

The Honorable James L. Robart

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

STATE OF WASHINGTON and
STATE OF MINNESOTA,

Plaintiffs,

v.

DONALD TRUMP, in his official capacity as
President of the United States; U.S.
DEPARTMENT OF HOMELAND
SECURITY; JOHN F. KELLY, in his official
capacity as Secretary of the Department of
Homeland Security; REX W. TILLERSON, in
his official capacity as Secretary of State; and
the UNITED STATES OF AMERICA,

Defendants.

No. 2:17-cv-00141 (JLR)

**DEFENDANTS' MEMORANDUM IN
RESPONSE TO FEBRUARY 10, 2017
MINUTE ORDER**

In a February 10, 2017 Minute Order (ECF No. 74), the Court instructed the parties to file a memorandum discussing “whether the Ninth Circuit has construed the court’s temporary restraining order (“TRO”) (TRO (Dkt. # 52)) as a preliminary injunction, such that additional briefing and possible evidence on a motion for preliminary injunction is no longer required in the district court . . . or whether the parties should submit additional briefing and evidence in the district court concerning the issue of a preliminary injunction.” Defendants’ position is set forth below.

1 On February 3, 2017, this Court entered a nationwide injunction barring enforcement of
2 sections 3(c), 5(a)-(c), and 5(e) of the Executive Order: Protecting the Nation from Foreign
3 Terrorist Entry into the United States. The injunctive order contained no explicit expiration date.
4 The Court's order directed the parties to jointly propose a briefing schedule for plaintiffs' motion
5 for preliminary injunction, and after the parties submitted a joint status report, the Court directed
6 that plaintiffs' forthcoming motion for preliminary injunction be filed no later than February 9,
7 2017.
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9 The day after this Court entered its injunctive order, defendants noticed their appeal of
10 the order and also moved the Ninth Circuit to stay the injunctive order pending resolution of the
11 appeal. A panel of the Ninth Circuit denied defendants' motion for a stay pending appeal on
12 February 9, 2017. In doing so, the court determined that it had appellate jurisdiction over the
13 stay motion because "the district court's order possesses the qualities of an appealable
14 preliminary injunction." *Washington v. Trump*, No. 17-35105, slip op. at 7, Dkt. No. 134 (9th
15 Cir. 2017); *see id.* at 7-8 ("[W]e believe . . . that the TRO should be considered to have the
16 qualities of a reviewable preliminary injunction."). The court noted, however, that this
17 "conclusion . . . does not preclude consideration of appellate jurisdiction at the merits stage of
18 this appeal." *Id.* at 8 n.2. The court set a briefing schedule for the merits stage of the appeal,
19 which concludes on March 29, 2017. *See Washington*, No. 17-35105, Order at 2, Dkt. No. 135
20 (9th Cir. 2017). Later on February 9, plaintiffs declined to file their motion for preliminary
21 injunction.
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24 On February 10, 2017, the parties were notified that a Ninth Circuit judge had *sua sponte*
25 requested a vote on whether to reconsider *en banc* the panel's order denying defendants' motion
26 for a stay pending appeal. *See Washington*, No. 17-35105, Order, Dkt. No. 139 (9th Cir. 2017).
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1 The parties have been directed to file briefs on whether reconsideration *en banc* is appropriate
2 by February 16, 2017.

3 Further proceedings in the Ninth Circuit will likely inform what additional proceedings
4 on a preliminary injunction motion are necessary in district court. Accordingly, at this time,
5 defendants believe the appropriate course is to postpone any further proceedings in the district
6 court. Defendants respectfully request that they be permitted to file a status report with the Court
7 no later than two business days after the Ninth Circuit decides whether to hear defendants' stay
8 motion *en banc*. The status report will update the Court on the Ninth Circuit's proceedings and
9 advise the Court of any update on defendants' position regarding preliminary injunction
10 proceedings in light of the Ninth Circuit's actions.
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12 DATED: February 13, 2017

Respectfully submitted,

13 CHAD A. READLER
14 Acting Assistant Attorney General

15 JENNIFER RICKETTS
16 Director, Federal Programs Branch

17 JOHN R. TYLER
18 Assistant Director, Federal Programs Branch

19 /s/ Michelle R. Bennett

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2017, I electronically filed the foregoing Memorandum in Response to February 10, 2017 Minute Order using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: February 13, 2017

/s/ Michelle R. Bennett

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