

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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STATE OF WASHINGTON, et al.,	)	
	)	
Plaintiffs,	)	CASE NO. C17-00141JLR
	)	
v.	)	SEATTLE, WASHINGTON
	)	February 13, 2017
DONALD J. TRUMP, et al.,	)	
	)	TELEPHONE CONFERENCE
Defendants.	)	
	)	

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VERBATIM REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE JAMES L. ROBART  
UNITED STATES DISTRICT JUDGE

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**APPEARANCES:**

**For the Plaintiffs:** COLLEEN M. MELODY  
Attorney General's Office  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188

ALAN I. GILBERT  
Attorney General of Minnesota  
445 Minnesota Street, #1100  
St. Paul, MN 55101-2128

**For the Defendants** MICHELLE R. BENNETT  
U.S. Department of Justice  
Civil Division Federal Programs  
20 Massachusetts Avenue NW, Suite 7300  
Washington, DC 20530

**Reported by:** NANCY L. BAUER, CCR, RPR  
Federal Court Reporter  
700 Stewart Street, Suite 17205  
Seattle, WA 98101  
(206) 370-8506  
nancy\_bauer@wawd.uscourts.gov

1 February 13, 2017

3:00 p.m.

2 PROCEEDINGS

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3 THE CLERK: Case No. C17-141, State of Washington v.  
4 Donald Trump.

5 Counsel, please make your appearances for the record.

6 MS. MELODY: Good afternoon, Your Honor. This is  
7 Colleen Melody for the State of Washington.

8 THE COURT: Thank you.

9 MS. BENNETT: Good afternoon, Your Honor. This is  
10 Michelle Bennett for the defendants. I also have some others  
11 on the call with me, if you'd like me to identify them as  
12 well.

13 THE COURT: Are you going to be the only one  
14 speaking?

15 MS. BENNETT: Yes, Your Honor.

16 THE COURT: That's fine, then. They don't need to be  
17 introduced.

18 MS. BENNETT: Thank you.

19 THE COURT: Ms. Melody, are you going to be the only  
20 person speaking on behalf of the States?

21 MS. MELODY: Yes, Your Honor.

22 THE COURT: All right.

23 Do have someone from Minnesota, also?

24 MR. GILBERT: Yes, Your Honor. My name is Alan  
25 Gilbert. I'm the State Solicitor General.

1 THE COURT: Thank you, Mr. Gilbert. Welcome.

2 MR. GILBERT: Thank you.

3 THE COURT: Counsel, my preference is not telephone  
4 conferences, but I understand the logistics on this, where we  
5 have the United States represented by counsel out of  
6 Washington, D.C., and counsel from Minnesota, I assume  
7 probably in the St. Paul or Minneapolis area, and the State  
8 of Washington down in Olympia. So this seemed the most  
9 expedient way to get your advice and counsel on where we go  
10 from here.

11 This hearing arose from the telephone conference that was  
12 requested on an expedited basis last Friday afternoon that  
13 had to do with the proper interpretation of the Ninth  
14 Circuit's order in this matter.

15 I found both of your status reports to be helpful. I  
16 guess I'm not surprised that you are not in agreement, but I  
17 thought you did a nice job of setting out your respective  
18 positions.

19 What I propose to do today is, I will give the plaintiffs  
20 up to 15 minutes to explain -- and I don't know how you want  
21 to divide your time between Washington and Minnesota -- to  
22 tell me how you see where we are right now. And then,  
23 Ms. Bennett, I'll give you 15 minutes to do it.

24 At the conclusion of that, I will probably state a  
25 conclusion or an order in the form of where we go from here,

1 and that will be followed up by a written order, which will  
2 be more detailed and also offer authority for the  
3 propositions that I think we ought to proceed with.

4 So just to frame the issue: When we last talked, the  
5 question arose in the context of the State of Washington, and  
6 I assume the State of Minnesota is a joinder, in the  
7 proposition that the Ninth Circuit Court of Appeals, which  
8 I'll sometimes call "the three-judge panel," order in this  
9 matter was, effectively, a preliminary injunction, and on  
10 that basis, the State had concluded that it was not filing a  
11 preliminary injunction in accordance with the schedule that  
12 you all had proposed and which I had entered.

13 And Ms. Bennett, in that telephone conversation on Friday,  
14 asked that the United States be given additional time in  
15 order to determine its approach to this situation. I  
16 believe, Ms. Bennett, you can correct me, but you were asking  
17 for Thursday or Friday of this week, and I was hesitant to do  
18 that for reasons that the schedule that you've originally  
19 proposed, "you" being the parties, certainly was more  
20 expedited than that, and the three-judge panel set a briefing  
21 schedule in this matter that's rather aggressive.

22 This is all a little bit complicated by the fact that  
23 there was an unnamed judge of the Ninth Circuit Court of  
24 Appeals who filed a request for en banc review of the  
25 three-judge panel's ruling.

1 Under their procedures, that's circulated to the judges, a  
2 vote is conducted, and then parties are advised that there  
3 was sufficient votes to proceed to en banc review or not.  
4 And they've given you additional homework to do on your  
5 already rather cluttered schedules. And it's not clear how  
6 long after your briefing is submitted to them they would tell  
7 you if there is going to be en banc review or not. And  
8 implicit in your pleadings is the fact that there is a  
9 disagreement as to the impact, if there was en banc review.

10 So with all of that in mind, Ms. Melody, you have the  
11 States' position in 15 minutes.

12 MS. MELODY: Thank you, Your Honor.

13 So the procedural history that you set out is correct, and  
14 the States were preparing last Thursday afternoon to file  
15 their preliminary injunction motion in accordance with the  
16 schedule that the court entered.

17 And the intervening event that happened was the issuance  
18 of the three-judge panel's opinion denying a stay pending  
19 appeal of this court's February 3rd order.

20 And we read that opinion to decide the issue for purposes  
21 of sort of the law of the case about what -- what this --  
22 what the February 3rd order is.

23 The defendants had taken the position in the Ninth Circuit  
24 that the February 3rd order was a reviewable preliminary  
25 injunction, that it had the qualities and characteristics of

1 a preliminary injunction such that the Ninth Circuit could  
2 review it. And that's important, because unless -- unless  
3 that February 3rd order was a preliminary injunction and not  
4 a temporary restraining order, this -- its name -- you know,  
5 the Ninth Circuit would have had no authority, no  
6 jurisdiction to review the order.

7 So the defendants took the position and were to secure a  
8 Ninth Circuit review that -- that this court's February 3rd  
9 order was a preliminary injunction, that it had the qualities  
10 of a preliminary injunction such that the Ninth Circuit could  
11 review it.

12 And, you know, that was the position that we read the  
13 Ninth Circuit's -- the three-judge panel's opinion to accept.

14 And so on page 7 and then again on page 8 of the order  
15 denying the stay pending appeal, the -- the three-judge panel  
16 twice says that, sort of in the extraordinary circumstances  
17 of this case, the -- the TR0, the February 3rd order, is a  
18 preliminary injunction, has the qualities of one, such that  
19 it can be appealed.

20 And seeing that language caused us to, you know, determine  
21 that we -- that we didn't have any relief that we needed  
22 granted, and such that a preliminary injunction motion was  
23 unnecessary and would have been duplicative of relief that  
24 the Ninth Circuit was now telling us we already had.

25 The Ninth Circuit panel didn't change any of the

1 provisions of the court's February 3rd order, despite being  
2 requested to do so, argument on that point, and explicitly  
3 declined to modify the scope of the injunction provisions in  
4 any way, and so because it became, in effect, by operation of  
5 law, a preliminary injunction when the Ninth Circuit accepted  
6 appellate review of it, that gave it all of the qualities of  
7 a preliminary injunction that we would have been seeking that  
8 same afternoon.

9 So the -- the time -- the piece about the time going  
10 forward, preliminary injunctions are in place until a  
11 judgment is reached on the merits or until one is altered by  
12 a subsequent order of this court or an appellate court.

13 And so you asked, Your Honor, you know, what may be the  
14 effect of the Ninth Circuit en banc proceeding, if any, or  
15 review on the merits by the merits panel, and the answer is  
16 that the preliminary injunction is in place until one of  
17 those bodies changes it.

18 But that's no reason -- that's no reason for this court  
19 not to proceed toward a determination on the merits of the  
20 States' claim. It is black letter law, in our view, that  
21 while a preliminary injunction is in place, the parties can  
22 proceed with discovery and litigation towards reaching a  
23 merits determination.

24 So, you know, I don't -- I don't know that it's tenable  
25 for the defendants now to take any other position in this

1 court that the February 3rd order is not a preliminary  
2 injunction, when that is the position that they took in order  
3 to secure the review that they wanted in the Ninth Circuit.  
4 So once the Ninth Circuit has said that that's what it is, I  
5 think that's what it is for purposes of the case going  
6 forward, whether in the Court of Appeals or in the district  
7 court.

8 So I don't think that I need all of the 15 minutes now.  
9 I'm certainly happy to answer questions, or, perhaps,  
10 preserve the rest of my time in case there are points that  
11 Ms. Bennett raises that the States may wish to respond to.

12 THE COURT: Thank you.

13 Mr. Gilbert, do you wish to say anything at this point?

14 MR. GILBERT: Your Honor, only that we certainly  
15 agree with what counsel for Washington indicated, and I think  
16 it's reflected in the memorandum we filed with the court.

17 THE COURT: All right. Thank you.

18 Ms. Bennett?

19 MS. BENNETT: Thank you, Your Honor.

20 As we indicated in our memorandum, we think that the  
21 proceedings that are taking place in the Ninth Circuit will  
22 likely inform the question that Your Honor asked.

23 As Your Honor noted, the merits -- or the panel of the  
24 Ninth Circuit that considered the stay motion did conclude  
25 that, for purposes of the stay motion, Your Honor's order

1 possessed the qualities of an appealable preliminary  
2 injunction.

3 But the court also noted that that conclusion didn't  
4 preclude consideration of appellate jurisdiction at the  
5 merits stage, and we also now have the issue of the Ninth  
6 Circuit considering whether to take this question up en banc,  
7 and, therefore, we think it would be appropriate to wait to  
8 address this question until after the Ninth Circuit has  
9 addressed the en banc question, where we might have more  
10 insight into what -- what the Ninth Circuit is thinking in  
11 terms of the scope of Your Honor's order.

12 THE COURT: Would you agree with me that there are  
13 really two parts to this? One is the appeal that the Ninth  
14 Circuit has now treated as a preliminary injunction that has  
15 to do with enforceability, and they've set a briefing  
16 schedule for you in that; and then the other aspect of it,  
17 which is the merits, which would ultimately result in a  
18 motion for a permanent injunction.

19 And I'm curious to know your thoughts on why a vote on the  
20 en banc on issue one would have an impact on issue two.

21 MS. BENNETT: Well, Your Honor, we don't understand  
22 the Ninth Circuit at all to be considering the question of a  
23 permanent injunction.

24 The en banc question right now that's before the court is  
25 whether to take the issue of a stay of Your Honor's

1 injunctive order pending our appeal of the merits of that  
2 order en banc.

3 THE COURT: I'm going interrupt you. I agree with  
4 you. I mean, perhaps my question wasn't precise enough.

5 That is the issue that's in the Ninth Circuit right now.  
6 Still pending in the district court, however, are the merits  
7 of the States' original case, in which they seek a permanent  
8 injunction. I understand that's not up in the Ninth Circuit  
9 at the present time.

10 MS. BENNETT: That's correct, Your Honor.

11 We think, in terms of the state proceeding with its case  
12 with respect to a permanent injunction, that it would make  
13 the most sense and be most efficient for Your Honor to stay  
14 district court proceedings until the Ninth Circuit is able to  
15 address the merits, because they will likely be addressing  
16 legal questions that will be relevant to Your Honor's  
17 decision on the final merits of this case.

18 Courts regularly stay district court proceedings pending  
19 an appeal of a preliminary injunction, and so we think that  
20 that would be the appropriate course in this case as well.

21 THE COURT: What is your best authority for the  
22 proposition that if it is a narrow question that's in the  
23 circuit now, the ban question, that they're going to give us  
24 some kind of advisory opinions in regards to the merits?

25 MS. BENNETT: Well, Your Honor, we think the question

1 that's before the Ninth Circuit on the merits of our appeal  
2 is whether plaintiffs have a likelihood of success on the  
3 merits of their claims, which is, the merits of the claims is  
4 the very question that Your Honor would be answering if you  
5 proceeded with the case.

6 And so we think that the Ninth Circuit's decision with  
7 respect to whether the government is likely to appeal on the  
8 merits -- or, sorry -- whether plaintiffs are likely to  
9 appeal on the merits would certainly be relevant to the  
10 underlying litigation of the merits.

11 THE COURT: Well, would you agree with me that  
12 discovery on the question of the merits, without a motion  
13 that would ultimately decide the question, would be the best  
14 use of the time?

15 MS. BENNETT: We don't think so, Your Honor. First  
16 of all, we would oppose discovery. But we also think that  
17 the government should have the opportunity first to, at  
18 least, respond to the complaint. As Your Honor is probably  
19 aware, our response to the complaint isn't due until April  
20 3rd, and we would plan in that motion to raise both  
21 jurisdictional and legal arguments. And we think that  
22 proceeding with that first would make the most sense before  
23 getting into any discovery, which, as I said, I don't think  
24 we think is appropriate anyway.

25 THE COURT: Well, wasn't the purpose of the

1 amendments to the civil rules that were done in December of  
2 2015 to promote early, at least, beginning discovery, even  
3 before answers were filed so that we would move these cases  
4 along?

5 MS. BENNETT: Well, Your Honor, I think that might be  
6 the case where there are no jurisdictional questions in a  
7 case. But where the government has and intends to challenge  
8 the plaintiffs' jurisdiction to bring a case, we think it is  
9 important to resolve that issue first, and, again, I would  
10 note also, while questions about the merits are being decided  
11 by the Ninth Circuit in a way that might provide Your Honor  
12 guidance on the legal questions that are relevant to the  
13 case.

14 THE COURT: Counsel, I'm going to suggest you used  
15 the wrong term in there.

16 Did you mean to say the plaintiffs' standing to bring the  
17 case?

18 MS. BENNETT: Yes, Your Honor. I'm sorry if I said  
19 something else.

20 THE COURT: Yes, you said "jurisdiction," and usually  
21 it is the court that has jurisdiction, not a party.

22 MS. BENNETT: Right. Their standing such that Your  
23 Honor has jurisdiction. I apologize.

24 THE COURT: I understand.

25 Anything else you'd like to say, counsel?

1 MS. BENNETT: No. Thank you, Your Honor.

2 THE COURT: All right. Well, I'd like to hear from  
3 the States on the question of staying discovery until after  
4 the U.S. files its answer, and, apparently, has an  
5 opportunity to challenge the jurisdiction of the court.

6 MS. MELODY: This is Colleen Melody, Your Honor.

7 And the States, you know, believe that discovery should  
8 proceed expeditiously in this case, in part due to the  
9 urgencies identified by all parties, you know, and the public  
10 interests that are at stake here.

11 And we don't read Rule 26 as preventing discovery  
12 before -- before a responsive pleading is filed, and  
13 certainly the States are available to confer with the  
14 government about, you know, sort of the scope of the  
15 discovery they expect in discovery, as required by Rule 26(f).

16 In terms of standing, you know, the States have sort of  
17 set out what their injuries are, have described their  
18 pecuniary harms and their parens patriae harms, and I'm not  
19 sure what the government is thinking about in terms of what  
20 additional arguments it may need to prepare or make beyond  
21 those that it's been making so far between now and April 3rd.

22 But, you know, if the government is proposing a motion to  
23 dismiss on standing grounds, that's something that we think  
24 we can proceed with, you know, in the near term rather than  
25 wait, in the interest of then, hopefully, simultaneously

1 beginning discovery.

2 THE COURT: All right. Do either side wish to add  
3 anything else to the conversation before we turn to a ruling?

4 MS. BENNETT: Your Honor, this is Ms. Bennett. Can I  
5 just make a couple more points?

6 THE COURT: Certainly.

7 MS. BENNETT: Just to the extent that plaintiffs are  
8 attempting to sort of have this case move faster than a  
9 normal case, we think they haven't shown any basis for that.  
10 For some sort of expedited discovery, they would need to show  
11 good cause. And in light of the fact that the government is  
12 currently enjoined from enforcing the Executive Order,  
13 there's no basis for that.

14 So whether it is speeding up the deadline for defendants  
15 to respond to the complaint or doing some sort of expedited  
16 discovery, we think there's just -- there's no basis for  
17 that, particularly in light of the fact that the plaintiffs  
18 aren't being harmed at the moment, in light of the  
19 injunction.

20 THE COURT: Counsel, I'm a little surprised to hear  
21 you say that, since the President announced he wanted to see  
22 each other in court. It strikes me that that -- you know,  
23 that's where we are.

24 Are you confident that's the argument you want to make?

25 MS. BENNETT: Yes, Your Honor.

1 THE COURT: All right. Anything else? You said "a  
2 couple of points."

3 MS. BENNETT: I'm sorry. Your Honor. Those were  
4 sort of two combined points. That's all I had.

5 THE COURT: All right.

6 Well, as I indicated, this is going to be an oral ruling.  
7 It will be supplemented with an actual written order. And as  
8 you all learned -- what is it now? -- two Fridays ago, we  
9 sometimes get written orders out fairly promptly so that you  
10 can do what you did, which is to seek review of my handling  
11 of the case, if you think that is appropriate.

12 My view of this, roughly, follows the following:

13 On February 3rd, 2017, I entered a temporary restraining  
14 order -- that's found in the docket at 52 -- with the  
15 intention of holding a subsequent hearing and issuing a  
16 subsequent, more detailed order on a motion for preliminary  
17 injunction. That's the way the civil rules instruct me to  
18 proceed.

19 The federal defendants appealed that order to the Ninth  
20 Circuit. That's found in the docket at 53.

21 It would have been a bit of an uphill task to have the  
22 Court of Appeals review, on an appellate basis, a temporary  
23 restraining order, which is really intended to do nothing  
24 more than preserve the status quo.

25 And in their pleadings that were filed with the Circuit,

1 they indicated that they felt this was, effectively, a  
2 preliminary injunction, and, therefore, they could appeal and  
3 that the Court of Appeals should issue a ruling.

4 On, I believe it was February 7, an argument before the  
5 Ninth Circuit, the initial positions were the United States  
6 wanted this to be treated as a preliminary injunction, and  
7 the States were adamant that it was a temporary restraining  
8 order.

9 I've heard the transcript of that hearing, and, in  
10 particular, towards the end of it, after the parties had the  
11 benefit of listening to the questions from the court, there  
12 was sort of like a change of ends in a football match. The  
13 United States was arguing that it was a temporary restraining  
14 order and that they specifically wanted it to be remanded to  
15 the district court, and the States were now arguing that it  
16 was a preliminary injunction. So much for fluid positions.

17 The Ninth Circuit opinion makes it quite clear that they  
18 viewed it as a preliminary injunction, and I don't think  
19 there was really much of a way to get around that ruling. I  
20 think the language was something to the effect of,  
21 "possessing the qualities of an appealable preliminary  
22 injunction."

23 So that seems to me that the question that's up the Ninth  
24 Circuit is on a preliminary injunction on the questions of  
25 the effectiveness of the ban, or the continued application of

1 the ban.

2 The Ninth Circuit issued two orders that day. The second  
3 order is a separate order, and it sets forth a briefing  
4 schedule concerning the merits of the appeal. That's in the  
5 docket at 69.

6 It seems to me that that's what governs your continued  
7 work in regards to that appeal, is the order of the Ninth  
8 Circuit, and I'm certainly not going to do anything to  
9 interfere with that.

10 On February 9th, the State filed a letter with the court  
11 saying that because of the court's finding -- the Ninth  
12 Circuit's finding that the TR0 possesses the quality of an  
13 appealable preliminary injunction, the State assumes that a  
14 district court briefing schedule is no longer applicable, and  
15 they, accordingly, did not intend to file a motion for a  
16 preliminary injunction.

17 That's what got us all together on the phone for me to set  
18 a briefing schedule, which was, I asked for -- by minute  
19 order, I asked the parties to file a joint status report no  
20 later than midnight on Sunday. In the telephone call later  
21 that day, that was revised in order to give the parties more  
22 time to submit a simultaneous memorandum. That happened at  
23 noon today, and I appreciate you giving up your weekend for  
24 that project.

25 The matter is now ripe before me to rule on where we go

1 from here.

2 In summary, the parties agree that no further briefing in  
3 this court is required on the motion for preliminary  
4 injunction, as the court's order is now on appeal as a  
5 preliminary injunction.

6 There is a clear disagreement as to what should happen at  
7 this point going forward in the district court. Reading from  
8 the States' brief, and I'm quoting, it says, "The States  
9 favor expeditious proceedings in this court," meaning the  
10 district court, "proceeding directly to discovery, including  
11 a prompt Rule 26(f) conference by the parties, will not  
12 interfere with the case on appeal."

13 I contrast that to the United States' position, in which  
14 Ms. Bennett wrote, "Further proceedings the Ninth Circuit  
15 will likely inform what additional proceedings on a  
16 preliminary injunction motion are necessary in district  
17 court. Accordingly, at this time defendants believe the  
18 appropriate course is to postpone any further proceedings in  
19 the district court."

20 I am not persuaded that the call for an en banc review by  
21 one judge, with briefing that doesn't really occur until  
22 later in the month, and then, apparently, a vote by the Ninth  
23 Circuit judges, ought to interfere with moving this case  
24 forward, which, I have the sense from reading all of the  
25 pleadings, a number of which I would note are deemed

1 emergency pleadings, that there is a very sensitive time  
2 issue, particularly with representations that have been made  
3 that the court's enjoining provisions of the Executive Order  
4 is allowing bad consequences to the citizens of the United  
5 States. If that is the case, I'm not prepared to slow this  
6 down.

7 So it seems to me that the best that we should do is,  
8 based on the interpretation of the Ninth Circuit order, the  
9 court agrees that its temporary restraining order has been  
10 construed as a preliminary injunction, that that's now on  
11 appeal, and that further briefing of that motion or on a  
12 motion for preliminary injunction is not warranted or  
13 appropriate while the appeal is pending.

14 Second, the court, however, does not see a basis for  
15 postponing other aspects of the case, and agrees with the  
16 States that the case should otherwise proceed. If motions  
17 are required to -- require the court to consider matters that  
18 are already on appeal, the court can consider those issues on  
19 a case-by-case basis if they arise. Otherwise, I am  
20 directing the parties to continue to prepare the aspect of  
21 the case which is not covered by the court's earlier ruling,  
22 and that would include preparation of information to allow  
23 you to meaningfully argue the motion for permanent  
24 injunction, which would potentially result at the conclusion  
25 of this proceeding.

1           So as I said, a written order will follow, but that should  
2 give you some guidance, since I know you'll be back to  
3 burning the midnight oil tonight.

4           Ms. Melody, anything further on behalf of the States?

5           MS. MELODY: No, Your Honor.

6           THE COURT: Ms. Bennett?

7           MS. BENNETT: No, Your Honor, thank you.

8           THE COURT: All right. Thank you, counsel. I found  
9 your material helpful, and I appreciate your assistance.

10          We will be in recess.

11                           (The proceedings concluded at 3:34 p.m.)

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## C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 14th day of February 2017.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR  
Official Court Reporter