No. 13-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547 (2011), this Court held that allegations of subjective decision-making by a multitude of managers at varying levels of the company, subject to limited oversight by "higher corporate authorities," were insufficient to satisfy the commonality requirement necessary for certification of a nationwide class action. In reviving such a class action against Family Dollar Stores, Inc. ("Family Dollar"), the Fourth Circuit, over a lengthy dissent, reached the opposite conclusion. Notably, it did so in a case Plaintiffs themselves had earlier declared to be "virtually identical" to *Wal-Mart*. This admission was unsurprising: individual supervisors at Family Dollar, like at Wal-Mart, decide on the salaries for each one of the thousands of individuals who manage the company's retail stores. Yet the panel held that *Wal-Mart* does not apply if the majority of those making these decisions—400 district managers and 95 regional vice-presidents in this case—could be characterized as "high level" or "top level" supervisors. This distinction is not only foreign to *Wal-Mart* and contrary to its holding, it should never have been reached as a procedural matter. The panel, having accepted a petition to review the district court's class certification decision under Rule 23(f), affirmed that decision, but—relying on pendent appellate jurisdiction—expanded its review to reverse the district court's otherwise unappealable order denying Plaintiffs leave to amend their complaint.

The questions presented are:

1. Whether the Fourth Circuit contravened *Wal-Mart* by holding that discretionary decisions by hundreds of supervisors can serve as the basis for a

nationwide class action because "*Wal-Mart* is limited to the exercise of discretion by lower-level employees, as opposed to upper-level, top-management personnel?"

2. Whether a court of appeals may exercise "pendent appellate jurisdiction" to review an unappealable interlocutory ruling that requires the court to decide legal and factual issues distinct from the ruling over which it has jurisdiction and unrelated to the power of the district court to enter the appealable order?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Family Dollar Stores, Inc. was the defendant in the district court proceedings and appellee in the court of appeals proceedings.

Respondents Luanna Scott, Shunderia Garlington, Ruth Bell, Wendy Bevis, Katherine Bracey, Ruby Brady, Marie Alice Brockway, Vickie Clutter, Diane Conaway, Judy Corrow, Traci Davis, Carol Dinolfo, Rebecca Dixon, Pamela Ewalt, Nancy Fehling, Teresa Fleming, Irene Grace, Dorothy Harson, Charlene Hazelton, Shelly Hughes, Christal J. Joslyn, Ada L. Kennedy, Neita Lafreniere, Margie A. Little, Carol Martin, Leanne Maxwell, Wanda Mayfield, Doris Moody, Vanessa L. Peeples, Veronica Perry-Preddie, Ruth Ellen Phelps, Sheila Pippin, Lana Radosh, Michelle Rodgers, Vada Rose, Vickey Jo Scrivwer, Linda R. Silva, Sharon Sipes, Nancy Smith, Marie E. Spellissy, Sylvia C. Tenorio, Judy Tidrick, Beverly L. Triplett, Carol Sue Vanfleet, Debbie Vasquez, Claire White, Bonnie Williams, and Cindy Marie Zimbrich, on behalf of a putative class of similarly situated individuals, were plaintiffs in the district court proceedings and appellants in the court of appeals proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, undersigned counsel state that Petitioner Family Dollar Stores, Inc. is a publicly traded company with no parent corporation, and no publicly held company owns 10 percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Family Dollar Stores, Inc. respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-59a) is reported at 733 F.3d 105. The district court's order granting Petitioner's motion to dismiss and/or strike class allegations (App. 60a-74a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 2013. The order of the court of appeals denying Petitioner's timely-filed petition for rehearing with suggestion for rehearing *en banc* was entered on November 14, 2013. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

Pertinent portions of Fed. R. Civ. P. 23 and Fed. R. Civ. P. 12 are reproduced in the Appendix (at 79a-80a).

STATEMENT OF THE CASE

1. Family Dollar operates a chain of over 7,000 stores in more than forty states. App. 3a. Family Dollar's operations are organized into divisions (each led by a vice president), regions (led by regional vice presidents), and districts (led by district managers). Family Dollar has 95 separate regions, *id.*, and each of Family Dollar's 400 districts "includes 10 to 30 retail stores[.]" *Id.*

2. On October 14, 2008, fifty-one named plaintiffs filed their original complaint against Family Dollar on behalf of a putative nationwide class consisting of females who are, or have been, store managers of Family Dollar stores. That complaint alleged class-wide violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII") and the Equal Pay Act of 1963, 29 U.S.C. § 206(d), based on allegations that were virtually identical to those in *Wal-Mart*. App. 61a, 68a. Both cases:

- alleged that gender played an impermissible role in the salaries paid to thousands of store-level personnel at a nationwide retailer;
- pleaded that "subjectivity and gender stereotyping" comprised the "common question" that gave rise to a nationwide class of female managers;
- challenged decision-making by individual "regional and district managers" throughout the retailer's national organization;
- attacked the setting of compensation by individual supervisors within salary ranges formulated at higher levels in the company; and
- emphasized alleged "centralized control" over myriad retail operational issues.

3. The fulcrum of the two complaints was the same: that "Defendant's pay decisions and/or system includes subjectivity and gender stereotyping that causes disparate impact to compensation paid to female store managers," and that "no other criteria [] causes such disparate impact[.]" App. 89a.

4. Family Dollar moved to dismiss or, alternatively, transfer the case to the Western District of North Carolina. In opposing dismissal, plaintiffs relied on the Ninth Circuit's *en banc* decision in *Dukes v. Wal-Mart*, arguing "[t]he Ninth Circuit has now affirmed certification of such a nationwide class having virtually identical claims of sex discrimination in pay to those brought in this case." App. 4a.

5. Following transfer, discovery commenced. App. 4a-5a. In September, 2011, three months after this Court issued its decision in *Wal-Mart*, Family Dollar moved under Fed. R. Civ. P. 12(c), 12(f), and 23(d)(1)(D) to dismiss and/or strike Plaintiffs' class allegations as legally insufficient under *Wal-Mart*. App. 66a. Family Dollar argued that, as in *Wal-Mart*, the only "glue" holding together "the alleged *reasons*" for the tens of thousands of employment decisions challenged here was the alleged delegation of discretion to managers to make pay decisions. *Id.* (citing *Wal-Mart*, 131 S. Ct. at 2552) (emphasis in original).

6. Plaintiffs opposed the motion to dismiss, and only then—over 120 days after the *Wal-Mart* decision—did Plaintiffs move for leave to file an amended complaint—one they characterized as merely "elaborat[ing]" on their prior allegations. Pls.' Mot. To Amend Compl. ¶ 6, *Scott v. Family Dollar Stores, Inc.*, No. 08-CV-540 (W.D.N.C. Oct. 28, 2011), ECF No. 120. In actuality, the proposed amended complaint expressly disclaimed Plaintiffs' prior class allegations premised on subjective, discretionary decision-making. App. 109a-110a (abandoning allegations that "unfettered discretion" or "subjectiv[ity]" is involved in setting store managers' pay and that subjectivity and gender stereotyping by supervisors

violates Title VII). Instead, for the first time, Plaintiffs attempted to allege the existence of company-wide pay and merchandising policies, although those so-called "policies" remained premised on the exercise of subjective discretion by hundreds of managers. App. 114a-116a. Family Dollar opposed the motion to amend.

7. Following a hearing, the district court granted Family Dollar's motion to dismiss and denied Plaintiffs' motion for leave to amend. *Scott v. Family Dollar Stores, Inc*., No. 08-CV-540, 2012 WL 113657, at *3, 4, 5 (W.D.N.C. Jan. 13, 2012), *aff'd in part, rev'd in part, and remanded*, 733 F.3d 105 (4th Cir. 2012). App. 60a-74a.

8. Referencing Plaintiffs' prior admission that the allegations of class-wide discrimination in their original complaint were "virtually identical" to those asserted in *Wal-Mart*, the district court concluded those allegations failed to satisfy the commonality requirement of Rule 23(a) because they were based on "subjective decisions made at the local store levels." App. 68a. It denied leave to amend on futility grounds, noting that although Plaintiffs "purport to deny [in the amendment] that class members' pay is set through a discretionary, subjective process . . . the *discretionary* pay of managers, within uniformly established parameters, remains the only source of discrimination alleged." App. 71a (emphasis in original). The court also denied leave to amend on the independent ground of prejudice, finding that allowing it three years into the litigation would prejudice Family Dollar and require extensive additional discovery. In addition, the district court applied bad faith analysis in finding that "plaintiffs' contention that they have learned 'new facts' is simply without merit[,]" and that the amended

complaint was nothing more than "an attempt to recast plaintiffs' class claims simply to avoid dismissal under *Dukes*[.]" App. 71a.

9. Plaintiffs filed a petition with the Fourth Circuit, pursuant to Fed. R. Civ. P. 23(f), for leave to appeal the order dismissing the original class allegations. The petition did not seek leave to appeal denial of Plaintiffs' motion to amend, nor did Plaintiffs apply for leave to appeal this order under 28 U.S.C. § 1292(b). Over Family Dollar's opposition, a motions panel of the Fourth Circuit granted Plaintiffs' Rule 23(f) petition.

10. On October 16, 2013, over a lengthy dissent by Judge Wilkinson, the Fourth Circuit issued its decision affirming in part, and reversing in part. *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105 (4th Cir. 2013). App. 1a-59a.

11. The majority found that it could exercise "pendent appellate jurisdiction" to review the denial of Plaintiffs' motion for leave to file an amended complaint, even though the ruling was not a final judgment and the petition had not sought review of the issue. App. 8a-9a. Citing *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), the majority stated that the denial of Plaintiffs' motion to amend was "inextricably intertwined" with and "necessary to ensure meaningful review" of the class certification decision, (App. 8a-9a), the only issue reviewable under Rule 23(f).

12. The majority then identified two "principles" that might distinguish the present case from *Wal-Mart*. First, it stated "*Wal-Mart* did not set out a per se rule against class certification where subjective decision-making or discretion is alleged." App. 13a.

Rather, in its view, certification might still be appropriate "if there is also an allegation of a company-wide policy of discrimination[.]" App. 14a.

13. Crucial to this Petition, the majority then concluded that "*Wal-Mart* is limited to the exercise of discretion by lower-level employees, as opposed to upper-level, top-management personnel." App. 14a. Characterizing that distinction as "critical," the majority reasoned that "when high-level personnel exercise discretion, [the] resulting decisions affect a much larger group," and thus are "more likely to satisfy the commonality requirement than the discretion exercised by low-level managers in *Wal-Mart*." App. 14a.

14. Applying its interpretation of *Wal-Mart*, the majority affirmed dismissal of the original complaint for two reasons: first, "the complaint fails to allege that the 'subjectivity and stereotyping' regarding compensation paid to female store managers were exercised in a common way with some common discretion;" and second, "aside from th[e] bare allegation" that "Family Dollar engaged in 'centralized control of compensation for store managers at the corporate level of its operations[,]'" "the original complaint does not identify the decision-makers responsible for pay and promotion." App. 18a.

15. Although it had then resolved the *only* issue raised by the Rule 23(f) petition, the majority went on to conclude the district court had abused its discretion by denying leave to amend based on an "erroneous interpretation of *Wal-Mart*." App. 2a. After declaring its jurisdiction over the denial of the motion to amend, the majority explained the district court had improperly "failed to consider" several matters, including whether "the discretionary authority at

issue was exercised by high-level managers, as distinct from the low-level type managers in *Wal-Mart*." App. 18a-19a. That failure mattered, the majority concluded, because "the amended complaint explains that . . . exceptions to corporate-imposed raise percentages were made by regional managers and senior vice presidents, again at 'corporate headquarters.'" App. 21a.

16. Because the district court had found that Plaintiffs' motion to amend should also be denied on prejudice grounds, independent of the *Wal-Mart* analysis, the majority proceeded to conduct its own review of the record without benefit of briefing from the parties. The majority concluded, based solely on its understanding of the procedural developments below, that "the district court's determinations as to prejudice are clearly erroneous." App. 22a.

17. In a 42-page dissent, Judge Wilkinson explained that the majority's "distinction" so limits *Wal-Mart* that it "drained it of meaning." App. 26a. Among other things, he observed: "Discretion cabined by broad corporate policies—including salary ranges—is precisely the structure that *Wal-Mart* found not to be susceptible to class action treatment," (App. 48a), and that the subjectivity attacked in *Wal-Mart* involved more than just "lower" level employees, but, as here, also involved discretionary decisions by regional and district managers. App. 48a. As for the motion to amend, Judge Wilkinson wrote that the majority's decision to reverse the district court for abuse of discretion failed to respect the "trial court's discretion and experience in matters explicitly entrusted by both logic and precedent to its competence." App. 29a.

18. Family Dollar unsuccessfully sought both panel and *en banc* rehearing. App. 75a-78a. In dissenting from the denial of panel rehearing, Judge Wilkinson wrote: "Inasmuch as the panel majority declines to [affirm the district court's denial of class certification], the central issue is best settled, if not in this action, then sometime soon, by the Supreme Court of the United States. 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." App. 76a.

REASONS FOR GRANTING THE PETITION

This Court should grant *certiorari* because the decision below conflicts with *Wal-Mart* and other relevant decisions applying that important precedent and, independently, provides an opportunity for the Court to resolve several deep and persisting circuit conflicts regarding the doctrine of pendent appellate jurisdiction. First, the Fourth Circuit's novel conclusion that "*Wal-Mart* is limited to the exercise of discretion by lower-level employees, as opposed to upper-level, top-management personnel," which allowed a nationwide class action "virtually identical" to *Wal-Mart* to proceed, contravenes the holding and rationale of *Wal-Mart*, which make no such distinction. In fact, the ruling below conflicts with a decision issued by the Sixth Circuit earlier in 2013, which affirmed denial of class certification for failure to satisfy *Wal-Mart*'s commonality holding in a case where the complaint implicated "upper" management in discriminatory decisions. Unless corrected, the decision will effectively abrogate *Wal-Mart* in the Fourth Circuit, thereby undermining the national uniformity of the law; provide litigants with a

roadmap for evading the rule of *Wal-Mart*; encourage forum shopping by parties who wish to take advantage of the Fourth Circuit's refusal to follow the dictates of *Wal-Mart*; and threaten to create a new and unnecessary circuit split over an issue this Court has already resolved.

Second, the Fourth Circuit improperly used pendent appellate jurisdiction to review the denial of Plaintiffs' motion to amend and reverse the district court for abuse of discretion and clear error. The Fourth Circuit had no jurisdiction to decide whether the district court acted properly in denying leave to file an amended complaint. Whether to allow a new pleading under Fed. R. Civ. P. 15 is entirely separate and distinct from whether a class meets the requirements of Rule 23. The court's reach to decide this nonappealable issue warrants review for multiple reasons: (1) the decision conflicts with this Court's opinion in *Swint*; (2) the court's application of pendent appellate jurisdiction is inconsistent with the test applied by a majority of the divided circuit courts, and (3) the unconstrained use of the doctrine, as exemplified by this case, threatens the integrity of the final judgment rule and disturbs the proper roles of district and appellate courts. Because the doctrine provides appellate judges a convenient mechanism to reach issues that attract their interests and arise for consideration for the first time on appeal, only this Court is institutionally capable of articulating boundaries on the doctrine. This case uniquely presents that opportunity.

I. THE FOURTH CIRCUIT'S DECISION CONTRAVENES *WAL-MART* AND CONFLICTS WITH SUBSEQUENT DECISIONS THAT FAITHFULLY APPLY THAT DECISION

A. As Judge Wilkinson Observed In Dissent, Limiting *Wal-Mart* To Subjective Decision-Making By "High Level" Supervisors "Drains" That Decision Of All Meaning

In *Wal-Mart*, this Court held that unless a common mode of exercising discretion pervades the entire company, allegations of discretionary decisions made by a multitude of supervisors will not satisfy the Rule 23 requirement of commonality. That was because the truth or falsity of issues central to the validity of each class member's claims could not be determined "in one stroke." 131 S. Ct. at 2551.

The amended complaint here alleges no such company-wide common mode of exercising discretion. Rather, its theory of class liability—like that in *Wal-Mart*—is that Regional Managers and Divisional Vice Presidents make exceptions to standard pay ranges, and they allegedly favor men when doing so. App. 111a. Consequently, a straightforward application of *Wal-Mart* should have compelled affirmance of the order disallowing certification of this nationwide class consisting of thousands of employees. As Judge Wilkinson explained, "despite plaintiffs' efforts to allege extensive centralized control, the amended complaint reveals the existence of a corporate decision-making structure parallel to that described in *Wal-Mart*,"—that is, discretion within parameters, with discretion being the only source of discrimination. App. 47a (Wilkinson, J., dissenting).

In concluding otherwise, the Fourth Circuit relied on a purported distinction that no post-*Wal-Mart* cases had previously recognized. Citing a law journal article, the majority held that "*Wal-Mart* is limited to the exercise of discretion by lower-level employees, as opposed to upper-level, top-management personnel." App. 14a. The majority thus concluded *Wal-Mart* may be disregarded if the discretionary decision-makers—400 district managers and 95 regional vice-presidents in this case—may be characterized as "high level" or "top level" supervisors. App. 18a-19a.

But this distinction, as Judge Wilkinson observed, "drains" *Wal-Mart* of meaning. Nothing in that decision supports the Fourth Circuit's distinction between "lower" *and* "upper" level supervisors. Indeed, the *Wal-Mart* opinion presupposes that the propriety of certification does not turn on the characterization of the relative "level" of the decision-making personnel. As this Court noted, the discretionary decisions challenged there had been made by both "lower" *and* "upper" management. For example, although "[l]ocal store managers" set pay for hourly employees, "[a]s for salaried employees, such as store managers and their deputies, higher corporate authorities have discretion to set their pay within pre-established ranges." *Wal-Mart*, 131 S. Ct. at 2547. Likewise, promotions were made not only by "lower" level employees, as both "regional and district managers [had] discretion to use their own judgment when selecting candidates for management training." *Id.* Yet despite this Court's attention to "higher corporate authorities" at Wal-Mart, nothing in the Court's opinion remotely suggests that class certification *would be* appropriate as to subjective, discretionary employment decisions made by those higher-level supervisors.

Additionally, the majority relies on the same law review article, rather than controlling legal authority, for another limitation on the actual holding of *Wal-Mart*, namely that a challenged employment practice need only "affect[] the class in a uniform manner" to satisfy the commonality requirement. App. 13a. *Wal-Mart* held, however, that commonality requires there to be "common *answers* apt to drive the resolution of the litigation" for all class members, a much more demanding standard. 131 S. Ct. at 2551 (emphasis in original).

Indeed, focusing on the rank of the subjective decision-maker by itself, as the Fourth Circuit would now require, would not aid the fact finder in determining whether there is a common method of providing an answer to the critical question, "*why was I disfavored*." *Id.* at 2552 (emphasis in original). That is, the necessity—under *Wal-Mart*'s holding—for "some glue holding the alleged *reasons* for [millions of employment decisions] together," *id.*, is not affected by the "status" of the individuals making those decisions. As Judge Wilkinson pointed out, the panel "refuses to explain why *Wal-Mart*'s commonality holding, by its plain language, does not apply to middle managers . . . why 500 [Family Dollar] vice presidents and district managers who concededly made discretionary decisions within delegated ranges are anything other than middle management, or why a system in which discretion is channeled by broad corporate guidelines does not fall within *Wal-Mart*'s literal terms." App. 57a n.2.

Put differently, the Fourth Circuit's novel test does not respond to the concerns that underlie *Wal-Mart*. *Wal-Mart* instructs that commonality requires Plaintiffs to bridge the wide conceptual gap between a

single discrimination claim and the claims of a class by demonstrating "significant proof that [the employer] operated under a general policy of discrimination[.]" 131 S. Ct. at 2553 (alteration omitted). The key to this analysis is the requirement that class claims "depend upon a common contention" and that contention must be of such a nature "that determination of its truth or falsity will resolve an issue that is central to the validity" of each one of the class member's claims "*in one stroke*." *Id.* at 2551 (emphasis added). Contrary to the Fourth Circuit's central concept, no common contention will be generated just because the discretionary decision-makers are alleged to be "high-level" supervisors in the corporate hierarchy. If a corporate agent sets an employee's salary after considering and weighing a number of different factors, it is of no moment whether that agent is a front-line supervisor, a "district manager" or a "vice president" because there will be no common contention that supports a class proceeding.

Additionally, the Fourth Circuit's test is artificial and unworkable on its own terms. It will invariably force courts to focus on distinctions, ranks, and titles in dividing those cases that meet the Rule's commonality requirement from those that do not. The record here displays the difficulties inherent in the majority's reformulation of *Wal-Mart*'s commonality standard. On remand in *Wal-Mart*, the district court concluded that the class could not proceed—even on a regional basis. Noting that "over 450 different managers [were] responsible for making the contested decisions,"—including 4 Regional Vice Presidents, 7 Regional Personnel Managers, and 49 District Managers—the district court reasoned that the resulting "different kinds of decisions across hundreds

of decision makers [] invit[ed] failures of proof at multiple points[.]" *Dukes v. Wal-Mart Stores, Inc.*, No. 01-CV-02252, 2013 WL 399300, at *1, 6 (N.D. Cal. Aug. 2, 2013). Although the Fourth Circuit majority assumed the record here is materially "different in kind" than in *Wal-Mart* (App. 21a), the opposite is true. Family Dollar employs hundreds of individuals with titles ranging from "district manager," to "Regional Vice President" to "Vice President." All told, the putative class seeks to challenge discretionary pay and promotion decisions made by some 95 Vice Presidents and 400 Regional Managers, an even greater number of decision-makers than in *Wal-Mart*. *See* App. 26a (Wilkinson, J., dissenting).[1] This invites the very same "failures of proof" to occur here. *Dukes*, 2013 WL 399300, at *1, 6. As Judge Wilkinson observed, "[t]he majority assumes that nearly 500 middle managers somehow all exercise their discretion in lockstep. That cannot be." App. 27a.

In sum, it is the nature and scope of individual decision-making that matters in determining commonality under *Wal-Mart*, not a decision-maker's relative title. By concluding otherwise, the Fourth Circuit majority read a nonexistent distinction into *Wal-Mart* that fundamentally changes this Court's ruling. As Judge Wilkinson explained, the majority's incorrect understanding of *Wal-Mart* leads it to reach a result contrary to *Wal-Mart* even though the cases are essentially identical, as Plaintiffs themselves

[1] As Judge Wilkinson also observed, the "lower" versus "upper" distinction also fails because exceptions to placements within the salary ranges are granted by corporate vice presidents, according to Plaintiffs, which necessarily means that the initial placement in the ranges are made by "middle" managers. App. 27a (Wilkinson, J., dissenting).

had earlier proclaimed: "Discretion cabined by broad corporate policies—including salary ranges—is precisely the structure that *Wal-Mart* found not to be susceptible to class action treatment." App. 48a (Wilkinson, J., dissenting) (citing 131 S. Ct. at 2547).

For this reason alone, the Court should grant the petition for writ of *certiorari*. In fact, the Fourth Circuit's error is so apparent under *Wal-Mart* that the Court should grant *certiorari* and summarily reverse. *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (*per curiam*) (granting *certiorari*, reversing and remanding where court of appeals' error was so obvious in light of this Court's previous decision that summary reversal was appropriate); *Wyrick v. Fields*, 459 U.S. 42, 43, 49 (1982) (*per curiam*) (granting *certiorari*, reversing and remanding where court of appeals had imposed a "new and unjustified limit" in violation of the Court's recent decision on the same subject).

B. The Fourth Circuit's Novel Reading Of *Wal-Mart* Conflicts With Post-*Wal-Mart* Decisions

This Court should also grant review because the Fourth Circuit's interpretation of *Wal-Mart* conflicts with numerous post-*Wal-Mart* decisions. State and federal courts alike have issued numerous decisions based on *Wal-Mart*. Prior to the Fourth Circuit's decision, no court had ruled that "*Wal-Mart* is limited to the exercise of discretion by lower-level employees, as opposed to upper-level, top-management personnel," although many cases involved decisions by higher-level employees. Moreover, several federal decisions have declined to limit the reach of *Wal-Mart* as the Fourth Circuit did here.

For example, in *Davis v. Cintas Corporation*, 717 F.3d 476 (6th Cir. 2013), the plaintiffs alleged that "upper-level managers both in [the defendant's] headquarters . . . and at each of its 365 facilities across the country" established an allegedly biased corporate culture. Pls.' First Am. Class Action Compl. ¶ 37, *Ramirez v. Cintas Corp.*, No. 06-CV-12311 (E.D. Mich. May 22, 2006), ECF No. 1-1. *See also* Pls.' Fourth Am. Compl. ¶ 21, *Ramirez v. Cintas Corp.*, No. 06-CV-12311 (E.D. Mich. May 22, 2006), ECF No. 1-2 ("Cintas regularly moves upper level managers from one . . . facility to another, and often from one state to another . . . in part to ensure that a uniform Cintas culture operates consistently. . . ."). Like the proposed amended complaint here, the *Cintas* plaintiffs also alleged that a specific, company-mandated hiring system was used company-wide, 717 F.3d at 480, and hiring decisions were based both on objective and subjective factors, including prior work experience. *Id.* Managers at various levels of that company, not simply "lower-level" managers, made individual hiring decisions. *Id.* ("managers" screen applicants, "invite qualified applicants to visit a Cintas location" and "[m]anagement then confers with everyone involved in the interview process"). Evaluating this decision-making scheme, the Sixth Circuit affirmed a finding that the commonality requirement had not been met under *Wal-Mart* because the women in the putative class had applied for positions "at many places, over a long time, under a largely subjective hiring system" guided by central corporate policies. *Id.* at 489.

Likewise, in *Ladik v. Wal-Mart Stores, Inc.*, 13-CV-123, 2013 U.S. Dist. LEXIS 77154, at *3 (W.D. Wis. May 24, 2013), another regional spin-off of the failed nationwide *Wal-Mart* class action, the court denied class certification because it found the plaintiffs

had not satisfied the commonality requirement as elaborated in *Wal-Mart*. The plaintiffs' challenges there in part were directed to decisions made by "upper-level" Wal-Mart managerial employees. *Id.* at *6-7 ("Regional vice presidents select co-managers, subject to approval by the divisional senior vice president."). Nonetheless, the district court did not direct certification of a class based on decisions made by "upper-level" supervisors.

And notably, on remand from this Court, the *Wal-Mart* plaintiffs in California similarly argued that "'top' level managers . . . exercised a strong influence over the rest [of the managers]." *Dukes*, 2013 WL 3993000, at *1, 6. Their claims on remand specifically challenged discretionary decisions that had been made by regional and district managers. *Id.* But, as explained above, the district court denied certification. Other district court decisions are in accord. *See Forte v. Wal-Mart Stores, Inc.*, No. 07-CV-155, 2012 U.S. Dist. LEXIS 97435, at *6 (S.D. Tex. July 13, 2012) ("individual inquiries, paired with discretion given to regional and district managers in the handling of the agreements between Plaintiffs and Defendant, negate a finding of commonality").

Absent review, the Fourth Circuit alone will limit *Wal-Mart* to cases where only "lower-level employees" are alleged to have made discriminatory employment decisions. Going forward, no complaint filed in that circuit (if not others) will fail to allege that "higher level" managers participate in some fashion in the discretionary decision-making that is being attacked. Given the numerous employment class actions presently pending in federal courts across the country, the Court confronts here an issue of wide importance. This Court previously has exercised its discretion to

grant *certiorari* in similar circumstances. *See, e.g., Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (noting *certiorari* was granted to resolve "apparent conflict" between First Circuit and "the Fifth Circuit's reasoning in a similar case.").

II. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE DIVISION AMONGST THE CIRCUITS REGARDING THE SCOPE OF PENDENT APPELLATE JURISDICTION

The Fourth Circuit created its novel and errant interpretation of *Wal-Mart* by assuming jurisdiction over an issue—the discretionary denial of leave to amend—that was neither appealed nor briefed by the parties. In this case, the court's one-paragraph, unanimous affirmance of the class certification order subject to appeal under Rule 23(f) morphed into something quite different: a 32-page evaluation of a concededly separate, discretionary, interlocutory and otherwise unappealable order denying leave to amend a complaint.[2] As the majority put it, "we focus our review in this appeal on the district court's denial of leave to amend the complaint." App. 10a. This exercise of jurisdiction was inconsistent with *Swint* and with the majority of conflicting appellate decisions applying "pendent appellate jurisdiction" principles. The Court should review the Fourth Circuit's decision to address a doctrine that has become a malleable instrument used to justify review of interlocutory orders. Indeed, in the nineteen years that have passed

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[2] Circuit precedent regarding appeal of such an order is clear: "denial of a motion to amend a complaint is not a final order, nor is it an appealable interlocutory or collateral order." *Bridges v. Dep't of Md. State Police*, 441 F.3d 197, 206 (4th Cir. 2006).

since this Court first discussed the possible contours of pendent appellate jurisdiction in *Swint*, 514 U.S. at 35, the circuit courts have tended to "drift away from the statutory instructions Congress has given to control the timing of appellate proceedings," *id.* at 45, thereby threatening this Court's plenary authority to decide "whether and when prejudgment orders should be immediately appealable." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 (2009).

Here, in its reach to "clarify" *Wal-Mart*, the Fourth Circuit aligned itself with a minority of courts that favor an expansive, far-reaching construction of pendent appellate jurisdiction. Although appellate judges are understandably inclined to "find appealability" "where the merits of the dispute may attract the[ir] deep interest," *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 440 (1985), this is not a cost-free exercise. Not only does it usurp Congress's constitutional authority to determine appellate jurisdiction, but it "can cause harm [by] . . . mak[ing] it more difficult for trial judges to do their basic job—supervising trial proceedings" resulting in "delay," additional costs, "diminishing coherence," "less developed [appellate] records" and "unnecessary" appeals. *Johnson v. Jones*, 515 U.S. 304, 309 (1995) (some punctuation altered).

This Court confronted pendent appellate jurisdiction earlier this term in *Madigan v. Levin*, 134 S. Ct. 2 (2013) (No. 12-872). There, the Seventh Circuit's use of the doctrine raised serious questions about its jurisdiction to reach the question upon which the Court had granted *certiorari*. *See* Brief of Law Professors as *Amici Curiae* in Support of Respondent at 5-15, *Madigan v. Levin*, 134 S. Ct. 2 (2013) (No. 12-872). Following a lengthy discussion of the doctrine at

oral argument, Transcript of Oral Argument at 3-9, *id.*, this Court dismissed the writ as improvidently granted.

Although *Madigan* did not provide an opportunity to address pendent appellate jurisdiction, *Madigan*—**and now this case**—illustrate the need for this Court to clarify it. Otherwise, the courts of appeals are left to do what they have largely done for the last nineteen years: incant the phrase "pendent appellate jurisdiction" to decide a nonfinal, unappealable ruling that garners their attention or interest. Put simply, because pendent appellate jurisdiction arises only on appeal and is subject to construction only by the appellate court considering that appeal, the circuit courts are institutionally ill-equipped to delineate the parameters of the doctrine.

Case-by-case resolution in the courts of appeals demonstrates this failing. Despite referencing the doctrine in nearly 500 cases,[3] the circuits have failed to approach a consensus since this Court decided *Swint*, resulting in deep and persisting divisions in the circuits. This Court has a particular responsibility to bring clarity and uniformity to the scope of appellate power because Congress has designated this Court's rulemaking authority, not "expansion by court decision," as the way to "define or refine when . . . an interlocutory order is appealable[.]" *Swint*, 514 U.S. at 48.

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[3] Because courts do not always use the phrase "pendent appellate jurisdiction," as was the case in *Madigan*, this figure likely understates how often the doctrine comes into play. *Cf.* Stephen Vladeck, *Pendent Appellate Bootstrapping*, 16 Green Bag 2d 199, 202 (2013) (referring to a "dramatic (if largely unnoticed) expansion of the collateral order doctrine in recent years").

A. The Circuits Are Irreconcilably Divided On The Proper Exercise Of Pendent Appellate Jurisdiction

In *Swint*, the Court chose not to decide whether it is "proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable." *Id.* at 51. Although reserving the question of the doctrine's propriety, the Court's brief discussion gave rise to a "test" for pendent appellate jurisdiction the federal courts of appeals have since used. This two-prong test asks whether a pendent decision is "inextricably intertwined with" or "necessary to ensure meaningful review of" an appealable decision." Although the circuit courts agree on the words that frame the test, they disagree on nearly everything else.

The courts of appeals are deeply divided regarding the meaning of the "inextricably intertwined" prong. The First, Second, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have adopted a strict interpretation, with many of them following the Tenth Circuit's analysis in *Moore v. City of Wynnewood*. "As we read *Swint*," that court explained, "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." 57 F.3d 924, 930 (10th Cir. 1995); *see also Shannon v. Koehler*, 616 F.3d 855, 866 (8th Cir. 2010) (quoting the *Moore* test); *Lopez v. Massachusetts*, 588 F.3d 69, 82 (1st Cir. 2009) (same); *Brennan v. Twp. of Northville*, 78 F.3d 1152, 1157-58 (6th Cir. 1996) (same). Other circuits apply the same restrictive test using different

nomenclature. *See Abelesz v. Erste Grp. Bank AG*, 695 F.3d 655, 660-61 (7th Cir. 2012) (holding that "closely related" issues do not justify the exercise of pendent appellate jurisdiction; rather, for issues to be "inextricably intertwined," they must be the "same single issue" or "head and tail of the same coin") (citations omitted); *Myers v. Hertz Corp.*, 624 F.3d 537, 553-54 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 368 (2011) (holding that issues not "inextricably intertwined" when "resolution of the non-appealable order would require . . . an inquiry that is distinct from and broader than the inquiry required to resolve solely the issue over which we properly have appellate jurisdiction.") (citation and internal quotation marks omitted); *see also Poulos v. Caesar's World, Inc.*, 379 F.3d 654, 669 (9th Cir. 2004) ("Two issues are not 'inextricably intertwined' if we must apply different legal standards to each issue.").

A minority of circuits take a significantly broader view of the "inextricably intertwined" prong. The Third, Eleventh, and District of Columbia Circuits have held it is met where there is an overlap of law *or fact*, even when the appealable issue does not *necessarily* resolve the pendent issue. *See McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1357 (11th Cir. 2007) (issues "inextricably intertwined" if they "overlap[], in significant part"); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 594 (3d Cir. 2004) ("sufficient overlap of facts . . . warrant[s] plenary review" of both appealable and nonappealable issues) (emphasis omitted); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997) (holding that "pendent appellate jurisdiction is *not limited* to circumstances where claims are 'so closely related' that review of the former is necessary to, or will dispose of, review of the latter")

(emphasis added)). This approach conflicts sharply with the majority position. *See, e.g., Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 758 (2d Cir. 1998) (rejecting *Jungquist* because it "would reserve to the courts of appeals a large measure of discretion" and contravene *Swint*'s holding that "affording the appellate courts such discretion would undermine the statutory scheme governing interlocutory review").

Before *Swint*, the Fourth Circuit viewed its "pendent appellate jurisdiction" broadly, permitting review of nonappealable decisions that "are reasonably related [to the appealable order] when that review will advance the litigation or avoid further appeals." *O'Bar v. Pinion*, 953 F.2d 74, 80 (4th Cir. 1991). Post-*Swint*, the court has articulated a more narrow meaning of "inextricably intertwined," but has not uniformly abandoned its broader, more malleable reading of the doctrine. *Compare Rux v. Republic of Sudan*, 461 F.3d 461, 475-76 (4th Cir. 2006) (refusing to use the doctrine because the appealable issue did not "necessarily resolve" the pendent issue), *with S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 327 n.1 (4th Cir. 2008) (citing *Rux* but also appearing to allow review of "substantially related" issues).[4]

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[4] Some other circuits are similarly conflicted. *Compare Lamar Adver. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 372 (2d Cir. 2004) (Sotomayor, J.) (issues not inextricably intertwined "where review of the unappealable issue is 'not necessary for review of' the appealed issue (citation omitted)), *with Freeman v. Complex Computing Co., Inc.*, 119 F.3d 1044, 1050 (2d Cir. 1997) ("substantial factual overlap" found sufficient). These intracircuit splits provide an additional justification for review—the scope of an interlocutory appeal should not depend on which line of circuit precedent an appellate panel chooses to follow. *See Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) ("Because

Here, although citing precedent more in line with a narrow view of the "inextricably intertwined" test, the majority departed dramatically from it. The court decided the class certification decision under review unanimously and without considering *any* of the allegations of the proposed amended complaint or the application of *Wal-Mart* to it. The review of the appealable class certification issue did not even relate to—much less "necessarily resolve"—whether the district court abused its discretion in denying leave to amend. To the contrary, the existence of "prejudice" had nothing to do with the court's determination concerning commonality under Rule 23(a). Thus, the majority's finding that the "district court's determinations as to prejudice are clearly erroneous," (App. 22a), plainly represents an "inquiry that is distinct from and 'broader' than the inquiry required to resolve solely the issue over which [the court] properly ha[s] appellate jurisdiction." *Myers*, 624 F.3d at 553-54 (citation omitted).

Circuit precedent concerning the "necessary to ensure meaningful review" prong of *Swint* is even more muddled. Most courts have either applied this prong in conclusory fashion or conflated it with the "inextricably intertwined" prong. *See, e.g., Palcko*, 372 F.3d at 595 (nonappealable issue was "so closely intertwined" with appealable issue that pendent appellate jurisdiction was "necessary to ensure meaningful review of the District Court's order in its entirety"); *Rein*, 162 F.3d at 758 (characterizing the two prongs as "essentially the same thing"). Here, the majority held that an issue is "necessary to ensure meaningful review . . . where review of

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of this intracircuit conflict, we made a limited grant of certiorari."); *Maggio v. Zeitz*, 333 U.S. 56 (1948).

the nonappealable issue is necessary to ensure meaningful review of the appealable one," underscoring the meaningless, and often circular, approach used by many circuits in applying the second prong. App. 9a. The majority illustrates the problems inherent in relying on such an ill-defined test in stating that "the proposed amended complaint includes specific company-wide policies that allegedly cause a disparate impact—policies not specified in the original complaint that would ensure meaningful review of the class certification decision." App. 9a. Yet the court never relied upon policies alleged in the new complaint to decide that the class allegations in the original complaint—the subject of the appealable ruling—did not satisfy the requirements of Rule 23. Those "new policies" were *irrelevant* to that decision, not necessary for its "meaningful review."

Only the Ninth Circuit has expressly established a distinct, substantive approach to the second part of the *Swint* test, restricting it to issues that "implicate the very power of the district court used to issue the rulings then under consideration." *Melendres v. Arpaio*, 695 F.3d 990, 997 (9th Cir. 2012) (internal quotation marks and citation omitted). In *Melendres*, the issue of plaintiffs' standing was "necessary to ensure meaningful review" of the injunction because the district court could not have entered the injunction if plaintiffs lacked standing. *Id.* Limiting its review to issues that necessarily underlie the appealable issue, the Ninth Circuit has reviewed issues such as standing, jurisdiction, and venue under this prong of the *Swint* test. *See, e.g.*, *Hendricks v. Bank of Am., N.A.*, 408 F.3d 1127, 1134-35 (9th Cir. 2005) (personal jurisdiction and venue); *Meredith v. Oregon*, 321 F.3d 807, 816 (9th Cir. 2003) (subject matter jurisdiction and *Younger* abstention). Although not explicitly

adopting the Ninth Circuit's approach, other circuits also have concluded that questions going to the authority of a district court to issue an appealable order are "necessary to ensure meaningful review" of the appealable order. *See, e.g., Merritt v. Shuttle, Inc.*, 187 F.3d 263, 269 (2d Cir. 1999) (antecedent issue of subject matter jurisdiction "necessary to ensure meaningful review" of order denying qualified immunity because it "goes to the very power of the district court to issue the rulings now under consideration"); *In Re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220, 230 n.5 (3d Cir. 2002) (personal jurisdiction).

B. Pendent Appellate Jurisdiction Must Be Narrowly Construed On Statutory, Jurisprudential, And Policy Grounds

The Court should grant certiorari to resolve this division among the circuits and endorse the narrow construction of pendent appellate jurisdiction mandated by the Court's jurisprudence on the scope of interlocutory appeals and the policies underlying the final judgment rule. The final judgment rule—the "dominant rule in federal appellate practice," *Flanagan v. United States*, 465 U.S. 259, 270 (1984) (citation omitted)—confines appellate jurisdiction to review of "final decisions of the district courts." 28 U.S.C. § 1291. As the Court held in *Swint*, the improper use of pendent appellate jurisdiction undermines this rule. *See* 514 U.S. at 49-50 ("[A] rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets"). In each instance, therefore, pendent appellate jurisdiction should be limited to the circumstances this Court recognized in *Swint*—when it is "essential

to the resolution of properly appealed collateral [issues]." 514 U.S. at 51 (citing Riyaz A. Kanji, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 Yale L.J. 511, 524-30 (1990)).

This narrow construction properly balances the policy concerns implicated by judicially-created exceptions to the final judgment rule. First, it respects Congressional authority. Congress designated the rulemaking process, "'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk Indus*., 558 U.S. at 113 (quoting *Swint*, 514 U.S. at 48)); *see also McCarter v. Ret. Plan For Dist. Managers of Am. Family Ins. Grp*., 540 F.3d 649, 653 (7th Cir. 2008) ("*Swint* pointedly remarked that these rules must be adopted after public notice and comment, and approval by the Judicial Conference and the Supreme Court . . . the subject has been taken out of the hands of the intermediate appellate courts in the federal system."). Under the narrow, majority approach to the "inextricably intertwined" prong, a court of appeals that recognizes the legal impact of a decision with respect to a pendent issue does not substantively expand its jurisdiction. Rather, it simply implements a holding that falls within the scope of its authorized jurisdiction. Similarly, when it confines the "necessary to ensure meaningful review" test to those issues that "implicate the very power of the district court," *Melendres*, 695 F.3d at 997, the court does not impermissibly expand its appellate jurisdiction: its review is confined to antecedent issues that necessarily underlie the district court's authority.

Second, this narrow construction is consistent with precedent. The phrase "inextricably intertwined"

occurs in other contexts prior to *Swint*, and it was always used consistently with the narrow test adopted by the majority of the circuits and advocated here. *See, e.g., United States v. Mersky*, 361 U.S. 431, 438 (1960) (issues "inextricably intertwined" when "the construction of one necessarily involves the construction of the other"); *cf. Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409-10 (1988) (issues not "inextricably intertwined" just because they involved "precisely the same set of facts"). In fact, the Court indirectly approved the Eighth Circuit's narrow interpretation of the "inextricably intertwined" prong not long after *Swint*. *Clinton v. Jones*, 520 U.S. 681, 707 n.41 (1997); *Jones v. Clinton*, 72 F.3d 1354, 1357 n.4 (8th Cir. 1996), *aff'd*, 520 U.S. 681 (1997) (issues inextricably intertwined when "answering one question of law resolves them all").

Similarly, the narrow approach to the "necessary to ensure meaningful review" prong returns the doctrine to its roots. This "antecedence" approach draws on a line of pre-*Swint* cases that authorized appellate courts to hear otherwise nonappealable issues in a collateral appeal from a preliminary injunction under 28 U.S.C. § 1292(a)(1). *Kanji*, 100 Yale L.J. at 526 (arguing that pendent appellate jurisdiction involves a "principle of antecedence" based on *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940). Indeed, the phrases "pendent appellate jurisdiction" and "necessary to ensure meaningful review" both originate in this line of cases.[5]

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[5] The first case to use the phrase "pendent appellate jurisdiction," *Brick v. CPC Int'l. Inc.*, 547 F.2d 185, 187 n.5 (2d Cir. 1976), relies on a case that cites *Deckert* as supporting "the doctrine of pendent jurisdiction at the appellate level." *Gen. Motors Corp. v. City of New York*, 501 F.2d 639, 648 (2d Cir. 1974).

Third, this narrow construction addresses the Court's longstanding concern regarding interlocutory review of factual issues by limiting pendent appellate jurisdiction to questions of law: whether resolution of an appealable legal issue necessarily resolves a nonappealable legal issue and whether the district court had authority to enter the appealable order. By contrast, under the minority approach, the doctrine's applicability depends on the degree of factual overlap, thereby requiring a court to determine whether the overlap between the pendent issue and the appealable issue is "substantial" or "sufficient." Such inquiries improperly require appellate courts to review facts on an incomplete record, often at an early stage of the case. For this reason, the Court has barred appellate courts from engaging in fact-based inquiries in the collateral order context and expressed doubt that appellate courts can rely on pendent jurisdiction to reach factual questions. *See Johnson*, 515 U.S. at 316 (interlocutory review of factual issues, where appellate judges "enjoy no comparative expertise," "can consume inordinate amounts of appellate time" and is "less likely to bring important error-correcting benefits . . . than where purely legal matters are at issue"); *Chappel v. Montgomery Cnty. Fire Prot. Dist. No. 1*, 131 F.3d 564, 572 (6th Cir. 1997) (post-*Johnson*, it is "an open question whether this court will . . . exercise pendent appellate jurisdiction over related questions of fact").

Fourth, establishing such limits on pendent appellate jurisdiction respects the proper roles of

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The first case to use the phrase "necessary to ensure meaningful review" also relies on interpretations of *Deckert* and related cases. *See Hoxworth v. Blinder, Robinson & Co., Inc*., 903 F.2d 186, 209 (3d Cir. 1990).

district and appellate courts. To do otherwise "thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—that of maintaining the appropriate relationship between the respective courts"—a "goal" that "is very much worth preserving." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (internal quotation marks omitted). *See also Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (noting that interlocutory appeals can "undermine the independence of the district judge").

Fifth, clear guidance to the circuits is necessary. As the Court held in *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010), jurisdictional rules should "remain as simple as possible." Given that determinations of appellate jurisdiction are essentially unreviewable, a bright-line rule is especially important. *See, e.g., Cunningham v. Hamilton Cnty., Ohio*, 527 U.S. 198, 206 (1999) ("[W]e have consistently eschewed a case-by-case approach to deciding whether an order is sufficiently collateral."); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) ("[T]he issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs . . ."). Not only would clarity reduce opportunities for error, it would also minimize the risk that judges would manipulate the doctrine to take or avoid specific issues, a recent source of controversy. *See, e.g., Kovacic v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 724 F.3d 687, 712-13 (6th Cir. 2013) (Sutton, J., dissenting); *Romo v. Largen*, 723 F.3d 670, 682-86 (6th Cir. 2013) (Sutton, J., concurring in part and in the judgment) (discussing the doctrine as mechanism to avoid limits on appellate review of factual issues, a way in which "ingenuity is a key that invariably unlocks the gateway to appellate jurisdiction").

C. This Case Squarely Presents The Issue Of Pendent Appellate Jurisdiction, Including The Questions That Divide The Circuits

This case provides an ideal vehicle for the Court to resolve the circuits' confusion and address the concerns raised by the expansive exercise of pendent appellate jurisdiction. The district court denied plaintiffs' motion to amend because "allowing plaintiffs to amend the complaint would prejudice defendant," among other reasons. App. 71a. The majority's review of this prejudice finding involved a wholly independent inquiry into the status of discovery, the procedural history of the case, the burden on the parties, and other issues committed to the sound discretion of the district court. This inquiry has nothing to do with class certification; it is indisputably "distinct from and broader than the inquiry required to resolve solely the issue over which [the court] properly ha[d] appellate jurisdiction." *Myers*, 624 F.3d at 553-54 (citation and internal quotation marks omitted). Moreover, the panel majority *affirmed* the ruling dismissing the class allegations in the initial complaint, which was the only decision subject to interlocutory appeal, without reference to the denial of the motion to amend. Thus, this case squarely implicates the divisions regarding both of the two *Swint* test. The district court's decision not to allow an amended complaint based on a finding of prejudice was independent of the "class certification" decision, not "inextricably intertwined" with it. Nor did the district court's ruling on the amended complaint implicate the court's authority to rule on the class certification decision—it was not "necessary to ensure meaningful review" of the appealable issue. Accordingly, whether the district

court abused its discretion regarding the proposed amendment was outside the court's appellate jurisdiction, and the majority should never have reached it—let alone reversed for clear error.

The majority's handling of the amended complaint also illustrates the dangers this Court has recognized in limiting the scope of interlocutory appeals. First, the panel's conclusion that the district court committed clear error in finding prejudice was, in fact, based on a misreading of the record. *Compare* App. 24a (characterizing the case as "many steps removed from trial") *with* Order at 2, *Scott v. Family Dollar Stores, Inc.*, No. 08-CV-540 (W.D.N.C. Nov. 1, 2011), ECF No. 121 ("[T]he remaining life of this 2008 case is now to be measured in months, not years. . . . this case will be tried . . . by early 2012."). Illustrative of the difficulties presented by unauthorized interlocutory review, the November 1, 2011 order was not made part of the record on appeal because it was not relevant to the class certification issue. Errors of this type are precisely why this Court has cautioned appellate courts against reviewing factual issues on an interlocutory basis. *Johnson*, 515 U.S. at 316.

Second, the exercise of pendent appellate jurisdiction disturbs the proper roles of district and appellate courts. Here, the majority used the doctrine to reach beyond its Rule 23(f) jurisdiction and review the district court's discretionary denial of Plaintiffs' motion to amend. Pendent appellate jurisdiction provided the only basis for the majority to usurp the district court's role and conduct its own independent nondeferential review of an incomplete record. The outcome of this review—the reversal of the district court for clear error and abuse of discretion—led the

dissent to conclude that "[t]he abuse was committed on appeal." App. 59a. (Wilkinson, J., dissenting).

Third, the panel's adoption of an expansive interpretation of each of the *Swint* prongs, despite its nominal citation of precedent narrowly construing them, illustrates the need for this Court to establish bright-line rules for application of this doctrine. Absent such guidance, appellate panels that wish to reach a particularly interesting or important issue can find jurisdiction simply by reciting the language of the tests—as the panel did here—and avoid the jurisdictional constraints the tests were intended to convey, resulting in the "case-by-case" determination of appealability that this Court has repeatedly rejected. *Richardson-Merrell*, 472 U.S. at 439.

Finally, this case demonstrates how the unconstrained exercise of pendent appellate jurisdiction is unfair to litigants and damages the integrity of the judicial process. Plaintiffs did not include their proposed amended complaint in their Rule 23(f) petition, did not seek leave to appeal under 28 U.S.C. § 1292(b), and declared at argument that "the case 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/oral-argument/listen-to-oral-arguments. Understandably, the parties did not brief whether the district court abused its discretion in denying the motion to amend. Despite this, the majority chose to exercise jurisdiction over the issue and held that "the district court's determinations as to prejudice are clearly erroneous." App. 22a.[6] When an appellate court takes it upon itself

[6] The majority also ignored bad faith as grounds for denying the motion to amend. As Judge Wilkinson noted, the district court "recognized that the system was being gamed and moved to

to review an interlocutory order without briefing or the benefit of argument, it is not only unfair to the litigants, it can result in error because the issue is not properly framed for review. *See Rux*, 461 F.3d at 476 ("We would issue an advisory opinion were we to pass 'judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.'" (quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961))).

In sum, principles of pendent appellate jurisdiction should honor the final judgment rule and maintain the proper balance of authority between district and appellate courts. Without express guidance as to its contours, courts will continue "to succumb to enticing suggestions to abandon the deeply-held distaste for piecemeal litigation in every instance of temptation" and "find appealability in those close cases where the merits of the dispute may attract the deep interest of the court," leading "to a lack of principled adjudication or perhaps the ultimate devitalization of the finality rule as enacted by Congress." *Richardson-Merrell*, 472 U.S. at 440 (citation omitted).

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instill respect for the integrity of the process over which it had the duty to preside." App. 59a. The majority ignored this question of bad faith entirely—perhaps because, like the prejudice issue, it was never briefed because neither party appears to have considered it within the scope of the appeal.

CONCLUSION

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

Respectfully submitted,

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