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

## RESPONDENTS' BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED

1. Was the court of appeals correct that an amendment to a putative class-action complaint would not be futile where the amended complaint alleged that company-wide policies and decisions made at corporate headquarters caused the harm for which the putative class sought relief?
2. Did the court of appeals abuse its discretion in exercising pendent appellate jurisdiction where it found this Court's criteria satisfied?

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## INTRODUCTION

A group of female store managers (respondents here) sued their employer, petitioner Family Dollar Stores, Inc., for employment and pay discrimination. After this Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the plaintiffs sought to amend their complaint to expand on their allegations in their initial complaint regarding Family Dollar's centralized decisionmaking. The district court simultaneously dismissed the class allegations in the original complaint and denied leave to amend primarily on the basis of futility. The court of appeals, applying *Wal-Mart*, agreed that the class could not be certified based on the original complaint but held that the district court erred in denying leave to amend because plaintiffs' proposed amended complaint alleged specific company-wide policies and decisions made at corporate headquarters that resulted in discrimination.

Regarding the application of *Wal-Mart*, the decision below is too narrow and preliminary to merit review. Contrary to Family Dollar's suggestion, the Fourth Circuit did not hold that *Wal-Mart* may be disregarded in cases involving discretionary decisions by high-level corporate officials; the court merely recognized that this case might be distinguishable from the facts of *Wal-Mart* under the analysis of *Wal-Mart* itself. And the Fourth Circuit did not address whether the class would ultimately be certified; it held only that plaintiffs should be afforded leave to amend their complaint. Thus the question Family Dollar poses — whether certification is justified based on the amended complaint — is not yet presented, and this Court should not reach out to

address it in the abstract. Additionally, because the court of appeals rested its decision not only on plaintiffs' allegations of decisions at corporate headquarters (the only non-jurisdictional aspect of the decision below that Family Dollar challenges) but also on plaintiffs' allegations of a company-wide policy, and the petition does not challenge the latter basis for the holding, this Court's review of the petition's first question presented would have no effect on the decision below. Family Dollar's attempt to show a circuit split fails because the decision that it claims conflicts with the decision below does not even discuss, much less take a position on, the issue of class certification based on discretionary decisions made at corporate headquarters.

On the jurisdictional question, Family Dollar strains to present the circuits as divided. In fact, the appellate decisions are consistent, applying the same standard and differing only in the verbiage used. Moreover, Family Dollar's portrayal of federal appellate jurisprudence is inaccurate: the petition cites a statement by the Third Circuit out of context, uses scraps of dicta from Second and Fourth Circuit cases to try to manufacture intra-circuit conflicts, and paints an incomplete picture of the jurisprudence of the D.C. and Eleventh Circuits. Family Dollar suggests that the exercise of jurisdiction over the leave-to-amend question was unfair because that issue was not briefed, but that claim is demonstrably wrong: the opening, response, and reply briefs below all addressed the question. Ultimately, Family Dollar agrees with the standard that the Fourth Circuit applied; Family Dollar claims only that the Fourth Circuit misapplied the standard in this case. That is not a basis for certiorari.

## STATEMENT OF THE CASE

Respondents, approximately fifty current and former store managers of the retail chain Family Dollar (petitioner here), filed a putative class action against Family Dollar, alleging sex discrimination and equal pay violations under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Equal Pay Act, 29 U.S.C. § 206(d). Pet. App. 2a-3a. The original complaint alleged both that Family Dollar "engages in centralized control of compensation for store managers at the corporate level of its operations," and that its "pay decisions and/or system includes subjectivity and gender stereotyping that causes disparate impact to compensation paid to female store managers." *Id.* at 3a.

After several unsuccessful motions by Family Dollar seeking, in turn, partial judgment on the pleadings, summary judgment, and a stay of discovery, and an unsuccessful attempt at mediation, Family Dollar moved "to dismiss and/or strike the class allegations" shortly following this Court's decision in *Wal-Mart Stores, Inc. v. Dukes*. *Id.* at 4a-5a. Plaintiffs opposed dismissal and also sought leave to amend in order to flesh out their allegations regarding corporate policies and practices. *Id.* at 5a-6a. Plaintiffs' proposed amended complaint alleged that several such policies or practices result in disparate impact and/or disparate treatment of female employees. As described in the decision below:

> First, Appellants assert the existence of a mandatory salary range for Store Managers set annually by the corporate headquarters, which locks in prior disparities between male and female Store Managers' compensation.

> Only corporate Vice Presidents can grant exceptions above the salary range, and they grant these exceptions disproportionally in favor of men. Second, Appellants allege the existence of an annual pay raise percentage set by corporate headquarters that corresponds to performance ratings. Regional Managers and Divisional Vice Presidents grant exceptions above the pay raise percentage, and "significantly greater" exceptions are granted to men. Third, Appellants claim a "built-in headwinds" corporate-imposed compensation criteria for Store Managers that takes [sic] into account "prior experience, prior pay, quartile rankings and other specific criteria which have a disparate impact." Finally, Appellants allege the existence of a dual-system of compensation structured to pay less to persons *promoted* to store managers than to persons *hired* (from outside the company) to the same position, where "women are disproportionately promoted to Store Manager [positions,] while men are disproportionately hired into such jobs."

*Id.* at 6a (quoting the proposed amended complaint; alterations and emphasis in the decision below).

In a single order, the district court granted Family Dollar's motion to "dismiss the putative class action claims" (without dismissing the individual claims) and denied plaintiffs leave to amend. *Id.* at 74a. The court quickly dispatched with the class claims in the original complaint, noting that plaintiffs themselves had at an earlier point in the litigation characterized their allegations as "virtually

identical" to those that this Court ultimately held insufficient to justify class certification in *Wal-Mart*. *Id.* at 67a-68a. The district court denied leave to amend primarily because *Wal-Mart* "simply foreclosed" certification on the original complaint and because "the proposed amended complaint appears to be an attempt to recast plaintiffs' class claims simply to avoid dismissal under [*Wal-Mart*]." *Id.* at 71a; *see also id.* at 72a-74a (explaining why amendment would be "futile" in light of *Wal-Mart*, and concluding that "despite plaintiffs' attempt to avoid [*Wal-Mart*], the proposed amended complaint suffers from the same fatal defects as the original complaint"). The district court also opined that permitting amendment would be prejudicial to Family Dollar, because of the amount of time since the filing of the original complaint and because the court thought that the complaint presented a new theory. *Id.* at 71a-72a.

The Fourth Circuit granted permission to appeal under Rule 23(f), and held that although the class could not be certified based on the original complaint, the district court erred in denying leave to amend. *Id.* at 7a, 18a, 24a. The court of appeals first noted that the district court's decision in which it "dismiss[ed] . . . the class allegations" was the "functional equivalent" of a denial of class certification, so a Rule 23(f) appeal could proceed. *Id.* at 7a n.2. The court of appeals then held that it had pendent appellate jurisdiction to review the denial of leave to amend along with the dismissal of the class claims both because the issues were "inextricably intertwined" and because review of the denial of leave was "necessary to ensure meaningful review" of the certification decision. *Id.* at 8a-9a.

On the merits, the court agreed with the district court that certification based on the original complaint was inappropriate under *Wal-Mart* "because the complaint fails to allege that the 'subjectivity and stereotyping'" regarding female employees' pay "were exercised in a common way with some common direction." *Id.* at 18a. But the court held that the district court had misread *Wal-Mart* and the proposed amended complaint in denying leave to amend based on futility. *Id.* at 18a-21a.

First, the court of appeals explained (in a portion of the opinion that the petition never mentions) that the district court had overlooked the amended complaint's allegations that discrimination resulted from "uniform corporate policies," including the policy of basing store managers' salaries on past salaries (thereby perpetuating the effects of past discrimination), and the policy of paying laterally-hired store managers (a group alleged to be predominately male) more than those who obtained the position by promotion (a group alleged to be predominately female). *Id.* at 20a. Because *Wal-Mart* preserved the availability of certification for employment discrimination cases in which the employer used a biased procedure or discriminatory policy, *see id.* at 12a, the court of appeals held that amendment would not be futile. *Id.* at 20a.

Second, the court of appeals noted that the amended complaint alleged a practice under which exceptions to corporate salary policies — exceptions alleged predominately to favor men — are made by "high-level corporate decision-makers with authority over a broad segment of Family Dollar's employees, not on an individual store level as in *Wal-Mart*." *Id.*

at 20a-21a. For class certification purposes, discretionary decisions made at a high level might be different from those made at a low level, the court of appeals posited, "because typically, in exercising discretion, lower-level employees do not set policies for the entire company; whereas, when high-level personnel exercise discretion, resulting decisions affect a much larger group," and so "discretionary authority exercised by high-level corporate decision-makers . . . is more likely to satisfy the commonality requirement[.]" *Id.* at 14a. In so concluding, the court noted that it was following the decisions of the other courts of appeals interpreting *Wal-Mart*. *Id.* at 14a-15a (citing *Tabor v. Hilti, Inc.*, 703 F.3d 1206 (10th Cir. 2013); *Bolden v. Walsh Construction Co.*, 688 F.3d 893 (7th Cir. 2012); and *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir.), *cert. denied*, 133 S. Ct. 338 (U.S. 2012)).

Importantly, the Fourth Circuit did not make a judgment about whether class certification on the amended complaint would be appropriate. *Id.* at 20a. The court held only that the amendment of the complaint would not be futile. *Id.* at 21a.

Finally, the court disagreed with the district court's assertion that Family Dollar would be prejudiced by amendment of the complaint. The court of appeals found that the delays of which Family Dollar complained were mainly of its own making, and that the amended complaint did not allege a new theory; rather, it expanded on a theory that was included but insufficiently pled in the original complaint. *Id.* at 21a-24a.

Judge Wilkinson dissented, disagreeing with the majority's interpretation of *Wal-Mart* but not

questioning the scope of the court's pendent appellate jurisdiction. *Id.* at 26a-59a.

The panel denied rehearing, and the court denied rehearing en banc, with no judge requesting a vote on the petition. *Id.* at 75a-78a.

## REASONS FOR DENYING THE WRIT

### I. This Case Does Not Present An Issue Concerning The Application Of *Wal-Mart* That Merits Review.

Regarding its first question presented, Family Dollar's petition misstates the holding of the decision below, ignores an independent basis justifying the decision, and attempts to manufacture a circuit split by plucking allegations from pleadings rather than identifying a conflict between decisions rendered by different circuits. A discussion of these three fundamental flaws in Family Dollar's argument also shows how the narrow decision below is consistent with *Wal-Mart*.

#### A. Review Is Inappropriate Because Of The Preliminary Posture Of The Case And The Narrowness Of The Holding.

Contrary to the petition's suggestion, the Fourth Circuit held neither that "*Wal-Mart* may be disregarded" under certain circumstances, Pet. 11, nor that proof of discretionary decisions by high-level as opposed to low-level managers necessarily suffices "as the basis for a nationwide class action." *Id.* at i-ii. The court's holding was narrower in two crucial respects that make certiorari inappropriate.

First, the court did not hold that certification would ultimately be appropriate — it held only that plaintiffs should be granted leave to amend their

complaint. Pet. App. at 20a. ("We do not now rule on the sufficiency of the allegations of the proposed amended complaint concerning the company-wide policies or on whether certification of the putative class will ultimately be warranted."). It is possible that on remand the evidence will not support certification. For this Court to weigh in now would be premature, given the preliminary nature of the decision below, the incomplete state of the record, and the possibility that the question Family Dollar asks might never arise. In short, the first question Family Dollar asks the Court to review is not yet presented — and may never be presented — by this case.

Second, the Fourth Circuit's application of *Wal-Mart* was much narrower than Family Dollar suggests. Plucking one quotation from the decision — "*Wal-Mart* is limited to the exercise of discretion by lower-level employees, as opposed to upper-level, top-management personnel," Pet. 11 (quoting Pet. App. 14a); *see also id.* at ii (same); *id.* at 6 (same) — Family Dollar asserts that the court of appeals has held the reasoning of this Court's decision in *Wal-Mart* may be "disregarded" whenever a putative class seeks relief based on decisions made at a high level within a corporate structure. *See id.* at 11.

The court of appeals held nothing of the kind. Rather, as the opinion makes clear, the court showed only how a potential distinction from the *facts* at issue in *Wal-Mart* — decisions made at corporate headquarters versus decisions made by local supervisors all across the country — *might* yield a different result on certification under the principles announced in *Wal-Mart* itself. *See* Pet. App. 13a ("*Wal-Mart* did not set out a per se rule against class

certification where subjective decision-making or discretion is alleged. Rather, where subjective discretion is involved, *Wal-Mart* directs courts to examine whether 'all managers [ ] exercise discretion in a common way with [ ] some common direction.'"); *id.* at 14a (explaining, immediately following the "*Wal-Mart* is limited" statement that the petition repeatedly quotes, that "discretionary authority exercised by high-level corporate decision-makers . . . is *more likely* to satisfy the commonality requirement," because "typically, in exercising discretion, lower-level employees do not set policies for the entire company; whereas, when high-level personnel exercise discretion, resulting decisions affect a much larger group" (emphasis added)). This narrow holding is consistent with *Wal-Mart*. Considering whether facts different from those before this Court in *Wal-Mart* might satisfy *Wal-Mart*'s standards does not denigrate those standards, but rather appropriately gives the parties a chance to meet them without prejudging the result of that inquiry.

Given the fact-bound, narrow, and preliminary nature of the decision below, review is unwarranted.

### B. The Decision Below Rests On An Independent Ground That The Petition Does Not Challenge.

The Fourth Circuit held that the denial of leave to amend the complaint on grounds of futility was erroneous for two independent reasons. One reason was that discretionary decisions made "at corporate headquarters," *id.* at 21a, might be indicative of the exercise of discretion "in a common way" with "some common direction," *Wal-Mart*, 131 S. Ct. at 2555, and

thus factually distinguishable from the circumstances in *Wal-Mart*. The other reason for the decision below was that the proposed amended complaint alleged that two specific corporate policies had a disparate impact on the salaries of female store managers. *Id.* at 19a-20a. Family Dollar assails the court's first rationale without challenging — or even mentioning — the second.

That second holding is, like the first, consistent with *Wal-Mart*, in which this Court noted that either a biased procedure or a discriminatory policy could establish commonality. *See* 131 S. Ct. at 2553. The proposed amended complaint's allegations of a company-wide pay policy that perpetuates prior discrimination by considering prior pay rates and of a company-wide policy that pays less to a predominately female group of store managers (promotees from within) than a predominately male group of store managers (lateral hires) fit comfortably within one or both of these categories.

Family Dollar's failure to mention the corporate-policy rationale for the decision below not only yields a misleading portrait of the decision but also, more importantly, obscures the fact that a grant of certiorari would be an abstract exercise producing an advisory opinion with no concrete effect on this case. A decision from the Court on the question whether discretionary decisions made at corporate headquarters might, on the right facts, satisfy the principles announced in *Wal-Mart* would leave undisturbed the Fourth Circuit's holding that leave to amend is not futile here because commonality may be shown based on the two corporate policies alleged.

Because review of the first question presented by the petition would not change the result below (reversal of the denial of leave to amend the complaint), certiorari is inappropriate.

### C. The Petition Does Not Show A Circuit Split Regarding The Proper Application Of *Wal-Mart*.

The only circuit-level decision that Family Dollar claims conflicts with the decision below is *Davis v. Cintas Corp.*, 717 F.3d 476 (6th Cir. 2013). The claimed conflict is illusory.

Unlike the decision below, *Davis* did not address the distinction between decisions made at corporate headquarters and decisions made by low-level supervisors. Rather, *Davis* held that a district court had not abused its discretion in denying certification where "'the hiring process . . . is conducted by *thousands of Cintas managers at hundreds of Cintas facilities*'" and "'[h]iring decisions are made for a diverse range of reasons and depend on widely differing circumstances *at each facility*.'" *Id.* at 487 (quoting the district court's opinion) (respondents' emphasis). Specifically, the Sixth Circuit held that the district court had not abused its discretion in finding unpersuasive the plaintiffs' expert testimony about a "common white male business culture" and in concluding that plaintiffs' anecdotal evidence of discriminatory comments was too individualized to justify class treatment. *Id.* at 489.

Family Dollar reaches back into the pleadings in *Davis* in an attempt to argue that the case was about high-level decisionmaking, *see* Pet. 16, but that is not how the Sixth Circuit characterized or decided the case. Nothing can be read into the Sixth Circuit's

silence about the allegations in the complaint regarding high-level decisionmaking: the question posed to (and answered by) the court was whether the district court had abused its discretion in denying certification based on *evidence*, not whether the complaint's *allegations* were necessarily insufficient to support certification. Family Dollar's quotations from the *Davis* opinion prove no more than that the case was about the decisions of "managers," *id.*, not that the case addressed the distinction between low-level and high-level decisionmakers. Thus, Family Dollar has failed to show that the circuits are in conflict.

Family Dollar's reliance on similarly context-specific rulings of district courts, *see id.* at 16-17, does nothing to suggest the existence of any circuit-court conflict warranting this Court's review. *See, e.g., Dukes v. Wal-Mart Stores, Inc.*, 964 F. Supp. 2d 1115, 1123-24 (N.D. Cal. 2013) (denying certification where, among other things, "Regional Personnel Managers were not always or even regularly involved in the details of each individual decision," and where "as Plaintiffs themselves recognize, they have not amassed sufficient anecdotal evidence of bias and stereotyped thinking among management to establish significant proof of a general policy of discrimination within any management group, 'top' or otherwise"), *cited at* Pet. 17.

* * *

Because of the preliminary posture of the case, the independent basis for the decision below not challenged before this Court, and the absence of a circuit split, certiorari on the first question presented should be denied.

## II. The Circuits Are Not Divided Regarding Pendent Appellate Jurisdiction, And The Decision Below Applied The Correct Standard.

Like its characterization of the lower court's leave-to-amend holding, Family Dollar's portrayal of the courts of appeals as deeply divided over the question of pendent appellate jurisdiction is misleading. Stripped of hyperbole, dicta, and distortions of the case law, the petition succeeds only in showing minor differences in the terminology employed by various circuits to describe a consistent rule. Moreover, Family Dollar agrees that the rule applied in the decision below was the correct one. Family Dollar's claim that the doctrine was misapplied here is not a basis for certiorari.

### A. There Is No Circuit Split On Pendent Appellate Jurisdiction.

Contemporary pendent appellate jurisdiction analysis is guided by *Swint v. Chambers County Commission*, 514 U.S. 35 (1995). There, this Court rejected the proposition that an interlocutory appeal of a denial of qualified immunity to individual officers could confer "pendent party appellate jurisdiction" to review the denial of summary judgment to another defendant, a county commission. *Id.* at 37-38. Although the Court did not "definitively or preemptively settle . . . 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 discussed two criteria relevant to that inquiry: first, whether the question over which pendent jurisdiction

is sought "was inextricably intertwined with" another question properly before the appellate court, and second, whether "review of the former decision was necessary to ensure meaningful review of the latter." *Id.* at 51.

Family Dollar's attempt to divide up the circuits between a "majority position" reading *Swint* narrowly and a "minority of circuits" that take a more permissive view, *see* Pet. 21-26, is flawed in several respects. First, the courts of appeals themselves view their applications of the doctrine as consistent. For instance, although Family Dollar classifies the Sixth Circuit as holding the "majority" view, that court has characterized its "discretionary exercise of pendent appellate jurisdiction" as "consistent with that of other courts of appeals," and has cited not only courts that Family Dollar characterizes as espousing the "majority" view (the Second, Eighth, and Tenth Circuits) but also a court that Family Dollar classifies as supporting the supposed "minority" rule (the Eleventh Circuit). *Brennan v. Twp. of Northville*, 78 F.3d 1152, 1157 (6th Cir. 1996). Similarly, the Fourth Circuit has noted that its approach is consistent with that of "[t]he First through Eleventh Circuits." *Rux v. Republic of Sudan*, 461 F.3d 461, 475 (4th Cir. 2006).

The second weakness in Family Dollar's argument for a circuit split is that it is pitched at too high a level of generality for an inquiry that Family Dollar's own authorities have described as "discretionary," *Myers v. Hertz Corp.*, 624 F.3d 537, 553 (2d Cir. 2010); *Brennan*, 78 F.3d at 1157, and "extremely narrow and fact-specific," *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 669 (9th Cir. 2004). Family Dollar's ability to cite differently-

worded general descriptions of the standard proves nothing. What Family Dollar fails to show is that any court of appeals would come out differently on the same question of pendent appellate jurisdiction presented here: whether, when the propriety of a denial of class certification turns in part on whether the complaint could be amended to assert claims that might support certification, pendent appellate jurisdiction extends to the amendment ruling. Absent such a showing, all that Family Dollar has demonstrated is that different cases reach different results on different facts — a truism for any context-specific inquiry.

The third problem with Family Dollar's portrayal of the case law is its distortion of quotations and reliance on dicta. For instance, Family Dollar cites *Palcko v. Airborne Express, Inc.*, 372 F.3d 588 (3d Cir. 2004), as holding that, under the doctrine of pendent appellate jurisdiction, "'sufficient overlap of facts . . . warrant[s] plenary review.'" Pet. 22 (quoting *Palcko*, 372 F.3d at 594); *see also id.* (characterizing the Third Circuit, among others, as holding that the "inextricably intertwined" test is met "where there is an overlap of . . . *fact*"). But that is not what the Third Circuit said. The whole quotation is:

> Recognizing that the Supreme Court has endorsed, but also limited, the use of pendent appellate jurisdiction by Courts of Appeals, we concluded that the doctrine should be used sparingly, and only where there is sufficient overlap in the facts relevant to both the appealable and nonappealable issues to warrant *plenary* review.

*Palcko*, 372 F.3d at 594 (citations and internal quotation marks omitted). Three sentences later, the court concluded that the exercise of pendent appellate jurisdiction over a state-law claim was appropriate because "not only does sufficient overlap of facts exist to warrant plenary review," but also the state-law claim was "so closely intertwined with the [other claim before the court] that our taking of pendent appellate jurisdiction over the former is necessary to ensure meaningful review of the District Court's order in its entirety." *Id.* at 594-95. Thus, what the Third Circuit said was not that a "sufficient overlap of facts . . . warrant[s] plenary review" in and of itself, Pet. 22, but that it could exercise pendent appellate jurisdiction when "sufficient overlap of facts exist[s] to warrant plenary review," 372 F.3d at 594, *and* one of the *Swint* criteria is met.

Family Dollar also mischaracterizes the law in the Fourth Circuit. The rule to which the Fourth Circuit adheres, and which it applied in the decision below, is that pendent appellate jurisdiction "is appropriate where issues are (1) so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal or [(2)] resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue." *Rux*, 461 F.3d at 476 (citation and internal quotation marks omitted); *see, e.g.*, Pet. App. 8a-9a (applying *Rux*); *Ealy v. Pinkerton Gov't Servs., Inc.*, 514 F. App'x 299, 309 (4th Cir. 2013) (same); *Pena v. Porter*, 316 F. App'x 303, 309 (4th Cir. 2009) (same). Family Dollar tries to manufacture an intra-circuit conflict by citing a footnote stating that pendent appellate jurisdiction can apply to an issue "substantially related" to the appealable issue. Pet.

23 (quoting *South Carolina Wildlife Federation v. Limehouse*, 549 F.3d 324, 327 n.1 (4th Cir. 2008)). But that footnote was the purest of dicta. It was neither necessary nor even relevant to the resolution of the case, which addressed only two issues: (1) standing, an issue reviewable under courts' inherent jurisdiction to assess their own jurisdiction, 549 F.3d at 329-30, and (2) sovereign immunity, an issue over which appellate courts have jurisdiction under the collateral order doctrine, *id.* at 327 n.1, 330-34. Not surprisingly, no Fourth Circuit decision has ever cited the footnote on which Family Dollar relies. Not only is there no intra-circuit split, but the Fourth Circuit's rule (as laid out in *Rux*) is one that Family Dollar itself seems to endorse. *See* Pet. 23.

Family Dollar likewise tries to show intra-circuit conflict in the Second Circuit, *see id.* at 23 n.4, by pulling a quotation out of context from a 1997 opinion. Family Dollar cites *Freeman v. Complex Computing Co.*, 119 F.3d 1044, 1050 (2d Cir. 1997), for the proposition that "substantial factual overlap" sometimes suffices to justify pendent appellate jurisdiction in the Second Circuit. But that quotation is, again, dicta: *Freeman* was using language from *Kaluczky v. City of White Plains*, 57 F.3d 202, 207 (2d Cir. 1995), which was decided a few months after *Swint* and which quoted the "substantial factual overlap" language from a *pre-Swint* case, *San Filippo v. United States Trust Co.*, 737 F.2d 246, 255 (2d Cir. 1984). In terms of their *holdings*, neither *Freeman* nor *Kaluczky* conflicts with the other Second Circuit cases Family Dollar cites. In both *Freeman* and *Kaluczky*, the court exercised pendent jurisdiction over issues that were "inextricably intertwined," not just "substantial[ly] . . . overlap[ping]," with other

questions before the court. *See Freeman*, 119 F.3d at 1050; *Kaluczky*, 57 F.3d at 207.

The final difficulty with Family Dollar's circuit-split argument is its incomplete discussion of the jurisprudence of the D.C. and Eleventh Circuits. Family Dollar is correct that the D.C. Circuit has stated that "the availability of 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." *Jungquist v. Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997) (citation omitted). What Family Dollar neglects to mention is that the D.C. Circuit subsequently clarified that "despite using more expansive language, we have so far largely confined the doctrine to cases that come within one or the other of the *Swint* conditions, or that involve questions like personal jurisdiction or the statute of limitations — which we have described as logically antecedent or threshold issues." *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1134 (D.C. Cir. 2004) (footnotes, citation, and internal quotation marks omitted). Since that clarification, the circuit has not ventured beyond the *Swint* conditions in assessing pendent appellate jurisdiction. *See, e.g., Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 199-200 (D.C. Cir. 2004) (declining to exercise pendent jurisdiction where neither *Swint* condition satisfied).

As in its discussion of the D.C. Circuit's law, Family Dollar tries to generalize about the Eleventh Circuit's jurisprudence based on one sentence that is not characteristic of that court's views. The Eleventh Circuit did state in *McMahon v. Presidential*

*Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007), that the issue over which it was asserting pendent appellate jurisdiction "overlap[ped], in significant part, the order over which we have jurisdiction." *Id.* at 1357, *cited at* Pet. 22. But that court has subsequently clarified that "the critical inquiry is whether the appealable issue can be resolved without reaching the merits of the nonappealable issues." *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1179 (11th Cir. 2011). The Eleventh Circuit has never since cited the "overlaps, in significant part" language (or *McMahon*) to justify exercising pendent appellate jurisdiction.

### B. The Alleged Misapplication Of A Properly Stated Rule Of Law Does Not Warrant Certiorari.

Setting aside Family Dollar's failed attempt to show a circuit split, what is left of its argument on the second question presented is a disagreement with the result reached in a decision applying the correct standard. *See* Pet. 8a-9a (applying the Fourth Circuit's standard as set forth in *Rux*); Pet. 23 (praising the *Rux* standard as appropriately narrow). This circumstance amounts to a classic plea for error correction and is not a basis for certiorari. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

Moreover, there was no error here, because review of the denial of leave was necessary to ensure meaningful review of the certification decision. What made the district court's ruling "dismissing" the "class claims" in the original complaint a denial of class certification reviewable under Rule 23(f) was

that the court not only found the class allegations in the original complaint lacking but also went on to conclude that leave to amend would be futile. Had the district court not rejected both the amended complaint and the class allegations of the original complaint, it would not have conclusively denied certification. Thus, the Fourth Circuit properly concluded that review of the certification decision would not have been possible without reviewing the denial of leave to amend as well as the viability of the original class allegations. *See* Pet. 9a. Accordingly, the issues were inextricably intertwined and review of the decision denying leave to amend was necessary to ensure meaningful review of the denial of certification as a whole. Family Dollar cites no case from any court holding otherwise under the same circumstances.

Finally, Family Dollar's suggestion that reaching the issue of leave to amend was unfair to the parties rests on its demonstrably false premise that "the parties did not brief whether the district court abused its discretion in denying the motion to amend." Pet. 33. In fact, the opening, response, and reply briefs in the court of appeals each discussed precisely that question in light of each side's arguments about the proper interpretation of *Wal-Mart*. *See* Br. for Pls.-Appellants 52-55 (4th Cir. filed Aug. 8, 2012); Br. of Appellee 33-36 (4th Cir. filed Oct. 12, 2012); Reply Br. for Pls.-Appellants 18-19 (4th Cir. filed Nov. 26, 2012). Even Judge Wilkinson, whose lengthy dissent faulted the majority opinion on numerous grounds, expressed no concern that the court had exceeded its authority in exercising pendent appellate jurisdiction.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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