No. 26-114

In the Supreme Court of the United States

FREDERICK L. ALLEN AND
NAUTILUS PRODUCTIONS, LLC,
Petitioners,

v.

JOSHUA STEIN, GOVERNOR OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

JEFF JACKSON
Attorney General

Nicholas S. Brod
Solicitor General
Counsel of Record

Olga E. Vysotskaya de Brito
Senior Deputy Attorney General

N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
(919) 716-6400
nbrod@ncdoj.gov

QUESTION PRESENTED

Whether the Fourth Circuit correctly held that it had appellate jurisdiction to review the district court's order reopening this litigation and allowing Petitioners to file an amended complaint to pierce the State's sovereign immunity for alleged copyright infringement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statute

Rules

Other Authority

INTRODUCTION

When the Court heard this case six years ago, it held that the Copyright Remedy Clarification Act of 1990 did not validly abrogate state sovereign immunity and that North Carolina was immune from Petitioners' copyright infringement claims as a result. *Allen v. Cooper*, 589 U.S. 248 (2020). That holding should have marked this litigation's end. Yet back in the district court on remand, the case took—as the Fourth Circuit generously put it—a "perplexing[ ]" turn. Pet. App. 35a.

In a 2021 order, the district court reopened the case and allowed Petitioners to file an amended complaint. The district court concluded that although Petitioners could no longer rely on the Copyright Remedy Act's prophylactic abrogation of state sovereign immunity, Petitioners could nonetheless invoke a different abrogation theory for the first time roughly five years into the litigation, on the heels of their unanimous loss before this Court. Pet. App. 129a-131a. The district court then doubled down on its view that this Court's decision in *Hans v. Louisiana*, 134 U.S. 1 (1890), holding that states have structural immunity beyond the Eleventh Amendment's text—and the more-than-a-century of cases that have followed—are wrongly decided and should be overruled. Pet. App. 120a; *see also* Pet. App. 65a n.7 (same); *Allen v. Cooper*, 244 F. Supp. 3d 525, 535-40 (E.D.N.C. 2017) (same).

In a 2024 order, the district court reiterated its prior holding in 2021 that Petitioners had a viable claim to overcome the State's sovereign immunity. The court denied in part Respondents' motion to dismiss on that basis and allowed Petitioners to proceed to discovery. Pet. App. 98a.

Respondents appealed. It is undisputed that an order denying a state its sovereign immunity is subject to an immediate appeal under 28 U.S.C. § 1291 and that the Fourth Circuit had jurisdiction to review the district court's 2024 order as a result. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). Exercising pendent appellate jurisdiction under *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), the Fourth Circuit held that it could also review the district court's 2021 order. Pet. App. 19a-25a. On the merits, the Fourth Circuit reversed, holding that the 2021 order was "fatally flawed for multiple reasons." Pet. App. 34a.

Petitioners now assert that the Fourth Circuit's exercise of appellate jurisdiction over the 2021 order implicates a division of authority among the circuits about the scope of pendent appellate jurisdiction under *Swint*. Pet. 16-29. In *Swint*, this Court recognized that pendent appellate jurisdiction may lie over otherwise nonappealable orders that are (1) "inextricably intertwined with" or (2) "necessary to ensure meaningful review of" an appealable order. 514 U.S. at 51. Petitioners contend that while a majority of circuits limit pendent appellate jurisdiction to *Swint*'s two scenarios, the Fourth, Fifth, and D.C. Circuits do not, while the Eleventh and Federal Circuits are internally divided. Pet. 16.

Petitioners are wrong. Since *Swint*, the Fourth Circuit "has consistently limited its application of pendent appellate jurisdiction to the two circumstances outlined therein." *Rux v. Republic of Sudan*, 461 F.3d 461, 475 (4th Cir. 2006). So too for the Fifth, Eleventh, and Federal Circuits. *See*, *e.g.*, *Heidi Grp., Inc. v. Tex. Health & Human Servs. Comm'n*, 138 F.4th 920, 929 (5th Cir. 2025) (holding that pendent appellate jurisdiction "exists over an order only if" it meets one of the *Swint* prongs); *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1379 (11th Cir. 2009) (per curiam) (holding that "pendent appellate jurisdiction should be present only under [the] rare circumstances" in *Swint*); *Orenshteyn v. Citrix Sys., Inc.*, 691 F.3d 1356, 1359 (Fed. Cir. 2012) (holding that a court "cannot exercise pendent jurisdiction unless at least one of the *Swint* tests is met"). As for the D.C. Circuit, it has permitted the exercise of pendent jurisdiction for a narrow set of nonappealable orders that typically involve personal jurisdiction, forum non conveniens, or statutes of limitations—issues that are not presented here. *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 874 (D.C. Cir. 2019); *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1134 & nn.10-11 (D.C. Cir. 2004). This case thus implicates no circuit conflict.

The decision below does not otherwise warrant review. Petitioners' remaining arguments amount to a plea for factbound error correction in a decade-old case with a set of procedural twists and turns that are unlikely to ever recur. The Fourth Circuit's application of *Swint* here does not depart from any other circuit, and Petitioners unsurprisingly fail to point to another case with remotely analogous facts. The Fourth Circuit also applied *Swint* correctly. As the court explained, the district court's 2021 order was entirely bound up in its 2024 order that the State should face Petitioners' copyright infringement claims, and without the 2021 order reopening the case, the 2024 order would be a nullity. Pet. App. 24a-25a. To hold that the district court's 2021 decision to subject the State to a new abrogation theory must await review until after final judgment would defy this Court's recognition that the value of state sovereign immunity "is for the most part lost as litigation proceeds past motion practice." *Puerto Rico Aqueduct*, 506 U.S. at 145.

As for Petitioners' alternative request that this Court summarily reverse, the Fourth Circuit did not depart from party-presentation principles, much less in a sufficiently drastic fashion to warrant the strong medicine of summary reversal. Petitioners' contrary arguments incorrectly describe the proceedings below and otherwise lack merit.

This Court should deny the petition.

STATEMENT

A. The district court reopens the case and allows Petitioners' *Georgia* claim to proceed.

In 2015, Petitioners filed this lawsuit. They alleged that Respondents committed copyright infringement by using Petitioners' photographs and video footage documenting the State's efforts to recover Blackbeard's sunken pirate ship, the *Queen Anne's Revenge*. Pet. App. 7a-8a. Petitioners also named as a defendant a nonprofit company, Friends of Queen Anne's Revenge (Friends of QAR), that was established to raise money for the wreck's excavation and preservation. Pet. App. 8a.

The district court denied in part Respondents' motion to dismiss based on sovereign, qualified, and legislative immunity. *Allen*, 244 F. Supp. 3d at 545-46. The Fourth Circuit reversed those rulings and remanded with instructions to dismiss all the claims against all Respondents. *Allen v. Cooper*, 895 F.3d 337, 358 (4th Cir. 2018). This Court affirmed the Fourth Circuit's decision on sovereign immunity, holding that Congress failed to validly abrogate state sovereign immunity for copyright infringement. *Allen*, 589 U.S. at 266-67.

The case returned to the district court, where only Petitioners' claims against Friends of QAR remained. Petitioners voluntarily dismissed those claims with prejudice. Pet. App. 11a; Fed. R. Civ. P. 41(a)(1)(A)(ii). Once Petitioners filed their stipulated dismissal, they had no claims left. The case was over.

Petitioners then moved under Rule 60(b)(6) to reopen the litigation. Pet. App. 11a. That rule required them to show extraordinary circumstances to revisit the final judgment. *BLOM Bank SAL v. Honickman*, 605 U.S. 204, 210-11 (2025). Petitioners claimed extraordinary circumstances by pointing to a statement that Respondents made during oral argument before this Court. Pet. App. 130a. During that argument, Respondents acknowledged the theoretical possibility that alleged violations of federal copyright law that also violated the Fourteenth Amendment could overcome state sovereign immunity under this Court's decision in *United States v. Georgia*, 546 U.S. 151 (2006). Tr. of Oral Arg. at 39-40, *Allen v. Cooper*, 589 U.S. 248 (2020) (No. 18-877). In *Georgia*, this Court held that even if Congress has not passed a valid prophylactic abrogation of state sovereign immunity, it maintains Section 5 power to "creat[e] private remedies against the States for *actual* violations" of the Fourteenth Amendment. 546 U.S. at 158. Petitioners claimed that the State's alleged copyright infringement also violated the Fourteenth Amendment, subjecting the State to suit under *Georgia*'s as-applied abrogation framework. Pet. App. 106a, 128a-131a. At the oral argument, however, Respondents never conceded that Petitioners could bring such a claim *in this case*. Tr. at 39-40. And Petitioners admitted that they had never before asserted a *Georgia* claim here. *Id.* at 31-32.

In a 2021 order, the district court reopened the litigation and allowed Petitioners to file an amended complaint. At the outset, the court rejected Petitioners' reliance on Rule 60(b)(6). Pet. App. 108a. The court held that this rule was "not applicable" here because the case had never reached final judgment. Pet. App. 108a. The court instead construed Petitioners' motion as arising under Rule 54(b), a rule for revising interlocutory orders. Pet. App. 108a, 128a;

Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

Applying the more lenient Rule 54(b) standard, the court allowed Petitioners to assert a new claim under *Georgia*. First, the court held that this new claim was "appropriate" because this Court's prior decision had "passed" on that issue. Pet. App. 129a. Yet this Court's decision did not mention *Georgia*, much less substantively analyze it. *Allen*, 589 U.S. at 251-67 (nowhere citing *Georgia*). Second, the court held that Petitioners had a "viable" *Georgia* claim. Pet. App. 129a. Specifically, the court held that Petitioners could allege copyright infringement amounting to "both a constitutional violation as well as a statutory violation" and that Petitioners could thus "still use" the Copyright Remedy Act's abrogation of state sovereign immunity "as a basis for [their] *Georgia* claim." Pet. App. 130a. Third, the court finally held that Rule 15(a)'s liberal allowance for pleading amendments authorized Petitioners' request. Pet. App. 131a.

Respondents appealed to the Fourth Circuit, which dismissed the appeal as interlocutory. Pet. App. 99a-101a.

Petitioners then filed an amended complaint asserting ten different claims. Pet. App. 52a-54a. Respondents moved to dismiss based on sovereign immunity. Pet. App. 54a, 56a. In a 2024 order, the district court struck most of the new claims as exceeding the scope of its 2021 order. Pet. App. 59a. But it allowed Petitioners to move forward on their claims under *Georgia* alleging violations of federal copyright law that also violated due process. Pet. App. 98a.

B. The Fourth Circuit unanimously reverses.

Respondents appealed, and the Fourth Circuit unanimously reversed.

The court started with its jurisdiction. The court held that it "indisputably" had jurisdiction under 28 U.S.C. § 1291 over the district court's 2024 order denying Respondents' motion to dismiss based on sovereign immunity. Pet. App. 20a. The only question was whether the court could also review the district court's 2021 order reopening the case and allowing Petitioners to file an amended pleading.

The court held that it could exercise pendent appellate jurisdiction over the 2021 order. Under this Court's decision in *Swint*, a court of appeals may exercise jurisdiction over an otherwise nonappealable order that is (1) "inextricably intertwined with" or (2) "necessary to ensure meaningful review of" an appealable order. 514 U.S. at 51. The Fourth Circuit held that it could exercise jurisdiction under either *Swint* prong. Pet. App. 23a. As for the first, the court explained that the district court's 2021 order, in recognizing the viability of a *Georgia* claim, was the "necessary foundational prerequisite" for the district court's 2024 order denying state sovereign immunity on that basis. Pet. App. 24a. As for the second, the Fourth Circuit reasoned that if the district court was wrong to reopen the litigation in 2021, "it would unequivocally have no authority to analyze and resolve" Respondents' sovereign immunity in the 2024 order. Pet. App. 25a.

Satisfied that it had jurisdiction, the Fourth Circuit reached the merits and reversed. The court held that the district court erred in reopening the case under Rule 54(b) because the litigation had concluded when Petitioners voluntarily dismissed with prejudice their remaining claims against Friends of QAR. Pet. App. 28a-31a. Under the proper Rule 60(b)(6) standard, the court further held that Petitioners could not show the extraordinary circumstances that reopening a final judgment requires. Pet. App. 33a. The district court's reasons for reopening the case, the Fourth Circuit explained, were "fatally flawed for multiple reasons." Pet. App. 34a. For one, the district court was simply incorrect that this Court addressed an as-applied abrogation theory under *Georgia* in its prior decision. Pet. App. 34a. For another, this Court decided *Georgia* in 2006—roughly a decade before Petitioners sued. Yet Petitioners waited five years into the litigation—after Respondents successfully defended this case all the way to this Court—before seeking to bring such a claim. Pet. App. 35a, 37a. The Civil Rules do not "afford plaintiffs a tool to engage in the litigation of cases one theory at a time." Pet. App. 37a (quoting *Omni Outdoor Advert., Inc. v. Columbia Outdoor Advert., Inc.*, 974 F.2d 502, 506 (4th Cir. 1992)). Worse, the district court granted leave to amend under Rule 15(a) before considering whether Petitioners could carry their burden to reopen the case under Rule 60(b)(6)—in direct conflict with this

Court's precedent. Pet. App. 36a-37a; *see BLOM Bank*, 605 U.S. at 213.

Petitioners sought rehearing en banc, which the Fourth Circuit denied without noted dissent. Pet. App. 133a-135a.

Petitioners then purported to move the district court to stay the Fourth Circuit's mandate. No. 15-cv-627 (E.D.N.C.), Dkt. 185 at 1-2. The district court denied that request, dismissed Petitioners' claims, and finally closed this case. *Id.* Dkt. 186. Petitioners appealed to the Fourth Circuit. *Id.* Dkt. 188. Their appeal remains pending. Petitioners sought and received a stay placing the appeal in abeyance until the resolution of their then-forthcoming petition for writ of certiorari. No. 26-1576 (4th Cir.), Dkt. 26, 27.

REASONS FOR DENYING THE PETITION

I. The Decision Below Does Not Implicate Any Circuit Split.

Petitioners' alleged split is illusory. Petitioners assert that the circuits have split on the question whether pendent appellate jurisdiction is limited to the circumstances described in *Swint*—when a nonappealable order is "inextricably intertwined with" or "necessary to ensure meaningful review of" an appealable order. Pet. 16-25. Petitioners claim that a majority of circuits confine pendent appellate jurisdiction to only those two *Swint* conditions. Pet. 16-18. By contrast, Petitioners claim, a minority of circuits have held that pendent appellate jurisdiction is not so limited. Pet. 18-23. Petitioners finally contend that some circuits are internally divided on the issue. Pet. 23-25. But in fact, all of the circuits follow *Swint*, and only the D.C. Circuit has recognized a narrow set of cases where pendent appellate jurisdiction may lie in situations beyond those that *Swint* contemplates, none of which are implicated here.

To begin, Petitioners are right that the First, Second, Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have all held that pendent appellate jurisdiction is limited to *Swint*'s two prongs. Pet. 16-17. Petitioners are wrong, however, that the other circuits depart from this approach in a way that would warrant this Court's review.

Start with the three circuits that have allegedly adopted an expansive reading of *Swint*—the Fourth, Fifth, and D.C. Circuits.

The Fourth Circuit. The Fourth Circuit has expressly held that pendent appellate jurisdiction "is exclusively available" under the two *Swint* prongs. *Ind. Servs. Grp., Inc. v. Dobson*, 68 F.4th 155, 166-67 (4th Cir. 2023). Petitioners themselves concede this point. Pet. 20. That concession finds support in many other cases. Indeed, the Fourth Circuit routinely reiterates that pendent appellate jurisdiction is limited to *Swint*, and the court has recently done so several times in declining to exercise pendent appellate jurisdiction over orders that fit neither *Swint* category. *See, e.g.*, *Doe v. Univ. of N.C. Sys.*, 133 F.4th 305, 320 (4th Cir. 2025); *Doe v. Sidar*, 93 F.4th 241, 246 (4th Cir. 2024).

Petitioners claim that the Fourth Circuit changed its rules on pendent appellate jurisdiction in this case. Pet. 20. But the decision below disproves that argument. Citing *Swint*, the Fourth Circuit acknowledged only two types of orders over which it could exercise pendent appellate jurisdiction: those that are inextricably intertwined with or necessary to ensure meaningful review of an appealable order. Pet. App. 22a. The court specifically referred to these as the two "prong[s] of the pendent jurisdiction analysis," Pet. App. 23a, and it quoted a prior Fourth Circuit case discussing "the two potential pendent jurisdiction scenarios set forth in *Swint*," Pet. App. 23a (quoting *Ealy v. Pinkerton Gov't Servs., Inc.*, 514 F. App'x 299, 309 (4th Cir. 2013) (per curiam)). Notably, on the very same page of that prior decision, the Fourth Circuit observed that it has "recognized that the Supreme Court's decision in *Swint* . . . indicates pendent appellate jurisdiction is available in only two scenarios . . . ." *Ealy*, 514 F. App'x at 309; *see id.* ("Our commitment to this dichotomy has held firm.").

The Fourth Circuit also cited favorably to a Ninth Circuit decision limiting pendent appellate jurisdiction to the two *Swint* prongs, Pet. App. 24a (citing *Hendricks v. Bank of Am., N.A.*, 408 F.3d 1127, 1134-35 (9th Cir. 2005))—even though the Ninth Circuit is on the other side of Petitioners' supposed split. Indeed, far from broadening *Swint*, the Fourth Circuit emphasized that pendent appellate jurisdiction "should only be exercised sparingly." Pet. App. 22a.

Nor does Petitioners' citation to *Hinson v. Norwest Financial South Carolina, Inc.*, 239 F.3d 611 (4th Cir. 2001), show that the Fourth Circuit has read *Swint* broadly. Pet. 20. To the contrary, in *Hinson*, the Fourth Circuit merely applied *Swint*'s inextricably intertwined prong. 239 F.3d at 615. The court did not recognize pendent appellate jurisdiction in any other circumstance, or indeed say anything about the hypothetical exercise of pendent appellate jurisdiction in future cases.

The Fifth Circuit. Like the Fourth Circuit, the Fifth Circuit has also held that pendent appellate jurisdiction is limited to *Swint*'s two prongs. As the Fifth Circuit has repeatedly explained, "[p]endent appellate jurisdiction 'is only proper in the rare and unique circumstances' articulated by *Swint*." *Escobar v. Montee*, 895 F.3d 387, 392 (5th Cir. 2018) (alterations omitted) (quoting *Byrum v. Landreth*, 566 F.3d 442, 449 (5th Cir. 2009)); *see also Heidi Grp., Inc. v. Tex. Health & Human Servs. Comm'n*, 138 F.4th 920, 929 (5th Cir. 2025) (holding that pendent appellate jurisdiction "exists over an order only if" it meets one of the two *Swint* prongs); *John Bludworth Shipyard, L.L.C. v. Bechtolt*, 138 F.4th 372, 384 (5th Cir. 2025) (holding that "pendent appellate jurisdiction is appropriate only in two circumstances" and listing the two *Swint* prongs).

Despite these holdings, Petitioners claim that the Fifth Circuit has actually recognized four different circumstances that might warrant pendent appellate jurisdiction. Pet. 20-21. Petitioners misread the Fifth Circuit's case law. The Fifth Circuit has tried to synthesize four *factual* "situations" that call for the exercise of pendent appellate jurisdiction. *Heidi*, 138 F.4th at 929; *accord Escobar*, 895 F.3d at 392-93 & nn.5-8 (surveying cases applying *Swint* and sorting them into four groups).

In doing so, the court has only categorized different fact-specific applications of *Swint* rather than expanded its scope. For example, one category includes cases where the Fifth Circuit has exercised pendent appellate jurisdiction over state-law claims against police officers when a district court has allowed federal-law claims to proceed over a qualified-immunity defense. *Morin v. Caire*, 77 F.3d 116, 119-20 (5th Cir. 1996). But these cases do not, as Petitioners assert, establish that the Fifth Circuit has broadened *Swint*'s reach. Rather, they are routine applications of *Swint*'s inextricably intertwined prong. *Carter v. Dupuy*, 173 F.4th 561, 565-66 (5th Cir. 2026) (officers were entitled to qualified immunity on Fourth Amendment claim given de minimis use of force and were also entitled to dismissal of state-law claims for the same reason); *Morin*, 77 F.3d at 122-23 (officers were entitled to qualified immunity on Fourth Amendment claim given lack of allegations that warrant had material misstatements and omissions and were also entitled to dismissal of state-law claims for the same reason).

The D.C. Circuit. The D.C. Circuit is the only court to recognize that pendent appellate jurisdiction may exist in circumstances beyond those set out in *Swint*. *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1134 & n.7 (D.C. Cir.

2004). But the court has acknowledged only certain narrow exceptions for otherwise nonappealable orders that typically involve personal jurisdiction, forum non conveniens, or statutes of limitations—issues that are not present here. *Id.* at 1134 & nn.10-11; *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 874 (D.C. Cir. 2019). Outside those narrow exceptions, the court has merely observed—in a footnote, in a case where the court ultimately held that it *lacked* pendent appellate jurisdiction—that *Swint* may not "prescribe a definitive or exhaustive list of conditions." *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 679 n.4 (D.C. Cir. 1996) (per curiam). But that possibility has turned out to be more theoretical than real. As the court has since explained, "despite using more expansive language," it has "so far largely confined the doctrine to cases that come within one or the other of the *Swint* conditions." *Kilburn*, 376 F.3d at 1134.

Petitioners next claim that the Eleventh and Federal Circuits are internally divided on the *Swint* issue. Pet. 23-25. They are not.

The Eleventh Circuit. Petitioners cite only one Eleventh Circuit case as adopting a broad reading of *Swint*. Pet. 24. But in that case, the Eleventh Circuit in fact *applied Swint*'s inextricably intertwined prong. *Bryant v. Jones*, 575 F.3d 1281, 1301 (11th Cir. 2009) (holding that pendent appellate jurisdiction was warranted because a preclusion defense was "'inextricably intertwined' with the qualified immunity issues" on appeal). The court said nothing about whether pendent appellate jurisdiction may exist in other types of cases.

The Federal Circuit. Nor is the Federal Circuit internally divided on this issue. To support that claim, Petitioners rely on a case that did not even cite *Swint*, *Procter & Gamble Co. v. Kraft Foods Global, Inc.*, 549 F.3d 842, 846-47 (Fed. Cir. 2008); a dissenting opinion, *Orenshteyn v. Citrix Sys., Inc.*, 691 F.3d 1356, 1372 (Fed. Cir. 2012) (Newman, J., dissenting); and a case that did not involve an appealable order in the first place, *Micron Tech., Inc. v. Longhorn IP LLC*, 161 F.4th 1374, 1382 (Fed. Cir. 2025). Pet. 24-25. In cases where the Federal Circuit has actually cited and applied *Swint* in majority opinions, however, its rule is clear: The court "cannot exercise pendent jurisdiction unless at least one of the *Swint* tests is met." *Orenshteyn*, 691 F.3d at 1359; *Elbit Sys. Land & C4I Ltd. v. Hughes Network Sys., LLC*, 927 F.3d 1292, 1305-06 (Fed. Cir. 2019) (similar).

Even if there were some doctrinal confusion within these two circuits, moreover, that fact would not call for this Court's review. Indeed, this Court does not ordinarily sit to resolve intra-circuit divisions of the kind Petitioners have purported to identify. *Joseph v. United States*, 574 U.S. 1038, 1040 (2014) (Kagan, J., respecting the denial of certiorari).

In sum, the circuits are nearly unanimous that pendent appellate jurisdiction is limited to the two circumstances described in *Swint*. Only the D.C. Circuit recognizes the possibility that *Swint* may set a floor rather than a ceiling. But even that circuit has largely disclaimed such an approach, confining it to nonappealable issues that are not presented here. At most, Petitioners have thus identified a barely perceptible split with limited practical significance. And any split has *no* practical significance on these facts because, as discussed, the Fourth Circuit follows the majority rule limiting pendent appellate jurisdiction to *Swint*'s two conditions. In other words, even under the D.C. Circuit's broader reading of *Swint*, this case would have come out the same way.

II. The Decision Below Does Not Otherwise Warrant This Court's Review.

Unable to establish a genuine split of authority, Petitioners contend that the circuits are "confused" about the meaning of *Swint*'s inextricably intertwined prong, that this case is an "excellent" vehicle for providing guidance on pendent appellate jurisdiction, and that the decision below is wrong. Pet. 25-36. On all three points, Petitioners are incorrect. Their arguments amount to nothing more than a request for factbound error correction in a case with facts that are highly unlikely to ever recur.

First, this case does not implicate whatever alleged confusion might exist in the circuits over *Swint*'s inextricably intertwined prong. Petitioners claim that the circuits have used different verbal formulations to describe the inextricably intertwined standard. Pet. 25-27. That issue has no bearing on this case's bottom line, however, because the Fourth Circuit held in the alternative that it would exercise jurisdiction under *Swint*'s necessary-to-ensure-meaningful-review prong in any event. Pet. App. 23a, 25a. Underscoring the irrelevance of any confusion about the inextricably intertwined prong to this case, Petitioners argue that the circuits have divided on whether otherwise nonappealable issues like statutes of limitations, personal jurisdiction, forum non conveniens, and state-law claims are sufficiently intertwined with appealable orders. Pet. 28-29. But of course, this case does not involve any of those issues.

Indeed, Petitioners cite *no* case where another circuit court has addressed pendent appellate jurisdiction over an order reopening a final judgment and allowing a pleading amendment on the ground that the plaintiff had a viable claim to pierce state sovereign immunity. Petitioners point to *Walker v. City of Pine Bluff*, 414 F.3d 989 (8th Cir. 2005), Pet. 28, 35, but their analogy to that case does not hold. In *Walker*, the Eighth Circuit declined to exercise pendent appellate jurisdiction over a district court's order granting the plaintiff leave to amend to assert an individual-capacity claim against an officer who later raised a qualified-immunity defense. 414 F.3d at 993. Nothing in the district court's nonappealable order allowing a pleading amendment, however, had anything to do with the immunity issue that was properly before the Eighth Circuit. *See id.* Here, by contrast, the nonappealable order reopening the case and permitting Petitioners to amend rested *entirely* on the appealable issue—the district court's view that Petitioners had a viable claim under *Georgia* overcoming state sovereign immunity. Pet. App. 24a-25a. Thus, Petitioners have not shown that the Fourth Circuit's application of *Swint* to these facts actually diverges with a decision from any other circuit.

Second, this case is a poor vehicle for clarifying *Swint*. Petitioners contend that the case comes to this Court free of "complications." Pet. 35. But that claim does not square with the case's highly unusual, decade-long procedural history. Indeed, Petitioners themselves are right now pursuing yet another appeal before the Fourth Circuit. *See supra* p 10. And the district court's "perplexing[ ]" 2021 order reopening this case under the wrong legal standards, Pet. App. 35a, while advocating for the overruling of *Hans v. Louisiana*, Pet. App. 120a, is anything but "routine," *contra* Pet. 19.

Third, the Fourth Circuit decided this case correctly. Petitioners criticize the court for allegedly adopting a "but-for" theory of pendent appellate jurisdiction that asks whether the nonappealable order in fact caused the order on appeal. Pet. 18. That is a test of Petitioners' own making. The Fourth Circuit said nothing about but-for causation, and its analysis does not reflect that concept. As the Fourth Circuit explained, the district court's 2021 order was about sovereign immunity root and branch. Pet. App. 23a-25a. The reason the district court reopened this litigation in the first place was because of its conclusion that Petitioners had a "viable" *Georgia* claim. Pet. App. 129a; *see* Pet. App. 24a (the 2021 order "made explicit rulings concerning [Petitioners'] *Georgia* theory"). Petitioners' assertion that the district court's 2021 order had "nothing to do" with sovereign immunity thus blinks reality. Pet. 32. The order refers to state sovereign immunity more than *forty* times. Pet. App. 102a-132a.

Petitioners thus overreach in variously describing Respondents' appeal as a "gambit," "meritless," and "frivolous." Pet. 32. "[A] motion by a State or its agents to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection." *Puerto Rico Aqueduct*, 506 U.S. at 145. The district court's 2021 order denied the State here that fundamental protection, based on a plainly incorrect reading of this Court's prior decision in this case, and in the face of manifest prejudice to the State from having to defend against a new abrogation theory after winning a unanimous victory in this Court that should have ended the litigation. The Fourth Circuit was therefore right to hold that the 2021 order was inextricably intertwined with and necessary to ensure meaningful review of the district court's later order denying Respondents' motion to dismiss based on sovereign immunity and allowing Petitioners' *Georgia* claim to proceed to discovery. Pet. App. 23a-25a. To conclude otherwise would mean that the district court's 2021 order subjecting the State to suit under an as-applied abrogation theory would have to await review until after this case reaches final judgment. But "the value to the States of their Eleventh Amendment immunity . . . is for the most part lost as litigation proceeds past motion practice." *Puerto Rico Aqueduct*, 506 U.S. at 145.

In sum, absent a genuine circuit split, Petitioners are left seeking factbound error correction of a one-off decision. A request of that kind does not warrant this Court's review.

III. Petitioners' Bid For Summary Reversal Is Meritless.

Petitioners conclude with an alternative request for summary reversal. They claim that the Fourth Circuit did not adhere to the party-presentation principle. Pet. 36-39. Their argument fails.

Courts "follow the principle of party presentation," relying "on the parties to frame the issues for decision." *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020) (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). The party-presentation principle "is supple, not ironclad," and "[t]here are no doubt circumstances in which a modest initiating role for a court is appropriate." *Id.* at 376. Indeed, "a court is not hidebound by the precise arguments of counsel." *Id.* at 380. The question is whether a court has "departed so drastically from the principle of party presentation as to constitute an abuse of discretion." *Id.* at 375.

The Fourth Circuit followed party-presentation principles here. Below, Respondents argued that the Fourth Circuit could exercise jurisdiction over the 2021 order because it "led up to" and thus merged into the 2024 order. Pet. App. 20a; Fed. R. App. P. 3(c)(4). Although the Fourth Circuit used a different label, its analysis in substance tracked that argument. The court explained, for example, that it could exercise jurisdiction over the 2021 order as the "sole and only seed" of the 2024 order that followed. Pet. App. 24a.

Petitioners claim that Respondents waived pendent appellate jurisdiction at oral argument. Pet.

37. Just as Petitioners inaccurately describe the oral argument before this Court, so too with the oral argument before the Fourth Circuit. Respondents expressly stated that *Swint*'s inextricably intertwined prong was "one way [the Fourth Circuit] could get at" why it had jurisdiction over the 2021 order. No. 24-1954, Oral Arg. at 40:38-40:47. And far from disclaiming pendent appellate jurisdiction, Respondents merely pointed out in response to the court's questions that this case does not involve an otherwise nonappealable issue, like a statute-of-limitations defense, but rather concerns an antecedent order whose sole basis was focused on sovereign immunity. *Id.* at 2:29-3:43 (describing the 2021 and 2024 orders as a single "ball of wax" for this reason).

Even if the Fourth Circuit departed from party presentation to some degree, its departure was hardly drastic enough to constitute an abuse of discretion. By exercising pendent appellate jurisdiction under *Swint*, the court did not effect a "radical transformation" of the case that "goes well beyond the pale." *Sineneng-Smith*, 590 U.S. at 380. At most, the court took a different path to arrive at the same destination that Respondents sought all along: that the court exercise jurisdiction over the 2021 order. The Fourth Circuit's decision here thus stands in sharp contrast to others that have dramatically transgressed party-presentation principles by refashioning a party's narrow request for as-applied relief into a more sweeping basis for facial invalidation. *Id.* at 379-80; *see also Margolin v. Nat'l*

Ass'n of Immigration Judges, 608 U.S. 339, 343 (2026) (per curiam) (holding that the court violated party presentation by turning an as-applied challenge into a "much broader" challenge to a statute's preclusive effect across all cases). The decision also bears no resemblance to other cases where a court has developed by itself a far broader substantive theory than the parties had urged. *See Clark v. Sweeney*, 607 U.S. 7, 9 (2025) (per curiam). To the contrary, if anything, the Fourth Circuit below took a *narrower* approach than Respondents by tying the court's jurisdiction to the limits set out in *Swint*'s two prongs. *See* Pet. App. 20a-21a. Particularly on an issue of the court's own appellate jurisdiction, and on these facts, to the extent the court departed from the party-presentation rule at all, that departure was not an abuse of discretion. *Sineneng-Smith*, 590 U.S. at 375.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JEFF JACKSON
Attorney General

Nicholas S. Brod
Solicitor General
Counsel of Record

Olga E. Vysotskaya de Brito
Senior Deputy Attorney General

N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
(919) 716-6400
nbrod@ncdoj.gov

September 16, 2026