No. 13-899

IN THE

Supreme Court of the United States

FAMILY DOLLAR STORES, INC.,
Petitioner,

v.

LUANNA SCOTT, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents do not attempt to defend substantively the rule announced by the Fourth Circuit limiting the holding in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Instead, they seek to insulate the panel majority's erroneous decision by arguing that review would be premature. With respect to pendent appellate jurisdiction, the doctrine the Fourth Circuit used to reach its interpretation of *Wal-Mart*, Respondents maintain that circuit courts are not divided only by refusing to engage either prong of this Court's test. Respondents are wrong on both issues, which warrant the Court's review at this time. This case provides an ideal vehicle for such review.

I. THE FOURTH CIRCUIT'S DECISION FUNDAMENTALLY SUBVERTS *WAL-MART*, MAKING PROMPT REVIEW BOTH NECESSARY AND APPROPRIATE.

A. The Fourth Circuit's Incorrect Interpretation Of *Wal-Mart* Should Be Reviewed Now

Respondents argue that the Fourth Circuit's construction of *Wal-Mart* is "too narrow and preliminary to merit review." Opp. 1. But there is nothing "preliminary" or "tentative" about the Fourth Circuit's pronouncements interpreting *Wal-Mart*, which, as Judge Wilkinson observed, are "contrary to the commonality *Wal-Mart* requires for a nationwide class action to proceed," and "drained [*Wal-Mart*] of meaning." Pet. App. 26a-27a (Wilkinson, J., dissenting). Indeed, it is precisely because the majority's views are *not* tentative that Judge Wilkinson wrote a 41-page dissent expressing his concerns for what the holding

portends in future class proceedings and the immediate dangers their decision creates. *See* Pet. App. 56a-59a.

The Fourth Circuit's opinion begins by baldly stating that "*Wal-Mart* is limited to the exercise of discretion by lower-level employees, as opposed to upper-level, top-management personnel." Pet. App. 14a. Next, applying that rule to the record before it, the majority concludes that Plaintiffs' proposed amendment was not futile because it alleged that "the discretionary authority at issue was exercised by high level managers, as distinct from the low-level type managers in *Wal-Mart*." Pet. App. 18a-19a. Those decision-makers, the majority wrote, have "authority over a broad segment of Family Dollar's employees, not on an individual store level as in *Wal-Mart*." Pet. App. 20a-21a; *but see* Pet. App. 76a ("To have the centralized delegation of discretion to 500 middle managers across the country expose a company to a nationwide class action seems to me so contrary to the Court's *Wal-Mart* decision as to whittle it down to near meaninglessness."). Further, the Fourth Circuit justified its exercise of pendent appellate jurisdiction on the basis that "the interpretation of *Wal-Mart* underlies both the appealable certification decision and the nonappealable leave-to-amend decision[.]" Pet. App. 9a. Far from raising questions that "may never be presented" on remand, as Respondents argue (Opp. 9), this newly announced standard "dumps on the district court an utterly unwieldy, unmanageable piece of litigation." Pet. App. 58a.

Without attempting to defend this untenable construction of *Wal-Mart*, Respondents argue instead that the Fourth Circuit "merely recognized that this case might be distinguishable from the facts of *Wal-*

Mart under the analysis of *Wal-Mart* itself," focusing on the majority's explanation that discretion exercised by high level decision-makers "is more likely" to demonstrate commonality than low-level managers' discretion. Opp. 1, 10. But this crabbed reading clashes with the Fourth Circuit's acknowledgment that almost 500 decision-makers (95 regional vice-presidents and 400 district managers) located all across the country were responsible for the discretionary decisions in this case—prompting Judge Wilkinson to warn that the result in this case "marks no more than the beginning of the problems in class action litigation generated by the majority's decision." Pet. App. 76a.

The Fourth Circuit's opinion is appropriately reviewed now for several reasons: If allowed to stand, its gloss on *Wal-Mart* will limit the application, scope, and preeminence of that decision in all future proceedings within the Fourth Circuit and in any other court that adopts its flawed reasoning. However the district court might apply the Fourth Circuit's interpretation of *Wal-Mart* to the specific record on remand, further proceedings would not sharpen the issue for review before this Court. A trial court ruling on class certification in these circumstances would, at most, further highlight the problems inherent in drawing a line between high and low-level employees under the Fourth Circuit's interpretation, but drawing *any* such line that would exempt certain management decisions from the requirement of commonality is contrary to the holding and rationale of *Wal-Mart*.

Similarly, absent review at this time, the propriety of the Fourth Circuit's interpretation may not be reviewed for many years, if ever, especially given the enormous settlement pressure created by class

certification. *See* Proposed *Amicus* Brief of Retail Litigation Center, Inc. ("RLI Br.") 20-21. Indeed, recognition of these pressures—along with the need to bring clarity and prompt resolution to class certification decisions—was the reason for enacting Rule 23(f), the basis for the appeal in this case. *See* Advisory Committee Notes to 1998 Amendment. Meanwhile, the majority's incorrect legal standard will likely be exploited through inevitable forum shopping by suits brought within the Fourth Circuit seeking to take advantage of the now governing interpretation of *Wal-Mart* in that circuit. *See* RLI Br. 21-22 ("[T]he . . . decision raises the very real possibility that nationwide class action lawsuits against national retailers (and other national businesses) will simply be filed in Fourth Circuit.").

In sum, denying Family Dollar's Petition on the grounds that the question relating to the proper interpretation of *Wal-Mart* should be deferred will not sharpen the issue presented. All it would do is encourage legally improper class action filings seeking to avoid the holding in *Wal-Mart* by taking advantage of the Fourth Circuit's incorrect interpretation of that decision.

B. Respondents' So-Called "Independent Ground" Is Illusory

Contrary to Respondents' assertion (Opp. 10-11), as Judge Wilkinson explained, the majority did not rely on any "independent ground." The allegations of "uniform corporate policies" (Opp. 6) alleged in the proposed amended complaint, which the circuit court considered, "are legally insufficient from the outset[]" because they entail the precise type of discretionary decision-making by numerous decision makers spread all across the country—here, 500 of them—found

insufficient for certification in *Wal-Mart*. Pet. App. 45a. Each such allegation identified by Respondents suffers from this fundamental flaw. For example, the amended complaint alleges that Family Dollar pays laterally hired employees more than those promoted from within, thus allegedly disfavoring women. But as the dissent pointed out, "Plaintiffs do not allege … that either method of selection is centrally mandated, nor do they allege that any central policy is even responsible for the supposed tendency of females to be promoted from within rather than hired laterally." Pet. App. 49a. "Given that the alleged policy does not dictate the internal or external route of store manager selection, any disparate impact that arises will necessarily be the result of decentralized choices by middle managers. Whether women are disproportionately hired from within will vary from region to region." Pet. App. 49a. Similarly, the alleged policy of considering prior experience and performance when making salary decisions boils down to discretionary decision-making because "Plaintiffs do not allege . . . that these criteria constitute a rigid formula; instead, the criteria appear to be simple guideposts listing multiple factors designed to channel the discretionary decisions of those middle managers charged with setting store manager salaries." Pet. App. 48a-49a. In short, such "[d]iscretion cabined by broad corporate policies . . . is precisely the structure that *Wal-Mart* found not to be susceptible to class action treatment." Pet. App. 48a.

C. Other Lower Courts Have Applied *Wal-Mart* In Ways That Clash With The Fourth Circuit's Decision

Despite Respondents' attempt to harmonize lower court decisions, the Fourth Circuit stands alone in

limiting *Wal-Mart* to lower-level employees. No other decision so limits *Wal-Mart*, and numerous decisions from around the country are at odds with it—generating a real split in the circuits. Respondents ignore most of the decisions cited in the Petition. Pet. 15-17. Respondents seek only to demonstrate that one decision, *Davis v. Cintas Corporation*, 717 F.3d 476 (6th Cir. 2013), is not actually inconsistent with the ruling here, attempting to dismiss *Cintas* as a mere evidentiary ruling. In so doing, Respondents ignore the Sixth Circuit's recognition that the uniformity of decision-making—not the title of the decision-makers—is the controlling element. As here, the *Cintas* plaintiffs alleged that high-level managers, working in tandem with lower-level managers, were responsible for the alleged discriminatory decisions. Yet the Sixth Circuit, unlike the Fourth Circuit, did not focus on employee titles or enunciate a "high/low" distinction, correctly recognizing the irrelevance of those issues under *Wal-Mart*.

For all of these reasons, the Court should grant *certiorari* as to the first question presented in the Petition.

II. THIS CASE PRESENTS THE IDEAL OPPORTUNITY FOR THIS COURT TO CLARIFY THE DOCTRINE OF PENDENT APPELLATE JURISDICTION.

The Fourth Circuit took interlocutory jurisdiction over an independent ruling that it expressly acknowledged was not appealed, using a doctrine, pendent appellate jurisdiction, that neither party had briefed nor argued. In opposing this Court's intervention to address the doctrinal confusion that enables this sort of overreach, Respondents do not even attempt to grapple with the heart of the question

presented: whether a circuit court can use pendent appellate jurisdiction to review "legal and factual issues distinct from the ruling over which it has jurisdiction." Pet. i. The answer to this question matters. Circuits that answer "no"—the majority, a group of which the Fourth Circuit was previously a member—would never have addressed the allegations in the amended complaint in an interlocutory appeal. But in this case, the Fourth Circuit answered "yes"—the minority view. This approach, which incants the language of *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), and then proceeds to review any and all issues the court sees fit to decide before a final judgment has been entered, provides no standard at all. As this case illustrates, this minority approach provides a license to an appellate court to exercise interlocutory jurisdiction over the entire case—exactly the kind of "multi-issue interlocutory appeal tickets" that *Swint* warned would result from a "rule loosely allowing pendent appellate jurisdiction[.]" *Id.* at 49-50.

The first prong of the *Swint* test asks whether the pendent ruling is "inextricably intertwined" with the appealable ruling. In the majority of circuits, "a pendent appellate claim can be regarded as inextricably intertwined with a properly reviewable claim on collateral appeal only if the pendent claim is coterminous with, or subsumed in, the claim before the court on interlocutory appeal—that is, when the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well." *Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995). Under this majority approach, the Fourth Circuit could never have reached the allegations in the amended complaint.

The "claim before the court on interlocutory appeal" was the district court's ruling that the original complaint could not support certification under *Wal-Mart*. The panel majority *affirmed* this conclusion, "[a]s a preliminary matter," in a single paragraph. Pet. App. 18a. But the panel majority did not stop there—it reached out to review the district court's denial of the motion to amend, even though Respondents never sought review of this ruling or invoked pendent appellate jurisdiction as the mechanism to do so.[1] As the panel majority put it, although Respondents "did not petition us directly for interlocutory review of the decision denying leave to amend" (Pet. App. 7a-8a), "we focus our review in this appeal on the district court's denial of leave to amend[.]" *Id.* 10a.

The Fourth Circuit's ruling on the pendent issue, the denial of the motion to amend, was in no way "coterminous with, or subsumed in, the claim before the court on interlocutory appeal," the class certification ruling. To the contrary, the denial of the motion to amend involved different law, different facts, and a different appellate review standard from the class certification ruling. The clearest demonstration that the class certification ruling did not "necessarily resolve" the denial of the motion to amend concerns the district court's finding that "allowing plaintiffs to amend the complaint would prejudice defendant." Pet. App. 71a. As with the issue of pendent appellate jurisdiction, neither party briefed

[1] To the contrary, Respondents were explicit at argument: this appeal "travels on the original complaint." Oral Argument at 6:38, *Scott v. Family Dollar Stores, Inc.*, No. 12-1610 (4th Cir. 2013), http://www.ca4.uscourts.gov/oralargument/listen-to-oral-arguments.

nor argued the propriety of this prejudice determination. More important, this factual finding not only fell within the province of the district court, it had nothing to do with the district court's class certification ruling. Nevertheless, the panel majority concluded: "[W]e find that the district court's determinations as to prejudice are clearly erroneous." Pet. App. 22a. Because this inquiry required the court to engage legal and factual issues not "necessarily resolved" by the class certification ruling, most circuits would have refused to consider it.

Indeed, a number of circuits have expressly rejected the argument that pendent appellate jurisdiction allows them to review a district court's ruling on a motion to amend. In *Walker v. City of Pine Bluff*, for example, the Eighth Circuit refused to review a decision granting a motion to amend under the inextricably intertwined prong. 414 F.3d 989, 993 (8th Cir. 2005). As that court explained, "we need not review the question whether the district court abused its discretion in allowing Walker to amend his complaint in order to review the denial of qualified immunity. Thus, we have no jurisdiction. . . ." *Id.* Courts generally refused to exercise pendent appellate jurisdiction over decisions on motions to amend even before the limitations imposed by *Swint*. *See, e.g.*, *Rowland v. Perry*, 41 F.3d 167, 175 (4th Cir. 1994) (refusing to exercise jurisdiction over denial of a motion to amend); *SEC v. Am. Bd. of Trade, Inc.*, 830 F.2d 431, 443 (2d Cir. 1987) ("Nor is the denial of amendment so related to the rulings properly appealed as to warrant the exercise of pendent appellate jurisdiction."). Accordingly, contrary to Respondents' position that Family Dollar "fails to show [] that any court of appeals would come out differently" (Opp. 16), the precedent above shows that a circuit

adhering to the "necessarily resolves" formulation of the inextricably intertwined test would have reached the opposite result. Only the test applied in the minority of circuits, which permit the exercise of pendent appellate jurisdiction over questions of fact and law when they merely "overlap," could even arguably have explained reaching out to address the denial of the motion to amend.

Instead of grappling with this clear circuit split, Respondents discuss intracircuit divisions, rejecting some (Second and Fourth) and creating others (D.C. and Eleventh), in a failed attempt to harmonize the law. For example, Respondents quote the D.C. Circuit's qualified statement that it has "largely confined the doctrine to cases that come within one or the other of the *Swint* conditions." *See* Opp. 19 (quoting *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1134 (D.C. Cir. 2004)). Yet they neglect to mention the sentence immediately preceding this quotation—that "other circuits have taken a different path, saying that they will take pendent appellate jurisdiction only when one or both of the *Swint* conditions appear, and criticizing our more permissive reading of *Swint*." *Kilburn*, 376 F.3d at 1134. Moreover, Respondents are incorrect that, "[s]ince that clarification, the circuit has not ventured beyond the *Swint* conditions in assessing pendent appellate jurisdiction." Opp. 19. To the contrary, the D.C. Circuit has referenced its "fairness and efficiency" test since *Kilburn*. *See Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1288 (D.C. Cir. 2007) (referring to "substantial considerations of fairness and efficiency" as a basis for pendent appellate jurisdiction).

As for the circuit split over the interpretation of the "necessary to ensure meaningful review" prong, Respondents ignore it entirely. In fact, Respondents do what many appellate courts have done, including the Fourth Circuit in this case: they conflate the two prongs of the test and claim that "the issues were inextricably intertwined and review of the decision denying leave to amend was necessary to ensure meaningful review." Opp. 21; *see* Pet. App. 9a ("An issue is necessary to ensure meaningful review if resolution of the appealable issue necessarily resolves the nonappealable issue or where review of the non-appealable issue is necessary to ensure meaningful review of the appealable one." (citation and quotation marks omitted)). This is a tautology, not a test, and, as formulated, provides no limits on interlocutory appellate jurisdiction.

Respondents' argument boils down to their contention that the confusion over pendent appellate jurisdiction does not warrant the Court's attention because all the courts of appeal cite *Swint*. As in *Morrison v. National Australia Bank Ltd.*, they mistakenly believe that "the Courts of Appeals have carefully trimmed and sculpted this 'judicial oak' into a cohesive canopy[.]" 561 U.S. 247, 259 n.4 (2010). To the contrary, the different circuits, "though perhaps under the impression that they nurture the same mighty oak, are in reality tending each its own botanically distinct tree." *Id.*

The conflict and confusion over pendent appellate jurisdiction calls for the Court's attention now. The doctrine has arisen in nearly 500 cases since *Swint*. It implicates concerns at the heart of the Court's institutional role, including the balance of authority between district and appellate courts, the jurisdiction

of the courts of appeal, and the vitality of the final judgment rule. Only this Court can bring consistency and clarity to pendent appellate jurisdiction. This case presents the ideal opportunity for it to do so.

CONCLUSION

For all of these reasons, the Court should grant Family Dollar's petition for a writ of *certiorari*.

Respectfully submitted,

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