

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

**REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF
JURISDICTION**

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In this case challenging Defendants’ policy and practice of making unlawful warrantless arrests in Oregon, the district court on June 24, 2026, granted a motion to certify two classes under Federal Rule of Civil Procedure 23(b).¹ Defendants seek interlocutory review of the court’s June 24 certification order, but they did not seek, and this Court did not grant, permission to appeal under Federal Rule of Civil Procedure 23(f).

Defendants assert that they did not need to seek permission to appeal under Rule 23(f) because the June 24 certification order is pendent to their separate appeal of a preliminary injunction order—an order that was both entered and appealed months *before* the certification order at issue in this appeal. *See* 9th Cir. No. 26-2090 (appeal filed Apr. 6, 2026). In the alternative, Defendants assert that the certification order is a modified preliminary injunction over which this Court has jurisdiction under 28 U.S.C. § 1292(a)(1). Neither theory provides a basis for this Court’s jurisdiction.

¹ The class definitions for the Unassessed Escape Risk Subclass and Warrantless Arrest Class are set forth on pages 3–4 of Appellees’ Motion to Dismiss.

ARGUMENT

I. This Court should not exercise pendent appellate jurisdiction over the June 24 class certification order.

“Pendent appellate jurisdiction refers to the exercise of jurisdiction over issues that ordinarily may not be reviewed on interlocutory appeal, but may be reviewed on interlocutory appeal if raised in conjunction with other issues properly before the court.” *Meredith v. Oregon*, 321 F.3d 807, 812 (9th Cir.), *as amended*, 326 F.3d 1030 (9th Cir. 2003) (citation omitted). This Court may exercise pendent appellate jurisdiction where it “unquestionably ha[s] jurisdiction to hear an interlocutory appeal,” and an “otherwise non-appealable ruling ... is ‘inextricably intertwined’ with or ‘necessary to ensure meaningful review of’ the order properly before [the Court] on interlocutory appeal.” *Melendres v. Arpaio*, 695 F.3d 990, 996 (9th Cir. 2012) (quoting *Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 51 (1995)). These two circumstances are “narrowly construed.” *Meredith*, 321 F.3d at 813; *see Melendres*, 695 F.3d at 996; *see also K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 975 (9th Cir. 2015) (stating that the court “must ‘exercise restraint in reviewing on interlocutory appeal otherwise non-appealable orders,’ lest litigants use collateral orders as ‘multi-issue ... appeal tickets’” (cleaned up)). The Court’s exercise of

pendent jurisdiction is purely “discretionary.” *Mueller v. Auker*, 576 F.3d 979, 990 (9th Cir. 2009).

Here, Defendants contend that the June 24 certification order is “inextricably intertwined” with the February 4 preliminary injunction. Opp. 6. Under this Court’s consistent and “very narrow[]” application of that term, separate district court rulings are “inextricably intertwined” where the legal theories are either (a) “so intertwined that [the Court] *must* decide the pendent issue in order to review the claims properly raised on interlocutory appeal,” or (b) “resolution of the issue properly raised on interlocutory appeal *necessarily* resolves the pendent issue.” *Armstrong*, 789 F.3d at 975 (citation omitted). Neither of these circumstances is present here.

First, review of the June class certification order is not necessary to effectively review the February preliminary injunction order. Among other things, that the order certifying the Warrantless Arrest Class was not issued until June 24—nearly five months *after* entry of the preliminary injunction—reflects that review of the certification order is not necessary for review of the preliminary injunction order. Contrary to Defendants’ assertion that the February 4 preliminary injunction “covers

the certified classes,” Opp. 8, the Warrantless Arrest Class was not certified, even on a preliminary basis, in the order granting a preliminary injunction. Further showing that review of class certification is not necessary to review of the preliminary injunction, Defendants appealed the preliminary injunction over two months *before* the June 24 certification decision.

Defendants are wrong that the June 24 certification order “determines who receives the [preliminary] injunction’s protection and how far that protection extends.” Opp. 8. The February preliminary injunction order does not define the preliminary relief according to the classes certified in the June order. The February order states:

The Court preliminarily ENJOINS Defendants and their agents 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).

Feb. 4, 2026, Order ¶ 3, ECF 80.² In addition, the order requires Defendants to report regularly on their documentation of “the facts and

² ECF citations refer to the ECF entries in the underlying district court docket, No. 6:25-cv-02011 (D. Or.).

circumstances” for warrantless civil immigration arrests conducted by Defendants or their agents in the District of Oregon. *Id.* ¶ 5. The scope of that preliminary relief—entered after the district court found that Plaintiffs were likely to succeed on their claim that Defendants’ policy or practice of making warrantless arrests is contrary to law—thus does not depend on the court’s June 24 certification of the two classes.

The cases that Defendants cite do not advance their argument. For example, in *Immigrant Assistance Project of Los Angeles County Federation of Labor (AFL-CIO) v. INS*, 306 F.3d 842 (9th Cir. 2002), the Court held that a certification order was inextricably intertwined with an order granting temporary relief, where the latter order required the defendant to “notify *all class members with pending legalization applications*” of certain information. *Id.* at 869. Accordingly, the court “could not uphold the order without also upholding the certification of the class” because the injunction required relief specific to those class members. *Id.* (quoting *Paige v. California*, 102 F.3d 1035 (9th Cir. 1996)). Similarly, in *Ahlman v. Barnes*, 20 F.4th 489 (9th Cir. 2021), the preliminary injunction required the county defendant to “take the temperature of *all class members*.” *Id.* at 492 (emphasis added). Thus,

the provisional class certification order in that case “depended on, and was in service of, [the] preliminary injunction.” *Id.* at 495 (quoting *Fraihat v. ICE*, 16 F.4th 613, 635 (9th Cir. 2021)).

By contrast, the June 24 certification order in this case was not in service of the February 4 preliminary injunction, because the preliminary injunctive relief is not dependent on the two certified classes: As review of the February order makes clear, this Court can affirm or vacate the order preliminarily enjoining the agency’s policy or practice without considering class certification. Indeed, courts may enter preliminary injunctions against agency regulations or policies without certifying a class at all. *See, e.g., U.S. Postal Serv. v. California*, 609 U.S. ___, 2026 WL 2687160 (Sept. 14, 2026) (denying a stay of a preliminary injunction against implementation of a final rule, entered without class certification).

Moreover, Defendants’ position that the final certification order “supplies the classwide foundation” for the preliminary injunction, Opp. 8, conflates the provisional and final certification orders. Again, the final certification order was issued nearly five months *after* the preliminary injunction. The June final certification order also certified a class (the

Warrantless Arrest Class) for which Plaintiffs had not sought preliminary relief. And to the extent that the district court's certification decisions affect who receives the injunction's protection, it is the provisional certification, entered for the purposes of the preliminary injunction, that governs, rather than the final class certification granted nearly five months later.³

Second, the Court's resolution of the appeal of the February order in No. 26-2090 does not "necessarily resolv[e]" the question whether the district court properly certified the Warrantless Arrest Class and Unassessed Escape Risk Subclass under Rule 23. *Armstrong*, 789 F.3d at 975. Obviously, whether the preliminary injunction factors are met is a different legal issue from whether Rule 23's requirements are satisfied. *See ARC of Cal. v. Douglas*, 757 F.3d 975, 993 (9th Cir. 2014) (explaining that "two issues are not inextricably intertwined where their resolution requires 'application of separate and distinct legal standards'").

³ Defendants assert that Plaintiffs "do not dispute" that the provisional certification "serves and is interwoven with the preliminary injunction." Opp. 8. The issue whether the portion of the February order granting provisional certification is interwoven with the portion of that order granting a preliminary injunction is not pertinent to the appeal of the June 24 order or to this motion.

Defendants observe that both the February order addressing provisional certification of one class and the June order addressing final certification of two classes concluded that Plaintiffs have standing and incorporated similar factual findings. *See* Opp. 9–10. To start, where appellate jurisdiction does not otherwise exist, an interest in judicial economy cannot create it. Moreover, regardless of whether the Court may exercise its discretion to review the *provisional* certification as pendent to the appealable preliminary injunction order, the Court’s resolution of the provisional order would not resolve the *final* certification decision, which certified a class that was not included in the provisional certification. *See ARC of Cal.*, 757 F.3d at 993 (explaining that where two orders present overlapping issues, pendent jurisdiction may be exercised if the “primary appeal” could be resolved “in a manner that resolves ‘*all* of the remaining issues presented by the pendent appeal” (quoting *Huskey v. City of San Jose*, 204 F.3d 893, 905 (9th Cir. 2000) (emphasis added))). And Defendants have not cited any case where the Court exercised interlocutory pendent appellate jurisdiction over a final class certification order based on an earlier provisional class certification decision that was pendent to the earlier appealable injunction.

In short, here, where “review of one order does not require review of the other,” *United States v. Jackson*, __ F.4th __, 2026 WL 2387099, at *14 (9th Cir. Aug. 17, 2026) (cleaned up), interlocutory review of the final class certification order does not fall within the “narrow avenue for ...pendent appellate jurisdiction,” *Huskey*, 204 F.3d at 905. Having chosen to forgo filing a Rule 23(f) petition, Defendants must wait until final judgment to appeal the June 24 order.

II. Defendants’ assertion that the class certification order modified the preliminary injunction is meritless.

Defendants further contend that this Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because the June 24 certification decision “broadened the injunction” by certifying the Warrantless Arrest Class. Opp. 14. That reading of the June 24 order strains credulity. Nothing in the order stated (or even suggested) that the district court was modifying the preliminary injunction. This Court should reject Defendants’ attempt to muddle injunctive relief and class certification, and the two discrete orders issued nearly five months apart, to evade the jurisdictional limitations for interlocutory review of class certification orders.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing has 1,778 words, including 0 words manually counted in any visual images, and does not exceed 10 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 and 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).

September 21, 2026

/s/ Wendy Liu

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