historic District.

The threat to this historical rail corridor arises from the Exit 4A highway project (the "Project"), proposed by the New Hampshire Department of Transportation ("NHDOT") with funding and approval from the Federal Highway Administration ("FHWA"). The project

includes a massive, six-lane arterial road that will sever the M&L Railroad Historic District and bury the historic right-of-way under ten feet of earthen fill. In their initial planning, FHWA and NHDOT recognized the potentially devastating consequences of this project—as well as their statutory obligation to minimize harm to historic properties—and included in their initial design (the "2020 Design") a wide, flat underpass, underneath the road and directly adjacent to the M&L Railroad right-of-way. This underpass would have accommodated the planned expansion of the existing Derry Rail Trail as a level, traffic-separated recreational route and preserved the historic characteristics of the M&L Railroad Historic District. FHWA and NHDOT recognized in 2020 that the underpass was essential to minimizing harm to the M&L Railroad Historic District. The 2020 Design resulted from over a decade of planning, reflected the input and collaboration of dozens of stakeholders and the New Hampshire Division of Historic Resources ("NHDHR"), and earned the endorsement of historic preservation and rail trail advocates while serving New Hampshire's transportation needs.

Nevertheless, four years after FHWA's approval, NHDOT unexpectedly and abruptly reversed course, proposing a new design (the "2024 Design") that not only expands the road crossing the M&L Railroad Historic District to six lanes but also completely eliminates the underpass. In place of the underpass, the 2024 Design proposes routing rail trail users across two perilous routes that bear no resemblance to the historic rail corridor and that will require users to navigate narrow hairpin turns, steep grades, and steep 10-foot at-grade traffic crossings. Despite vigorous advocacy from key stakeholders, including Plaintiffs' members, pointing out the serious flaws and increased harms resulting from the redesign, FHWA approved the 2024 Design within hours of NHDOT's submission in May 2024. At no point did FHWA or NHDOT determine that their prior finding regarding the necessity and reasonableness of the underpass

was incorrect.

Plaintiffs initiated this action to reverse Defendants' arbitrary and unlawful about-face under Section 4(f) of the Department of Transportation Act, a "stringent" historic-preservation statute. *See Save Our Heritage, Inc. v. F.A.A.*, 269 F.3d 49, 59 (1st Cir. 2001). Section 4(f) mandates that FHWA include "***all possible planning to minimize harm***" to historic resources impacted by highway projects. 23 U.S.C. § 138(a)(3) (emphasis added). FHWA has failed to do so here. This motion seeks a preliminary injunction and/or relief under 5 U.S.C. § 705 to preserve the status quo and to keep Defendants from proceeding with their plans to construct Folsom Road across the M&L Railroad Historic District without the underpass. Contracts for construction of the 2024 Design are expected to be awarded in the coming weeks, and unless this Court enters a preliminary injunction or postponement under 5 U.S.C. § 705, the M&L Railroad Historic District and Plaintiffs' use and enjoyment of the district will be irreparably damaged.

I. FACTUAL BACKGROUND

Rail corridors like the Manchester & Lawrence Railroad were once the backbone of America's transportation network: these mighty engines of economic growth not only shaped communities through the movement of goods and people for business and pleasure, they shaped the physical landscape itself as armies of laborers carved and blasted through bedrock, flattening hills and raising dales, to create straight and level routes for rail traffic. Because of their monumental impact on the physical and historical landscape of this country, corridors like the M&L Railroad Historic District have been recognized as eligible for inclusion in the National

Register of Historic Places.[1] Today, long-disused—but not forgotten—railroads like the M&L Railroad hold the potential to connect communities and recreational pursuits through their incorporation into a growing network of multi-use rail trails. Rail trails offer visitors a unique, immersive way to experience the historic qualities of the railroad while preserving these historic railroad rights-of-way from encroaching development, including the Exit 4A Project proposed by Defendants.

A. The Manchester & Lawrence Railroad Historic District

Chartered in 1847 and placed into service in 1849, the Manchester & Lawrence Railroad connected the cities of Manchester, New Hampshire, and Salem, Massachusetts, with stations in Salem, Windham, Derry, Londonderry, and Manchester. Compl. Ex. 1 (ECF No. 1-1), N.H. Div. of Hist. Res., *Determination of Eligibility* (July 14, 2009) ("NHRP Eligibility Determination") at 13. The M&L Railroad survived acquisition by the Boston & Maine Railroad before being abandoned in the 1980s, making a "significant contribution" to the history and development of the communities it served. *Id.* at 14-16, 28.

Although the tracks are long gone, the railroad right-of-way largely remains as a showcase of the significant engineering required to carve a flat, straight railroad through the rolling New Hampshire topography and the largely Irish labor force that constructed it. *Id.* at 13. In addition to the right-of-way, many existing structures remain, from former station houses in Derry and Windham to a historic tell-tale device[2] located just north of the current Madden Road

[1] *See, e.g.* Cheryl Nagle, *Evaluating Pennsylvania's Railroads for National Register Eligibility*, Pennsylvania Historical & Museum Commission (Nov. 11, 2020), available at https://pahistoricpreservation.com/evaluating-pennsylvanias-railroads-for-national-register-eligibility/ (concluding that 43 percent of railroads in Pennsylvania are Register-eligible).

[2] A railroad tell-tale is a metal structure that dangles rope or chain along the top of a passing train to alert railroad crew riding on top of a railcar of an approaching bridge, tunnel, or other low-clearance obstacle.

crossing, the future site of Defendants' planned Folsom Road.

In light of its historical significance, including the "significant concentration of resources illustrative of railroad engineering and architecture from the mid 19th to early 20th century," NHDHR determined in 2009 that the M&L Railroad Historic District—comprising 22 miles of the former right-of-way from the Massachusetts state line to the Manchester Airport—was eligible for inclusion on the National Register of Historic Places. *Id.* at 28. In doing so, NHDHR recognized that the "integrity of materials, design, workmanship, feeling, setting and association" that qualified the district for the National Register was due largely to the fact that "the right-of-way is still generally recognizable as a contiguous transportation corridor." *Id.*

B. The Derry Rail Trail

Since the end of rail service, portions of the M&L Railroad Historic District have been developed into multi-use recreational trails—a key part of New Hampshire's statewide network of rail trails. The portion of the M&L Railroad Historic District that will be crossed by Folsom Road is one of the few remaining portions of the railroad not yet developed into multi-use paths: the existing Derry Rail Trail extends to just south of the Project area, while the Londonderry Rail Trail continues to the north, both along the railroad right-of-way. Ex. D (Declaration of Charles Kelsh); Ex. 1, Fed. Highway Admin., *I-93 Exit 4A Final Environmental Impact Statement and Record of Decision* (2020) ("2020 FEIS/ROD") at 4-225.[3] A connection between these two segments through the Project area is already planned. Ex. A (Declaration of Alexander Vogt) ¶ 8.

Members of the surrounding communities, including members of Plaintiff organizations, regularly use these existing rail trails and are eagerly awaiting their connection. *Id.*; Ex. B

[3] All numbered exhibits subsequently referenced in this motion are to the Declaration of Charles Kelsh.

(Declaration of David Topham) ¶¶ 7-8; Ex. C (Declaration of Catherine McDonald) ¶ 4-6.

C. The Original Exit 4A Design

NHDOT has proposed the construction of a transportation project that significantly threatens the historical integrity and recreational use of the M&L Railroad Historic District. The Project, which will receive funding from FHWA, contemplates the construction of a new exit on I-93 ("Exit 4A") in the town of Derry as well as "other transportation improvements to reduce congestion and improve safety" in the towns of Derry and Londonderry, New Hampshire. Ex. 1, (2020 FEIS/ROD) at ROD-1. A significant element of this project will be the construction of Folsom Road, a major, multi-lane access road, across the M&L Railroad Historic District at the present location of Madden Road, a two-lane dead-end road. *Id.* at ROD-1.

Because the project would receive federal funding, NHDOT and FHWA were required to ensure that the project complied with federal environmental and historic preservation statutes, including Section 4(f), the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.,* and Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108. FHWA and NHDOT documented their analysis of the 2020 Design and conclusions under these statutes in a Final Environmental Impact Statement and Record of Decision issued in February 2020 ("2020 FEIS/ROD").

The Section 4(f) analysis in the 2020 FEIS/ROD explicitly identified the M&L Railroad Historic District as a resource "subject to Section 4(f)" due to its eligibility for the National Register of Historic Places. Ex. 1 (2020 FEIS/ROD) at 7-1 to 7-2. FHWA and NHDOT determined there were no "feasible and prudent alternatives" to the use of the M&L Railroad Historic District, and recognized their resulting obligation under Section 4(f) to include in the Project "all possible planning to minimize harm" to the M&L Railroad Historic District. *Id*. at

ROD-6, 7-20. To address this requirement, FHWA and NHDOT explained that the 2020 Design "would incorporate mitigation measures to preserve and enhance the railroad corridor's historic features and qualities," including "an underpass under Madden Road and … a 900-foot paved path connection to the former railroad ROW north of Madden Road that would allow the future proposed expansion of the Rail Trail." *Id.* at 7-12 to 7-13.

Based on the inclusion of the underpass, FHWA and NHDOT determined that the 2020 Design complied with Section 4(f) "due to its measures to minimize harm to the historic district by allowing the continuity of the M&L Railroad, even if off-alignment." *Id*. at ROD-5. The 2020 FEIS/ROD repeatedly reiterated that the underpass was the key measure minimizing harm from the Project's use of the M&L Railroad Historic District, including by providing a grade-separated path that would preserve the essentially flat, linear nature of the former railroad, which the 2020 FEIS/ROD refers to as the district's "continuity." *See, e.g.*, *id*. at ROD-5, 7-7 to 7-8. The underpass would "enable trail construction to the north as part of a separate future project by others, which in turn will help protect more of the historic district from other development." *Id*. at 7-13. The inclusion of the underpass in the 2020 Design was thus essential to the Project's compliance with Section 4(f)'s requirement that the Project include "all possible planning to minimize harm." 23 U.S.C. § 138(a)(3). The 2020 FEIS/ROD did not evaluate any alternative Folsom Road designs without the underpass.

D. The Modified Exit 4A Design

At some point after the 2020 FEIS/ROD was signed, and despite the extensive public process that had led to the 2020 Design, NHDOT decided to replace it with the 2024 Design. The 2024 Design expands the new Folsom Road crossing of the M&L Railroad Historic District from five lanes of vehicle traffic to six and completely eliminates the trail underpass from the Project.

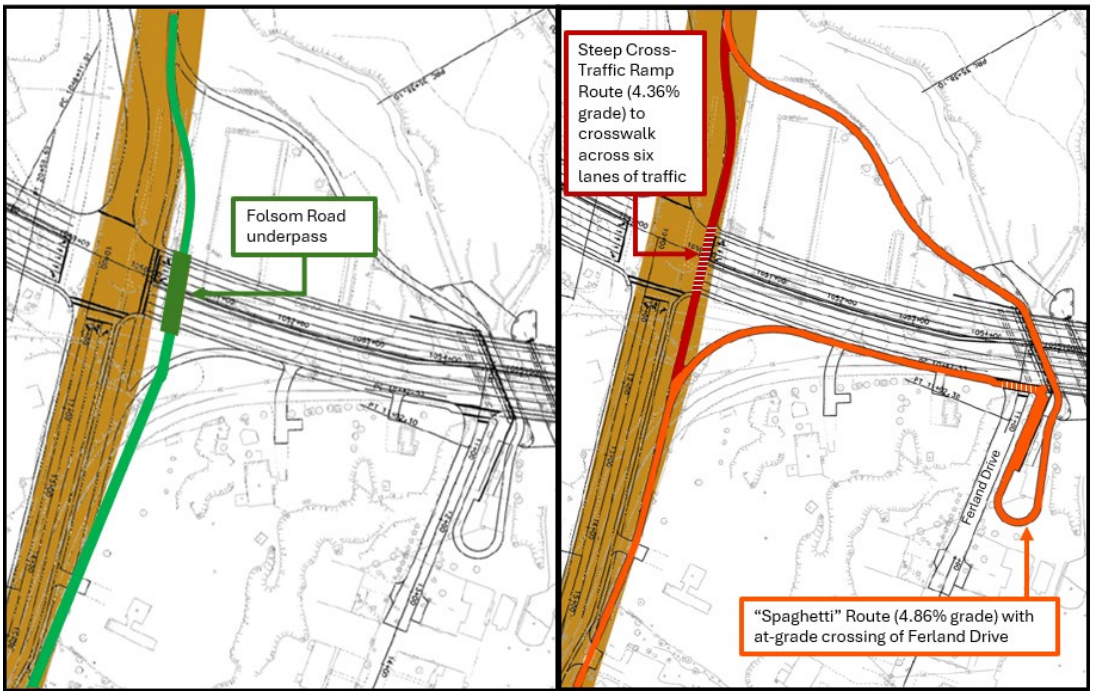
Ex. 2, Fed. Highway Admin., *Derry-Londonderry 13065B, IM-0931(201) NEPA Written Re-Evaluation* (May 13, 2024) ("2024 Re-Evaluation") at 4-5. In place of the underpass, the 2024 Design includes two new elements that had never before been proposed or considered.

First, NHDOT proposed adding "a signalized at-grade path … run[ning] parallel to North High Street, cross[ing] over Folsom Road at a signalized crossing and continu[ing] north of Folsom Road" ("the Cross-Traffic Ramp Route"). Ex. 5 (Letter from Jill Edelmann, May 10, 2024). In contrast to the car-free, grade-separated underpass, this "signalized crossing" will require trail users to navigate across six lanes of interstate-bound traffic. Moreover, because Folsom Road will be constructed approximately 10 feet above the railroad right-of-way, this route will require steep grades up to 4.36 percent along the right-of-way both north and south of Folsom Road, a striking visual and topographic departure from the present virtually flat M&L Railroad Historic District. Ex. 6 (Amended Adverse Effect Memo). The historic tell-tale device would also be reinstalled along this path. Ex. 2 (2024 Re-Evaluation) at 20; Ex. 7 (Updated Memorandum of Agreement). However, while the underpass would complement the tell-tale device by providing a visual illustration of its historic function as a warning for overhead structures, placing it near the proposed crosswalk would essentially reverse its historical purpose. Ex. C (Declaration of Catherine McDonald) ¶ 9.

Second, NHDOT proposed to add "a grade-separated option … following the multi-use path east along Folsom Road and under the Shields Brook crossing." Ex. 5 (Letter from Jill Edelmann, May 10, 2024). Because of its unnecessary, undesirable, and unsafe twists and turns, this element of the 2024 Design is commonly referred to as the "spaghetti alternative." *See, e.g.*, Ex. B (Declaration of David S. Topham) ¶ 11. The "spaghetti alternative" path ("the Spaghetti Route") would not follow or resemble the historic corridor at all and instead involves a 180-

degree hairpin turn, two 90-degree turns, and grades as high as 4.86 percent. Ex. 6 (Amended Adverse Effect Memo). Moreover, despite NHDOT's description, this element is not in fact "grade-separated" from vehicle traffic: to use this route, bicyclists and pedestrians, including children, will need to cross Ferland Drive, a two-lane roadway, and climb a steep hill. Ex. 2 (2024 Re-Evaluation) at 5. In sum, the steep slopes and hairpin turns of 2024 Design will destroy the essentially flat, linear nature of the M&L Railroad Historic District, which was constructed with grades of approximately 1 percent or less. Ex. A (Declaration of Alexander V. Vogt) ¶ 11.

The figures below compare the 2020 Design and the 2024 Design, with the M&L Railroad Historic District marked in brown:



2020 Design **2024 Design**

Recognizing the significant departure from the design approved by FHWA in the 2020 FEIS/ROD, NHDOT also prepared a 2024 Re-Evaluation. During this process, several of Plaintiffs' members commented to NHDOT that the 2024 Design substantially increased the harm to the M&L Railroad Historic District, including compromising both safety and historical

integrity, as a result of the additional lane of traffic. the substantial grades to be constructed on both sides of Folsom Road, and the hairpin turns on the Spaghetti Route. Ex. 3 (Letter from Alex Bernhard to Jill Edelmann, Oct. 22, 2023); Ex. 4 ("Cultural Resource Agency Coordination Meeting Notes"). They also objected that Section 4(f) prohibited the removal of the underpass, a reasonable, prudent, and feasible measure to minimize harm to the M&L Railroad Historic District. Ex. 8 (Letter from Charles Kelsh to Jamison Sikora, Nov. 15, 2022).

In the final 2024 Re-Evaluation, the only identified reason for the redesign was the assertion that deleting the tunnel would "be less costly to construct and maintain than what was originally proposed." Ex. 2 (2024 Re-Evaluation) at 3. However, the documentation approved by FHWA contains no analysis of or information regarding the comparative cost of the underpass or its maintenance compared to the 2024 Design. *See generally* Ex. 2 (2024 Re-Evaluation).

Although the 2024 Re-Evaluation reiterated the 2020 FEIS/ROD's conclusion that the Project would harm the M&L Railroad Historic District and recognized that undertaking "all possible planning" to minimize that harm would be required by Section 4(f), the 2024 Re-Evaluation contained no analysis of how the 2024 Design causes ***less*** harm to the M&L Railroad Historic District than the 2020 Design, or how it contains "all possible planning to minimize harm" to this historic resource despite the absence of the underpass. Instead, it merely noted that the 2024 Design "would incorporate mitigation measures to preserve and enhance the railroad corridor's historic features and qualities." Ex. 2 (2024 Re-Evaluation) at 19-20. These so-called "mitigation" measures, listed in both the Re-Evaluation and an Updated Memorandum of Agreement between Defendants, the Town of Derry, and NHDHR,[4] include only two measures

[4] This Memorandum of Agreement was executed pursuant to FHWA and NHDOT's Section 106 obligations under 36 C.F.R. §§ 800.6, 800.11(f).

not found in the 2020 FEIS/ROD: relocation of the tell-tale and a "rail trail signage program." *Id.* at 19; Exhibit 7 (Updated Memorandum of Agreement). In other words, these measures merely serve to document historic resources following their destruction rather than actually mitigate harm. The 2024 Re-Evaluation did not attempt to analyze or explain how the 2024 Design could include "all possible planning to minimize harm," as required by Section 4(f), when a previously incorporated measure to mitigate the Project's harm to the M&L Railroad Historic District—the underpass—had been removed.

NHDOT submitted its documentation of the 2024 Design to FHWA for its approval in May 2024, stating that "the Department believes that the February 3, 2020 Record of Decision remains valid." Ex. 9 (Letter from Kevin T. Nylan to Patrick Bauer, May 13, 2024). FHWA summarily approved NHDOT's 2024 Re-Evaluation—and therefore the 2024 Design—within hours of NHDOT's submission. Defendant Patrick Bauer, Division Administrator for FHWA's New Hampshire Division, wrote to Defendant William Cass, NHDOT Commissioner, indicating that FHWA "concur[red]" with NHDOT's analysis and therefore the Re-Evaluation process was purportedly "complete." Ex. 10 (Letter from Patrick Bauer to William Cass, May 13, 2024).

Plaintiffs understand that FHWA's approval of the 2024 Re-Evaluation is the final step of FHWA's review of the 2024 Design's compliance with Section 4(f). Plaintiffs further understand that, following approval of the contract by the New Hampshire Executive Council, the Project may be put out to bid and construction may begin. *See* N.H. Const. pt. 2, art. 56. On September 25, Defendant Cass reported to the Executive Council that NHDOT was moving forward with the contract notwithstanding this pending action. Ex. D (Declaration of Charles Kelsh) ¶ 15.

II. LEGAL FRAMEWORK

Section 4(f) of the Department of Transportation Act imposes a "plain and explicit bar to

the use of federal funds" for transportation projects that use historic sites, with "only the most unusual situations" exempted. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411-13 (1971). This stringent mandate reflects Congress' intent that protection of historic properties be given "paramount" importance in transportation planning. *Id.*

Agency action that fails to incorporate the protections required by Section 4(f) is subject to judicial review under the Administrative Procedure Act. 5 U.S.C. § 706; *Neighborhood Ass'n of the Back Bay, Inc. v. Fed. Transit Admin.*, 463 F.3d 50, 64 (1st Cir. 2006). Specifically, questions of law—including whether the agency's decision was "not in accordance with law"—are decided *de novo* by the court. 5 U.S.C. § 706; *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) ("Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."); *see also Senville v. Peters*, 327 F. Supp. 2d 335, 369 (D. Vt. 2004) (noting that "neglect of a statutory duty is not subject to the arbitrary and capricious standard"). Challenges to the agency's factual conclusions are in turn reviewed under the arbitrary and capricious standard, which, in the Section 4(f) context, involves a "thorough, probing, in-depth review" to ensure the determination was "based on a consideration of the relevant factors." *Overton Park*, 401 U.S. at 415-16. Courts must reject agency action based on "a clear error of judgment." *Id.*

A reviewing court may take all necessary steps to "postpone agency action" or to "preserve status" during the court's review of the agency action. 5 U.S.C. § 705. Because "it would be a crime to take even a slight risk of depriving future generations of [historic resources] so as to satisfy our present demand for speedy uninterrupted automobile travel," courts regularly issue preliminary injunctions against highway projects that violate Section 4(f). *See, e.g.*, *Soc'y for Prot. of New Hampshire Forests v. Brinegar*, 381 F. Supp. 282, 289 (D.N.H. 1974) (entering

preliminary injunction against construction of Interstate 93 through Franconia Notch in light of the failure to consider alternate routes that would avoid potential harms to the Old Man of the Mountain); *Merritt Parkway Conservancy v. Mineta*, 424 F. Supp. 2d 396, 425 (D. Conn. 2006) (finding preliminary injunction warranted where FHWA failed to take any steps to ensure that mitigation measures for highway project had been accomplished prior to approval); *City of S. Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1144 (C.D. Cal. 1999) (entering preliminary injunction where FHWA failed to properly consider whether a multimodal alternative to highway project through Pasadena would minimize harm).

In the First Circuit, a motion for preliminary injunction is evaluated on four factors: "(1) the likelihood of success on the merits; (2) the potential for irreparable harm [to the movant] if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest." *Nw. Bypass Grp. v. U.S. Army Corps of Engineers*, 470 F. Supp. 2d 30, 36 (D.N.H. 2007). Moreover, where, as here, the party opposing the preliminary injunction is the government, the balance-of-impositions and public-interest inquiries merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Does 1-6 v. Mills*, 16 F.4th 20, 37 (1st Cir. 2021). A motion for relief under § 705 is evaluated under the same standard. *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985).

III. ARGUMENT

A. Plaintiffs Are Likely to Succeed on the Merits of Their Claim That Defendants Violated Section 4(f)

Section 4(f) creates a "stringent" substantive mandate. *Save Our Heritage*, 269 F.3d at 58. It provides that the Secretary of Transportation "***shall not approve*** any program or project" requiring the use of historic sites where such use will have more than a *de minimis* impact

"unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes ***all possible planning*** to minimize harm" to the historic site. 23 U.S.C. § 138(a)(3) (emphasis added); *see also* 49 U.S.C. § 303(c). Regulations implementing Section 4(f) define "all possible planning" to mean "that ***all reasonable measures*** identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects ***must be included*** in the project." 23 C.F.R. § 774.17 (emphasis added). The agency's Section 4(f) evaluation also must include "sufficient supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative" and must "summarize the results of all possible planning to minimize harm." *Id.*

For purposes of this motion, Plaintiffs do not challenge FHWA's determination under § 138(a)(3)(A) that there are no feasible and prudent alternatives that would completely avoid all impacts to historic properties. Ex. 1 (2020 FEIS/ROD) at ROD-6; Ex. 2 (2024 Re-Evaluation) at 21. Rather, Plaintiffs challenge FHWA and NHDOT's failure to include "all possible planning to minimize harm" to the M&L Railroad Historic District as required by § 138(a)(3)(B). Plaintiffs are likely to succeed on the merits of their claim because the record demonstrates that NHDOT and FHWA excluded from their planning a previously identified reasonable measure to minimize harm to the M&L Railroad Historic District: namely, the underpass included in the 2020 Design.

i. NHDOT and FHWA Were Required to Include All Possible Planning to Minimize Harm to the M&L Railroad Historic District

Section 4(f) obligations attach when a project receiving Department of Transportation funding "use[s]" a historic site. 23 U.S.C. § 138(a)(3). A historic site is "used" if, *inter alia*, it is "permanently incorporated into a transportation facility." 23 C.F.R. § 774.17. Here, the 2020 FEIS/ROD reflects the agencies' own determination that the M&L Railroad Historic District is a historic site entitled to Section 4(f) protections. Ex. 1 (2020 FEIS/ROD) at 7-1 to 7-2. In the

Section 4(f) analyses in both the 2020 FEIS/ROD and the 2024 Re-Evaluation, NHDOT and FHWA further determined that:

- The permanent incorporation of a portion of the M&L Railroad Historic District into the Project constitutes a "use" under Section 4(f). Ex. 1 (2020 FEIS/ROD) at 7-19; Ex. 2 (2024 Re-Evaluation) at 19.
- No feasible and prudent alternatives to use of the M&L Railroad Historic District existed. Ex. 1 (2020 FEIS/ROD) at ROD-6; Ex. 2 (2024 Re-Evaluation) at 21.
- The Project would have a more than *de minimis* impact on the M&L Railroad Historic District, and would in fact harm the Historic District "due to the modern intrusion within the National Register boundary of the rail corridor and consequent realignment of the historic corridor." Ex. 1 (2020 FEIS/ROD) at 7-7; Ex. 2 (2024 Re-Evaluation) at 16.

These determinations triggered Section 4(f)'s obligation to include in the Project "all possible planning to minimize harm." 23 U.S.C. § 138; *Safeguarding the Historic Hanscom Area's Irreplaceable Res., Inc. v. F.A.A.*, 651 F.3d 202, 213 (1st Cir. 2011) ("Once an agency determines that there is no feasible and prudent alternative to the use of protected land, section 4(f) requires it to consider whether the proposal at hand includes all possible planning to minimize harm." (quotations omitted)).

ii. FHWA Approved a Project Design That Does Not Include All Possible Planning to Minimize Harm

Section 4(f)'s "affirmative duty" to minimize harm to historic resources "is a condition precedent to approval" of a project, and an agency must withhold approval until it has determined that the project includes all possible planning—including all reasonable mitigation measures—to minimize harm. *See Monroe Cnty. Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 700 (2d Cir. 1972). A reasonable alternative that would minimize harm to historic properties cannot be rejected under Section 4(f)(2) unless the Secretary finds that it is either imprudent or infeasible under the stringent *Overton Park* standard. *See Druid Hills Civic Ass'n,*

Inc. v. Fed. Highway Admin., 772 F.2d 700, 715 (11th Cir. 1985). The record demonstrates that FHWA failed to minimize harm to the M&L Railroad Historic District and failed to make any of the determinations that would justify rejecting the underpass in favor of the 2024 Design.

As explained above, FHWA initially determined in its 2020 FEIS/ROD that the Project complied with Section 4(f) because it included "all appropriate measures to minimize harm and enhance the railroad corridor's historic features and qualities." Ex. 1 (2020 FEIS/ROD) at ROD-5. Chief among the measures FHWA identified as "appropriate" was the underpass under Folsom Road, as reflected by the repeated references to the underpass throughout the FEIS/ROD. *See, e.g.*, *id.* at ROD-5, 7-7 to 7-8, 7-20. Specifically, FHWA determined that the underpass would minimize harm "by allowing the continuity of the M&L Railroad" and by "facilitat[ing] future completion of the Derry Rail Trail and help[ing] preserve the rail corridor from development" using a "suitably designed underpass that is complementary to the historic railroad corridor." Ex. 1 (2020 FEIS/ROD) at ROD-5, 7-20. This conclusion was well founded: The gentle slopes, isolation from traffic, and direct connection between adjoining segments of the M&L Railroad Historic District provided by underpass would preserve the "feeling, setting and association" of the former railroad and ensure that it remains "recognizable as a contiguous transportation corridor." Compl. Ex. 1 (ECF No. 1-1) (NHRP Eligibility Determination) at 28.

Despite these findings, and without revisiting its own prior determination that the underpass was a reasonable measure to minimize harm, FHWA approved a revised project—the 2024 Design—that ***eliminated*** the underpass. In its place, NHDOT offered Scylla and Charybdis: two perilous routes, divorced from any sense of "feeling, setting [or] association" connected to the M&L Railroad Historic District. With its steep grade up 10 feet of earthwork and treacherous six-lane crossing, the Cross-Traffic Ramp Route is more reminiscent of the perilous rock shoals

of Scylla—so tall that "no man, though he had twenty hands and twenty feet, could get a foothold on it and climb it"[5]—than the flat, car-free M&L Railroad. And like the ravenous whirlpool of Charybdis, the Spaghetti Route directs trail users along a narrow, steeply sloping downhill grade through several dizzyingly sharp turns and across an active side street.

Tellingly, neither of the two documents purportedly describing the mitigation measures in the 2024 Design—the 2024 Re-Evaluation and the Updated Memorandum of Agreement between Defendants and NHDHR—claim that either of these elements mitigate the harm to the M&L Railroad Historic District. Instead, the only new "mitigation" measures offered are the relocation of the historic tell-tale[6] and the "rail trail signage program." Ex. 2 (2024 Re-Evaluation) at 20; Ex. 7 (Updated Memorandum of Agreement).

By eliminating the underpass—a reasonable mitigation measure, by the agencies' own findings—Defendants failed to include "all possible planning" to minimize harm. 23 U.S.C. § 138(a)(3). Moreover, the purported mitigation measures included in the 2024 Design do not bring the Project into compliance. Defendants have thus failed to comply with Section 4(f)(2) for four separate and independent reasons.

First, there is no indication in the record that the agencies properly determined that the 2024 Design minimized harm and thus included "all possible planning" as required by Section 4(f). This determination must be based on a straightforward analysis: When, as here, an agency is considering various mitigation measures, it must "total the harm caused by each" design and select the alternative which "does the ***least*** harm" to the Section 4(f) property. *Druid Hills*, 772

[5] Homer, *Odyssey*, Bk. 12.
[6] As noted *supra*, whether the tell-tale's proposed relocation to the Cross-Traffic Ramp Route would actually mitigate harm is dubious given that its new location would no longer bear any relation to its original purpose of providing warning of a low underpass.

F.2d at 716 (emphasis added); *see also Merritt Parkway*, 424 F. Supp. 2d at 417; *Conservation Law Found. v. Fed. Highway Admin.*, 827 F. Supp. 871, 883 (D.R.I. 1993), *aff'd*, 24 F.3d 1465 (1st Cir. 1994). FHWA's own regulations set forth a seven-factor balancing test for selecting the alternative that would cause "the least overall harm in light of the statute's preservation purpose" and also reiterate the statutory language requiring that the selected alternative include "all possible planning to minimize harm" and all reasonable mitigation measures. *See* 23 C.F.R. §§ 774.3(c)(1)-(2), 774.17. Here, there is simply no evidence that FHWA conducted any analysis whatsoever of the relative harms of the 2020 Design's underpass and the 2024 Design's "mitigation" measures, let alone followed the process set out in FHWA's own regulations.

Instead, the record suggests that the agencies believed that they were free to select among mitigation measures on any basis of their choosing. Rather than basing their decision on a careful balancing of the relative harms, the agencies' only proffered justification for removing the underpass from the 2024 Design was that the modified design would be "less costly to construct and maintain." Ex. 2, 2024 Re-Evaluation at 3. But courts have admonished that "cost is a subsidiary factor in all but the most exceptional cases." *See Coal. for Resp. Reg'l Devel. v. Brinegar,* 518 F.2d 522, 525-26 (4th Cir. 1975); *Stop H-3 Ass'n v. Dole*, 740 F.2d, 1442, 1452 (9th Cir.), *cert. denied*, 471 U.S. 1108 (1985). As the Supreme Court noted in *Overton Park*, cost-driven decision-making will almost always favor greater use of properties protected by Section 4(f). 401 U.S. at 411-12. Section 4(f)'s purpose is thus to ensure that, unless those costs reach "extraordinary magnitudes," protection of historic resources is given "paramount importance," since "there would have been no need" for Section 4(f) at all if Congress had wanted agencies to engage in a "wide-ranging balancing" of preservation against cost and other considerations. *Id.* at 411-13; *see also* 23 C.F.R. § 774.17 (defining "feasible and prudent" to

exclude an alternative based on cost only where it "result[s] in additional construction, maintenance, or operational costs of an extraordinary magnitude").

Moreover, even according to the FHWA's own regulations, "[s]ubstantial differences in costs among the alternatives" are but one of seven factors to be considered in order to support a finding that, on balance, the 2024 Design "[c]auses the least overall harm in light of the statute's preservation purpose." 23 C.F.R. § 774.3(c)(1). Here, there is simply no record evidence to support a conclusion (nor did the agencies reach one) that these costs would reach "extraordinary magnitudes" requiring rejection of an alternative measure that would minimize harm to the M&L Railroad Historic District. (Nor could that conclusion stand without an explanation of what changed since the 2020 Design. *See infra* pp. 21-22.)

Second, the agencies were required to explicitly document in the record this balancing and the basis for their conclusion, but they did not do so. 23 C.F.R. § 774.7(c) (requiring the agency's analysis of which alternative causes the least overall harm "must be documented"); 77 Fed. Reg. 42,802, 42,810 (July 20, 2012) ("FHWA is required to explain how the seven factors were compared to determine the least overall harm . . . ."); *Merritt Parkway*, 424 F. Supp. 2d at 420. In *Merritt Parkway*, for example, the court held that FHWA failed to include all possible planning to mitigate harm when its Environmental Assessment failed to "describe any alternative build options, much less analyze how they might vary in respect to their impacts" on a historic property. 424 F. Supp. 2d at 419. Although in that case FHWA had supplemented the record with two reports on alternatives, the *Merritt Parkway* court rejected the reports because they considered factors like "wetland impact" and "right-of-way acquisition" rather than the minimization of harm to historic resources. *Id.* at 419-20. The court held that, in any case, the "mere presence in the record of documents from which FHWA *might* have concluded that the

requirements of Section 4(f)(2) had been met does not allow the Court to infer that FHWA in fact so concluded." *Id.* Likewise, in *Druid Hills,* when FHWA rejected mitigation alternatives to a project based on a "generalized and often contradictory" analysis that focused primarily on the feasibility of those alternatives, rather than the extent they mitigated harm, the court held that although "the administrative record must contain adequate information to enable the Secretary to weigh the relative damage to protected properties," FHWA "did not make the requisite findings necessary for an informed comparison" required by Section 4(f). 772 F.2d at 716-17 and n.20. As a result, the court remanded the case for the agency to "furnish a more specific analysis." *Id.*

Here, there is no record evidence in the 2024 Re-Evaluation or elsewhere that NHDOT or FHWA undertook any consideration of whether the 2024 Design and its mitigation measures caused more or less harm than the 2020 Design's underpass (or, for that matter, whether those mitigation measures could be implemented in addition to the underpass). As in *Merritt Parkway* and *Druid Hills,* the 2024 Re-Evaluation does not even attempt to quantify the mitigative impact of the 2024 Design's measures, let alone discuss whether those measures are more or less effective at mitigating harm than the 2020 Design's underpass.

Third, these newly identified measures (the tell-tale and signage program) do not even appropriately constitute measures that "mitigate," much less minimize, harm to the M&L Railroad. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.,* 177 F.3d 800, 809 (9th Cir. 1999) ("photograph[ing]" and "document[ing]" a resource without "preserv[ing its] significant historic features" was not mitigation). Had the agencies performed the required least-harm analysis, it is indisputable that the 2020 Design would have a lesser degree of harm to the M&L Railroad than the "document and destroy" option belatedly selected in the 2024 Re-Evaluation. Further, there is no basis in either logic or the record to think that the newly identified measures (the tell-tale

and signage program) could not have been implemented ***in addition to*** the underpass, an alternative that FHWA arbitrarily and capriciously failed to consider entirely. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46 (1983) (finding agency action arbitrary and capricious when agency "gave no consideration whatsoever" to "obvious" alternative suggested by agency's prior findings); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1288 (1st Cir. 1996) (in NEPA case, agency failure to "in any way explain its reasoning or provide a factual basis for its refusal to consider, in general, the possibility of alternatives" rendered decision arbitrary and capricious). Had the agencies performed the required least-harm analysis and evaluated all of the identified mitigation measures together, an alternative that included ***all*** of them presumably would have been least harmful. FHWA and NHDOT offered no explanation for not considering such an alternative. *Cf.* 77 Fed. Reg. 42,802, 42,810 (July 20, 2012) (in analyzing which alternative would cause the least overall harm, "the comparison may not be skewed by over-mitigating one alternative while under-mitigating another alternative for which comparable mitigation could be incorporated").

Fourth, to the extent that FHWA's approval embodied an implicit determination that the underpass was no longer a reasonable measure to mitigate harm, such a determination was arbitrary and capricious. Although an agency may reject a mitigation measure as "infeasible or imprudent," *Druid Hills*, 772 F.2d at 716, NHDOT and FHWA have already determined in the 2020 FEIS/ROD that the underpass is feasible and prudent and therefore that cost is no barrier. The agencies did not identify or acknowledge any change in their assessment of the underpass's reasonableness, much less provide a credible rationale or explanation for such a change. Such a reversal without providing a "reasoned explanation" for "disregarding facts and circumstances" that supported the prior determination—let alone *sub silentio*—is a hallmark of arbitrary and

capricious action. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).[7] As noted above, the glib reference to "cost" in the 2024 Re-Evaluation is insufficient to demonstrate that these costs are so extraordinary that including the underpass is imprudent.

In sum, in approving the Project without the underpass, FHWA approved a project that uses a historic resource without including "all possible planning to minimize harm." The agencies' half-hearted assertion that the 2024 Design "minimize[s] harm" is "so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise." *Hanscom*, 651 F.3d at 207 (quoting *Assoc'd Fisheries of Me., Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997)). Its approval was therefore arbitrary, capricious, and contrary to law, and Plaintiffs are likely to succeed on the merits of their claim that NHDOT and FHWA acted in violation of Section 4(f).

B. Allowing the Exit 4A Project to Proceed According to the 2024 Design Will Cause Irreparable Harm to Plaintiffs and Their Members.

The substantive harm contemplated by Section 4(f) is "the actual harm to . . . historic sites that will occur if the [agency] does not … make all possible plans to minimize the harm" resulting from use of that site. *Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1086 (10th Cir. 2004). These harms are, by their nature, "generally irreparable." *Id.*; *see also Merritt*

[7] The First Circuit recently vacated a similar FHWA Section 4(f) approval as arbitrary and capricious. *See Historic Bridge Foundation v. Buttigieg,* 22 F.4th 275, 285 (1st Cir. 2022). The FHWA Section 4(f) approval at issue in *Historic Bridge* had departed from the cost-calculation methodology recommended by prior federal guidance without explanation. *Id.* (citing *Fox*). Rejecting the possible justifications offered in litigation, the court held that FHWA had offered "no support" for using that methodology in the record nor did FHWA even acknowledge the contrary prior guidance in its decision documents. *Id.* As in *Historic Bridge*, the record here offers no assurance that FHWA "deliberately changed" its prior determination based on substantial evidence, rather than simply "casually ignored" its prior conclusion. *See Sierra Club v. LaHood,* 693 F. Supp. 2d 958, 974 (D. Minn. 2010) (finding NPS acted arbitrarily and capriciously in approving four-lane bridge over a protected river without acknowledging its previous finding that four-lane bridge was impermissible).

Parkway, 424 F. Supp. 2d at 425 (finding irreparable harm to historic Merritt Parkway in the form of an "irreversible change to the landscape" resulting from extensive earthwork). By FHWA's own determination, the Project will harm the M&L Railroad Historic District, introducing "modern intrusion[s]" in the form of a six-lane arterial road that will degrade the historic character of the rail line and result in the "realignment of the historic corridor." As FHWA acknowledged in the 2020 FEIS/ROD, the underpass would mitigate harm to the Historic District by preserving the corridor's alignment and allowing uninterrupted travel along the historic right-of-way. In contrast, the 2024 Design will provide none of this mitigation.

Any harm to the M&L Railroad Historic District will in turn be felt by Plaintiffs and their members who use the district. *See Pres. Coal. v. Fed. Transit Admin.*, 129 F. Supp. 2d 551, 573 (W.D.N.Y. 2000) (finding irreparable harm where a construction project would reduce access to a Section 4(f) resource based on plaintiffs' "adequate proximity and use of the land in question"); *Valley Cmty. Pres. Comm'n*, 373 F.3d at 1086 (same). Members of the Committee and RTC, including Catherine McDonald, David Topham, and Alexander Vogt, live in or around the town of Derry and regularly use the M&L Railroad Historic District for recreation and to enjoy its historic qualities. For example, Mr. Topham finds his trips on the existing rail trails in the M&L Railroad Historic District a "unique opportunity" to combine his passion for cycling with his interest in railroad history, in part because the "gentle slops and unbroken sightlines" of these trails provide a sense of "linear continuity" that recalls his childhood trips on the railroad with his father along the same route. Ex. B (Declaration of David Topham) ¶ 7; *see also* Ex. C (Declaration of Catherine McDonald) ¶ 6; Ex. A (Declaration of Alexander Vogt) ¶ 7.

If implemented, the 2024 Design will reduce Plaintiffs' members' use and enjoyment of the M&L Railroad Historic District. For example, where the underpass approved in the 2020

Design would have facilitated their access to new areas of the M&L Railroad Historic District and the broader network of rail trails along the right-of-way, Mr. Topham and Mr. Vogt will not be able to safely navigate the steep, winding routes approved in the 2024 Design, keeping them from accessing this portion of the Historic District. Ex. B (Declaration of David Topham) ¶ 12; Ex. A (Declaration of Alexander Vogt) ¶ 15. Moreover, the 2024 Design removes the "visual and geographic continuity," suggestive of railroad engineering, that Mr. Vogt would enjoy with the underpass, as well as a reference point for Ms. McDonald to appreciate the purpose of a nearby historic tell-tale. Ex. A (Declaration of Alexander Vogt) ¶ 13; Ex. C (Declaration of Catherine McDonald) ¶ 9. This loss of access and enjoyment would cause irreparable harm to Plaintiffs' "legally protected interest in [their] members[']s access to, and enjoyment of" the M&L Railroad Historic District. *Pres. Coal.*, 129 F. Supp. 2d at 573.

C. The Balance of Harms and Public Interest Favor An Injunction and Section 705 Relief.

Weighed against the inevitable and irreparable injury that will occur should construction on the Project proceed while the Court is considering this case, the burden on Defendants is minimal. Construction has yet to begin, and no bids have been awarded, so Defendants face no contractual liability from a pause. Furthermore, enjoining only the 2024 Design approval would in no way prevent Defendants from proceeding with the original 2020 Design approved in the 2020 ROD/FEIS, either in its entirety or as to those components not modified by the 2024 Design. *Cf. Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 224 (D.D.C. 2003) (finding minimal harm from order enjoining lethal culling of swan population when FWS could use other non-lethal population management techniques). As documented in the 2020 ROD/FEIS, the 2020 Design adequately meets the project's purpose and need. *Mass. Fair Hous. Ctr. v. Dep't of Hous. & Urb. Dev.*, 496 F. Supp. 3d 600, 611 (D. Mass. 2020) (finding no particularized harm to

government from order enjoining new rule but restoring previous "workable" rule).

Moreover, the threat of harm to the public's interest in historic resources assumes a more significant role in the Section 4(f) context. "The scales on which the relative importance" of a harm to a historic resource is to be weighed "are not entirely neutral," since Congress, in enacting Section 4(f), "placed its thumb on the scales in favor of forcing governmental agencies to make a special effort" to protect historic resources. *Merritt Parkway*, 424 F. Supp. 2d at 425. In other words, if harm to a historic resource appears sufficiently likely, "the balance of harms usually weighs in favor of an injunction." *Sierra Club v. Marsh*, 714 F. Supp. 539, 592 (D. Me.), *amended*, 744 F. Supp. 352 (D. Me. 1989), *aff'd*, 976 F.2d 763 (1st Cir. 1992); *see also Brinegar*, 381 F. Supp. at 287 (entering preliminary injunction on Section 4(f) claim, noting that "protection to the environment has priority over the construction of highways" and "delay is better than hasty and irreversible action"). Given the acknowledged harm to the M&L Railroad Historic District that would result should Defendants be permitted to proceed with the 2024 Design, the balance tips strongly in favor of an injunction and/or relief under Section 705.

IV. CONCLUSION

NHDOT's adoption and FHWA's approval of a Project that does not incorporate identified mitigation measures to protect the M&L Railroad Historic District violate the agencies' obligation under Section 4(f) to undertake "all possible planning to minimize harm" to historic resources like this one. 23 U.S.C. § 138(a)(3). The Court should issue a preliminary injunction and/or relief under 5 U.S.C. § 705 to preserve status, to postpone FHWA from moving forward with the 2024 Design without the underpass while this case is pending, and to prevent unnecessary and irreparable harm to the M&L Railroad Historic District until FHWA and NHDOT adopt a Project design that complies with Section 4(f).

Dated: October 8, 2024

Respectfully submitted,

COMMITTEE TO SAVE THE DERRY RAIL TRAIL TUNNEL

RAILS TO TRAILS CONSERVANCY

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CERTIFICATE OF SERVICE

I, Charles Kelsh, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing on October 8, 2024.

I further certify that, on October 8, 2024, I served this document via email on counsel for Defendants Shailen Bhatt and Patrick Bauer, on written consent from counsel, at the below address:

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