
No. 26-4343

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CRUZ GAMEZ, et al.,

Plaintiffs-Appellees,

v.

TODD M. LYONS, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Oregon
No. 6:25-cv-02011 • Hon. Mustafa T. Kasubhai

MOTION TO DISMISS FOR LACK OF JURISDICTION

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August 17, 2026

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal is from a district court order certifying a class and subclass under Federal Rule of Civil Procedure 23. An appeal of a class certification order before final judgment is permitted, however, only if the party seeking to challenge the order timely petitions for permission to appeal the order under Federal Rule of Civil Procedure 23(f) and the court of appeals grants such permission. *See Nutraceutical Corp. v. Lambert*, 586 U.S. 188 (2019); *Microsoft v. Baker*, 582 U.S. 23 (2017). Defendants-Appellants here did not seek or receive permission to appeal the class certification decision. This Court therefore lacks jurisdiction over the appeal, which should be dismissed. Defendants-Appellants oppose this motion.

BACKGROUND

A. In October 2025, officers of Defendants U.S. Immigration and Customs Enforcement and U.S. Department of Homeland Security (collectively, ICE) “reported to Oregon to execute what President Trump describes as ‘the single largest Mass Deportation Program in History.’”

Op. & Order 1, ECF 88.¹ “To serve the President’s demands for 3,000 immigration arrests each day nationally, evidence shows that ICE officers deployed to Oregon communities and arrested an ‘extraordinary’ number of Oregonians ... with little regard for conducting lawful arrests.” *Id.* at 5. As a result, in October 2025, “civil immigration arrests in Oregon rose 1,400% over previous months, and 7,900% over the prior year.” *Id.* at 5–6. In making these arrests, ICE systematically arrested people without first securing arrest warrants. *See* Supp. Pleading ¶¶ 47–58, ECF 68 (describing Defendants’ policy and practice of “arrest first, ask questions later”).

Federal immigration law, however, prohibits warrantless civil immigration arrests without specific, individualized probable cause determinations as to each arrested person’s risk of escape. Specifically, under the Immigration and Nationality Act (INA) and its implementing regulations, an ICE officer may arrest a person without a warrant only if they have probable cause to believe that the person (1) is in the United

¹ ECF citations refer to the ECF entries in the underlying district court docket, No. 6:25-cv-02011 (D. Or.).

States unlawfully, and (2) is “likely to escape before a warrant can be obtained.” 8 U.S.C. § 1357(a)(2); 8 C.F.R. § 287.8(c)(2)(ii).

B. Plaintiffs-Appellees M-J-M-A- and Victor C.G. are individuals who were arrested without warrants by ICE and detained without probable cause findings that they posed a flight risk. On behalf of themselves and others similarly situated, Plaintiffs challenge Defendants’ policy and practice of “systematically making immigration arrests without a warrant and without probable cause findings as to immigration status and flight risk as required under federal immigration law.” Supp. Pleading ¶ 58. Plaintiffs allege, among other things, claims under the Administrative Procedure Act that this policy and practice is arbitrary, capricious, contrary to law, and in excess of statutory authority. *See id.* at 19–21.

On January 9, 2026, Plaintiffs moved for class certification of the following class and subclass under Federal Rule of Civil Procedure 23(b)(1)(A), or in the alternative, under Rule 23(b)(2):

WARRANTLESS ARREST CLASS: All person[s] since September 28, 2025, who have been arrested or will be arrested in the District of Oregon for alleged immigration violations without a warrant and without a pre-arrest, individualized assessment of probable cause that the person

is in the United States unlawfully and that the person poses a flight risk.

UNASSESSED ESCAPE RISK SUBCLASS: All person[s] since September 28, 2025, who have been arrested or will be arrested in the District of Oregon for alleged immigration violations without a warrant and without a pre-arrest, individualized assessment of probable cause that the person poses a flight risk.

Class Cert. Mot. 1, ECF 60.

Separately, also on January 9, 2026, Plaintiffs moved to preliminarily enjoin Defendants from conducting warrantless civil immigration arrests without first making an individualized probable cause determination of the person's risk of escape. Prelim. Injunction Mot., ECF 61. The motion also sought provisional certification of the Unassessed Escape Risk Subclass, *id.* at 16, but did not seek provisional certification of the Warrantless Arrest Class, *id.* at 12 n.21.

On February 4, 2026, the district court issued an order preliminarily enjoining Defendants "from enforcing their policy or practice of making warrantless civil immigration arrests in the District of Oregon without a pre-arrest individualized determination by the arresting agent of probable cause that the person being arrested is likely to escape before a warrant can be obtained, as required by 8 U.S.C.

§ 1357(a)(2) and 8 C.F.R. § 287.8(c)(2)(ii).” Order ¶ 3, ECF 80. In the same order, the court provisionally certified the Unassessed Escape Risk Subclass, “comprised of all persons who, since September 28, 2025, have been or will be arrested in the District of Oregon for alleged immigration violations without a warrant and without a pre-arrest, individualized assessment of probable cause that the person poses an escape risk.” *Id.* ¶ 1. Defendants timely appealed the February 4 order. *See Cruz Gamez et al. v. Lyons et al.*, No. 26-2090 (9th Cir.).

Meanwhile, briefing on the class certification motion continued and was completed on March 6, 2026. On June 24, 2026, the district court issued an order granting Plaintiffs’ motion for class certification. ECF 103. To begin, the court rejected the Defendants’ arguments that the Plaintiffs lacked standing and that the INA barred the injunctive relief sought by Plaintiffs. Then, it held that the Warrantless Arrest Class and Unassessed Escape Risk Subclass “are not impermissibly fail-safe because the proposed classes can be determined through objective criteria.” *Id.* at 6. Further, the court concluded that the class and subclass satisfied the requirements of Rule 23(a) and Rules 23(b)(1)(A) and 23(b)(2). Accordingly, it certified the Warrantless Arrest Class and

Unassessed Escape Risk Subclass, as defined in Plaintiffs' class certification motion, and appointed Plaintiffs' counsel, Innovation Law Lab, as Class Counsel. *Id.* at 12.

C. On July 6, 2026, Defendants filed a notice of appeal from the June 24 class certification order. *See* ECF 107. Defendants, however, did not file a petition for permission to appeal under Federal Rule of Civil Procedure 23(f). The time within which to file a Rule 23(f) petition expired on August 10, 2026.

ARGUMENT

“Orders granting or denying class certification ... are ‘inherently interlocutory,’ hence not immediately reviewable under 28 U.S.C. § 1291, which provides for appeals from ‘final decisions.’” *Microsoft*, 582 U.S. at 26 (internal citation omitted). Federal Rule of Civil Procedure 23(f), however, “authorizes ‘permissive interlocutory appeal’ from adverse class-certification orders in ‘the sole discretion of the court of appeals.’” *Id.* Rule 23(f) “was adopted pursuant to [28 U.S.C.] § 1292(e), which empowers [the Supreme Court], in accordance with the Rules Enabling Act, 28 U.S.C. § 2072, to promulgate rules ‘to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise

provided for [in § 1292].” *Microsoft*, 582 U.S. at 30–31 (internal citation omitted). “Absent such permission” from the court of appeals under Rule 23(f), final judgment is the “point [at which] the ... class-action certification [decision] becomes ripe for review.” *Id.* at 26.

Thus, “[t]o take an immediate appeal from a federal district court’s order granting or denying class certification, a party must first seek permission from the relevant court of appeals” within the time period specified in Rule 23(f). *Nutraceutical*, 586 U.S. at 189–90. Rule 23(f)’s “deadline is not subject to equitable tolling.” *Id.* at 193; *see also id.* (stating that the “Rules ... express a clear intent to compel rigorous enforcement of Rule 23(f)’s deadline”). The deadline for the federal government, agency, officer or employee to file a Rule 23(f) petition for interlocutory review of a class-certification order is “within 45 days after the order is entered.” Fed. R. Civ. P. 23(f).

Here, Defendants did not petition for permission to appeal the class-certification order under Rule 23(f). This Court therefore lacks jurisdiction over the class-certification order. *See Plata v. Davis*, 329 F.3d 1101, 1108 (9th Cir. 2003) (noting that a notice of appeal was not a

petition for interlocutory appeal and concluding that the court lacked jurisdiction over the appeal).

In their pending motion to consolidate, Defendants have cited *Fraihat v. ICE*, 16 F.4th 613 (9th Cir. 2021), and *Paige v. State of California*, 102 F.3d 1035 (9th Cir. 1996), to suggest that this Court has jurisdiction because the class-certification order is “inextricably intertwined” with the preliminary injunction order. Consol. Mot. ¶ 3. In *Fraihat*, however, the district court granted class certification simultaneously with the injunction, 16 F.4th at 629, and ordered that the injunction “remain in place as long as ... members of the Subclasses” faced substantial threat of harm, *id.* at 630–31. And in *Paige*, the injunction was tied to the class certification order that had previously been issued. *See* 102 F.3d at 1039 (stating that “the injunction issued here provides class-wide relief”). Thus, in both cases, the injunctions depended on the certification orders, and the Court could “not uphold [the injunction] without also upholding the certification of the class.” *Id.*

Here, in contrast, the class certification order was issued nearly five months *after* the preliminary injunction, and it certified a class (the Warrantless Arrest Class) for which Plaintiffs had not sought

preliminary injunctive relief. *See supra* pp.4–5. In fact, the district court noted in the preliminary injunction opinion that “[c]omplete briefing on th[e] [class certification] motion is pending.” ECF No. 88 at 4. Thus, the preliminary injunction did not depend on the class certification decision. Further evidencing that the two orders are not inextricably intertwined, Defendants appealed the order granting a preliminary injunction over two months before class certification was even granted. *See* ECF 93; *Cruz Gamez v. Lyons*, No. 26-2090 (9th Cir.).

In short, Rule 23(f) and the Supreme Court’s cases make plain that a class certification order can be appealed before final judgment only if a party files, and the court of appeals then grants, a petition seeking permission to appeal. Because Defendants did not file a Rule 23(f) petition, this Court lacks jurisdiction over this appeal.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing has 1,666 words, including 0 words manually counted in any visual images, and is less than 20 pages, excluding the items exempted by Federal Rule of Appellate Procedure 32(f) and the rules of this Court. The foregoing's type style and typeface comply with Federal Rules of Appellate Procedure 27, 32(a)(5) and (6) because it has been prepared using 14-point Century Schoolbook type, which is serif and proportionally spaced.

I certify that the foregoing complies with the word limits of Federal Rule of Appellate Procedure 27 and Ninth Circuit Rule 27-1(1)(d).

August 17, 2026

/s/ Wendy Liu
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