Nos. 08-40372 and 08-40373

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
HILARIA AND BALDOMERO MUÑIZ
Defendants-Appellants.

and

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PAMELA RIVAS
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas, McAllen Division
Civil Action Nos. M-08-cv-23-AH and M-08-cv-24-AH

EMERGENCY MOTION FOR STAY PENDING APPEAL (OPPOSED) AND FOR EXPEDITED APPEAL (UNOPPOSED) AND FOR CONSOLIDATION OF APPEALS

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,	§	
Plaintiff-Appellee,	§	
	§	
v.	§	**APPEAL NOS.**
	§	**08-40372 and 08-40373**
HILARIA AND BALDOMERO MUÑIZ,	§	
AND PAMELA RIVAS	§	
Defendants-Appellants.	§	

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

A.	Parties:	Baldomero Muñiz Hilaria Muñiz Pamela Rivas United States of America	
B.	Counsel:	For the United States	John E. Arbab David L. Guerra
		For Defendants-Appellants:	Jerome W. Wesevich Robert W. Doggett

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Defendants-Appellants.	§	

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 27

The undersigned counsel certifies that this motion complies with Local Rule 27. The facts supporting emergency consideration appear at pages 7 and 8 below.

Appellants attempted to avoid the need for emergency consideration of this motion by writing to the United States to negotiate a resolution, but a response has not yet been received, even though the United States has promptly responded to other email messages concerning this motion.

Counsel for the United States have been notified of this motion and provided a copy. They stated that the United States will file documents opposing an emergency stay.

. Counsel believe that action on this motion is necessary at the soonest possible date, April 22, 2008. Counsel attempted to file this motion electronically, but because it was past 2 p.m., counsel were told by the clerk's office to have this motion delivered by FedEx the next morning, on April 23, 2008.

CONTENTS

Page

ATTACHMENTS (filed in a separate volume)

A. District Court Order Granting the Government Possession Of the Muñiz Family's Land (April 3, 2008)

B. District Court Order Granting the Government Possession Of Ms. Rivas's Land
(April 3, 2008)

C. District Court Order Overruling the Muñiz Family's § 1103(b) Objection
(April 3, 2008)

D. District Court Order Overruling Mr. Rivas's § 1103(b) Objection
(April 3, 2008)

E. District Court Order Denying Landowners' Motion for Stay Pending Appeal
(April 7, 2008)

F. District Court Memorandum Opinion Construing 8 U.S.C. § 1103(b)
in the Related Case of *United States v. Tamez*, No. B-08-cv-044 (S.D. Tex.)
(March 7, 2008)

G. Government's Letter to the Muñiz Family
(December 7, 2007)

H. Government's December 7, 2007 Letter to Ms. Rivas
(December 7, 2007)

I. Government's Supplemental Briefing on Negotiations
(April 3, 2008)

J. Government's Claimed Authority for the Takings at Issue
. (January 30, 2008)

Landowners seek an emergency stay of orders granting the United States Government possession of their land because the Government failed to comply with the statute granting the condemnation authority at issue. *See U.S. v. 162.20 Acres of Land*, 639 F.2d 299, 303 (5th Cir. 1981) ("It is clear that a condemnee may challenge the validity of the taking for departure from the statutory limits."). The district court agreed with landowners that the text of 8 U.S.C. § 1103(b) is clear, but the district court applied a different legal standard nonetheless. The landowners respectfully submit that the district court's neglect of what it held to be clear statutory text threatens bedrock principles of judicial review. *See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1549 (2007) ("[W]hen the intent of Congress is clear from the statutory text, that is the end of the matter.").

Without an emergency stay of the possession orders, the Government will obtain complete relief under a condemnation statute that it is not yet authorized to use, landowners will never have an opportunity to appeal, and the rights taken can never be restored. The stay would preserve the *status quo* during the short time necessary for this Court to review whether the district court erred by abrogating clear statutory text. *See Doe v. Gonzalez*, 126 S.Ct. 1, 3-4 (2005) (Ginsberg, J., in chambers) (stay is appropriate when a court of appeals will promptly review important questions).

INTRODUCTION AND SUMMARY

The Government has filed some 50 identical condemnation lawsuits seeking

temporary easements as it plans to fence the U.S.–Mexico border.[1] Two of those cases were filed against Defendants-Appellants Mr. and Mrs. Hilaria and Baldomero Muñiz, and Pamela Rivas, who own land adjacent to the U.S.-Mexico border (Landowners). The district court ordered the Landowners to surrender possession of their property and homes from April 3 until September 30 to enable the Government to conduct surveys and destroy any land, trees, fences, or buildings that the Government deems necessary.

The Landowners naturally insist that the Government follow federal law in taking their property. Under the plain text of 8 U.S.C. § 1103(b), the Government cannot "commence" a border-fence condemnation action until the Government and landowners are "unable to agree upon a reasonable price."[2] The district court agreed that the text of § 1103(b)(3) "clearly" makes pre-suit negotiations a "condition

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[1] The suits are pending in three divisions of the U.S. District Court for the Southern District of Texas. All of the suits seek a temporary easement to enter border land and buildings at any time to test and clear them. The Government deposited $100 as just compensation in every case, regardless of whether it proposed to take 0.1 acres or 100 acres, whether it sought access to the land for three months or six months, or whether the taking would exclude landowners from their homes or businesses.

[2] The statute at issue provides:

> **Land acquisition authority.**
>
> (1) The Attorney General may contract for or buy any interest in land, **including temporary use rights**, adjacent to or in the vicinity of an international land border when the Attorney General deems the land essential to control and guard the boundaries and borders of the United States against any violation of this Act.
>
> (2) The Attorney General may contract for or buy any interest in land identified pursuant to paragraph (1) as soon as the lawful owner of that interest fixes a price for it and the Attorney General considers that price to be reasonable.
>
> (3) **When the Attorney General and the lawful owner of an interest identified pursuant to paragraph (1) are unable to agree upon a reasonable price, the Attorney General may commence condemnation proceedings** pursuant to § 3113 of title 40.

8 U.S.C. § 1103(b) (emphasis added).

precedent" to the Government's border-fence condemnation power, and that the Government must prove that it engaged in a *bona fide* effort to negotiate as required by the statute. Attach. F at 20-27. Here, however, the Government filed suit before mentioning, let alone offering to discuss, *any* price for the temporary easements.

The Government argues that it complied with § 1103(b) by giving a "voluntary right of entry" form to landowners and explaining that the Government would sue them if they refused to sign it. The Government never offered any sum of money to landowners for the temporary easement that it sought by this "voluntary" right of entry. Now the Government claims: (a) its actions should be construed to have "offered" the "price" of "zero dollars" because the temporary easement that it sought before suit (possession of land and structures for 12 months) was "valueless;" and (b) courts lack authority to review whether zero is a "price" or whether zero is "reasonable" under § 1103(b)(3). Attach. I.

The district court did not accept the Government's arguments. Instead, it allowed the Government to have relief under § 1103(b)(3) because of *post-suit* negotiation attempts. Attachs. C&D at 3, 6-7.

The single, simple issue on appeal is a matter of law to be decided by this Court *de novo*: Do *post-suit* price discussions authorize the Government to "commence" suit under § 1103(b)? The Landowners submit that the district court's ruling neglects the statutory text because an event *after* litigation begins cannot logically authorize suit

to "commence." The Government is not entitled to the possession orders at issue because it lacked authority to "commence" the suits in which the orders were granted. The single issue in this case could be briefed and ready for decision by this Court within one month, leaving ample time for the Government to survey before its self-selected September 2008 deadline, regardless of how this Court rules on the merits.

The Landowners need a stay to preserve the *status quo* pending expedited appeal. Otherwise, the Landowners will forfeit their Due Process and statutory rights to their land while being deprived of any opportunity for review.

FACTS

No material fact is disputed.

Defendants Hilaria and Baldomero Muñiz are a married couple who worked for decades as migrant farm workers. When each harvesting season ended, the Muñizes and their five children returned to Los Ebanos, Texas to build—cement block by cement block over five years—a small house on their 0.35 acres of land near the Rio Grande. Now Mr. Muñiz is 84 and Ms. Muñiz is 78, and they survive by tending goats outside their home.

Government agents contacted Mr. Muñiz in June and September 2007 and asked him to sign a "voluntary right of entry" form. The Government sought permission to enter Mr. Muñiz's property and home at any time it chose during a 12-month period to conduct surveys and soil tests, and destroy any trees, fences, or buildings that it

deemed necessary. The Government never offered Mr. Muñiz any money, never advised Mr. Muñiz that any of the "voluntary right of entry" terms were subject to negotiation, and never identified any way for him to submit any bargaining proposal. Mr. Muñiz speaks only Spanish, and he does not read or write. Mr. Muñiz never understood negotiations to be an option. On December 7, 2007, the Government sent Mr. Muñiz a letter. The letter confirms that Mr. Muñiz correctly understood the Government's position: sign the enclosed temporary easement form or be sued. Attach. G. Mr. Muñiz did not sign. The Government brought the present condemnation action against him on January 30, 2008.

Defendant-Appellant Pamela Rivas owns 2.5 acres of border land that has been in her family for generations. Her extended family, including her young child, regularly use the land for recreation because it features wildlife, ancient trees, and an old house, all of which Ms. Rivas wishes to preserve. In every material respect described above for the Muñiz family, the Government used identical means of seeking a temporary right of entry upon Ms. Rivas's land. Ms. Rivas received the identical December 7, 2007 letter. Attach. H. Before being sued, Ms. Rivas never learned that price or any other term involving the temporary easement sought by the Government was open for negotiation.[3]

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[3] Representatives of the Rio Grande City Independent School District corroborated the testimony of Mr. Muñiz and Ms. Rivas as to how the Government sought the temporary easement at issue: "nothing ...gave us any indication that we could negotiate with them." March 17 Trans. at 78:4.

Before suit, the Government never stated any amount of money—not "$0.00" or any amount—that it was willing to pay for a temporary easement. Before suit, the Government never tried to bargain over price or any other terms of a temporary easement. Before suit, the Government never authorized anyone to bargain with the Landowners, prepared to bargain with the Landowners, or commissioned the customary appraisal of the temporary easement's value.[4] The Government's December 7 letter and its temporary easement form confirm that the Government decided to take *temporary* easements from landowners by ultimatum, and that the Government only planned what it calls pre-suit "negotiation" of price for *permanent* takings that may be needed *after* the temporary takings at issue here are complete.[5]

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[4] The Government characterizes its pre-suit contacts with the Landowners as "negotiations," and calls its agents "negotiators" even though those agents never had authority to negotiate anything, and never attempted to do so. The timing, method, and content of the Government's interactions with the Landowners are undisputed. The parties simply label their interactions differently. *See Weber v. Johns-Manville Corp.*, 630 F. Supp. 285, 287 (D.N.J. 1986) (characterization differences do not create a genuine dispute as to the underlying facts).

[5] Indeed, Attachment G describes two separate takings. First, the Government seeks a temporary easement so that it can decide where to build the fence. *Id*. As to this first taking, the letter recites the Government's prior warnings and confirms that Mr. Muñiz understood them correctly: sign the enclosed right-of-entry form or face a lawsuit. *Id*. Second, after taking the temporary easements, the Government plans to take a fee interest in the parts of the surveyed land where it decides to build the fence. *Id*. As to this second taking, the Government explains:

> If, after negotiations with you, we are unable to agree on a price for the necessary property, the Government will return to court to seek title and possession, and the court will determine fair market value.

Id. at 2. At minimum, this statement proves that the Government understood its duty to negotiate under § 1103(b) and that the Government could actually inform landowners of its willingness to negotiate. The Government, however, deliberately chose not to inform landowners of its duty to negotiate over the temporary easement at issue here. The Government only notified landowners that if it seeks a permanent land interest in the future, only then will it negotiate price before suit. The Government's difficulty, however, is that § 1103(b) requires the Government to attempt pre-suit price

The Government sued on January 30 and the Landowners objected that the Government lacked authority to commence the lawsuits for want of pre-suit negotiations under § 1103(b). *Afterward*, on March 10, the Government attempted to negotiate a price for the temporary interests that it seeks from the Landowners. For the reasons described in Part II.A.2 below, the Landowners declined to engage in *post-suit* negotiations that would forfeit their important rights to *pre-suit* negotiations.

PROCEEDINGS BELOW

The Government filed complaints in the two condemnation lawsuits at issue here on January 30, 2008. With each complaint, the Government filed an "Ex Parte Motion for an Order of Immediate Possession." The district court denied the Government's motions insofar as they sought *ex parte* relief, and granted the Landowners' request for a hearing on whether the Government had complied with § 1103(b). The hearing was held March 17, when the Government, Landowners and their counsel, and numerous other landowners and their counsel, argued and testified. The parties extensively briefed the § 1103(b) issue, submitting at least 12 memoranda on the subject.

On April 3, 2008, the district court granted the Government's motion for "immediate possession" of the Landowners' property. The district court did so in two separate orders in each case. The first order rejects each Landowner's § 1103(b) defense because the Landowners declined to engage in *post-suit* negotiations. The

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negotiations for "temporary use rights" as well as permanent interests. *See* n.1, *supra*.

second order grants the Government immediate possession of each Landowner's property so that the Government may clear land and structures, and test and measure the land, as the Government deems necessary. The Landowners sought a stay pending appeal on April 7, which the district court denied. Attach. E. After denying the stay request, the district court ordered further briefing to be completed by April 17, but the district court did not respond to inquiries on April 21 and 22 as to whether it will reconsider its order denying the stay. The Landowners asked the Government to delay seeking possession until the stay issue is resolved, but the Government did not respond, and it has contractors in the area, so the Landowners proceed by this motion.

ARGUMENT

I. This Court Has Jurisdiction Over The Landowners' Appeal From The District Court's Possession Orders

For two independent reasons, the Landowners' immediate appeals from the district court's possession orders are properly before this Court.

A. Condemnees Must Have Access to Appellate Review of Invalid Takings

Condemnation statutes must be construed to afford landowners a meaningful right to appeal the issue of whether a taking is authorized by statute:

> [t]he alternative construction, that title passes irrevocably, leaving the owner no opportunity to question the taking's validity or one for which the only remedy would be to accept the compensation which would be just if the taking were valid, would raise serious question concerning the statute's validity. In any event we think it would run counter to what reasonable construction requires.

Catlin v. United States, 324 U.S. 229, 241 (1945).

Following *Catlin*, the D.C. Circuit stayed a possession order, expedited appeal, and held that where,

> [as] a factual matter the property owners would be left with no means by which to defeat, or to test, the validity of the transfer of title, [immediate appeal is available.] We are of the opinion that the United States cannot by a judgment on the declaration of taking defeat the right of a property owner to contest in a judicial proceeding the validity of the taking.

Loughran v. U.S., 317 F.2d 896, 898-99 (D.C. Cir. 1963). The Second Circuit reached the same result although the issue arose in a different procedural posture:

> appeal lies from the district court's denial of the application to restrain the government from taking possession .... No compelling reason exists for deferring appellate review until the entire case has been adjudicated. The occupants' rights would be rendered moot and beyond the power of any court to rectify if they could not be heard at once and before they have been dispossessed.

U.S. v. Certain Land of Manhattan, 332 F.2d 679, 680 (2d Cir. 1964); *see also Wilson v. Union Elec. Light & Power Co.*, 59 F.2d 580, 581 (8th Cir. 1932) (appeal of Oct. 18, 1930 possession order was filed Jan. 12, 1931 and decided although compensation was not decided until Apr. 25, 1931); *162.20 Acres of Land*, 639 F.2d at 303 (5th Cir. condemnees may assert "lack of authority to take" defense).

Just as in *Loughran*, immediate appeal is the Landowners' only means of challenging the validity of the takings at issue. Unless the possession orders can be appealed now, the takings will be fully effectuated before they are ever reviewed.

B. The District Court's Possession Orders Have the Practical Effect of Injunctions And Are Appealable As of Right Under 28 U.S.C. § 1292(a)(1)

Orders having the "practical effect" of an injunction are appealable if they have "serious, perhaps irreparable, consequence" and may be "effectively challenged only

on immediate appeal." *U.S. v. Garner*, 749 F.2d 281, 286 (5th Cir. 1985); *see also Bailey v. Systems Innovation*, 852 F.2d 93, 96 (3d Cir. 1988) (the "label 'injunction'" is unnecessary for a § 1292(a)(1) appeal). As detailed in Part II.B. below, the orders threaten the Landowners with "serious, perhaps irreparable harm." As in *Loughran* and *Manhattan* above, the Landowners' *only* effective challenge is this appeal.

II. All Relevant Factors Favor A Stay of the District Court's Possession Orders

Four factors determine whether a stay pending appeal is justified:

> (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted; (3) whether the granting of the stay would substantially harm other parties, and (4) whether the granting of the stay would serve the public interest.

Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. Unit A 1981); *see also Doe*, 126 S.Ct. at 3-4 (stay upheld where court of appeals will promptly resolve important questions). All of these factors weigh in favor of the stay now sought by the Landowners.

A. Landowners Are Likely to Prevail on Appeal Because the District Court Abrogated The Clear Text of § 1103(b)

Of course this Court decides *de novo* what statutes require.

The "Congress of the United States [exercises] the right of eminent domain" and Congress may delegate this authority to federal agencies by statute. *Chappell v. U.S.*, 160 U.S. 499, 509-510 (1895); *see also T.V.A. v. Welch*, 327 U.S. 546, 551-52 (1946) ("it is the function of Congress to decide what type of taking is for a public use and ... the agency authorized to do the taking may do so to the full extent of its statutory

authority") (emphasis added). Many statutes are like § 1103(b) in that they place enforceable limits upon the federal government's authority to take land. *E.g. U.S. v. 16.03 Acres of Land,* 26 F.3d 349, 357 (2d Cir. 1994) ("The Secretary is simply not free to invoke his eminent domain authority without first attempting to purchase the land in question."); Attach. F. at 23-26 (many examples).

The Government must state "the authority for [each] taking" that it seeks to accomplish by court order. FED. R. CIV. P. 71.1(c)(2)(A). The *only* authority claimed by the Government for the takings at issue here appears in § 1103(b).[6]

1. The Text of § 1103(b) Clearly Requires Negotiation of Price *Prior* to Suit

The statute at issue plainly limits border-fence condemnation authority:

> When the Attorney General and the lawful owner of an interest [in land] are **unable to agree upon a reasonable price**, the Attorney General may **commence condemnation proceedings pursuant to [40 U.S.C. § 3113].**

8 U.S.C. § 1103(b)(3) (emphasis added). This text does not allow the Government to take land any time and any way it wants. This text only allows the Government to take land by agreement with the landowner or by commencing condemnation proceedings if the parties are "unable to agree upon a reasonable price." Absent agreement, the Government cannot take land any way it wants, but rather must "commence"

[6] The Government also lists 40 U.S.C. §§ 3113 and 3114. Attach. J. These two statutes only specify *procedures* for taking land, not independent authority to take land. *See Bishop v. U.S.*, 288 F.2d 525, 527-528 (5th Cir. 1961) ("The Declaration of Taking Act does not bestow independent authority to condemn lands for public lands. On the contrary, it provides a proceeding ancillary or incidental to suits brought under other statutes.").

proceedings in court as specified in 40 U.S.C. § 3113 (and arguably 40 U.S.C. § 3114). The Government "commenced" suit "by filing a complaint with the Court." Fed. R. Civ. P. 3 and 71.1(c). The text of § 1103(b)(1) specifies "temporary use rights" as one of the interests for which the Government must attempt to negotiate a "reasonable price" before it is empowered to "commence" condemnation proceedings. The statutory text is unambiguous on all of these points.

Accordingly, the district court concluded "that Congress clearly intended there to be some level of negotiation between the Government and the owner of a property interest *prior to the institution of eminent domain procedures pursuant to § 1103(b)(3).*" Attach. F. at 20-22; *see also id.* at 22 ("The language of § 1103(b)(3) clearly contemplates that some attempt has been made to reach an agreement *prior to the Attorney General exercising the authority to pursue eminent domain remedies*.") (emphasis added).

"If the intent of Congress is clear, that is the end of the matter; for the Court, as well as [federal agencies], must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc., v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *BOS Dairy, Inc. v. U.S. Dept. of Agriculture*, 209 F.3d 785, 786 (5th Cir. 2000). The Landowners are likely to prevail on appeal because the district court violated this principle of judicial review.

2. The District Court Erred By Holding That the Government May Satisfy § 1103(b) By Attempting to Negotiate Price *After* Suing Landowners

Indisputably, under FED. R. CIV. P. 3 and 71.1(c), the Government "commenced condemnation proceedings" on January 30. Nevertheless, the district court held that the Government could satisfy the negotiation requirement of § 1103(b) at any time before April 3, the date that the district court ordered the Landowners to surrender possession to the Government.

The district court repeatedly emphasized its legal standard: as long as the Government attempts to negotiate price "prior to receiving possession," it may obtain relief under § 1103(b). Attachs. C&D at 3; *id*. at 4 ("This Court finds that the *pre-possession* effort to negotiate should include at a minimum: ... a description of the interest sought, and the price to be paid for that interest."); Attach. F. at 25 ("Nevertheless, a court may direct further negotiations as a *condition precedent to condemnation* if it finds the negotiations have, so far, been inadequate.") (emphasis added). Indeed, the district court's only mention of any attempt to negotiate "price" occurred on March 10 and 11, which is over a month *after* the Government commenced suit against the Landowners on January 30. Doc. 17 at 6.

The district court does not attempt to explain how its legal standard can be consistent with the text of § 1103(b). Nothing in the text of § 1103(b) can be construed to refer to the time when the government takes possession of property.

The district court names four reasons for allowing post-suit negotiation attempts to satisfy § 1103(b), none of which involves the statutory text. First, the district court cites *U.S. v. County of Cascade*, 163 F.Supp. 518 (D. Mont. 1958) to conclude that "a court may direct further negotiations as a condition precedent to condemnation if it finds the negotiations have, so far, been inadequate." Attach. F. at 25. But *Cascade* supports no such rule. The *Cascade* court only considered ordering post-suit negotiations after detailing why *pre-suit* negotiations met the statutory requirement. 163 F. Supp. at 525 (three-and-one-half months before suit, extensive "negotiations terminated in disagreement, and both parties agreed that an action in condemnation would be necessary"). Nowhere does *Cascade* suggest that post-suit negotiations may substitute for statutorily required pre-suit negotiations.

Second, the district court appears to hold that the Government can proceed with condemnation as long as the district court has subject matter jurisdiction over the action, citing *Wilson*, 59 F.2d at 582. Attachs. C&D at 7 n.1. But jurisdiction does not equate to a party's authority to sue. Much to the contrary, even if the district court has jurisdiction to decide whether the Government complied with § 1103(b), *Wilson* still requires the district court to decide whether the Government has proved its authority to proceed under the statute. *Id*. at 582 ("If ... the court should find that there had been no bona fide effort to acquire the property by contract [as required by statute, condemnation] relief would be denied.").

Third, the district court held that landowners "cannot bar the Government from accessing their land under its condemnation powers by refusing or stalling negotiations, even if such refusal or delay is made in good faith. *See Kohl v. United States*, 91 U.S. 367, 371 (1875)." Doc. 17 at 6-7. But Congress wrote § 1103(b) to make landowner cooperation unnecessary to condemnation, in perfect accord with *Kohl*. The statute only requires the Government to *attempt* to seek agreement on price prior to suit. The Government could have done so here, but did not.

Finally, the district court explained:

> To dismiss this case [for the Government's lack of authority to proceed under § 1103(b)] only to have it re-filed would be a frivolous action and courts should not do vain or useless things or grant decrees which would not confer any real benefit or effect any real relief.

Doc. 17 at 7 n.1. As a matter of law, this basis is also insufficient for neglecting the text of § 1103(b). Statutory prerequisites to suit are not a "procedural 'gotcha.'" *McClain v. Lufkin Indus.*, 519 F.3d 264, 2008 U.S. App. LEXIS 4451 at *6 (5th Cir. 2008) (per Jones, J.). This Court presumes that Congress enacts statutory prerequisites to suit for good reason. If statutory prerequisites to suit are not met, the cases are routinely dismissed.

The great irony of the district court's possession orders is that they render Congress's text "a useless thing" in the name of preventing the judiciary from doing "a useless thing." Allowing post-suit negotiations to satisfy § 1103(b) would render the statutory text meaningless. *See Beck v. Prupis*, 529 U.S. 494, 506 (2000) ("terms

in a statute should not be construed so as to render any provision of that statute meaningless or superfluous"). The facts of this case show that if the Government is allowed to avoid the negotiation requirement, it will do so: (a) the Government knew before July 2007 that it would seek temporary easements; (b) the Government bypassed the customary practice of commissioning an appraisal, and instead told landowners that they must provide a temporary easement for free or be sued; (c) the Government never told landowners that they had a statutory right to be offered a reasonable price for the temporary easement before suit; and (d) after suit, the Government dissembled in attempting to recast its pre-suit service of an ultimatum as "negotiation." *See* March 17 Trans. at 28:16-17 (The district court stated, "If I go up and say, 'Sign this paper or else,' ... that doesn't really sound like negotiation ...."); *Atlantic Coast Line R. Co. v. Brotherhood of R. Trainmen*, 262 F. Supp. 177, 183 (D.D.C. 1967) ("the service of an ultimatum does not constitute a negotiation"). Allowing the district court's possession order to stand only encourages this lawless and unfair behavior in future actions involving these and other landowners.[7]

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[7] The district court did not accept several arguments that the Government attempted to explain how it could have complied with § 1103(b). These arguments would be absurd if they did not come from the federal government:

- "$0.00" is a "price," *but see Portland Natural Gas Transmission Sys. v. 19.2 Acres of Land in Haverhill*, 195 F. Supp. 2d 314, 322 (D. Mass. 2002) ("A landowner must be compensated for the loss of use of property taken by a temporary easement....");
- mention of a pre-existing legal duty to pay for actual damages to property is a "price," *but see U.S. v. New Orleans Public Service, Inc.*, 553 F.2d 459, 478 (5th Cir. 1977) ("A promise to perform a service which one is under a pre-existing legal obligation to perform is not valid consideration for a return promise."); and

No one can know whether negotiations would be successful if they are held as required by § 1103(b): outside litigation. The Landowners believe that negotiations would succeed, and that the likelihood of successful negotiations would be increased by an order that assures the Landowners that they are negotiating with a Government that will respect the law.

For all of these reasons, the Landowners are likely to succeed in their appeal from the district court's possession orders.

B. The Balance of Harms and the Public Interest Favor Staying the District Court's Possession Orders Pending Expedited Appeal

The Landowners face concrete and constitutional harm that will be irreversible by the time any appeal can be completed unless this Court stays the district court's possession orders. "It is well settled that [Rule 62] is expressive of the power in the courts to preserve the *status quo* pending appeal." *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1003 (5th Cir. 1969).

The district court correctly found that the Landowners may face "unavoidable damage" as a result of activities permitted under the possession orders at issue. Attachs. A&B at 3. This is in accord with longstanding authority:

> It is settled beyond the need for citation ... that a given piece of property is considered to be unique, and its loss is always an irreparable injury. Substitution of another piece of property cannot cure the loss of one's property by an unconstitutional procedure.

- after the district court required negotiation efforts to be "bona fide," the Government responded: "this creates a heightened standard that does not apply to the United States."

United Church of Medical Center v. Medical Center Com., 689 F.2d 693, 701 (7th Cir. 1982). The Landowners also face damage to their "environment, culture, commerce and quality of life." *See* Attachs. A&B at 3. These intangible injuries are not readily compensated by damages, and thus irreparable. *See Thiry v. Carlson*, 891 F. Supp. 563, 566-67 (D. Kan. 1995) (finding irreparable harm in staying a possession order pending appeal of constitutional and statutory challenges to condemnation).

"As a matter of law, federal courts at all levels have recognized that constitutional rights violations constitute irreparable harm." *See Maxey v. Smith*, 823 F.Supp. 1321, 1328 (N.D. Miss. 1993); *accord McCoy v. La. State Bd. of Ed.*, 332 F.2d 915, 917 (5th Cir. 1964). If the Government is allowed to take the Landowners' property without following the procedures that Congress requires in § 1103(b), the Government arguably threatens the Landowners' constitutional rights. These include the right to hold property until it is taken by due process of law, which should include the pre-deprivation hearing that Congress led landowners to expect in § 1103(b): pre-suit negotiation of price. *See Bridges v. Wixon*, 326 U.S. 135, 152-53 (1945) (rules requiring signature and oath "were designed to afford ... due process of law by providing safeguards against essentially unfair procedures," and violation of rules denied due process); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (a legislature "may not constitutionally authorize the deprivation of [a property interest] without appropriate procedural safeguards"). The Landowners' constitutional rights also include the right

not to be subject to eminent domain without Congress's authorization, and without the right to appeal taking validity to this Court. *See Catlin v. United States*, 324 U.S. 229, 241 (1945) (if a statute authorizes condemnation to be completed before it is subject to judicial review on appeal, the statute's "validity" would be in doubt).

In balancing risk of harm to the Government, the Landowners emphasize that this motion also seeks an expedited appeal. The Landowners anticipate that this case can be ready for decision within one month, and consent to any briefing and argument schedule that will assist the Court. No evidence indicates that a stay would prevent the Government from completing its surveying, testing, and clearing of the Landowners' property by the September 30 date stated in the possession orders, regardless of how this Court rules in the expedited appeal. If the Government ever faced imminent harm from a stay, it could unilaterally moot this appeal at any time by dismissing the condemnation cased, offering to negotiate with the Landowners, and then re-filing the cases if negotiations were not successful. This could all be accomplished in days, not the months that the Government has consumed in litigating the § 1103(b) issue. Because the Government elects to continue litigation instead, it should not be heard to object to the delay necessary to secure appellate review its actions.

The public interest at issue in this case is defined by the text of Congress's border-fence condemnation statute, § 1103(b). "[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman v. Parker*,

348 U.S. 26, 32 (1954). This weighs heavily in favor of a stay, so that this Court may determine what Congress requires in § 1103(b). Appellate review promotes public confidence not only in the Government's border-fence efforts, but also in respect for the rule of law.

III. Good Cause Abounds For Expedited Appeal and Consolidation

All parties agree that if this Court decides the Landowners' appeals, it should do so on an expedited basis. "Good cause" exists because this case raises a single, simple issue of law, the issue affects many people and is the subject of vast attention, and appellate delay could jeopardize the rights of all parties. Fifth Cir. Loc. R. 27.5. Both appeals raise the identical questions of law, so consolidation of the appeals would promote efficiency and uniformity of decision.

CONCLUSION

This Court should stay the possession orders pending expedited appeal.

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CERTIFICATE OF SERVICE

I certify that I caused a true and complete copy of the foregoing document, with all attachments, to be sent to John E. Arbab and David L. Guerra, counsel for Plaintiff on April 22, 2008 via electronic mail.

_____
Jerome Wesevich