

NO. 16-3522

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

ASHTON WHITAKER, a minor, by his mother and next friend, MELISSA WHITAKER,

Plaintiff-Appellee,

v.

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION and
SUE SAVAGLIO-JARVIS, in her official capacity as Superintendent of the
Kenosha Unified School District No. 1,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Wisconsin
Case No. 2:16-cv-00943-PP
The Honorable Judge Pamela Pepper

**PLAINTIFF-APPELLEE'S RESPONSE IN OPPOSITION TO
DEFENDANTS-APPELLANTS' MOTION FOR THE EXERCISE OF
PENDENT JURISDICTION**

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INTRODUCTION

Having failed to convince the District Court to certify for interlocutory appeal an order denying their motion to dismiss, Defendants-Appellants Kenosha Unified School District No. 1 Board of Education and Sue Savaglio-Jarvis, in her official capacity as Superintendent of the Kenosha Unified School District (“KUSD”) (collectively, “Defendants”), now ask this Court to review it anyway as an exercise of pendent appellate jurisdiction. This Court should not do so, as the stringent requirements for such jurisdiction are not met.

This is an appeal from a preliminary injunction barring Defendants from taking certain actions against Plaintiff-Appellee Ashton Whitaker (“Plaintiff” or “Ash”), a transgender boy, during the pendency of the litigation below. Prior to issuing the injunction, the District Court denied Defendants’ motion to dismiss. It found it unnecessary to rule on much of the parties’ legal disputes regarding what protections transgender students receive under Title IX of the Education Amendments of 1972 (“Title IX”) and the Equal Protection Clause of the Fourteenth Amendment. The court noted that Ash had multiple theories of relief for each claim and found that, at the pleading stage, it could find his claims viable depending on what facts emerged through discovery regardless of the proper resolution of some unsettled legal issues.

Consistent with that reasoning, the District Court then declined to certify the order denying Defendants’ motion to dismiss for interlocutory review under 28 U.S.C. § 1292(b). Order, Sept. 25, 2016 [Dist. Ct. Dkt. No. 36] (“September 25 Order”). It concluded that, far from expediting resolution of this case, Defendants’ attempt to gain interlocutory review simply disregarded the “many factual issues yet to be fleshed out by both parties, and legal issues to be expanded upon” during the litigation. *Id.* at 9. Defendants asked this Court to accept their petition for review anyway, and this Court denied the petition.

Undeterred, Defendants now repackage essentially the same arguments into their present Motion for the Exercise of Pendent Jurisdiction (“Motion”), requesting that this Court exercise pendent appellate jurisdiction over the District Court’s motion to dismiss decision as it reviews the preliminary injunction. Defendants have failed to explain how the two orders are “inextricably intertwined” so as to warrant the exercise of pendent jurisdiction. This Court can determine whether the District Court acted within its discretion in issuing the injunction without engaging in plenary, *de novo* review of the denial of the motion to dismiss; it certainly does not need to answer the unsettled legal questions raised in the Motion, which the District Court properly found might be unnecessary to resolve for Plaintiff to ultimately prevail on his claims.

Exercise of pendent jurisdiction here would subject virtually every motion to dismiss denial followed by an appealable injunction decision to interlocutory review. Such a result would amount to an unwarranted expansion of the narrow exception to the final-judgment rule represented by the pendent jurisdiction doctrine. Rather, Congress has appropriately determined that denials of motions to dismiss ordinarily should be subject to interlocutory review only where a district court certifies that doing so would expedite resolution of the litigation. Here, the District Court found that it would not. This Court should deny Defendants’ Motion.

STATEMENT OF THE CASE

Ash Whitaker is a 17-year-old boy who attends high school in KUSD, a public school district operated by Defendants. Ash is transgender. He challenges Defendants’ discriminatory treatment of him under Title IX of the Education Amendments of 1972 (“Title IX”) and the Equal Protection Clause of the Fourteenth Amendment.

Ash alleges that Defendants treated him differently from other students until enjoined from doing so. This differential treatment included excluding him from boys’ restrooms and actively monitoring his use of restrooms; segregating him from other students in overnight

accommodations on school trips; intentionally referring to him by female pronouns and by his traditionally female birth name rather than his chosen male name; and proposing that he and other transgender students be given green wristbands to help track their restroom use. These actions stigmatized and humiliated Ash; exacerbated his symptoms of Gender Dysphoria, including anxiety, depression, and suicidal ideation; resulted in physical health problems due to his avoiding restroom use at school; and impacted his education.

Under both Title IX and the Equal Protection Clause, Ash alleges that, in taking the actions catalogued above, Defendants treated him differently from other students and singled him out for unlawful gender-based discrimination based both on (1) his male gender identity, and (2) his nonconformity to gender stereotypes. Separately, he alleges that Defendants violated the Equal Protection Clause by subjecting him to discriminatory and differential treatment because of his transgender status.

PROCEDURAL HISTORY

Ash filed his complaint on July 20, 2016, followed by an amended complaint on August 15, 2016. [Dist. Ct. Dkt. Nos. 1, 12]. Also on August 15, 2016, Ash filed a motion for preliminary injunction [Dist. Ct. Dkt. No. 10] requesting that the court order Defendants to, *inter alia*, permit him to resume his previous use of boys' restrooms during the pendency of this litigation, without fear of discipline by school officials, by the start of the new school year. In addition to arguing that he had a sufficient likelihood of success on the merits, Ash presented the District Court with considerable evidence that Defendants' refusal to permit him to use boys' restrooms had caused and would continue to cause him irreparable educational, emotional, and physical harm, and that Defendants would face no harm by allowing him to use boys' restrooms. Mem. in Support of Mot. for Prelim. Inj. [Dist. Ct. Dkt. No. 11], at 10-12, 28-30. Ash submitted declarations from himself; his mother; three experts in gender identity and transgender youth

development; and educators with experience implementing policies allowing transgender students to access restrooms matching their gender identity. [Dist. Ct. Dkt. Nos. 10-1-10-9]. By contrast, Defendants submitted no evidence either rebutting Ash's showing of irreparable harm or demonstrating that they would be harmed in any way by the requested injunction.

On August 16, 2016, Defendants filed their motion to dismiss. Following briefing, the District Court heard oral argument on the motion to dismiss on September 6, 2016. On September 19, 2016, the District Court issued an oral decision from the bench denying the motion. Tr. of Oral Dec. on Mot. to Dismiss, Sept. 19, 2016 (attached as Ex. A) ("September 19 Transcript"); Court Minutes, Sept. 19, 2016 [Dist. Ct. Dkt. No. 28] ("September 19 Court Minutes") (attached as Ex. B). The court explained that Ash had alleged sufficient facts to state plausible Title IX and Equal Protection Clause claims under multiple theories of relief for each claim. Sept. 19 Court Minutes at 7-9.

Specifically, the District Court concluded that Ash alleged sufficient facts under Title IX to state a plausible claim for gender-based discrimination under two theories: (1) that discrimination against him based on his gender identity was *per se* sex discrimination; and, alternatively, (2) that he was treated differently for nonconformity to gender stereotypes. Sept. 19 Court Minutes at 7-8. The District Court "emphasized at the motion-to-dismiss stage, [that] it had made no finding as to whether the plaintiff (Ash Whitaker) was male or female, a determination that would need to be made after further litigation before addressing the question of discrimination." *Id.* at 5. It found that question to be properly deferred until later in the case, since neither Title IX itself nor any controlling case law in this Circuit defines the word "sex," the dictionary definitions of "sex" often refer both to biological and behavioral factors, and "none of these definitions are helpful when some of those various factors—genes, or

chromosomes, or character, or attributes—point toward male identity, and others toward female,” *id.* at 3, *i.e.*, when a person is transgender.

In any event, the court concluded, it was unnecessary to resolve all of the parties’ legal disputes to decide the motion before it because, regardless of its ultimate findings on these questions, Ash stated a claim under the firmly established theory of gender stereotyping. *Id.* at 8. The court, therefore, concluded that Ash presented sufficient facts and legal authority “to overcome the defendants’ argument that [Plaintiff] had no possibility of prevailing as a matter of law” and denied the motion to dismiss the Title IX claims. *Id.*

With respect to the Equal Protection Clause claims, the District Court concluded that Ash “alleged sufficient facts to indicate that he was discriminated against relative to other males” and also “to show discrimination based on gender stereotypes.” *Id.* at 8. “[P]laintiff is transgender, and if the court concludes at a later stage in the proceedings that transgender persons constitute a suspect class, then the plaintiff has alleged sufficient facts to show discrimination on that basis.” *Id.* The court noted that, at this juncture, it did not need to determine whether transgender persons are a suspect class or the appropriate level of scrutiny to apply in order to conclude that Ash alleged sufficient facts to survive a motion to dismiss his constitutional claim. *Id.* at 9 (citing *Durso v. Rowe*, 579 F.2d 1365, 1372 (7th Cir. 1978)).

The next day, September 20, 2016, the District Court held a hearing on Ash’s motion for preliminary injunction, which sought to enjoin several of Defendants’ discriminatory practices, including enforcement of their policies regarding Ash’s restroom use. Following argument, the

court ruled from the bench, partially granting the motion.¹ The court enjoined Defendants from denying Ash access to boys' restrooms; preventing him from using boys' restrooms at school or while attending school-sponsored events; disciplining him for using boys' restrooms; and monitoring his restroom use in any way. The court explained its reasoning at length during the oral decision, Tr. of Oral Arg. on Mot. for Prelim. Inj., Sept. 20, 2016 (attached as Ex. C), at 50:19-68:21 ("September 20 Transcript"), followed by a written decision issued on September 22, 2016 [Dist. Ct. Dkt. No. 33] ("Preliminary Injunction Order"). In reaching its decision, the court relied on the evidence that Ash submitted with his motion for preliminary injunction. Specifically, "[r]elying primarily on the plaintiff's declaration (which the defendants did not challenge at the hearing), the court has no question that the plaintiff's inability to use the boys' restroom has caused him to suffer harm." Prelim. Inj. Order at 11. The court further found that Defendants provided no evidence that an injunction would harm them or the public interest. *Id.* at 13-15.

Following the September 20, 2016 injunction hearing, Defendants filed a proposed order denying the motion to dismiss, which contained language to certify the decision for interlocutory appeal under 28 U.S.C. § 1292(b). The next morning, September 21, 2016, the District Court entered a dismissal order containing that certification language. [Dist. Ct. Dkt. No. 29]. On September 22, 2016, Plaintiff filed an expedited motion to reconsider the interlocutory certification. [Dist. Ct. Dkt. No. 30]. While that motion was pending, on September 23, 2016,

¹ The Court deferred ruling on Ash's request that Defendants refer to him by his chosen male name and male pronouns in light of Defendants' representation that they had amended Ash's student records due to his recent legal name change. The Court denied without prejudice Ash's request that Defendants be enjoined from implementing the proposed green wristband policy based on the parties' agreement that the policy had not been implemented in the new school year.

Defendants petitioned this Court for interlocutory review of the motion to dismiss denial. [Case No. 16-8019 Dkt. No. 1].

On September 25, 2016, the District Court granted Plaintiff's motion for reconsideration. Sept. 25 Order. It found that Defendants failed to establish the requirements for interlocutory appeal and that it had therefore erred in entering the proposed order containing the interlocutory certification. *Id.* at 6. The court found that appellate resolution of the unsettled legal question that Defendants wanted to appeal—whether discrimination based on “sex” includes discrimination against a transgender student based on gender identity under Title IX or the Equal Protection Clause—could not definitively resolve this case because Ash had “pleaded sufficient facts to survive a motion to dismiss on a claim of gender stereotyping” under both his statutory and constitutional claims. *Id.* at 7. The court specified a number of distinct bases by which Ash could succeed on his claims, most of which do not involve a “controlling question of law as to which there is substantial ground for difference of opinion.” *Id.* at 8. Accordingly, the court vacated the portion of the order containing the certification language, *id.* at 10, and issued an amended order of dismissal. [Dist. Ct. Dkt. No. 35]. On September 27, 2016, Defendants moved the District Court to reconsider this decision [Dist. Ct. Dkt. No. 42], which the court denied. Order, Oct. 3, 2016 [Dist. Ct. Dkt. No. 47].

On October 5, 2016, this Court instructed Defendants to file a position statement “in light of the district court’s order of September 25, 2016, revoking certification for interlocutory appeal.” Order, Oct. 5, 2016 [App. Case 16-8019 Dkt. No. 11]. On October 11, 2016, Defendants filed their statement and Plaintiff filed a response. [App. Case 16-8019 Dkt. Nos. 12-1, 12-2]. On November 14, 2016, this Court denied Defendants’ petition for interlocutory review. Op., Nov. 14, 2016 [Case No. 16-8019, Dkt. No. 16]. The Court held that it lacked appellate jurisdiction to

review the petition in light of the District Court's withdrawal of the interlocutory certification prior to any action on the petition by this Court. *Id.*

On December 1, 2016, Defendants filed the present motion. They once again seek appellate review of the District Court's denial of their motion to dismiss, this time through the exercise of pendent appellate jurisdiction under 28 U.S.C. 1292(a)(1). Defendants assert that, in order to resolve their appeal of the District Court's preliminary injunction order, this Court necessarily must review as well the District Court's findings in its order denying Defendants' motion to dismiss. Mot. at 6. In particular, Defendants assert that, to review the preliminary injunction order, this Court must conclusively resolve contested legal issues including, *inter alia*, whether a transgender boy has the right under Title IX to use restrooms consistent with his male gender identity; whether Defendants' conduct is actionable as sex-stereotyping discrimination; and whether "transgender" [sic] is a suspect class under the Fourteenth Amendment. Mot. at 9.

LEGAL STANDARD

Except with respect to specifically delineated interlocutory orders, such as the preliminary injunction properly on appeal here, *see* 28 U.S.C. § 1292(a)(1), this Court only has jurisdiction to hear appeals from "final decisions" of a federal district court. *See* 28 U.S.C. § 1291; *Nanda v. Bd. of Trs. of Univ. of Ill.*, 303 F.3d 817, 821 (7th Cir. 2002). A district court's denial of a motion to dismiss is not a final judgment and is not appealable as a matter of right. *See Nanda*, 303 F.3d at 821. Normally, such a decision is only appealable if the district court certifies the question for interlocutory review under 28 U.S.C. § 1292(b) and the appeals court accepts jurisdiction. *See In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2002). This "dual gatekeeper system" is designed to ensure that an otherwise unreviewable decision denying a motion to dismiss "is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden." *Id.*

In rare cases, this Court may exercise pendent appellate jurisdiction over a non-final judgment when that decision is “inextricably intertwined” with an order that is immediately appealable under 28 U.S.C. § 1292(a)(1). *See Abelesz v. OTP Bank*, 692 F.3d 638, 647 (7th Cir. 2012). Pendent appellate jurisdiction “is a narrow doctrine” that has been “sharply restricted” in the years following the Supreme Court’s decision in *Swint v. Chambers Cty. Comm’n*, 514 U.S. 35 (1995). *Id.* “[P]endent appellate jurisdiction may be invoked only if there are compelling reasons for not deferring the appeal of the former order to the end of the lawsuit. . . . [A]ny laxer approach would allow the doctrine of pendent jurisdiction to swallow up the final-judgment rule.” *Montaño v. City of Chicago*, 375 F.3d 593, 599 (7th Cir. 2004) (internal citations and quotation marks omitted). This Court “approach[es] the § 1292(a)(1) exception somewhat gingerly lest a floodgate be opened that would deluge the appellate courts with piecemeal litigation.” *Albert v. Trans Union Corp.*, 346 F.3d 734, 737 (7th Cir. 2003) (internal quotation marks and citations omitted).

Pendent jurisdiction “should not be stretched to appeal normally unappealable interlocutory orders that happen to be related—even closely related—to the appealable order.” *Abelesz*, 692 F.3d at 647. To meet the high bar needed to invoke pendent jurisdiction, “it must be *practically indispensable* that [the Court of Appeals] address the merits of the unappealable order to resolve the properly-taken appeal.” *Id.* (emphasis added) (quoting *Valders Stone & Marble, Inc. v. C-Way Const. Co.*, 909 F.2d 259, 262 (7th Cir. 1990)). In other words, the issues presented in the two orders must concern “the same single issue” or be “the head and tail of the same coin.” *Id.* at 648. Judicial economy is not an appropriate basis for exercising pendent jurisdiction. *Id.* at 647 n.3.

ARGUMENT

I. The District Court’s Unappealable Order Denying the Motion to Dismiss is not “Inextricably Intertwined” with its Order Granting the Preliminary Injunction.

A. The District Court denied Defendants’ motion to dismiss because Plaintiff alleged sufficient facts to state both of his claims under multiple legal theories.

Defendants incorrectly assert that the District Court “based its [preliminary injunction] decision on the same grounds as its decision to deny the motion to dismiss” and that “the legal issues and arguments surrounding Plaintiff’s likelihood of success on the merits argument are the same as those raised in the motion to dismiss.” Mot. at 6-7. Even if true, this assertion would be insufficient to justify exercise of pendent jurisdiction, for the reasons stated below in Point I.B. But Defendants’ argument also fails on its own terms, as it is based on a mischaracterization of the District Court’s rulings. Defendants’ argument is based on the premise that both orders below are based on the same “conclu[sion] that Plaintiff’s status as being transgender affords relief under Title IX and the Equal Protection Clause.” *Id.* at 7. That premise is incorrect.

As the District Court explicitly stated in denying certification—in language that Defendants quote but then ignore—the court “denied the motion to dismiss because it found that there were *several avenues* by which the plaintiff might obtain relief.” *Id.* at 7 (quoting and citing the September 25 Order) (emphasis added). The District Court further explained, in language directly on point, that “the court based its denial of dismissal on several grounds,” so “the order is not solely based on resolution of ‘a controlling question of law as to which there is substantial ground for a difference of opinion.’” Sept. 25 Order at 6.

In particular, the District Court granted the preliminary injunction and denied the motion to dismiss without purporting to resolve the unsettled issues that Defendants now seek to appeal. It found it unnecessary to resolve, at this juncture, whether Title IX’s protections extend to discrimination against transgender students based on their gender identity, because resolution of

that issue involves questions of both law and fact that are properly answered later in the litigation. *Id.* Moreover, it found, “regardless of whether Title IX provides protections for transgender persons, the plaintiffs have also alleged sufficient facts to sustain a gender stereotyping claim” under both Title IX and the Equal Protection Clause. Sept. 19 Court Minutes at 7-8. Thus, even if the District Court or this Court were to ultimately conclude that Title IX’s reach does not extend to gender identity discrimination, Plaintiff still states a claim through his allegations that Defendants’ actions were rooted in impermissible gender stereotypes. It is firmly established that a plaintiff of either sex can bring sex discrimination claims based on gender stereotyping under Title IX and the Equal Protection Clause. Sept. 19 Court Minutes at 7-8; *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989); *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997); *Nabozny v. Podlesny*, 92 F.3d 446, 455-56 (7th Cir. 1996); *N.K. v. St. Mary’s Springs Acad. of Fond Du Lac, Wis., Inc.*, 965 F. Supp. 2d 1025, 1034 (E.D. Wis. 2013); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008).

Thus, the issues that Defendants seek to appeal immediately—some of which pose unsettled questions of law in this Circuit—did not yet need to be resolved by the District Court and do not need to be reached by this Court in reviewing Defendants’ appeal from the preliminary injunction. Rather, as the District Court found, this case may instead turn on mixed questions of law and fact that cannot be resolved at this stage of the case. Sept. 19 Court Minutes at 5-9. In sum, as the District Court concluded, resolution of any unsettled questions of law at this juncture is not controlling on the outcome of either of Plaintiff’s claims, and so they cannot possibly be “inextricably intertwined” with this Court’s review of the preliminary injunction.

B. The District Court’s decision to grant the preliminary injunction correctly concluded that Plaintiff had “some likelihood of success on the merits” based on the factual and legal authority presented by Plaintiff with his motion for preliminary injunction.

Even if the preliminary injunction order actually were based on resolution of the issues Defendants seek to appeal—and it is not—the requirements for exercising pendent jurisdiction still would not be met. As a preliminary matter, Defendants never state the actual question properly before this Court, which is whether the District Court abused its discretion in entering the injunction. *Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 594 (7th Cir. 1986). By failing to even argue in their motion that the issues they hope to raise in this appeal are “inextricably intertwined” with whether the District Court abused its discretion, Defendants have waived any such argument. Such an argument would fail in any event, because this Court need not march comprehensively through the various legal issues Defendants presented in their motion to dismiss and again in their motion papers, *see* Mot. at 9, in order to affirm the District Court’s grant of a preliminary injunction as a proper exercise of its broad discretion.

This Court’s “review of a district court’s grant of a preliminary injunction is deferential.” *Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999). This Court “review[s] the court’s legal conclusions *de novo*, its findings of fact for clear error, and its balancing of the injunction factors for an abuse of discretion.” *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). This Court “accord[s], absent any clear error of fact or an error of law, ‘great deference’ to the district court’s weighing of the relevant factors.” *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 896 (7th Cir. 2001) (quoting *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992)).

In granting the preliminary injunction, the District Court concluded that Ash met the threshold question of demonstrating “some likelihood of success on the merits” of his claims. Prelim. Inj. Order at 7-10. As the court correctly observed, “[t]he threshold for this showing is low” in this Circuit. *Id.* at 8, 10; *Cooper*, 196 F.3d at 813 (citing *Roland Mach. Co. v. Dresser*

Indus., Inc., 749 F.2d 380, 387 (7th Cir. 1984)). “Plaintiffs need only demonstrate ‘a better than negligible chance of succeeding.’” *Cooper*, 196 F.3d at 813 (quoting *Boucher v. Sch. Bd. of Greenfield*, 134 F.3d 821, 824 (7th Cir. 1998)). Accordingly, the court correctly concluded that Ash presented sufficient factual evidence and legal authority to exceed this threshold, but made no definitive finding on the merits. Prelim. Inj. Order at 7-10. Having determined that Ash has several paths to success under both of his claims, the court then found that the balance of harms overwhelmingly favored Ash. *Id.* at 13-15. Specifically, the court found that the available evidence showed that Ash was harmed by Defendants’ actions and that Defendants had failed to present any evidence that they would be harmed by an injunction. *Id.* The court also found that the injunction would not harm the public interest. *Id.* at 15. The court noted that under this Circuit’s “sliding scale” approach, “the more likely [the plaintiff] is to win, the less the balance of harms must weigh in his favor; the less likely he is to win, the more it must weigh in his favor.” *Id.* at 7. Applying this analysis, the court issued the injunction. *Id.* at 18.

Because the Seventh Circuit does not require a Plaintiff to show that he *will* succeed on the merits—only that he has *some* chance of success—this Court can review and ultimately affirm the lower court’s decision granting the injunction without definitively resolving each of the merits-based issues that Defendants claim, incorrectly, are “inextricably intertwined” with the preliminary injunction order. With respect to the merits, this Court need only find, as the District Court did, that Plaintiff demonstrated a “more than negligible” likelihood of success on the merits for at least one of Plaintiff’s claims to affirm the preliminary injunction. This is especially so where, as here, the balance of harms weighs heavily in Plaintiff’s favor. The proposition that this Court must review the motion to dismiss denial “[i]n order . . . to undertake a meaningful review” of the preliminary injunction, Mot. at 10, is simply wrong.

In their Motion, Defendants lean heavily on the unremarkable fact that the District Court employed similar reasoning in first denying the motion to dismiss and then finding a sufficient likelihood of success as part of granting the preliminary injunction. Defendants argue that this is an indication that the court “based its finding of a likelihood of success on the merits on its denial of the motion to dismiss.” Mot. at 9. But that only makes the two orders related, not “inextricably intertwined” or “two sides of the same coin” for purposes of pendent jurisdiction. To the extent the District Court cross-referenced its oral decision on the motion to dismiss when issuing the preliminary injunction, it was to reiterate its conclusions that Plaintiff’s claims were plausible under multiple theories of relief and that no single legal question was controlling on the outcome of the case. Indeed, it would be peculiar if the court’s analysis of the legal issues in the case varied from one motion to the next.

By Defendants’ logic, every denial of a motion to dismiss followed by the granting of a preliminary injunction—which presumably will always rest on some limited merits determination—would be immediately reviewable on appeal. This is plainly at odds with this Court’s precedent and narrow application of pendent jurisdiction. Indeed, Defendants have not cited a single post-*Swint* case in which this Court or any federal appeals court has exercised pendent jurisdiction over a district court’s denial of a motion to dismiss, let alone one in which such an order was deemed inextricably intertwined with a discretionary grant of a preliminary injunction. Rather, in the only post-*Swint* case cited by Defendants in which a party sought pendent jurisdiction to review a motion to dismiss order in an appeal of a preliminary injunction, the court *denied* that request. See *Amador v. Andrews*, 655 F.3d 89, 95 (2d Cir. 2011) (finding the court lacked jurisdiction to review dismissal of plaintiffs’ damages claims in an appeal of the district court’s denial of a preliminary injunction). Defendants do not argue that the orders at

issue here are more “intertwined” than any other orders in the same procedural posture, and they are not.

The post-*Swint* cases cited by Defendants in which this Court has exercised pendent jurisdiction are all easily distinguishable from this case. In *Northeastern Rural Electric Membership Corporation v. Wabash Valley Power Association, Inc.*, the Court exercised pendent jurisdiction over the denial of a motion to remand since it presented “precisely the same question of subject matter jurisdiction” as a preliminary injunction appeal. 707 F.3d 883, 886 (7th Cir. 2013). Another case, *Research Automation, Inc. v. Schrader-Bridgeport International, Inc.*, also involved a common jurisdictional question between an appealable denial of an injunction and an unappealable order granting a motion to transfer venue. 626 F.3d 973, 977 (7th Cir. 2010). In *Heartwood, Inc. v. U.S. Forest Service*, the Court exercised pendent jurisdiction to review orders vacating a consent decree and granting third-party intervention to avoid the “serious, perhaps irreparable consequence of defeating the parties’ ability to settle their claims.” 316 F.3d 694, 699 (7th Cir. 2003). In *Montaño*, which appears to be the only other post-*Swint* case in which this Court has exercised pendent jurisdiction, the Court reviewed an unappealable order relinquishing supplemental jurisdiction over state claims with a subsequent appealable order dismissing the federal law claims. 375 F.3d at 600.

Unlike these cases, here, there are no common jurisdictional questions at issue in the District Court’s motion to dismiss and preliminary injunction orders. Nor does denying immediate review pose any “irreparable consequences” on Defendants. Accordingly, Defendants’ appeal of the motion to dismiss order must await the District Court’s final judgment, consistent with the Seventh Circuit’s strong preference against piecemeal litigation.

II. Defendants Attempt to Relitigate Their Failed Petition For Interlocutory Appeal In Urging the Court to Exercise Pendent Jurisdiction to “Prevent Piecemeal Litigation” and to “Resolve Unsettled Questions of Law . . . Which Are a Matter of National Importance.”

In addition to arguing, incorrectly, that the issues raised in the denial of the motion to dismiss and preliminary injunction orders are “inextricably intertwined,” Defendants also suggest that this Court may exercise pendent jurisdiction to “prevent piecemeal litigation” and to “resolve unsettled questions of law . . . which are a matter of national importance.” Mot. at 10. Neither of these is a permissible basis for pendent jurisdiction. Rather, they are reasons for certifying interlocutory appeals, should the District Court find them convincing—and it did not.

In support of the proposition that pendent jurisdiction may be used to prevent piecemeal litigation, Defendants cite this Court’s decision in *Greenwell v. Aztar Ind. Gaming Corp.*, 268 F.3d 486, 491 (7th Cir. 2001). However, this Court has since observed that, in light of the Supreme Court’s decision in *Swint*, *Greenwell*’s reliance on “judicial economy” as a basis for exercising pendent jurisdiction was incorrect. *See Abelesz*, 692 F.3d at 647 n.3. Rather, consideration of such concerns is properly left to the sound discretion of the District Court. Here, the District Court expressly decided that the ultimate termination of this litigation would not be advanced by interlocutory review of the motion to dismiss and that interlocutory review likely would *result* in piecemeal litigation, not prevent it. Sept. 25 Order at 9-10.

Similarly, resolving some legal issues that may be unsettled in this Circuit, no matter how important they may be, is not a basis for the exercise of pendent jurisdiction. This is especially so where, as here, resolution of those issues was not controlling on either the motion to dismiss or the motion for preliminary injunction.

CONCLUSION

Defendants’ Motion to Exercise Pendent Jurisdiction should be denied.

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Respectfully submitted,

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