

The Honorable James L. Robart

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

12 STATE OF WASHINGTON and
 13 STATE OF MINNESOTA,

CIVIL ACTION NO. 2:17-cv-00141-JLR

14 Plaintiffs,

15 v.

STATES' MEMORANDUM ON
 NINTH CIRCUIT ORDER
 CONSTRUING TEMPORARY
 RESTRAINING ORDER AS
 PRELIMINARY INJUNCTION

16 DONALD TRUMP, in his official
 17 capacity as President of the United
 18 States; U.S. DEPARTMENT OF
 19 HOMELAND SECURITY; JOHN F.
 20 KELLY, in his official capacity as
 21 Secretary of the Department of
 22 Homeland Security; REX W.
 23 TILLERSON, in his official capacity
 24 as Secretary of State; and the UNITED
 25 STATES OF AMERICA,

26 Defendants.

23 **I. INTRODUCTION**

24 The Court ordered the parties to submit memoranda “discuss[ing] whether the Ninth
 25 Circuit has construed the court’s temporary restraining order as a preliminary injunction, such that
 26 additional briefing and possible evidence on a motion for a preliminary injunction is no longer

1 required in the district court.” Minute Order, ECF 74 at 2. Washington and Minnesota (the States)
 2 respectfully submit that the answer is yes. The Ninth Circuit’s ruling treats this Court’s prior order
 3 as a preliminary injunction, rendering further preliminary injunction proceedings unnecessary and
 4 allowing the parties to proceed directly to discovery.

5 II. RELEVANT PROCEDURAL HISTORY

6 On February 3, the Court granted the States’ motion for a nationwide temporary
 7 restraining order enjoining Defendants from enforcing sections 3(c), 5(a)-(c), and 5(e) of
 8 Executive Order 13,769. ECF 52 (February 3 Order). On February 4, Defendants filed a notice
 9 of appeal and an Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and
 10 Motion for Stay Pending Appeal. ECF 53; *Washington v. Trump*, No. 17-35105 (9th Cir. filed
 11 Feb. 4, 2017), ECF 14 (Ninth Circuit Docket). A Ninth Circuit motions panel denied
 12 Defendants’ request for an immediate administrative stay of the February 3 Order and set a
 13 briefing schedule for the emergency motion for a stay pending appeal. *Id.*, ECF 15.

14 In briefing the emergency stay motion, the parties disagreed about the proper
 15 characterization and reviewability of the February 3 Order. Defendants conceded that
 16 temporary restraining orders ordinarily are not appealable, but argued that the Ninth Circuit
 17 should treat the February 3 Order as “an appealable injunctive order” and exercise jurisdiction
 18 under 28 U.S.C. § 1292(a)(1), the statute authorizing interlocutory appellate review of
 19 preliminary injunctions. Ninth Circuit Docket, ECF 14 at 8 (citing *Serv. Emps. Int’l Union v.*
 20 *Nat’l Union of Healthcare Workers*, 598 F.3d 1061, 1067 (9th Cir. 2010)). The States opposed
 21 that characterization, arguing that the February 3 Order was just what it purported to be: a
 22 temporary restraining order. Ninth Circuit Docket, ECF 28 at 5-6. The States urged the
 23 motions panel to allow this Court to rule on the States’ anticipated motion for a preliminary
 24 injunction. Ninth Circuit Docket, ECF 28 at 5-6; *see also* Oral Argument at 30:28, 53:13,
 25 *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 7, 2017),
 26 http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010885 (argument by the

1 States that the February 3 Order is not appealable and may only be reviewed through a writ of
2 mandamus).

3 The Ninth Circuit denied Defendants' request for a stay pending appeal, leaving in
4 place all of the injunctive provisions contained in the February 3 Order. Ninth Circuit Docket,
5 ECF 134 at 3, 23-24 (Order Denying Stay) ("declin[ing] to modify the scope" of the February
6 3 Order in any respect). In doing so, however, the Ninth Circuit adopted Defendants' position
7 that the February 3 Order "possesses the qualities of an appealable preliminary injunction." *Id.*
8 at 7. The court issued a briefing schedule for the merits of Defendants' appeal of the February
9 3 Order. Ninth Circuit Docket, ECF 135 at 2; *see also* Order Denying Stay at 8 n.2 (referring to
10 next step of Ninth Circuit proceedings as "the merits stage of this appeal").¹ The States
11 anticipate that the Ninth Circuit will now review the February 3 Order under the familiar abuse
12 of discretion standard applicable to preliminary injunctions. *See Am. Trucking Ass'ns, Inc. v.*
13 *City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

14 III. DISCUSSION

15 A. The Ninth Circuit Construed the February 3 Order as a Preliminary Injunction

16 The Ninth Circuit held that the February 3 Order "possesses the qualities of an appealable
17 preliminary injunction." Order Denying Stay at 7. In reaching that conclusion, the Ninth Circuit
18 relied on a line of cases outlining the limited circumstances under which an appellate court may
19 construe a temporary restraining order as a preliminary injunction. *See id.* (citing *Bennett v.*
20 *Medtronic, Inc.*, 285 F.3d 801, 804 (9th Cir. 2002); *Serv. Emps. Int'l Union v. Nat'l Union of*
21 *Healthcare Workers*, 598F.3d 1061, 1067 (9th Cir. 2010)). Under these cases, appellate
22 jurisdiction arises under 28 U.S.C. § 1292(a)(1) if a temporary restraining order is "akin to a
23 preliminary injunction." *Bennett*, 285 F.3d at 804; *see also Sampson v. Murray*, 415 U.S. 61, 86-

24
25 ¹ On February 10, following a *sua sponte* request that an en banc vote be taken, Ninth Circuit Chief
26 Judge Thomas ordered the parties to submit simultaneous briefs on whether the Order Denying Stay should be
reconsidered en banc. Ninth Circuit Docket, ECF 139. The briefing order did not alter the terms of the February 3
Order.

1 89 & n.58 (1974) (“view[ing] the [temporary restraining] order at issue here *as* a preliminary
 2 injunction” where it had “the same practical effect as the issuance of a preliminary injunction”)
 3 (emphasis added) (quoting *Pan Am. World Airways, Inc. v. Flight Eng’rs’ Int’l Ass’n*, 306 F.2d
 4 840, 843 (2d Cir. 1962).

5 The Ninth Circuit’s decision that the February 3 Order is an appealable preliminary
 6 injunction necessarily implies that it “must be treated as a preliminary injunction” going forward.
 7 *See Sampson*, 415 U.S. at 86. Treating the order as a preliminary injunction is also consistent with
 8 the law of the case doctrine, which requires that the appellate court’s ruling on a legal issue be
 9 followed in subsequent proceedings in the same case. *Harrington v. Cty. of Sonoma*, 12 F.3d 901,
 10 904 (9th Cir. 1993); *Liberty Mut. Ins. Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir. 1982) (explaining
 11 that district courts are precluded “from reconsidering . . . issues decided explicitly or by necessary
 12 implication in [the Ninth Circuit’s] previous disposition”). The alternative approach—treating the
 13 February 3 Order as a preliminary injunction for purposes of appeal, but as something else for
 14 purposes of the concurrent district court proceedings—would create the type of confusion that the
 15 law of the case doctrine is intended to prevent. *See Harrington*, 12 F.3d at 904. Accordingly, the
 16 Ninth Circuit’s ruling that the temporary restraining order is a preliminary injunction applies
 17 equally in the appellate and district court.

18 **B. A Renewed Preliminary Injunction Motion Is Unnecessary**

19 The States’ planned preliminary injunction motion was rendered moot by the Ninth
 20 Circuit’s determination that the February 3 Order “possesses the qualities” of a preliminary
 21 injunction. *See Order Denying Stay* at 7. The purpose of a preliminary injunction is to “preserve
 22 the status quo and the rights of the parties until a final judgment issues in the cause.” *U.S. Philips*
 23 *Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010) (citing *Univ. of Tex. v. Camenisch*,
 24 451 U.S. 390, 395 (1981)). Absent an order from this Court modifying the February 3 Order, or a
 25 subsequent decision from the Ninth Circuit or Supreme Court altering it, the February 3 Order
 26 will “last[] until the completion of the trial on the merits.” *See* 11A Charles Alan Wright et al.,

1 Federal Practice & Procedure § 2947, Westlaw (3d ed. & Suppl. Apr. 2016); *see also id.* (“A
 2 preliminary injunction remains in effect until a final judgment is rendered or the complaint is
 3 dismissed, unless it expires earlier by its own terms, or is modified, stayed, or reversed.”)
 4 (footnote omitted).

5 The February 3 Order granted each of the specific terms of the injunction sought by the
 6 States. *See* ECF 3-1 (proposed temporary restraining order). The Order Denying Stay left the
 7 injunctive terms of the February 3 Order untouched. It would thus be unnecessary for the States to
 8 file another motion seeking the exact same relief. *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1054
 9 (9th Cir. 2013) (en banc) (Kozinski, J., concurring) (warning that “[b]ad things can happen” to
 10 litigants who have “the nerve to vex a federal judge with a clone motion”); *F.W. Kerr Chem. Co.*
 11 *v. Crandall Assoc., Inc.*, 815 F.2d 426, 428-49 (6th Cir. 1987) (describing “successive motions for
 12 preliminary injunction” as “unwarranted” absent a material change to factual or legal claims).²

13 In short, because the Ninth Circuit has construed the February 3 Order to grant all the
 14 preliminary relief the States would have sought through a motion for a preliminary injunction, no
 15 additional briefing or evidence is required in the district court on the propriety of preliminary
 16 relief.

17 **C. The Case on the Merits Should Proceed Promptly**

18 The Ninth Circuit’s current appellate jurisdiction is limited to the February 3 Order. *See*
 19 *Nat’l Res. Def. Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (limiting
 20 appellate jurisdiction to “the matters being appealed”). When appeal is made from an order
 21 granting preliminary injunction, the appeal “does not divest the district court of jurisdiction to
 22 proceed with the action on the merits.” *G & M, Inc. v. Newbern*, 488 F.2d 742, 746 (9th Cir.
 23 1973). “The case, except for the hearing on the appeal from the interlocutory order, is to
 24 proceed in the lower court as though no such appeal had been taken, unless otherwise specially

25 _____
 26 ² Of course, the States stand ready to file their preliminary injunction motion if the Court determines that
 it is appropriate.

1 ordered.” *Phelan v. Taitano*, 233 F.2d 117, 119 (9th Cir. 1956) (quoting *Ex parte Nat’l*
2 *Enameling & Stamping Co.*, 201 U.S. 156, 162 (1906)).

3 The States favor expeditious proceedings in this Court. Proceeding directly to
4 discovery, including a prompt Rule 26(f) conference by the parties, will not interfere with the
5 case on appeal. To the contrary, it will allow this Court to consider the merits of the case in an
6 efficient manner. Given the gravity of the States’ constitutional allegations, Defendants’ stated
7 national security concerns, and the public interests at stake, the States respectfully submit that
8 discovery should proceed without delay.

9 **IV. CONCLUSION**

10 As detailed above, the Ninth Circuit has determined that the February 3 Order operates as
11 a preliminary injunction. In light of that conclusion, the parties should now begin discovery so
12 that the Court may determine the merits of the States’ claims.

13 DATED this 13th day of February, 2017.

14 Respectfully submitted,

15 ROBERT W. FERGUSON
16 Attorney General
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18 /s/ Noah G. Purcell

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