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Appealable TROs

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APPEALABLE TROS

By
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I. INTRODUCTION

Appealable TROs are all the rage. Between May 2020 and February 2021, there were at least fifteen interlocutory appeals of district court orders granting or denying temporary restraining orders regarding the Covid-19 pandemic alone.[1] Federal courts have also recently considered whether to permit jurisdiction over appeals of TROS in many other cases unrelated to the pandemic.[2] While it is well-established that TROs are appealable in circumscribed instances to prevent irreparable injury, such appeals should be appropriately limited.

Among the most venerable precepts governing federal appellate practice is that a temporary restraining order (TRO), as opposed to its close cousin, the preliminary injunction, is not appealable. Brief reflection on this stalwart of federal appeals practice leads to the deceptively satisfying conclusion that a bright-line version of this no-appeal-of-TROs rule is appropriate: (1) it furthers the foundational requirement that federal appeals be taken only from a final judgment or from interlocutory orders that fall within limited exceptions to that rule; (2)

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[1] *E.g.*, Rivas v. Jennings, 845 F. App'x 530, 533-34 (9th Cir. 2021); Calvary Chapel of Bangor v. Mills, 984 F.3d 21 (1st Cir. 2020); Bognet v. Sect'y, Commonwealth of Pa., 980 F.3d 336, 347 (3d Cir. 2020), *cert. granted, judgment vacated as moot by*, Bognet v. Degraffenreid, 141 S. Ct. 2508 (2021); Givens v. Newsom, 830 F. App'x 560 (9th Cir. 2020); Marlowe v. LeBlanc, 810 F. App'x 302, 304 n.1 (5th Cir. 2020) (per curiam); Hope v. Warden York Cnty. Prison, 956 F.3d 156 (3d Cir. 2020); *In re* Rutledge, 956 F.3d 1018, 1025-27 (8th Cir. 2020); S. Wind Women's Ctr. LLC v. Stitt, 606 F. App'x 677 (10th Cir. 2020) (per curiam); *In re* Abbott, 954 F.3d 772 (5th Cir. 2020); Pre-Term Cleveland v. Att'y Gen. of Ohio, No. 20-3365, 2020 WL 1673310 (6th Cir. Apr. 6, 2020); Newsom v. S. Bay United Pentecostal Church (*In re* S. Bay United Pentecostal Church), 992 F.3d 945, 949-50 (9th Cir. 2021); S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938, 939 (9th Cir. 2020); Roberts v. Neace, 958 F.3d 409, 412-13 (6th Cir. 2020) (per curiam); Maryville Baptist Church, Inc.. v. Beshear, 977 F.3d 561 (6th Cir. 2020; Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 612 (6th Cir. 2020) (per curiam).

[2] *E.g.*, Decker v. Lammer, No. 21- 1328, 2022 WL 135429 (7th Cir. Jan. 14, 2022); Uniformed Fire Officers Ass'n v. de Blasio, 973 F.3d 41, 46-48 (2d Cir. 2020); Pearson v. Kemp, 831 F. Appx. 467, 470-72 (11th Cir. 2020); Jackson v. Inch, 816 F. App'x 309, 311 (11th Cir. 2020) (per curiam) ; Moton v. Wetzel, 833 F. App'x 927, 929 n.1 (3d Cir. 2020) (per curiam); Wise v. Dept. of Transp., 943 F.3d 1161, 1164-65 (8th Cir. 2019); Schlafly v. Eagle Forum, 771 F. App'x 723, 724 (8th Cir. 2019); Perry v. Brown, 791 F. App'x 643, 645 (9th Cir. 2019); E. Bay Sanctuary v. Trump, 932 F.3d 742, 762-63 (9th Cir. 2018); Washington v. Trump, 847 F.3d 1151, 1158 (9th Cir. 2017) (per curiam); Garza v. Hargan, 2017 WL 9854552, *1 n.1 (D.C. Cir. 2017), (per curiam), *vacated in part on rehearing en banc*, 874 F.3d 735, 736 n.1 (D.C. 2017) (per curiam), *cert. granted, judgment vacated*, *Azar v. Garza*, 138 S. Ct. 1790 (2018); Riddick v. Maurer, 730 F. App'x 34, 36-37 (2d Cir. 2018). In other cases, courts summarily dismissed attempted appeals of TROs concluding simply that TROs are not appealable. *See, e.g.*, Powelson v. City of Sausalito, No.22-15455, 2022 WL 2314462, at*1 (9th Cir. Apr. 22, 2022); Clark as Trustee of Clark Revocable Living Trust v. LSF9 Master Participation Trust, 857 F. App'x 307, 307-08 (9th Cir. 2021) (Mem.); Scott v. Family Dollar Stores, C.A. No. 21-1224, 2021 WL 6881109 (3d Cir. 2021); Bratcher v. Clarke, 725 F. App'x 203, 204 (4th Cir. 2018) (per curiam); Barroso V. Texas, 736 F. App'x 485, 485 (5th Cir. 2018) (Mem.) (per curiam); Druley v. Patton, 601 F. App'x 632, 634 (10th Cir. 2015).

it reflects that TROs are so short-lived, so devoid of adversarial input, and so quickly reargued in the context of a preliminary injunction motion, that TROs can neither impose the type of drastic injury that warrants immediate appeal nor provide sufficient adversarial input to guide appellate review; and (3) it provides institutional benefits, protecting appellate courts from expending scarce resources to determine whether marginal cases warrant appeal and from deciding cases without sufficient factual or legal foundation, while also protecting district courts from unwarranted appellate court intrusion.[3] Each of these factors supports limited appeal of TROs but not an outright ban.

The general rule against appeal of TROs is part of the "final judgment" rule, which precludes most appeals in federal court before a final judgment in a case. An important exception to the final judgment rule is the statutory exception permitting litigants to appeal immediately from orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions."[4] The Supreme Court has concluded that Congress authorized appeal of injunctions under 28 U.S.C. § 1292(a)(1) to "permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence" if effective review cannot later be had.[5] This exception to the final judgment rule recognizes that injunctive orders are among the orders that may cause the most drastic harm if not immediately appealable.[6]

Courts have generally defined "injunctions," for purposes of immediate appeal under § 1292(a)(1), to include "preliminary injunctions" but to exclude the evanescent TRO.[7] Indeed,

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[3] *E.g.*, 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FED. PRAC. & PROC. § 3922.1 (3d ed. 2002 & April 2022 Update) [hereinafter WRIGHT & MILLER]; Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 367-69 (1961). For authority discussing the advantages and disadvantages of the final judgment rule, *see* Michael E. Solimine, *The Renaissance of Permissive Interlocutory Appeals and the Demise of the Collateral Order Doctrine*, 53 AKRON L. REV. 607, 608 (2019) [hereinafter, Solimine, *Permissive Interlocutory Appeals*]; Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. Rev. 353, 354, 356-57 (2010)); John C. Nagel, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L.J. 200, 203 (1994) (discussing the policies for and against the final judgment rule); Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 11-68-69 (1990) [hereinafter, Solimine, *Revitalizing Interlocutory Appeals*] (same, but also mentioning importance of interlocutory appeal of injunctions under § 1292(a)(1) when the impact of the ruling may be irreparable even if later reversed); Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, 47 LAW & CONTEMP. PROBS. 157, 157-62 (1984) (noting the importance of considering, *inter alia*, the following factors in deciding when interlocutory appeal is appropriate: the scarce resources of federal appellate courts and the ability of appellate review to improve upon the trial court decision; the authority and prestige of the district courts and the volume and type of litigation before the court; and whether serious consequences or irreparable injury will occur without immediate appeal).

[4] 28 U.S.C. § 1292(a)(1).

[5] Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981) (quoting Baltimore Contractors, Inc., v. Bodinger, 348 U.S. 176, 181 (1955)).

[6] *Id*.; *accord* Abbott v. Perez, 138 S. Ct. 2305, 2319-2320 (2018) (emphasizing that the "practical effect" construction of § 1292(a)(1) recognizes that "[i]f an interlocutory injunction is improperly granted or denied, much harm can occur before the final decision in the district court"); Sampson v. Murray, 415 U.S. 61, 86 n.58 (1974) (quoting Pan Am. World Airways, Inc. v. Flight Eng'rs' Int'l Ass'n, 306 F.2d 840, 843 (2d Cir. 1962)).

[7] *E.g.*, Off. of Pers. Mgmt. v. Am. Fed'n of Gov't Emps., 473 U.S. 1301, 1303 (1985) (Burger, C.J., in chambers); *accord* Pearson v. Kemp, 831 F. App'x 467, 471 (11th Cir. 2020) (citing McDougald v. Jenson, 786 F.2d 1465, 1472 (11th Cir. 1986)); Washington v. Trump, 847 F.3d 1151, 1158 (9th Cir. 2017) (per curiam); Fideicomiso De La Tierra Del Caño

TROs, which are described in Fed. R. Civ. P. 65(b),[8] seem particularly ill-suited for immediate appeal as "injunctions" because the archetypal TRO issues on minimal evidence; exists for a short duration only; is issued *ex parte*; and is intended to last only until a quick hearing may be held on whether an appealable preliminary injunction should issue.

But courts have recognized that some short-duration TROs threaten immediate and irreparable injury and cannot later be reviewed effectively. And some TROs issue following procedural opportunities mirroring those of a preliminary injunction hearing and, in fact, are simply misnamed as TROs. Ought those TROs be considered "injunctions" or be considered to have the "practical effect" of an injunction for purposes of immediate appeal pursuant to 28 U.S.C. § 1292(a)(1)? A small, yet significant, group of cases has so held under a "practical effect" doctrine that permits appeal of TROS when they have the "practical effect" of an "injunction."

This Article explores the so-called "practical effect" construction of § 1292(a)(1) through which courts have permitted interlocutory appeal of TROs. This pragmatic construction of § 1292(a)(1) illustrates the proverbial "exception to an exception to an exception." That is, in 28 U.S.C. § 1291, Congress created a general bar on interlocutory appeals, prohibiting appeal of interim district court orders, including injunctions, until after the final judgment in a case.[9] Through § 1292(a)(1), Congress later created a limited statutory exception to the final judgment rule, permitting immediate appeal of orders regarding "injunctions,"[10] but this exception too excludes TROs from classification as "injunctions" and, thus, from immediate appeal under § 1292(a)(1). Finally, federal courts have relaxed the ban on appeal of TROs under § 1292(a)(1) and now permit small categories of TROs to be appealed immediately in the following instances -- the TRO follows a full evidentiary hearing,[11] exceeds the Rule 65(b) time limits on TROs,[12] has the effect of a final order,[13] or is deemed to have the "practical effect" of a preliminary or permanent injunction.[14] Many instances of this "exception to an exception to an exception" phenomenon present obscure thought-experiments. The exception permitting immediate appeal of TROs deemed to have the practical effect of an injunction, however, presents a boots-on-the-ground issue that commonly arises in high-pressure, high-stakes situations and typically before courts have had adequate time to assess the facts and law in a case.

This Article explores the narrow, but generally recognized exceptions that permit interlocutory appeal of TROs, recommends that the divergent appellate approaches to

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Martin Peña v. Fortuño, 582 F.3d 131, 132-33 (1st Cir. 2009) (per curiam); Cnty., Mun. Emps.' Supervisors' and Foremen's Union Local 1001 v. Laborers' Int'l Union of N. Am., 365 F.3d 576, 578 (7th Cir. 2004); *see also* WRIGHT & MILLER., *supra* note 3, § 3922.1; Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 203 & n.109-10 (2001) (noting the Supreme Court has construed § 1292(a)(1) "strictly" and concluding both that TROs are not appealable under § 1292(a)91) and that the *Carson* Court imposed strict requirements on appeal under § 1292(a)(1) of orders that are not express injunctions).

[8] FED. R. CIV. P. 65(b).

[9] 28 U.S.C. § 1291.

[10] 28 U.S.C. § 1292(a)(1); *see also* Carson v. Am. Brands, Inc., 450 U.S. 79, 84 & n.8 (1981).

[11] *See infra* notes 143-156 and accompanying text.

[12] *See infra* notes 157-164 and accompanying text.

[13] *See infra* notes 165-188 and accompanying text.

[14] *See infra* notes 189-194 and accompanying text.

interlocutory appeal of TROs under the "practical effect" analysis be unified into a single approach, and provides guidelines for determining, in the fast-paced world of TRO appeals, whether appeal of a particular TRO is appropriate. The Article recommends that courts follow the standard established in *Carson v. American Brands, Inc.* for determining if an order that is not an express injunction may, nevertheless, may be appealed under § 1292(a)(1) because it has the "practical effect" of an injunction.[15] The *Carson* Court held that, in such an instance, a litigant must establish the following three elements: the order has the practical effect of denying an injunction, it threatens serious or irreparable harm if not appealed immediately, and immediate appeal is necessary for effective review.[16] Although most circuit courts have adopted the *Carson* analysis or otherwise narrowly restrict appeals of TROS,[17] three circuits have adopted more expansive approaches to appeal of TROs,[18] particularly in instances of governmental appeals.[19] Moreover, circuit courts that generally restrict appeal of TROS sometimes also adopt one of the more expansive interpretations to permit more expansive appeals of TROs.[20] Use of the expansive approaches, or both narrow and expansive approaches, essentially permits circuit courts to choose which TROs they will review.

An example of the expansive approaches to § 1292(a)(1) is the TRO that was appealed in *Washington v. Trump*.[21] In *Washington v. Trump*, the U.S. Government (Government), through Executive order 13769, banned travel to the United States by noncitizens from certain countries with majority Muslim populations.[22] This first "Muslim ban" or "travel ban" issued by President Donald Trump's Administration barred or impacted, for varying periods of time, admission into the United States of nationals from listed countries with majority Muslim populations or

[15] *Carson*, 450 U.S. at 84.

[16] *Id*. The Supreme Court later concluded that the *grant* of a TRO may also be construed to have the practical effect of an injunction and, thus, may also be appealed under a *Carson* practical effect analysis. *See* Abbott v. Perez, 138 S. Ct. 2305, 2320-21 (2017) (citing Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 287-88 (1988)).

[17] *See infra* notes 275-279 and 343-354 and accompanying text.

[18] *See infra* notes 357-421 and accompanying text.

[19] *See infra* notes 427-439 and accompanying text.

[20] *See, e.g.*, Uniformed Fire Officers Ass'n v. de Blasio, 973 F.3d 41, 47-48 (2d Cir. 2020) (using a "factor" approach to determining if a nominal TRO constitutes a preliminary injunction that included the following factors – duration of the order, whether the TRO followed notice and hearing, the nature of the showing, and whether the grant or denial of the district court order "might have a serious, perhaps irreparable, consequence," but considering only whether the order might inflict a "serious, perhaps irreparable, consequence") (quoting Romer v. Green Pt. Sav. Bank, 27 F.3d 12, 15 (2d Cir. 1994); Marlowe v. LeBlanc, 810 F. App'x 302, 304 n.1 (5th Cir. 2020) (per curiam); Turner v. Epps, 460 F. App'x 322, 325-26 (5th Cir. 2012); Garza v. Hargan, No. 17-5236, 2017 WL 9854552, at *1 n.1 (D.C. Cir. Oct. 20, 2017) (per curiam), *vacated in part on rehearing en banc*, 874 F.3d 735 (D.C. Cir. 2017) (per curiam), *cert. granted and en banc order vacated as moot sub nom.* Azar v. Garza, 138 S. Ct. 1790 (2018); Riddick v. Maurer, 730 F. App'x 34, 36-37 (2d Cir. 2018) (permitting appeal of TRO based on factors regarding nature of hearing and order and not requiring the additional *Carson* factors of threatened serious or irreparable consequences and need to appeal immediately for effective review); Boltz v. Jones, 182 F. App'x 824, 824-25 (10th Cir. 2006) (per curiam).

[21] Washington v. Trump, 847 F.3d 1151, 1158 (9th Cir. 2017) (per curiam).

[22] *Id*. at 1156-57 (citing Executive Order 13769, "Protecting the Nation From Foreign Terrorist Entry Into the United States," 82 Fed. Reg. 8,977, 8,977-80 (2017)).

refugees.[23] Shortly after the travel ban became effective, a district court in the Western District of Washington entered a TRO that barred the Government from implementing the travel ban.[24]

Forgoing the opportunity for a quick preliminary injunction hearing, the Government appealed immediately to the Ninth Circuit and moved for an emergency stay of the TRO.[25] The Ninth Circuit permitted appeal of the TRO decision, using a "qualities-of-the-adversary hearing" analysis.[26] It stressed that the issues regarding enforcement of the travel ban had been vigorously contested by the litigants in an "adversarial hearing" in the district court and that, in these "unusual" circumstances, in which the Government argued that appeal was necessary to "support its efforts to prevent terrorism" *and* the TRO would or might extend beyond the TRO duration limits of rule 65(b)(2),[27] the TRO had qualities that warranted treating the injunctive order as a "reviewable preliminary injunction."[28] Because the Government appealed immediately, however, the TRO did not exceed the 14-day limit in Rule 65(b)(2). It also appeared that the district court was willing to move quickly to a preliminary injunction hearing since it stated in its February 3rd temporary restraining order that the TRO was "necessary until such time as the court can hear and decide the States' request for a preliminary injunction" and since the plaintiffs had requested a preliminary injunction hearing to be scheduled within 15 days after the TRO issued.[29] The district court also indicated in the TRO it issued on February 3rd that the parties should propose a briefing schedule on the States' motion for preliminary injunction "no later than Monday, February 6, 2017, at 5:00 p.m." and that the court would "promptly schedule" the preliminary injunction hearing "if requested and necessary[] following receipt of the parties' briefing."[30] Furthermore, the district court could have extended the 14-day limit for the one additional 14-day period permitted by Rule 65(b), or the parties could have extended the TRO by consent, thus negating a right of immediate appeal based on the duration of the TRO.

The Ninth Circuit permitted appeal, concluding that there had been an adversarial hearing; the TRO "has or will" later exceed the Rule 65(b) duration limits; and the issue was "unusual" and "extraordinary."[31] The Government, however, had provided little or no evidence, in the limited time period before appeal of the TRO that would establish the three *Carson* factors

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[23] *See* 82 Fed. Reg. 8,977; *see also* Shoba Sivapradsad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE. L. REV. 1475, 1483-85 (2018). The ban suspended the entry of noncitizens from Iran, Iraq, Libya, Sudan, Somalia, Yemen, and Syria for 90 days; suspended refugee admissions for 120 days; reduced refugee admissions from 110,000 to 55,000; and suspended indefinitely admission of Syrian refugees. 82 Fed. Reg. 8,977; *accord* Wadhia, *supra* at 1483-84.

[24] Washington v. Trump, No. C17-0141, 2017 WL 462040, at *2-*3 (W.D. Wash. Feb. 3, 2017).

[25] *Washington*, 847 F.3d at 1156-57.

[26] *Id*. at 1158. For the Ninth Circuit's varying methods for determining if a TRO is appealable, *see infra* notes 357 to 367.

[27] *Id*. (first citing Bennett v. Medtronic, Inc., 285 F.3d 801, 804 (9th Cir. 2002); and then quoting Serv. Emps. Int'l Union v. Nat'l Union of Healthcare Workers, 598 F.3d 1061, 1067 (9th Cir. 2010)).

[28] *Id*.

[29] *Washington*, 2017 WL 462040 at **2-3 (W.D. Wash. Feb. 3, 2017); States' Response to Emergency Motion under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal, at 5-6, Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105), 2017 WL 492505, at **5-6 (noting that the States had moved for a preliminary injunction hearing and proposed a schedule that would permit a hearing within 15 days after the TRO was entered).

[30] *Washington*, 2017 WL 462040, at *3.

[31] Washington v. Trump, 847 F.3d 1151, 1158 (9th Cir. 2017) (per curiam).

-- that any banned noncitizen in fact presented an immediate threat, that appeal was needed to prevent serious or irreparable injury before a preliminary injunction hearing could be held, and that appeal following a preliminary injunction hearing would be ineffectual. To the contrary, on appeal the Ninth Circuit emphasized the paucity of evidence before it.[32] It emphasized that it would have to "assess" the merits of the stay request, including whether the Government was likely to succeed on the merits, the degree of hardship caused by the grant or denial of a stay of the TRO, and the public interest, "in light of the limited evidence put forward by both parties at this very preliminary stage."[33] Brief delay for a quick preliminary injunction hearing would have informed the appellate decision.

The *Washington v. Trump* case went from the filing of the complaint to an appellate court decision in 11 days. Following the Ninth Circuit's denial of the stay request, the Trump Administration quickly abandoned its first travel ban and implemented a more limited ban.[34] On March 8, 2017, the Government filed an unopposed motion to voluntarily dismiss its appeal, which the Ninth Circuit granted.[35] Thus, ended the brief, but eventful, life of Executive Order 13769. Before the dust had settled on the whirlwind appeal, however, commentators began questioning the Ninth Circuit's decision that it had jurisdiction under 28 U.S.C. § 1292(a)(1).[36] These concerns align with the textbook understanding that TROs are not appealable and with arguments of appellees and amici in *Washington v. Trump*, who contended, *inter alia*, that (1) the TRO was not appealable because the limited exception for appeal of TROs applies where the parties have had a full opportunity to brief the issues and usually have put on evidence and the TRO is extended for lengthy periods, but not where, as here, the court was willing to move to the preliminary injunction hearing;[37] and (2) the TRO was not appealable and appellate review could be had only by writ of mandamus.[38]

This Article concludes that courts should permit appeal of TROs under a practical effect construction of § 1292(a)(1) in the limited instances in which (1) the TRO has the practical effect

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[32] *Id*. at 1156.

[33] *Id*.

[34] Doe v. Trump, Nos. C17-0178 and C17-1707, 2017 WL 6551491, at *3 (W.D. Wash., Dec. 23, 2017). In its stead, the President signed a second Executive Order, No. 13-780 on March 9, 2017, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." *Id*.

[35] Washington v. Trump, No. 17-35105, 2017 WL 3774041, at *1 (9th Cir. Mar. 8, 2017).

[36] Josh Blackman, *The 9th Circuit's Contrived Comedy of Errors in* Washington v. Trump, 95 TEX. L. REV. SEE ALSO 18, 21, 23 (2017) (concluding that the Ninth Circuit "grossly erred" in taking jurisdiction); S. Cagle Juhan & Greg Rustico, *Jurisdiction and Judicial Self-Defense*, 165 U. PA. L. REV. ONLINE 123, 124-129 (2017) (concluding that the issue was "a close one" and Ninth Circuit could have easily concluded that the order was a TRO and that there was no appellate jurisdiction).

[37] *See, e.g.*, States' Response to Emergency Motion under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal, at 5-6, Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105), 2017 WL 492505, at **5-6; *accord* Motion for Leave to File Brief of American Immigration Council, National Immigration Project of the National Lawyers Guild, Northwest Immigrant Rights Project, Human Rights First, Kind (Kids in Need of Defense), and Tahirih Justice Center As *Amici Curiae* in Support of Appellees, at 5-9, *Washington*, 847 F.3d 1151 (No. 17-35105), 2017 WL 9833266, at **5-9 (noting, *inter alia*, that the district court was moving toward a preliminary injunction hearing).

[38] State of Hawaii's Opposition to Defendants' Motion for Emergency Stay, at *4, *Washington*, 847 F.3d 1151 (No. 17-35105) (citing Wilson v. U.S. Dist. Court for Northern Dist. Of California, 161 F.3d 1185, 1187 (9th Cir. 1998)).

of granting or denying an injunction; (2) that practical effect also threatens to impose serious or irreparable injury before a preliminary injunction hearing may be held; and (3) the TRO threatens harm in a way that can only be effectively reviewed by immediate appeal. That is, when the TRO would be appealable under the "practical effect" construction of § 1292(a)(1) set forth by the Supreme Court in *Carson v. American Brands, Inc.* TROs should not, however, be appealable in scenarios that present important issues of governmental policy as a type of proxy for the requirements of imminent serious or irreparable injury that may only be effectively reviewed by immediate appeal. Such TROs may warrant immediate appeal or review under other exceptions to the final appeal rule, such as by writ of mandamus[39] or pursuant to 28 U.S.C. § 1292(b),[40] though these avenues of interlocutory appeal also have limits.

In 2001, Timothy Glynn could conclude that "there remain few disputes over which types of orders" qualify for appeal under § 1292(a)(1), noting that the Supreme Court had construed the category strictly in *Carson*, and that, "for instance, temporary restraining orders" are not appealable.[41] The standard for appeal of TROs was previously settled. Since the early 2000s, however, three circuits have developed more expansive appeal standards for appeal of TROs under § 1292(a)(1). Other circuits typically use a narrow approach to appeal of TROs, but they, too, sometimes use the newer, more expansive approaches to permit appeal of TROs. This contradicts the Supreme Court's strict limits on appeal under § 1292(a)(1), while also importing the negatives of discretionary review: The expansive standards are akin to certiorari, giving appellate courts nearly "unfettered authority" to choose which TROs to review, thus, permitting personal preferences regarding "outcomes, plaintiffs or defendants, or types of claims or defenses to creep into" the appeal calculus.[42] Expansive, discretionary standards may,

[39] *See, e.g.*, Newsom v. S. Bay United Pentecostal Church (*In re* S. Bay United Pentecostal Church), 992 F.3d 945, 949-50 (9th Cir. 2021) (denying writ of mandamus for review of TRO); *In re* Rutledge, 956 F.3d 1018, 1025-27 (8th Cir. 2021) (issuing writ of mandamus to permit immediate review of TRO); *In re* Abbott, 954 F.3d 772, 780-96 (5th Cir. 2020) (granting writ), *vacated as moot*, Planned Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261 (2021); Fideicomiso De La Tierra Del Caño Martin Peña v. Fortuño, 582 F.3d 131, 134-35 (1st Cir. 2009) (per curiam) (denying writ); Fernandez-Roque v. Smith, 671 F.2d 426, 430-32 (11th Cir. 1982) (treating attempted appeal of TRO as a petition for writ of mandamus).

[40] *See, e.g.*, Harris v. Johnson, 376 F.3d 414, 415 n.1 (5th Cir. 2004) (per curiam) (permitting, with minimal discussion, appeal by state defendants of TRO prohibiting state of Texas to use certain chemicals in the execution of a death-row inmate, where the district court certified a controlling question of law under § 1292(b)). *But see* Pearson v. Kemp, 831 F. App'x 467, 472-72 (11th Cir. 2020) (rejecting appeal of TRO under § 1292(b) because it did not meet the requirements of § 1292(b), for the following reasons: (1) the TRO was entered after only a week of litigation; (2) the order neither identified a particular issue for review on appeal nor conclusively answered any legal issue; (3) the parties intended to present more evidence on the issues addressed in the orders at a scheduled hearing; (4) the primary question at issue appeared not to be a pure issue of law; and (5) a decision on the issue would not hasten the ultimate termination of the case); Cnty., Mun. Emps.' Supervisors' and Foremen's Union Local 1001 v. Laborers' Int'l Union of N. Am., 365 F.3d 576, 578 (7th Cir. 2004) (rejecting review of TRO under § 1292(b)).

[41] Glynn, *supra* 7, at 203 & n.109; *see also* Nagel, *supra* note 3, at 210 (quoting Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981)).

[42] Glynn, *supra* 7, at 245; *see also* James T. Carney, *Rule 65 and Judicial Abuse of Power: A Modest Proposal for Reform*, 19 AM. J. TRIAL ADVOC. 87, 89-90, 95-101 (1995) (suggesting, in the 1990s, that judges were granting preliminary injunctions based on "sympathy and political philosophy" and that plaintiffs, in "political cases," could often overcome the "irreparable harm" hurdle, which is necessary to obtain a preliminary injunction, "only with judicial assistance").

correspondingly, disserve the law development function of appeals by permitting uneven and sporadic appeal that may permit judges to serve particular personal agendas.[43] Indeed, the discretionary TRO standards, at present, seem to benefit government appellants disproportionately. Moreover, extending appealable TROs beyond those that threaten immediate irreparable injury and that cannot later be reviewed effectively weakens the ability of appellate courts in their lawmaking and error correction functions because of the likelihood of undeveloped legal and factual presentation underlying the TRO decision. And discretionary avenues for appeal of TROs increase satellite litigation regarding which TROs are appealable. In short, absent a showing of the three *Carson* requirements, the parties should proceed to the timely preliminary injunction hearing where the parties and the district and appellate courts will benefit from the more detailed evidentiary and legal submissions possible at the preliminary injunction hearing.

Section II reviews the congressionally created final judgment rule and exceptions to that rule, focusing on the exception permitting interlocutory appeal of "injunctions" pursuant to § 1292(a)(1). Section II then compares TROs and preliminary injunctions and discusses why TROs, as opposed to preliminary injunctions, should rarely be appealable. It also explores the traditional, narrow grounds for appealing a TRO. That's a lot of descriptive ground to cover. But this background regarding early injunctive orders and their appeal has been sparsely covered in the literature. Further, the narrow, traditional exceptions for appeal of TROs should be primary bases for TRO appeals and should inform the "practical effect" construction of § 1292(a)(1). Section III reprises Supreme Court cases establishing only a narrow right of appeal under the "practical effect" construction of § 1292(a)(1), in order to cull for appeal only those orders that threaten serious or irreparable injury while respecting that exceptions to the final judgment rule ought to remain narrow. Section IV identifies the varying standards used by each circuit court to permit appeal of TROs. Section V emphasizes that the expansive approaches are typically used in cases dealing with high-stakes, political contexts; reiterates why courts should uniformly enforce the *Carson* requirements; and provides guidelines for applying the *Carson* requirements. Section VI concludes.

II. THE FINAL JUDGMENT RULE, ITS EXCEPTIONS, AND APPEAL OF PRELIMINARY INJUNCTIONS AND TROS UNDER § 1292(a)(1)

Section II first discusses the congressionally created final judgment rule and its exceptions, with emphasis on § 1292(a)(1), which permits appeal of "injunctions" as well as orders that have the "practical effect" of an injunction. Section II also discusses the differences between preliminary injunctions, *ex parte* TROs, and notice-provided TROS, and, finally, it provides a comprehensive review of those scenarios in which courts have traditionally permitted very limited appeal of TROs.

A. *The Final Judgment Rule and Its Exceptions – A Brief Review*

Congress has power to establish the appellate jurisdiction of the federal circuit courts based on its powers to create the inferior federal courts, which is set forth in Articles I and III of

[43] Glynn, *supra* note 7, at 249-54.

the Constitution,[44] and based on its authority, under Article I, to do that which is necessary and proper for the exercise of its express powers.[45] Pursuant to this authority, Congress imposed a "final judgment" rule that prohibits appeal of most orders issued by a district court before a case reaches final judgment.[46] It did so by limiting the jurisdiction of the appellate courts, in 28 U.S.C. § 1291, to "final decisions" of district courts and other lower courts.[47] The final judgment rule promotes orderly administration of litigation, prevents delay of trial proceedings, encourages deference to and respect for trial court decisions, and prevents overburdening the appellate courts with disputed issues, many of which will resolve or become moot in the course of trial court proceedings. [48]

Because delaying appeal until final judgment will not always promote equitable and efficient results, however, Congress and the federal courts have created exceptions to the final judgment rule,[49] including statutory exceptions, rule-based exceptions, and exceptions created by pragmatic construction of appeal statutes.[50] The exceptions are generally narrow. Some acknowledge that some interlocutory appeals are necessary to prevent irreparable loss before a final judgment, while other early appeals provide for early supervision of the trial court, permit quick error correction, prevent duplicative proceedings, or promote law development.[51]

The primary statutory exceptions to the final judgment rule are set forth in 28 U.S.C. § 1292(a) and (b). Section 1292(a) permits immediate appeal of certain district court orders regarding injunctions; regarding appointment and duties of receivers; and regarding rights and liabilities of parties in certain admiralty cases.[52] This Article concentrates on the "practical effect" application of § 1292(a)(1), which extends the exception permitting appeal of "injunctions" to also permit appeal of orders having the "practical effect" of injunctions.

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[44] U.S. CONST. art. I, § 8, cl. 9, and U.S. CONST. art. III, § 1.

[45] U.S. CONST. art. I, § 8, cl. 9, 18.

[46] 28 U.S.C. § 1291.

[47] *Id*. Section 1291 provides that "[t]he courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction from all final decisions of the district courts of the United States. . . ."

[48] Solimine, *Permissive Interlocutory Appeals*, *supra* note 3, at 608; Petty, *supra*, note 3, at 356; Glynn, *supra* note 7, at 182-83; Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 728 (1993); Nagel, *supra* note 3, at 203; Solimine, *Revitalizing Interlocutory Appeals, supra* note 3, at 1168.

[49] Petty, *supra* note 3, at 359-60; Note, *The Final Judgment Rule in the Federal Courts*, 47 COLUM. L. REV. 239, 239 & n.5 (1947); Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 552-53 (1932) (noting the "escapes from the restrictions" of the final judgment rule, including "statutory modification in some states[,] . . . [and] use of extraordinary remedies").

[50] Glynn, *supra* note 7, at 185-94.

[51] *See* Solimine, *Permissive Interlocutory Appeals*, *supra* note 3, at 608; Petty, *supra* note 3, at 356-57; Glynn, *supra* note 7, at 183; Nagel, *supra* note 3, at 203; Solimine, *Revitalizing Interlocutory Appeals*, *supra* note 3, at 1169; Cooper, *supra* note 3, at 157.

[52] 28 U.S.C. § 1292(a) provides for immediate appeal of the following interlocutory orders: (1) interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions," *see* 28 U.S.C. § 1292(a)(1); (2) interlocutory orders "appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property," *see* 28 U.S.C. § 1292(a)(2); and (3) "interlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." *See* 28 U.S.C. § 1292(a)(3).

A second statutory grant, 28 U.S.C. § 1292(b), permits appeal of orders "certified" by a district court for appeal under 28 U.S.C. § 1292(b) and also accepted for appeal by the circuit court.[53] Section 1292(b) ostensibly provides a broad avenue for appellate review when both the district and appellate courts recognize the case as appropriate for immediate, interlocutory appeal. The federal courts have, however, limited appeals under § 1292(b), sometimes appearing to restrict use of § 1292(b) to "big" or "exceptional" cases.[54] Professor Solimine recently concluded that federal courts apply § 1292(b) in "a measured fashion, and [the provision] has neither fallen into disuse nor carved out a significant exception to the final judgment rule."[55]

Congress also permits limited early review by writ of mandamus, generally in extraordinary situations that reveal a judicial "'usurpation of power' or a 'clear abuse of discretion.'"[56] The Supreme Court's guidance on mandamus, however, has been inconsistent,[57] and, over the last century, some courts have used mandamus more broadly to provide substantive review of district court decisions over a range of issues.[58]

Federal rulemakers may also create rule-based avenues for appeal before final judgment. Fed. R. Civ. P. 54(b) has long permitted appeal based on a trial court's certification that an issue should be considered "final," when the case involves multiple claims or multiple parties, and the court enters an order that decides fewer than all claims.[59] Additionally, in the early 1990s, Congress empowered the Supreme Court to define, through Court rulemaking, both pre-judgment orders that may be deemed "final" and, thus, immediately appealable, and pre-

[53] 28 U.S.C. § 1292(b).

[54] Solimine, *Permissive Interlocutory Appeals*, *supra* note 3, at 610-13; Glynn, *supra* note 7, at 195-96.

[55] Solimine, *Permissive Interlocutory Appeals, supra* note 3, at 613, 637. Additionally, in 9 U.S.C. § 16, Congress provided a statutory exception to the final judgment rule to permit immediate appeals of interlocutory orders disfavoring arbitration, while precluding early appeal of interlocutory orders favoring arbitration. *See* Martineau, *supra* note 48, at 735-36 (discussing types of orders subject to interlocutory appeal).

[56] Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1264 (2007) (quoting Cheney v. U.S. Dist. Court, 542 U.S. 367, 380 (2004)); *accord* Petty, *supra* note 3, at 389 (quoting Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953), quoting in turn De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945)).

[57] Steinman, *supra* note 56, at 1263-65 (noting that the Supreme Court's opinion in *Cheney* articulated three conditions for issuance of a writ of mandamus – no other adequate means for obtaining relief exist, the right to the writ is "clear and indisputable," and issuance of a writ is "appropriate under the circumstances" -- but the Court has been inconsistent in applying the approach, and some, but not all, appellate courts have followed or elaborated on the approach articulated in *Cheney*); Petty, *supra* note 3, at 393-94.

[58] Petty, *supra* note 3, at 389-93; Steinman, *supra* note 56, at 1267.

[59] FED. R. CIV. P. 54. In these instances, Rule 54(b) authorizes the district court to "direct entry of a final judgment" regarding one or more but fewer than all claims if "the court expressly determines that there is no just reason for delay." *Id*.; *see also* Martineau, *supra* note 48, at 736-37.

judgment orders that may be appealed even though interlocutory.[60] The Court has, however, rarely exercised this authority.[61]

Against this backdrop of narrow avenues for appeal before final judgment, the Supreme Court continues to construe pragmatically § 1292(a)(1), which permits immediate, interlocutory appeal of injunctions, while some appellate courts have opted for more expansive interpretation. Congress adapted the final judgment requirement from English practice. English practice, however, limited the final judgment requirement to actions at law.[62] In actions in equity, which included actions seeking injunctions, it permitted interlocutory appeal from nonfinal orders.[63] Likewise, § 1292(a)(1) permits appeal of early injunctions, as follows:

> [T]he courts of appeal shall have jurisdiction from appeals from:
>
> (1) Interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.[64]

Under § 1292(a)(1), interlocutory court orders that constitute "injunctions" are immediately appealable. Congress originally created the exception embodied in § 1292(a)(1) in 1891.[65] If the order is not an injunction, but has the practical effect of an injunction, however, it is appealable only if it "may cause drastic consequences that cannot later be corrected."[66] Congress, thus, recognized that the categorical threat of drastic harm from the grant or denial of injunctions at early stages of litigation is intensified if the order may not be appealed immediately.[67] Commentators likewise have concluded that the "substantive impact of possible

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[60] Congress amended the Rules Enabling Act in 1990 to authorize the Court to prescribe rules "defin[ing] when a ruling of a district court is final for purposes of appeal under section 1291." 28 U.S.C. § 2072(c). It amended 28 U.S.C. § 1292 in 1992 to empower the Court to prescribe rules "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" in § 1292. *See* 28 U.S.C. § 1292(e). *See* Steinman, *supra* note 56, at 1246; Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeal Under Rule 23(f)*, 41 WM & MARY L. REV. 1531, 1562-64 (2000).

[61] Fed. R. Civ. P. 23(f), which permits discretionary appeal of class action certification decisions, represents the Court's only use of this expanded rulemaking authority. Solimine, *Permissive Interlocutory Appeals*, *supra* note 3, at 633; *see also generally* Solimine & Hines, *supra* note 60, at 1563-64 (discussing the promulgation of Rule 23(f)).

[62] Crick, *supra* note 49, at 541-48.

[63] Petty, *supra* note 3, at 357; Martineau, *supra* note 48, at 727; Crick, *supra* note 49, at 541-48.

[64] 28 U.S.C. § 1292(a)(1); Note, *supra* note 3, at 367-71.

[65] Carson v. Am. Brands, Inc., 450 U.S. 79, 83 n.8 (1981). The original version of this statutory exception was enacted as part of the Evarts Act and permitted appeal of orders granting injunctions but not orders refusing injunctions. A provision permitting appeal of orders refusing injunctions was enacted in 1895, removed in 1900, and finally add back in 1911. It has remained a part of the statute since that time. *Id*.

[66] *Id.* at 83-84, 86-90; *see also* Abbott v. Perez, 138 S. Ct. 2305, 2320, 2324 (2018) (quoting *Carson* and indicating that § 1292(a)(1) is construed "narrowly"); Sampson v. Murray, 415 U.S. 61, 86 n.58 (1974) (quoting Pan Am. World Airways, Inc. v. Flight Eng'rs' Int'l Ass'n, 306 F.2d 840, 843 (2d Cir. 1962)). *Sampson*, however, has also been interpreted by some courts to permit appeal if the district court holds a hearing and the TRO is strongly challenged. *See infra* notes 362-367 and 428-431 accompanying text.

[67] *Id.* at 83-84; *Sampson*, 415 U.S. at 86 n.58; *see also Abbott*, 138 S. Ct. at 2319 (reiterating that Congress created § 1292(a)(1) because "'rigid application of [the final judgment rule] was found to create undue hardship in some cases'" (quoting *Carson*, 450 U.S. at 83)); *accord* Note, *supra* note 3, at 367-68 ("Despite the absence of legislative

error" in the preliminary injunction setting is so patent "as to warrant a routine right of interlocutory appeal."[68]

The Supreme Court clarified in *Carson v. American Brands, Inc.* that § 1292(a)(1) provides a limited basis for appeal of interlocutory orders that are not injunctions but have the "practical effect" of an injunction.[69] In so doing, the *Carson* Court hewed closely to the underlying rationale for permitting early appeal of injunctions under § 1292(a)(1) -- to prevent drastic harm that cannot later be repaired.[70] The *Carson* Court concluded that orders that are not injunctions, but have the "practical effect" of an injunction, may be appealable under § 1292(a)(1) only in instances in which the appellant can establish the following three requirements -- the order has the practical effect of an injunction, it threatens serious, perhaps irreparable consequences, and it may be effectually reviewed only by immediate appeal.[71] The Court emphasized that unless an appellant can establish each of these factors, Congress's general policy precluding piecemeal appeal should control.[72] The Supreme Court recently confirmed, in *Abbott v. Perez*, that the practical effect construction of § 1292(a)(1) "serves a valuable purpose," again emphasizing that improvidently granted or denied interlocutory injunctions may cause much harm before the final judgment in a case, as may orders that have the practical effect of an injunction.[73]

Through § 1292(a)(1), Congress deliberately changed, for interlocutory orders that constitute "injunctions," what Professor Rutledge has referred to as the ordinary "vertical sequencing" for appellate review.[74] Immediate appeal of injunctions and orders having the "practical effect" of a preliminary or permanent injunction is now the norm under 1292(a)(1), rather than delay of appeal until final judgment, in order to permit quick review of orders that threaten serious or irreparable harm. Professor Rutledge emphasizes that immediate appellate review decreases the amount of time the trial court invests, allocates time and work to the

history, the courts have uniformly supposed that the purpose of the statute was to allow interlocutory appeals from a class of orders likely to cause serious and irreparable harm if not corrected without delay"); Cooper, *supra* 3, at 162.

[68] Cooper, *supra* note 3, at 162; *accord* Note, *supra* note 3, at 367-68.

[69] Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981).

[70] *Id*.

[71] *Id*. at 83-84.

[72] *Id*. at 84.

[73] Abbott v. Perez, 138 S. Ct. 2305, 2319 (2018). *Abbott* also extended the practical effect rule of § 1292(a)(1) to appellate statute, 28 U.S.C. 1253, which permits direct appeal to the Supreme Court of certain injunctive decisions by three-judge district courts. *Id.* at 2319-20.

[74] *See generally* Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1, 8, 11, 20-23 (2010) (discussing, inter alia, "vertical sequencing," which includes the "sequencing rules [that] determine when reviewing bodies can resolve decisions of inferior tribunals" and which, in federal court, is heavily influenced by the final judgment rule and its exceptions and also emphasizing that the "order in which courts resolve matters – both as individual courts and across layers of the judiciary – has significant and underappreciated outcomes," and may influence a judge's choice among multiple options for deciding the case, the parties' incentives to settle the case, the outcome of the case, and the outcome of future cases).

appellate court, alters settlement incentives, and increases accurate outcomes in current and future cases by providing for error correction and law development.[75]

Because Congress designed § 1292(a)(1) to permit speedy appellate review of interlocutory injunctions, the district court's decision regarding whether to issue a preliminary injunction or other early injunctive order is not the "main event" that a district court decision becomes after a full trial.[76] Instead, § 1292(a)(1) envisions an important role for the district court followed immediately by an important role for the appellate court. The right to quick appeal of an injunctive order, thus, does not signal lack of respect for trial courts, but that, as a system-wide arrangement, a quick opportunity for review by a multi-member appellate panel is likely to improve upon early district court injunctive decisions.

Professor Solimine has observed, in the context of interlocutory appeals under 28 U.S.C. § 1292(b), that interlocutory appellate review may actually increase the respect for the district judge, particularly if the district court's decision is affirmed.[77] Given the district court's need for tremendously quick action on preliminary injunctions, the limited opportunity for pre-hearing presentation, and the threat of serious or irreparable harm posed by an injunction, appellate review of interlocutory injunctions may increase the respect for the court system regardless of whether the appeals court affirms or reverses the district court's ruling on a preliminary injunction. That review is abuse-of-discretion review for issues regarding the district court's application of the preliminary injunction standard and clearly erroneous review regarding factual findings.[78] Immediate but deferential appellate review balances Congress's desire for quick review of district court decisions regarding early injunctions with standards that privilege the district court's decision, absent the existence of disputed legal issues. When legal issues are featured, prompt *de novo* review provides immediate and controlling appellate input on the legal issues, which are considered to be within the appellate court's special expertise.[79] It also furthers law development, and provides error correction in a context in which legal error may cause serious or irreparable injury to parties and nonparties and may otherwise escape review.[80]

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[75] For instance, Professor Rutledge observes that, if immediate review is available for a particular issue, the trial court may decide an issue, then leave the case as the appellate court takes over review, and, finally, return to the case, upon remand, with additional appellate input, thus decreasing the work of the trial court and reallocating some work to the appellate court. Rutledge, *supra* note 74, at 21, 23, 29-30; *see also* Cooper, *supra* note 3, at 162-63 (noting that an interlocutory district court ruling, including the grant or denial of a preliminary injunction, may warrant interlocutory appeal because of the substantive impact of the ruling and because, in some procedural circumstances, the ruling may engender more serious consequences or greater probability of error). Further, the appellate court's decision may provide immediate error correction, may increase accurate outcomes, and may permit law development in areas that might escape review if review after final judgment were required. Rutledge, *supra* note 74, at 29-31.

[76] *See* Joan E. Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1603-04 & nn.331-34 (2012).

[77] Solimine, *Revitalizing Interlocutory Review*, *supra* note 3, at 1178-79.

[78] *E.g.*, 11A WRIGHT & MILLER, *supra* note 3, at § 2962.

[79] *Id*.; *see also* Chad M. Oldfather, *Universal De Novo Review*, 77 Geo. Wash. L. Rev. 308, 327-38 (2009); Cooper, *supra* note 3, at 162; *see also* Rutledge, *supra*, note 74, at 29-31.

[80] Oldfather, *supra* note 79, at 327-28; Cooper, *supra* note 3, at 162; *see also* Rutledge, *supra*, note 74, at 29-31.

Congress's deliberate alteration of appellate sequencing norms emphasizes the important role of the appeals court when early injunctions are at issue, but that same speed typically makes less institutional sense for TROs. When a district court rules on a preliminary injunction motion early in an action, the district court must make a decision, which has the potential to impose drastic harm, based on a necessarily limited version of the facts and exposition of the law. With respect to TROs, however, the factual and legal presentation is typically much more truncated than at the limited preliminary injunction hearing, possibly including only the minimal legal and factual presentation permitted by a verified complaint or plaintiff's affidavits, plaintiffs written memorandum in support of the motion for TRO, and the defendant's hasty reply. Further, the TRO is typically quickly followed by the preliminary injunction hearing, which permits greater factual and legal adversarial presentation.

The need for speedy appellate review of TROs ought, thus, to be carefully scrutinized and cabined to ensure that, unless the TRO decision threatens immediate serious or irreparable harm that cannot be effectively reviewed upon later appeal, the courts will proceed to the timely preliminary injunction hearing, which typically permits at least limited discovery, presentation of witnesses (especially when facts are contested), and more detailed briefing and argument and thereafter also yields an immediately appealable preliminary injunction. This would permit appellate courts to more effectively carry out their error correction and law giving functions. Some intermediate appellate courts, however, have permitted more expansive appeal of TRO decisions, particularly in the context of high-profile, "political cases," which have previously been defined by commentator James Carney, in the preliminary injunction context, to include "cases that (1) involve issues 'of great public concern,' (2) reflect conflicts that have not been resolved by the political process, and (3) evoke judges' sympathy and political philosophy."[81] Carney argued, in the 1990s that in many such "political cases," plaintiffs could not establish the necessary "irreparable harm," and, indeed, could surmount the irreparable harm hurdle only with the judicial assistance of sympathetic judges.[82] The current, more expansive appellate review of certain high-profile TROs reflects a similar concern. Some appellate courts permit appeal of TROs before a party, now typically a governmental entity, has established the irreparable harm and lack of effective later appellate review that the Supreme Court has deemed necessary for immediate appeal of orders that are not injunctions, but have the "practical effect" of an injunction under 1292(a)(1).

Further, when circuit courts exercise discretion to permit appeal of some, but not all, TRO decisions because the TRO decision has the "practical effect" of an injunction -- but without requiring the applicant to show both irreparable harm and the need for immediate appeal -- this gives appellate courts new and unbounded discretionary authority not contemplated in 1292(a)(1). And once the appeal is before the appellate court, the more meager TRO record burdens the court with a difficult task of deciding important issues without adequate development of facts and law at issue. Like other early appeals, interlocutory appeal of TROs changes settlement incentives, but it does so in a context that limits the ability of the appellate

[81] Carney, *supra* note 42, at 90; *see also* Solimine, *Permissive Interlocutory Appeals*, *supra* note 3, at 611 (noting that 28 U.S.C. § 1292(b) has also been criticized when limited to an appeal avenue for "exceptional" or "big" cases).
[82] Carney, *supra* note 42, at 95-101.

court to perceive error or provide guidance on governing law, given the skimpy trial court record typical in TRO appeals.[83]

B. *Rule 65 -- Preliminary Injunctions,* Ex Parte *TROs, and Notice-Provided TROs*

A more detailed look at preliminary injunctions and temporary restraining orders permitted under Rule 65 reinforces the importance of limited appeal of TROs. Rule 65 discusses preliminary injunctions and *ex parte* TROs. By negative implication, it references TROs that issue following notice to the opposing party. Neither type of TRO is appealable as an "injunction" under § 1292(a)(1) because the TRO is typically characterized by "its brevity, its *ex parte* character, and . . . its informality,"[84] and the preliminary injunction decision will issue shortly thereafter.

1. *Preliminary Injunctions*

Rule 65(a) permits district courts to issue preliminary injunctions but only after notice to the opposing party.[85] The notice requirement ensures that the district court will hold an adversarial hearing, which typically includes factual presentation.[86] The preliminary injunction is "preliminary" because it issues before resolution of the case on the merits, while a "permanent" injunction issues after the trial on the merits.[87]

The Wright and Miller treatise and other commentators have concluded that the primary purposes of the preliminary injunction are to avoid irreparable injury to the plaintiff and preserve the court's power to decide the case on the merits.[88] Courts often also state, however, that the purpose is to preserve the status quo.[89] In an early and influential article, Professor Leubsdorf emphasized that preservation of the status quo and avoidance of mandatory injunctions should

[83] *See* Glynn, *supra* note 7, at 179, 231-32, 243-46 (emphasizing that permitting appellate courts discretionary authority to review some but not all cases in a "category-based appeal" (within which Prof. Glynn situates appeals under § 1292(a)(1)) does not increase review of cases presenting irreparable harm or lead to increased law development, but instead may give appellate courts new burdens of determining which orders are appealable as well as new powers that threaten the integrity of the appellate courts' error correction and lawmaking functions); *see also* Steinman, *supra* note 76, at 1603-05, 1605-09 (disparaging, on similar grounds, appellate court action as a "first responder" in resolving issues not reached in the trial court and, thus, issues for which there is incomplete factual and legal presentation).

[84] *E.g.*, Smith v. Frank, 99 F. App'x 742, 743 (7th Cir. 2004) (quoting Geneva Assurance Syndicate, Inc. v. Med. Emergency Servs. Ass'n, 964 F.2d 599, 600 (7th Cir. 1992)); *see also, e.g.*, Dilworth v. Riner, 343 F.2d 226, 229 (5th Cir. 1965). *Accord* Note, *Developments in the Law – Types of Injunctions*, 78 HARV. L. REV. 1055, 1056 (1965).

[85] FED. R. CIV. P. 65(a). *See also* 11A WRIGHT & MILLER, supra note 3, § 2947 (noting that Rule 65(a)(1) implicitly requires a hearing of some type).

[86] *E.g.*, WRIGHT & MILLER, *supra* note 3, at § 2949.

[87] Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 794-96 (2014); Carney, *supra* note 42, at 87-88.

[88] 11A WRIGHT & MILLER, *supra* note 3, at §§ 2947-2948; Kevin M. Clermont, *Rules, Standards, and Such*, 68 BUFFALO L. REV. 751, 781 (2020); Carney, *supra* note 42, at 88-89, 95; Note, *supra* note 84, at 1056-58; *see also* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 546 (1978) (citations omitted).

[89] 11A WRIGHT & MILLER, *supra* note 3, at § 2948 (discussing and disparaging the tendency of courts to require that a preliminary injunction not disturb the status quo or that it not provide affirmative relief and noting as well that the doctrine has been criticized by academics and frequently "ignored or rejected by the courts").

not be rigid requirements and should not be considered defining characteristics of preliminary injunctions:

> Emphasis on preserving the status quo is a habit without a reason. To freeze the existing situation may inflict irreparable injury on a plaintiff deprived of . . . rights or a defendant denied the right to innovate. The status quo shibboleth cannot be justified as a way to limit interlocutory judicial meddling, because a court interferes just as much when it orders the status quo preserved as when it changes it. The test is not even easy to apply, since it eddies off into conundrums about what status quo is decisive.
>
> Aversion to mandatory injunctions, like the solicitude for the status quo from which it grew, has continued to mark judicial opinions. Although judges should consider how seriously an injunction restricts the defendant's lawful freedom of action, the restriction cannot be measured by whether the injunction compels or forbids action. The distinction between requiring action and prohibiting action is mainly a verbal one unrelated to the likelihood of irreparable loss to the defendant.[90]

Similarly, James Carney emphasized that the purpose to preserve the status quo is a loose formulation that reflects the typical situation but that a preliminary injunction may, in fact, "disturb the status quo, provide affirmative relief, or even provide the plaintiff, at least on a temporary basis, with the ultimate relief sought if such measures are necessary to preserve the ability of the court to award meaningful relief following a full trial on the merits."[91] Contemporary commentators and courts agree.[92]

The preliminary injunction, once issued, extends through trial, absent further action by the court to modify or dissolve it.[93] Doctrinally, the preliminary injunction decision is important because it preserves the court's power to decide the case at the trial on the merits and, thus, permits the court to allay irreparable injury prior to a final judgment. Pragmatically, the decision is much more consequential. Commentators have concluded that the decision on the preliminary injunction is "often 'outcome determinative'"[94] and "functionally dispositive" of the case[95]

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[90] Leubsdorf, *supra* note 88, at 546 (citations omitted).

[91] Carney, *supra* 42, at 88-89, 95 (citing Leubsdorf, *supra* note 88, at 545-56 (1978)).

[92] *E.g.*, 11A WRIGHT & MILLER, *supra* note 3, §§ 2947-2948 (citing, *inter alia*, RoDa Drilling Co. v. Siegal, 552 F.3d 1203, 1208-09 (10th Cir. 2009); O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973 (10th Cir. 2004), *aff'd on other grounds and remanded*, 546 U.S. 418 (2006); Canal Auth. of Fla. v. Callaway, 489 F.2d 567 (5th Cir. 1974); United States v. Barrows, 404 F.2d 749 (9th Cir. 1968)); Maggie Wittlin, *Meta-Evidence and Preliminary Injunctions*, 10 U. CAL. IRVIN L. REV. 1331, 1359-62 (2020); Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 163-66 (2001); *accord* Note, *supra* note 84, at 1057-58; *see also* NACCO Materials Handling Grp., Inc. v. Toyota Materials Handling USA, Inc., 246 F. App'x 929, 935 n.2 (6th Cir. 2007) (noting that the difference between mandatory and prohibitory injunctions "does not warrant application of differing legal standards" (quoting United Food & Com. Workers Union v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 348 (6th Cir. 1998)); *United Food*, 163 F.3d at 348; Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353, 359-60 (4th Cir. 1991), *abrogation on other grounds recognized in* Real Truth About Obama, Inc. v. Fed. Election, Comm'n, 575 F.3d 342, 346-47 (4th Cir. 2009); Stenberg v. Cheker Oil Co., 573 F.2d 921, 925 (6th Cir. 1978).

[93] 11A WRIGHT & MILLER, *supra* note 3, § 2947; Wittlin, *supra* note 92, at 1336.

[94] Stephen C. Norman & Peter J. Walsh, Jr, *The Injunction Rollercoaster*, 21 No. 2 LITIG. 8, 8 (1995).

[95] Wittlin, *supra* note 92, at 1334-35, 1360-62.

because the decision often either drives parties to settle[96] or strongly impacts the judge's ultimate decision.[97] Thus, the preliminary injunction hearing is "high stakes for both the movant and the nonmovant."[98] Kevin Lynch, moreover, has argued that when, on limited discovery and a limited hearing, a judge decides a preliminary injunction against a plaintiff because the plaintiff failed to show likely success on the merits, and the party thereafter suffers the threatened irreparable harm, the situation is uniquely susceptible to both "lock-in" effect and "confirmation bias."[99] The "lock-in" theory posits that a judge may subconsciously feel pressure to interpret new evidence and legal arguments to accord with a prior assessment of likely success on the merits, while confirmation bias suggests the judge may subconsciously look for or give greater credence to evidence that supports the initial decision while discounting or devaluing evidence to the contrary.[100]

Thus, the nature of the preliminary injunction hearing is critical. After that hearing, the judge must make complex determinations based on incomplete information. In its preliminary injunction decision, a court must determine, on a necessarily limited record, the likelihood of the plaintiff's success on the merits, the likelihood of irreparable injury, the balance of the hardships between the parties if an injunction is granted or denied, and the public interest.[101]

Courts have wide discretion regarding the nature of a preliminary injunction hearing. Although the hearing may vary from hearings held solely or primarily on affidavits to hearings held with live witnesses following opportunity for discovery,[102] the preliminary injunction hearing

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[96] *Id*. at 1360-62 (noting that "[p]reliminary injunctions may effectively resolve a case – particularly when timing is key to the parties' interests"); Norman & Walsh, *supra* note 94, at 8.

[97] Wittlin, *supra* note 92, at 1361 (citing Kenneth R. Berman, *Litigating Preliminary Injunctions: Sudden Justice on a Half-Baked Record*, 15 PRAC. LITIGATOR 31, 33 (2004), and Lynch, *supra* note 87, at 780-81, 804-09)); Norman & Walsh, *supra* note 94, at 8.

[98] Wittlin, *supra* note 92, at 1337.

[99] Lynch, *supra* note 87, at 804-06. Professor Wittlin has noted that "the same reasoning could apply" when a judge's grant of a preliminary injunction causes irreparable harm to the defending party. Wittlin, *supra* note 92, at 1361 n.218.

[100] Lynch, *supra* note 87, at 806

[101] *E.g.*, Wittlin, *supra* note 92, at 1338-1340. Although scholars have long urged a uniform standard for examining these elements and the Supreme Court seemed to move closer to requiring a uniform standard in *Winter v. Natural Resources Defense Council*,[101] circuit courts employ varying formulations of these elements in their decisions regarding whether to grant or deny a preliminary injunction. *E.g.*, Clermont, *supra* note 88, at 782-84 (noting that some courts require the plaintiff to establish all four requirements while other courts apply the factors in variations of a sliding-scale approach and that each variation grants the court a good deal of discretion in it decisionmaking); *accord* Wittlin, *supra* note 92, at 1338-1340; Lynch, *supra* note 87, at 796-99.

[102] *See* Wittlin, *supra* note 92, at 1347-1349 (reporting on varying types of preliminary injunction hearings, based on discussions with five judges within three different circuits, noting that preliminary injunctions vary, with hearings ranging from hearings of one judge who typically consolidated the TRO and preliminary injunction hearings and permitted hearings on affidavits rather than live testimony; to another who typically held hearings on affidavits, but with the affiants available for cross-examination; to a magistrate judge who typically held hearings after a TRO was in place and after discovery, with the hearing tending to "look more like a trial on the merits, with live testimony and cross-examination"); *see also* Mark Spottswood, *Live Hearings and Paper Trails*, 38 FLA. ST. U. L. REV. 827, 870 (2011)(observing that judges have "nearly unfettered discretion to choose between live and paper-based fact-finding" in a preliminary injunction hearing); *see also* 11A WRIGHT & MILLER, *supra* note 3, § 2949.

has been referred to as "trial lite."[103] Some commentators, indeed, conclude that the preliminary injunction "is most often like a full-blown trial on the merits" in that it typically follows expedited discovery, includes direct and cross-examination of witnesses, and often includes opening and closing statements.[104] Others have similarly concluded that, when facts are in dispute, courts are most likely to provide for live testimony.[105] Based on considerations of accuracy, procedural fairness, and cost, Professor Mark Spottswood has concluded that live hearings on preliminary injunctions are preferable to paper-based hearings that rely largely on affidavits, particularly when the case involves relatively complex questions of fact.[106] Because the preliminary injunction hearing is so likely to impact the decision on the merits, moreover, Professor Maggie Wittlin has concluded that district courts should enforce more closely the Federal Rules of Evidence regarding the "likelihood of success on the merits" factor, asserting that this will permit more accurate conclusions by giving greater weight to evidence that indicates a party "will be able to produce admissible evidence at trial" and lesser weight to evidence that is not so supported.[107]

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[103] STEPHEN C. YEAZELL & JOANNA C. SCHWARTZ, CIVIL PROCEDURE, 315 (Wolters Kluwer 11th ed. 2019) (noting that the preliminary injunction "occurs after evidentiary presentations and argument – but with perhaps curtailed discovery and less than complete evidence"); Spottswood, *supra* note 102, at 870-72, 879-81 (concluding that live presentation in the preliminary injunction should be favored over documentary presentation, based on factors including accuracy considerations; subjective fairness; the likelihood that judges will permit cost-saving devices, such as telephonic testimony that will keep expenses low; and the likelihood that written submissions at the early litigation stage of the preliminary injunction hearing will have gaps or ambiguities).

[104] Erik A. Christiansen, *Preliminary Injunctions Live or Die on Powerful Evidence of Wrongdoing*, 45 No. 2 Litig. 14, 16 (2019) (stating that the preliminary injunction hearing "is most often like a full-blown trial on the merits and noting that it often follows extensive discovery and includes opening and closing statements as well as direct and cross examination); Clermont, *supra* note 88, at 781 n.64.

[105] Wittlin, *supra* note 92, at 1364-65 (citing 11A Wright & Miller, *supra* note 3, at § 2949 and various cases).

[106] Spottswood, *supra* note 102, at 830, 870-71. Professor Spottswood concludes that values of objective accuracy, subjective legitimacy, and hearing costs all weigh in favor of live testimony at the preliminary injunction hearing. *Id*. at 830, 868-72. Objective accuracy is furthered because the live hearing permits judges to probe witnesses for additional or explanatory information, and lawyers have less time, in the rapid-fire context of preliminary injunction litigation, to "coach" witnesses. *Id*. at 871. Thus, presentation by live witnesses is likely to both be more authentic and to render cross-examination particularly effective, both of which serve objective accuracy goals. *Id*. Subjective fairness to the litigants in the fast-paced context of the preliminary injunction is also furthered by live hearings because it meets litigants' and the public's general preference for parties to be heard through live testimony, while overcoming the countervailing disadvantage of increased costs typically associated with a live hearing since the preliminary injunction hearing is less formal and less evidence is available to be presented. *Id*. at 851-60, 869, 871. Finally, Professor Spottswood concludes that the relatively quick, live preliminary injunction hearing serves the values of increased accuracy and increased subjective fairness without the higher costs in preparation, delay, and formality that attend the full trial on the merit. *Id*. at 869, 871-71.

[107] Wittlin, supra note 92, at 1335, 1365-67, 1369, 1775-76. Professor Wittlin concludes that applying the Federal Rules of Evidence (FRE) regarding the likelihood of success factor, rather than the current "purely discretionary" system, would produce the following results -- an increase in predictability regarding what is admissible, more focus for attorneys on what evidence to seek, additional focus for attorney arguments; and a requirement that judges justify evidentiary decisions, thereby potentially limiting judicial bias and also potentially rendering the decision more legitimate to the viewing public. It would also require judges to consider and clarify the role of the evidence admitted. Further, applying the FRE may increase the accuracy of the preliminary injunction decision by "excluding

The hearing process preceding issuance of a preliminary injunction aims to ensure that litigants and attorneys obtain at least limited discovery, introduce evidence, and fulfill adversarial roles prior to the court's ruling on the preliminary injunction. It is the opportunity for discovery and a more extensive hearing in the preliminary injunction scenario that permits more effective decisionmaking in the district and appellate courts than is possible with the necessarily quicker TRO decisions discussed below.

2. Ex Parte *TROs*

Rule 65(b) permits district courts to issue an *ex parte* TRO, that is, to issue a TRO without notice to the opposing party and, thus, without adversarial input. The *ex parte* TRO follows a minimal presentation with only the plaintiff providing input, often through briefing and a verified complaint or affidavits.[108] Its purpose is to prevent irreparable harm until a preliminary injunction hearing can be had[109] as well as, courts often say, to preserve the status quo.[110] Others have cabined the *ex parte* TRO by limiting it to use "when it is the sole method of preserving a state of affairs in which the court can provide effective final relief."[111] As with preliminary injunctions, however, the focus should be on preventing irreparable injury and preserving the ability of the district court to enter a meaningful preliminary injunction, rather than on whether a TRO preserves the status quo.

Each subsection of Rule 65(b) provides limitations that, by the terms of Rule 65(b), apply only to the *ex parte* TRO, including that (1) the facts in the complaint must be verified; (2) the movant's attorney must certify efforts made to give notice to the opposing party or certify why no notice is warranted; (3) the TRO must not exceed 14 days or one additional period of 14 days, for good

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evidence that factfinders are likely to overvalue" and may discourage attorneys from offering inadmissible evidence. *Id*. at 1377-81. Disadvantages noted by Professor Wittlin are that using the FRE could burden plaintiffs in cases in which time constraints prevent obtaining admissible evidence by preventing them from using the lower-quality inadmissible evidence and that imposing an exclusion-of-evidence rule may largely shift the burden of exclusion to plaintiffs. *Id.* at 1381-83; *see also* 11A WRIGHT & MILLER, § 2949 (indicating that hearsay evidence may be introduced and noting that courts give hearsay evidence "less credence than direct allegations").

[108] Jack L.B. Gohn & Michael D. Oliver, *In Pursuit of the Elusive TRO*, 19 No. 4, LITIG. 25, 27 (1993).

[109] 11A WRIGHT & MILLER, *supra* note 3, § 2951.

[110] Granny Goose Foods, Inc. v. Bhd. of Teamsters and Auto Truck Drivers Loc. No. 70, 415 U.S. 423, 439 (1974); Hope v. Warden York Cnty. Prison, 956 F.3d 156, 160 (2020); *see also* 11A WRIGHT & MILLER, *supra* note 3, 2951 (noting that the TRO is "designed to preserve the status quo until there is an opportunity to hold a hearing on . . . a preliminary injunction").

[111] Note, *supra* note 84, at 1060; *accord* 16 WRIGHT & MILLER, *supra* note 3, § 3922.1 (concluding as follows: "The basic rationale for nonappealability [of TROs] draws from the view that temporary restraining orders are designed to preserve the opportunity to rule in orderly fashion upon a request for longer-lasting preliminary relief. The brief duration of such orders may mean that a grant, and perhaps even a denial, does not threaten irreparable injury. Immediate appeal, moreover, might intrude on the ability of the district court to proceed promptly to an expanded hearing and determination of the preliminary injunction request"); Christiansen, *supra* note 104, at 15 (counseling against seeing a TRO in all preliminary injunction scenarios and noting that a "TRO is most appropriate when there are exigent circumstances that require expedited relief"); Carney, *supra* note 42, at 95 (concluding, in a discussion of preliminary injunctions, that "[t]he raison d'etre for preliminary injunctive relief is the need to preserve the ability of the court to afford the plaintiff relief in the event that the plaintiff prevails at trial. Accordingly, the court need not provide preliminary injunctive relief unless the action or inaction of the defendant will deprive the court of power to remedy the alleged wrong").

cause shown; (4) the TRO must be set for hearing at the earliest possible time; and (5) the party opposing the TRO may, on two days' notice, appear and seek dissolution of the TRO.[112]

Some cases in this Article refer to the 10-day duration periods of Rule 65(b) because Rule 65 originally limited the lifespan of a TRO to one 10-day period and one possible extension of that period for good-cause. The 10-day limits of Rule 65(b) were changed to 14-day limits in 2009 by rule amendment.[113] Thus, grants or denials of TROs, govern for very short periods of time only.

In fact, however, *ex parte* TROs are a rarity[114] and, thus, are rarely appealed.[115] First, judges discourage *ex parte* presentation regarding TROs and typically require parties seeking TROs to give notice to the opposing party or attorney.[116] Second, the 1966 amendments to Rule 65(b)(1) discouraged *ex parte* TROs. Those amendments required that, before a court may issue an *ex parte* TRO, the proponent must make two showings: (1) the proponent must "clearly show" by specific facts in an affidavit or verified complaint that "irreparable injury, loss, or damage will result" before the opposing party may be heard; and (2) the proponent's attorney must certify all efforts taken to give the opposing party notice or why notice should not be required.[117] Finally, both the 1966 amendments to Rule 65 and the Advisory Committee Notes to Rule 65 emphasized that informal notice to an adverse party or attorney is preferable to no notice.[118]

3. *Notice-Provided TROs*

Rule 65(b), by implication, recognizes the second and much more common TRO -- the "notice-provided" TRO. This TRO, though referenced only by negative inference in Rule 65(b), is the typical TRO. As noted above, both the language of Rule 65(b) and the supporting Advisory

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[112] *See* FED. R. CIV. P. 65(b)(1)-(4).

[113] In 2009, federal rulemakers amended Rule 65(b)(2) to extend the duration of a TRO to 14 days and one permissible extension of that 14-day period. 11A WRIGHT & MILLER, *supra* note 3, § 2952, n.23.

[114] Norman & Walsh, *supra* note 94, at 9 (noting that "[i]n today's world of virtually instantaneous global communication ex parte TROs are a rare occurrence"); Gohn & Oliver, *supra* note 108, at 25-26 (noting that "nowadays . . *ex parte* usually means something more like 'without a full-dress hearing at which the other side can be fully heard'").

[115] *But c.f.* NBA Props. v. John Does, No. 97-4069, 1997 WL 271311, at *1 (10th Cir. May 21, 1997) (unreported table decision) (permitting immediate appeal of the denial of an *ex parte* TRO that was requested to prevent continued sale of merchandise with "trademarks, service marks, trade names and/or logos of the National Basketball Association").

[116] Norman & Walsh, *supra* note 94, at 9; *accord* Christiansen, *supra* note 104, at 14-15 (observing that courts presented with a motion for an *ex parte* for TRO will generally require notice to the opposing party "unless secrecy and speed are critical to maintaining the status quo or preventing real harm"); Gohn & Oliver, *supra* note 108, at 25-26.

[117] FED. R. CIV. P. 65(b)(1)(A) and (B).

[118] 11A WRIGHT & MILLER, *supra* note 3, § 2952. The 1966 amendments to the Advisory Committee Notes for Rule 65(b) provided that Rule 65(b)(1) was amended to encourage informal notice over no notice. Noting that the first sentence of Rule 65(b) previously indicated that notice would be "served" on the "adverse party" if a "hearing" could be held," might be interpreted to mean that notice could be omitted if time and circumstances would not permit a formal notice regarding a formal hearing. It further stated that Rule 65(b) was "amended to make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all." Adv. Comm Notes, 12A WRIGHT & MILLER, *supra* note 3, Rule 65, 1966 Amendment. Subdivision (b).

Committee Notes to Rule 65 encourage notice to the party against whom a TRO is sought.[119] Judges also strongly encourage plaintiffs seeking TROs to provide notice to the defending party.

The notice-provided TRO, thus, issues following notice to the party proposed to be enjoined and after an adversarial hearing of some sort, which may, but need not, approach the type of hearing held before issuance of a preliminary injunction.[120] The nature of the TRO hearing varies significantly, depending on both the judge's inclination and the time available. In many cases, there is no time for discovery. Thus, the pre-TRO hearing may range from a decision on the verified complaint or affidavits, to affidavits and oral argument, to a "full-fledged adversarial hearing with witnesses."[121] Notwithstanding the form of the hearing, courts require the movant to establish "credible" evidence of the elements for obtaining a TRO -- likelihood of success on the merits, irreparable injury, balance of the equities favors the TRO, and the public interest favors the TRO, with irreparable injury often the focus of the TRO inquiry.[122]

The Wright & Miller treatise emphasizes that the purpose of the TRO differs from that of the preliminary injunction. A preliminary injunction is intended to prevent irreparable injury and preserve the court's ability to decide the case during the time before a final judgment may be reached.[123] A TRO, by contrast, is designed to "prevent an immediate, irreparable injury" for a much shorter period of time -- before there is time to conduct discovery and hold the preliminary injunction hearing.[124] Courts and commentators often also state that the purpose of the TRO is maintain the status quo.[125] As with preliminary injunctions, this is a generalization. First, courts often duel over whether a TRO disturbs the status quo.[126] Second, often a TRO will maintain the status quo, but not always. Sometimes preserving the opportunity for a meaningful preliminary injunction hearing means that the TRO will preserve the status quo or the TRO will not be

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[119] *See supra* notes 116-118 and accompanying text; *see also* Gohn & Oliver, *supra* note 108, at 25-26.

[120] 11A WRIGHT & MILLER, *supra* note 3, § 2951; *see also* Christiansen, *supra* note 104, at 15-16, 18 (indicating that most courts require, before granting a TRO, that the movant provide "credible, admissible evidence" regarding each of the following factors – plaintiff has a right to protection, likelihood of success on the merits, irreparable harm, and there is no adequate legal remedy, and recommending that defendants plan to "develop a credible and admissible factual record that disputes the facts in the moving papers," and also concluding that the preliminary injunction hearing "is most often like a full-blown trial on the merits"); Gohn & Oliver, *supra* note 108, at 27 (noting that the type of hearing a judge will permit on a TRO is "hard to predict," ranging from a decision on affidavits submitted, to paper submissions plus oral argument, to a "full-fledged adversarial hearing with witnesses").

[121] Gohn & Oliver, *supra* note 108, at 27.

[122] *E.g.*, WRIGHT & MILLER, *supra* note 3, § 2951; Clermont, *supra* note 88, at 775-76 (observing that the test "for granting or denying a TRO [requires] the plaintiff . . . [to] make a showing of *immediate and irreparable harm*" but that this is not a binary, yes-no decision, because the judge typically also considers the merits, the balance of harms to the parties and the public" (emphasis in original)) Christiansen, *supra* note 104, at 16.

[123] *See supra* notes 88-92 and accompanying text.

[124] *E.g.*, 11A WRIGHT & MILLER, *supra* note 3, at §§ 2947, 2951; *see also* Gohn & Oliver, *supra* note 108, at 25 (emphasizing that the issue on application for a TRO is whether irreparable injury is likely before a chance to have a preliminary injunction hearing); Norman & Walsh, supra note 94, at 9 ("In a true emergency, . . . a TRO can hold matters in abeyance for a short time until the applicant can proceed on a more developed record to a preliminary injunction hearing"); Note, *supra* note 84, at 1060 (TRO permissible when it is the "sole method of preserving a state of affairs in which the court can provide effective final relief").

[125] *See supra* note 110.

[126] *E.g.*, 16 WRIGHT & MILLER, *supra* note 3, § 3922.1 (noting that what constitutes the "status quo" presents ambiguity and "depends on the perspective taken"); *accord* Note, *supra* note 84, at 1060.

"mandatory," but occasionally preventing irreparable injury before the preliminary injunction hearing requires modifying the status quo in the time before a preliminary injunction hearing may be had[127] or entering a mandatory TRO.[128]

Courts, however, apply the 14- and 28-day duration limits on TROs to both *ex parte* and notice-provided TROs.[129] Thus, the notice-provided TRO, like the *ex parte* TRO, may transform into an appealable injunction if it extends beyond the time periods in Rule 65(b) and, correspondingly, threatens the irreparable injury that justifies immediate appeal under § 1292(a)(1).[130]

The extremely limited time frame, the typical lack of discovery, and the more limited hearing available before a judge rules on the TRO argue against treating most TROs as appealable "injunctions" under § 12929(a)(1) and against expansively construing TROs as appealable under § 1292(a)(1) because they have the "practical effect" of a preliminary injunction. As discussed above, preliminary injunction decisions often effectively determine how the court will ultimately

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[127] *E.g.*, 16 WRIGHT & MILLER, *supra* note 3, § 3922.1; *accord* Pre-Term Cleveland v. Att'y Gen. of Ohio, No. 20-3365, 2020 WL 1673310, at **1-3 (6th Cir. Apr. 6, 2020) (denying jurisdiction over appeal of grant of TRO that would permit limited elective abortions during pandemic, notwithstanding that order of the Director of the Ohio Department of Health barred elective or nonessential surgeries and notwithstanding the conclusion of dissenting judge that the TRO both disturbed the status quo and threatened irreparable injury); San Francisco Real Est. Invs. V. Real Est. Inv. Tr. of Am., 692 F.2d 814, 816, 818 (2d Cir. 1982) (district court entered TRO, in part to maintain the status quo and prevent irreparable injury, but appellate court concluded that TRO would serve neither purpose since it could be construed not to preserve the status quo and, in either case, threatened irrevocable harm to a would-be purchasing corporation and potential investors).

[128] *E.g.* Off. of Pers. Mgmt. v. Am. Fed'n of Gov't Emps., 473 U.S. 1301, 1304-05 (1985) (quoting *Adams v. Vance*, 570 F.2d at 953-54); *see also* Belknap v. Leary, 427 F.2d 497 (2d Cir. 1970).

[129] *E.g.*, Perry v. Brown, 791 F. App'x 643, 645 (9th Cir. 2019) (court's six- month extension of original TRO that lasted for only 14 days, following notice and briefing, is appealable based on excessive duration of TRO); Tooele Cnty. v. United States, 820 F.3d 1183, 1186-87 (10th Cir. 2016) (TRO that had lasted for more than 14 days when appealed is treated as a preliminary injunction for purposes of appeal); Nutrasweet Co. v. Vit-Mar Enters., Inc., 112 F.3d 689, 692-94 (3d Cir. 1997); United States v. Bd. of Educ., 11 F.3d 668, 671-72 (7th Cir. 1993) (TRO that extended beyond 20 days without consent of parties is appealable); Nordin v. Nutri/System, Inc., 897 F.2d 339 (8th Cir. 1990) (TRO had no expiration date and exceeded the 10-day duration for TROs on the date of appeal); Quinn v. Missouri, 839 F.2d 425, 426 (8th Cir. 1988) (TRO exceeding 10-day duration set forth in Rule 65(b) has practical effect of preliminary injunction); Pan Am. World Airways, Inc., v. Flight Eng'rs' Ass'n, 306 F.2d 840, 842 (2d Cir. 1962) (permitting appeal because the court found no authority for "indefinite, successive extensions" of TROs and the order at issue extended "far beyond the limits prescribed by Rule 65(b)").

[130] *E.g.*, *Nutrasweet*, 112 F.2d at 692 (permitting appeal of a TRO that had been in effect for 62 days and noting both (1) that the "most prevalent view" is that TROs entered without notice will be treated as appealable preliminary injunctions if they exceed the time periods in Rule 65(b); and (2) that *Sampson v. Murray*, 415 U.S. 61 (1974), was a case in which the Supreme Court permitted appeal of an order designated as a TRO that exceeded the Rule 65(b) time periods, even though an adversary hearing had been held, thus, indicating that the TRO issued with notice); *accord* San Francisco Real Est. Invs. v. Real Est. Inv., 692 F.2d 814, 816-17 (1st Cir. 1982); United States v. Bd. of Educ., 11 F.3d 668, 671-72 (7th Cir. 1992) (Chicago School Finance Committee appealed a purported TRO that extended beyond 30 days without consent of the parties); *Pan Am. World Airways*, 306 F.2d at 842-43. In some situations, however, the plaintiff and the restrained party agree to extend the TRO beyond the Rule 65 time periods to permit parties to obtain necessary discovery and prepare for a meaningful preliminary injunction hearing. *See. e.g.*, Norman & Walsh, *supra* note 94, at 9.

rule or frequently drive the parties to settle,[131] and appellate courts give substantial deference to preliminary injunction decisions on immediate interlocutory appeal.[132] Thus, treating a TRO decision as equivalent to a preliminary injunction under a "practical effect" analysis, when the TRO issues in a much shorter time frame, follows meager or no discovery, and is issued after a more limited hearing in which factual issues remain unresolved, is and ought to remain the exception rather than the rule.

C. *Traditional, Limited Exceptions Permitting Appeal of TRO Decisions*

Section 1292(a)(1) is often considered to create a bright-line statutory rule permitting appeal of preliminary injunction decisions but barring interlocutory appeal of TRO decisions. This bright line does not exist. Instead, appellate courts permit appeal of TROs under § 1292(a)(1) in at least four situations, which are detailed below. Additionally, in rare instances a litigant may also obtain immediate appellate review of a TRO through a writ of mandamus or by certified appeal under 28 U.S.C. § 1292(b).[133]

The "exceptions" that permit immediate appeal of a TRO under § 1292(a)(1) often simply recognize that some TROs threaten immediate serious or irreparable harm. Indeed, the Wright and Miller treatise indicates that courts have permitted immediate appeal of orders denominated as TROs on several grounds because they recognize that it is "manifestly wrong in many situations" to conclude that TROs do not involve the sort of drastic consequences that make preliminary injunctions appealable.[134] Thus, a district court's characterization of an early injunctive order as a "TRO" is not determinative.[135] Instead, appellate courts have recognized the following scenarios as exceptions to the general rule that TROs are not appealable[136]:

(1) <u>*The "Full Evidentiary Hearing" Exception*</u>. Here, the court issues the TRO after holding a full evidentiary hearing.[137] Simply, the injunctive order at issue is a preliminary injunction but was misnamed as a TRO.

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[131] *See supra* notes 94-100 and accompanying text.

[132] 11A WRIGHT & MILLER, *supra* note 3, § 2962.

[133] *See supra* notes 39-40.

[134] WRIGHT & MILLER, *supra* note 3, § 3922.1; *accord* Note, *supra* note 3, at 368 (acknowledging scant legislative history for § 1292(a)(1), but noting that courts have uniformly concluded that the purpose of § 1292(a)(1) was to "allow interlocutory appeal of a class of orders likely to cause serious and irreparable harm if not corrected without delay").

[135] *E.g.*, *Sampson*, 415 U.S. at 86-88; Uniformed Fire Officers Ass'n v. de Blasio, 973 F.3d 41, 47 (2d Cir. 2020); Pre-Term Cleveland v. Att'y Gen. of Ohio, No. 20-3365, 2020 WL 1673310, at *1 (6th Cir. Apr. 6, 2020); Ne. Ohio Coal. for the Homeless & Serv. Emps. Int'l Union v. Blackwell 467 F.3d 999, 1005 (6th Cir. 2006);

[136] The categories of exceptions discussed in this Section provide a useful way of thinking about the situations in which appeal of a TRO may be permitted. The exceptions that permit appeal of TROs under § 1292(a)(1), however, may be organized differently. *See, e.g.*, WRIGHT & MILLER, *supra* note 3, § 3922.1 (discussing three theories that may permit appeal of a TRO – excess duration of the "TRO" or the nature of the TRO proceedings; a final-judgment equivalent; and the particular circumstances indicate a need for immediate appeal); Gohn & Oliver, *supra* note 108, at 30 (discussing appeal of TROs (1) pursuant to § 1291, as "final decisions;" (2) under § 1292(a)(1), if the facts were fully presented in a hearing similar to a preliminary injunction hearing, or because the TRO exceeded the maximum permissible time under Rule 65(b), or because the order was "practically final[]"); and (3) pursuant to § 1292(b), as a certified appeal).

[137] *See infra* notes 143-156 and accompanying text.

(2) *The "Extended Duration" Exception*. In this case, the TRO extends beyond the 14-day or 28-day periods in Rule 65(b)(2) that delimit the duration of TROs. These longer-duration TROs threaten harm identical to that threatened by a preliminary injunction, which lasts through trial unless modified. Relatedly, courts permit immediate appeal of a TRO when the court indicates that it will not move forward to a preliminary injunction hearing, thus ensuring that the TRO will extend beyond the duration permitted in Rule 65(b).[138]

(3) *The "Final Order" or "Death Knell" Exception*. In these cases, the TRO, in effect, constitutes a "final order" or a "death knell" for the action, under 28 U.S.C. § 1291. This category renders immediate appeal available when the legal decision underlying the TRO at issue effectively ends the litigation on a claim[139] or moots an issue,[140] and it also threatens immediate, harmful consequences that cannot be effectively reviewed absent immediate appeal.[141]

(4) *The "Practical Effect" of an Injunction Exception*. In other, fact-specific instances, courts permit appeal of a TRO because it has the "practical effect" of an injunction and meets the requirements of *Carson v. American Brands, Inc*. or meets the standard of *Sampson v. Murray*.[142] This practical effect analysis now encompasses both the "extended duration" and "final order" or "death knell" scenarios. Circuit courts differ on the outer limits of the "practical effect" exception, however, with some circuit courts creating a much more malleable standard for appeal of TROs than others. The Article examines this "practical effect of an injunction" exception at length in Sections III through V and concludes that TROs should only be appealable under this category when they have the practical effect of an injunction, as defined in the Supreme Court's decision in *Carson v. American Brands, Inc*.

1. Exception One -- The Full Evidentiary Hearing Exception

Courts permit appeal of TROs in rare instances in which the court concludes that the district court in fact held the full evidentiary hearing it would hold for a preliminary injunction motion and, thus, that the district court simply misnamed a preliminary injunction as a TRO.[143]

[138] *See infra* note 164

[139] *See infra* note 168.

[140] *See infra* note 169 and 183.

[141] *E.g.* United States v. Wood, 295 F.2d 772, 778 (1961); *see also infra* notes 165-188 and accompanying text.

[142] *See* Carson v. Am. Brands, Inc., 450 U.S. 79, 83 (1981); Sampson v. Murray, 415 U.S. 61, 85-87 & n.58 (1974).

[143] *E.g.*, Knowles v. Wells Fargo Bank, 513 F. App'x, 414, 414-15 (5th Cir. 2013); Smith v. Frank, 99 F. App'x 742, 743 (7th Cir. 2004) (concluding that the "court gave the non-moving party notice and an opportunity to be heard, conducted a full hearing, and contemplated whether to grant relief pending trial"); Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1421-22 (11th Cir. 1995) (TRO was "in all respects an appealable preliminary injunction"); ITT Lamp Div. of Int'l Tel. & Tel. Corp. v. Minter, 435 F.2d 989, 991 n.2 (1st Cir. 1970) (citing Austin v. Altman, 332 F.2d 273, 275 (2d Cir. 1964)); Dilworth v. Riner, 343 F.2d 226, 229 (5th Cir. 1965).

This is the so-called "preliminary injunction masquerading as a TRO."[144] Unless the court holds a full evidentiary hearing, the parties should proceed to the preliminary injunction hearing unless a would-be appellant can establish a traditional exception or that, under the *Carson* requirements, the order has the practical effect of an injunction, threatens serious or irreparable harm if the TRO is not immediately reviewed, and later appeal would be ineffective.[145]

As a pragmatic matter, preliminary injunctions typically spell the end of litigation, either because, given the exigencies of time, the parties settle or because the court continues to issue orders that accord with its first decision on the preliminary injunction.[146] And, as noted above, appellate review of the preliminary injunction is highly deferential. Thus, before the district court rules on the request for injunctive relief, it should have as complete a record as possible in the shortened time frame before the preliminary injunction decision. Additionally, appellate courts that decide cases based on appeal of a TRO frequently mention that a lack of facts limits the appellate court[147] or proceed to decide disputed issues over objection that further fact-finding

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[144] *E.g.*, Pearson v. Kemp, 831 F. App'x 467, 471-72(11th Cir. 2020) (concluding that TRO was not a preliminary injunction masquerading as a TRO, by examining the duration of the order, the extent of the evidence submitted, and the facts that the TRO would last only 10 days, no live witnesses testified, no discovery was conducted, and the defendant had not filed a response); Turner v. Epps, 460 F. App'x 322, 332 (5th Cir. 2012) (Haynes, J., dissenting) (concluding, in dissent, that the TRO at issue was not appealable as a "preliminary injunction masquerading as a TRO" even though the district court had received affidavits and written submissions and heard oral argument, where (1) the "State itself argued . . . that it was unprepared for a preliminary injunction;" (2) "all agreed that the matter before the court was solely brief, temporary relief in the form of a TRO"; and (3) the court confined the duration of the TRO to no more than 14 days); *see also Cuban Am. Bar Ass'n*, 43 F.3d at 1421-22 (concluding that the "TRO" was "in all respects an appealable preliminary injunction" where the order was indefinite, there was notice and a hearing, the court received evidence and declarations from both litigants, the court commented that no further factual development was needed, the court referred to the order as providing "preliminary injunctive relief," and the court ordered the parties to make status reports every 30 days).

[145] *See* Nagel, *supra* note 3, at 210-11, n. 85 (citing *Carson*, 450 U.S. at 84; *accord* Glynn, *supra* note 7, at 203-04 & nn.109-110.

[146] *See supra* notes 94-100 and accompanying text.

[147] *E.g.*, Vasquez v. Wolf, 830 F. App'x 556, 557-58 (9th Cir. 2020) (permitting immediate appeal of TRO because "the circumstances render the denial [of the TRO] tantamount to the denial of a preliminary injunction," but vacating and returning the case to the district court for the court to consider additional evidence presented for the first time to the appellate court on appeal); S. Wind Women's Ctr. LLC v. Stitt, 808 F. App'x 677, 681 (10th Cir. 2020) (per curiam) (concluding that the appellant's alleged irreparable harm lacked "evidentiary certainty"); *see also id*. at 682 (Lucero, J., concurring) (concluding that appellants' presentation regarding irreparable harm was "devoid of evidence" and constituted "hypothetical scenarios"); Garza v. Hargan, 874 F.3d 735, 740-42 (D.C. Cir. 2017) (en banc) (Millett, J., concurring) (emphasizing the absence of facts in the record supporting the Government's request for stay pending appeal and noting the "factual disputes that surfaced for the first time in the rehearing papers"), *vacated by* Azar v. Garza, 138 S. Ct. 1790 (2018); Washington v. Trump, 847 F.3d 1151, 1156, 1168-89 (9th Cir. 2017) (per curiam) (emphasizing that the court made its decision regarding whether the Government was entitled to a stay of the lower court TRO "in light of the limited evidence put forward by both parties at this very preliminary stage" and concluding that the Government did not show likely success on the merits or irreparable harm); Romer v. Green Point Sav. Bank, 27 F.3d 12, 16-17 (2d Cir. 1994) (noting that the TRO at issue was one of the rare TROs that disposed of all that was at issue in the case and met the *Carson* requirements and, further, that the Rule 52(a) does not require that courts include findings of fact and conclusions of law in a TRO, but advising that "it would be highly useful" to appellate review if the district courts made such findings and conclusions); *see also* Newsom v. S. Bay United Pentecostal Church (*In re* S. Bay United Pentecostal Church), 992 F.3d 945, 949-50 (9th Cir. 2021) (denying writ of mandamus for

should have been presented.[148] The TRO that issues after a full evidentiary hearing, however, satisfies these concerns.

The scenario in *Knoles v. Wells Fargo Bank, N.A.* fits within the "full evidentiary hearing" exception and, thus, it was appealable as a preliminary injunction "masquerading as a TRO." In *Knoles*, plaintiff Patrick Knoles challenged, in federal court, a bank's judicial foreclosure on his residence, following a forcible detainer action in state court. Knoles sought to prevent his eviction by moving for a TRO in federal court.[149] In a March 6, 2011, motion, Knoles indicated that he had contacted the defendant bank about the motion for TRO, he and the bank could not resolve the matter, and the bank requested a hearing on the motion.[150] The magistrate judge held a hearing the next day; both parties presented witnesses and submitted evidence; the magistrate judge entered a report and recommendation on March 8th; and Knoles filed objections on March 13th.[151] The district court considered the objections and entered an order denying the "TRO" on March 20th, two weeks after the motion had been filed.[152]

When Knoles immediately appealed, the Fifth Circuit permitted appeal under § 1292(a)(1), concluding that the court's TRO was "more in the nature of a preliminary injunction in fact, though not in name" based on the adversarial hearing and the parties' "relative lack of urgency."[153] The Fifth Circuit indicated that the pace for this nominal TRO was relatively leisurely

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review of TRO where both parties represented in TRO hearing that additional evidence would be forthcoming, district court was "unable to make findings on an adequate record," and the district court had discretion to create a "meaningful" record for review); *see also* Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay, 420 F. App'x 97, 99 (2d Cir. 2011) (emphasizing that sparse factual and legal record prior to issuance of a preliminary injunction, limited review and required affirmance because the district court, which had planned more detailed hearings, had made no factual findings and only tentative legal conclusions).

[148] *See, e.g.*, Sampson v. Murray, 415 U.S. 61, 86-88 (1974) (permitting appeal of TRO); *but see id*. at 98-100, 102-03 (Marshall, J., dissenting) (emphasizing that the absence of findings of fact and legal conclusions makes review of the TRO nearly impossible and questioning the Supreme Court's determination that complainant was not entitled to preliminary injunctive relief when neither the district court nor appellate court had considered the issues involved and the complainant had no opportunity to present evidence on some of the issues resolved); Workman v. Bredesen, 486 F.3d 896, 904 (6th Cir. 2007) (state may appeal TRO delaying immediate execution of death-row prisoner because TRO has "the practical effect of an injunction"); *but see id*. at 921-28 (Cole, J., dissenting) (concluding that the TRO was not appealable and arguing, on the merits, that the requested five-day delay for a preliminary injunction was needed to determine whether inmate was likely to experience constitutionally excessive pain and suffering during execution); Cath. Soc. Servs., Inc. v. Meese, No. 86-2907, 1987 WL 61013, at *2 (9th Cir. Apr. 3, 1987) (permitting appeal of TRO precluding Government from excluding certain immigrants and deporting others, who were eligible for legalization except that they had departed and reentered the United States illegally), *withdrawn and vacated*, 820 F.2d 289 (9th Cir. 1987); *but see id*. at **6-8 (Hall, J., dissenting) (concluding that TRO was not appealable and that the appellate court did not have sufficient facts to complete the weighing of hardships regarding whether a preliminary injunction should issue); Berrigan v. Sigler, 475 F.2d 918, 919 (D.C. Cir. 1973) (per curiam) (concluding that rights will be irreparably lost absent appeal of denial of TRO); *see also id*. at 920 (Bazalon, J., statement) (concluding that denial of TRO is appealable under the practical finality doctrine); *but see id*. at 924 (MacKinnon, J., dissenting) (concluding that appellants' factual showing on the issue of irreparable harm absent appeal was "wholly insufficient").

[149] Knoles v. Wells Fargo Bank, 513 F. App'x, 414, 414-15 (5th Cir. 2013).

[150] *Id*. at 415.

[151] *Id*.

[152] *Id*.

[153] *Id*.

and that "denial of a so-called TRO" is appealable if it is entered after a hearing that "allow[s] for full presentation of relevant facts."[154] The context of this pre-TRO adversarial hearing was unusual. The hearing permitted the parties to provide all relevant evidence; it followed a magistrate judge's decision, plaintiff's objections to that decision, and a delayed district court ruling; and it also followed state-court proceedings on the issues. The Fifth Circuit, thus, concluded that the nominal TRO was, in fact, a preliminary injunction.

In other cases, courts have also concluded, based on the full evidentiary hearing held before the TRO issued, that the TRO was, in fact, a preliminary injunction.[155]

Although these scenarios are unusual, when a nominal TRO issues after notice and a full evidentiary hearing in which all parties participate, several factors support immediate appeal under § 1292(a)(1). First, no additional facts will be presented by delaying for a preliminary injunction hearing. Second, opposing parties and attorneys have received notice, have contested the issues, and have participated in an evidentiary hearing. Third, the trial court has held a hearing and entertained factual and legal presentations before issuing a ruling. Finally, the appellate court is permitted its typical role of reviewing a prior trial court decision, made following an adversarial hearing that involved presentation of all facts and legal arguments that would have been available in the compressed time-frame of the preliminary injunction proceedings.[156]

2. Exception Two – The Extended Duration TRO

The remaining exceptions that permit appeal of an order denominated as a TRO focus on the threat that the short-duration order may impose serious or irreparable consequences that cannot be effectively reviewed if immediate appeal is not permitted. Indeed, the overriding

[154] *Id*. at 414-15.

[155] *E.g.*, Smith v. Frank, 99 F. App'x 742, 743 (7th Cir. 2004) (concluding that nominal TRO was appealable as an injunction because the court gave notice and opportunity to be heard, "conducted a full hearing, and contemplated whether to grant relief pending trial"); Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1421-22 (11th Cir. 1995) (concluding that the "TRO" was "in all respects a preliminary injunction); ITT Lamp Div. of Int'l Tel. & Tel. Corp. v. Minter, 435 F.2d 989, 991 n.2 (1st Cir. 1970) (citing Austin v. Altman, 332 F.2d 273, 275 (2d Cir. 1964) (noting that the TRO at issue was appealable because the order was issued "after a full presentation by both parties" and, thus, had the "effect of a denial of an injunction"); Dilworth v. Riner, 343 F.2d 226, 229-230 (5th Cir. 1965) (noting that the district court "held a full scale hearing on the third day after the filing of the complaint [in which] . . . [f]ive witnesses for appellants and three for appellees testified, and the court heard argument of counsel" and "concluding that the hearing was "in substance and result a hearing on and the denial of a preliminary injunction" and also concluding that the TRO was independently appealable on a death knell theory); Com. of Va. V. Tenneco, Inc., 538 F.2d 1026, 1029-30 (4th Cir. 1976).

[156] *See, e.g.*, *Dilworth*, 343 F.2d 229 (citing Connell v. Dulien Steel Prods., 240 F.2d 414, 418 (5th Cir. 1957)); *see also* Note, *supra* note 3, at 368 (noting that the nonappealabiity of TROs stems either from fact that the restrained party should have the opportunity to present arguments to the trial court before presenting them to the appellate court and that the TRO would expire before appeal is possible); *see also* Cooper, *supra* note 3, at 158-62 (concluding that the timing of appeal, in general, should depend on institutional factors, including the roles of the district and appellate courts, the bar, and the subject matter at issue); Crick, *supra* note 49, at 560-65.

purpose of § 1292(a)(1) was to put injunctive orders that threaten drastic harm if not immediately reviewable within the province of the federal appellate courts.[157]

In assessing whether a nominal TRO is, in fact, appealable because of the threat of serious or irreparable consequences, the duration of the TRO – and whether the nominal TRO extends beyond the time periods permitted in Rule 65(b)(2) – is a key determinant that the TRO at issue "has the same practical effect as the issuance of a preliminary injunction."[158] Indeed, courts routinely conclude that a TRO, which extends beyond the 14- and 28-day limits currently imposed in Rule 65(b)(2) (or beyond the 10- or 20-day limits previously imposed[159]), is immediately appealable. [160]

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[157] *See supra* notes 66-73 and accompanying text. Thus, the Supreme Court has construed § 1292(a)(1) as permitting immediate appeal of a TRO even before a trial court decision on the merits of the TRO if the TRO threatens irreparable harm absent appeal, such as when the TRO extends beyond the time periods in rule 65(b). *E.g.*, Carson v. Am. Brands, Inc., 450 U.S. 79, 83-85 (1981); Sampson v. Murray, 415 U.S. 61, 86-87 & n.58 (1974).

[158] Pan Am. World Airways, Inc. v. Flight Eng'rs' Int'l Ass'n, 306 F.2d 840, 843 (2d Cir. 1962); *see also Sampson*, 415 U.S. at 86 n.58 (quoting *Pan Am*., 306 F.2d at 843 (emphasizing that "'[i]t is for the same reason, the possibility of drastic consequences which cannot later be corrected, that an exception is made to the final judgment rule to permit review of preliminary injunctions. . . . To deny review of an order that has all the potential danger of a preliminary injunction in terms of duration, because it is issued *without* a preliminary adjudication of the basic rights involved, would completely defeat the purpose of this provision'" (emphasis in original)); *accord* Tooele Cnty. v. United States, 820 F.3d 1183 (10th Cir. 2016); Jones v. Belhaven College, 98 F. App'x 283 (5th Cir. 2004) (per curiam); Nutrasweet Co. v. Vit-Mar Enters., Inc., 112 F.3d 689, 692-94 (3d Cir. 1997); United States v. Bd. of Educ., 11 F.3d 668, 671-72 (7th Cir. 1993); Nordin v. Nutri/System, Inc., 897 F.2d 339 (8th Cir. 1990); Quinn v. Missouri, 839 F.2d 425, 426 (8th Cir. 1988); Edudata Corp. v. Sci. Computs., Inc., 746 F.2d 429, 430 (8th Cir. 1984) (per curiam); Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1422 (11th Cir. 1995).

[159] Until the 2009 amendments to the Federal Rules of Civil Procedure, the limit on the duration of a TRO was 10 days plus one possible 10-day extension. *See supra* note 113 and accompanying text. The 2009 amendments increased these time periods to 14 days.

[160] *E.g., Tooele Cnty*., 820 F.3d at 185 (TRO that had lasted for more than 14 days when appealed is treated as a preliminary injunction for purposes of appeal); Jones v. Belhaven College, 98 F. App'x at 284; *Nutrasweet*, 112 F.3d at 692-94 (noting that long-duration TROs can "inflict substantial injury"); United States v. Bd. of Educ., 11 F.3d 668, 671-72 (7th Cir. 1993) (TRO that extended beyond 20 days without consent of parties is appealable because long-duration TROs can "inflict substantial injury"); *Nordin*, 897 F.2d 342-43 (TRO had no expiration date and exceeded the 10-day duration for TROs on the date of appeal); *Quinn*, 839 F.2d at 426 (TRO exceeding 10-day duration set forth in Rule 65(b) has practical effect of preliminary injunction); Waste Mgmt., Inc. v. Deffenbaugh, 534 F.2d 126, 129 (8th Cir. 1976); *Pan Am. World Airways*, 306 F.2d at 842 (permitting appeal because the court found no authority for "indefinite, successive extensions" of TROs and the order at issue extended "far beyond the limits prescribed by Rule 65(b)"). Courts also sometimes combine a TRO extending beyond 14 days with the opportunity for an adversarial hearing to conclude that the TRO is appealable. *E.g.*, Decker v. Lanner, No. 21-1328 , 2022 WL 135429 at *2 (7th Cir. Jan. 14, 2022) (eight-month delay in ruling on motion, combined with notice to defendant, briefing, and request for a TRO that would exceed 14 days); Perry v. Brown, 791 F. App'x 643, 645 (9th Cir. 2019) (court's six-month extension of original TRO that lasted for only 14 days, following notice and briefing, is appealable based on excessive duration of TRO); E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 763 (9th Cir. 2018) (permitting immediate appeal of order labeled as a TRO by Government appellants where an adversary hearing had been held and the basis for issuing the order was strongly challenged, the TRO was to extend for 30 days, the Government had an opportunity to be heard, and the Government argues that "emergency relief is necessary to support the national interests"); Bennett v. Medtronic, Inc., 285 F.3d 801, 804 (9th Cir. 2002) (noting that the TRO was granted for a

In concluding that a TRO that exceeds the maximum time periods imposed by Rule 65(b) may be appealed under § 1292(a)(1), the Second Circuit explained that longer-duration TROs, like preliminary injunctions, may lead to loss of rights simply based on the passage of time:

> "[T]he longer the period of . . . prohibition [mandated by a TRO] the greater the chance that the right will be completely frustrated because the opportunity once suspended may, as a practical matter, be lost. . . . It is because the remedy is so drastic and may have such adverse consequences that the authority to issue temporary restraining orders is carefully hedged in rule 65(b) by protective provisions. And the most important of these protective provisions is the limitation on the time during which such an order can continue to be effective.
>
> It is for the same reason, the possibility of drastic consequences which cannot later be corrected, that an exception is made to the final judgment rule to permit review of preliminary injunctions. 28 U.S.C. § 1292(a)(1). . . ."[161]

In some cases, parties agree that more than 14 or 28 days is necessary to prepare for the preliminary injunction hearing. In these cases, parties can and do consent to a TRO that extends beyond the periods in Rule 65(b),[162] but even TROs extended by party consent will ultimately be appealable under § 1292(a)(1) as an injunction at some point.[163]

If the parties do not consent to an extension of the TRO, however, and any threat of serious or irreparable harm is based on the duration of the TRO exceeding Rule 65(b) duration limits, rather than on other demonstrated loss or adverse consequences, courts should not permit appeal of a TRO until the 14-day or 28-day periods prescribed in rule 65(b) have actually been exceeded, particularly when the district court plans to hold a quick hearing on the preliminary injunction that will provide for additional factual and legal presentation. By contrast, courts should permit appeal when the order indicates that the judge will not move forward to a

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period of 30 days, that the TRO was "strongly challenged," and that both parties filed extensive written materials and made oral arguments); San Francisco Real Est. Invs. v. Real Est. Inv. Trust, 692 F.2d 814, 816 (1st Cir. 1982) (emphasizing that (1) the parties had notice, filed "relatively extensive written memoranda," and had an opportunity for oral argument; (2) the TRO extended beyond the 10-day period then established in Rule 65(b); and (3) the threatened harm could be irrevocable by the time for the preliminary injunction hearing).

[161] *Pan Am. World Airways*, 306 F.2d at 843 (citing Sims v. Greene, 160 F.2d 512 (3d Cir. 1947); Missouri-K-T R.R. Co. v. Randolph, 182 F.2d 996 (8th Cir. 1950); W. Union Tel. Co. v. United States & Mex. Trust Co., 221 F. 545, 553 (8th Cir. 1915); Grant v. United States 282 F.2d 165, 167-68 (2d Cir. 1965) (dictum) and 7 MOORE, FED. PRAC. ¶ 65.07 (2d Ed. 1955) and 3 BARRON & HOLTZOFF, FED. PRAC. & Proc. § 1440 (Wright Ed. 1958)); *accord Nutrasweet*, 112 F.3d at 692-94 (noting that short duration of TROs renders immediate appeal unnecessary to protect parties, but longer TROs may inflict significant harm).

[162] *E.g.*, Fernandez-Roque v. Smith, 671 F.2d 426, 429-30 (11th Cir. 1982).

[163] *E.g.*, In re Arthur Treacher's Franchise Litig., 689 F.2d 1150, 1153-54 (3d Cir. 1982); New York Tel. & Tel. Co. v. Commc'ns. Workers of Am., 445 F.2d 39, 46 (2d Cir. 1971).

preliminary injunction hearing.[164] In this instance, the court indicates that its originally entered TRO will not be followed by a quick preliminary injunction hearing, thus ensuring that the TRO decision is not temporary, but will extend beyond the duration permitted in Rule 65(b).

3. Exception Three – The "Final Order" or "Death Knell" Exception Under a Pragmatic Construction of 28 U.S.C. § 1291

A third category of appealable TROs arises from situations in which an order labeled as a TRO will finally decide an issue or will moot the issue, and the order cannot be effectively reviewed on later appeal. Under this exception, somewhat counter-intuitively, immediate appeal was originally permitted because the TROs were construed as "final judgments" under a practical construction of the final judgment rule established in 28 U.S.C. § 1291, even though they would not qualify as a *de facto* preliminary injunction for purposes of appeal under 28 U.S.C. § 1292(a)(1).[165]

These "final order" TROs are a subspecies of the *Cohen* collateral final order doctrine.[166] Under this "final order" exception, the TRO is appealable because it "determin[es] substantial rights of the parties which [would] be irreparably lost if review [were] delayed until final judgment."[167] In these cases, circuit courts allow appeal of an order denominated as a TRO when a court issues a TRO in such time-sensitive circumstances that, despite the TRO's shorter duration, the TRO threatens consequences so serious or irreparable that the issue will be finally

[164] *E.g.*, J.G. *ex rel.* Greenberg v. Hawaii, 728 F. App'x 764, 764-65 (9th Cir. 2018); Belbacha v. Bush, 520 F.3d 452, 455 (D.C. Cir. 2008); Doe v. Vill. of Crestwood, 917 F.2d 1476, 1477 (7th Cir. 1990); Belo Broad. Corp. v. Clark, 654 F.2d 423, 426 n.3 (5th Cir. Unit A 1981); Levesque v. Maine, 587 F.2d 78, 79-80 (1st Cir. 1978); Virginia v. Tenneco, Inc., 538 F.2d 1026, 1030 (4th Cir. 1976).

[165] 15A WRIGHT & MILLER, *supra* note 3, §§ 3912, 3922.1; *see also e.g.*, United States v. Wood, 295 F.2d 772, 778 (1961); Dilworth v. Riner, 343 F.2d 226, 229-30 (5th Cir. 1965); Berrigan v. Sigler, 475 F.2d 918, 920-21 (D.C. Cir. 1972) (Bazelon, C.J., statement).

[166] *E.g.*, *Wood*, 295 F.2d at 777-78 & n.6; *Dilworth*, 343 F.2d at 229-30; *Tenneco, Inc.*, 538 F.2d at 1030; *Berrigan*, 475 F.2d at 920-21 (Bazelon, C.J., statement). Since these decisions in the early 1960s, the Supreme Court has reduced the reach of the collateral order doctrine, and Michael Solimine suggests that the collateral order doctrine "rests on shaky jurisprudential foundations" that portend further narrowing of its availability or that the doctrine may "even [be] abandoned entirely." Solimine suggests that these appellate avenues should not be interpreted to overrule the collateral order doctrine, but may be read "more modestl[y]" to further limit expansion of collateral order appeals or to create an "even stronger presumption" against recognizing new bases for appeal. *See* Solimine, *Permissive Interlocutory Appeals*, *supra* note 3, at 609, 625- 27, 630-34 (emphasizing that the Court has limited the *Cohen* collateral order doctrine and has emphasized the availability of appeals under 28 U.S.C. § 1292(b) or court rulemaking regarding interlocutory and final orders).

[167] *E.g.*, *Wood*, 295 F.2d at 778 (concluding that TROs may, in some circumstances, be considered final decisions under a practical construction of 28 U.S.C. § 1291 and citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)); *see also* Wirtz v. Powell Knitting Mills Co., 360 F.2d 730, 732 (2d Cir. 1966) (citing *Cohen*, 337 U.S. at 545-47); *Dilworth*, 343 F.2d at 229-30 (same).

decided by the TRO decision, absent immediate appeal[168] or the TRO issue will become moot if appeal is not permitted.[169]

The Fifth Circuit's 1961 decision in *United States v. Wood* is a prototypical and influential use of the *Cohen* collateral order doctrine[170] to permit appeal of a TRO under § 1291 because the issue would be rendered moot and, thus, "final," as a pragmatic matter, if not immediately appealable.[171] In *Wood*, the U.S. Government (Government) appealed the denial of a TRO it had sought in order to restrain the prosecution of John Hardy, an African American man who was scheduled to be prosecuted in a Mississippi county court for disturbing the peace.[172] The Government's complaint and affidavits established that Hardy, a member of the Student Non-Violent Coordinating Committee, was in Mississippi in 1961 to assist African Americans in registering to vote.[173] When Hardy accompanied some of those he had instructed to the county registrar's office on September 4, 1961, the county registrar struck Hardy in the back of the head with his revolver; the county sheriff had Hardy jailed; and Hardy was ultimately charged with disturbing the peace.[174] Hardy's trial for disturbing the peace was set for September 22, 1961 -- just 15 days after he had been charged.[175] On September 20, 1961, the Government filed a lawsuit in federal court against the county registrar, county sheriff, a city attorney, and a district attorney. The Government requested a TRO restraining Hardy's trial, on the theory that the prosecution of Hardy "was designed to, and would intimidate qualified [African Americans] . . . from attempting to register to vote" in violation of their right to be free of interferences in voting, under 42 U.S.C. § 1971.[176] The Government served the defendants with notice of the TRO on September 20th. The district court held the TRO hearing on September 21st[177] and denied the

[168] *E.g.*, Ramos v. Dep't of Homeland Sec. Bureau of Immigr. & Customs Enf't, 179 F. App'x 239, 240 (5th Cir. 2006); Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1223, 1225 (11th Cir. 2005); Populist Party v. Herschler, 746 F.2d 656, 661 n.2 (10th Cir. 1984) (per curiam); *Berrigan*, 475 F.2d at 919 (per curiam); New York Tel. & Tel. Co. v. Commc'ns. Workers of Am., 445 F.2d 39, 44-46 (2d Cir. 1971); *Wood*, 295 F.2d at 777-78; *accord* 11A WRIGHT & MILLER, *supra* note 3, § 2962..

[169] *E.g.*, *Wirtz*, 360 F.2d at 732; *Berrigan*, 475 F.2d at 919 (per curiam); *accord* 11A WRIGHT & MILLER, *supra* note 3, § 2692.

[170] *Wood*, 295 F.2d at 777-78 & n.6 (noting that some circuit courts appeared to have permitted appeal of TROs in deportation cases "evidently on the theory that unless review is had the entire controversy would be mooted by the deportation of the appellant" (citing Shih v. Kennedy, No. 16272 (D.C. Cir. Mar. 23, 1961) and Marcello v. Brownell, No. 12838 (D.C. Cir. Aug. 31, 1955)).

[171] *Id*.

[172] *Id*. at 774.

[173] *Id*. at 775. The Defendants did not submit counter-affidavits because they alleged insufficient time to prepare and present them. *Id*. at 774.

[174] *Id*. at 775-776.

[175] *Id*. at 774.

[176] *Id*. at 774, 779-83.

[177] *Id*. at 774. The U.S. Government submitted its case on unopposed affidavits because the Defendants claimed insufficient notice or time to prepare counter-affidavits. *Id*.

requested TRO that evening, thus, permitting Hardy's prosecution to proceed the next morning.[178]

On expedited appeal, the Government argued that the Fifth Circuit had jurisdiction to hear appeal of the denial of the TRO seeking delay of Hardy's prosecution, because the trial court's denial of the TRO would moot the claim for relief and would render appeal at final judgment ineffective.[179] The gravamen of the Government's claim was that prosecution of Hardy – regardless of the outcome of the trial or later appeals – would deter non-party, qualified African Americans from registering to vote "for fear that they [would] be subjected to unjustified official acts, including arrest and prosecution."[180] Indeed, denial of immediate appeal would, as a practical matter, be equivalent to the dismissal of its first claim.[181] Further, the Government argued, a later appeal could not undo the intimidation of those nonparties, who might decide, based on the prosecution of John Hardy, to forgo their rights to vote. The Fifth Circuit agreed that, on these facts, the denial of the TRO constituted a "final" and appealable order under § 1291 because the denial, which was otherwise nonappealable, would "determin[e] substantial rights" which would be "irreparably lost if review [were] delayed until final judgment."[182]

Following *United States v. Wood*, federal appellate courts have used this "final order" construction of 28 U.S.C. § 1291 to permits appeal of case-ending or issue-ending TRO decisions because (1) the orders finally dispose of an issue or render an issue moot; or (2) the rights at issue will be irreparably lost absent immediate appeal and will avoid effective review if not immediately appealed.[183] Some examples include permitting appeal of a TRO when (1) a patient's nutrition and hydration will be stopped, likely resulting in death before the preliminary injunction hearing;[184] (2) a death-row inmate will be executed before the preliminary injunction will be

[178] *Id*.
[179] *Id*. at 777.
[180] *Id*. at 777-84.
[181] *Id*.
[182] *Id*. at 778.
[183] *E.g.*, Ramos v. Dep't of Homeland Sec. Bureau of Immigr. & Customs Enf't, 179 F. App'x 239, 240 (5th Cir. 2006); Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1223, 1225 (11th Cir. 2005) (per curiam); Populist Party v. Herschler, 746 F.2d 656, 661 n.2 (10th Cir. 1984) (per curiam); Berrigan v. Sigler, 475 F.2d 918, 919 (D.C. Cir. 1973) (per curiam); Berrigan v. Sigler, 475 F.2d 918, 920-21 (D.C. Cir. 1972) (Bazelon, C.J., statement); New York Tel. & Tel. Co. v. Commc'ns. Workers of Am., 445 F.2d 39, 44-46 (2d Cir. 1971); Wirtz v. Powell Knitting Mills Co., 360 F.2d 730, 732 (2d Cir. 1966); Dilworth v. Riner, 343 F.2d 226, 229-30 (5th Cir. 1965); *accord* 11A WRIGHT & MILLER, *supra* note 3, § 2692.
[184] *Schiavo*, 403 F. 3d at 1225. In *Schiavo*, the district court denied a request for a TRO that would have reintroduced nutrition and hydration for a patient in a persistent vegetative state. *Schiavo*, 403 F.3d at 1225. Restarting the nutrition and hydration was necessary to preserve the patient's life. *Id*. at 1232 (providing the opinion of the district court as an attachment to the appellate decision). Notwithstanding that the district court's order was styled as a denial of a TRO, the Eleventh Circuit permitted appeal because the "grant or denial of [the] TRO might have a serious, perhaps irreparable, consequence, and can only be challenged by immediate appeal." *Id*. at 1225. The Eleventh Circuit explained that immediate appeal was permissible because in such cases the TRO is "equivalent to" a preliminary injunction or the TRO may be deemed a final judgment, each of which is appealable. *Id*. The *Schiavo* TRO, thus, may be classified as an appealable "death knell" TRO under § 1292(a)(1) or as appealable under a practical, "final order" or "death knell" construction of § 1291.

held;[185] (3) a noncitizen, who will be removed from the country before a preliminary injunction hearing, claims he will be tortured upon removal;[186] and (4) some grants or denials of TROs requesting extension of limited time frames for consummating a corporate change of structure.[187] Permitting immediate appeal in these TRO scenarios makes sense: The decision on the TRO effectively ends the claim or case on the merits and threatens irreparable harm, rendering later appeal meaningless.

The "final order" or "death knell" construction of § 1291 remains a valid means for appealing TROs. The practical effect construction of § 1292(a)(1), which has gained currency since the 1970s and to which the Article turns next, however, now also encompasses both this "final order" or "death knell" analysis and the extended-duration TRO analysis because the foundation of the Supreme Court's decision in *Carson* is that orders that are not express injunctions may be appealed when, like "final order" TROs, they threaten immediate serious or irreparable injury that can only be effectively reviewed by immediate appeal. Courts, thus, sometimes permit appeal of this type of TRO on differing grounds - on a final order analysis/death knell analysis or on a practical effect construction of § 1292(a)(1).[188]

4. Exception Four – The "Practical Effect" Exception Under § 1292(a)(1)

Courts also permit appeal of TRO decisions when an appellant establishes that the TRO at issue has the "practical effect" of an injunction under § 1292(a)(1). Under the Supreme Court's decision in *Carson v. American Brands, Inc*., TROs would be appealable under a practical effect analysis when a TRO has the practical effect of an injunction, threatens immediate serious or irreparable effect, and immediate appeal is needed for effective review of the TRO.[189] This

[185] *See e.g.*, Duvall v. Keating, 162 F.3d 1058, 1062 (10th Cir. 1998); Ingram v. Ault, 50 F.3d 898, 899-900 (11th Cir. 1995) (per curiam). In *Ingram*, the Eleventh Circuit permitted immediate, interlocutory appeal of the denial of the TROs at issue under a practical effect construction of § 1292(a)(1) because the prisoner would face irreparable consequences – execution – within 24 hours, and appeal following a preliminary injunction hearing would unquestionably come too late to be effective. *Id*. at 899.

[186] *E.g.*, *Belbacha*, 520 F.3d at 455 (permitting immediate appeal, under § 1292(a)(1), of denial of TRO, which denied motion of Guantánamo Bay detainee to bar his transfer to Algeria, where he alleged he would likely be tortured, because the order would effectively bar the detainee from seeking further preliminary relief through a preliminary injunction and was thus "tantamount to denial of a preliminary injunction" (quoting Levesque v. Maine, 587 F.2d 78, 79-80 (1st Cir. 1978)); *Ramos*, 179 F. App'x at 240; *accord Wood*, 295 F.2d at 77-78 & n.6) (noting that appellate courts had permitted appeal of denials of TROs in deportation cases, "evidently on the theory that unless review is had the entire controversy would be mooted by the deportation of the appellant" and citing *Shih v. Kennedy*, No. 16272 (D.C. Cir. Mar. 23, 1961 and *Marcello v. Brownell*, No. 12838 (D.C. Cir. August 31, 1955)).

[187] Romer v. Green Point Sav. Bank, 27 F.3d 12, 15-16 (2d Cir. 1994); *see also* Edudata Corp. v. Scientific Computs., Inc., 746 F.2d 429, 430 (8th Cir. 1984) (per curiam) (permitting appeal of a TRO suspending a tender offer because it extended beyond the 10-day limit for TROs); San Francisco Real Est. v. Real Est. Inv. Trust, 692 F.2d 814, 816-17 (1st Cir. 1982) (time was of the essence making immediate appeal available when district court, with two days' notice, extended the time period in a tender offer when those who had subscribed to sell shares were guaranteed that at least some of their shares would be purchased and when (1) both parties had notice; (2) the parties filed briefs and made argument; (3) the purchaser and potentially selling shareholders could suffer irreparable injury before a preliminary injunction hearing; and (4) the court had initially characterized the order as a preliminary injunction).

[188] *E.g.*, *Schiavo*, 403 F.3d at 1225; *Green Point Sav. Bank*, 27 F.3d at 15-16.

[189] Carson v. Am. Brands, Inc., 450 U.S. 79, 83-86 (1981); *see also infra* notes 272 and 275-282 and accompanying text.

practical effect construction of § 1292(a)(1) derives from Supreme Court decisions in the 1970s and 1980s and from pre-*Carson* cases that established the three previous "exceptions" to the rule that TROs are not appealable.

Courts now often use a "practical effect" construction of 28 U.S.C. § 1292(a)(1) to permit appeal of TROs previously appealed under a § 1291 "final order" or "death knell" analysis. In these "final order" TRO appeals, temporal urgency is clear and insistent and the threatened loss, absent immediate appeal, is certain and drastic.[190] In short, time is critical. Delaying for a preliminary injunction hearing or postponing appeal until the expiration of the artificially established (though generally useful) 14- or 28-day deadlines in Rule 65(b), will render the appeal ineffective. As the Supreme Court has noted, § 1292(a)(1) permits immediate appeal of "injunctions" because "rigid application" of the final judgment rule to injunctions sometimes imposes undue hardship because it may preclude "lawful and important conduct" or allow "unlawful and harmful conduct . . . to continue."[191] The "final order" or "death knell" TROs are prime examples of how a short-lived TRO can have the practical effect of a preliminary or permanent injunction, and they, thus, qualify for immediate interlocutory appeal under the "practical effect" construction of § 1292(a)(1) because the threatened consequences are "serious, perhaps irreparable" and the order may only be effectively reviewed by immediate appeal. In these cases, time is generally an important factor, and the grant or denial of a TRO assertedly threatens immediate injury to an important right that cannot be remedied by later appeal.

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[190] *E.g.*, *Schiavo*, 403 F.3d at 1225; *Green Point Sav. Bank*, 27 F.3d at 15-16; Berrigan v. Sigler, 475 F.2d 918, 920 (D.C. Cir. 1972) (Bazelon, J., statement); Ohio Republican Party v. Brunner, 543 F.3d 357, 360 (6th Cir. 2008) (acknowledging jurisdiction over grant of TRO that advised county boards of election that they need not permit election observers during the 35-day period for in-person absentee voting based on "extraordinary time constraints" of the election issue and the need for immediate appeal); Populist Party v. Herschler, 746 F.2d 656, 661 n.2 (10th Cir. 1984) (per curiam) concluding that, absent immediate appeal of denial of the TRO, "plaintiffs would be unable to have their party and candidate placed on the 1984 election ballot . . . and [their] rights would be irretrievably lost"); *E.g.*, Belbacha v. Bush, 520 F.3d 452, 455 (D.C. Cir. 2008) (permitting immediate appeal, under § 1292(a)(1), of denial of TRO, which denied motion of Guantánamo Bay detainee to bar his transfer to Algeria, where he alleged he would likely be tortured, because the order would effectively bar the detainee from seeking further preliminary relief through a preliminary injunction and was thus "tantamount to denial of a preliminary injunction" (quoting Levesque v. Maine, 587 F.2d 78, 79-80 (1st Cir. 1978)); Ramos v. Dep't of Homeland Sec. Bureau of Immigr. & Customs Enf't, 179 F. App'x 239, 240 (5th Cir. 2006) (per curiam) (construing denial of a TRO as denial of a preliminary injunction and, hence, appealable under § 1292(A)(1) where appellant sought to enjoin the Department of Homeland Security, Bureau of Immigration and Customs Enforcement from detaining him and removing him from the United States, pending the decision on his immigration status and citing *U.S. v. Wood*, 295 F.2d 772, 778 (5th Cir. 1961)); *accord Wood*, 295 F.2d at 77-78 & n.6) (noting that appellate courts had permitted appeal of denials of TROs in deportation cases, "evidently on the theory that unless review is had the entire controversy would be mooted by the deportation of the appellant" and citing *Shih v. Kennedy*, No. 16272 (D.C. Cir. Mar. 23, 1961 and *Marcello v. Brownell*, No. 12838 (D.C. Cir. August 31, 1955)); Adams v. Vance, 570 F.2d 950, 953, 956 & n.4 (1977) (permitting appeal of TRO requiring Secretary of State (Secretary) to file objection to International Whaling Commission's ban on bowhead whale hunting, where TRO ordered Secretary to act within three days and the ordered action would "irreversibly alter[] the delicate diplomatic balance in the environmental arena").

[191] Abbott v. Perez, 138 S. Ct. 2305, 2319 (2018) (quoting Carson v. Am. Brands, Inc., 450 U.S. 79, 83 (1981)).

But there is a larger underlying issue. Some circuit courts analyze the three *Carson* requirements and confine appeal of TROs to the limited instances when each requirement is met or other very narrow bases for appeal.[192] Other circuit courts, by contrast, do not require analysis of each of the *Carson* factors when considering whether a TRO is immediately appealable under a practical effect analysis, but use more expansive, discretionary grounds for appealing TRO decisions.[193] Further, some courts that generally enforce narrow limits on appeal of TROs under *Carson* occasionally apply a more expansive analysis for selected TROs.[194]

The remainder of this Article examines Supreme Court guidance on appeal of orders under a practical effect construction of § 1292(a)(1); illustrates circuit court divergence on when TROs may be appealed under a practical effect analysis; asserts that the *Carson* requirements ought to control appeal of the right to appeal a TRO decision; and provides guidance on how to decide if and when a TRO is appealable under the *Carson* standard.

III. THE SUPREME COURT AND THE "PRACTICAL EFFECT" CONSTRUCTION OF § 1292(a)(1)

Section III examines the evolution of the "practical effect" construction of § 1292(a)(1) in three cases in which the Supreme Court acknowledged, developed, and confirmed the "practical effect" analysis of § 1292(a)(1) and in a 1985 decision of Chief Justice Burger, acting as Circuit Justice for the D.C. Court of Appeals. In these cases, the Court concluded that, to appeal an order that is not an express injunction because it has the "practical effect" of an injunction, the putative appellant must establish that the order at issue both threatens serious or irreparable injury absent appeal and that immediate appeal is necessary for effective review.

1. The Practical Effect Analysis of § 1292(a)(1) and Sampson v. Murray

In its 1974 decision in *Sampson v. Murray*, the Supreme Court used a "practical effect" construction of § 1292(a)(1) to permit the government's appeal of a district court order labeled as a "continuation of a temporary restraining order," in a case in which the district court had begun the preliminary injunction hearing and the TRO later exceeded the permissible time limit for TROs under Rule 65(b)(2).[195] But the TRO exceeded that permissible time period only because the Government-appellant opted to appeal the "continued" TRO, rather than proceed with the

[192] *See infra* notes 275 to 279 and 344 to 354, and accompanying text.

[193] *See infra* notes 357 to 421, and accompanying text.

[194] *E.g.*, Uniformed Fire Officers Ass'n v. de Blasio, 973 F.3d 41, 47-48 (2d Cir. 2020); Marlowe v. LeBlanc, 810 F. App'x 302, 304 n.1 (5th Cir. 2020) (per curiam); Turner v. Epps, 460 F. App'x 322, 325-26 (5th Cir. 2012) (per curiam); Garza v. Hargan, No. 17-5236, 2017 WL 9854552, at *1 n.1 (D.C. Cir. Oct. 20, 2017) (per curiam), *vac'd in part on rehearing en banc*, 874 F.3d 735, 766 n.1 (D.C. Cir. 2017) (per curiam), *cert. granted and judgment vac'd*, Azar v. Garza, 138 S. Ct. 1790 (2018); Riddick v. Maurer, 730 F. App'x 34, 36-37 (2d Cir. 2018) (permitting appeal of TRO based on factors regarding nature of hearing and order and not requiring the additional *Carson* factors of threatened serious or irreparable consequences and need to appeal immediately for effective review); Boltz v. Jones, 182 F. App'x 824, 824-25 (10th Cir. 2006) (per curiam) (failing to analyze *Carson* factors in government's appeal of grant of TRO barring execution of death-row prisoner).

[195] Sampson v. Murray, 415 U.S. 61, 85-87 & n.58 (1974) (majority opinion).

ongoing preliminary injunction hearing.[196] In this context, the *Sampson* Court concluded that the district court's "TRO" could be immediately appealed as having the practical effect of a preliminary injunction because the TRO issued after an adversary hearing in which the parties strongly challenged the issuance of the TRO and because the TRO exceeded the permissible duration for TROs imposed by Rule 65(b)(2), thus creating the potential for drastic or irreparable loss that could not later be reviewed effectively.[197]

The language of the *Sampson* opinion recognized a fairly stringent rule for appealing TROs - TROs may be appealed under § 1292(a)(1) when a TRO is "continued beyond the time permissible under Rule 65" and "an adversary hearing has been held[] and the court's basis for issuing the order strongly challenged."[198] In a footnote, the Court emphasized the importance of the fact that the TRO exceeded the Rule 65 time periods and, thus, threatened "drastic consequences which cannot later be corrected." [199] But the Court also created ambiguity by emphasizing the nature of the hearing held.[200] The underlying facts of *Sampson*, moreover, might be construed as permitting a litigant to appeal, in part, because it raised an important separation-of-powers issue, as a substitute for the requirement that an appellant establish that the TRO threatened drastic consequences that could not later be effectively appealed. Examination of the facts of *Sampson* reveals the only potential for serious or irreparable harm in the case was the duration of the TRO once the government declined to proceed with an ongoing preliminary injunction hearing.

In *Sampson*, the district court entered a TRO on May 28, 1971, ordering the General Services Administration (Government) not to dismiss a probationary employee pending her administrative appeal of her termination.[201] The court also scheduled a quick preliminary injunction hearing for June 4, 1971.[202] At the June 4th hearing, the Government opted not to supply the witness who had terminated employee, Jeanne Murray, even though the district court had requested his testimony.[203] Instead, the Government proffered an affidavit.[204] The district court, believing that the in-person testimony of the witness was critical and, moreover, that the Government planned to supply the witness, declined to rule on the preliminary injunction until

[196] *Id*.; *see also id.* at 94-95 (Douglas, J., dissenting) (indicating that the "stay was issued only because the federal agency involved refused to produce as a witness the officer who had decided to discharge respondent"), and *id*. at 97-98 (Marshall, J., dissenting).
[197] *Id*. at 85-87 & n.58 (majority opinion).
[198] *Id*.
[199] *Id*. (citing Nat'l Mediation Bd. v. Air Line Pilots Ass'n, 323 F.2d 305 (D.C. Cir. 1963) (citing Pan Am. World Airways, Inc. v. Flight Eng'rs' Int'l, Ass'n, 306 F.2d 840, 843 (2d Cir. 1962))).
[200] *Id*.
[201] Murray v. Kunzig, 462 F.2d 871, 873 (1972), *rev'd sub nom.* Sampson v. Murray, 415 U.S. 61 (1974).
[202] *Id*. at 873-74.
[203] In *Sampson*, the district court issued a temporary restraining order and set a hearing to consider entering temporary injunctive relief for June 4, 1971. *Sampson*, 415 U.S. at 66 (majority opinion); *Kunzig*, 462 F.2d at 873-74. At the hearing, the district court declined to resolve the issues based on affidavits alone and requested that the government provide a key witness to testify in person. *Samson*, 415 U.S. at 66 (majority opinion); *Kunzig*, 462 F.2d at 874.
[204] *Samson*, 415 U.S. at 66 (majority opinion); *Kunzig*, 462 F.2d at 874.

the witness testified.[205] The court, thus, "continued" its existing TRO, pending testimony of the witness.[206] Instead of providing the witness as it led the court to believe it would, the Government appealed the continued TRO to assert its structural contention that the district court had no authority to issue temporary injunctive relief in the entire class of cases at issue.[207]

In affirming the existence of appellate jurisdiction under § 1292(a)(1) over the "continued" TRO,[208] the *Sampson* Court used a practical effect analysis that examined both the quality of the proceeding and the threat of drastic consequences absent appeal.[209] The Court emphasized that the district court's order was "in no way limited in time;"[210] the TRO exceeded the time frames in Rule 65(b)(2);[211] the district court had held an adversary hearing; and the parties had strongly challenged issuance of the TRO.[212] In a footnote, the *Sampson* Court cited cases concluding that, even if a district court does not reach a decision on the rights at issue (as the *Sampson* district court did not since it believed the Government would soon provide the witness to testify), appellate courts may take jurisdiction of an interlocutory order under § 1292(a)(1) when there is "a possibility of drastic consequences which cannot later be corrected."[213] The language in *Sampson*, thus, accords with a narrow right to appeal TROs in circumstances of irreparable injury and futility of a later appeal.

The facts of *Sampson* suggest, however, that the Court permitted appeal absent a showing of drastic consequences that could not be corrected later. Although the *Sampson* Court indicated that the district court had held an adversary hearing at which the parties strongly challenged the TRO, that hearing was, in fact, a preliminary injunction hearing, and the Government decided to

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[205] *Kunzig*, 462 F.2d at 874.

[206] *Id*.; *Sampson*, 415 U.S. at 66-67 & n.8 (majority opinion). Plaintiff Jeanne Murray filed a motion for temporary restraining order on May 28, 1971, which the district court granted that day. *Kunzig*, 462 F.2d at 873. On June 3, 1971, Murray moved for a preliminary injunction. *Id*. The district court held a hearing on the preliminary injunction on June 4, 1971. *Id*. at 873-84. At the hearing, the Government argued, among other things, that the district court had no authority to issue an injunction in the case, and it agreed to provide an affidavit of W.H. Sanders, the Acting Commissioner, Building Services, but declined to provide Mr. Sanders to testify in person. *Id*. The district court entered an order "continuing the T.R.O. of 28 May 1971 'pending the appearance before this court of Mr. W.H. Sanders, Acting Commissioner, Public Buildings Service, because unless Defendants are restrained from terminating Plaintiff's employment, Plaintiff may suffer immediate and irreparable injury, loss, and damage before the Civil Service Commission can consider Plaintiff's claim. . . ." *Id*. at 874. The Government appealed from this order.

[207] *Sampson*, 415 U.S. at 67 (majority opinion). The D.C. Circuit, in fact, concluded that what the Government sought in the case was "a declaration of no jurisdiction in the district court to grant temporary relief under any circumstance, on the ground that to do so would interfere with the Executive Branch's right to 'hire and fire.'" *Kunzig*, 452 F.2d at 880. The Supreme Court ultimately concluded that district courts have authority to issue temporary injunctions in this context, albeit in limited instances not applicable on the facts presented. *Sampson*, 415 U.S. at 668-84.

[208] *Sampson*, 415 U.S. at 84-85 (majority opinion).

[209] *Id*. at 84-88 & n.58.

[210] *Id*. at 85.

[211] *Id*. at 83-84 & n.58.

[212] *Id*. at 85-87. The Supreme Court determined that the order appealed was a continuation of the TRO first entered by the trial court, *id*. at 85, and the Court noted that the order "was in no way limited in time." *Id*.

[213] *Id*. at 86 n.58 (citing Nat'l Mediation Bd v. Air Line Pilots Ass'n, 323 F.2d 305 (D.C. Cir. 1963) (citing in turn Pan Am. World Airways, Inc. v. Flight Ass'n, 306 F.2d 840, 843 (2d Cir. 1962))).

stop participating and to appeal instead. Any potential for serious or drastic consequences absent immediate appeal existed because the Government's refusal to proceed with the ongoing preliminary injunction hearing caused the TRO to extend beyond the then-permissible 10-day duration of a TRO. Importantly, the Government did not argue or establish that it would suffer irreparable injury absent the ability to immediately terminate the probationary employee at issue, but argued, instead, that the order styled as a TRO extended impermissibly beyond the 10-day limit of Rule 65(b) and impermissibly interfered with the executive branch's general authority to hire and fire probationary employees.[214] This situation presented an important issue of structural authority of the federal courts vis-à-vis the federal government, to be sure, but not one in which the Government demonstrated threatened immediate drastic consequences either (1) if the Government could not immediately terminate employee Murray; or (2) if the Government had to await a decision on the preliminary injunction before appealing. The Court also did not consider or discuss whether the issue of district court authority could have been effectively reviewed later.

Although *Sampson* was decided in 1974, well before the Supreme Court explicitly imposed that requirement in its 1981 decision in *Carson v. American Brands, Inc*., the *Sampson* Court emphasized that TROs are appealable under a practical effect construction of § 1292(a)(1) when they threaten "drastic consequences *that cannot later be corrected*."[215] Further, if the government (or other litigants) may facilitate an order's exceeding the permissible duration of a TRO, by appealing instead of participating in an ongoing preliminary injunction hearing, litigants would possess a virtual right to appeal a TRO at will, without establishing either a threat of irreparable injury or that immediate review is necessary.

Indeed, in a subsequent case, when a private litigant attempted to appeal a TRO rather than participate in the preliminary injunction hearing, the Seventh Circuit promptly rejected jurisdiction. It held that the litigant's attempt to appeal the TRO, instead of requesting a preliminary injunction hearing, was unavailing to confer appellate jurisdiction under the practical effect rule of § 1292(a)(1).[216] The Seventh Circuit emphasized that the only reason the TRO could have the practical effect of a preliminary injunction was the appellant's litigation strategy of appealing rather than seeking a preliminary injunction.[217] "Jumping the gun," the Seventh Circuit concluded, "does not turn an otherwise nonfinal order into an appealable order . . . unless the judge is unwilling to make a prompt decision even though delay erodes or obliterates the rights in question."[218]

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[214] *See Sampson*, 415 U.S. at 78-84 (majority opinion).

[215] *Id*. at 86 n.58

[216] Cnty., Mun. Emps.' Supervisors' & Foremen's Union v. Laborers' Int'l Union of North Am., 365 F.3d 576, 578 (7th Cir. 2004).

[217] *Id*.

[218] *Id*.; *see also* Fernandez-Roque v. Smith, 671 F.2d 426, 429-430 (11th Cir. 1982) (concluding that the Government had consented to extension of a TRO when the Government and court failed to agree on the scope of the preliminary

As is discussed in Section IV, the Ninth Circuit relies primarily on the *Sampson* decision, rather than the Supreme Court's later decision in *Carson v. American Brands, Inc*., in determining whether a TRO may be appealed immediately.[219] It construes *Sampson* broadly – particularly in instances of government appeals or appeals regarding recent government action – and permits appeal of TROs in some cases based primarily on the nature of the pre-TRO hearing, omitting the requirements that the litigant establish the threat of drastic harm and the need for immediate review.[220]

A majority of circuits, by contrast, rely on the *Carson*[221] or construe *Sampson* narrowly, to preclude appeal unless the would-be appellant provides evidence that the TRO decision threatens drastic consequences absent immediate appeal or otherwise meets traditional and narrow requirements for appealing a TRO.[222]

2. The Practical Effect Analysis and Carson v. American Brands, Inc.

Seven years after *Sampson v. Murray*, the Supreme Court further explained the practical effect construction of § 1292(a)(1) in *Carson v. American Brands, Inc*. The *Carson* Court established that litigants appealing based on an argument that an order is, in "practical effect" an injunction, must establish three factors: (1) the order has the practical effect of an injunction; (2) serious or irreparable harm will result absent immediate appeal; and (3) later appeal would be ineffectual.[223] The *Carson* analysis has become the gold-standard for "practical effect" appeals under § 1292(a)(1), with all circuits adopting it in some "practical effect" scenarios[224] and seven circuits having used the *Carson* requirements in the TRO scenario.[225]

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injunction hearing, the Government indicated that it was not seeking a hearing on the TRO, and the Government did not move to dissolve the TRO).

[219] *See infra* notes 357-369 and accompanying text.

[220] *See infra* notes 361-367 and accompanying text.

[221] *See infra* notes 275-279 and accompanying text.

[222] *See infra* notes 343-354 and accompanying text.

[223] 450 U.S. 79, 84-86 (1981).

[224] *E.g.*, Managed Care Advisory Group, LLC v. United Healthcare of N.C., No. 21-10247, 2022 WL 792267, at **3-4 (11th Cir. Mar. 16, 2022) (per curiam); Jones v. Riot Hospitality Group LLC, No. 20-15407, 2022 WL 401329, at **1-2 (9th Cir. Feb. 9, 2022) (quoting Negrete v. Allianz Life Ins. Co. of No. Am., 523 F.3d 1091, 1097 (9th Cir. 2008)); Defense Distributed v. Att'y. Gen of N.J., 972 F.3d 193, 197-202 (3d Cir. 2020); S. Wind Women's Ctr. LLC v. Stitt, 808 F. App'x 677, 680-681 (10th Cir. 2020) (per curiam) (TRO scenario); Butler v. Denka Performance Elastomer LLC, 806 F. App'x 271, 275-75 (5 Cir. 2020) (per curiam) (citing EEOC v. Kerrville Bus Co., 925 F.2d 129, 133-34 (5th Cir. 1991)); Watchtower Bible & Tract Soc'y of New York, Inc. v. Colombani, 712 F.3d 6, 12 (1st Cir. 2013); Salazar ex rel. Salazar v. District of Columbia, 671 F.3d 1258, 1262-67 (D.C. Cir. 2012); Corona v. Knowles, 423 F3d. Appx. 695, 696 (7th Cir. 2011); Hadix v. Johnson, 228 F.3d 662, 669 & n.1 (6th Cir. 2000); Morganstern v. Wilson, 29 F.3d 1291, 1294-95 (8th Cir. 1994) (citing the following cases: MAI Basic Four, Inc. v. Basic, Inc., 968 F.2d 978, 982 (10th Cir. 1992)); United States v. Bayshore Assocs., 934 F.2d 1391, 1395-96 (6th Cir. 1991).

[225] *E.g.*, Calvary Chapel of Bangor v. Mills, 984 F.3d 21, 27-28 (1st Cir. 2020), *cert. denied* 142 S. Ct. 71 (2021); S. Wind Women's Ctr. LLC v. Stitt, 808 F. App'x 677, 680-681 (10th Cir. 2020) (per curiam); Pearson v. Kemp, 831 F. App'x 467, 471- (11th Cir. 2020) (quoting Ingram v. Ault, 50 F.3d 898, 899-90 (11th Cir. 1995), which quotes, in turn, Romer v. Green Point Sav. Bank, 27 F.3d 12, 15 (2d Cir. 1994) (quoting Carson v. Am. Brands, Inc. 450 U.S. 79, 84 (1981))));

The *Carson* Court emphasized that Congress created § 1292(a)(1) because "rigid application" of the final judgment rule would create "undue hardship in some cases."[226] It also stressed, however, the importance of an appellant's demonstrating both the threat of serious or irreparable injury and that an order may be effectually challenged only by immediate appeal.[227] Indeed, the Court emphasized that, in order "to carve out only a limited exception to the final-judgment rule," there may be no appeal under a practical effect construction of § 1292(a)(1) unless a litigant establishes that an interlocutory order has the practical effect of an injunction, and also both threatens "serious, perhaps irreparable consequence[s]" and that the order may be "'effectually challenged' only by immediate appeal."[228]

Indeed, the *Carson* Court emphasized the importance of establishing both the threat of irreparable injury and that the order cannot be effectively reviewed on later appeal by discussing two cases in which the Supreme Court had previously refused to permit appeal under § 1292(a)(1) based on a practical effect analysis because the appellant failed to meet those requisites.[229] In *Switzerland Cheese Assn. v. E. Horne's Market, Inc.*, the Court denied appeal under § 1292(a)(1) of the denial of a summary judgment motion, which sought a permanent injunction, because the appellant could not demonstrate irreparable consequences if immediate review were unavailable.[230] Instead, the permanent relief sought might be obtained at trial, and, if not granted, effective appeal would lie from the final judgment.[231] Similarly, the *Carson* Court observed, that in *Gardner v. Westinghouse Broadcasting Co.*, the denial of a request for class certification in a case that sought a permanent injunction was not appealable under a theory that denial of certification refused "a substantial portion of the injunctive relief requested."[232] As in *Switzerland Cheese*, the appealing plaintiff had sought no preliminary injunction, absent which irreparable consequences might be threatened, but only a permanent injunction that could be considered at trial. Further, the denial of class certification could be reviewed both prior to and after the final judgment.[233]

Schlafly v. Eagle Forum, 771 F. App'x 723, 724 (8th Cir. 2019); First Eagle SoGen Funds, Inc. v. Bank for Int'l Settlements, 252 F.3d 604, 607-08 (2d Cir. 2001). The Fifth Circuit previously recognized the *Carson* analysis for appeal of TROs, *see* Sherri A.D. v. Kirby, 975 F.2d 193, 202 (5th Cir. 1992), but has more recently analyzed appealability of TROs without reference to the *Carson* requirements. *See* Jones v. Belhaven, 98 F. App'x 283, 284 (5th Cir. 2004) (per curiam); Matter of Lieb, 915 F.2d 180, 183 (5th Cir. 1990). The Sixth Circuit also often cites the *Carson* requirements for determining when a TRO is appealable, but it does not always apply each of the *Carson* requirements. *See e.g.*, Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 612 (6th Cir. 2020) (per curiam); FCA US LLC v. Bullock, 737 F. App'x 725, 727 (6th Cir. 2018); Workman v. Bredesen, 486 F.3d 896, 904 (6th Cir. 2007); NACCO Materials Handling Group, Inc. v. Toyota Materials handling USA, Inc., 246 F. App'x 929, 945-46 (6th Cir. 2007); Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l Union v. Blackwell, 467 F.3d 999, 1005-06 (6th Cir. 2006).

[226] *Carson*, 450 U.S. at 83.

[227] *Id*. at 84-86.

[228] *Id*. at 84.

[229] *Id*. at 84-86.

[230] *Id*. at 85 (discussing Switzerland Cheese Ass'n v. E. Horne's Mkt., Inc., 385 U.S. 23 (1966)).

[231] *Id*.

[232] *Id*.

[233] *Id*. at 85-86.

The Supreme Court, thus, concluded that the tripartite requirements of its *Carson* "practical effect" analysis implement the congressionally desired balance of permitting immediate appeal of orders that might cause immediate serious or irreparable harm, while enforcing Congress's general policy of disfavoring piecemeal appellate review.[234] Importantly, the three elements of the *Carson* practical effect construction of § 1292(a)(1) do not focus on the qualities of the proceedings or hearings, which were extensive in *Carson* and which was an element of the *Sampson* decision. Instead, they focus on the potential for immediate drastic consequences that cannot later be remedied.

The injunctive order in *Carson* was a district court's refusal to enter a consent decree embodying the parties' settlement agreement. Only private parties were involved in the litigation. Further, the district court's refusal to enter the consent decree occurred not at the TRO stage, but after extensive discovery, significant hearings, and the district court's certification of a class action.[235] The fact of extensive hearings, however, was not alone sufficient to make the order appealable.

In *Carson*, current and former African-American applicants for seasonal work sued the Richmond Leaf Department of the American Tobacco Company, alleging discrimination in hiring, promotion, transfer, and training opportunities.[236] They sought preliminary and permanent injunctive relief.[237] After the court certified the suit as a class action, the litigants negotiated a settlement.[238] Plaintiffs and Defendant jointly moved the district court to approve, through a consent decree, a settlement that included hiring and seniority preferences for African-American employees and also required certain supervisory positions to be filled with qualified African-American employees.[239] The district court denied the requested consent decree, concluding, *inter alia*, that the facts did not demonstrate past or present discrimination[240] and that the proposed decree would wrongly provide relief to African-American employees, absent individualized showing that each had been a victim of discrimination.[241] The proposed consent order would have granted injunctive relief to plaintiffs, who immediately appealed its denial. A divided Fourth Circuit, sitting en banc, dismissed the appeal for lack of jurisdiction under either the *Cohen* collateral final order doctrine or § 1292(a)(1).[242]

The Supreme Court reversed, holding that appeal was appropriate under a "practical effect" construction of § 1292(a)(1) because, absent immediate appeal, plaintiffs would lose the chance

[234] *Id*. at 84.
[235] *Id*. at 83-84.
[236] *Id*. at 80-81.
[237] *Id*. at 81-82.
[238] *Id*. at 81.
[239] *Id*.
[240] *Id*. at 81-82.
[241] *Id*.
[242] Carson v. Am. Brands, Inc. 606 F.2d 420, 421-24 (4th Cir. 1979) (en banc), *rev'd* 450 U.S. 79 (1984). Three judges dissented and would have held that the interlocutory order constituted an appealable "injunction" under 28 U.S.C. § 1292(a)(1). *Id*. at 428-29 (Winter, J., dissenting).

to appeal an interlocutory order that denied injunctive relief.[243] The Court further concluded that plaintiffs had shown two types of serious or irreparable consequences that, if immediate appeal were denied, could not be effectually remedied later: (1) potential loss of the opportunity to settle on the terms the plaintiffs had negotiated;[244] and (2) delay of their right to quickly restructure the transfer and promotional policies to avoid irreparable injury and to obtain immediately the benefits such restructuring would produce, including "specific job opportunities and the training and competitive advantages" that might result from those opportunities.[245]

Thus, in the context of a case that did not involve the government as a party, the *Carson* Court reaffirmed the availability of the practical effect construction of § 1292(a)(1) to permit appeal of orders that are not express injunctions. It also concluded that the practical effect exception of § 1292(a)(1) requires the appellant to demonstrate three elements -- that the order at issue has the practical effect of an injunction and that the order both threatens serious or irreparable consequences absent appeal and cannot be effectively challenged by later appeal.

3. The Practical Effect Construction of 28 U.S.C. § 1292(a)(1) and Office of Personnel Management v. American Federation of Government Employees

One year later, in *Office of Personnel Management v. American Federation of Government Employees*, Chief Justice Warren Burger, acting as Circuit Justice for the D.C. Circuit, entertained an application to vacate an order of the D.C. Circuit that had permitted appeal of the denial of a TRO.[246] Chief Justice Burger vacated the order, concluding that the D.C. Circuit had no jurisdiction over the appeal, based on an analysis that largely followed the requirements of the *Carson* analysis.[247] Although the opinion did not mention *Carson*, Chief Justice Burger concluded that the D.C. Circuit had no jurisdiction over the appeal of the denial of a TRO because the appellant had made no showing of serious or irreparable injury absent immediate appeal and the district court was poised to move forward quickly to a preliminary injunction hearing.[248]

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[243] Carson v. Am. Brands, Inc., 450 U.S. 79, 82 (1981).

[244] *Id*. at 86-89. The Supreme Court noted that parties often settle to avoid the uncertainties of trial. After parties have been "effectively ordered to proceed to trial [as the *Carson* district court had ordered] and have [had] their respective rights and liabilities established," however, a party may withdraw consent to the settlement since a settlement position is based on avoiding trial and attendant uncertainty and risk. *Id*. at 87-88 & nn.12-14 The defendant, in fact, had already attempted to withdraw its agreement to the consent decree after the order to proceed to trial. *Id*. at 87, n.13.

[245] *Id*. at 88-90 & n.15-16 (1981). Further, the Court noted that the proposed consent decree would have essentially provided the following relief to Plaintiffs that they had requested in their Complaint: relief from the Company's "continuing to maintain policies, practices, customs or usages [that limited plaintiffs and class members] . . . to the lower-paying and less desirable jobs, denying them on-the-job- training opportunities, denying them the opportunity to advance to supervisory positions, denying them fringe benefits afforded other employees of the Company, and denying them adequate and effective union representation because of their race or color." *Id*. at 89 n.15.

[246] Off. of Pers. Mgmt. v. Am. Fed. of Gov't Emps., 473 U.S. 1301, 1303 (1985) (Burger, C.J., in chambers)

[247] *Id.* at 1303-06.

[248] *Id*. at 1303-05.

In *Office of Personnel Management*, the American Federation of Government Employees (American Federation) sought a TRO, on June 28, 1985, to block new government regulations, that would permit agencies making personnel decision, to give less weight to seniority and more to merit.[249] The regulations were scheduled to become effective on July 1, 1985.[250] On June 28, the D.C. District Court denied the TRO, stating that American Federation had not shown irreparable harm if the TRO were denied and concluding that nothing "of any concrete nature [would occur] in the immediately foreseeable future which would be unable to be redressed in some form or another at some later time should the regulations go into effect."[251] On June 29, American Federation filed an emergency motion in the D.C. Circuit Court.[252] The D.C. Circuit ordered that the emergency motion for injunctive relief be held in abeyance; ordered the District Court to hold a hearing and rule on a motion for preliminary injunction by July 10; and entered a stay of the proposed regulations, observing that American Federation "may suffer irreparable injury in the absence of a stay."[253]

On July 2nd, the Office of Personnel Management filed with Chief Justice Burger an application to vacate the order of the D.C. Circuit,[254] which he granted on July 3rd.[255] Chief Justice Burger's opinion emphasized that ordinarily appellate courts have no jurisdiction over the appeal of the denial of a TRO and emphasized also that the D.C. Circuit stated that American Federation "'may suffer irreparable injury in the absence of a stay,' but did not identify [any] irreparable injury."[256]

The *Office of Personnel Management* opinion rejected the D.C. Circuit's reliance on the Supreme Court's decision in *Sampson v. Murray*, noting that *Sampson* dealt with the grant of a TRO, which was appealable because it had the effect of a preliminary injunction once it extended beyond the Rule 65(b) time-periods.[257] The instant case, by contrast, dealt with denial of a TRO, thus rendering *Sampson* inapposite.[258] The opinion also rejected the D.C. Circuit's reliance on a prior D.C. Circuit case, *Adams v. Vance*, noting that the *Adams* case dealt with the grant of a TRO that did not preserve the status quo and that also commanded "unprecedented action" that would "'irreversibly alter[]' a delicate balance involving the foreign relations of the United States."[259] Emphasizing that the consequences in *Adams* were "irretrievable," Chief Justice Warren concluded both that the consequences of the denial of the TRO in *Office of Personnel Management* "were not nearly so grave" and that the District Court had planned to hold a prompt

[249] *Id.* at 1301-03.
[250] *Id.* at 1302-03.
[251] *Id.* at 1303 (quoting the district court's opinion which was delivered from the bench).
[252] *Id.*
[253] *Id*.
[254] *Id*.
[255] *Id*.
[256] *Id.*
[257] *Id.* at 1304.
[258] *Id*.
[259] *Id.* at 1305.

preliminary injunction hearing.[260] Though he did not reference *Carson*, Chief Justice Burger's conclusion was, in effect, a conclusion that the last two *Carson* requirements were not met – the appellant had not established serious or irreparable injury absent immediate appeal, nor had it established that immediate appeal was the only way to obtain effectual review of the TRO decision. Instead, the litigants could simply proceed to the preliminary injunction hearing.

Chief Justice Burger, thus, concluded that the denial of the instant TRO "was not in any sense a *de facto* denial of a preliminary injunction," and the appellate court had no jurisdiction to review the denial of the TRO.[261]

4. The Practical Effect Construction of 28 U.S.C. § 1292(a)(1) and Abbott v. Perez

In its 2018 decision in *Abbott v. Perez*, the Supreme Court reaffirmed in dicta the validity of permitting immediate appeal under 28 U.S.C. § 1292(a)(1) of orders, including TROs, that have the "practical effect" of a preliminary injunction.[262] It did so in the context of extending the practical effect rule of § 1292(a)(1) to 28 U.S.C. § 1253, which permits direct appeal to the Supreme Court of certain injunctive orders issued by three-judge district courts.[263] In so doing, the Court reaffirmed use of the *Carson* practical effect analysis for determining whether orders that are not express injunctions may be appealed.[264]

In *Abbott v. Perez*, a three-judge panel of the Western District of Texas (Texas district court panel) determined that the State of Texas's redistricting plans for certain Texas House and U.S. congressional districts violated the Equal Protection Clause, the Voting Rights Act, or both.[265] The Texas district court panel stated that the violations for all affected districts "must be remedied."[266] In separate orders, the Texas district court panel required the Texas Attorney General to advise within three days whether "the Legislature intends to take up redistricting in an effort to cure these violations" and advised that if it chose not to do so, the court would "hold a hearing to consider remedial plans."[267] Thereafter, the Texas district court panel ordered the parties to attend a hearing on the congressional plan on September 5, 2017 and on the state plan

[260] *Id.*

[261] *Id*. Chief Justice Burger also concluded that, since the appellate court had no jurisdiction over the denial of the TRO, it likewise had no jurisdiction to enter a stay on appeal. *Id*. at 1306.

[262] 138 S. Ct. 2305, 2319-20 (2018) (majority opinion) (emphasizing that "[i]n analogous contexts, we have not allowed district courts to 'shield [their] orders from appellate review' by avoiding the label "injunction. . . . For instance, in *Sampson v. Murray*, 415 U.S. 61, 87 (1974)], we held that an order labeled a temporary restraining order (which is not appealable under § 1292(a)(1) should be treated as a 'preliminary injunction' (which is appealable) since the order had the same practical effect as a preliminary injunction. *Id*. at 86-88").

[263] 28 U.S.C. § 1253 provides as follows:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

[264] *Abbott*, 138 S. Ct. at 2319-20 (majority opinion).

[265] *Id*. at 2318.

[266] *Id.*

[267] *Id.*

on September 6, 2017.[268] As with other constitutional and Voting Rights challenges to state redistricting decisions, the case raised significant federalism issues.

All members of the *Abbott v. Perez* Court agreed that a litigant, who seeks interlocutory appeal under the practical effect test of § 1292(a)(1) must establish three factors to appeal under a practical effect analysis: that the order at issue has the practical effect of granting or denying an injunction, that the order threatens serious or irreparable consequences, and that the order can only be effectually reviewed by immediate appeal.[269] In applying the *Carson* analysis, however, the majority and dissenting opinions in *Abbott* disagreed on application of each of the three practical effect factors.[270]

Thus, Supreme Court decisions dealing with appeal under a "practical effect" analysis of § 1292(a)(1) -- from the 1974 *Sampson* case to the most recent *Abbott v. Perez* opinion -- should lead to the same "practical effect" destination regarding TROs: Appeal is available under a "practical effect" analysis when the district court issues a TRO that has the practical effect of granting or denying an injunction, the TRO at issue threatens serious or irreparable harm, and the threatened harm can only be effectively reviewed by immediate appeal.

IV. THE CIRCUIT COURTS, "PRACTICAL EFFECT" APPEALS OF TROS, AND THE *CARSON* ANALYSIS

The federal circuit courts disagree on the standard for permitting appeal of an order labeled as a TRO under a "practical effect" construction of § 1292(a)(1).

As detailed above, there are two broad grounds for appealing TROs. The first is that the pre-TRO hearing constituted a full evidentiary hearing, and, thus, the purported TRO is in fact a misnamed preliminary injunction. This is the so-called preliminary injunction masquerading as a TRO. The second basis is that the TRO has the practical effect of a preliminary or permanent injunction. This difference matters. Preliminary injunction decisions are appealable under § 1292(a)(1) with no additional showing – simply because, under the language of § 1292(a)(1), the preliminary injunction decision is an order "of the district court[] . . . granting, continuing, modifying, refusing or dissolving [an] injunction[]."

By contrast, Supreme Court case law permits appellants to appeal orders, which are not injunctions, but which have the "practical effect" of an injunction under § 1292(a)(1), only if they

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[268] *Id*. at 2319.

[269] *Id*. at 2319-20, 2321-2324 (concluding that the *Carson* factors were satisfied); *see also id*. at 2343-45 (Sotomayor, J., dissenting) (also applying the *Carson* factors, but concluding the factors were not met).

[270] The *Abbott* majority concluded that the district court orders had the practical effect of injunctions that barred the state of Texas from using a statute enacted by its legislature to conduct "this year's" elections. *Abbott*, 138 S. Ct. at 2321-24. The majority also concluded that the state had established the threat of serious and irreparable harm and that only an immediate appeal could protect that interest. *Id*. at 2324. The dissenting justices argued, in contrast, that, (1) the orders did not have the practical effect of an injunction; (2) with over 12 months before the next election, the orders at issue did not threaten serious or irreparable injury; and (3) that the majority opinion gave "short shrift" to the requirement of the practical effect analysis that an immediately appealable order must be one that can be "effectually challenged" only by immediate appeal. *Id*. at 2339-45 (Sotomayor, J., dissenting).

establish the three requirements set forth in *Carson v. American Brands, Inc*. The circuit courts have uniformly acknowledged this difference between appeal requirements for express injunctions and those for orders having the "practical effect" of an injunction,[271] but, as detailed below, some have moved away from requiring each of each *Carson* requirement in the TRO context.

Five circuits – the First, Second, Eighth, Tenth, and Eleventh Circuits -- construe appeal of TROs under a practical effect analysis strictly and requires application of each of the three *Carson* requirements.[272]

A second set of circuits -- the Fourth, Fifth, Seventh, and D.C. Circuits -- typically impose strict limits on appeal of TROs, but they often do so without referencing *Carson*, primarily relying, instead on narrow, pre-*Carson* avenues for appeal of TROs and on narrow construction of the Supreme Court's decision in *Sampson v. Murray*.[273]

The third group of courts often expands the circumstances in which a TRO may be appealed by relying primarily on the nature of the pre-TRO hearing or on the nature of the TRO, often citing the Supreme Court's decision in *Sampson v. Murray* in lieu of the Court's decision in *Carson*.[274] These courts, the Third, Sixth, and Ninth Circuits, often elide consideration of whether the TRO will impose serious or irreparable harm and decline to consider whether the TRO decision can be effectually reviewed later.

A. *The First, Second, Eighth, Tenth, and Eleventh Circuits -- Narrow Grounds for Appealing TROs Based on the Supreme Court's Decision in* Carson v. American Brands, Inc.

[271] *E.g.*, Watchtower Bible & Tract Soc'y of New York, Inc. v. Colombani, 712 F.3d 6, 12 (1st Cir. 2013); Corona v. Knowles, 423 F3d. Appx. 695, 696 (7th Cir. 2011); Anderson v. City of Boston, 244 F.3d 236, 238 (1st Cir. 2001); Hadix v. Johnson, 228 F.3d 662, 669 & n.1 (6th Cir. 2000); Sherri A.D. v. Kirby, 975 F.2d 193, 202-03 (5th Cir. 1992); Morganstern v. Wilson, 29 F.3d 1291, 1294-95 (8th Cir. 1994) (citing the following cases: MAI Basic Four, Inc. v. Basic, Inc., 968 F.2d 978, 982 (10th Cir. 1992); *Sherri A.D.*, 975 F.2d at 202; United States v. Bayshore Assocs., 934 F.2d 1391, 1395-96 (6th Cir. 1991); (get others from Morganstern) *see also* Moore v. Tangipahoa Parish School Bd., 843 F.3d 198, 201 n.1 (5th Cir. 2016) (noting that the Fifth Circuit has sometimes permitted appeal of an order that did not explicitly state that it was an injunction without considering wither it imposes serious or irreparable consequences).

[272] *See infra* notes 275-279 and accompanying text.

[273] *See infra* notes 343-354 and accompanying text.

[274] *See infra* notes 357-421 and accompanying text.

The First,[275] Second,[276] Eighth,[277] Tenth,[278] and Eleventh[279] Circuits typically require that a litigant desiring to appeal a TRO must establish *Carson*'s three-part test – (1) the TRO has the

[275] *E.g.*, Calvary Chapel of Bangor v. Mills, 984 F.3d 21, 27-28 (1st Cir. 2020) (citing Carson v. Am. Brands, Inc., 450 U.S. 79, 83-84 (1981)), *cert. denied* 142 S. Ct. 71 (2021); Watchtower Bible and Tract Soc'y of New York, Inc. v. Colombani, 712 F.3d 6, 12 (1st Cir. 2013); Nwaubani v. Grossman, 806 F.3d 677, 679-81 (1st Cir. 2015); Fideicomiso De La Tierra Del Caño Martín Peña v. Fortuño, 592 F.3d 131, 132-34 (1st Cir. 2009) (per curiam).

[276] *E.g.*, Canadian St. Regis Band of Mohawk Indians *ex rel*. Francis v. Bombay, 484 F. App'x 586, 587-88 (2d Cir. 2012); Ross v. Rell, 398 F.3d 203, 204 (2d Cir. 2005); First Eagle SoGen Funds, Inc. v. Bank for Int'l Settlements, 252 F.3d 604, 607-08 (2d Cir. 2001); Romer v. Green Point Sav. Bank, 27 F.3d 12, 15-17, (2d Cir. 1994); *but see* Uniformed Fire Officers Ass'n v. de Blasio, 973 F.3d 41, 47-49 (2d Cir. 2020) (using a "factor" analysis in determining whether the grant of a TRO was appealable, which included duration of the TRO; whether there was pre-TRO notice to the defendant and a hearing; the type of showing made in obtaining the TRO; and whether the TRO decision "might have a serious, perhaps irreparable consequence, " but concluding that the court need only consider whether "the grant or denial of a TRO might have a serious, perhaps irreparable, consequence") (quoting *Green Point*, 27 F.3d at 15)).

[277] *E.g.*, In re Rutledge, 956 F.3d 1018, 1026 (8th Cir. 2020) (dicta) (citing Hunter v. Bradford, 642 F. App'x 648, 648-49 (8th Cir. 2016) (per curiam)); Schlafly v. Eagle Forum, 771 F. App'x 723, 724 (8th Cir. 2019) (per curiam) (indicating that § 1292(a)(1) allows appeal of decisions on preliminary and permanent injunctions, not TRO decisions that unambiguously provide temporary restraint); *accord* Nordin v. Nutri/System, Inc., 897 F.2d 339, 341-43 (8th Cir. 1990) (TRO appealable because it had no expiration date and exceeded 10-day limit for TROs in Rule 65(b)); Quinn v. Missouri, 839 F.3d 425, 426 (8th Cir. 1988) (per curiam) (appeal of TRO permitted because it would extend, without consent, beyond the maximum 20 days then permitted under Rule 65); *but see* Wise v. Dep't of Transp., 943 F.3d 1161, 1164-65 (8th Cir. 2019) (permitting appeal of a TRO without examining the *Carson* requirements and relying, instead, on *Abbott v. Perez*, 138 S. Ct. 2305, 2319 (2018) and *Sampson v. Murray*, 415 U.S. 61, 68-88 (1974) to conclude that the order had the "practical effect" of an injunction, although the facts indicate that the *Carson* requirements were probably met since the denial of the TRO permitted an ongoing construction project to proceed even though it would allegedly violate the National Environmental Policy Act of 1969 (NEPA) and NEPA regulations).

[278] *E.g.*, S. Wind Women's Ctr. LLC v. Stitt, 808 F. App'x 677, 680-681 (10th Cir. 2020) (per curiam) (concluding that grant of time-limited TRO to permit certain abortions notwithstanding executive order limiting medical procedures in order to preserve person protective equipment during COVID-19 pandemic, was not appealable because it did not threaten serious or irreparable injury and other avenues for appeal of the issue were available); Frischenmeyer v. Gonzales, 114 F.3d 1198, 1997 WL 329561, at **1-2 (10th Cir. 1997) (unpublished table decision) (indicating that TRO at issue did not meet any of the three *Carson* requirements); *see also* Druley v. Patton, 601 F. App'x 632, 634 (10th Cir. 2015); Forest Guardians v. Babbitt, 174 F.3d 1178, 1185-1186 (10th Cir. 1999) (permitting appeal of order with practical effect of an injunction when the three *Carson* factors were met); Duvall v. Keating, 162 F.3d 1058, 1062 (10th Cir. 1998) (permitting appeal of TRO where death row prisoner would suffer irreparable harm of execution absent immediate review); Populist Party v. Herschler, 746 F.2d 656, 661 n.2 (10th Cir. 1984) (per curiam) (TRO appealable because appellants' rights would be irretrievably lost if they could not appeal the denial of right to place candidate and party on the ballot for the 1984 presidential election); *but see* Boltz v. Jones, 182 F. App'x 824, 824-25 (10th Cir. 2006) (per curiam) (failing to analyze *Carson* factors in government's appeal of grant of TRO barring execution of death-row prisoner).

[279] *E.g.*, Pearson v. Kemp, 831 F. App'x 467, 471 (11th Cir. 2020) (noting that the Eleventh Circuit permits "emergency appeals from TRO decisions only in the direst of circumstances" and concluding that the grant of the TRO at issued did not threaten a serious or irreparable consequences nor could it be effectually reviewed only by immediate appeal); Redford v. Gwinnett Cnty. Jud. Cir., 350 F. App'x 341, 345 (11th Cir. 2009) (per curiam); Schiavo *ex rel*. Schindler v. Schiavo, 403 F.3d 1223, 1225 (11th Cir. 2005) (per curiam); Ingram v. Ault, 50 F.3d 898, 899-900 (11th Cir. 1995) (per curiam) (citing *Carson* and finding both irreparable harm and need for immediate review where death-row inmate's request for TRO to bar his imminent execution – within 24 hours – was denied). Prior to 1995, but post-*Carson*, the Eleventh Circuit often relied on the *Sampson v. Murray* case to determine if the TRO at issue was similar

practical effect of granting or denying injunctive relief; (2) the TRO threatens serious or irreparable consequences; and (3) immediate appeal is necessary to effectually review the TRO decision.[280] These circuits stress, as the Supreme Court did in *Carson v. Am. Brands, Inc*., that narrow construction of the practical effect analysis serves Congress's goals for § 1292(a)(1): (1) permitting early appeal of orders that threaten drastic consequences absent immediate appeal; and (2) respecting Congress's general policy disfavoring piecemeal review, which dictates that § 1292(a)(1) create only a narrow exception to the final judgment rule.[281] Thus, doubts about availability of appeal under § 1292(a)(1) are construed against its applicability.[282]

This narrow approach to appealability of TROs is also preferable from a pragmatic and policy standpoint since TROs often issue without discovery and without the more complete factual and legal exploration available in a preliminary injunction hearing. The additional information in the preliminary injunction context, in turn, permits more effective district and appellate decisions. Further, as indicted earlier, the preliminary injunction decisions and, correspondingly, appealable TRO decisions, often effectively determine the outcome of the case. Thus, courts should delay for additional discovery and a more rigorous review of factual and legal issues when possible. Indeed, courts that permit more expansive appeal of TROs often end up returning the case to the district court for additional factfinding[283] or deciding issues with

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to a preliminary injunction, *see* Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1421-22 (11th Cir. 1995); Fernandez-Roque v. Smith, 671 F.2d 426, 429-31 (11th Cir. 1982); or similar to a preliminary injunction and threatened irreparable harm that required immediate appeal. McDougald v. Jenson, 786 F.2d 1465, 1472-74 (11th Cir. 1986); *see also* AT&T Broadband v. Tec. Commc'ns, Inc., 381 F.3d 1309, 1314 (11th Cir. 2004) (order granting a TRO may be appealed if each of the following are satisfied: (1) its duration exceeds the time period allowed under Rule 65(b); (2) the notice and hearing provided suggest the order was a preliminary injunction; and (3) the order seeks to change the status quo).

[280] Despite that these circuits articulate the *Carson* requirements as the standard for appeal of a TRO, particular panels within the circuits have sometimes used a more expansive appeal analysis. *E.g.*, *Uniformed Fire Officers Ass'n*, 973 F.3d at 47-49 (using a "factor" analysis to determine that the grant of a TRO was appealable, but concluding that the court need only consider one factor in the particular case -- whether "the grant or denial of a TRO might have a serious, perhaps irreparable, consequence"); *Wise*, 943 F.3d at 1164-65 (permitting appeal of the denial of a TRO without examining the *Carson* requirement and based, instead, on a conclusory statement that the denial had the "practical effect" of an injunction, although the facts indicated that the *Carson* requirements were probably met where the denial permitted a construction project to proceed even though it would allegedly violate the National Environmental Policy Act of 1969 (NEPA) and NEPA regulations); *Boltz*, 182 F. App'x at 824-25 (concluding that the grant of a TRO was appealable without analyzing the *Carson* requirements).

[281] *E.g.*, *Ditucci*, 985 F.3d at 809; *S. Wind Women's Ctr.*, 808 F. App'x at 680 (quoting Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981)); *Anderson*, 244 F.3d at 238; *Frischenmeyer*, 114 F.3d 1198 (Table), 1997 WL 329561, at **1-2.

[282] *E.g.*, *Watchtower Bible*, 712 F.3d at 12; *see also Pearson*, 831 F. App'x at 471 (noting that the *Carson* factors create "a high hurdle for appellants to clear" and that emergency appeals from TRO decisions are permitted in the Eleventh Circuit "only in the direst of circumstances"); Overton v. City of Austin, 748 F.2d 941, 948-49 (5th Cir. 1984) (indicating that § 1292(a)(1) is to be construed strictly); *accord* Auto Driveaway Franchise Sys, LLC v. Auto Driveaway Richmond, LLC, 928 F.3d 670, 678 (7th Cir. 2019).

[283] *E.g.*, Vasquez v. Wolf, 830 F. Appx. 556, 557-58 (9th Cir. 2020) (permitting immediate appeal of TRO because "the circumstances render the denial [of the TRO] tantamount to the denial of a preliminary injunction," but vacating and returning the case to the district court for the court to consider additional evidence presented for the first time to the appellate court on appeal); S. Wind Women's Ctr. LLC v. Stitt, 808 F. App'x 677, 681 (10th Cir. 2020) (per curiam)

arguably insufficient facts and over dissents disparaging appellate decisions made on assertedly incomplete facts.[284]

Calvary Chapel of Bangor v. Mills provides a good example of the analysis undertaken by a court applying all three *Carson* factors when deciding whether to permit appeal of a TRO under a practical effect analysis.[285] The First Circuit, in *Calvary Chapel*, emphasized that Calvary Chapel of Bangor (the Chapel), which appealed the TRO decision, had the burden to establish each of the *Carson* requirements and, moreover, that it had failed to establish any of them.[286] In *Calvary*

(concluding that the appellant's alleged irreparable harm lacked "evidentiary certainty"); *see also id*. at 682 (Lucero, J., concurring) (concluding that appellants' presentation regarding irreparable harm was "devoid of evidence" and constituted "hypothetical scenarios"); Garza v. Hargan, 874 F.3d 735, 740-42 (D.C. Cir. 2017) (en banc) (Millett, J., concurring) (emphasizing the absence of facts in the record supporting the Government's request for stay pending appeal and noting the "factual disputes that surfaced for the first time in the rehearing papers"), *vacated by* Azar v. Garza, 138 S. Ct. 1790 (2018); Washington v. Trump, 847 F.3d 1151, 1156, 1168-89 (9th Cir. 2017) (per curiam) (emphasizing that the court made its decision regarding whether the Government was entitled to a stay of the lower court TRO "in light of the limited evidence put forward by both parties at this very preliminary stage" and concluding that the Government did not show likely success on the merits or irreparable harm); Romer v. Green Point Sav. Bank, 27 F.3d 12, 16-17 (2d Cir. 1994) (noting that the TRO at issue was one of the rare TROs that disposed of all that was at issue in the case and met the *Carson* requirements and, further, that the Rule 52(a) does not require that courts include findings of fact and conclusions of law in a TRO, but advising that "it would be highly useful" to appellate review if the district courts made such findings and conclusions); *see also* Newsom v. S. Bay United Pentecostal Church (*In re* S. Bay United Pentecostal Church), 992 F.3d 945, 949-50 (9th Cir. 2021) (denying writ of mandamus for review of TRO where both parties represented in TRO hearing that additional evidence would be forthcoming, district court was "unable to make findings on an adequate record," and the district court had discretion to create a "meaningful" record for review); *see also* Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay, 420 F. App'x 97, 99 (2d Cir. 2011) (emphasizing that sparse factual and legal record prior to issuance of a preliminary injunction, limited review and required affirmance because the district court, which had planned more detailed hearings, had made no factual findings and only tentative legal conclusions).

[284] *See, e.g.*, Sampson v. Murray, 415 U.S. 61, 86-88 (1974) (majority opinion) (permitting appeal of TRO); *see also id*. at 98-100, 102-03 (Marshall, J., dissenting) (emphasizing that the absence of findings of fact and legal conclusions makes review of the TRO nearly impossible and questioning the Supreme Court's determination on whether the complainant was entitled to preliminary injunctive relief when neither the district court nor appellate court had considered the issues involved and the complainant had not had an opportunity to present evidence on some of the issues resolved); Workman v. Bredesen, 486 F.3d 896, 904 (6th Cir. 2007) (majority opinion) (state may appeal TRO delaying immediate execution of death-row prisoner because TRO has "the practical effect of an injunction"); *see also id*. at 921-28 (Cole, J., dissenting) (concluding that the TRO was not appealable and arguing, on the merits, that the requested five-day delay for a preliminary injunction was needed to determine whether inmate was likely to experience constitutionally excessive pain and suffering during execution); Cath. Soc. Servs., Inc. v. Meese, No. 86-2907, 1987 WL 61013, at *2 (9th Cir. Apr. 3, 1987) (majority opinion) (permitting appeal of TRO precluding Government from excluding certain immigrants and deporting others, who were eligible for legalization except that they had departed and reentered the United States illegally), *withdrawn and vacated*, 820 F.2d 289 (9th Cir. 1987); *see also id*. at **6-8 (Hall, J., dissenting) (concluding that TRO was not appealable and that the appellate court did not have sufficient facts to complete the weighing of hardships regarding whether a preliminary injunction should issue); Berrigan v. Sigler, 475 F.2d 918, 919 (D.C. Cir. 1973) (per curiam) (concluding that rights will be irreparably lost absent appeal of denial of TRO); *see also id*. at 920 (Bazalon, J., statement) (concluding that denial of TRO is appealable under the practical finality doctrine); *see also id*. at 924 (MacKinnon, J., dissenting) (concluding, *inter alia*, that appellants' factual showing on the issue of irreparable harm absent appeal was "wholly insufficient").

[285] *Calvary Chapel*, 984 F.3d at 27-28.

[286] *Id*. at 27.

Chapel, the district court denied the Chapel's request for a TRO that would bar application of executive orders of the Governor of Maine to the Chapel's church services. The executive orders limited to 10 or fewer the number of people who could participate at in-person church services, because of the COVID-19 pandemic.[287] In response to the threat of contagion and death posed by COVID-19, the Maine Governor had issued four orders between March 18 through April 29, 2020, that, among other things, limited certain in-person gatherings to no more than ten persons; made exceptions for "essential" businesses and operations; entered various "stay-at-home" orders; and provided for a staggered reopening of Maine's economy.[288] The Chapel, a church in Orrington, Maine, held weekly in-person worship services and other in-person meetings.[289] On May 5, 2020, the Chapel filed a verified complaint against the Maine Governor, asserting federal and state constitutional and statutory violations, and it moved for a TRO or, alternatively, a preliminary injunction.[290] The Governor submitted an expedited response to the motion.[291]

The district judge considered the motion based on the verified complaint, affidavits, a May 7th teleconference between the court and parties, of which no verbatim transcript was made, and the Governor's expedited response.[292] No discovery was done before the conference, and no witnesses were called at the conference.[293] The district court denied the motion for TRO on May 9, 2020, and the Chapel appealed immediately.[294]

Based on the foregoing record, the First Circuit concluded that it did not have jurisdiction over the denial of the TRO because the Chapel had not established any of the *Carson* requirements. First, the court concluded that the TRO did not have the practical effect of denying injunctive relief, and that on this ground alone, the appellate court lacked jurisdiction over the appeal.[295] The *Calvary Chapel* court noted that the TRO would have had the effect of a preliminary injunction if it had been issued after a full adversarial hearing or if no further interlocutory relief would have been available.[296] Neither situation pertained. The First Circuit held that there had not been a full evidentiary hearing because the TRO was issued after a telephone conference, there was no verbatim record of the hearing, the parties did not obtain discovery, no witnesses testified at the conference, the Chapel did not have an opportunity to respond to the Governor's expedited filing, and the record was sparse and contained gaps.[297] Additionally, the First Circuit concluded that the sparse record argued in favor of finding that

[287] *Id*. at 24-25.
[288] *Id*. at 25-26.
[289] *Id*. at 25.
[290] *Id.*
[291] *Id*.
[292] *Id.* at 27.
[293] *Id.*
[294] *Id*.
[295] *Id*. at 27-28.
[296] *Id*. at 27 (citing Fideicomiso De La Tierra Del Caño Martín Peña v. Fortuño, 582 F.3d 131, 133 (1st Cir. 2009) (per curiam)).
[297] *Id*. at 27-28.

there were other avenues for interlocutory appeal because the Chapel could have moved quickly to the preliminary injunction hearing,[298] which would have permitted more informed court decisions and would have yielded an appealable order.[299]

The First Circuit also concluded that the Chapel had failed to establish the second and third *Carson* requirements. The Chapel failed to establish the second requirement -- that it would be seriously or irreparably injured absent immediate appeal -- because, the court concluded, "serious" or "irreparable" injury is contextual.[300] In the context of the extraordinary medical crisis confronting Maine and the entire United States, the harm of temporarily restricting in-person religious worship services – which the court recognized as significant -- did not constitute serious or irreparable harm, particularly given the gaps in the record and that other worship options remained, including on-line services, drive-in services, and in-person worship by ten or fewer.[301] Third, the Chapel did not establish that it could not later effectively appeal the constitutionality of Maine's executive orders.[302] The denial of the TRO did not create an "irreversible or meaningful shift in the relationship between the parties."[303] Instead, the Chapel could proceed to a preliminary injunction hearing, which the district court appeared poised to hear promptly, and, thus, the denial of the TRO would be quickly superseded by an appealable decision on the preliminary injunction, which, in turn, would be based on a more complete factual and legal record.[304]

As noted, the Second, Eighth, Tenth, and Eleventh Circuits also typically require that the litigant appealing a TRO establish each of the *Carson* requirements. In some cases, these courts elide application of the first element – assuming that the TRO has the practical effect of a preliminary or permanent injunction – though they apply the second and third factors.[305] As Wright & Miller, emphasizes, however, the general rule is that orders "granting, refusing, modifying, or dissolving" TROs are not appealable under § 1292(a)(1) "as orders respecting injunctions."[306] Similarly, the concurring judge in *Calvary Chapel* emphasized that once a court concludes that the first *Carson* factor is not met, a court need go no further, particularly if constitutional issues are implicated.[307] Thus, courts should discuss each element, including whether the TRO has the practical effect of an injunction.

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[298] Id.
[299] *Id*. at 28.
[300] *Id*. at 28-29.
[301] *Id*.
[302] *Id.* at 29-30.
[303] *Id.* at 29.
[304] *Id.*
[305] *E.g.*, First Eagle SoGen, Inc. v. Bank for Int'l Settlements, 252 F.3d 604, 607 (2d Cir. 2001).
[306] *But see* 16 WRIGHT & MILLER, *supra* note 3, § 3922.1; *accord* Off. of Pers. Mgmt. v. Am. Fed. of Gov't Emps., 473 U.S. 1301, 1303 (1985) (Burger, C.J., in chambers); Druley v. Patton, 601 F. App'x 632, 634 (10th Cir. 2015).
[307] Calvary Chapel of Bangor v. Mills, 984 F.3d 21, 30 (1st Cir. 2020) (Barron, J., concurring), *cert. denied* 142 S. Ct. 71 (2021).

i. *The First* Carson *Factor – Does a TRO Have the Practical Effect of an Injunction?*

Courts have deemed TRO decisions to have the "practical effect of an injunction," and thus to meet the first *Carson* requirement, when they have the practical effect of a permanent injunction or a preliminary injunction.[308]

Courts consider grants or denials of a TRO to be in effect a permanent injunction when the TRO decision (1) ends the litigation on an issue and effectively award victory to one party,[309] (2) moots an issue,[310] (2) indicates that there will be no ruling on a preliminary injunction,[311] or (3) threatens irretrievable harm before the TRO expires.[312] In these permanent injunction scenarios, the court must still find that the second and third *Carson* requirements are also met; otherwise, the order will be reviewable only at a final judgment.[313]

Courts using the *Carson* requirements to determine the ability to appeal a grant or denial of a TRO because it has the practical effect of a preliminary injunction, consider several factors. First, courts examine the extent of the hearing held, including whether the parties conducted

[308] *E.g.*, S. Wind Women's Ctr. LLC v. Stitt, 808 F. App'x 677, 680 (10th Cir. 2020) (per curiam); Schlafly v. Eagle Forum. 771 F. App'x 723, 724 (8th Cir. 2019) (per curiam); Romer v. Green Point Sav. Bank, 27 F.3d 12, 15 (2d Cir. 1994) (denial of TRO had the "drastic" effect of a final permanent injunction, effectively awarding the plaintiffs final victory in the case); Populist Party v. Herschler, 746 F.2d 656, 661 n.2 (10th Cir. 1984) (per curiam); Kartell v. Blue Shield of Mass., Inc., 687 F.2d 543, 550-54 (1st Cir. 1982) (even if district court order had effect of a permanent injunction, appellants did not show irreparable harm or inability to appeal effectively at final judgment); Levesque v. Maine, 587 F.2d 78, 79 (1st Cir. 1978).

[309] *E.g.*, Duvall v. Keating, 162 F.3d 1058, 1062 (10th Cir. 1998) (permitting appeal of denial of TRO that would stop "imminent execution" of death row-inmate before the preliminary injunction could be had); Romer v. Green Point Sav. Bank, 27 F.3d 12, 15-16 (2d Cir. 1994); Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott, 869 F.2d 1306, 1308-09 (9th Cir. 1989) (per curiam) (denial of TRO was appealable where "district court was emphatic . . . that [precedent] foreclosed any interlocutory relief"); Some pre-*Carson* cases also recognized this basis for appeal of TROs. *E.g.*, Adams v. Vance, 570 F.2d 950, 953 (D.C. Cir. 1977) (TRO ordering U.S. Secretary of State to take certain action in international negotiations within three days would have irreparable harm of "irreversibly altering the delicate diplomatic balance" at issue before a preliminary injunction hearing could be had); Berrigan v. Sigler, 417 F.2d, 918, 920 (1973 (Bazelon, C.J., statement).

[310] *E.g.,* United States v. Wood, 295 F.2d 772, 777 (5th Cir. 1961); *Berrigan*, 475 F.2d at 919 (per curiam).

[311] *E.g.*, J.G. *ex rel.* Greenberg v. Hawaii, 728 F. App'x 764, 764-65 (9th Cir. 2018); Belbacha v. Bush, 520 F. 3d 452, 455 (D.C. Cir. 2008); Doe v. Vill. of Crestwood, 917 F.2d 1476, 1477 (7th Cir. 1990); *Religious Tech. Ctr., Church of Scientology Int'l*, 869 F.2d at 1308-09; Belo Broad. Corp. v. Clark, 654 F.2d 423, 426 n.3 (5th Cir. Unit A 1981); Levesque v. Maine, 587 F.2d 78, 79-80 (1st Cir. 1978); Virginia v. Tenneco, Inc., 538 F.2d 1026, 1030 (4th Cir. 1976).

[312] *E.g.*, Ramos v. Dep't of Homeland Sec. Bureau of Immigr. & Customs Enf't, 179 F. App'x 239, 240 (5th Cir. 2006) (per curiam) (citing *Wood*, 295 F.2d at 778, and indicating parenthetically that Wood "contru[ed] the denial of a TRO as a final order for appealability purposes in order to preserve determination of the parties' substantial rights"); Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1223, 1225 (11th Cir. 2005) (per curiam); *Populist Party*, 746 F.2d at 661 n.2 (per curiam); Berrigan v. Sigler, 475 F.2d at 919 (per curiam); New York Tel. & Tel. Co. v. Commc'ns. Workers of Am., 445 F.2d 39, 44-46 (2d Cir. 1971); *Wood*, 295 F.2d at 777-78.

[313] Carson v. Am. Brands, Inc., 450 U.S. 79, 84-86 (1981).

discovery, witnesses testified, the court made a verbatim recording of the hearing, parties were fully heard on factual and legal issues, and the record is complete or is sparse with factual gaps.[314]

Second, courts consider whether the TRO is limited to or exceeds the permissible duration under Rule 65. If the TRO is confined to the Rule 65(b) limit of 14 days (plus one optional extension of 14 days by the district court for good cause), that is evidence that the TRO is what it purports to be – a non-appealable, short-term injunctive order that is to be in place only until a preliminary injunction hearing may be had.[315] If the TRO duration exceeds the Rule 65(b) time-periods, duration alone warrants treating the TRO as a preliminary injunction because long-lasting injunction threatens los of rights and the drastic consequences that render appeal under § 1292(a)(1) available.[316] However, a decision that a TRO constitutes a preliminary injunction based on duration should not be made until the TRO in fact exceeds the permissible time frames[317] or the court has set the preliminary injunction hearing to occur after the maximum 28-

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[314] *See, e.g.*, Calvary Chapel of Bangor v. Mills, 984 F.3d 21, 27-28 (1st Cir. 2020); Pearson v. Kemp, 831 F. App'x 467, 471-72 (11th Cir. 2020) (although some evidence was submitted, there was no live testimony, no discovery, defendants did not have an opportunity to file a reply brief, and the court was poised to move quickly to a preliminary injunction hearing to obtain more evidence); Cuban Am. Bar Ass'n, Inc. v. Martinez, 43 F.3d at 1412, 1422 (11th Cir. 1995) (the extent of evidence submitted); Mass. Air Pollution & Noise Abatement Comm. v. Brinegar, 499 F.2d 125, 126 (1st Cir. 1974); *see also* S. Wind Women's Ctr. LLC v. Stitt, 808 F. App'x 677, 682 (10th Cir. 2020) (Lucero, J., concurring) (noting that appellants presented only "hypothetical scenarios" in support of their argument that the TRO threatened irreparable harm and that the presentation was "devoid of evidence").

[315] *E.g.*, *S. Wind Women's Ctr.*, Stitt, 808 F. App'x at 681; *Pearson*, 831 F. App'x at 472; Perry v. Brown, 791 F. App'x 643, 645 (9th Cir. 2019) (first TRO, which lasted 14 days, was not appealable); Turner v. Epps, 460 F. App'x 322, 332 (5th Cir. 2012) (Haynes, J., dissenting) .

[316] *E.g.*, Tooele Cnty. v. United States, 820 F.3d 1183 (10th Cir. 2016); Jones v. Belhaven College, 98 F. App'x 284 (5th Cir. 2004) (per curiam); Nutrasweet Co. v. Vit-Mar Enters., Inc., 112 F.3d 689, 692-94 (3d Cir. 1997); United States v. Bd. of Educ. of City of Chi., 11 F.3d 668, 671-72 (7th Cir. 1993); Nordin v. Nutri/System, Inc., 897 F.2d 339 (8th Cir. 1990); Quinn v. Missouri, 839 F.2d 425, 426 (8th Cir. 1988) (per curiam); Edudata Corp. v. Sci. Computs., Inc., 746 F.2d 429, 430 (8th Cir. 1984) (per curiam); Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 412, 122 (11th Cir. 1995). Courts also sometimes combine a TRO extending beyond 14 days with the opportunity for an adversarial hearing to conclude that the TRO is appealable. *E.g.*, Decker v. Lanner, No. 21-1328 , 2022 WL 135429 at *2 (7th Cir. Jan. 14, 2022) (eight-month delay in ruling on motion, combined with notice to defendant, briefing, and request for a TRO that would exceed 14 days); *Perry*, 791 F. App'x at 645 (court's six- month extension of original TRO); E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 763 (9th Cir. 2018) (permitting immediate appeal of order labeled as a TRO by Government appellants where an adversary hearing had been held and the basis for issuing the order was strongly challenged, the TRO was to extend for 30 days, and the Government argues that "emergency relief is necessary to support the national interests"); Bennett v. Medtronic, Inc., 285 F.3d 801, 804 (9th Cir. 2002) (noting that the TRO was granted for a period of 30 days, the TRO was "strongly challenged," and both parties filed extensive written materials and made oral arguments); Spath v. Nat'l Collegiate Athletic Ass'n, 728 F.2d 25, 27 (1st Cir. 1984) (case was tried on the merits and a TRO was continued "without time limitation"); San Francisco Real Est. Invs. v. Real Est. Inv. Trust, 692 F.2d 814, 816 (1st Cir. 1982) (emphasizing that (1) the parties had notice, filed "relatively extensive written memoranda," and had an opportunity for oral argument; (2) the TRO extended beyond the 10-day period then established in Rule 65(b); and (3) the threatened harm could be irrevocable by the time for the preliminary injunction hearing); s*ee also supra* notes 158-161 and accompanying text.

[317] *See, e.g.*, *Perry*, 791 F. App'x at 645 (first TRO, which lasted 14 days, was not appealable); *Nordin*, 897 F.2d at 342-43 (TRO exceeded 10 days, as of date of appeal); Quinn v. Missouri, 839 F.2d 425, 426 (8th Cir. 1988) (TRO expressly ordered to last for 24 days, at time when TRO duration was one 10-day period with a possible extension

day length of a TRO. Courts may extend a TRO for an additional 14 days or the parties may agree to an extension. In these instances, the duration of the TRO, though longer than the 14 days now prescribed in Rule 65(b) as the initial time-frame for a TRO, would not be a basis for immediate interlocutory appeal.

Third, and similarly, the ability to obtain further interlocutory relief quickly, such as a preliminary injunction, is critical in determining whether an order labeled as a TRO has the practical effect of an injunction. Immediate appeal should generally be denied if the TRO is simply an initial, temporary ruling that is to remain in place only until the parties and court can move quickly – and within the Rule 65(b)(2) time-limits of 14 to 28 days (or through a longer period permitted by party consent) -- to a preliminary injunction hearing.[318] The district court's decision following the preliminary injunction hearing may be in favor of the party who lost at the TRO stage, thus potentially rendering appeal unnecessary, or, if appeal is still needed, appeal following the preliminary injunction hearing will indisputably be available under § 1292(a)(1) and will be based on a more complete record, thus, enabling better district court and appellate decisions. By contrast, if the court plans no further action on a preliminary injunction or if no further factual development is required, this is evidence that the TRO may serve as the final interlocutory injunction and may be appealable.[319]

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of one more 10-day period); *see also Tooele Cnty*., 820 F.3d at 1185-86 (noting that TRO had lasted more than 14 days before litigants appealed and citing *Sampson v. Murray*, 415 U.S. 61, 86 n.58, 87-88 (1974)).

[318] *E.g.*, Off. of Pers. Mgmt. v. Am. Fed. of Gov't Emps., 473 U.S. 1301, 1305 (1985) (Burger, C.J., in chambers); *Calvary Chapel*, 984 F.3d at 29; *Pearson*, 831 F. App'x at 471-72; *S. Wind Women's Ctr*., 808 F. App'x at 681 (case remains pending for on appellee's motion for preliminary injunction and it appears that the district court will rule promptly on the motion); *Fideicomiso de la Tierra*, 582 F.3d at 134 (decision on TRO was not appealable where further interlocutory relief was available and court indicated it was resolving threshold matters to "clear the way for a definitive, reviewable ruling on the preliminary injunction"); Cnty, Mun. Emps.' Supervisors' & Foremen's Union Local 1001 v. Laborers' Int'l Union of N. Am., 365 F.3d 576, 578 (7th Cir. 2004) (indicating that appeal of TRO is appropriate only "when resort to the regular processes of litigation is unavailing, and the judges is unwilling to make a prompt decision even though delay erodes or obliterates the rights in question"); Mass. Air Pollution & Noise Abatement Comm. v. Brinegar, 499 F.2d 125, 126 (1st Cir. 1974) (appeal unavailable where further interlocutory relief is available and the alleged harm is not irreparable); *see also* Canadian St. Regis Band of Mohawk Indians *ex rel.* Francis v. Town of Bombay, 484 F. App'x 586, 588 (2d Cir. 2012) (noting that order was a nonappealable TRO, in part, because court retained the ability to grant injunctive relief later and, indeed, the "district court contemplated granting the . . . requested relief at some point in the future").

[319] *E.g.*, Belo Broad. Corp. v. Clark, 654 F.2d 423, 426 & n.3 (5th Cir. Unit A Aug. 1981) (noting, *inter alia*, that TRO hearing was extremely brief, perhaps lasting less than one minute, but that no further factual development was needed and that the district court had declined to rule on a subsequent request for preliminary injunction and indeed that the preliminary injunction motion "languishes unanswered in the court below, indicating that in all but name the motion for this TRO served the same function as that for the preliminary injunction"); *Cnty, Mun. Emps.' Supervisors' & Foremen's Union Local 1001*, 365 F.3d at 578 (indicating in *dicta* that appeal of TRO is appropriate only "when resort to the regular processes of litigation is unavailing, and the judges is unwilling to make a prompt decision even though delay erodes or obliterates the rights in question").

Fourth, a decision on a TRO may be considered a TRO rather than a preliminary injunction if the order and procedure "unambiguously involve[s] temporary restraint," in which case the "bare fact that a substantial hearing was held should not justify appeal."[320]

Fifth, a decision to grant or deny a TRO may, by contrast, have the practical effect of an injunction because the court's legal ruling effectively decides the pertinent legal issues, leaving no basis for a change in that ruling even if the court were to hold a later preliminary injunction hearing.[321]

ii. *The Second* Carson *Factor – Does a TRO Threaten Serious or Irreparable Injury?*

In determining whether the TRO at issues threatens serious or irreparable consequences, courts examine, first, the nature of the threatened harm and, second, whether the TRO will impose "an irreversible or meaningful shift in the relationship between the parties" that can only be forestalled or remedied by immediate appeal.[322]

With respect to whether the TRO threatens serious or irreversible consequences, courts examine (1) the nature and quality of the threatened harm, including whether the harm is serious and irreparable or whether the harm, though certain and irreparable, is short term and de

[320] 16 Wright & Miller, *supra* note 3, § 3922.1; *See also* Schlafly v. Eagle Forum, 771 F. App'x 723, 724 (8th Cir. 2019) (quoting 16 Wright & Miller, § 3922.1 (3d 3d. 2019)); *accord Fideicomiso de la Tierra del Caño Martín Peña*, 582 F.3d at 133 (TRO motions "simply evinced a desire for quick, temporary relief, the precise function of a TRO"); *see also* Graff v. City of Chi., 986 F.2d 1055, 1059 (7th Cir. 1993) (order that "in no sense" seeks "brief, *ex parte*, preliminary relief" construed as appealable preliminary injunction).

[321] *E.g.*, *Fideicomiso de la Tierra del Caño Martín Peña*, 582 F.3d at 133-34; Belbacha v. Bush, 520 F.3d 452, 455 (D.C. Cir. 2008) (denial of TRO because the district court believed "it lacked the power" to grant the TRO effectively barred detainee from seeking a preliminary injunction and was appealable as "tantamount to the denial of a preliminary injunction" where the denial would send Guantanamo Bay detainee to Algeria pending decision on his status to stay in America and the removal would likely lead to his torture) (quoting Levesque v. State of Maine, 587 F.2d 78, 79-80 (1st Cir. 1978)); Populist Party v. Herschler, 746 F.2d 656, 661 n.2 (10th Cir. 1984) (per curiam); Env't Def. Fund, Inc., v. Andrus, 625 F.2d 861, 862 (9th Cir. 1980); *Levesque*, 587 F.2d at 79-80 (TRO decision declining to reinstate Plaintiff to his employment, determining that Plaintiff's property interest could be protected by a post-termination hearing ,and suggesting that the parties proceed to that hearing, effectively precluded a preliminary injunction hearing where the court would make an identical decision); Mass. Air Pollution & Noise Abatement Comm. v. Brinegar, 499 F.2d 125, 126 (1st Cir. 1974); Doe v. Vill. of Crestwood, 917 F.2d 1476, 1477 (7th Cir. 1990).

[322] *E.g.*, *Calvary Chapel*, 984 F.3d at 28-30 (no meaningful shift in relationship where district court is prepared to expeditiously move to preliminary injunction); S. Wind Women's Ctr. LLC v. Stitt, 808 F. Appx. 677, 681 (10th Cir. 2020); Frischenmeyer v. Gonzales, 114 F.3d 1198, 1997 WL 329561, at **1-2 (10th Cir. 1997) (unpublished table decision) (no *Carson* factors met and, indeed, not even allegations of "imminent or planned" transfer to another prison); Romer v. Green Point Sav. Bank, 27 F.3d at 15 (meaningful shift in relationship where grant of TRO prohibiting a mutual savings bank from converting to a public stock company meant that the bank could not meet state-imposed deadlines for the conversion and, thus, immediate appeal was necessary to determine if the savings bank should be permitted to proceed).

minimis;[323] (2) the certainty of the harm;[324] (3) whether, in the context of other harmful consequences, the harm is acceptable until a quick preliminary injunction hearing is held;[325] and (4) whether a preliminary injunction or other relief is quickly available.[326] The Eleventh Circuit, for instance, stresses that TROs are appealable "only in the direst of circumstances,"[327] such as when a prisoner would have been executed within 24 hours of the denial of a requested TRO[328] and when a patient will die between the denial of a TRO and the quickly available preliminary injunction hearing.[329] In these instances, the threatened harm is irreversible and the likelihood of that harm is certain and severe. In other cases, courts similarly have held TROs to be appealable because, on the facts at issue, an order granting a TRO would certainly and effectively bar a requested change in business organization because state-law deadlines would preclude the reorganization before the preliminary injunction hearing could be had[330] or because certain public disclosure of harmful and previously undisclosed information would be made before a preliminary injunction hearing could be had.[331] In these instances, too, the threated of harm is

[323] In the following cases, the courts indicated, in denying appeal of a TRO decision, that the harm at issue was neither serious nor irreparable: *Off. of Pers. Management*, 473 U.S. at 1304-05 (Burger, C.J., in chambers) (consequences of denial of TRO "not nearly so grave" as in case in which appeal of TRO decision was permitted); *Pearson*, 831 F. App'x 467, 471-72 (no showing of imminent harm); *S. Wind Women's Ctr.*, 808 F. App'x at 681 (per curiam); *see also id*. at 681-82 (Lucero, J., concurring) (emphasizing that district court "carefully analyzed the need for reducing abortion procedures in different scenarios, weighted this against the harm resulting from denial of abortion services, and tailored its temporary relief," while appellant suggest only "hypothetical scenarios" . . . "devoid of evidence" in which there might be irreparable harm); Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. Town of Bombay, 484 F. App'x 586, 588-89 (2d Cir. 2010) (magistrate judge had viewed intrusion as "de minimis" and appellate court failed to discern a serious or irreparable consequence); First Eagle SoGen Funds, Inc. v. Bank for Int'l Settlements, 252 F.3d 604, 607 (2d Cir. 2001) (adequate remedy through monetary damages); Mass. Air Pollution & Noise Abatement Comm. v. Brinegar, 499 F.2d 125, 126 (1st Cir. 1974) (per curiam) (no showing of "serious damage" but only "some incremental annoyance").

[324] *E.g.*, *Off. of Pers. Management*, 473 U.S. at 1304-05 (Burger, C.J., in chambers); *Pearson*, 831 F. App'x 467, 471-72 (no showing of imminent harm); *S. Wind Women's Ctr.*, 808 F. App'x at 681; Romer v. Green Point Sav. Bank, 27 F.3d 12, 15 (2d Cir. 1994) (appeal of TRO permitted where harm is "far more drastic" than a typical TRO" -- effectively granting final victory to the plaintiff -- as well as certain, thus, making it impossible for defendant to later meet the state deadlines for the bank conversion at issue).

[325] *Calvary Chapel*, 984 F.3d at 28-29 (no meaningful shift in relationship where district court is prepared to expeditiously move to preliminary injunction); *see also Off. of Pers. Management*, 473 U.S. at 1305 (Burger, C.J., in chambers) (emphasizing that the district court "explicitly contemplated a prompt hearing on a preliminary injunction"); *S. Wind Women's Ctr.*, 808 F. App'x at 681 ("court intend[ed] to promptly rule on the request for a preliminary injunction"); *First Eagle SoGen Funds*, 252 F.3d at 607 (noting that district court was "poised to hear . . . the motion for a preliminary injunction as soon as" the case was returned to the district court).

[326] *E.g.*, *Off. of Pers Management*, 473 U.S. at 1305 (Burger, C.J., in chambers); *S. Wind Women's Ctr*., 808 F. App'x at 681; *Canadian St. Regis Band of Mohawk Indians*, 484 F. App'x at 588-89; *First Eagle SoGen Funds*, 252 F.3d at 607; Huminski, v. Rutland City Police Dep't, 221 F.3d 357, 359-62 (2d Cir. 2000) (no indication that appellant moved for a preliminary injunction).

[327] Pearson v. Kemp., 831 F. App'x 467, 471 (11th Cir. 2020).

[328] Duvall v. Keating, 162 F.3d 1058, 1062 (10th Cir. 1998); Ingram v. Ault, 50 F.3d 898, 899-900 (11th Cir. 1995) (per curiam).

[329] Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1223, 1225 (11th Cir. 2005).

[330] *E.g.*, Romer v. Green Point Sav. Bank, 27 F.3d 12, 16-17 (2d Cir. 1994).

[331] *E.g.*, Uniformed Fire Officers Ass'n v. de Blasio, 973 F.3d 41, 47-48 (2d Cir. 2020).

severe and the likelihood of the harm is certain or virtually certain. Indeed, some courts have concluded that the alleged harm does not arise to serious or irreparable harm that would justify immediate appeal before a preliminary injunction hearing unless the putative appellant can establish that the alleged harm is imminent.[332]

When the alleged consequences are not so clearly serious or irreparable or the likelihood of the consequences is not so certain or imminent, courts will deny the ability to appeal a TRO,[333] or they may examine the harm in context, concluding in some instances, that the harm threatened does not arise to a serious or irreparable harm, given the context at issue.[334] Hypothetical or possible consequences, unsupported by evidence, will not suffice.[335]

Additionally, in assessing whether alleged consequences are serious or irreparable, courts will examine how quickly and persistently the appellant seeks injunctive relief.[336] For instance, in *Canadian St. Regis Band of Mohawk Indians* ex rel. *Francis v. Town of Bombay*, the court concluded that denial of a TRO was not appealable based on the argument that serious or irreparable injury would occur before an appeal could be had in the ordinary course of litigation, where only a small parcel of 230 acres out of the disputed 12,000 acres was at issue; that parcel was not "effectively" awarded to another entity; the district court retained the ability to rule later on an injunction; the plaintiff had previously received and not enforced a state-law warrant of eviction; and the appeal of the TRO had been withdrawn for nearly a year before being reinstated.[337] In this instance, the appellant did not persistently pursue injunctive relief, and it failed to enforce a state-law remedy that might have permitted immediate relief.

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[332] *E.g.*, *Pearson*, 831 F. App'x at 471 (appellant did not establish that allege harm was imminent, that is, they did not establish that defendants would "wipe" the data from voting machines before the quick preliminary injunction hearing scheduled by the district court); *Huminski*, 221 F.3d at 359-60 (denying appeal observing no urgency by appellant).

[333] Off. of Pers. Mgmt. v. Am. Fed. of Gov't Emps., 473 U.S. 1301, 1305 (1985) (Burger, C.J., in chambers); *S. Wind Women's Ctr*., 808 F. App'x at 681; Mass. Air Pollution & Noise Abatement Comm. v. Brinegar, 499 F.2d 125, 126 (1st Cir. 1974) (per curiam).

[334] *E.g.*, *Calvary Chapel*, 984 F.3d at 28-29; *S. Wind Women's Ctr. LLC*, 808 F. App'x at 681 (per curiam); *see also id*. at 682 (Lucero, J., concurring) (concurring that denial of TRO would not threaten serious or irreparable consequences where the appellants' presentation is devoid of evidence and presents only "hypothetical scenarios" suggestion a risk of harm); *First Eagle SoGen Funds*, 252 F.3d at 607 (U.S. mutual fund opposing buyback of publicly held shares of the Bank for International Settlements regarding Germany's war reparations could not appeal denial of TRO because it did not face serious or irreparable harm that could only be avoided by immediate appeal where any injury could be adequately remedied by a monetary award, the district court is poised to rule quickly on the preliminary injunction motion, the mutual fund did not establish that it must tender its stock before it could fully arbitrate or litigate the issues is posed, and it delayed before for four months before seeking a TRO).

[335] *S. Wind Women's Ctr.*, 808 F. App'x at 682 (Lucero, J., concurring).

[336] *E.g.*, Off. of Pers. Mgmt. v. Am. Fed. of Gov't Emps., 473 U.S. 1301, 1305 (1985) (Burger, C.J, in chambers) (request for TRO made eight months after parties learned of effective date for new regulations and with only 72 hours remaining before effective date); *First Eagle SoGen Funds,* 252 F.3d at 607 (four-month delay in moving for TRO); Anderson v. City of Boston, 244 F.3d 236, 239 (1st Cir. 2001) (citing cases); *Huminski*, 221 F.3d at 360-61.

[337] 484 F. App'x 586, 588-89 (2d Cir. 2010).

iii. *The Third* Carson *Factor – If the TRO Threatens Serious or Irreparable Injury, Can the Threat Be Effectually Reviewed Only by Immediate Appeal?*

In determining whether immediate appeal is needed for effective review of the TRO decision, courts consider again whether the TRO decision would inflict "irreparable" consequences or "an irreversible or meaningful shift in the relationship between the parties."[338] Also important in this inquiry is whether the litigant may move for a preliminary injunction and, thus, the TRO decision would last for only a short period of time before the district court moved expeditiously to provide further examination of the issues in a preliminary injunction hearing[339] or other hearing.[340] In these cases, quick resolution of the preliminary injunction, on more complete facts, may either abate the alleged serious or irreparable harm or permit immediate appeal of the preliminary injunction. Thus, the "traditional litigation channel" of moving to a speedy preliminary injunction hearing may prevent the "irreversible or meaningful" shift in the relationship of the parties, and it also provides the opportunity for more in-depth factual and legal analysis in the district court.

If the brief delay between TRO and preliminary injunction hearing does not irrevocably change the relation between the parties, moving to a quick preliminary injunction will serve Congress's goals of permitting interlocutory appeal of injunctive orders that threaten drastic harm and limiting piecemeal appeals, and it will also enable important factual and legal presentation on the issues presented.

B. *The Fourth, Fifth, Seventh, and D.C. Circuits – Narrow Grounds for Appeal of TROs Based Primarily on Historically Limited Ability to Appeal TROs or on* Sampson v. Murray

The Fourth, Fifth, Seventh, and D.C. Circuits have also established narrow grounds for appealing TROs, but they typically base limited right to appeal TROs on the Supreme Court's decision in *Sampson v. Murray*[341] (which they narrowly construe to require that the TRO must

[338] *Calvary Chapel*, 984 F.3d at 29; *accord Office of Pers. Mgmt*., 473 U.S. at 1304-05 (Burger, C.J., in chambers) (noting that in case where immediate appeal of a TRO was permitted, the court concluded that the action "'irreversibly alter[ed]' a delicate balance involving the foreign relations of the United States"); Ingram v. Ault, 50 F.3d 898, 899-900 (11th Cir. 1995) (where death-row inmate faced execution in less than 24 hours, he established the requirements of irreparable harm and need for immediate appeal that made appeal from a TRO decision appropriate); Populist Party v. Herschler, 746 F.2d 656, 661 n.2 (10th Cir. 1994) (per curiam) (absent appeal of order denominated as a TRO, plaintiffs' rights would be "irretrievably lost" because they "would be unable to have their party and candidate placed on the 1984 election ballot"); *see also* Nwaubani v. Grossman, 806 F.2d 677, 679-81 (1st Cir. 2015) (assuming first two *Carson* factors are established, issue is effectively reviewable after trial where plaintiff seeks only remedies such as back pay, money damages, declaratory relief, or reinstatement).

[339] *E.g.*, *Off. of Pers. Mgmt*., 473 U.S. at 1305 (Burger, C.J., in chambers); *Calvary Chapel* 984 F.3d at 29; *Pearson*, 831 F. App'x at 472 (noting that "nothing compelled an immediate appeal" since the district court was set to go forward with a quick evidentiary hearing); *S. Wind Women's Ctr*., 808 F. App'x at 681; *Huminski*, 221 F.3d at 361-62.

[340] *E.g.*, FCA US LLC v. Bullock, 737 F. App'x 725, 727 (6th Cir. 2018) (noting that conduct at issue could be challenged in other forums); Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. Town of Bombay, 484 F. App'x 586, 588-89 (2d Cir. 2010).

[341] 415 U.S. 61 (1974).

extend beyond the permissible Rule 65(b) time periods); on the Chief Justice Burger's decision, acting as Circuit Justice, in *Office of Personnel Management v. American Federation of Government Employees*;[342] or on other historically permissible but limited avenues for appeal and without citing or relying on the *Sampson* or *Carson*.[343]

The Fourth Circuit, for example, routinely dismisses attempted appeals of TROs by indicating simply that TROs are not appealable or are only appealable in "exceptional circumstances" and citing *Sampson v. Murray*[344] or Chief Justice Burger's decision in *Office of Personnel Management*.[345]

Additionally, the Fourth, Fifth, and Seventh Circuits construe *Sampson v. Murray* narrowly and treat it, as Chief Justice Burger did in *Office of Personnel Management*, as primarily permitting early appeal of TROs when the TRO at issue exceeds the time limits of Rule 65(b).[346] The Seventh Circuit sometimes cites *Carson v. American Brands, Inc.*, but does not appear to have discussed *Carson's* three-part requirements in the context of a TRO.[347] The Fifth Circuit initially used the *Carson* analysis in determining if TROs were appealable under § 1292(a)(1),[348] but later

[342] 473 U.S. 1301 (1985) (Burger, C.J., in chambers).

[343] *E.g.*, Belbacha v. Bush, 520 F.3d 452, 455 (D.C. Dir. 2008) (permitting appeal of TRO where the court's order effectively foreclose[s] the plaintiff from seeking a preliminary injunction); Native Vill. of Chenega Bay v. Lujan, No. 91-5042, 1991 WL 40471, at *1 (D.C. Cir. Mar. 8, 1991) (citing Adams v. Vance, 570 F.2d 950, 953 (D.C. Cir. 1977);

[344] E.g., Brown v. Taylor, 35 F.3d 555 (Table), 1994 WL 445628, at *1 (4th Cir. 1994); Snurkowski v. Terrangi, 976 F.2d 727 (Table), 1992 WL 235561, at *1 (4th Cir. 1992); *see also* Drudge v. McKernon, 482 F.2d 1375 1376 (4th Cir. 1973) (per curiam) (TROs may be appealed only in "exceptional circumstances").

[345] *See, e.g.*, Cecil v. Large, 802 F. App'x 801, 902 (4th Cir. 2020) (per curiam); Williams v. McNut, 807 F. App'x 274, 274 (4th Cir. 2020) (per curiam); Bratcher v. Clarke, 725 F. App'x 203, 204 (4th Cir. 2018) (per curiam).

[346] *E.g.*, *Off. of Per. Mgmt*., 473 U.S. at 1304 (Burger, C.J., in chambers); *accord* H-D Mich., LLC v. Hellenic Duty Free Shops S.A., 694 F.3d 827, 844-45 (7th Cir. 2012); In re Any and All Funds or Other Assets in Brown Bros. Harriman & Co. Account # 8870792 in the Name of Tiger Eye Invs. Ltd., 613 F.3d 1122, 1125-26 (D.C. Cir. 2010); Jones v. Belhaven, 98 F. App'x 283, 284 (5th Cir. 2004) (per curiam); *but see* Garza v. Hargan, 2017 WL 9854552, *1 n.1 (D.C. Cir. Oct. 20, 2017), (per curiam) (citing *Sampson* and permitting immediate appeal with no explanation and before Rule 65(b)(2) time periods elapsed), *vacated in part on rehearing en banc*, 874 F.3d 735, 736 n.1 (D.C. Cir. 2017) (per curiam), *cert. granted, judgment vacated*, *Azar v. Garza*, 138 S. Ct. 1790 (2018); *Compare also* Turner v. Epps, 460 F. App'x 322, 326 (5th Cir. 2012) (per curiam) (construing *Sampson* broadly in context of government appeal), *with id*. at 332 (Haynes, J, dissenting) (noting that *Sampson* is inapplicable because TRO would not exceed 14 days, the state conceded it was unprepared for a preliminary injunction hearing, all agreed that the order was "temporary relief in the form of a TRO," and the appellant could not establish the irreparable injury needed to appeal a TRO).

[347] *E.g.*, Cnty., Mun., Emps.' Supervisors' & Foremen's union Local 1001 v. Laborers' Int'l Union of N. Am., 365 F.576, 578 (7th Cir. 2004) (appealing instead of moving to preliminary injunction hearing cannot create an appealable TRO because the TRO is in effect longer that the Rule 65(b) time periods); Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd., 496 F3d 769, 770-71 (7th Cir. 1990). In *Commodity Futures*, for example, the Seventh Circuit did not need to reach this issue, concluding that when a TRO exceeds the maximum Rule 65(b) time-limit, it is treated as a preliminary injunction without a *Carson* analysis. *Commodity Futures*, 496 F.3d at 771; *see also* Am. Can Co. v. Mansukhani, 742 F.2d 314, 319-320 (7th Cir. 1984).

[348] Sherri A.D. v. Kirby, 975 F.2d 183, 203-04 (5th Cir. 1992).

retreated to its current position in which it primarily construes ability to appeal TROs under § 1292(a)1) narrowly but does not rely on *Carson*.[349]

The Fourth, Fifth, Seventh, and D.C. Circuits generally permit appeal of a TRO only in the following circumstances: (1) the district court had held a full evidentiary hearing;[350] (2) the TRO extended beyond the Rule 65(b) time-periods;[351] (3) the decision on the TRO would moot a claim or effectively constitute dismissal of the claim;[352] (4) the decision would effectively preclude the litigant from pursuing a preliminary injunction;[353] or (5) the decision would threaten irreparable harm before a preliminary injunction hearing could be had.[354] These are narrow appeal scenarios permitted in the pre-*Carson* time period or under a narrow *Sampson* analysis, but many of the scenarios would probably comply with the *Carson* requirements. The circuit courts should acknowledge and apply the *Carson* requirements to these and similar requests to appeal the grant or denial of a TRO.

C. *The Third, Sixth, and Ninth Circuits - Expansive Construction*

The Third, Sixth, and Ninth Circuits, by contrast, have adopted analyses that allow more expansive appeal of TRO decisions. These analyses, however, tend to address only the first *Carson* factor – whether the TRO has the practical effect of an injunction. They, thus, allow the circuits to permit appeal of TRO decisions without addressing whether the TRO at issue threatens serious

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[349] *E.g.*, Jones v. Belhaven, 98 F. App'x 283, 284 (5th Cir. 2004) (per curiam); Matter of Lieb, 915 F.2d 180, 183 (5th Cir. 1990).

[350] *E.g.*, Knowles v. Wells Fargo Bank, 513 F. App'x, 414, 414-15 (5th Cir. 2013); Smith v. Frank, 99 F. App'x 742, 743 (7th Cir. 2004) (court held a full hearing and considered granting relief pending trial); Virginia v. Tenneco, Inc., 538 F.2d 1026, 1029-30 (4th Cir. 1976); Dilworth v. Riner, 343 F.3d 226, 229 (5th Cir. 1965).

[351] *E.g., H-D Michigan, LLC*, 694 F.3d at 843-45; *In re Any and All Funds or Other Assets in Brown Bros. Harriman & Co. Account # 8870792*, 613 F.3d at 1125-26; Chi. United Indus., Ltd. v. City of Chi., 455 F.3d 940, 943 (7th Cir. 2006); *Jones*, 98 F. App'x at 284; Jackson v. FBI, 14 F.3d 604, 1993 WL 537702, at *1 (7th Cir. 1993) (unpublished table decision) (TRO not appealable preliminary injunction on facts, which included that FBI was not served with the complaint or present at the hearing and no witnesses, evidence, or additional arguments were presented); *Commodity Futures*, 496 F3d at 770-71 (citing Carson v. Am. Brands, Inc., 450 U.S. 79 (1981)); Nat'l Mediation Bd. v. Air Line Pilots Ass'n Int'l, 323 F.2d 305, 305-06 (D.C. Cir. 1963); Clements Wire & Mfg. Co. v. NLRB, 589 F.2d 894, 896-97 (5th Cir. 1979); *see also* Cedar Coal Co. v. United Mine Workers of Am., 560 F.2d 1153, 1161-62 (4th Cir. 1977) (indefinite postponement of a preliminary injunction hearing is appealable under § 1292(a)(1)).

[352] *E.g.*, Arthur J. Gallagher & Co. v. Babcock, 339 F. App'x 384, 385-87 (5th Cir. 2009); Ramos v. Dep't of Homeland Sec. Bureau of Immigr. & Customs Enf't, 179 F. App'x 239, 240 (5th Cir. 2006) (per curiam); Graham v. Teledyne-Cont'l Motors, 805 F.2d 1386, 1388 (9th Cir. 1986); N. Stevedoring & Handling Corp. v. Int'l Longshoremen's & Warehousemen's Union, 685 F.2d 344, 347 (9th Cir. 1982) (TRO decision effectively decided the merits and district court does not contemplate further action); United States v. Hubbard, 650 F.2d 293, 314 n.73 (D.C. Cir. 1980); Berrigan v. Sigler, 475 F.2d 918, 919 (D.C. Cir. 1973) (per curiam); *Berrigan*, 475 F.2d at 920 (Bazelon, C.J., statement); *Dilworth*, 343 F.3d at 229-30 (citing United States v. Wood, 295 F.2d 772, 778 (5th Cir. 1961) and Woods v. Wright, 334 F.2d 369, 370-74 (5th Cir. 1964)).

[353] *E.g.*, Belbacha v. Bush, 520 F.3d 452, 455 (D.C. 2008); H.K Porter Co. v. Metro Dade Cnty., 650 F.2d 778, 781-82 (5th Cir. 1981); Doe v. Vill. of Crestwood, 917 F.2d 1476, 1477 (7th Cir. 1990) (noting that the grant of a TRO to forbid a mass to be held the next day was "not properly characterized as 'temporary'" where the mass would not be rescheduled, all questions concerning the mass had "been wrapped up," and the trial court contemplated no further hearings regarding the issue); *Tenneco*, 538 F.2d at 1030.

[354] *E.g.*, Adams v. Vance, 570 F.2d 950, 953 & n.4 (D.C. Cir. 1978); *Berrigan*, 475 F.2d at 919 (per curiam).

or irreparable injury and whether immediate appeal of the TRO is needed for effective review – the very factors that *Carson* insists are necessary to limit appeal under § 1292(a)(1) of orders that are not express injunctions but have the "practical effect" of an injunction.

Furthermore, other circuits that generally use a narrow view of appealability of TROs occasionally permit appeal of a TROs by reliance on these more expansive grounds established by the Third, Sixth, or Ninth Circuits.[355]

The Third, Sixth, and Ninth Circuit have each concluded, however, in non-TRO scenarios, that all three *Carson* factors must be applied to appeal orders under §1292(a)(1) that are not express injunctions but have the "practical effect" of an injunction, because application of the *Carson* factors is critical to serving Congress's dual goals of permitting appeal of orders that threaten drastic consequences absent immediate appeal; while limiting piecemeal appeals.[356] To be sure, the second and third *Carson* factors may sometimes be met on the facts of cases for which these circuits use an expansive TRO approach. These factors also may not be met, however, and failure to address these factors gives courts discretion to permit appeal in cases – often high-stakes, high publicity cases involving recent government action -- that the appellate courts want to hear even though appeal may violate jurisdictional requirements. Further, given the limited information at most TRO hearings, interlocutory appeal of the TRO may not permit appellate courts an adequate factual or legal basis to make optimal decisions in these high-stakes appeals.

1. *Ninth Circuit – Narrow and Expansive "Quality of the Adversarial Hearing" Approaches*

The Ninth Circuit articulates both narrow and expansive standards for appealing the grant or denial of a TRO. The varying standards permit a court to apply a malleable standard when it desires to permit appeal more freely but also to apply the narrower standard to preclude immediate appeal.

The Ninth Circuit, in fact, has three strands of cases permitting appeal of TRO decisions, two of which would fit comfortably within a *Carson* analysis, if *Carson* were used. The first strand

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[355] *See, e.g.*, Uniformed Fire Officers Ass'n v. de Blasio, 973 F.3d 41, 47-48 (2d Cir. 2020); Marlowe v. LeBlanc, 810 F. App'x 302, 304 n.1 (5th Cir. 2020); Turner v. Epps, 460 F. App'x 322, 325-26 (5th Cir. 2012); Garza v. Hargan, No. 17-5236, 2017 WL 9854552, at *1 n.1 (D.C. Cir. Oct. 20, 2017), *vac'd in part on rehearing en banc*, 874 F.3d 735, 766 n.1 (D.C. Cir. 2017) (per curiam), *cert. granted and judgment vac'd*, Azar v. Garza, 138 S. Ct. 1790 (2018); Riddick v. Maurer, 730 F. App'x 34, 36-37 (2d Cir. 2018) (permitting appeal of TRO based on factors regarding nature of hearing and order and not requiring the additional *Carson* factors of threatened serious or irreparable consequences and need to appeal immediately for effective review); Boltz v. Jones, 182 F. App'x 824, 824-25 (10th Cir. 2006) (per curiam) (failing to analyze *Carson* factors in government's appeal of grant of TRO barring execution of death-row prisoner).

[356] *E.g.*, Def. Distributed v. Att'y Gen. of N.J., 972 F.3d 193, 197-200 (3d Cir. 2020) (citing Abbott v. Perez, 138 S. Ct. 2305, 2319 (2018) and Carson v. Am. Brands, Inc., 450 U.S. 79, 83 (1981)); Hadix v. Johnson, 228 F.3d 662, 668-69 (6th Cir. 2000) (quoting *Carson*, 450 U.S. at 84) (TRO); Orange Cnty. v. Hongkong & Shanghai Banking Corp., 52 F.3d 821 (9th Cir. 1995) (*passim*); Privitera v. Cal. Bd. of Med. Quality Assurance, 926 F.2d 890, 892-94 (9th Cir. 1991); Constr. Laborers Pension Tr. v. Cen-Vi-Ro Concrete Pipe & Prods. Co., 776 F.2d 1416, 1421-23 (9th Cir. 1985); Bradley v. Milliken, 772 F.2d 266, 270 (6th Cir. 1985).

provides that TRO decisions are appealable, if the district court held a full evidentiary hearing or if the appellant is "effectively foreclosed from pursuing interlocutory relief."[357] The latter situations would generally meet the requirements of the *Carson* practical effect test, though the court should indicate how and why each requirement is met in individual cases.

The second strand articulates a generalized "quality of the adversary hearing" standard, *i.e.*, requiring that appealable TROs must have "the qualities of a preliminary injunction,"[358] or must "not possess the essential features of a temporary restraining order."[359] This second approach, however, can be viewed as the "quality of the adversary hearing plus" strand of Ninth Circuit cases. In these cases, the Ninth Circuit articulates a broad standard for appeal, but, in application, narrows the approach, emphasizing that immediate interlocutory appeal is available because of the nature of the hearing held *and* the fact that (1) the court held a full evidentiary hearing, which renders the nominal TRO a preliminary injunction; or (2) the TRO, in fact, extended beyond the Rule 65(b) time periods; or (3) both of the foregoing factors are present.[360] These are traditional, narrow grounds for appeal of a TRO and the fact that the court also held an adversary hearing of sorts only enhances the ability to appeal.

The Ninth Circuit's third approach is expansive and more rarely used. It takes the Ninth Circuit's generalized "quality of the adversarial hearing" approach for all its worth, permitting appeal when the district court held a limited "adversary hearing" and "the court's basis for determining the order [is] strongly challenged"[361] or is simply "tantamount to a preliminary

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[357] *E.g.*, Givens v. Newsom, 830 F. App'x 560, 560-61 (9th Cir. 2020) (quoting Rel. Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott, 869 F.2d 1306, 1308 (9th Cir. 1989) (quoting in turn Env't Def. Fund, Inc., v. Andrus, 625 F.2d 861, 862 (9th Cir. 1980))); Elofson v. Bivens, No. 16-15367, 2016 WL 11005054, at *1 (9th Cir. July 6, 2016); N. Stevedoring & Handling Corp. v. Int'l Longshoremen's & Warehousing Union, 685 F.2d 344, 347 (9th Cir. 1982); Env'l Def. Fund, Inc. v. Andrus, 625 F.2d 861, 862 (9th Cir. 1980).

[358] *E.g.*, Washington v. Trump, 847 F.3d 1151, 1158 (9th Cir. 2017) (Serv. Emps. Int'l Union v. Nat Union of Healthcare Workers, 598 F.3d 1061, 1067 (9th Cir. 2010)); *accord* E. Bay Sanctuary Covenant v. Trump, 932 F.3d 742, 762-63 (9th Cir. 2018).

[359] *E.g.*, Bennett v. Medtronic, 285 F.3d 801, 804 (9th Cir. 2002) (observing that the parties filed extensive written materials and presented oral argument and the TRO was entered for a period of 30 days); *accord* Perry v. Brown, 791 F. App'x 643, 645 (9th Cir. 2019).

[360] *E.g.*, Decker v. Lanner, No. 21-1328 , 2022 WL 135429 at *2 (7th Cir. Jan. 14, 2022) (eight-month delay in ruling on motion, combined with notice to defendant, briefing, and request for a TRO that would exceed 14 days); Rivas v. Jennings, 845 F. App'x 530, 533 (9th Cir. 2021); *E. Bay Sanctuary*, 932 F.3d at 762-63 (court held adversary hearing, government strongly challenged basis for TRO, TRO was to remain in effect for 30 days, and the Government argued that national interests were at stake); *Serv. Emps. Intl' Union*, 598 F.3d at 1067 (two-day evidentiary hearing, extensive written materials, oral argument, and TRO had no expiration); *Bennett*, 285 F.3d at 804 (briefing, oral argument, and TRO would last 30 days); *see also Perry*, 791 F. App'x at 645 (district court extended original 14-day TRO for three months).

[361] *Washington*, 847 F.3d at 1158 ("TRO was strongly challenged in adversarial proceedings," the TRO "has or will remain in force longer than" 14 days - but no consideration that district court might extend the TRO before the end of the 14-day period, and "unusual circumstances" in which Government argues for emergency relief to "prevent terrorism," though it presented no evidence on the issue); Grand Canyon Skywalk Dev., LLC v. 'Sa' Nyu Inc., 715 F.3d 1196, 1199-2000 (9th Cir. 2013) (appeal of TRO permitted because adversarial hearings held and basis for TRO was

injunction."[362] This enables appeal when parties have had an opportunity to provide written submissions and provide argument on relevant issues, but have done little more. In particular, this loose "qualities of the adversarial hearing" approach is a facts-and-circumstances approach that does not require a full evidentiary hearing or require that the TRO extend beyond the Rule 65(b) time limits or that there be a serious harm that requires speedy appeal. These decisions sometimes also disregard that the court may extend the initial 14-day duration for a TRO as permitted under Rule 65(b) or that the parties may consent to such an extension and, instead, simply state that the TRO may or will extend beyond 14 days.[363] Moreover, other circuits that typically use a restrictive approach to appeal of TROs sometimes adopt this loose, qualities of the adversarial hearing approach to permit early appeal of TROs.[364]

These more expansive "quality of the adversary hearing" decisions sometimes also articulate additional flexible criteria for appeal, such as indicating that the TRO may be granted

strongly challenged); *see also* S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938, 939 (9th Cir. 2020) (noting without analysis that "the circumstances render the denial 'tantamount to the denial of a preliminary injunction'" (citing Religious Tech. Ctr., Church of Scientology Int'l Inc. v. Scott, 869 F.2d 1306, 1308 (9th Cir. 1989)); *but see id*. at 941 (Collins, J., dissenting) (stating that the TRO was appealable because it foreclosed any further relief and was "indisputably fatal" to the plaintiff's claim). *Compare* Cath. Soc. Servs., Inc. v. Meese, ., No. 86-2907, 1987 WL 61013, at *2 (9th Cir. 1987) (majority opinion) (permitting appeal of TRO because it ordered the Attorney General to take "drastic" action, did not preserve the status quo, and impaired ability to control the borders and prevent illegal immigration appealable), *withdrawn and vacated*, 820 F.2d 289 (9th Cir. 1987), with *id*. at **6-8 (Hall, J., dissenting) (noting that TRO was not appealable because, *inter alia*, it, in fact, preserved the status quo and there was insufficient factfinding).

[362] *E.g.*, Vasquez v. Wolf, 830 F. App'x 556, 557 (9th Cir. 2020); Middendorf v. U.S. Gen. Servs. Admin, 92 F.3d 1193, (9th Cir. 1996 (unreported table decision).

[363] *E.g.*, *Washington*, 847 F.3d at 1157-58 (noting that the legal basis for the TRO was vigorously contested, and anticipating that the TRO would remain in effect longer than the Rule 65(b) time periods because the TRO had no expiration date and no hearing had been set, although the district court had indicated the desire to move quickly to a preliminary injunction hearing and the Government appealed the day after the TRO was entered, thus, precluding the district court's scheduling of the hearing); *Cath. Soc. Servs., Inc*., No. 86-2907, 1987 WL 61013, at **6-8 (Hall, J., dissenting) (noting that the district court had planned to move quickly to a preliminary injunction hearing that would have been scheduled well within the 20-day limit then imposed on duration of a TRO).

[364] *E.g.*, Marlowe v. LeBlanc, 810 F. App'x 302, 304 n.1 (5th Cir. 2020) (TRO appealable as an injunction when the court "holds a hearing on a preliminary motion and the motion is strongly contested"); Turner v. Epps, 460 F. App'x 322, 325-26, 332 (5th Cir. 2012) (permitting appeal of TRO where district court received affidavits, written submissions, and oral arguments because, based on *Sampson v. Murray*, an "adversary hearing" had been held "and the court's basis for issuing the order strongly challenged," notwithstanding the dissenting judge's argument that the TRO would not extend beyond 14 days, the State was unprepared to move to a preliminary injunction hearing, and the court had ordered "brief, temporary relief"); Garza v. Hargan, No. 17-5236, 2017 WL 9854552, at *1 n.1 (D.C. Cir. Oct. 20, 2017 (citing *Sampson v. Murray* and permitting appeal of TRO because the order "was more akin to preliminary injunctive relief"), *vac'd in part on rehearing en banc*, 874 F.3d 735, 766 n.1 (per curiam), *cert. granted and judgment vac'd*, Azar v. Garza, 138 S. Ct. 1790 (2018); Riddick v. Maurer, 730 F. App'x 34, 36-37 (2d Cir. 2018) (permitting appeal of TRO based on factors regarding nature of hearing and order and not requiring the additional *Carson* factors of threatened serious or irreparable consequences and need to appeal immediately for effective review); Boltz v. Jones, 182 F. App'x 824, 824-25 (10th Cir. 2006) (per curiam) (failing to analyze *Carson* factors in government's appeal of grant of TRO barring execution of death-row prisoner).

or denied if the context of the TRO is "extraordinary" or "unusual" or "important."[365] This more flexible TRO appeal standard is at odds with the historical purpose for permitting appeal of injunctions and orders with the practical effect of an injunction under § 1292(a)(1) -- that the TRO threatens immediate serious or irreparable injury that can only be effectively reviewed by immediate appeal.

Furthermore, the Ninth's Circuit expansive "qualities of the adversary hearing" approach only explores criteria relevant to the first of the three *Carson* appeal criteria - whether an order has "the practical effect of an injunction." It does not require the putative appellant to establish also (1) that the TRO decision threatens serious or irreparable consequences before appeal can be had in the ordinary course of litigation – including following a quick preliminary injunction hearing; and (2) that effective review is not possible absent immediate appeal. These are the very factors that justify rare appeals of TRO decisions on the minimal factual and legal presentation permitted in the fast-paced TRO context and that the Supreme Court has emphasized are critical to avoiding unnecessary, piecemeal appeals that are contrary to the requirements of the final judgment rule.

In its expansive approach, the Ninth Circuit typically purports to follow the Supreme Court's decision in *Sampson v. Murray*, in which the court permitted appeal of an order labeled as the "continuation of [a] temporary restraining order."[366] The *Sampson* Court did emphasize that an "adversary hearing ha[d] been held" and "the order strongly challenged" – the hallmarks of the Ninth Circuit's expansive approach. But the *Sampson* Court also observed that when these two factors coincide, classifying "*a potentially unlimited order*" as a TRO "seems particularly unjustified."[367] Thus, even though the *Sampson* case was decided seven years before *Carson v.*

[365] *E.g., Washington*, 847 F.3d at 1158 (considering the "extraordinary" and "unusual" circumstances of the case in which the Government contended that appeal was necessary to support "efforts to prevent terrorism"); *Cath. Soc. Servs.*, 1987 WL 61013, at *2 (noting that order dealt with the ability to "control the borders and prevent illegal immigration"); *accord Turner*, 460 F. App'x at 326 (concluding that TRO could be appealed based on nature of hearing held and "the fact that the . . . TRO would delay [the death-row prisoner's] execution beyond its scheduled date," and noting that "at least two sister circuits have found TROs halting executions to be, in effect, preliminary injunctions"); Workman v. Bredesen, 486 F.3d 896, 904 (6th Cir. 2007) (permitting appeal of TRO, which delayed for five days the execution of a death-row inmate, because the TRO "effectively operates as an 'injunction'" because the TRO delays an inmate's scheduled date of execution and the TRO "affects an important interest of the State" in enforcing the inmate's long-delayed execution); *see also E. Bay Sanctuary*, 932 F.3d at 762-63 ("emergency relief was necessary to support the national interests"); Ross v. Rell, 398 F.3d 203, 204 (2d Cir. 2005) (purporting to use a *Carson* analysis, but, in fact, permitting appeal "in light of the unusual circumstances . . . and the fact that the death warrant [for execution of a death-row inmate] will expire before the TRO").

[366] Sampson v. Murray, 415 U.S. 61, 85 (1974) (majority opinion).

[367] *Sampson*, 415 U.S. at 87. As a factual matter and as a matter criticized earlier in this Article, the *Sampson* Court (over strong dissent) permitted appeal by a governmental entity that chose to discontinue participation in a timely-initiated, ongoing preliminary injunction hearing and to appeal the district court's "continuation of the TRO," which the court entered when the Government indicated at least implicitly that it intended to return and complete the preliminary injunction hearing. Sampson, 415 U.S. at 956 (Marshall, J., dissenting). The Seventh Circuit would later, correctly, foreclose this option to private litigants, indicating that "jumping the gun" on appeal by failing to participate in a timely preliminary injunction hearing does not render appealable a TRO that later exceeds the Rule 65(b) time-periods.

American Brands, Inc., it sowed the seeds of the *Carson* analysis. It permitted appeal not solely because a contested, adversarial hearing had been held and the basis for the court's decision strongly challenged, thus rendering the nominal TRO similar to a preliminary injunction, but because the Court also concluded that the duration of the order exceeded the Rule 65 time-periods, thereby threatening drastic consequences that could not later be remedied.

2. *Sixth Circuit – A Modified* Carson *Analysis and Automatic Appealability If the TRO Alters the Status Quo or Is Mandatory*

The Sixth Circuit has long acknowledged that the *Carson* requirements set the standard for appealability of grants or denials of TROs, but it often fails to apply all the requirements. The Sixth Circuit applied each of the three *Carson* requirements in determining the appealability of TROs under § 1292(a)(1) as early as 1985,[368] and it sometimes still does.[369] Since 2006, however, the Sixth Circuit sometimes applies only one or two parts of the three-part *Carson* standard.

In the case, *Northeast Ohio Coalition for Homeless and Service Employees Int'l v. Blackwell (NEOCH)*, the Sixth Circuit began its adoption of a modified *Carson* analysis. It began by quoting the three requirements of the *Carson* standard and concluding that TROs, though generally not appealable, may be appealed if the TRO "has the practical effect of an injunction and 'furthers the statutory purpose of "permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence."'"[370] Standard *Carson* fare.

Thereafter, however, the *NEOCH* court altered the *Carson* requirements, observing that courts have allowed immediate appeal under § 1292(a)(1) if (1) the TRO threatened "to inflict irretrievable harms before the TRO expire[s];"[371] or (2) the TRO does "not preserve the status quo but rather act[s] as a mandatory injunction requiring affirmative action."[372] Though the first alternative is similar to *Carson* and arguably includes the third requirement that immediate appeal is needed for effective review of the TRO, these two *NEOCH* modifications spurred a move away from the *Carson* analysis and to use of short-hand formulations that do not ensure that the

[368] *E.g.*, Brown v. Brown, 904 F.2d 706, 1990 WL 77466, at *1 (6th Cir. June 8, 1990) (Table); Owens v. Leake, 863 F.2d 49, 1988 WL 123485, at *1 (6th Cir. 1988) (Table); Wilson v. Denton, 785 F.2d 311, 1986 WL 16451, at *1 (6th Cir. Jan. 17, 1986) (Table); Stallworth v. Detroit Bd. of Educ., 770 F.2d 167, 1985 WL 13493, at *1 (6th Cir. July 12, 1985) (Table).

[369] *E.g.*, FCA US LLC v. Bullock, 737 F. App'x 725, 727 (6th Cir. 2018); Williamson v. Recovery Ltd. P'ship, 731 F.3d 608, 621 (6th Cir. 2013); Nacco Materials Handling Grp., Inc. v. Toyota Materials Handling USA, Inc., 246 F. App'x 929, 945-46 (6th Cir. 2007).

[370] Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l v. Blackwell, 467 F.3d 999, 1005 (6th Cir. 2006) (quoting Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981) (quoting in turn Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955))).

[371] *Id*. at 1005-06 (citing Ross v. Rell, 398 F.3d 203 (2d Cir. 2005) and the pre-*Carson* cases of Berrigan v. Sigler, 475 F.2d 918 (D.C. Cir. 918) and United States v. Wood, 295 F.2d 772 (5th Cir. 1961)).

[372] *Id*. at 1006 (quoting Adams v. Vance, 570 F.2d 950, 953 (D.C. Cir. 1978); Belknap v. Leary, 427 F.2d 496, 498 (2d Cir. 1970) and Off. of Pers. Mgmt. v. Am. Fed'n of Gov't Emps., 473 U.S. 1301, 1304-05 (1985)).

Carson requirements are satisfied. The Sixth Circuit has often concluded that either of the foregoing two requirements, independently, is sufficient to permit appeal of a TRO.[373]

The first *NEOCH* alternative formulation for when TROs may be appealable – the TRO threatens to inflict irretrievable harm before the TRO expires – permits the Sixth Circuit to elide the first and third *Carson* requirements, which include that an appealable TRO must have the practical effect of an injunction and that immediate appeal is required for effective review. It does, however, rely on a key *Carson* component of irreparable harm before the TRO expires. The second *NEOCH* formulation – that the TRO fails to preserve the status quo and, instead, acts as a mandatory injunction – has three failings. First, it makes one factor – whether the TRO preserves the status quo or acts as a mandatory injunction -- determinative of whether the TRO has the practical effect of an injunction. Second, it does not examine whether the TRO threatens serious or irreparable harm, and third, it fails to examine whether immediate appeal is necessary for effective review of the TRO.

In concluding that that the appellant need only establish that a TRO threatens "to inflict irretrievable harm before the TRO expire[s]," the *NEOCH* court relied primarily on pre-*Carson* cases, citing *Berrigan v. Sigler*, a 1973 case in which the per curiam opinion and a concurring "statement" in the case, concluded, respectively, that the situation presented a "death knell" appeal because (1) absent immediate review of the TRO, the rights at issue would be irretrievably lost and the issue might be mooted;[374] and (2) the decision would be for all practical purposes a final decision in the case.[375] *NEOCH* also cited the 1961 case of *United States v. Wood*, in which the Fifth Circuit permitted immediate appeal of a TRO under a *Cohen* "final order" analysis under

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[373] *E.g.*, Pre-Term Cleveland v. Att'y Gen. of Ohio, No. 20-3365, 2020 WL 1673310, at *1 (6th Cir. Apr. 6, 2020) (quoting *NEOCH* standard but finding it was not met and grant of TRO, which was limited and targeted, was not appealable);); *Id*. at *2-*3 (Bush, J. dissenting opinion) (quoting *NEOCH* standard and concluding that TRO should have been appealable because TRO disrupted the status quo and would cause "significant harm to Ohio's pandemic response"); Hill v. Snyder, No. 16-2003, 2016 WL 4046827, at *1 (6th Cir. 2016) (majority opinion) (permitting appeal because the TRO at issue required affirmative action by defendants and without regard to whether the TRO had the practical effect of an injunction, threatened immediate serious harm, or could only be effectively reviewed on immediate appeal); Ohio Republican Party v. Brunner, 543 F.3d 357, 360 (6th Cir. 2008) (reciting that TROs may be appealed if the TRO threatens "to inflict irretrievable harms before the TRO expires"); Workman v. Bredesen, 486 F.3d 896, 904 (6th Cir. 2007) (reciting the *Carson* standard but examining primarily "the salient question . . . [of] whether the order effectively operates as an 'injunction'" – the first of the *Carson* factors -- and concluding that the grant of the TRO at issue (which prevented for five days the execution of a death-row inmate pending a preliminary injunction hearing on whether the new three-drug protocol for execution would subject him to pain and suffering in violation of the Eighth Amendment) had "the practical effect of an injunction" and concluding that it is "untenable" to suggest either that the State has "meaningful appellate options" for imposing the "25-year-old sentence other than . . . interlocutory review" or that the TRO did not affect an "important" state interest); *see also* Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 612 (6th Cir. 2020) (per curiam) (noting that circuit court has jurisdiction to hear an appeal from a TRO when an order "has the practical effect of an injunction" and an appeal "further[s] the statutory purpose of permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence," but presuming that each factor was met where the TRO would, in part, affect the holding of a Sunday church service the next day) (quoting Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981)).

[374] Berrigan v. Sigler, 475 F.2d 918, 919 (D.C. Cir. 1973) (per curiam); *see also id.* at 920 (Bazelon, J., statement).

[375] *Id*. at 920 (Bazelon, J., statement).

28 U.S.C. § 1291.[376] Because the cases were decided before *Carson*, they did not articulate or apply the three-part *Carson* analysis, but both cases required that the TRO decision have occurred in a situation in which serious or irreparable harm was threatened and in which immediate appeal was crucial for effective review of the TRO decision.

The *NEOCH* court did consider one post-*Carson* case – the Second Circuit opinion in *Ross v. Rell*.[377] *Ross* articulated the complete *Carson* analysis, but, in a single sentence, applied only the second *Carson* requirement. The *Ross* court stated, in a conclusory fashion, that the grant of the TRO at issue -- which had *halted temporarily* the execution of a death-row inmate -- was appealable because the circumstances were "unusual," and the death warrant at issue would expire before the TRO would be vacated.[378] The halting of the execution of a death-row inmate would not ordinarily be expected to cause irreparable injury to the government since the execution can and likely will go forward at a later date. The case did not explore whether the TRO constituted an injunction in practical effect or, of equal importance, whether the decision could be effectively reviewed later through appeal following a preliminary injunction hearing. *Ross*, indeed, gave only scant attention to whether the state would suffer serious or irreparable injury if it had to wait until after the preliminary injunction hearing to appeal.

Notwithstanding that the Sixth Circuit in *NEOCH* articulated modified versions of *Carson* that did not apply each *Carson* requirement, the Government appellants in *NEOCH* may well have been able to establish each *Carson* requirement. [379] The court should have used that analysis.

The *NEOCH* court also concluded that TROs may be appealed on a second basis, without resort to the three-part *Carson* analysis -- solely on the ground that a TRO fails to preserve the status quo and, instead, constitutes a mandatory injunction that requires affirmative action.[380]

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[376] *Id*. 1005-06 (citing United States v. Wood, 295 F.2d 772 (5th Cir. 1961)).

[377] Ne. Ohio Coal. for the Homeless & Serv. Emps. Int'l Union v. Blackwell, 467 F.3d 999, 1005-06 (6th Cir. 2006) (citing Ross v. Rell, 398 F.3d 203 (2d Cir. 2005)).

[378] *Ross*, 398 F.3d at 204.

[379] In the case, two plaintiff organizations filed suit, seeking a TRO on October 24, 2006, to enjoin application of certain voter ID requirements to absentee ballots cast for the November 2006 election that were established by a newly passed law. *Ne. Ohio Coalition*, 467 F.3d at 1002-04. At the October 27, 2006, TRO hearing, the plaintiffs argued, *inter alia*, that the new provisions were unconstitutionally vague and would not be applied evenly throughout the state. *Id*. at 1004. After the TRO hearing, the district court entered a TRO, which was to expire after the court's decision on the preliminary injunction and which ordered the Secretary of State to issue a directive to the Boards of Elections precluding them from enforcing certain new provisions of the law and to requiring the Boards to tell absentee voters that they need not comply with the enjoined provisions. *Id*. On these facts, the Government appellants argued that the TRO threatened to inflict irretrievable harm before it expired, and the Sixth Circuit agreed. *Id*. at 1006. The Government could and should also have argued that the TRO constituted, in practical effect, a preliminary injunction even though the court had established a quick evidentiary hearing on the preliminary injunction to be heard on November 1. It could and should also have argued that a ruling on a quick preliminary injunction hearing would not provide for effective review. If it had so argued and if the court had agreed, the appeal would have been permissible under the standard *Carson* requirements.

[380] *Id*. (citing Adams v. Vance, 570 F.2d 950, 953 (D.C. Cir. 1978) and Belknap v. Leary, 427 F.2d 496, 498 (2d Cir. 1970)).

This short-hand standard for appeal of TROs arguably represents a conclusion that such a TRO automatically meets some or all of the *Carson* requirements. The Third, in fact, has permitted appeal of the denial of motion for TRO because the relief requested – and denied – would have disturbed the status quo if the district court had granted the TRO.[381] The Sixth Circuit has permitted appeal of a grant of TRO solely on the ground that the TRO disturbed the status quo and was mandatory and without considering other *Carson* requirements.[382] Again, the cases relied on in *NEOCH* do not support automatic appeal for all TROs that fail to preserve the status quo or that are mandatory. In *Adams v. Vance*, which the *NEOCH* court cited in support of permitting immediate appeal of TROs that are mandatory or alter the status quo, the D.C. Circuit emphasized that the mandatory injunction at issue imposed consequences "irreversibly altering the diplomatic balance in the environmental arena" in a way that could not later be undone.[383] Thus, the TRO in *Adams*, in fact, met the *Carson* requirements of threatening serious, perhaps irreparable consequences that cannot be undone by later review. Similarly, the *Belknap v. Leary* decision, also cited in *NEOCH*, while opaque, also presented a situation where time was of the essence and, absent immediate appeal, the TRO could not be effectively reviewed.[384] Further, the *NEOCH* court relied on Chief Justice Burger's decision in *Office of Personnel Management v. American Federation of Government Employees*, but Chief Justice Burger, there noted that the TRO it

[381] Moton v. Wetzel, 833 F. App'x 927, 929 n.3 (3d Cir. 2020) (per curiam) (quoting Hope v. Warden Cnty. Prison, 956 F.3d 145, 160 (3d Cir. 2020)).

[382] Hill v. Snyder, 2016 WL 4046827, at *1 (concluding that the TRO, in part, constituted a mandatory injunction that did not preserve the status quo and, thus, was appealable); *see also* Pre-Term Cleveland, No. 16-2003, 2020 WL 1673310, at *2 (Bush, J., concurring in part and dissenting in part) (dissenting from conclusion by majority that the TRO was not appealable and concluding that the TRO was appealable in part because it constituted a mandatory injunction that did not preserve the status quo); *but see also* NACCO Materials Handling Group, Inc. v. Toyota Materials Handling USA, Inc., 246 F. App'x 929, 945-46 (6th Cir. 2007) (applying all three *Carson* requirements and concluding that a preliminary injunctive order that *maintained the status quo* was appealable under *Carson* analysis because the order that would maintain the status quo pending decision on preliminary injunction, had the practical effect of an injunction, threatened serious or irreparable harm before preliminary injunction, and could only be effectively reviewed by immediate appeal); *accord* Adams v. Vance, 570 F.2d 950 (D.C. Cir. 1978) (TRO that maintained the status quo appealable because it "commanded an unprecedented action irreversibly altering the delicate diplomatic balance in the environmental arena" and immediate appeal is necessary to protect the parties' rights) .

[383] 570 F.2d 950, 954 (D.C. Cir. 1978).

[384] 427 F.2d 496 (2d Cir. 1970). In this pre-*Carson* case, the Second Circuit indicated, in part, that the TRO at issue was appealable solely because it was mandatory. *Id*. at 498. The facts, however, reveal the "urgency as to time" that the court indicated permitted immediate appeal. In the case, the court noted that there was an "alleged gross neglect [of duty] by a number of police officers" in failing to prevent harm to anti-war demonstrators on May 8, 1970, but that the New York City mayor and police had thereafter taken corrective measures. *Id.* at 498-99. Notwithstanding these circumstances, plaintiffs who planned demonstrations for May 29, 30, and 31, sought and received on May 27, 1970, a TRO (1) restraining the New York City Commissioner and virtually all other members of the city police force from failing to protect certain peaceful protestors and from failing to guarantee proper and adequate protection; and (2) requiring that the district court's order be read or conveyed by the Police Commissioner or a designate to every member of the police department who would be on duty. *Id*. at 497-98. Because there was only one day before the first protest, because the police department had taken curative action, and because the impending compliance could not later be undone, this appeal may be construed to fall within the class of appeals that threaten serious or irreparable injury absent immediate appeal.

reviewed, in fact, preserved the status quo.[385] Chief Justice Burger also went on to intimate that immediate appeal of TROs based on a conclusion that they that are mandatory or do not preserve the status quo should be limited to instances similar to *Adams v. Vance*, in which the appellant establishes that the TRO at issue also threatens serious or irreparable consequences that cannot be remedied absent immediate review.[386]

Whether a TRO disturbs the status quo or is mandatory may be an appropriate factor for courts to consider in determining whether the appellant can show that a TRO has the practical effect of an injunction. But courts and commentators suggest, instead, that these factors should be given little if any weight, with primary focus based instead on the threat of irreparable injury and need for immediate appeal. First, courts often disagree regarding what constitutes the status quo.[387] Appeal of a TRO, for example, often occurs when a unit of the federal or state government has initiated a new policy, regulation, or law. In these and other instances, it may be difficult to determine whether an affirmative order maintains or alters the status quo. The D.C. Circuit panel and Circuit Justice, Chief Justice Burger, for example, disagreed on just this issue in *Office of Personnel Management*.[388] Commentators, likewise, have concluded the terms "status quo" or "mandatory" injunction labels are costly because the terms are "inherently ambiguous" and invite substantial litigation.[389]

Second, the fact that an injunction disturbs the status quo or is mandatory is "an unreliable proxy" for causation of irreparable harm.[390] Thus, commentators conclude, as did Chief Justice Burger in *Office of Personnel Management* with respect to TROs, that courts should directly examine the facts at issue to determine (1) whether an injunction that alters the status quo or is a mandatory injunction will cause irreparable harm; and (2) whether such an injunction can be effectively reviewed at a later time.[391] Finally, either an affirmative or mandatory injunction, which does not maintain the status quo, or a prohibitory injunction, which maintains

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[385] Off. of Pers. Mgmt. v. Am. Fed'n of Gov't Emps., 473 U.S. 1301, 1305 (1985) (Burger, C.J., in chambers).

[386] *Id*. at 1304-05 (Burger, C.J., in chambers) (quoting *Adams v. Vance*, 570 F.2d at 953-54). Additionally, Justice Burger indicated that the district court contemplated a quick preliminary injunction hearing, further indicating that the TRO was not a *de facto* preliminary injunction.

[387] *E.g.*, *Off. of Pers. Mgmt*., 473 U.S. at 1304-05 (Burger, C.J., in chambers) (disagreeing with the D.C. Circuit's conclusion on status quo). *Compare also* Cath. Soc. Servs., Inc. v. Meese, ., No. 86-2907, 1987 WL 61013, at *2 (9th Cir. 1987) (majority opinion) (permitting appeal of TRO because it ordered the Attorney General to take "drastic" action, did not preserve the status quo, and impaired ability to control the borders and prevent illegal immigration appealable), *withdrawn and vacated*, 820 F.2d 289 (9th Cir. 1987), with *id*. at **6-8 (Hall, J., dissenting) (noting that TRO was not appealable because, *inter alia*, it, in fact, preserved the status quo and there was insufficient factfinding).

[388] *Off. of Pers. Mgmt*., 473 U.S. at 1304-05 (Burger, C.J., in chambers).

[389] 11A WRIGHT & MILLER, *supra* note 3, § 2948; Leubsdorf, *supra* note 88, at 546; Lee, *supra* note 92, at 164-66.

[390] Lee, *supra* note 92, at 161-166 (concluding that the status quo is an unreliable proxy for irreparable harm and it is more costly than directly determining if irreparable harm exists); *see also* 11A WRIGHT & MILLER, *supra* note 3, § 2948; Wittlin, *supra* note 92, at 1359-60; Leubsdorf, *supra* note 88, at 534-40, 546; Note, *supra* note 88, at 1063 (noting that a prohibitory order "may easily place a greater burden on the defendant than an order which, by any definition, is mandatory").

[391] *See supra* note 390.

the status quo, may irreparably damage a party. Thus, there is little reason to permit automatic appeal of one, but not of the other.[392]

Indeed, the Sixth Circuit has concluded similarly with respect to preliminary injunctions, that there is "little consequential importance to the concept of status quo, and [we] conclude that the distinction between mandatory and prohibitory relief is not meaningful."[393] The Sixth Circuit, for example, has held that it would apply the traditional standard for injunctive relief, rather than a higher standard, regardless of whether the preliminary injunction at issue was mandatory or prohibitory.[394] In another case discussing the standard for granting or denying a preliminary injunction, the Sixth Circuit similarly rejected the idea that there is "any particular magic in the phrase 'status quo,'" explaining that courts should focus on the prevention of injury, rather than on preserving the status quo.[395]

Following the rationale of courts and commentators considering preliminary injunctions, a TRO should not be held to have the practical effect of a preliminary injunction simply because it alters the status quo or is mandatory. Instead, the court should consider other factors relevant to whether the TRO has the practical effect of an injunction, including the nature of discovery, completeness of the record, and the nature of the pre-TRO hearing; the duration of the TRO; whether the court plans to move quickly to the preliminary injunction hearing; and whether the TRO unambiguously authorizes only temporary restraint. Moreover, a TRO that allegedly alters the status quo – whether affirmative or not – should not be appealable under § 1292(a)(1) as having the practical effect of an injunction unless the TRO also threatens to inflict serious or irreparable consequences that may only be effectively reviewed by immediate appeal. Absent this tripartite showing required by *Carson v. American Brands, Inc.*, the district and appellate courts will benefit from requiring the parties to move to the more complete evidentiary and legal hearing available in the preliminary injunction setting.

3. *Third Circuit – An Expansive "Characteristics of the Order" Approach*

Until recently, the Third Circuit would have been characterized as a circuit that permitted limited TRO appeals, based on its narrow reading of *Sampson v. Murray* that required that the TRO extend beyond the permissible time limits in rule 65(b).[396] In its 2020 decision in *Hope v.*

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[392] 11A WRIGHT AND MILLER, *supra* note 3, § 2948; Wittlin, *supra* note 92, at 1359; Leubsdorf, *supra*, note 88, at 546.

[393] United Food & Com. Workers Union v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 348 (6th Cir. 1998); *see also* Chi. United Indus., Ltd. v. City of Chi., 445 F.3d 940, 943-46 (7th Cir. 2006) (noting that whether TROs or preliminary injunctions would "'preserve the status quo' is indeed a common formula, but [that] its is much and rightly criticized" and also stating that "[w]hether and in what sense the grant of relief would change or preserve some previous state of affairs is neither here nor there . . . [but] merely . . . fuzz[es] up the legal standard," before concluding that the Tenth Circuit had made a "thoughtful . . . defense" of the concept and that, on the facts at issue, the court need not resolve the issue of whether to impose a heightened standard); *see also supra* note 92.

[394] *United Food*, 163 F.3d at 348.

[395] Stenberg v. Cheker Oil Co., 573 F.2d 921, 925 (6th Cir. 1978).

[396] *E.g.*, Globus Med., Inc. v. Vortex Spine, Inc., 605 F. App'x. 126, 128-29 (3d Cir. 2015); Nutrasweet Co. v. Vit. Mars Enters., Inc., 112 F.3d 689, 692 (3d Cir. 1997) (TRO lasted 77 days); SEC v. Black, 163 F.3d 188, 184 (3d Cir. 1998) (several months); In re Arthur Treacher's Franchise Litig., 680 F.2d 1150, 1153-55 & n.8 (3d Cir. 1982).

Warden York County Prison, however, the Third Circuit charted new ground, creating a "characteristics of the TRO order" approach that keys on whether the characteristics of the pre-TRO hearing and the order render a TRO similar to a preliminary injunction. The *Hope* decision establishes a general and malleable appeal standard that permits a court to examine both the "purpose and effect of a purported TRO."[397]

In what appears to be its first use of *Carson v. American Brands, Inc.* in a TRO case, the Third Circuit in *Hope* downgraded the second and third *Carson* requirements from requirements for appeal of a TRO to "characteristics" of a TRO that "make the case for immediate appealability even stronger."[398] Among characteristics the *Hope* court recognized as distinguishing the TRO from the preliminary are (1) whether the adverse party received notice and an opportunity to be heard; (2) whether the order complied with the duration limits of Rule 65(b); (3) whether the purpose of the order was to maintain the status quo for a temporary period or, instead, disturbed the status quo or imposed a mandatory injunction; and (4) whether the "effects of the purported TRO are substantial and potentially irreversible" because the order threatens serious or irreparable injury and can only be effectually reviewed by immediate appeal under a *Carson* analysis.[399]

In *Hope*, the appellants – state prison authorities and federal Immigration and Homeland Security officials (the Government) – appealed TROs entered by a district court that permitted immediate release of twenty immigration detainees housed at county prisons, based on the detainees' arguments at the height of the COVID-19 pandemic, that they were particularly susceptible to the illness.[400] The case presented a number of procedural issues that might alone have made the case appealable as well as facts that seemed to meet the *Carson* requirements for appeal of an order that has the practical effect of an injunction. In *Hope*, twenty immigration detainees filed a habeas petition and a motion for a TRO, seeking release from confinement and arguing that, based on their underlying health conditions, detention during the COVID-19 pandemic threatened serious injury or death, thus, violating their constitutional rights.[401] Without hearing from the Government in opposition to the motion for TRO, the district court granted a rare, *ex parte* TRO on April 7, 2020, directing that the petitioners be released from confinement.[402] Moreover, rather than setting a preliminary injunction hearing "at the earlier possible time[] . . . [that would] tak[e] precedence over all other matters except hearings on older matters of the same character," as required by Rule 65(b)(3) for TROs issued without notice, the district court also ordered, on April 7th, that the Government show cause by April 13th why the

[397] Hope v. Warden York Cnty. Prison, 956 F.3d 156, 160-61 (3d Cir. 2020) (*Hope I*).
[398] *Id*. at 161.
[399] *Id*. at 160-61 (quoting Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981).
[400] *Id*. at 157-58.
[401] *Id.* at 158.
[402] *Id*.

TRO should not be converted to a preliminary injunction.[403] This improperly shifted the burden of proof to the Government.[404] Several hours later, the Government filed motions to reconsider and stay the TRO, and it filed a declaration describing the conditions at the prisons at issue as well as details of the detainees' criminal histories.[405] That same day, the district court granted the motion for reconsideration, stayed the TRO, and ordered the petitioners to respond.[406]

Following quick responses by the detainees to the Government's motion for reconsideration and by the Government to the detainees' motion for TRO, the district court, on April 10, denied the Government's motion for reconsideration, concluding that the Government failed to establish a sufficient basis for reconsideration of the TRO decision.[407] The court, thereafter, lifted the stay and ordered the immediate release of the detainees, stating both that the TRO would expire on April 20, 2022 at 5:00 p.m. (which would have been within the Rule 65(b) time periods) and that the detainees' release from detention would extend indefinitely - until Pennsylvania's COVID-19 state of emergency was lifted or until further order of the court.[408] The Government immediately appealed the court's TROs of April 7 and April 10 and sought, from both the district court and the Third Circuit, a stay of release of the detainees.[409] The district court denied the requested stay.[410] The Third Circuit quickly granted the stay request, but before it did so, nineteen of the twenty detainees had been released and had not been re-detained by the time the Third Circuit issued its April 21st opinion recognizing jurisdiction for the appeal.[411]

The case presented delayed opportunity for the Government to respond to the requested TRO; improper shifting of the burden of proof to the Government when the court treated the case as requiring the Government to move for reconsideration, rather than requiring an expedited preliminary injunction hearing following the *ex parte* TRO; a TRO that disturbed the status quo and ordered "mandatory, affirmative relief"; ambiguity regarding whether the purported TROs would extend beyond the Rule 65(b) time periods; and declarations provided by the Government regarding the conditions at the prisons at issue and regarding the detainees' criminal histories.[412] On these facts, the Government may well have established that the district court's order denying the Government's motion for reconsideration of the TRO effectively denied the Government the expedited preliminary injunction hearing on the *ex parte* TRO that is

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[403] *Id*.; *see also* Hope v. Warden York Cnty Prison, 972 F.3d 310, 320-21 (3d Cir. 2020) (*Hope II*) (emphasizing that Rule 65(b) requires a court to hold an expedited preliminary injunction hearing after issuing an *ex parte* TRO and that the court may not treat an *ex parte* TRO as a preliminary injunction without a hearing).
[404] *Hope II*, 972 F.3d at 321.
[405] *Hope I*, 956 F.3d at 158.
[406] *Id.*
[407] *Id*. The court noted that the Government had not demonstrated a change in controlling law, that it had previously unavailable evidence, that there had been a clear error of law, or that reconsideration was needed to prevent manifest injustice. *Id*.
[408] *Id*.; *see also Hope II*, 972 F.3d at 318-319.
[409] *Hope I*, 956 F.3d at 159.
[410] *Id*.
[411] *Id.*
[412] *Id*. at 157-59, 162.

required under Rule 65(b)(3).[413] Rule 65(b)(3) expressly provides that, at the required expedited preliminary injunction hearing, the party who obtained the *ex parte* TRO must proceed with a preliminary injunction hearing, or the court "must dissolve the order."[414] Instead, the court stated that to prevail on the motion for reconsideration, the Government needed to establish (1) an intervening change in law; (2) new evidence that was not previously available; and (3) that reconsideration was necessary to correct a clear error of law or to prevent manifest injustice.[415] The district court concluded that the Government had not met that "exacting standard,"[416] it failed to set the case for an expedited preliminary injunction hearing, and it simultaneously stated that TRO would terminate on April 20 and that it would extend until Pennsylvania's state of emergency regarding Covid-19 terminated or further court order.[417] It does not appear, however, that the Government requested an expedited preliminary injunction hearing. On these facts, the Third Circuit might have concluded that the decision on the motion for reconsideration indicated that the district court would not move to the expedited preliminary injunction hearing required under Rule 65(b) and that immediate appeal was warranted on the basis of the denial of the right to an expedited preliminary injunction hearing.

Alternatively, the Government might also have established each of the *Carson* requirements for immediate appeal of an order that is not an express injunction. First, the TRO might have had the practical effect of a preliminary injunction because the order substituted for, or denied the right to, the expedited preliminary injunction hearing on the *ex parte* TRO required under Rule 65(b); required the Government to make a much more difficult showing of a ground for reconsideration of the TRO decision; did not indicate unambiguously either that the court would move quickly to a preliminary injunction hearing or that the TRO would expire within the rule 65(b) time periods; and the Government had produced affidavits on the prison conditions and the criminal histories of the 20 detainees, 19 of whom had been released and not re-detained. Second, the Third Circuit concluded that there was a "substantial possibility that the petitioners' release will result – if it has not already – in serious and potentially irreversible consequences."[418] Third, the Third Circuit concluded that immediate review was necessary to protect the rights of the parties and the consequences of delayed appeal might be irreversible.[419] If the Government's declarations supported these conclusions, the *Hope* court could have permitted appeal based on the *Carson* requirements.

Instead, using a "characteristics of the TRO order" approach set forth above, the Third Circuit permitted immediate appeal because each of the following "characteristics" of a

[413] *See* Hope v. Doll, No. 1:20-cv-562, 20 WL 5035724 (M.D. Pa. Apr. 10, 2020) (denying motion to reconsider and stay temporary restraining order).
[414] RULE 65(b).
[415] *Doll*, 2020 WL 5035724 at **1-2.
[416] *Id*.
[417] *Id*. at *2.
[418] Hope v. Warden York Cnty. Prison, 956 F.3d 156, 162 (3d Cir. 2020) (*Hope I*).
[419] *Id*.

preliminary injunction favored treating the TROs as preliminary injunctions: (1) the TRO disturbed the status quo, ordering "mandatory, affirmative relief" by permitting release of twenty immigration detainees on their own recognizance; (2) there was a "substantial possibility" of "serious and potentially irreversible consequences"; (3) the TRO did "not necessarily comply with the fourteen-day limit" in Rule 65; and (4) if appeal were delayed, the consequences of the TRO might be irreversible.[420]

The *Hope* court, thus, considered all of the *Carson* requirements, but reduced them to factors, among others, to be considered rather than requirements. Moreover, the Third Circuit has already used short-hand from the *Hope* analysis to broaden the basis for appeal of TROs, concluding summarily in a subsequent case that a denial of a TRO was appealable solely because the TRO, *which was denied by the district court*, would have disturbed the status quo and mandated affirmative relief if it had been granted.[421]

V. CIRCUIT APPLICATION OF THE EXPANSIVE APPROACH TO APPEAL OF TROS

Circuits courts employing an expansive approach to appeal of TRO decisions, at present, most often do so in the context of an appeal of a TRO involving a government decision or governmental action and, often to permit a government appellant to obtain interlocutory review.[422] These appeals often require only that the appellant show, as in the Ninth Circuit's "quality of the adversary hearing" approach, that the court held an adversary proceeding at which both parties provided briefing and argument and that they did so in the context of an extraordinary or unusual situation.[423] In the other cases, the expansive approaches of the Third or Sixth Circuit are followed, which often key on whether the TRO preserves the status quo.[424] Regardless of the expansive appeal rationale used, the cases often involve TROs that raise

[420] *Id*. at 158-59, 161-62.

[421] Moton v. Wetzel, 833 F. App'x 927, 929 n.3 (3d Cir. 2020) (per curiam) (quoting Hope v. Warden Cnty. Prison, 956 F.3d 145, 160 (3d Cir. 2020)).

[422] *See infra* notes 428 to 431, and accompanying text.

[423] *See infra* notes 428 to 431, and accompanying text.

[424] *E.g.*, Moton v. Wetzel, 833 F. App'x at 929 n.3 (quoting Hope v. Warden Cnty. Prison, 956 F.3d 145, 160 (3d Cir. 2020)); Hill v. Snyder, 2016 WL 4046827, at *1 (concluding that the TRO, in part, constituted a mandatory injunction that did not preserve the status quo and, thus, was appealable); *see also* Pre-Term Cleveland, No. 16-2003, 2020 WL 1673310, at *2 (Bush, J., concurring in part and dissenting in part) (dissenting from conclusion by majority that the TRO was not appealable and concluding that the TRO was appealable in part because it constituted a mandatory injunction that did not preserve the status quo).

"important" structural separation-of-power issues,[425] federalism issues,[426] issues or constitutional issues,[427] and the cases often occur in high-stakes political contexts. But the appeals sometimes fail one or more of the key criteria for appeal under § 1292(a)(1): that the TRO has the practical effect of an injunction, it threatens serious or irreparable damage, and it can only be effectively reviewed by immediate appeal.

In the following cases, courts have permitted appeal of TRO decisions based simply on a showing that a TRO has "the qualities of a preliminary injunction" or the "qualities of the adversarial hearing" or the TRO was "tantamount to a preliminary injunction" or the TRO disturbed the status quo and ordered affirmative relief, but without requiring a showing that the Rule 65 time-periods have elapsed or other showing that the TRO threatened serious or irreparable injury absent immediate appeal and that immediate appeal was necessary for effective review: (1) a Government appeal of the TRO barring application of President Trump's first "Muslim ban" or "travel ban";[428] (2) Government appeals in three cases of TROs temporarily delaying execution of death-row inmates in order to proceed with the executions rather than delay for preliminary injunction hearings regarding whether a state corrections department had unconstitutionally infringed the right to access the courts by refusing a request for a psychiatric exam and whether, in other cases, the pharmaceuticals used for execution would violate the Eighth and Fourteenth Amendments;[429] (3) a Government appeal of a TRO ordering that an

[425] *E.g.*, Sampson v. Murray, 415 U.S. 61, 86-88 (1974) (examining whether district courts have authority to issue TROs to preclude termination of a probationary employee pending the employee's appeal of termination within the Civil Service Commission); Washington v. Trump, 847 F.3d 1151, 1158 (9th Cir. 2017) (per curiam) (whether district court may enjoin enforcement of an executive order banning travel to the United States by noncitizens from certain countries with majority Muslim populations despite the Government's contention that the Executive's powers in immigration and national security is unreviewable); Cath. Soc. Servs., Inc. v. Meese, No. 86-2907, 1987 WL 61013, at *2 (9th Cir. Apr. 3, 1987) (permitting appeal of TRO precluding Government from excluding certain immigrants and deporting others, who were eligible for legalization except that they had departed and reentered the United States illegally), *withdrawn and vacated*, 820 F.2d 289 (9th Cir. 1987); Berrigan v. Sigler, 475 F.2d 918, 919 (D.C. Cir. 1973) (per curiam) (concluding that constitutional right to travel will be irreparably lost absent appeal of federal prison authority's denial of TRO).

[426] *E.g.*, Hope v. Warden York Cnty. Prison, 956 F.3d 156 (3d Cir. 2020) (federal court grants TRO permitting release of immigration detainees from county prisons).

[427] *E.g.*, Garza v. Hargan, 2017 WL 9854552, *1 n.1 (D.C. Cir. Oct. 20, 2017) (per curiam) (whether denial of TRO would interfere with right to abortion), *vacated in part on rehearing en banc*, 874 F.3d 735, 736 n.1 (D.C. 2017) (en banc) (per curiam), cert. granted, judgment vacated, *Azar v. Garza*, 138 S. Ct. 1790 (2018); *Washington*, 847 F.3d at 1158; Turner v. Epps, 460 F. App'x 322, 323-24 (5th Cir. 2012) (whether state corrections department had infringed constitutional right of access to the courts by denying prisoner's access to psychiatric evaluation to support claims that the Eighth and Fourteenth Amendments barred execution because of a severe mental disorder and to support a petition for clemency); Workman v. Bredesen, 486 F.3d 896 (6th Cir. 2007) (whether "State's three-drug protocol for implementing the death penalty violates the Eighth (and Fourteenth) Amendment"); Boltz v. Jones, 182 F. App'x 824, 824-25 (10th Cir. 2006) (challenging pharmaceuticals to be used in prisoner execution).

[428] *Washington*, 847 F.3d at 1158; *see also Cath. Soc. Servs.*, No. 86-2907, 1987 WL 61013, at *2 (9th Cir. Apr. 3, 1987), *withdrawn and vacated*, 820 F.2d 289 (9th Cir. 1987).

[429] *Turner*, 460 F. App'x at 323-24; *Workman*, 486 F.3d at 904; Boltz v. Jones, 182 F. App'x at 824-25; *see also* Ross v. Rell, 398 F.3d 203, 204 (2d Cir. 2005) (purporting to apply two *Carson* requirements but not discussing them and, instead, permitting appeal in "light of the unusual circumstances . . . and the fact that the death warrant in issue will expire before the [TRO]. . . expires").

unaccompanied minor be transferred to an abortion facility for state-required counseling and to obtain an abortion; [430] (4) a Government appeal of TRO ordering prison officials to create protections against spread of COVID-19, including proper hygiene and social distancing;[431] and (5) a Government appeal of a TRO that changed the status quo and affirmatively ordered that certain state defendants could not immediately file motions for resentencing of certain juvenile offenders.[432] Importantly, the Government may have been able to satisfy the *Carson* requirements for appeal in some of these cases, but in others, it would not have been able to do so.

Courts also sometimes, but rarely, permit non-Government appellants to appeal early based on an expansive appeal rationale, or without establishing the three *Carson* requirements, when a government order or decision is at issue. In two cases, for example, church members appealed the denial of a TRO requesting that a free-exercise-of-religion argument barred application to the churches of stay-at-home orders issued during COVID-19 pandemic.[433] These cases were unique, however, in that the Attorney General of Kentucky, joined the appeals as amicus curiae and that the cases occurred in contentious and high-stakes political contexts.[434] In another case, the court permitted appeal by a private litigant over the government's objection, based on the court's conclusory statement that the TRO was appealable because it had the "'practical effect' of granting or denying an injunction," but the facts indicated that the *Carson* requirements could have been satisfied.[435] In this case, the plaintiffs sought a TRO to enjoin an ongoing highway project, arguing that the construction violated requirements of the National Environmental Policy Act of 1969 (NEPA) and federal regulations implementing NEPA.[436] The denial of the TRO permitted defendants to demolish a highway overpass and, absent immediate appeal, further work on the project would continue, thus, potentially causing serious or

[430] Garza v. Hargan, No. 17-5236, 2017 WL 9854552, at *1 n.1 (per curiam) (citing Sampson v. Murray, 415 U.S. 61, 86 n.58 (1974)), *vacated in part on reh'g en banc*, 874 F.3d 735, 736 n.1 (D.C. Cir. 2017) (per curiam); Garza v. Hargan, 874 F.3d 735, 736 n.1 (D.C. Cir. 2017) (per curiam).

[431] Marlow v. Le Blanc, 810 F. App'x 302, 304 n.1 (5th Cir. 2020) (permitting appeal of TRO because a hearing was held and the motion was strongly contested and citing Sampson v. Murray, 415 U.S. 61, 87 (1974)).

[432] Hill v. Snyder, 2016 WL 4046827, at *1 (permitting Government to appeal a TRO that did not otherwise threaten serious injury that could not be immediately appealed because the TRO, in part, constituted a mandatory injunction that did not preserve the status quo in that it changed the status quo by affirmatively ordering defendant state prison officers to advise state prosecutors not to file motions for resentencing for a period of time).

[433] Roberts v. Neace, 958 F.3d 409, 412-13 (6th Cir. 2020) (per curiam) (indicating, without analysis, that the denial of the TRO at issue "operates as the denial of an injunction" and then concluding that "no one can fairly doubt" that the appeal would further the purpose of § 1292(a)(1) to permit "challenge of interlocutory orders of serious, perhaps irreparable consequence" (citing Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981))); Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 612 (6th Cir. 2020) (same); .

[434] *Id*.

[435] Wise v. Dep't of Transp, 943 F.3d 1161, 1164-65 (8th Cir. 2019) (citing both Abbott v. Perez, 138 S. Ct. 2305, 2319 (2018) and Sampson v. Murray, 415 U.S. 61, 86-88 (1974)) (permitting appeal of the denial of TRO that sought to bar continued work on a highway construction project based on an assertion that the work violated NEPA environmental assessment and environmental impact statement requirements).

[436] *Id*. at 1163-65.

irreparable injury that could not later be undone.[437] In other unique circumstances, courts have permitted immediate appeal by non-governmental appellants, without considering all the *Carson* factors, but only after concluding that the appellants were threatened with serious or irreparable consequences[438] or that there was no factual doubt as to irreparable injury and the only issues presented were legal.[439] Finally, a court recently permitted appeal of the denial of a TRO requested by a state prisoner in an action against state and federal defendants on the sole and expansive basis that the relief requested by the prisoner – but denied with the denial of the TRO – would have altered the status quo and would have mandated affirmative relief had the TRO been granted.[440] There was, however, no indication of an order that had the practical effect of an injunction and no evidence of serious or irreparable injury absent immediate appeal.

Expansive TRO appeal standards do not serve the purposes of § 1292(a)(1) – to permit appeal of early injunctive orders that may impose immediate serious or irreparable harm that cannot later be repaired -- because judges often ignore or elide the irreparable harm requirement and the requirement that later appeal would be ineffective. Thus, expansive appeal standards for TROs thwart Congress's goals of creating a limited exception to the final judgment rule that permits appeal narrowly to prevent irreparable injury. Further, because expansive appeal standards permit appellate courts to omit or ignore one or more of the *Carson* requirements, the decision on whether to permit appeal of a TRO becomes discretionary, thus permitting courts to employ "a new and dangerous kind of power" to pick and choose which TRO decisions are appealable – a power that is similar to the Supreme Court's certiorari authority.[441] This allows judges to decide based on personal preference, personal experience, or a desire to reach out to decide high-profile, political issues or other "important" issues. Permitting discretionary authority to intermediate appellate judges, moreover, permits those judges to use discretion to permit asymmetrical appeal – permitting appeal in sympathetic cases, but denying the right of review in other similar cases.[442] Today, appellate courts primarily wield this power to permit

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[437] *Id*.

[438] Uniformed Fire Officers Ass'n v. de Blasio, 973 F.3d 41, 46-48 (2d Cir. 2020) (police, firefighter, and corrections officer unions permitted to appeal a TRO that would permit disclosure of civilian complaints against their members, when appellate court did not examine all *Carson* factors, but after the appellate court concluded the TRO would inflict "serious, perhaps irreparable, consequences" if not immediately appealable).

[439] Coal. for Basic Human Needs v. King, 654 F.2d 838, 40-41 (1st Cir. 1981) (per curiam) (appeal permitted of the denial of a TRO by a plaintiff's class of general relief recipients and recipients of Aid to Families with Dependent Children permitted, but only where there was no doubt as to irreparable injury since all welfare recipients in the state, who had no reserves, had lost two weeks of planned relief and would soon start losing their next two weeks of assistance and where the issues were legal ones, requiring no additional factual exploration).

[440] Moton v. Wetzel, 833 F. App'x 927, 929 n.3 (3d Cir. 2020) (per curiam) (quoting Hope v. Warden Cnty. Prison, 956 F.3d 145, 160 (3d Cir. 2020)).

[441] *See* Glynn, *supra* 16, at 243-44 (discussing discretionary appeal authority in general). Check Dalton, note 33 Glynn about loss of checks on app authority.

[442] *See* Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 71-72 (1985) (concluding that when intermediate appellate courts entertain discretionary review, the discretionary choice denies the right of review to some would-be appellants based on reasons ranging from the jurisprudential to the political to judicial sympathy).

governmental appeals or appeals in other "important" or "extraordinary" cases, but review authority under some of the expansive tests is essentially unbounded.

Early appeal or, as Professor Rutledge would say, altering the typical "vertical sequencing" in a case, may alter settlement incentives, divert work to the appellate courts, and provide opportunity for both improving on the trial court's decision and providing law development regarding issues that may, in the ordinary appellate sequencing, evade review.[443] With appeal of TRO decisions, however, the typical benefits of appellate review often do not obtain.

Indeed, pragmatic and structural reasons counsel strongly against early appeal of TRO decisions, absent (1) a full hearing on the "TRO" in the district court, that is, the purported TRO is, in fact, a preliminary injunction masquerading as a TRO; or (2) a showing by the appellant of urgent need to appeal to prevent serious or irreparable harm, which is best limited to the instances in which the appellant can establish the *Carson* requirements. When a TRO decision is appealed, the lower court record is typically uniquely unsuitable for appellate review, given the typically incomplete factual exposition in the pre-TRO hearing, the limited opportunity for legal presentation, the limited time before the district court ruling, and the fact that the district court typically intends to move quickly to the fuller preliminary injunction hearing following expedited discovery. The limited nature of the factual and legal presentation in the pre-TRO hearing, thus, hobbles the appellate court in both its error-correction and law-giving functions.[444] And it does so primarily in the context of the very issues that deserve measured appellate consideration – high-profile, political, and important or extraordinary issues. At the same time, however, the very fact of immediate appellate review changes the parties' settlement calculus and gives the district court's TRO decision the out-come determinative or functionally dispositive quality of a preliminary injunction. Thus, quick review of TRO decisions is typically unlikely to improve upon the district court decisions, unlikely to produce guidance for future cases, but likely to impel settlement decisions by the parties on a very incomplete record.

Thus, absent the appellant's showing of the three *Carson* requirements – a TRO that has the practical effect of an injunction; threatened serious or irreparable injury; and immediate appeal is needed for effective review -- the best course is to permit the district court to move quickly to the preliminary injunction hearing, which will create a more complete record, ensure greater input on legal issues, enable appellate review of a more considered district court opinion, and also produce an appealable preliminary injunction. The circuit courts should, thus, use the *Carson* analysis when determining whether a TRO is appealable.

[443] Rutledge, *supra* note 74, at 21, 23, 29-31.

[444] *See* Glynn, *supra* note 7, at 179, 231-32, 243-46; Steinman, *supra* note 76, at 1603-05, 1605-09 (disparaging, on similar grounds, appellate court action as a "first responder" in resolving issues not reached in the trial court and, thus, issues for which there is incomplete factual and legal presentation).

The following guidelines will enable appellate courts to more appropriately determine when a TRO decision meets the three *Carson* requirements and, thus, which TROs merit early appeal.

1. *The TRO Has the Practical Effect of an Injunction*

The first *Carson* requirement – whether the TRO decision has the practical effect of an injunction -- is not automatically met when a court issues a TRO. A TRO is, in general, a short-term injunctive order intended to allay irreparable harm so that the court may effectively issue a later preliminary injunction. Courts should consider the following factors to determine if a TRO has the practical effect of a preliminary injunction: (1) the extent of the pre-TRO hearing, including whether the parties conducted discovery, witnesses testified, the court made a verbatim recording of the hearing, parties were fully heard on the factual and legal issues, the record is complete as opposed to sparse and containing factual gaps; (2) whether the TRO is limited in duration to the periods set forth in Rule 65(b) – 14 or 28 days -- or the TRO has, *at the time of appeal*, exceeded those limits, with an understanding that the court may extend a 14-day TRO for one additional 14-day period or the parties may consent to extension; (3) whether the court is poised to move quickly to the more complete preliminary injunction hearing, or whether the court plans no further action on the request for injunctive relief; (4) whether the TRO decision unambiguously provides temporary relief; and (5) whether the ruling decides the issues at stake leaving no basis for a change in the ruling even if a further hearing were held.[445]

The fact that a TRO may "disturb the status quo" or may impose a "mandatory" or affirmative requirement should not alone indicate that the TRO has the practical effect of a preliminary injunction and, thus, should not alone be determinative that a TRO is appealable. Commentators and courts, including the Sixth Circuit, have long concluded that these factors should not be considered characteristic of a preliminary injunction because they are neither necessary nor sufficient criteria to establish that an order has the effect of a preliminary injunctive.[446] Further, even if a court were to conclude that a TRO has the practical effect of a preliminary injunction solely because the order alters the status quo or is mandatory, that would satisfy only the first part of the tripartite *Carson* requirements. The court should then move to the determine whether the decision threatens serious or irreparable injury and whether that threat can only be remedied by immediate review.

TRO decisions may also have the practical effect of a permanent injunction if the TRO effectively ends the litigation and awards victory to one party or will moot an issue or otherwise indicates that there will be no further injunctive rulings.[447] Importantly, the Supreme Court has

[445] *See supra* notes 308-321 and accompanying text.
[446] *See supra* notes 88-92 and 380-395 and accompanying text.
[447] *See supra* notes 183 and 352-353 and accompanying text.

indicated that even when an early injunctive order has the effect of a permanent injunction, the decision is not appealable unless the remaining two *Carson* factors are met.[448]

2. *Whether the TRO Decision Threatens Serious or Irreparable Injury*

Factors important to the second *Carson* factor – whether the TRO decision threatens serious or irreparable injury include the following: (1) the quality nature of the threatened harm; (2) the certainty of the harm; (3) whether the harm, though certain and irreparable, is de minimis; (4) whether the harm though certain and serious is permissible in the context of other serious harms if the TRO is not granted; (5) whether the harm is imminent; (6) whether the threatened harm is merely hypothetical or possible, rather than supported by evidence; (7) how quickly and persistently the appellant sought relief from the threatened harm; and (8) whether a preliminary injunction or other relief is available that may lessen the harm.[449]

3. *Whether the Threat of Serious or Irreparable Injury May Only Be Reviewed Effectively by Immediate Appeal*

Factors important to the third *Carson* requirement, which questions whether immediate appeal is needed for effective review, overlap with factors that establish the first two *Carson* requirements. Those factors include (1) whether the TRO would have "irreparable" consequences or would create an irreversible or meaningful shift in the relationship of the parties; (2) whether the consequences, though irreparable, are short-term and relatively minor or even hypothetical; (3) whether the consequences, though irreparable, are, in context of other competing harms, consequences that may be suffered until a quick preliminary injunction hearing is held; and (4) whether the TRO decision will last for a short period of time only before the court moves quickly to a preliminary injunction hearing.[450]

VI. CONCLUSION

Courts should be frugal,[451] but the Supreme Court instructs, "sensible"[452] with the "practical effect" exception to the final judgment rule under 28 U.S.C. § 1292(a)(1), which permits interlocutory appeal of TRO decisions, in order to retain the institutional benefits associated with general, though not rigid, application of the final judgment rule, while also permitting appeal of orders that may impose irreparable injury if not appealed immediately. Moreover, generally declining to permit appeal of decisions granting or denying TROs and requiring appeal, instead,

[448] Carson v. Am. Brands, Inc., 450 U.S. 79, 84-86 (1981).
[449] *See supra* notes 322-337 and accompanying text.
[450] *See supra* notes 338-339 and accompanying text.
[451] *E.g.*, Pearson v. Kemp, 831 F. App'x 467, 471 (11th Cir. 2020) (emphasizing that the Eleventh Circuit permits appeal of TROs "only in the direst of circumstances"); Fideicomiso de la Tierra Del Caño Martín Peña v. Fortuño, 582 F.3d 131, 132-34 (1st Cir. 2009) (per curiam) (noting that § 1292(a)(1) is to be construed strictly and that TROs are not ordinarily appealable).
[452] Abbott v. Perez, 138 S. Ct. 2305, 2323-24 (2018) (noting with respect to the "practical effect" construction of district court orders as preliminary injunctions under 28 U.S.C. § 1253, that courts should construe the exception "strictly," but "sensibly").

after a preliminary injunction hearing serves the institutional and structural goals of ensuring that the district court's ruling is based on the more complete evidentiary and legal presentation afforded by a preliminary injunction hearing; that appellate courts will review a district court decision made after an adequate adversary presentation and, thus, the appellate decision will more likely, serve appellate error-correction and law-giving functions; and that appellate courts do not exercise unwarranted discretionary authority in picking and choosing which TROs are appealable. Thus, TROs should be appealable in the following instances: (1) the TRO follows a full evidentiary hearing, and thus the "TRO" is, in fact, a preliminary injunction "masquerading as a TRO"; (2) the TRO exceeds the 14- or 28-day time limits established in Rule 65(b); (2) the TRO has the impact of a "final order" under a *Cohen* final order analysis and, thus, also meets the *Carson* requirements; or (4) most flexibly, in accord with *Carson v. American Brands, Inc.,* the TRO has the practical effect of a preliminary or permanent injunction, it threatens serious or irreparable injury, and immediate appeal is necessary for effective review.[453]

[453] Carson v. Am. Brands, Inc., 450 U.S. 79 (1981).