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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF THE CAPITAL)	
CRESCENT TRAIL, et al.,)	
)	Civil No. 14-1471
Plaintiffs)	
)	
v.)	
)	Washington, D.C.
FEDERAL TRANSIT)	
ADMINISTRATION, et al.,)	
)	Thursday, June 15, 2017
Defendants.)	2:40 p.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiffs:	David W. Brown KNOPF & BROWN 401 East Jefferson Street Suite 206 Rockville, MD 20850
	-and-
	Eric Robert Glitzenstein MEYER GLITZENSTEIN & EUBANKS LLP 4115 Wisconsin Avenue, NW Suite 210 Washington, DC 20016
	-and-
	John MacKnight Fitzgerald JOHN FITZGERALD, ATTORNEY AND ADVOCATE 4502 Elm Street Chevy Chase, MD 20815

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For the Defendants:

Kevin W. McArdle
U.S. DEPARTMENT OF JUSTICE
Wildlife & Marine Rescue Section
P.O. Box 7369
Washington, DC 20044-7369

-and-

Tyler L. Burgess
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources
Division
601 D Street, NW
Room 3204
Washington, DC 20004

-and-

Nancy-Ellen Zusman
U.S. DEPARTMENT OF TRANSPORTATION
200 West Adams Street, Suite 300
Chicago, Illinois 60606

For the Defendant
Intervenor:

Albert M. Ferlo, Jr.
PERKINS COIE LLP
700 13th Street, NW
Suite 600
Washington, DC 20005

Court Reporter

PATRICIA A. KANESHIRO-MILLER, RMR, CRR
U.S. Courthouse, Room 4700A
333 Constitution Avenue, NW
Washington, DC 20001
(202) 354-3243

P R O C E E D I N G S

1
2 THE DEPUTY CLERK: Good afternoon, Your Honor.

3 We have Civil Action Number 14-1471, Friends of the
4 Capital Crescent Trail, et al. v. Federal Transit
5 Administration, et al.

6 Will counsel for the parties please approach the
7 lectern and identify yourselves for the record and the party
8 or the parties that you represent, please.

9 MR. FERLO: Good afternoon. Albert Ferlo,
10 representing the State Intervenor, State of Maryland.

11 THE COURT: Welcome.

12 MR. FERLO: Thank you, Your Honor.

13 MR. GLITZENSTEIN: Good afternoon, Your Honor. Eric
14 Glitzenstein for the plaintiffs. And with me at counsel
15 table is David Brown and John Fitzgerald.

16 THE COURT: Welcome.

17 MS. BURGESS: Good afternoon, Your Honor. Tyler
18 Burgess for the federal defendants, and with me today at
19 counsel table is Mr. Kevin McArdle, also from the Department
20 of Justice, and Nancy-Ellen Zusman, Assistant Chief Counsel
21 for Federal Transit Administration.

22 THE COURT: Ms. Burgess, are you with Justice or are
23 you with the agency?

24 MR. FERLO: I'm with the Department of Justice.

25 THE COURT: DOJ, Civil Division?

1 MR. FERLO: With the Environment & National Resources
2 Division.

3 THE COURT: Thank you.

4 Anyone else?

5 All right, counsel, we're here for the motion to
6 stay.

7 We will hear first from the moving party, State of
8 Maryland.

9 Mr. Ferlo, you can have 20 minutes, but you can
10 reserve up to 5 minutes for rebuttal.

11 MR. FERLO: Thank you, Your Honor. I would like to
12 reserve 5 minutes, if I could.

13 THE COURT: That's fine.

14 You may proceed when you're ready.

15 MR. FERLO: Thank you.

16 May it please the Court, Albert Ferlo on behalf of
17 the State of Maryland, the intervenor in this case.

18 We are here today to talk about our motion for a stay
19 of the judgment pending appeal and specifically that portion
20 of the judgment that vacates the Record of Decision issued by
21 the Federal Transit Administration.

22 This Court issued an order back in August of 2016
23 vacating the Record of Decision. And at the time, there
24 were, as the Court characterized it in its most recent
25 opinion, a plethora of issues raised in that litigation. In

1 the August 3rd opinion, the Court decided one issue and
2 vacated the ROD.

3 We are here today because the Court has now decided
4 all of the issues in the case, has issued a final judgment,
5 and the circumstances surrounding vacating the ROD, we
6 contend, have changed in that sense. The circumstances have
7 changed because the May 30th judgment rules in favor of the
8 state and federal defendants on all issues except the one,
9 and that judgment makes clear that the reasons for ruling
10 against the State are limited to the May 22nd opinion.

11 The other part of the changed circumstances is that
12 the State's ability to fund nonconstructive-related
13 activities that are allowed to go forward without the ROD,
14 these are activities that the state can do, the funding for
15 that is at an end. There is little money left for the State
16 to continue on in doing what they have been doing.

17 The other changed circumstance is that the analysis
18 of the Metrorail ridership issue was completed by the agency.
19 I understand the Court disagreed or didn't find that analysis
20 sufficient, but it was the result of a 35-page study and an
21 additional study by the FTA.

22 In ruling that that analysis and the FTA decision was
23 insufficient, the Court essentially said it's deficient
24 because you failed to acknowledge and to discuss the material
25 or the points that were in the three declarations that

1 plaintiffs had said were related to their claim.

2 The other reason why we're here, Your Honor, too, is
3 that in our renewed motion for summary judgment that we filed
4 back in December once that analysis was done, we at that
5 point in time asked the Court to reconsider the vacatur order
6 that you had issued. The May 22nd opinion doesn't address
7 that issue.

8 THE COURT: I have already done it. I have done it
9 twice, actually.

10 MR. FERLO: Understood.

11 THE COURT: What you're asking for is for me, for a
12 third time, to do what you want. The Court is willing to
13 listen to what arguments you have as to how you say things
14 have changed. And I think you're probably very well aware,
15 Mr. Ferlo, of the standard. It is essentially the same
16 standard as a preliminary injunction. It is a very high bar
17 to get a Court to grant a stay under these circumstances.
18 I'm willing to listen to your arguments on it --

19 MR. FERLO: Thank you, Your Honor.

20 THE COURT: -- but it is a pretty substantial
21 standard.

22 MR. FERLO: It is. We are asking you for the third
23 time because we can't ask the Court of Appeals without asking
24 you again for the third time.

25 THE COURT: I see.

1 MR. FERLO: So we're here.

2 Let me address the standards. The Court is familiar
3 with them. Likelihood of success on the merits. We believe
4 that the analysis that was prepared by both the State and
5 then subsequently by the FTA addressed the issues that were
6 raised concerning the decline in Metrorail ridership and its
7 impact on the Purple Line. That analysis covered both the
8 environmental impacts that would flow from a decreased
9 ridership for Metro, as well as whether or not the decreased
10 ridership for Metro would have an impact on the viability of
11 the Purple Line.

12 The Court raised an issue that found a flaw because
13 there are three declarations that plaintiff had submitted
14 that were part of the administrative record that the agency
15 had in its possession, the agency said they considered. But
16 the Court's position was, the Court's ruling was that simply
17 saying that you have considered them is not enough.

18 When looking at those declarations and looking at the
19 analysis and determination that was made, the declarations
20 themselves raised essentially a single issue. They raised
21 various points about how the initial preliminary analysis
22 that was submitted to the Court as part of the Rule 59 motion
23 wasn't sufficient because the declarants didn't agree with
24 the assumptions. Primarily, at bottom, their disagreement
25 was you're still assuming Metro is going to be around, and

1 you have no idea what happens if Metro goes away, and whether
2 or not it goes away totally or just there's no passengers
3 coming to the Purple Line from Metro.

4 The analysis that was prepared and the determination
5 by FTA actually did assume, looked at what happens if there
6 are no passengers coming from Metrorail and what happens to
7 the Purple Line. That analysis showed that even with no
8 passengers coming from Metrorail, the Purple Line ridership
9 was more than robust to support the determination to build a
10 light rail line along this corridor.

11 THE COURT: Wasn't one of the main purposes for
12 building the Purple Line to create a public transportation
13 system that enhances and improves the existing WMATA system?

14 MR. FERLO: The intent wasn't to improve the existing
15 WMATA system, no, Your Honor. It was to connect to the WMATA
16 system to allow passengers in Silver Spring, one arm of the
17 Red Line, to get over to Bethesda, the other arm of the Red
18 Line, without having to go through --

19 THE COURT: Wouldn't you say that's enhancing and
20 improving it?

21 MR. FERLO: Well, it --

22 THE COURT: It's giving people greater vehicles,
23 greater ways to get from one point to another.

24 MR. FERLO: There is no doubt it's enhancing citizens
25 in that corridor, their ability to go from one place to

1 another more easily. One of the primary purposes of this is
2 to serve the citizens in the corridor to give them faster
3 access and more reliable access in an east-west direction as
4 opposed to having to come all the way down into the city.

5 THE COURT: How would that purpose be served if your
6 assumption were to be put in place?

7 MR. FERLO: People will still be able to travel
8 east-west, they will still be able to go from Silver Spring
9 to Bethesda. They will still be able to go from Silver
10 Spring to College Park, New Carrollton. That remains no
11 matter what happens to Metro, no matter how many people come
12 off of Metro or get onto Metro from the Purple Line.

13 THE COURT: Wouldn't that be a diminution in the
14 value to the federal government, the taxpayers' dollars, if
15 the WMATA system were to shut down and not provide the
16 27 percent, whatever the percentage most recently calculated
17 is of the ridership of the Purple Line?

18 MR. FERLO: Well, Your Honor, whether or not it is a
19 diminution of value to the WMATA system or the Purple Line,
20 speaking in terms of value as far as dollar values, that is
21 really not a consideration relevant to NEPA analysis. NEPA
22 deals with reasonably foreseeable impacts to the human
23 environment. A decision by the government, whether it be the
24 federal government or the state government, to expend money
25 on a project is not governed by what the NEPA analysis is.

1 The NEPA analysis requires the agency to take a hard look at
2 those environmental impacts. But you could say the impacts
3 are horrible but we think this is a valid project. NEPA
4 doesn't stop that, and the Supreme Court has said that
5 repeatedly.

6 So to the extent that an issue is, is the State
7 spending its money wisely, is the FTA spending its money
8 wisely, it is not something that is actually subject to this
9 litigation. It is not part of what a NEPA analysis is about,
10 and it is not grounds for reversing the agency's decision.

11 THE COURT: It could affect whether or not there is a
12 more modest or more limited means to achieve the same result,
13 especially if one of the bedrock assumptions for which the
14 program is based on would be in doubt. Would it not?

15 MR. FERLO: No. Well, Your Honor, no. No. Because
16 the choice, ultimately the choice of how to proceed is left
17 to the agency. Whether or not the agency, in making that
18 choice, has adequately considered the environmental impacts,
19 that is what NEPA is about. And if it can be demonstrated
20 that those impacts or those effects caused by various other
21 outside influences have been looked at, have been analyzed,
22 and have been disclosed, then, under NEPA, you can choose
23 whatever action you want to choose as long as it has been
24 studied in the EIS. So, no, Your Honor, I would respectfully
25 disagree with your analysis on that.

1 THE COURT: That wasn't intended to be the analysis.
2 The analysis, in my opinion, speaks for itself. In my
3 opinion, the State of Maryland didn't give it the hard look
4 it is required to give it.

5 MR. FERLO: We understand --

6 THE COURT: It did not do that.

7 MR. FERLO: -- and the basis for that are the three
8 declarations and the issues that are raised in those three
9 declarations. At bottom, those declarations say you should
10 look at a situation where Metrorail is either nonexistent or
11 the passenger levels are so low. We looked at that. We
12 examined that. And that's a scenario that neither the State
13 nor FTA has found to actually be reasonably foreseeable,
14 which is one of the bedrock principles of NEPA analysis in
15 any event. You should be looking at issues and impacts that
16 are reasonably foreseeable. And the MTA and the FTA took the
17 position that that is just simply not going to happen. Metro
18 going away is not going to happen. There may be fewer
19 riders. And we looked at what happens if there are fewer
20 riders. And what happens is, yes, passenger levels on the
21 Purple Line go down, but even under the most extreme --

22 THE COURT: Let's talk about the irreparable harm
23 because you only have about five minutes left if you're going
24 to reserve five minutes for rebuttal.

25 MR. FERLO: Thank you, Your Honor.

1 THE COURT: Isn't in the final analysis the
2 irreparable harm you keep alluding to here is self-inflicted
3 harm?

4 MR. FERLO: No, Your Honor.

5 THE COURT: Your client entered into a contract, did
6 it not, while this litigation was pending?

7 MR. FERLO: Yes, Your Honor.

8 THE COURT: After the litigation had been filed,
9 after the summary judgment motion had been filed, they
10 entered into a contract, the terms of which are the vehicle
11 that are causing the harm that you are complaining about
12 right now; right?

13 MR. FERLO: Yes.

14 THE COURT: Exactly.

15 And they entered into a contract that did not have an
16 escape clause if the litigation didn't go in the direction
17 they had hoped for; right?

18 MR. FERLO: Your Honor, there are --

19 THE COURT: That's a "yes" or "no" question. Was
20 there an escape clause?

21 MR. FERLO: There were various --

22 THE COURT: Was there an escape clause for the State
23 of Maryland if the litigation didn't go in the way they
24 thought, they hoped it would go?

25 MR. FERLO: I am not prepared to say there was no way

1 that would happen, but I --

2 THE COURT: Sir, it is a simple question. Was there
3 an escape clause in the contract for Maryland that they
4 negotiated where they could escape the consequences you're
5 complaining about now if the litigation didn't go in the
6 direction they hoped it would?

7 MR. FERLO: Not that I'm aware of, Your Honor.

8 THE COURT: Of course. The answer is no, there
9 wasn't.

10 Was there an escape clause for the private
11 contractors?

12 MR. FERLO: Yes.

13 THE COURT: Yes, there was. Okay.

14 So Maryland was the one who took the risk on behalf
15 of the citizens of Maryland, the taxpayers of Maryland, to
16 enter into a contract while this litigation was pending
17 without an escape clause in the event the litigation didn't
18 go the way they hoped it would. You're the ones that came up
19 with that deal so to speak.

20 MR. FERLO: Uh-huh.

21 THE COURT: So why should the Court in this situation
22 here bail you out of the gamble that you took?

23 MR. FERLO: We're not being asked to be bailed out of
24 the gamble.

25 THE COURT: You're not? What are you asking for?

1 You're asking for \$900 million, are you not?

2 MR. FERLO: I'm asking for the Record of Decision --

3 THE COURT: Sir, I asked you a question.

4 MR. FERLO: I'm sorry. I didn't hear you.

5 THE COURT: If I ask you a question, it is your job
6 to answer it.

7 You're asking for \$900 million; are you not?

8 MR. FERLO: We are asking FTA for \$900 million.

9 THE COURT: You're asking this Court to make it
10 possible for you to get \$900 million; is that not correct?

11 MR. FERLO: That would be the outcome, yes, Your
12 Honor.

13 THE COURT: Exactly. That's what you want this Court
14 to do, essentially to bail you out for a contract situation
15 that you're complaining about now that you were the authors
16 of, that you were the creators of.

17 Have you attempted to renegotiate the contract in
18 light of the litigation not going in the way that you wished
19 it would?

20 MR. FERLO: I'm not aware of any attempts to
21 renegotiate the contract, but you asked me a question about
22 whether or not the injury was self-inflicted. Our
23 response to that --

24 THE COURT: The Court is already satisfied that it
25 is --

1 MR. FERLO: Our response --

2 THE COURT: -- based on what the facts are.

3 MR. FERLO: I understand that. I would like to put
4 on the record what our response is.

5 To the extent that this injury, the State's
6 continuing efforts to implement this process, are considered
7 self-inflicted injuries for the purposes of equitable relief
8 would mean that any project could be stopped simply upon
9 filing a complaint. Once a complaint is filed against a
10 public project, then it is incumbent under this theory, it is
11 incumbent --

12 THE COURT: Under what theory?

13 MR. FERLO: Under the theory that it is a
14 self-inflicted injury to continue to implement that project.

15 THE COURT: No one forced the State of Maryland to
16 enter into the contract they entered into if you're not
17 complaining about the consequences --

18 MR. FERLO: No one --

19 THE COURT: Nobody forced Maryland to do this --

20 MR. FERLO: And no one bothered to file a motion with
21 the Court to seek injunctive relief to prevent that from
22 happening, which is typically the normal course of events. A
23 project is approved. Litigation is filed. Plaintiffs bring
24 a motion --

25 THE COURT: You could have waited until the ruling on

1 summary judgment took place, but you didn't.

2 MR. FERLO: Your Honor, yes. We could have waited.
3 We could have waited for a year and a half.

4 THE COURT: That is a specious argument. Don't make
5 arguments like that in this courtroom, sir. That's a
6 specious argument.

7 It was argued in June. The Court issued an opinion
8 in August. Correct?

9 MR. FERLO: That's correct, Your Honor.

10 THE COURT: You could have waited until you got the
11 opinion and --

12 MR. FERLO: The lawsuit -- I'm sorry, Your Honor.

13 THE COURT: One at a time for my reporter. You get
14 it?

15 MR. FERLO: Uh-huh.

16 THE COURT: Okay. You could have waited. You didn't
17 wait. You entered into a contract without an escape clause
18 provision. You rolled the dice that you would win in this
19 Court. And as it turned out, you didn't. And then you
20 rolled the dice again when, instead of doing the supplemental
21 environmental impact statement, you decided to seek a change
22 in the Court's existing ruling. It might have been done by
23 now, the supplemental, but instead, you chose a litigation
24 strategy that has put you in the place that you're in today.

25 You have three minutes left. You want to reserve it

1 or use it?

2 MR. FERLO: I will reserve it. Thank you, Your
3 Honor.

4 THE COURT: Thank you.

5 You can have 20 minutes.

6 MR. GLITZENSTEIN: Thank you, Your Honor.

7 THE COURT: If you think you need it.

8 MR. GLITZENSTEIN: In the interest of simply
9 responding to a couple of the points that were made by
10 counsel --

11 THE COURT: You choose how you wish to argue it.

12 MR. GLITZENSTEIN: As Your Honor recognized, it is,
13 as the Court of Appeals has said, an extraordinary remedy.

14 Just to respond very briefly to a couple of the
15 points that have been made. The State's position that there
16 are changed circumstances, the only changed circumstance
17 other than self-inflicted injury which I heard was that the
18 Court has issued a ruling on other issues in the meantime,
19 but of course the Court's vacatur was not based upon any of
20 those other issues; it was based upon the SEIS. As Your
21 Honor pointed out, not once, but twice the Court addressed
22 the vacatur standard under *Allied Signal*.

23 In our view, in fact, there are at least five changed
24 circumstances which reinforce the rationale for vacatur in
25 the first place.

1 Number one, Your Honor at their request gave them an
2 opportunity to come up with a rationale for either doing an
3 SEIS or not doing one. That was on reconsideration. As Your
4 Honor knows, they could have immediately embarked on the
5 SEIS. They asked for that opportunity. And as Your Honor
6 has ruled, they essentially came up with a self-justifying
7 rationale which ignored all the submissions that plaintiffs
8 made and fundamentally did change the rationale for the
9 project, which was based heavily upon interrelatedness with
10 Metro and has now basically distanced themselves from that in
11 a significant way.

12 Let me, as an aside, be clear about this. Our
13 position was never that Metro was necessarily going to
14 disappear. Our position, if you look at the declarations
15 that they ignored from Dr. Lysy, who worked for The World
16 Bank for 30 years and analyzed projects exactly like this
17 one, is that a substantial decline in Metro ridership could,
18 as Your Honor was just suggesting, change the cost-benefit
19 calculation that was relied upon to justify this project. If
20 you look at the underlying documents, it was heavily based on
21 ridership projections of a certain amount. In fact, they
22 continued to be repeated in the declaration that was filed in
23 support of their stay motion from Mr. Rahn, who said that we
24 based our projections on 74,000 riders a day. Now they come
25 in, and in their brief, in the very same submission to the

1 Court, say, well, maybe if it goes down to 50,000 riders a
2 day, we would have the same justification. This is why a
3 SEIS was necessary.

4 And instead of responding to Your Honor's original
5 ruling by saying this is commonsensical -- and I think this
6 is also an important point to get across as we go forward in
7 this case. Your Honor made no secret of the fact even before
8 the summary judgment ruling that you had a concern about
9 this. As Your Honor may recall, at the June 2016 argument,
10 this was a heavy focus at that particular juncture, was
11 whether or not the Metro problems, which everyone in this
12 area knows and the Court took judicial notice of, was
13 extraordinary and unanticipated. No one is saying they
14 necessarily should have anticipated, but when they happened,
15 the question was: Do you take a hard look at alternatives
16 that might be more feasible, more sensible, more cost
17 beneficial in light of these changes in the ridership
18 projections?

19 THE COURT: Would not those other alternatives at
20 least be potentially less expensive for the federal
21 government's contribution? Instead of a \$900 million
22 contribution, a more modest approach, whatever that might be
23 hypothetically, might only require a federal contribution of
24 \$500 million, hypothetically again speaking. Right?

25 MR. GLITZENSTEIN: Right, Your Honor.

1 THE COURT: And that's the whole idea. There is an
2 interrelationship between the degree of the size of the
3 program warranted under the circumstances and the amount of
4 money that the federal government is being asked to pony up
5 towards it. At this point, it is 900 million. Perhaps under
6 a more modest approach, based on a reevaluation of the WMATA
7 situation, 500 million or 300 million -- I don't know --
8 maybe a much lesser amount, which would protect the federal
9 taxpayers.

10 MR. GLITZENSTEIN: Correct, Your Honor. And as Your
11 Honor pointed out, it could actually be a more modest project
12 that would both protect federal taxpayers and reduce the
13 environmental footprint of the project, a potential win/win.

14 The State keeps acting as if they're not asking for
15 federal money. That's why we're here in this case. When you
16 hear Mr. Ferlo's description, he keeps saying it is our
17 choice. Well, it is the State's choice in terms of their
18 preference, that's true. But the reason NEPA comes into play
19 is when you ask the federal government for nearly a billion
20 dollars, the federal agency that is being asked for the money
21 is obligated to take a hard look at an alternative and
22 whether or not the federal government should dispense funds
23 of that magnitude or whether the federal government can look
24 at it and say, assuming we want to spend any federal money at
25 all, and these matters are in a state of flux as to what the

1 federal government's priorities on these kinds of projects
2 are, maybe we can get away with spending half the money or a
3 quarter of the money on a rapid bus transit system. Now, we
4 know the State doesn't like that. But the point of a NEPA
5 process and the theory behind NEPA is that a hard look may
6 actually inform those kinds of decisions in light of new
7 information that may come to the fore.

8 It seems that their arguments are based on a lack of
9 understanding of not only Your Honor's rulings in this case,
10 which we don't believe they have demonstrated a likelihood of
11 success with respect to -- we don't think they have
12 demonstrated any serious issue as to the correctness of Your
13 Honor's rulings, but also a fundamental lack of appreciation
14 of the whole NEPA process that Your Honor has now ruled is
15 necessary and should take place.

16 I would say two other significant changed
17 circumstances which cut in our favor since Your Honor's
18 original ruling, one is the decision that they made to
19 continue to spend money on this project. This is an
20 absolutely crucial aspect of Your Honor's colloquy with
21 counsel for the State. Even after Your Honor issued the
22 August 2016 ruling, the Rahn declaration says, point blank,
23 we continue to spend state money on this project with the
24 expectation and assumption that we would get reimbursed by
25 the federal government. That is self-inflicted injury

1 squared. Even after the Court has decided that an SEIS is
2 necessary and while they're seeking reconsideration, without
3 any idea as to what the outcome of that process would be
4 under the best case scenario, since reconsideration is
5 difficult to accomplish, they still went ahead and decided to
6 spend hundreds of millions of dollars on a project that the
7 Court had already determined had serious legal problems.

8 So, again, we're not here to talk about the State's
9 fiscal responsibility. That's their business. But from the
10 standpoint of a stay, which as Your Honor has pointed out is
11 tantamount to a preliminary injunction, very high, stringent
12 standard, this is the ultimate example of self-inflicted
13 injury. So, to me, the developments that have occurred since
14 Your Honor's initial ruling, if anything, reinforce the basis
15 for the vacatur rather than cut in the other direction.

16 THE COURT: What would be the practical consequences
17 if I were to grant a stay? Would that not open the
18 floodgates for the 900 million, which could be expended at
19 whatever rate the State expended it only to find out months
20 from now or maybe longer that the Court of Appeals may uphold
21 the Court's decision on the SEIS? How do you get the money
22 back? There is no way to get the money back; is there?

23 MR. GLITZENSTEIN: It is practically impossible, Your
24 Honor, which is why vacatur is the appropriate remedy in a
25 situation like this.

1 In addition to that concern, which is once you have
2 spent the money, how do you undo the damage that has been
3 done --

4 THE COURT: Is there any way to claw it back?

5 MR. GLITZENSTEIN: There is no feasible way to do
6 that.

7 In addition to that, obviously, if the construction
8 has proceeded apace, the whole argument the State will make
9 is we have already gone down the road. They are already
10 making that argument based on a contract they opted to sign.
11 One can imagine what the argument would be if they go out and
12 destroy 40 acres of woods and lay the groundwork
13 construction-wise, which will happen during the course of any
14 appellate proceedings. So as a practical matter, not only is
15 there no logic or legal theory that underlies that, but it
16 would actually mean that you would be giving plaintiff no
17 remedy whatsoever. I think this is actually a crucial point,
18 Your Honor, which I think, on top of all the other arguments
19 we've discussed, reinforces why a stay has to be rejected.

20 You have ruled that they have violated NEPA and an
21 SEIS is necessary.

22 Now, as I understand the State's position just
23 reinforced today -- because I read their papers several times
24 to understand this -- they're only asking for a stay of the
25 vacatur part of Your Honor's ruling. They don't seem to be

1 asking for a stay of Your Honor's ruling that they have to do
2 an SEIS. If you put those things together, what they're
3 basically saying in so many words is give the plaintiffs a
4 completely pointless make-work exercise remedy. If not for
5 stating the fact that if any kind of premise has to be
6 applied, it's that environmental injury is irreparable, not
7 self-inflicted injury of this kind. But their argument
8 basically is go ahead and do an SEIS that is a complete
9 pointless paperwork exercise.

10 In our papers, Your Honor, we cite one Supreme Court
11 case after another, *Public Citizens v. The Department of*
12 *Transportation*, as being one, that say the whole point of
13 NEPA is procedural. We recognize that. We're not saying at
14 the end of this process they can't make a new decision
15 assuming they can comply with the 5309 criteria, which, as
16 Your Honor recognizes, they still have to comply with.

17 THE COURT: That's down the road. That's not right
18 now.

19 MR. GLITZENSTEIN: I agree with that, Your Honor.
20 But on the NEPA standpoint, because it is procedural, their
21 argument is give the plaintiffs no remedy whatsoever, because
22 unless this decision is put off while the NEPA process is
23 pursued and the project is constructed, then we essentially
24 get no remedy at all.

25 THE COURT: It is pretty obvious to this Court, at

1 least, what they're doing, they want a ruling out of this
2 Court as fast as possible so they can get the Court of
3 Appeals to grant the stay. That's what is going on here. I
4 haven't been around this Court 15 years and not figured that
5 out.

6 Look, I've got to apply the standards that have to be
7 applied under our Circuit's law. There are very high
8 standards for a stay under these circumstances. It is very
9 high. It is essentially like granting a PI.

10 MR. GLITZENSTEIN: I agree, Your Honor. We
11 understand a particular situation where a District Court has
12 made a decision and part of their obligation is to convince
13 the Court who made the decision they're likely to prevail on
14 appeal, which is an inherently difficult position for any
15 party seeking a stay, but just to be clear about this, we
16 don't believe this is a case where they're even going to have
17 a very coherent argument in the Court of Appeals on the
18 merits.

19 I don't want to sort of go overboard on this because
20 we understand where we are in this process. But even on the
21 obligation to consider plaintiffs' submissions that they
22 made to the agency when you remanded this issue to them,
23 Your Honor said in your ruling on why an SEIS ultimately
24 was necessary that this case really was exactly like the
25 *PEER* case, the *Public Employees for Environmental*

1 *Responsibility* --

2 THE COURT: Very similar.

3 MR. GLITZENSTEIN: -- they're going to have a very
4 difficult time, I would think, convincing anybody that this
5 case is not covered by that case. As you pointed out, this
6 is almost a functionally identical situation, where on remand
7 the Court said address a certain issue. Several days later
8 we went out of our way to submit -- and these are not
9 half-a-paragraph declarations, as Your Honor has recognized,
10 these are 20-, 25-page declarations from acknowledged experts
11 whose credentials they never questioned. And the FTA said
12 not a word about them in the ultimate decision it made. They
13 say in the reply brief that they were not mentioned at all in
14 the letter that we sent. That is simply not true. If you
15 look at the letter, which is in the record, several times we
16 specifically referred both generally to the importance of
17 considering independent experts and specifically pointed out
18 that we were attaching declarations from these very experts
19 in the field.

20 Again, not to belabor this point, but I think even on
21 the merits issue, which is a threshold requirement they have
22 to meet to get a stay, they're going to have an awfully
23 difficult time convincing the D.C. Circuit that the *PEER* case
24 does not fully apply under these circumstances.

25 THE COURT: What about this self-inflicted injury

1 problem? I mean, our courts in this circuit are not in the
2 business of granting extraordinary relief when, first of all,
3 the injury is monetary; but second of all, when it is
4 monetary but self-inflicted monetary. I just don't see the
5 courts in this circuit having a history of granting under
6 those circumstances.

7 Have you seen anything like that?

8 MR. GLITZENSTEIN: No, Your Honor. In fact, we point
9 out cases where courts have specifically said that is a
10 factor that cuts against the party seeking a stay or an
11 injunction when you have voluntarily gone out and imposed
12 some kind of a financial injury on yourself. Frankly, I
13 don't even understand precisely the argument that we should
14 have sought a preliminary injunction to prevent them from
15 hurting themselves. I have never heard that as a basis for a
16 preliminary injunction before. I have heard the argument
17 that you seek a preliminary injunction to prevent injury to
18 yourself, which is what you have to prove, but if we had come
19 to this Court and said we need a preliminary injunction
20 because we're worried that they're going to visit injury upon
21 themselves by entering into a contract that they don't have
22 to enter into now, quite frankly, I think Your Honor would
23 have appropriately laughed us out of the courtroom if we had
24 done that. And in fact, when we had the initial status
25 hearing in the case, you raised why we're going to have

1 summary judgment proceedings and specifically pointed out
2 that it would be in no one's interest to engage in
3 preliminary injunction proceedings. The federal government's
4 lawyer agreed with that and said that would not be in
5 anybody's interest. You then set a very rapid and reasonable
6 schedule for summary judgment briefing. Your Honor ruled
7 very quickly after that. And so this notion that they
8 couldn't have waited while this case was basically being put
9 on a reasonable track for resolution is beyond me. And in
10 fact, it especially makes no sense because there is a very
11 short statute of limitations, as Your Honor knows, for filing
12 these kind of cases because Congress wanted them to be
13 considered and ruled on quickly. Plaintiffs acted completely
14 consistent with that understanding; the Court did, as well.
15 The only party really that didn't was Maryland, which I hate
16 to say it, really acted as if it was trying to steamroll this
17 entire project so that any ruling the Court issued they could
18 raise some questions about. That is not an appropriate way
19 for any party to act when they want to come in and ask for an
20 equitable remedy, which is what they're asking the Court to
21 provide.

22 As I pointed out, in addition to the self-inflicted
23 injury that Your Honor talked to, if you look carefully at
24 the declaration they filed, the timing is really quite
25 remarkable in some ways. Not only did they enter into the P3

1 contract shortly before Your Honor had a hearing and during
2 summary judgment briefing, but according to that declaration,
3 two days after the hearing Your Honor held on summary
4 judgment, where Your Honor clearly had raised concerns about
5 the relationship between Metro and the validity of this
6 project, according to their own declaration, a "proceed with
7 all preconstruction activities" order was issued to the
8 private contractor two days later.

9 THE COURT: There must have been someone with a
10 crystal ball in an office somewhere in Maryland.

11 MR. GLITZENSTEIN: Perhaps. Or perhaps they thought
12 they would be able to use that kind of development like an
13 argument they're making now. It doesn't seem to be the kind
14 of argument that augurs well for issuing a stay pending
15 appeal. Our view is that they have not met any of those
16 standards.

17 THE COURT: You've had a lot more experience, and I'm
18 sure Mr. Ferlo has, than this Court has had with SEIS's in
19 the course of your career and his career. After the Court's
20 ruling in August, if they had launched forward and done an
21 SEIS, isn't it realistically possible it would have been done
22 by now?

23 MR. GLITZENSTEIN: In my experience, yes, Your Honor.
24 SEIS's generally take somewhat less time than a full EIS.
25 You need to have a public comment period --

1 THE COURT: It doesn't have to be as long, does it?

2 MR. GLITZENSTEIN: It has to be long enough to
3 address the issues, and this issue that Your Honor has
4 remanded, it is obviously a crucial one that goes to the
5 heart of the validity of the project. It really talks about
6 looking at the underlying rationale and whether or not it has
7 changed based on the developments.

8 In my view, I think they made a tactical decision, as
9 Your Honor indicated, to seek reconsideration as opposed to
10 simply embarking on the SEIS.

11 THE COURT: Get it done.

12 MR. GLITZENSTEIN: They could have gotten it done.
13 And they could have been here now or shortly after now
14 saying: Here is our analysis. Either we decided yes, we
15 should change the approach that we're taking and do something
16 which is more modest and less expensive and less
17 environmentally damaging, or if not, here is why we continue
18 to think that this is an appropriate project to pursue. But
19 in either event, we would be in a different place than we are
20 now.

21 THE COURT: Which the Court of Appeals might have had
22 the benefit, if the Court ended up not agreeing with them,
23 they could have appealed that. If the Court agreed with
24 them, you could have appealed it. But either way, the Court
25 of Appeals would have had the benefit of the supplemental

1 environmental impact statement. Now it is not going to have
2 that.

3 MR. GLITZENSTEIN: That's correct, Your Honor.

4 Well, the bottom line from plaintiffs' standpoint is
5 they haven't met any of the standards for a stay. We
6 respectfully request that their request be denied.

7 Thank you, Your Honor.

8 THE COURT: Thank you.

9 Mr. Ferlo, you get three minutes.

10 MR. FERLO: Thank you, Your Honor.

11 Just a couple of things. I respect the career
12 Mr. Glitzenstein has had in this area. I have been doing it
13 for 35 years.

14 THE COURT: I know both of you have been doing this
15 stuff like all the time.

16 MR. FERLO: Yes. And in my experience, doing an SEIS
17 under the conditions that were created by your August 3rd
18 opinion would take much more time than six months, and here
19 is why.

20 THE COURT: What do you think it would have taken?

21 MR. FERLO: At the time of the August 3rd opinion,
22 there were still pending -- I think if you look at your
23 May 30th, your most recent opinion -- there was still pending
24 five to six other claims for supplemental EIS. We were in
25 the position of saying: Okay, we lost on one SEIS issue. We

1 don't know where we are with the other issues. We don't know
2 if the underlying EIS is valid. But let's go ahead, take the
3 time, and prepare an SEIS on that one issue and come back to
4 the Court and see, maybe we will win the rest of them, but
5 maybe we will have to do another --

6 THE COURT: Which you did.

7 MR. FERLO: We didn't know at the time, and at the
8 time, we filed the motion for reconsideration. The Court
9 said it's up to the agency in the first instance to make that
10 determination, and the agency did that. They looked at that
11 issue, and as it stands now, the only thing standing in the
12 way of that analysis that was completed by both MTA and the
13 State and being able to go forward with the project is your
14 finding that it should have specifically considered those
15 declarations that plaintiff had submitted.

16 Now, those declarations, by the way, were submitted
17 in the context of this litigation. So those are litigation
18 declarations, one of which was actually responded to in the
19 litigation by FTA. FTA looked at one of those -- I think it
20 was the Allen declaration, and it is the second declaration
21 of Lucy -- I can't pronounce her last name --

22 THE COURT: I know what you're referring to.

23 MR. FERLO: She said, I have read the Allen
24 declaration, and he is simply wrong for the following
25 reasons. That is one of them that has been addressed.

1 Going back, in looking at the other two declarations,
2 they present the same basic point, which is that the
3 Metrorail decline has an impact on the Purple Line that you
4 haven't looked at and it might change the circumstances. We
5 went back. We looked at it. We looked at it under five
6 scenarios. Each of those scenarios, the FTA and MTA looked
7 at it and said: It doesn't change the circumstances. This
8 project still works no matter how many people were getting
9 off of Metro.

10 And under those circumstances and not knowing until
11 May 30th of this year whether or not other SEIS issues were
12 going to be favorable to us, we have done everything that was
13 required, we believe we have done it well, and we hope the
14 Court can issue a decision as soon as possible.

15 I have been doing this for a while. I'm not hopeful,
16 but I never know, but we would appreciate --

17 THE COURT: You didn't expect to win all the other
18 ones, did you?

19 MR. FERLO: No, we didn't, Your Honor.

20 So we would appreciate a decision quickly so that we
21 can proceed with the next phase of this litigation.

22 THE COURT: This is, obviously, something I can do
23 more quickly than the twenty-two or -three other sections
24 that I had to do in my most recent opinion. This, of course,
25 will be my third major opinion in this case in a relatively

1 short time. I think my decision in August was a matter of
2 weeks after the oral argument, six weeks or something like
3 that. So I'm not going to give you a prediction of how
4 many days it is going to take, or weeks it is going to take,
5 but I have to write an opinion --

6 MR. FERLO: Well, Your Honor.

7 THE COURT: -- because it is going to be appealed.
8 The Court of Appeals likes things with ribbons and bows on
9 them, so they will get ribbons and they will get bows.

10 MR. FERLO: Your Honor, it is obviously up to you
11 whether or not you need to write an opinion, but in my
12 experience in similar situations, the Court just simply
13 denied it from the bench and said go talk to the Court of
14 Appeals.

15 THE COURT: That's not how things work in this
16 circuit, in my opinion.

17 Thank you, counsel.

18 (Proceedings adjourned at 3:19 p.m.)
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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Patricia A. Kaneshiro-Miller, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Patricia A. Kaneshiro-Miller

June 15, 2017

PATRICIA A. KANESHIRO-MILLER

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