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:

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P R O C E E D I N G S

THE DEPUTY CLERK: Good afternoon, Your Honor.

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

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

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

THE COURT: Welcome.

MR. FERLO: Thank you, Your Honor.

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

THE COURT: Welcome.

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

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

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

THE COURT: DOJ, Civil Division?

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

THE COURT: Thank you.

Anyone else?

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

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

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

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

THE COURT: That's fine.

You may proceed when you're ready.

MR. FERLO: Thank you.

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

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

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

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

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

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

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

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

plaintiffs had said were related to their claim.

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

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

MR. FERLO: Understood.

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

MR. FERLO: Thank you, Your Honor.

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

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

THE COURT: I see.

MR. FERLO: So we're here.

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

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

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

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

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

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

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

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

MR. FERLO: Well, it --

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

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

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

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

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

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

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

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

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

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

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

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

MR. FERLO: We understand --

THE COURT: It did not do that.

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

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

MR. FERLO: Thank you, Your Honor.

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

MR. FERLO: No, Your Honor.

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

MR. FERLO: Yes, Your Honor.

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

MR. FERLO: Yes.

THE COURT: Exactly.

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

MR. FERLO: Your Honor, there are --

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

MR. FERLO: There were various --

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

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

that would happen, but I --

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

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

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

Was there an escape clause for the private contractors?

MR. FERLO: Yes.

THE COURT: Yes, there was. Okay.

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

MR. FERLO: Uh-huh.

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

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

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

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

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

THE COURT: Sir, I asked you a question.

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

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

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

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

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

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

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

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

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

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

MR. FERLO: Our response --

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

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

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

THE COURT: Under what theory?

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

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

MR. FERLO: No one --

THE COURT: Nobody forced Maryland to do this --

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

THE COURT: You could have waited until the ruling on

summary judgment took place, but you didn't.

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

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

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

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

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

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

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

MR. FERLO: Uh-huh.

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

You have three minutes left. You want to reserve it

or use it?

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

THE COURT: Thank you.

You can have 20 minutes.

MR. GLITZENSTEIN: Thank you, Your Honor.

THE COURT: If you think you need it.

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

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

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

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

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

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

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

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

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

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

MR. GLITZENSTEIN: Right, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Responsibility --

THE COURT: Very similar.

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

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

THE COURT: What about this self-inflicted injury

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

Have you seen anything like that?

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Get it done.

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

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

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

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

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

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Ferlo, you get three minutes.

MR. FERLO: Thank you, Your Honor.

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

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

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

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

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

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

THE COURT: Which you did.

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

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

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

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

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

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

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

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

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

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

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

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

MR. FERLO: Well, Your Honor.

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

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

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

Thank you, counsel.

(Proceedings adjourned at 3:19 p.m.)

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 — DATE

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