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

MOTION OF THE RETAIL LITIGATION CENTER, INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Retail Litigation Center, Inc. ("RLC") moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for respondents has withheld consent.

The RLC is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The questions presented in this case are of great importance to the retail industry, which stands on the front line of class-action litigation in virtually every jurisdiction nationwide. Major retailers are subject to a steady barrage of cases that rely upon novel and sometimes dubious theories seeking to achieve class-action status. The reason that plaintiffs and their lawyers are so eager to obtain class certification is simple: Class actions almost always settle before they are subject to adversarial testing in the courtroom. Modern class actions are large, ex-

pensive, and highly unpredictable—so much so that rational corporate decisionmakers can seldom afford to do anything but settle. Class certification, simply put, is the whole ballgame in many cases. And the ground rules governing interlocutory appeals of class-certification decisions under Fed. R. Civ. P. 23(f)—including the extent to which the courts of appeals may expand such jurisdiction by invoking the judge-made doctrine of pendent appellate jurisdiction—are thus of great practical significance.

In this case, the Fourth Circuit's decision to exercise pendent appellate jurisdiction has added to the general confusion in the lower courts about the scope and legitimacy of that doctrine, which is invoked in a variety of interlocutory appellate settings. It has also increased the uncertainty faced by *all* litigants in the important, high-stakes setting of a Rule 23(f) appeal. Had the Fourth Circuit declined to exercise pendent appellate jurisdiction in this case, it would never have reviewed the trial court's denial of leave to amend the complaint or reached its distorted and idiosyncratic reading of *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). This Court should grant review of the jurisdictional issue to bring clarity and predictability to this important area of the law.

Equally important to RLC's members is that courts faithfully apply the stringent requirements governing class certification set forth in Fed. R. Civ. P. 23, including the "commonality" requirement analyzed by this Court in *Wal-Mart*. The decision below, however, severely undermines the protections recognized in *Wal-Mart*, conflicts with that decision, and creates a circuit conflict that, if left uncorrected,

will encourage forum-shopping and impose serious and unwarranted burdens on retailers and other class-action defendants. RLC and its members thus have a vital interest in both of the issues presented by the petition.

RLC's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

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BRIEF OF THE RETAIL LITIGATION CENTER, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case offers the Court a valuable opportunity to resolve significant conflicts and uncertainty in the lower federal courts concerning the doctrine of pendent appellate jurisdiction and the meaning of this Court's decision in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). The legal standards governing class certification, and the proper scope of pendent appellate jurisdiction (invoked, as here, in appeals taken from class certification rulings under Fed. R. Civ. P. 23(f)), are critically important aspects of modern class-action litigation in the federal courts.

The stakes involved in the proper resolution of these issues can hardly be exaggerated. Improper class certification—whether ordered by the trial

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[1] Pursuant to S. Ct. Rule 37.2, the Retail Litigation Center, Inc. ("RLC") states that all parties' counsel received timely notice of the intent to file this brief. Pursuant to S. Ct. Rule 37.6, *amicus* states that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

court or upheld on appeal—exerts hydraulic settlement pressure on defendants. Once a class is certified, a claim that individually might represent only a modest risk—and thus could be fully adjudicated or otherwise appropriately resolved—can instantly be transformed into a potentially enormous judgment. Faced with those circumstances, defendants almost invariably will settle. See, *e.g.*, Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, And CAFA*, 106 COLUM. L. REV. 1872, 1875 (2006) ("Whatever their partisan stakes in a given litigation, all sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis (and not otherwise resolved by dispositive motion) result in settlements."). Flawed appellate or trial-court decisions regarding class certification thus give plaintiffs unfair leverage to extract an outsized settlement from even moderately risk-averse defendants. Indeed, corporate decisionmakers must often settle even meritless cases because they simply cannot "stake their companies on the outcome of a single jury trial." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

In the decision below, the Fourth Circuit has significantly raised the uncertainty and risks faced by class-action defendants. Both its broad ruling concerning pendent appellate jurisdiction, and its flawed interpretation of *Wal-Mart* (which the court never would have reached but for its jurisdictional ruling), are deserving of further review in this Court.

I. The Court should take this valuable opportunity to address and clarify the scope of the doctrine of pendent appellate jurisdiction, which arises in a

variety of interlocutory appellate settings and was recently the source of substantial confusion in *Madigan* v. *Levin*, No. 12-872. As Petitioner Family Dollar Stores, Inc. ("Family Dollar") demonstrates (Pet. 21-26), the circuits are sharply divided over the scope of such jurisdiction. And much of that confusion is ultimately traceable to divergent interpretations of this Court's decisions in *Swint* v. *Chambers County Comm'n*, 514 U.S. 35 (1995), *Hartman* v. *Moore*, 547 U.S. 250 (2006), *Wilkie* v. *Robbins*, 551 U.S. 537 (2007), and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). Only this Court can settle these disagreements.

There are several additional reasons why review is warranted. Jurisdictional rules should be clear and simple, especially in the context of appeals from class certification decisions under Rule 23(f). Pendent appellate jurisdiction is a judge-made doctrine. This Court has a special responsibility to police and clarify judge-made jurisdictional doctrines as well as the overall framework of rules governing federal appeals. *Amicus* RLC does not take a position here on what the scope of pendent appellate jurisdiction should be in this case—but given the extraordinary stakes involved in class-certification decisions, the ground rules for appellate review ought to be clear. Moreover, this case is an excellent vehicle for addressing this important and recurring jurisdictional issue because (a) the issue was squarely presented below in a published opinion, in contrast to many opinions and orders involving Rule 23(f); (b) the Fourth Circuit's broad jurisdictional ruling was also a necessary predicate to its idiosyncratic interpretation of *Wal-Mart* as applied to the amended complaint; and (c) this case would

allow the Court to choose between the various competing "tests" for pendent appellate jurisdiction.

II. The Fourth Circuit's indefensible reading of *Wal-Mart* independently warrants plenary review (if not summary reversal). As Family Dollar shows (Pet. 10-18), the panel majority's analysis is not only incompatible with (and allows easy circumvention of) *Wal-Mart* but also creates conflict and confusion in the lower courts over the "commonality" requirement of Fed. R. Civ. P. 23(a)(2). Such uncertainty is especially harmful in the context of nationwide class actions such as this, which create powerful incentives for defendants to settle even unmeritorious claims. Finally, in the absence of this Court's intervention, the Fourth Circuit will become a magnet for nationwide class-action lawsuits such as this. Indeed, class actions are particularly vulnerable to such naked forum-shopping by virtue of liberal venue provisions. Plaintiffs' class counsel doubtless will seek to exploit the watered-down test for "commonality" adopted by the majority below.

ARGUMENT

I. The Court Should Clarify The Doctrine Of Pendent Appellate Jurisdiction And Thereby Reduce Uncertainty In The Critically Important Setting Of Rule 23(f) Appeals

Petitioner Family Dollar demonstrates not only that the circuits are sharply divided over the scope of pendent appellate jurisdiction (Pet. 21-26), but also that this case is an ideal vehicle for clarifying that doctrine (Pet. 31-34). For those reasons and others set forth below, the Court should take this

opportunity to clarify this important doctrine and bring greater consistency and coherence to the rules that govern appellate jurisdiction in the courts of appeals.

The issue could hardly be more timely. Last year, this Court granted review in *Madigan* v. *Levin*, No. 12-872, to decide whether "state and local government employees may avoid the Federal Age Discrimination in Employment Act's comprehensive remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983." No. 12-872 Pet. i. The Seventh Circuit had decided that issue based on a broad exercise of pendent appellate jurisdiction in a case involving an interlocutory appeal under the "collateral order" doctrine from a decision denying summary judgment based on the defense of qualified immunity. After the propriety of the Seventh Circuit's assertion of jurisdiction was disputed by an *amicus* brief (but not by either of the parties), see No. 12-872 Brief of Law Professors as *Amici Curiae* in Support of Respondent, at 5-15 (Aug. 5, 2013), and was the subject of sustained questioning at oral argument, see No. 12-872 Oral Arg. Tr. 3-12 (Oct. 7, 2013), the Court dismissed the petition as improvidently granted. See 134 S. Ct. 2 (order) (Oct. 15, 2013). *Madigan* is symptomatic of the doctrinal confusion in the lower courts and the corresponding need for guidance from this Court concerning the contours of pendent appellate jurisdiction.

A. Jurisdictional Rules Should Be Clear, And The Need For Such Clarity Is Especially Great In The Context Of Rule 23(f) Appeals

As the Court has repeatedly recognized, jurisdictional rules should be simple and clear. See, *e.g.*, *Hertz Corp.* v. *Friend*, 559 U.S. 77, 80 (2010) (emphasizing "the need for judicial administration of a jurisdictional statute to remain as simple as possible"); *id.* at 94 ("Simple jurisdictional rules…promote greater predictability."); *Grupo Dataflux* v. *Atlas Global Grp., L.P.*, 541 U.S. 567, 582 (2004) ("Uncertainty regarding the question of jurisdiction is particularly undesirable . . . ."). Clear and simple jurisdictional rules discourage wasteful ancillary litigation, reduce litigation costs, and enhance predictability for all litigants. In contrast, as this Court has explained:

> Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but [jurisdictional issues] . . . . Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake.

Hertz Corp., 559 U.S. at 94.

Not surprisingly, this Court has taken special interest in and responsibility for clarifying the ground rules relating to appellate jurisdiction in the federal courts. Thus, in *Swint* v. *Chambers County Comm'n*, 514 U.S. 35 (1995), which like *Madigan* came to the court of appeals on an interlocutory

appeal under the "collateral order" doctrine from a qualified-immunity ruling, this Court granted review and instructed the parties to file supplemental briefs addressing the propriety of pendent *party* appellate jurisdiction. *Id.* at 41. Although the Court held that "there is no 'pendent party' appellate jurisdiction of the kind the Eleventh Circuit purported to exercise," it declined to "definitively or preemptively settle here whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable." *Id.* at 50-51. The Court noted, however, that various circuits had "endorsed the doctrine of pendent appellate jurisdiction," but recognized that "they have expressed varying views about when such jurisdiction is properly exercised." *Id.* at 44 n.2 (citing cases).

Similarly, in *Hohn* v. *United States*, 524 U.S. 236 (1998), this Court granted review to decide a jurisdictional issue that *neither party had raised* in order to *resolve lingering uncertainty created by its prior decisions*, see, *e.g.*, *Davis* v. *Jacobs*, 454 U.S. 911 (1981) (opinions respecting denial of certiorari), and, since both parties agreed that jurisdiction existed, appointed counsel to brief and argue the contrary position. See 524 U.S. at 236, 240-41; see also 522 U.S. 944 (order) (Oct. 31, 1997). The issue in *Hohn* was whether this Court's jurisdiction, under 28 U.S.C. § 1254(1), over all "cases" that are "in" the courts of appeals, extended to a case in which the court of appeals had denied a certificate of appealability. This Court took pains to address the confusion over this jurisdictional issue even though the Solicitor General had confessed error and, like the petitioner, had urged the Court simply to vacate

the decision below and remand. The Court's action reflects the importance—and logical primacy—of jurisdictional issues. In *Hohn*, the Court held that its jurisdiction under the broadly worded Section 1254 was indeed proper.

The need for clear and simple jurisdictional rules is especially important in the context of Rule 23(f) appeals, given the enormous stakes associated with the underlying class-certification decisions. See Fed. R. Civ. P. 23(f) (court of appeals "may permit an appeal from an *order granting or denying class-action certification*") (emphasis added). In this case, the Fourth Circuit stated that "[a]ppellate jurisdiction pursuant to Rule 23(f)'s interlocutory provision lies *only* where the subject matter of the appeal is the grant or denial of class certification," Pet. App. 8a (emphasis added),[2] but it went on to review the trial court's separate denial of a motion for leave to amend the complaint, invoking *sua*

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[2] Accord *Brown* v. *Nucor Corp.*, 576 F.3d 149, 155 n.8 (4th Cir. 2009) (concluding that appellate jurisdiction under Rule 23(f) did not extend to a discovery order). Other circuits have taken a similarly limited view of the jurisdiction conferred by Rule 23(f). See, *e.g.*, *Vega* v. *T-Mobile USA., Inc.*, 564 F.3d 1256, 1264 n.5 (11th Cir. 2009) (declining to address denial of summary judgment because under Rule 23(f) "our jurisdiction is limited to review of the district court's class certification decision"); *McKowan Lowe & Co.* v. *Jasmine, Ltd.*, 295 F.3d 380, 389-90 (3d Cir. 2002) (same for trial court's dismissal of individual claims; rejecting argument that this ruling was reviewable under Rule 23(f) because it occurred "in the same order in which [the district court] denied class certification"). See also 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1802.2, at 310 (3d ed. 2005) ("Appeal under this new rule is limited to consideration of the certification decision.").

sponte as the basis for doing so "our pendent appellate jurisdiction jurisprudence." Pet. App. 8a. The Fourth Circuit took this action even though respondents had *never even requested* interlocutory review of that ruling (much less raised the issue of pendent appellate jurisdiction) in their Rule 23(f) petition. See Pet. App. 7a-8a (respondents "did not petition us directly for interlocutory review of the decision denying leave to amend the complaint").[3]

Amicus RLC does not take a position here on either the validity or the proper scope of pendent appellate jurisdiction in this particular setting. Our point, instead, is that the uncertainty over the scope of that doctrine—which, as petitioner shows, is invoked in a variety of appellate contexts—creates unique burdens for both the parties and the courts in the setting of Rule 23(f) appeals. To the extent the Fourth Circuit's approach prevails, it will encourage litigants to do what the respondents did here: obtain permission to take a Rule 23(f) appeal on a narrow basis and then, once such permission is granted,

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[3] Indeed, the procedural history of this case well illustrates the great degree of uncertainty that use of pendent appellate jurisdiction can interject into an appeal under Rule 23(f) (and thus into the *ex ante* decisionmaking of litigants as to whether or not to seek such an appeal in the first place). In their Rule 23(f) petition, respondents never asked the Fourth Circuit to review the trial court's ruling on their motion to amend and indeed mentioned that ruling only in passing in a footnote in recounting the factual background and procedural history of the case. See Pet. C.A. Br. 12-13, 16; see also Plaintiffs' Petition for Permission to Appeal Pursuant to F.R. Civ. P. 23(f), No. 12-118, *Scott* v. *Family Dollar Stores, Inc.*, at 4 n.1 (filed Jan. 27, 2012); *id.* at 4 (making no mention of the ruling on the motion to amend in setting forth the questions presented).

expand the issues on appeal in an effort to persuade the court of appeals to reach additional rulings. And to the extent courts of appeals take divergent approaches to pendent appellate jurisdiction, it will increase the uncertainty all parties face in appeals under Rule 23(f). Regardless of what the proper approach should be, it is important that this Court provide greater clarity and predictability to ensure that the Rule 23(f) appeal process operates with some modicum of smoothness and *ex ante* predictability.

It is no answer to say, as respondents did below, that Rule 23(f) *itself* confers "'unfettered discretion'" on the appellate courts to decide which petitions for interlocutory review to accept. Resp. C.A. Reply Br. 19 (citing and quoting Fed. R. Civ. P. 23(f) committee note). The broad discretion to choose which of the petitions falling within the jurisdiction granted by Rule 23(f) to accept does not also confer the ability to add to the jurisdictional authority conferred by the rule. If anything, the "unfettered discretion" given to the courts of appeals with regard to which petitions to grant makes it all the more important for the Court to establish clear rules concerning the permissible exercise of appellate jurisdiction in this setting. Litigants plainly need greater certainty and predictability.

B. Only This Court Can Authoritatively Clarify The Doctrine Of Pendent Appellate Jurisdiction

As Family Dollar shows (Pet. 21-26), the circuits are sharply divided over the contours of the doctrine of pendent appellate jurisdiction. Although virtually every circuit has recognized this form of appellate

jurisdiction, the circuits are in disarray over when such jurisdiction is properly exercised. As in all such situations, only this Court can resolve these disagreements. This Court's intervention is not only necessary but especially appropriate here for several additional reasons.

First, the confusion traces back in large measure to this Court's decision in *Swint* v. *Chambers County Comm'n*, 514 U.S. 35 (1995). As explained above, the Court there *rejected* a form of "pendent *party* appellate jurisdiction" that had been adopted by the Eleventh Circuit in a collateral-order-doctrine appeal involving qualified immunity. *Id.* at 51 (emphasis added); see also *id.* at 48 n.6. At the same time, however, the Court declined to decide the broader question of the legitimacy of pendent appellate jurisdiction. See *id.* at 50-51 ("We need not definitively or preemptively settle here whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable."). The Court also observed, in a footnote, that various circuits had "endorsed the doctrine of pendent appellate jurisdiction, although they have expressed varying views about when such jurisdiction is properly exercised." *Id.* at 44 n.2.

Notably, the *Swint* Court explained why it had no occasion to address the broader issue of the legitimacy of pendent appellate jurisdiction:

> The parties do not contend that the District Court's decision to deny the Chambers County Commission's summary judgment motion was [1] *inextricably intertwined* with that court's decision

> to deny the individual defendants' qualified immunity motions, or that review by the former decision was [2] *necessary to ensure meaningful review* of the latter. Cf. Kanji, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 YALE L.J. 511, 530 (1990) ("Only where essential to the resolution of properly appealed collateral orders should courts extend their *Cohen* jurisdiction to rulings that would not otherwise qualify for expedited consideration."). Nor could the parties so argue. The individual defendants' qualified immunity turns on whether they violated clearly established federal law; the county commission's liability turns on the allocation of law enforcement power in Alabama.

Ibid. (emphasis added). Significantly, the highlighted language, which merely restated the standards that had been articulated by several of the circuit decisions cited in the earlier footnote (*id.* at 44 n.2), has been treated by the lower courts since *Swint* as endorsing or adopting those standards. Yet this Court only said that it need not address the validity of pendent appellate jurisdiction because the County Commission could not satisfy *any* of the tests applied by the lower courts for such jurisdiction.

This Court should correct this misimpression and clarify what it meant in *Swint*. Beyond that, the disagreement in the lower courts centers on what precisely is meant by the "inextricably intertwined" and "necessary to ensure meaningful review" language in *Swint*, which again the circuits have treated as "standards" (or even a two-pronged test) supposedly endorsed by this Court. See Pet. 21-26.

Only this Court can clarify whether it meant to adopt those standards in *Swint* and, if so, what those standards actually mean.

Second, pendent appellate jurisdiction is a *judge-made* doctrine. As such, it can be developed or clarified only by the courts (unless, of course, Congress elects, either explicitly or implicitly, to nullify or foreclose it by statute). By its very nature, the issue of pendent appellate jurisdiction also arises for the first time in the courts of appeals, which decide the issue without the benefit of a ruling on the question by the trial court. Compare 28 U.S.C. § 1292(b) (requiring permission from the trial court for certain interlocutory appeals). And, of course, this Court is the only forum in which disagreements in the lower courts over the validity and contours of this judge-made doctrine can be finally resolved.

Third, as the Court noted in *Swint*, the judge-made "discretionary" doctrine of pendent appellate jurisdiction can coexist uneasily with—and in some situations can even subvert—the framework of rules created by Congress to govern the appellate jurisdiction of the federal courts. See 514 U.S. at 45-47 (discussing Congress's authorization of appeals as of right from "final decisions" under 28 U.S.C. § 1291, interlocutory appeals for certain categories of rulings under 28 U.S.C. § 1292(a), and permissive interlocutory appeals if approved by both the trial and appellate court under 28 U.S.C. § 1292(b)); *id.* at 48 (discussing Congress's enactment of 28 U.S.C. § 1292(e), which authorizes this Court, through the rulemaking process, to expand the list of orders appealable on an interlocutory basis). More specifically, this Court explained in *Swint* that "the

'liberal' or 'flexible' approach" to pendent appellate jurisdiction urged by the County Commission would "severely undermine[]" and "circumvent" Section 1292(b)'s requirement that the trial court also grant approval of a permissive interlocutory appeal. 514 U.S. at 47 & n.5. The same potential exists here, because Section 1292(b) is frequently invoked by class-action litigants seeking to take interlocutory appeals of issues other than decisions on class certification. Moreover, in *Swint*, this Court also took note of the potential tension between the expansion of appellate jurisdiction by courts on an *ad hoc* basis and the rulemaking mechanism specified by Congress in 28 U.S.C. § 1292(e).[4] Of course, Rule 23(f) was the product of just such a rulemaking proceeding under Section 1292(e)—making it all the more appropriate that this Court grant review to clarify the validity and scope of adding onto the appellate jurisdiction created by Rule 23(f) by resorting to the judge-created doctrine of pendent appellate jurisdiction.

Fourth, a triad of this Court's recent decisions has compounded the confusion in the lower courts over the legitimacy and scope of the doctrine of pendent

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[4] See *Swint*, 514 U.S. at 48 (noting that, under 28 U.S.C. § 1292(e), "Congress's designation of *the rulemaking process* as the way to define or refine . . . when an interlocutory order is appealable warrants the Judiciary's full respect") (emphasis added); see also *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100, 114 (2009) (in declining to conclude that disclosure orders adverse to the attorney-client privilege are appealable under the collateral-order doctrine, stating that "[a]ny further avenue for immediate appeal of such rulings should be furnished, if at all, through rulemaking, with the opportunity for full airing it provides").

appellate jurisdiction. See *Hartman* v. *Moore*, 547 U.S. 250 (2006); *Wilkie* v. *Robbins*, 551 U.S. 537 (2007); *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). All three cases involved *Bivens* actions and interlocutory appeals under the collateral-order doctrine from trial court decisions denying motions either to dismiss or for summary judgment based on qualified immunity. In *Levin* v. *Madigan*, 692 F.3d 607, 611, 622 (7th Cir. 2012), cert. granted, 133 S. Ct. 1600 (Mar. 18, 2013), cert. dismissed, 134 S. Ct. 2 (Oct. 15, 2013), the Seventh Circuit relied on language in *Hartman* and *Wilkie* in deciding to assert pendent appellate jurisdiction over an issue that was "irrelevant" to the qualified-immunity inquiry. As Professor Vladeck and other law professors explained in their *amicus* brief to this Court, the Seventh Circuit's jurisdictional ruling rested on a misreading of certain "inartful dicta" in *Hartman* and *Wilkie* as well as on a failure to grasp the key distinction between the court of appeals' pendent appellate jurisdiction and this Court's far broader jurisdiction under 28 U.S.C. § 1254(1). See No. 12-872 Brief of Law Professors as *Amici Curiae* in Support of Respondent, at 3-4, 11-13, 16-26 (Aug. 5, 2013); see also *Hohn*, 524 U.S. at 246-53 (discussing broad jurisdictional authority conferred on this Court under Section 1254(1)). If the Seventh Circuit can make that mistake, other courts of appeal are likely to do so as well.[5]

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[5] See also Stephen I. Vladeck, *Pendent Appellate Bootstrapping*, 16 GREEN BAG 2D 199, 202 (2013) (noting that "lower courts have begun to piggyback *other* legal questions going to the merits onto interlocutory immunity appeals" based on a broad reading of certain language in *Hartman*, *Wilkie*, and *Iqbal*).

Here again, only this Court can clarify the meaning of these three recent decisions—and their ramifications, if any, for the doctrine of pendent appellate jurisdiction. Given the complexity of the jurisdictional inquiry, including the key distinction (overlooked by the Seventh Circuit in *Madigan*) between the *court of appeal's* jurisdiction over an *interlocutory appeal* and *this Court's* sweeping jurisdiction over *all* "[c]ases in the court of appeals" whether "before or after rendition of judgment or decree" (28 U.S.C. § 1254(1)), clarification must come from this Court. The Court should take this opportunity to bring greater clarity, coherence, and order to the system of appellate review in the federal courts of appeals.

C. This Case Presents A Valuable Opportunity To Address The Jurisdictional Issue

As Family Dollar explains (Pet. 31-34), this case is a good vehicle for addressing the scope of pendent appellate jurisdiction because that issue is squarely presented. Indeed, it was the necessary basis for the controversial reading of *Wal-Mart* adopted by the Fourth Circuit majority below. Had the panel majority limited itself to the trial court's denial of class certification based on the original complaint, there would have been no need to decide whether *Wal-Mart* would preclude certification of the class under a proposed amended complaint that had not been permitted to be filed. Thus, the Fourth Circuit's assertion of pendent appellate jurisdiction was a crucial underpinning of the decision below concerning the meaning of *Wal-Mart*—a controversial ruling that elicited a long and

vehement dissent by Judge Wilkinson. See Pet. App. 26a-59a.

Nor is this all. Unlike in *Madigan*, where (as explained above) the Seventh Circuit had exercised pendent appellate jurisdiction over an issue that concededly was "unrelated" to qualified immunity, the ruling reviewed pursuant to the Fourth Circuit's exercise of pendent appellate jurisdiction here was *not* completely unrelated to the trial court's separate ruling on class certification. As the Fourth Circuit observed, the trial court's decision to deny leave to amend the complaint rested, albeit only in part, on a reading of *Wal-Mart* (at least as it applied to the amended complaint). But it also rested on a variety of other grounds that plainly were not "inextricably intertwined" with the class certification decision, including findings by the trial court that (1) allowing the amendment would cause prejudice to Family Dollar, (2) the "proposed amended complaint attempts to restate claims for individuals who stipulated to dismissal with prejudice" either of the Equal Pay Act claims or the entire case, (3) the proposed complaint sought monetary relief that was foreclosed by *Wal-Mart*, and (4) plaintiffs' claim that the amended complaint was based on new facts they had recently learned was false. See Pet. App. 70a-74a. As that list makes clear, the Fourth Circuit majority was simply wrong in concluding that resolution of the *Wal-Mart* issue "will necessarily resolve" the appeal from the denial of the motion to amend the complaint (and so was "inextricably intertwined" as that term is understood in the Fourth Circuit). Pet. App. 8a-9a.

In any event, the fact that there is *some* relationship between the *Wal-Mart* issues and the decision not to permit the amended complaint means that this is a good vehicle for defining the meaning of the "inextricably intertwined" standard as well as other standards deployed in this setting (including the "necessary to ensure meaningful review" standard). What is more, this case would also allow the Court to clarify whether there is a limiting principle that should or must be applied to the exercise of pendent appellate jurisdiction *even where such jurisdiction is appropriate*. For example, assuming that it was appropriate for the Fourth Circuit to exercise some form of pendent appellate jurisdiction, should the appellate court have merely addressed the related *Wal-Mart* issue that was implicated in the ruling on the motion for leave to amend, and then simply remanded to the trial court to determine in the first instance whether that made any difference in its ruling on the motion to amend? Such a minimalist approach to pendent appellate jurisdiction would have obviated the need for the Fourth Circuit to review the unrelated factual findings concerning prejudice and other matters that were also the basis for the ruling on the motion to amend.

Finally, this case should be granted because it involves an appeal taken under Rule 23(f) and therefore offers the opportunity to more clearly define the scope of such appeals, once granted. Rule 23(f) appeals are often resolved by unpublished decisions or by unpublished orders simply denying leave to appeal. See Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Court of Appeals*, 246 F.R.D. 277, 284 (2008) (concluding based on empirical analysis of dockets

that only 10% of decisions accepting or denying Rule 23(f) petitions resulted in a published or electronically available opinion; 90% were "reflected only in docket entries, and, even then, the court's reasoning may not be provided in the docket sheet"). In this case, there is a lengthy published opinion by a divided panel that squarely addresses the issue of pendent appellate jurisdiction. As explained above, there is a pressing need for greater certainty and predictability concerning not only the scope of Rule 23(f) appeals but also the standards governing class certification. A grant of review would permit this Court to offer that much-needed clarification on both fronts.

II. The Fourth Circuit's Cramped And Indefensible Reading Of *Wal-Mart* Warrants Further Review Or Summary Reversal

"[C]lass actions are without doubt the most controversial subject in the civil process today." Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1377 (2000). Much of the controversy centers on certification; indeed, as explained above (at pages 1-2), class certification can transform a comparatively modest case into one with millions of claimants and billions of dollars in claimed damages. This Court's decision in *Wal-Mart* brought substantial clarity—and greater predictability—to this important area of law by insisting on a stringent approach, among other things, to the inquiry into "commonality" under Rule 23(a)(2).

As Family Dollar demonstrates (Pet. 10-15), however, the panel majority's analysis of the class

certification issue rests on a highly distorted reading of *Wal-Mart* that is fundamentally flawed. The lower court's analysis of *Wal-Mart* is also squarely at odds with the decisions of other circuit and district courts. Pet. 15-18. Given the real-world stakes of class certification, those are reasons enough for this Court to summarily reverse (or at a minimum grant plenary review of the first question presented). But there are still more reasons why this Court should not permit the decision below to stand.

A. If Left Uncorrected, The Decision Below Will Create Uncertainty And Expose Class-Action Defendants To A Higher Risk Of Burdensome And Unwieldy Litigation And Coercive Settlements

As explained above (at pages 1-2), the combination of thousands of claims into a single lawsuit—subject to a single jury verdict—transforms many otherwise ordinary lawsuits into bet-the-company litigation. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). The resulting enormous pressure to settle is present even where the merits of plaintiffs' claims are weak. Judge Friendly aptly labeled "settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" *Ibid.* (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).

Against this backdrop, judicial decisions that increase the likelihood that large, sprawling, and unwieldy nationwide classes will be certified under Rule 23 are a significant problem for national retailers. According to the Fourth Circuit panel majority, this Court's decision in *Wal-Mart*—holding

that just such a sprawling class action against a nationwide retailer could not be certified—"is limited to the exercise of discretion by lower-level employees, as opposed to upper-level, top-management personnel." Pet. App. 14a. As Judge Wilkinson correctly noted, that nonsensical and highly malleable distinction effectively "drain[s]" *Wal-Mart* "of meaning," Pet. App. 26a, thereby reintroducing into the class-certification process much of the harmful uncertainty that *Wal-Mart* eliminated. See also Pet. 13-14 (explaining why the Fourth Circuit's test is unworkable). The majority's refusal to adhere faithfully to *Wal-Mart* also "unload[s] on the district court the prospect of a massive, nationwide class action whose administrability would in all likelihood prove impossible." Pet. App. 26a (Wilkinson, J., dissenting). To correct this error below and restore greater predictability to class-action law, further review by this Court is needed. And, of course, only this Court can authoritatively say what *Wal-Mart* means and resolve the conflict in the lower courts created by the decision below.

B. The Decision Below Will Also Encourage Forum-Shopping, Especially In Cases Involving Nationwide Retailers Such As Many Of RLC's Members

The fact that the Fourth Circuit apparently stands alone in adopting (in direct conflict with other federal circuit and district courts) a cramped and nonsensical reading of *Wal-Mart* is not a reason to either deny or defer further review. On the contrary, the Fourth Circuit's 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. Such an outcome, of course, would further undermine the significant protections for class-action defendants recognized by this Court in *Wal-Mart*. The Court should act now to prevent such blatant forum-shopping.

The venue rules governing federal class actions provide substantial leeway to plaintiffs' counsel who wish to secure venue in a particular jurisdiction. For starters, the general venue provision (28 U.S.C. § 1391(b)) provides, among other things, for venue in any "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." *Id.* § 1391(b)(2). The venue provision applicable to Title VII claims contains similar language. See 42 U.S.C. § 2000e-5(f)(3). Significantly, courts look to the claims of the *named or representative plaintiffs* in conducting the venue analysis in class actions. See, *e.g.*, *Quarles* v. *General Investment & Development Co.*, 260 F. Supp. 2d 1, 7-14 (D.D.C. 2003); 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 6:36 (5th ed. 2013).

Plaintiffs' counsel, of course, selects the named representatives to include in the class-action complaint. Where, as here, a class action targets a national retailer or other nationwide business with a presence in virtually every jurisdiction and includes claims such as for alleged employment discrimination on a nationwide basis, it is possible for plaintiffs' counsel to ensure that venue will lie in the Fourth Circuit. This Court should take action now to ensure that the *Wal-Mart* decision is faithfully implemented on a uniform basis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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