CASE No. 22-_____

IN THE

SUPREME COURT OF THE UNITED STATES

ALENA WALTERS and STEVEN WALTER
Petitioner-Applicants,
v.
LONG ISLAND POWER AUTHORITY, et al
Respondents

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR A WRIT OF CERTIORARI

To The Honorable Sonia Sotomayor, Associate Justice, and Circuit Justice For The United States Court Of Appeals For The Second Circuit: Applicants Alena Walters and Steven Walter respectfully submit this application for an extension of time by the amount of thirty (30) days in which to submit a petition for writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit.

JURISDICTION

This court has jurisdiction under 28 U.S.C. § 1254(1) to review a petition for writ of certiorari, the filing of which an extension of time is herein sought.

SUMMARY OF PROCEDURAL HISTORY

A hybrid Petition-complaint—that is, *a combination* of a Special Proceeding under Article 78 of the New York Civil Practice Law and Rules (challenging as irrational and capricious several determinations by state agencies regarding an Energy Center project that was planned to be built – where the rendering of such determinations had been required under federal and state laws, respectively), i.e. the original "Petition", *and* a direct Action taken under multiple state and federal laws, the original "Complaint"—was filed in New York State Supreme Court in the county of Nassau on June 1, 2019, Index Number 607512/2019. The complaint also alleged that the Energy Center and other practices violated the public trust doctrine in that the land had been dedicated to outdoor public recreation (park) use. The case was removed to U.S. District Court Eastern District of New York (EDNY), that year after remand attempts failed. Federal court dismiss motion briefing occurred during the summer of 2020, and the U.S. District Court EDNY, in a ruling on these motions, issued an ordered in May of 2021 that :

(i) the portion of the Complaint relating to Common Law causes of action, e.g. abuse of the public trust, or appropriation of land to a different purpose than that to which it has been dedicated (a.k.a "Parkland Alienaton") and the other Common Law cause of action, are remanded to State Court

(ii) The 'Article 78' challenges to determinations that had been rendered under ***state*** law[1] made by state agencies are remanded to State Court;

(iii) All 'Article 78' challenges to determinations rendered under ***federal*** law by state agencies are dismissed with prejudice for failure to state a claim upon which relief could be granted;

(iv) That portion of the complaint taken directly under federal law for violation of federal law are dismissed with prejudice.

Four Petitioner-plaintiffs, D. Powers, R. Slawski, S. Walter, and A. Walters appealed a part of the District Court's ruling to the Second Circuit, Case Number 21-1755-cv. The Second Circuit, issued an August 8, 2022 Summary Order, which:

(i) passed upon the question of whether plaintiffs have the right to bring action under the Land and Water Conservation Fund Act (LWCFA), because it ruled it moot, despite the fact argued by Walters that if the LWCFA-imposed encumbrances on the land limiting its use to parks use (public outdoor recreation) are not enforced, plaintiffs would lose their property interest in the land.

(ii) passed upon the issue of judicial review of agency action (the issue of whether a statutory right of action need be found in the statute under which a determination rendered under *federal* law by a state agency in order for a party aggrieved by that determination to request judicial review of it), deciding, on

[1] State Environmental Quality Review Act ("SEQRA") Art. 8 of Ch. 43B NY Env'tl. Cons. L., and its implementing regulations at 6 NYCRR 617; and "Waterways Act" NY Exec. L. 42 §910-921, and its implementing regulations at 19 NYCRR 600. All State Tidal Wetlands claims had already been withdrawn by Petitioner-plaintiffs.

August 8, 2022 to reinterpret the U.S. District Court's ruling as having had remanded all such matters more than a year earlier, on May 10, 2021.

(iii) dismissed without prejudice rather than remanding certain claims that the district court had dismissed with prejudice for sovereign immunity, in part because, held the Second Circuit, there was lack of ripeness as in its view Petitioner-plaintiffs did not sufficiently attest to injuries beyond those resulting from a building's construction.

A year before this ruling was issued, motions by Respondent-defendants to dismiss those portions which had been remanded were filed in the New York State Supreme Court seated in Nassau County and the motions were fully briefed by the Fall of 2021. The State Court did not rule on the motions until almost a year later.

On August 9, 2022, within one day of the Second Circuit's Order and ruling, the New York State Supreme Court seated in Nassau County dismissed the Petition-Complaint in entirety, even though the parties had not yet made any arguments on those portions that the Second Circuit newly reinterpreted as having been remanded the year prior. The ruling of the State Supreme Court was based in part on the notion that those aspects of the Energy Center that could not be reconciled with a park purpose are only transient events which are temporary uses. Notice that the order of the State Supreme Court would be appealed to the Appellate Division Second Department was given on or about October 15, 2022, by four of the Petitioner-plaintiffs (H. Jurist, R. Slawski, A.Walters, and L.Jurist).

On October 21, 2022 Petitioner-plaintiffs learned that approximately three weeks prior, in late September of 2022 (after the August 2022 ruling of the State Supreme Court)

the Long Island Power Authority declared it was preparing to begin construction and installation of a series of sizable and kiosk-style energy exhibits at the center at west end relating to: energy storage technology; changes to the electrical grid within its territory that it will require; technologies that could be installed in residential homes a.k.a. "smart homes"; virtual tour of power plants, and other exhibits. Such establishment of a veritable Energy Demonstration Center Facility at west end would clearly not be a transient temporary use, and would be a material breach of the terms of the deed and conveyance that prohibit any facilities other than those incidental to park. (EXHIBIT A). The deed and conveyance clearly subjects the land to limitations and the parties to a covenant that no part of west end (then called "Short Beach") may ever be used for any other facility, other than facilities incidental to park. If west end is used for any other facility, all of the land at west end (now 284 acres) immediately revests in the Town of Hempstead, who, following revestiture is under no obligation to keep it a public park or refrain from developing it. Thus, the new construction and installation to establish the center as a facility to promote energy policy will cause imminent and irreversible extinguishment of plaintiffs' property interest at west end, and unspeakable loss by this and all future generations of public rights to west end, which the New York Department of State has examined and has characterized as irreplaceable: "R assessment: Irreplaceable"[2].

[2] Page 1 of report, "Replaceability (R) – ability to replace the area, either on or off site, with an equivalent replacement for the same fish and wildlife and uses of those same fish and wildlife, for the same users of those fish and wildlife". internet source: https://dos.ny.gov/jones-beach-west

During the preparation of a Petition to this court for writ of certiorari, these plans for constructing and installing exhibits to render the center a bona fide persistent Energy Center Facility were discovered in the third week of October 2021, causing the applicants who make the request before you to have to divert their attention to the emergency measure of making sure their property rights are not extinguished. Preparing or helping to prepare an emergency request to New York's Appellate Division Second Department for interim relief in the form of an injunction so they do not experience total loss of their property rights in west end has necessarily diverted time and attention from the preparation of petition for writ of certiorari.

SUBJECT OF THE PETITION FOR WRIT OF CERTIORARI WE INTEND TO SUBMIT

This court would be requested, on application for writ of certiorari, to review a determination of the Second Circuit that plaintiffs' cause of action under the Land and Water Conservation Fund Act[3] is moot. This court would also be requested, on application for writ of certiorari, to review that part of the decision of the U.S. Court of Appeals for the Second Circuit pertaining to Article 78 challenge of a *federal* law determination made by a <u>state</u> agency, which decision by the Second Circuit improperly reinterpreted the District court's ruling to a meaning that had been stretched beyond its clear and plainly stated meaning—in effect, changing the decision by a sitting U.S District court without overturning it and without review of Appellants' arguments regarding it. While the edit made by the Second

[3] Acceptance of Land and Water Conservation Funds by state agency New York State Office of Parks, Recreation, and Historic Preservation ("PARKS") creates an encumbrance on the deed that imposes a continuing obligation by the agency and its assigns (including Long Island Power Authority "LIPA") that restrict to public outdoor recreation, the use to which the land can be put.

Circuit to the District Court Judge's ruling was to revise it so that this particular matter is taken to have been remanded to State Supreme Court the previous May rather than dismissal with prejudice, the ruling of the Second Circuit did not address that portion of the District Court's opinion which held that a party aggrieved by state agency action cannot bring an Article 78 Special Proceeding to challenge a federal-law determination made by that state agency, if the federal law by which the determination was rendered by the state agency contains no express provision of a private right of action[4]. Thus, the Second Circuit appears to not have not disturbed this opinion, but re-characterized it as advisory. This disadvantages the remanded Article 78 challenges to federal-law determinations, if in fact they were remanded, because this U.S. District Court's opinion—that a party aggrieved by State agency action cannot bring an Article 78 Special Proceeding to challenge a federal-law determination made by that state agency, where the underlying federal law by which the determination was (or was required to be) rendered contains no express provision that there is a private right of action—although having been edited by the Second Circuit into an advisory opinion which is not binding, still may be cited as persuasive evidence, whereas the Second Circuit's implication that the U.S. District Court may have lacked jurisdiction to make such a ruling, is barred from being cited as precedent on account of it being issued by Summary Order. The ruling of the Second Circuit—revising the District court's decision

[4] This is clear error as judicial review of agency action whether under the Administrative Procedures Act in the federal court or whether under Article 78 of the New York Civil Practice Law and Rules, has never required a private right of action in the law under which the agency took or failed to take action, as has been affirmed by this court time and time again, and because these vehicles by which agency action may be judicially reviewed (A.P.A. and Article 78) are rooted in application for writs under the common law application of writ of mandamus to review. Applicants wish to submit a petition for writ of certiorari for this court to review this error.

without any review of Appellants arguments pertaining to it—deprives plaintiffs of their right to appeal that holding of U.S. District Court, where appeal was taken as of right.

The District Court, with respect to the State Parks Commissioner Kulleseid, stated it need not examine whether he has Sovereign Immunity because even if he does, a Petition which challenges state agency determination rendered under federal law is not viable and fails to state a cause of 'action' upon which relief can be granted for the reason that a statutorily expressed private right of action is required in the federal stattue under which hthe agency rendered its determination.

CONSENT OF THE PARTIES

The parties to the appeal were notified between 10/30/22 and 10/31/2022 of this application for extension and were asked for consent. In reply, Eileen Flynn counsel for the New York Power Authority (NYPA) has stated via email that NYPA takes no position; Blair Greenwald, counsel for The New York State Agencies and Commissioners and NYSERDA stated via email that they take no position; Adam Stolorow, counsel for Long Island Power Authority stated in an email that Long Island Power Authority is opposed; Robert Slawski stated by telephone that he consents to the extension; counsel for Bureau of Ocean Energy Management stated by phone on behalf of the Bureau that she would take no position, and Donald Powers hasn't yet replied to voicemail asking for consent.

REASONS JUSTIFYING EXTENSION OF TIME

On August 8, 2022, the U.S. Court of Appeals for the Second Circuit entered its judgment and opinion in this matter. The petition for a writ of certiorari in the instant case accordingly is due by November 7, 2022.

On October 21, 2022 Petitioner-plaintiffs learned that approximately three weeks prior, on September 28, 2022 (after the August 2022 ruling of the State Supreme Court) Long Island Power Authority declared it was preparing to begin construction and installation of a series of sizable and kiosk-style energy exhibits at the center at west end relating to: energy storage technology; changes to the electrical grid within its territory that it will require; technologies that could be installed in residential homes a.k.a. "smart homes"; virtual tour of power plants, and other exhibits. Because such establishment of a veritable Energy Demonstration Center Facility at west end would clearly not be a transient temporary use, it would be a material breach of the terms of the deed and conveyance. The deed and conveyance clearly subjects the land to limitations and the parties to a covenant that no part of west end (then called "Short Beach") shall have any facilities other than those incidental to park. If west end is has any other facility, all of the land at west end (now 284 acres) immediately revests in the Town of Hempstead, who, following revestiture is under no obligation to make it a public park or refrain from developing it. Thus, the new construction and installation to establish the center as a facility to promote energy policy will cause imminent and irreversible extinguishment of plaintiffs' property interest at west end, and

unspeakable loss by this and all future generations of public rights to west end, which the New York Department of State has examined and has characterized as "irreplaceable".

During the preparation of a Petition to this court for writ of certiorari, these plans for constructing and installing exhibits to render the center a bona fide persistent Energy Center Facility were discovered in the third week of October 2021, causing the applicants who make the request before you to have to divert their attention to the emergency measure to prevent extinguishment of their property at west end by preparing or helping to prepare an emergency request to New York's Appellate Division Second Department for interim relief in the form of an injunction so they do not experience total loss of their property rights in west end. This request has not yet been filed, but is substantially completed.

As a result, our period to file a certiorari petition will expire Monday, November 7, 2022 with our petition not yet complete. We file this application for extension of time on November 1, six days prior to the November 7, due date of the Petition for Writ. We ask for an extension of thirty (30) days, until December 7, 2022.

We feel that it is for good cause and fits squarely within the extraordinary circumstances under which an application for extension of time that has been filed less than ten days before the date due will be considered.

The portion of the deed which triggers the reversionary clause is

> "[On] no part of [west end] [5] ... shall there be ... any other facilities excepting those incidental to park and parkway uses and to healthful exercise and recreation."

[5] In the 1920's and 1930's at the time of conveyance of west end by the Town of Hempstead, west end was known as "Short Beach".

[Deed #15432 recorded in Nassau County on May 31, 1932, at 2:47 P.M.at pages 110-114 (EXHIBIT A) referencing (at last para. of page 111) conditions incorporated into the deed, which conditions of conveyance were voted on a proposition by the Town Board of the Town of Hempstead, November 4, 1931].

"Incidental to" park obviously means causally produced by, occurring in, or normally associated with, the typical, or customary operations of a park[6], or ordinarily found therein and occurring as a consequence of. This would include picnic area, bathrooms and other sanitation facility, and the like. It would most definitely not include facilities whose purpose is to promote or explain State Energy Initiatives, the future of the energy grid in New York, connectivity of power sources to the grid, or strategies and financial incentives to reduce energy bills and usage, to facilitate adoption of technologies that could aid the transition to new sources of power production, regardless of whether or not the fulfillment of such objectives as the activities and exhibits seek to further are beneficial to the state and its people.

While the interest in finality and desire to avoid delay that underlie the rules and procedures are served by strict adherence to the time set absent some unusual circumstances, it is indeed such unusual circumstance as surely has been contemplated by the rule that we the immediate need to stop the establishment of a persistent Energy Center facility causing deed breach triggering loss of the land . The rise, during the period of time to file, of an

[6] https://www.lawinsider.com/dictionary/incidental-to; https://thelawdictionary.org/incident/

imminent danger to the 284-acre irreplaceable area of land and the urgent need to address it, including via the preparation of an injunction pending appeal at New York's Second Department to prevent total and irrevocable loss of property caused by New York State Office of Parks, Recreation and Historic Preservation's violation of its deed obligations and the abdication of its duties to supervise all of its assigns, including LIPA.

For the foregoing reasons, Applicants respectfully request that this Court grant an extension of 30 days, up to and including December 7, 2022, within which to file a petition for writ of certiorari in this case.

Respectfully Submitted,

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(718) 423-6708

November 1, 2022
date

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Oceanside, NY 11572
(212) 608 6112 Ext.0
Please send mail to :
19 Julia Cir. E.Setauket, NY 11733,
temporary mailing address

November 1, 2022
date

CC to:

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Powers, et al. v. Long Island Power Auth., et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of August, two thousand twenty-two.

PRESENT:

JOHN M. WALKER, JR.,
JOSEPH F. BIANCO,
BETH ROBINSON,
Circuit Judges.

Donald Powers, Alena Walters, Robert Slawski, Steve Walter,

Plaintiffs-Appellants,

Herbert H. Jurist, Susan Johnson, Lawrence Ryan, Linda Jurist, Marie Ryan,

Plaintiffs,

v. 21-1755-cv

Long Island Power Authority, Erik Kulleseid, Commissioner of the New York State Office of Parks Recreation and Historic Preservation, New York State Office of Parks, Recreation and Historic Preservation,

Defendants-Appellees,

Power Authority of the State of New York, New York State Department of Environmental Conservation ("NYS DEC"),

Basil Seggos, Commissioner of New York State Department of Environmental Conservation, The Bureau of Ocean Energy Management, New York State Department of State, New York State Energy Research and Development Authority,

Defendants.[*]

FOR PLAINTIFF-APPELLANT POWERS:	Donald Powers, *pro se*, Merrick, NY.
FOR PLAINTIFF-APPELLANT WALTERS:	ALENA WALTERS, *pro se*, Oceanside, NY.
FOR PLAINTIFF-APPELLANT SLAWSKI:	Robert Slawski, *pro se*, Copaigue NY.
FOR PLAINTIFF-APPELLANT WALTER:	Steve Walter, *pro se*, Bayside, NY.
FOR DEFENDANT-APPELLEE LONG ISLAND POWER AUTHORITY:	ADAM STOLOROW, Joyce E. Kung, Sive, Paget & Riesel, P.C., New York, NY.
FOR DEFENDANTS-APPELLEES ERIK KULLESEID, NEW YORK STATE OFFICE OF PARKS, RECREATION, AND HISTORIC PRESERVATION, AND NEW YORK DEPARTMENT OF STATE:	BLAIR J. GREENWALD, Assistant Solicitor General, Judith N. Vale, Assistant Deputy Solicitor General, Barbara D. Underwood, Solicitor General *for* Letitia James, Attorney General, State of New York, New York, NY.

Appeal from an order and judgment of the United States District Court for the Eastern District of New York (Brodie, *J.*; Bloom, *M.J.*).

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* The Clerk of Court is respectfully directed to amend the caption as set forth above.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order and judgment of the district court are **AFFIRMED IN PART, VACATED IN PART,** and **REMANDED** with the instruction that the district court dismiss all of the federal claims against defendants-appellants without prejudice for lack of subject matter jurisdiction.

Plaintiffs-appellants Donald Powers, Alena Walters, Robert Slawski, and Steve Walter, proceeding *pro se*, sued a group of state agencies and their commissioners, state power authorities, and a federal agency under state and federal law, seeking injunctive and declaratory relief related to their opposition to the construction of the Energy Education Center (the "Center") in Jones Beach State Park on Long Island, New York, which plaintiffs alleged was a preparatory step toward the construction of an offshore wind energy plant. Plaintiffs initiated this action in New York Supreme Court, Nassau County. The Bureau of Ocean Energy Management ("BOEM") removed the case to federal court. 28 U.S.C. §§ 1441(a), 1442(a)(1).

The taxonomy of plaintiffs' claims is not entirely clear from the face of the complaint, as it identifies a number of different defendants, a host of federal statutes, and a combination of direct claims against the federal agencies and legal arguments based on federal statutes raised in the context of plaintiffs' petition for review of state agency action under Article 78 of the New York Civil Practice Law and Rules, N.Y. C.P.L.R. § 7801 *et seq.* However, during the course of these proceedings plaintiffs have clearly stated their intent to bring certain federal claims directly—including, in relevant part, claims under the Land and Water Conservation Fund Act ("LWCFA"), 54 U.S.C. § 200301 *et seq.*, and the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 *et seq.*—while also alleging violations of certain federal statutes as part of their state court Article

78 petition challenging state agency action—including, in relevant part, claims regarding violations of the CZMA and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*

The district court adopted the Magistrate Judge's report and recommendation, which recommended that the court: (1) dismiss the claims without prejudice against the federal defendant, BOEM, for lack of subject matter jurisdiction on ripeness grounds; (2) dismiss the remaining federal claims with prejudice because they were barred, in part, by sovereign immunity, and because none of the federal statutes cited in the complaint created a private right of action; and (3) remand the remaining state claims to state court. Regarding the remaining state claims, the Magistrate Judge acknowledged that plaintiffs attempted to use Article 78 "as a mechanism which allows them to challenge defendants' actions without hindrance from . . . the lack of a private right of action under the federal statutes [at issue]," Suppl. App. at 76, and recommended "declin[ing] to exercise supplemental jurisdiction over all of plaintiffs' remaining claims . . . includ[ing] plaintiffs' claims under Article 78. These claims should be remanded to state court." *Id.* at 77. The district court adopted the report and recommendation, dismissing the federal claims and remanding the state law claims, apparently including the Article 78 claims, to state court. App. at 46. However, in doing so, the court discussed the availability of an Article 78 remedy based on a federal statute and concluded that Article 78 does not provide an independent basis for plaintiffs to assert federal claims under statutes that do not otherwise provide for private causes of action.[1] App. at 42–44.

[1] The district court's analysis and conclusion on this point is in some tension with its decision to adopt the magistrate's recommendation and remand the Article 78 claims to state court. In light

Beyond their requests for injunctive relief in the Complaint, plaintiffs did not file a separate motion for preliminary injunctive relief or a temporary restraining order,[2] and construction of the Center was completed before the district court ruled in this case.

Plaintiffs have expressly abandoned a number of claims on appeal.[3] In this appeal, they challenge: (1) the dismissal of claims against the Long Island Power Authority ("LIPA") raised pursuant to the LWCFA, 54 U.S.C. § 200305(f)(3); and (2) the dismissal of claims against the New York State Office of Parks, Recreation, and Historic Preservation (the "Parks Office"), Parks Office Commissioner Erik Kulleseid, and the New York Department of State pursuant to (a) the LWCFA, (b) the Coastal Zone Management Act, and (c) the National Environmental Policy Act.

In connection with each of these claims, plaintiffs sought orders enjoining construction of

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of the district court's remand of the state law claims, we understand the district court's discussion to be advisory and do not understand the district court to have purported to rule on the question whether, under New York law in New York state courts, plaintiffs may invoke the specific federal statutes at issue in connection with their petitions for Article 78 review of state agency action. As set forth more fully below, this tension has created some confusion on appeal.

[2] Plaintiffs explain that they "were granted by the State Supreme court a very quick date for the Petition to be heard," therefore they did not file a separate motion for preliminary injunctive relief. Appellants' Reply Br. (Gov't Defs.) at 53. But "[b]efore the Petition hearing date, and before scheduled demolition," BOEM removed the case to federal court. *Id.* After removal, plaintiffs believed "making another request for preliminary relief in the form of a post-removal motion would have surely been futile." *Id.* at 54.

[3] Two defendants, the BOEM and the Power Authority of the State of New York ("NYPA"), move for summary affirmance of the dismissal of the claims brought against them. In response, plaintiffs made clear that they are not pursuing an appeal as to the dismissal of the claims against these two defendants. Therefore, the motions for summary affirmance are moot. We also decline to consider any challenge to the district court's dismissal of claims against the New York State Energy Research and Development Authority because plaintiffs similarly assert that they do not wish to pursue such a challenge. The Clerk of Court has been instructed to amend the caption accordingly.

the Center and any parking or use restrictions around the Center. Under the CZMA, plaintiffs additionally sought declarations concerning whether preexisting buildings and the Center were water-dependent uses. Under the NEPA, plaintiffs sought orders that, among other things, would compel the defendants to obtain federal approval for the Center's construction. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review jurisdictional questions *de novo*, and "we are not limited in our right to refer to any material in the record" in resolving such questions. *Velez v. Sanchez*, 693 F.3d 308, 314 (2d Cir. 2012) (internal quotation marks omitted). We review the dismissal of claims for failure to state a claim "*de novo*, accepting all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff[s'] favor." *Id.* at 313 (internal quotation marks omitted).

As noted above, with respect to the federal claims at issue on appeal, the district court dismissed some of those claims without prejudice for lack of subject matter jurisdiction and dismissed other claims with prejudice, in part because claims against the New York State agencies were barred by sovereign immunity, and because the federal statutes upon which plaintiffs rely do not provide for a private right of action on the remaining federal claims. As set forth below, we need not address any challenges involving plaintiffs' Article 78 claims, including those claims that rely in part upon NEPA and CZMA, because the district court remanded those claims to the state court and no party argues on appeal that remand of those claims was improper. We conclude that the claims that are properly before us on appeal—plaintiffs' direct challenges based on CZMA and LWCFA—are moot or unripe. *See Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 405 (2d

Cir. 2006) ("[W]e are free to affirm a decision on any grounds supported in the record . . . .").[4] Thus, although we agree with the district court that all of the federal claims actually before us must be dismissed, we vacate the order and judgment as to those claims, and remand for the sole purpose of directing that the district court dismiss the direct CZMA and LWCFA claims *without prejudice* for lack of subject matter jurisdiction.[5] *See Green v. Dep't of Educ.*, 16 F.4th 1070, 1074 (2d Cir. 2021) (per curiam) ("When subject matter jurisdiction is lacking, the district court lacks the power to adjudicate the merits of the case, and accordingly Article III deprives federal courts of the power to dismiss the case with prejudice." (internal quotation marks and alteration omitted)).

Much of plaintiffs' briefing on appeal focuses on the question whether alleged violations of federal statutes that do not otherwise provide for a private right of action, such as NEPA and CZMA, may support an Article 78 petition under state law in New York state court. Plaintiffs apparently interpreted the district court order as dismissing their Article 78 claims on the merits, at least to the extent they invoked federal statutes in challenging state agency action in New York. As noted above, we understand the district court to have remanded to New York state courts plaintiffs' state law challenges to state agency action under Article 78. Plaintiffs have not asserted a separate direct federal NEPA claim.[6] Accordingly, this court need not address arguments related to NEPA briefed by the parties, nor the arguments relating to CZMA, in connection with state law

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[4] Even though LIPA has not raised these jurisdictional issues, this Court has an obligation to "satisfy [itself] that jurisdiction exists." *Bayerische Landesbank, N.Y. Branch v. Aladdin Cap. Mgmt. LLC*, 692 F.3d 42, 48 (2d Cir. 2012) (internal quotation marks omitted).

[5] Therefore, we do not reach the other grounds for dismissal relied upon by the district court.

[6] Even if we construed the complaint to include such a claim—and plaintiffs do not contend that it does—plaintiffs do not challenge (and therefore we do not address) the district court's conclusion that there is no private right of action under NEPA.

claims challenging state agency action pursuant to Article 78. Those claims have been remanded to state court.

We conclude that we lack jurisdiction with respect to plaintiffs' direct claims under LWCFA and CZMA for different reasons. Federal courts lack jurisdiction over cases that are moot or unripe. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537 (1978); *United States v. Traficante*, 966 F.3d 99, 106 (2d Cir. 2020). "The mootness doctrine ensures that the litigant's interest in the outcome continues to exist throughout the life of the lawsuit, including the pendency of the appeal." *Fox v. Bd. of Trs. of SUNY*, 42 F.3d 135, 140 (2d Cir. 1994) (internal quotation marks and alteration omitted). "A case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Tann v. Bennett*, 807 F.3d 51, 52 (2d Cir. 2015) (per curiam) (internal quotation marks omitted). A case is unripe where it presents "abstract disagreements over matters that are premature for review because the injury is merely speculative and may never occur." *Traficante*, 966 F.3d at 106 (internal quotation marks omitted).

Because the Center had already been constructed by the time the district court entered its order, plaintiffs' request to enjoin its construction was moot. *See Knaust v. City of Kingston*, 157 F.3d 86, 87–88 (2d Cir. 1998) (finding request to enjoin construction of park and federal funding of that construction moot after the construction was completed and all federal funding disbursed). The request for declaratory relief, and to compel the parties to obtain a federal review of the project, was moot for the same reason; plaintiffs have not identified any practical consequence from the requested declarations and federal agency review other than that they would block the Center's construction. *See Preiser v. Newkirk*, 422 U.S. 395, 402 (1975) (in determining whether

a request for declaratory relief is moot, courts consider "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" (internal quotation marks and emphasis omitted)).

As to the request to enjoin parking and use restrictions, plaintiffs never alleged facts explaining why they believed that the defendants were going to impose such restrictions, and they do not claim that these restrictions were ever put in place. Plaintiffs also have not identified any reason to believe the parking and access rules will change following the Center's opening, or that there is otherwise any live controversy regarding public access or parking in this area. Accordingly, to the extent that plaintiffs sought such an injunction because they anticipated that the restrictions would be imposed during construction or upon opening of the Center, the claim is moot because construction is complete, the Center was opened, and no parking or use restrictions are in place. *See Tann*, 807 F.3d at 52. To the extent that they sought an injunction against future restrictions, the claim was unripe. *See Traficante*, 966 F.3d at 106.

CONCLUSION

We have considered all of the plaintiffs' remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the dismissal of the federal claims, except that we **VACATE** the order and judgment to the extent that the dismissal of some of those claims was with prejudice, and **REMAND** with the instruction that the district court dismiss all of the federal claims against defendants-appellees without prejudice for lack of subject matter jurisdiction. The motions for summary affirmance are **DENIED** as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

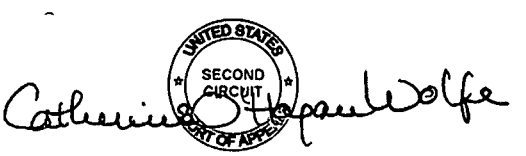

EXHIBIT A

to a society shall pay fifty cents per lot, per year as an assessment towards the expense of maintaining roads, etc: in the Cemetery, and no interment will be permitted unless all charges shall have been paid.

XII. These rules and regulations may be amended, revised and added to by the Board of Directors of the party of the first part, at any time without notice:

XIII. The directors from time to time may lay out or alter said avenues, paths or walks and make such rules and regulations for the government of the grounds as they may deem requisite and proper to secure and promote the general objects of the Society.

XIV. All foundations formonuments shall be at least six feet deep, and shall be built by the Superintendent of the Cemetery.

XV. Headstones, slabs and monuments which have fallen or which require repairing will be removed by order of the Directors unless replaced by the owners within thirty days after notification.

XVI. All stone masons, gardeners or others employed by lot owners to work upon their lots in any capacity must give notice to the Superintendent at the office of the Cemetery before beginning work, stating kind and style of work to be done, and receive written permit from Superintendent before bringing any materials into the ground, said permit to be shown whenever demanded, by the Superintendent of the Cemetery. All monumental work must have the surface next to the foundation dressed off true, to allow every part to be in contact with the foundation. The removal or building of any part of the foundation, the use of spawls between the base stone and foundations, or any other defective workmanship, will not be allowed.

XVII. All workmen, employed in the construction of tombs, erection of monuments etc. shall be subject to the control and direction of the cemetery, and any workmen failing to conform to this regulation will not be permitted to work in the grounds.

XVIII. Persons with liquors or refreshments will not be permitted to enter, and those having baskets or like articles must, during their stay in the grounds, leave them at the office of the Superintendent, No liquors or refreshments will be allowed to be taken upon the Cemetery ground to be disposed of in any manner whatsoever.

XIX. All persons are prohibited from climbing trees and from leaping or crossing over enclosures whether belonging to the Cemetery Association or to individuals.

XX. All those holding land in the Beth David Cemetery must file a map of their ground, before interments are made:

Recorded in Nassau County on May 31, 1932, at 1:55 P.M.

(RS)

1880/110

DEED #15432

Town of Hempstead

to

People of the State of New York

THIS INDENTURE, made the 31st day of May, 1932, between the Town of Hempstead, a municipal corporation, created and existing under and by virtue of the laws of the State of New York, and its ancient charters, hereinafter called the party of the first part, and the People of the State of New York, hereinafter called the party of the second part,

Witnesseth,

That pursuant to the vote of the electorate of the Town of Hempstead, affirmative [illegible] passed at the general election held on the 3rd day of November, 1931,

and to the resolution of the Town Board of the Town of Hempstead, duly adopted at its regular meeting held at the Town Hall intne Village of Hempstead, New York, on the 31st day of May, 1932, the party of the first part, in consideration of the premises and in consideration of the conditions and limitations hereinafter set forth, does hereby convey remise, grant and release unto the party of the second part, for the protection of the Jones Beach Causeway, the State Boat Channel System, and the lands already conveyed to the State, and in order to clear questions of ownership of certain meadowlands and lands under water as between the State and the Towns of Hempstead and Oyster Bay, and for the extension of the State Park, Parkway, Causeway and the Boat Channel System, all right, title and interest of the Town of Hempstead, in and to

All those certain parcels of town, land, meadowland, and land under water lying in the Town of Hempstead, County of Nassau, State of New York, as shown on map filed September 1, 1931, with the Town Board of the Town of Hempstead, entitled, "Map of a part of NassauCounty indicating the Jones Beach Causeway, Short Beach and the proposed Meadowbrook State Causeway, prepared by the Long Island State Park Commission, August 25, 1931," and more particularlybounded and described as follows:

Parcel I.

All those portions of Seaman's Island, Great Island, Low Island, Cross Teal Island, Flat Island, Long Meadow and Sanford's Island, lying outside of the strip of land described in certain deeds from the Town of Hempstead, to the State of New York, dated March 11,1927, and recorded in the Nassau County Clerk's Office on March 14, 1927, in Liber 1087 of deeds, at page 165, and dated June 19, 1928, and recorded in the Nassau County Clerk's Office on July 20,1928, inLiber 1366 of Deeds, at page 193; together with all lands under water lying within 1000 feet of the Jones Beach Causeway center line, all as shown on the above described map; including any rights to entrances to and service roads, paralleling the Jones Beach State Causeway,

Parcel II.

All those islands or portions of island known as Fighting Island, High FlatsMarsh, Pettit Marsh, Little Sand Creek Marsh, West Crow Island, and Jones Island, lying east of the westerly boundary of the Proposed Boat Channel shown on said map; together with all lands and lands under water lying within 1000 feet of the center line of the proposed Meadowbrook Causeway; and together with all the lands and lands under water lying within the limits of the proposed Boat Channel, all as shown on the above described map.

Parcel III.

All that tract of land being part of Short Beach and lands under water between the north shore of Short Beach and the southerly edge of Sloop Channel, lying west of the beach described in a certain deed from the Town of Hempstead to the State of New York, dated March 11, 1927, and recorded in the Nassau County Clerk's Office on March 14, 1927, in Liber 1087 of deeds at page 165, bounded on the south by the Atlantic Ocean, on the west by Jones Inlet, on the north by the southerly edge of Sloop Channel; and on the east by Jones Beach State Park, allas shown on the above described map.

Together with the appurtenances, and all the estate, rights and interest of the party of the first part, in and to said premises;

To have and to hold the premises hereinabove described unto the party of the second part, its successors and assigns forever, subject, however, to all outstanding leases, indentures, conveyances and instruments affecting the above described premises duly made on or before the 3rd day of November, 1931, by the Town of Hempstead.

Subject also to all covenants, conditions, limitations and reservations more particularly set forth in the proposition known as "Proposition Number [illegible]."

the Town Board of the Town of Hempstead, to the voters of the Town of Hempstead, and voted upon at the general election held on November 3, 1931, a certified copy of which proposition is herewith annexed and made a part hereof, with like force and effect as though written and included herein.

In witness whereof, the party of the first part, has caused this indenture to be executed, and its corporate name by its presiding officer and its corporate seal to be hereto affixed and attested by its Town Clerk the day and year first above written.

Town of Hempstead,

Attest: Robt. G. Anderson, Presiding Supervisor.

Franklin C. Gilbert
Town Clerk

Official Seal.

State of New York)
County of Nassau) SS On this 31st day of May, 1932, before me personally came Robt. G. Anderson, to me known, who, being by me duly sworn, did depose and say; that he resides at Freeport, Nassau County, New York, that he is the Presiding Supervisor of the Town of Hempstead, the municipal corporation described in, and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed pursuant to a resolution of the Town Board of the Town of Hempstead, and that he signed his name thereto by like order:

Wm. Cornell, Notary Public, Nassau County, New York.

PROPOSITION FOR THE CONVEYANCE OF ALL RIGHT, TITLE AND INTEREST OF THE TOWN OF HEMPSTEAD IN CERTAIN LANDS, MEADOWLANDS AND LANDS UNDER WATER FOR STATE PARK, PARKWAY, CAUSEWAY AND BOAT CHANNEL PURPOSES, SUBMITTED TO THE VOTERS OF THE TOWN OF HEMPSTEAD, TO BE VOTED ON AT THE GENERAL ELECTION ON NOVEMBER 3rd, 1931.

P R O P O S I T I O N

Shall the Town of Hempstead convey to the People of the State of New York for the protection of the Jones Beach State Causeway, the State Boat Channel System, and the lands already conveyed to the State, and in order to clear questions of ownership of certain meadowlands and lands under water as between the State and the Towns of Hempstead, and Oyster Bay, and for the extension of the State Park, Parkway, Causeway and the Boat Channel System all right, title and interest of the Town of Hempstead, in and to all those certain parcels of town, land, meadowland, and land under water lying in the Town of Hempstead, County of Nassau, State of New York, as indicated generally on a map filed September 1st, 1931, by the Long Island State Park Commission, with the Town Board of the Town of Hempstead, entitled: "Map of a part of Nassau County Indicating the Jones Beach Causeway, Short Beach and the proposed Meadowbrook State Causeway, prepared by the Long Island State Park Commission, August 25th, 1931, and more particularly bounded and described as follows:

Parcel 1 - All those portions of Seamans Island, Great Island, Low Island, Cross Teal Island, Flat Island, Long Meadow, and Sanford's Island, lying outside of the strip of land described in certain deeds from the Town of Hempstead to the State of New York, dated March 11, 1927, and recorded in the Nassau County Clerk's office on March 14, 1927, in Liber 1087 of Deeds, at page 165, and dated June 19, 1928, and recorded in the

Nassau County Clerk's office on July 20, 1928; in Liber 1365 of Deeds, at page 193; together with all lands under water lying within 1000 feet of the Jones Beach Causeway, center line, all as shown on the above described map; including any rights to entrances to and service roads paralleling the Jones Beach State Causeway;

Parcel II. All those islands or portions of island known as Fighting Island, High Flats Marsh, Pettit Marsh, Little Sand Creek, Marsh, West Crow Island and Jones Island lying east of the westerly boundary of the proposed boat channel shown on saidmap; together with all lands and lands under water lying within 1000 feet of the center line of the proposed Meadowbrook Causeway; and together with all the lands andlands under water lying within the limits of the proposed Boat Channel, all as shown on the above describedmap.

Parcel III. All the tract of land being part of Short Beach and lands under water between the north shore of Short Beach and the southerly edge of Sloop Channel lying west of the beach described in a certain deed from the Town of Hempstead to the State of New York, dated March 11,1927, and recorded in the Nassau County Clerk's Office on March 14, 1927, in Liber 1087 of Deeds, at page 165, bounded on the south by the Atlantic Ocean, on the west by Jones Inlet, on the north by the southerly edge of Sloop Channel, and on the east by Jones Beach State Park, all as shown on the above describedmap.

The deed conveying title to the People of the State of New York, is to contain the following covenants, conditions, limitations and reversions:

1. All expenses attendant upon and incidental to the development of any of the lands above described for State Park, Parkway, Causewayor Boat Channel purposes shall be borne and paid for XXX by the State of New York, and no such expense shall be borne by or be charge against the Town of Hempstead.

2. The Long Island State Park Commission shall commence the construction of a Causeway and parkway, to be known as the Meadowbrook State Causeway, over the lands conveyed in parcels II and III as described herein, connecting the Southern State Parkway at Meadowbrook State Park with Short Beach within five years from the date of delivery of said deed.

3. The Long Island State Park Commission shall construct a boat channel not less than 15 feet deep at mean low water and not less than 200 feet wide which boat channel shall extend from Woodcleft Creek near Freeport to the State boat channel near Jones Inlet.

4. The Long Island State Park Commission shall construct an additional bathhouse, parking field and a boat basin with dockage and anchorage for boats in connection with the development of Short Beach, such facilities to be available upon the completion of the said Meadowbrook State Causeway.

X 5. An easement is reserved to the Town of Hempstead or to the County of Nassau or both for a trunk sewer along the Meadowbrook State Causeway and across Short Beach for the disposal of fully treated sewage effluent only, provided the location of the trunk sewer and its outlet in the ocean shallhave the approval of the State Department of Health. X

6. The Long Island State Park Commission will cooperate with the federal authorities in the development and improvement of Jones Inlet; and the Commission agrees not to construct any facilities other than improvements to navigation within one thousand feet of such inlet.

7. In the event the said lands, meadowlands and lands under water are used for other than State Park, Parkway, Causeway or Boat Channel purposes, or in the event the work of constructing said Meadow brook Causeway is not commenced within five years of the date of delivery of said deed, the lands conveyed as herein provided shall immediately revert to and revest in the Town of Hempstead, and the State of New York, or its agents shall make, execute and deliver any and all proper instruments of conveyance necessary to effectuate suchrevesting of said lands in the Town of Hempstead.

8: It is the intent of this dedication and the Long Island State Park Commission agrees that the lands and meadowlands adjacent to the Jones Beach Causeway, excepting Long Meadow and Sanford's Island, and the lands and meadowlands adjacent to the proposed Meadowbrook State Causeway, shall always be maintained as nearly as possible as they are with the addition of landscaping and that Long Meadow and Sanford's Island, shall have only developments of a recreational character including swimming, outdoor games, boating, docks and channels. It is also the intent of this dedication and the Long Island State Park Commission agrees that no part of Shore Beach shall ever be rented for cottage sites or camps nor shall there be any artificial mechanical amusement devices, nor any other facilities excepting those incidental to park and parkway used and to healthful exercise and recreation.
Recorded in Nassau County on May 31, 1932, at 2:47 P.M.

(RS)

DEED #13433
Town of Oyster Bay
to
The People of the State of New York

THIS INDENTURE, made the 24th day of May, 1932, between the Town of Oyster Bay, a municipal corporation, created and existing under and by virtue of the laws of the State of New York, and its ancient charters, hereinafter called the party of the first part, and the People of the State of New York, hereinafter called the party of the second part,

Witnesseth,

That pursuant to the vote of the electorate of the Town of Oyster Bay affirmatively expressed at the general election held on the 3rd day of November, 1931, and to a resolution of the Town Board of the Town of Oyster Bay, duly adopted at its regular meeting held at the Town Hall in the Village of Oyster Bay, New York, on the 24th day of May, 1932, the party of the first part, in consideration of the premises and in consideration of the conditions and limitations hereinafter set forth, does hereby convey, remise, grant and release unto the party of the second part, forthe protection of the Jones Beach Causeway, the State Boat Channel System and the lands already conveyed to the State, and in order to clear questions of ownership of the premises as between the State and the Towns of Oyster Bay and Hempstead, all right, title and interest of the party of the first part, in and to all those certain parcels of land, meadowlands and lands under water lying in the County of Nassau, State of New York, as indicated generally on a map filed September 4, 1931, bythe Long Island State Park Commission with the Town Board of the Town of Oyster Bay, entitled, "Map of a part of Nassau County indicating the Jones Beach Causeway, prepared by the Long Island State Park Commission September 2, 1931," and more particularly bounded and described as follows:

All right, title and interest the Town of Oyster Bay may have of, in and to Seaman's Island, Great Island, Low Island, Cross Tool Island, Flat Island, Long Meadow and Sanford's Island and all lands under water, lying within 1000 feet of the Jones Beach Causeway center line, all as shown on the above described map.

Together with the appurtenances, and all the estate, rights and interest of the party of the first part, in and to saidpremises;