

No. 26-114

IN THE
Supreme Court of the United States

FREDERICK L. ALLEN et al.,
Petitioners,

v.

JOSHUA STEIN,
Governor of North Carolina, et al.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
REPLY	1
I. This case implicates an important circuit split over pendent appellate jurisdiction.	2
A. The circuit split is real and entrenched.....	2
B. This case directly implicates the split and is an excellent vehicle for resolving it.....	6
II. The Fourth Circuit’s defiance of the party-presentation principle warrants summary reversal.	11
CONCLUSION	13

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Azima v. RAK Inv. Auth.</i> , 926 F.3d 870 (D.C. Cir. 2019)	5, 9
<i>Bryant v. Jones</i> , 575 F.3d 1281 (11th Cir. 2009)	5-6
<i>Clark v. Sweeney</i> , 146 S.Ct. 410 (2025)	13
<i>Escobar v. Montee</i> , 895 F.3d 387 (5th Cir. 2018)	10
<i>Hans v. Louisiana</i> , 134 U.S. 1 (1890)	11
<i>Hinson v.</i> <i>Norwest Financial South Carolina, Inc.</i> , 239 F.3d 611 (4th Cir. 2001)	2-4
<i>KiSKA Constr. Corp.-U.S.A. v.</i> <i>Wash. Metro. Area Transit Auth.</i> , 167 F.3d 608 (D.C. Cir. 1999)	5
<i>Knick v. Township of Scott</i> , 139 S.Ct. 2162 (2019)	7
<i>Margolin v. Nat’l Ass’n of Immigr. Judges</i> , 146 S.Ct. 1285 (2026)	13
<i>Micron Tech., Inc. v. Longhorn IP LLC</i> , 161 F.4th 1374 (Fed. Cir. 2025)	6
<i>Procter & Gamble Co. v. Kraft Foods Global, Inc.</i> , 549 F.3d 842 (Fed. Cir. 2008)	6
<i>Swint v. Chambers County Commission</i> , 514 U.S. 35 (1995)	1-6, 9-11

<i>Walker v. City of Pine Bluff</i> , 414 F.3d 989 (8th Cir. 2005)	10
<i>Waller v. Hanlon</i> , 922 F.3d 590 (5th Cir. 2019)	10
<i>Walters v. Coleman</i> , 146 S.Ct. 2714 (2026) (mem.)	13
Rules	
Fed. R. Civ. P. 15	7-8
Fed. R. Civ. P. 54(b)	7
Fed. R. Civ. P. 60(b)	7
Other Authorities	
Defendants-Appellants’ Response to Plaintiffs- Appellees’ Motion to Dismiss Appeal, <i>Allen v. Cooper</i> , 2022 WL 19226124 (4th Cir. Oct. 14, 2022) (No. 21-2040), Dkt.24 ...	8

REPLY

This is the rare case that combines piracy on the high seas with the nuances of appellate procedure. Born from the wreckage of Blackbeard's last voyage, this case presents the perfect opportunity to resolve a circuit split that has been festering for decades. In the thirty years since *Swint*, the circuits have intractably split regarding the scope, purpose, and application of pendent appellate jurisdiction. The decision below dives headlong into this split through a *sua sponte* assertion of pendent jurisdiction that expands appellate power well beyond the limits Congress set.

Both the circuit split and the Fourth Circuit's violation of the party-presentation principle warrant this Court's attention.

On the split, respondents agree that pendent jurisdiction should be limited to the circumstances *Swint* identified; they agree that eight circuits follow *Swint*; and they agree that at least one circuit does not. That alone would justify this Court's review.

The main point of disagreement is whether the remaining circuits follow *Swint*. As to those, respondents ignore the decisions' substance and treat mere mention of *Swint* as adherence to its principles, while ignoring the non-*Swint* standards actually applied.

Unable to deny the divide, respondents try to take this case out of the split by rewriting both the district court's orders and the Fourth Circuit's reasons for exercising jurisdiction. But respondents' assessment of the decision below suffers from the same fallacy as their analysis of the split: Respondents treat the citation to *Swint* as dispositive while ignoring the sub-

stance of the analysis, which bears no resemblance to what *Swint* requires. The record refutes respondents' narrative at every turn.

On party presentation, respondents cannot point to anywhere in the record where they invoked pendent jurisdiction and do not even try to justify the court's decision to chart its own course. So respondents are left to suggest that this particular violation was no big deal compared to last Term's misadventures. Respondents are wrong. The Fourth Circuit's decision to introduce its own jurisdictional theory—with no opportunity for Allen to respond—warrants summary reversal.

I. This case implicates an important circuit split over pendent appellate jurisdiction.

A. The circuit split is real and entrenched.

Despite calling the split “illusory,” respondents admit that it exists. BIO.10-11. Their focus is on minimizing the split: portraying the Fourth and Fifth Circuits as part of the majority, downplaying the D.C. Circuit's view, and denying the Eleventh and Federal Circuits' confusion.

The attempt fails because it focuses on isolated phrases while ignoring the substance of when and why courts exercise pendent jurisdiction. What matters is whether the same case would come out differently in different circuits. That minority circuits sometimes cite *Swint* does not erase the split. *Contra* BIO.11-14.

Fourth Circuit. Both the decision below and the earlier decision in *Hinson v. Norwest Financial South Carolina, Inc.*, 239 F.3d 611, 615 (4th Cir. 2001), firmly plant the Fourth Circuit in the minority camp.

Start with *Hinson*. As the petition explained, *Hinson* charted the course the Fourth Circuit followed below. Pet.20. Respondents insist that *Hinson* “merely applied *Swint*’s inextricably intertwined prong.” BIO.13. *Hinson* did no such thing. True, it used the word “inextricably.” But instead of considering whether the primary and pendent issues were substantively intertwined, *Hinson* considered whether there was a connection between the pendent issue and the “outcome” of the issue properly on appeal. 239 F.3d at 615. That led the court to exercise pendent jurisdiction on a but-for causation theory. *See id.* at 615, 618 (“[H]ad the district court properly excluded the new plaintiffs, no case to remand would have remained ...”).

The decision below applied the same reasoning, exercising pendent jurisdiction on *Hinson*’s but-for causation theory, rather than any substantive overlap between the issues. Pet.App.23-24 (citing *Hinson*).

Respondents dismiss the panel’s reasoning, focusing instead on the lip service it paid to *Swint* by purporting to find jurisdiction “under either prong.” BIO.11-12 (quoting Pet.App.23). But as the petition explained, the decision did not actually apply either prong. Pet.18-20.

Respondents do not even attempt to refute the petition’s argument on that issue, perhaps because even a cursory review confirms that the decision below did not heed *Swint*. After recounting its test for “inextricably intertwined,” Pet.App.22-23, the Fourth Circuit failed to apply it. Instead, echoing *Hinson*, the court found jurisdiction simply because the 2021 order “made the 2024 Ruling possible” in a but-for sense—

never mind that the two orders involved different legal questions governed by different legal standards. Pet.App.24.

So too for the “necessary to ensure meaningful review” prong. Pet.19-20. Once again, the court started by acknowledging *Swint*, noting that this prong is satisfied “when [the] orders at issue [are] so interconnected that they ha[ve] to be reviewed concurrently.” Pet.App.23 (cleaned up). But the decision below never reached the appealable issue. Pet.App.38-39 (vacating immunity decision as moot). Thus, the pendent issue could hardly have been “necessary to ensure meaningful review” of the 2024 sovereign immunity decision. After all, pendent jurisdiction cannot “ensure meaningful review” if it is used to avoid the appealable issue altogether. Pet.19, 32.

At bottom, the Fourth Circuit’s approach, as expressed in both *Hinson* and the decision below, expands pendent jurisdiction beyond *Swint*’s bounds. Of course, not every case pushes the limits—but in the Fourth Circuit, unlike those in the majority, the limit is not *Swint*.

Fifth Circuit. Respondents admit that the Fifth Circuit recognizes four “situations” under which it will exercise pendent jurisdiction. BIO.13-14; *see* Pet.20-22. Respondents insist that those situations are just “different fact-specific applications of *Swint*.” BIO.14. Yet respondents do not and cannot explain how either *Swint* prong supports using pendent jurisdiction to reach “otherwise unreviewable” issues or to “further the purpose of officer-immunities by helping the officer avoid trial.” Pet.20-21 (attribution omitted). Instead, respondents simply assert that these are “rou-

tine applications” of *Swint* and call it a day. BIO.14. Sticking the “*Swint*” label on a more permissive test does not make it so.

D.C. Circuit. Respondents acknowledge, as they must, that the D.C. Circuit exercises pendent jurisdiction “in circumstances beyond” *Swint*. BIO.14. Forced to admit the split, respondents try to downplay the departure from *Swint* as “narrow” and “theoretical.” BIO.15. Yet what respondents call “exceptions” for issues like “personal jurisdiction, forum non conveniens, or statutes of limitations,” *id.*, actually reflect a sweeping view of pendent jurisdiction. Pet.22-23. The D.C. Circuit reviews those orders because they present “threshold issue[s]” that can be used to avoid “difficult” but properly appealable questions. Pet.22-23 (quoting *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 874 (D.C. Cir. 2019); and *KiSKA Constr. Corp.-U.S.A. v. Wash. Metro. Area Transit Auth.*, 167 F.3d 608, 611 (D.C. Cir. 1999)). Any other threshold issue—or whatever promotes “fairness or efficiency”—would also qualify. *Azima*, 926 F.3d at 874 (attribution omitted).

Confused Circuits (Eleventh and Federal). Respondents again elevate labels over substance in their attempt to downplay the Eleventh and Federal Circuits’ confusion. BIO.15-16.

As to the Eleventh Circuit, respondents claim that *Bryant v. Jones*, 575 F.3d 1281 (11th Cir. 2009), followed *Swint* because it incanted the words “inextricably intertwined.” BIO.15. *Bryant*’s reasoning belies that label. The court exercised jurisdiction not because the issues were intertwined, but because they were separable; the court reviewed the pendent issue because doing so could “dispense of any need to pass on

the [properly appealable] immunity issues” and serve “the interests of judicial economy.” *See* 575 F.3d at 1301-02 (citing pre-*Swint* authority).

Regarding the Federal Circuit, respondents complain that the cases that go beyond *Swint* do not cite it. BIO.16. But that’s the point: The Federal Circuit sometimes cites and follows *Swint*, and sometimes reverts to pre-*Swint* law. Pet.24-25; *see Micron Tech., Inc. v. Longhorn IP LLC*, 161 F.4th 1374, 1382 (Fed. Cir. 2025) (ignoring *Swint* in favor of *Procter & Gamble Co. v. Kraft Foods Global, Inc.*, 549 F.3d 842 (Fed. Cir. 2008), which in turn ignored *Swint* in favor of a pre-*Swint* case, *id.* at 846).

Regardless, adding two circuits to the majority would only deepen the split.

Whether the split is 3-8-2, 3-10, or 5-8 does not change the fact that the circuits are divided. For all their quibbling over the lineup, respondents cannot dispute the cases and commentary acknowledging the considerable confusion surrounding *Swint*, Pet.25-27, or how that confusion matters here, Pet.27-29.

B. This case directly implicates the split and is an excellent vehicle for resolving it.

Faced with a genuine divide among the circuits, respondents attempt to distance this case from the split. Respondents’ arguments distort both the 2021 order and the Fourth Circuit’s basis for exercising jurisdiction over it. And their search for vehicle obstacles comes up empty.

1. The decision below squarely implicates the split because the 2021 order does not satisfy either *Swint* prong.

Respondents’ contrary argument conflates the 2021 grant of leave to amend with the 2024 denial of sovereign immunity on the merits. In respondents’ telling, the 2021 order definitively “denied” their sovereign immunity defense and required them to proceed to discovery and trial, *see* BIO.20 (“subject[ed] the State to suit”), while the 2024 order simply “reiterated” that holding, BIO.1-2.

Respondents are wrong on both counts. The 2021 order did not resolve the merits of sovereign immunity, and the 2024 order’s sovereign immunity analysis did not rely on the 2021 order.

a. The 2021 order addressed two questions: First, whether the district court should reconsider its dismissal of Allen’s takings claim under Rules 54(b) or 60(b) based on this Court’s intervening decision in *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019). Second, whether, under Rules 15, 54(b), and 60(b), Allen should be permitted to amend to account for this Court’s decision in this case invalidating CRCA. Pet.App.102-32; *see* Pet.12.

On the first question, the district court agreed that Allen should be allowed to pursue his takings claim consistent with *Knick*’s guidance. Pet.App.109-28. Although the court applied the Rule 54(b) standard because the case had not reached final judgment, it also found Rule 60(b)’s stricter standard satisfied. Pet.App.106-09. So if the case needed reopening under Rule 60(b), the takings ruling reopened it. Respondents did not challenge that ruling, and the Fourth Circuit did not review it. Pet.15 n.1.

On the second question, the court allowed Allen to amend to address CRCA’s invalidation. Pet.App.128-

31. That decision did not rest on an assessment of the merits of Allen’s claims or respondents’ immunity defense. *Contra* BIO.19. Instead, the court applied Rule 15’s liberal standard for pleading amendments while leaving the substantive analysis for another day, after Allen had the chance “to allege more facts to buttress” his claim. Pet.App.130-31. All the 2021 order decided was “viable” was the general concept of “case-by-case abrogation under *Georgia*”—something respondents had already conceded. Pet.App.129-30 & n.2; Pet.11. The point of allowing Allen to amend was to facilitate answering the next question: whether Allen could allege case-by-case abrogation here.

In short, the decision that Allen could *try* to state a claim was not a decision rejecting respondents’ immunity defense.

That is why respondents could not immediately appeal the 2021 order. When they tried, on the theory that it was a collateral order that “denie[d] North Carolina its sovereign immunity,” Defendants-Appellants’ Response to Plaintiffs-Appellees’ Motion to Dismiss Appeal at 8, *Allen v. Cooper*, 2022 WL 19226124 (4th Cir. Oct. 14, 2022) (No. 21-2040), Dkt.24, the Fourth Circuit dismissed for lack of jurisdiction. Pet.App.100-01. Yet here respondents are again, claiming that the 2021 order “subject[ed] the State to suit” and “denied” the “fundamental protection” of sovereign immunity. BIO.20. That claim is no more persuasive now than before.

b. When the district court decided the sovereign immunity question in 2024, it did so without relying on or even citing the 2021 order. Pet.App.64-69, 78-98.

The two orders therefore are not intertwined, as respondents now suggest. The 2021 and 2024 orders applied different standards to answer different questions, and so the 2024 order could have been reviewed independently. Pet.19. By failing to do so, the Fourth Circuit waded right into the split: Only by departing from *Swint* could it dodge the sovereign immunity question presented by the 2024 order and reach the procedural decision from 2021. Pet.19-20.

c. Respondents repeat their mistake when characterizing the Fourth Circuit’s reason for looking back to 2021, claiming that it did so because the orders resolved the same sovereign immunity issue. BIO.8.

But the Fourth Circuit was crystal clear in its position that the 2021 order was reviewable because it was the “necessary foundational prerequisite” for the 2024 order. Pet.App.24. Without the 2021 procedural decision, the case would have been over, and the 2024 order would not have happened. *Id.*; accord BIO.4 (“without the 2021 order reopening the case, the 2024 order would be a nullity”). That is but-for causation, not an inextricable link between the issues.

2. The decision below would have come out similarly in the other minority circuits, but differently under the majority rule.

Although the minority circuits articulate their tests differently, their approaches likely would have led them to exercise pendent jurisdiction here, too. The 2021 decision granting leave to amend is exactly the kind of threshold, potentially case-dispositive issue that satisfies the D.C. Circuit’s efficiency test. *E.g.*, *Azima*, 926 F.3d at 874; Pet.22-23.

And in the Fifth Circuit, using pendent jurisdiction to dispose of the case would arguably “further the purpose of [sovereign immunity] by helping the [State] avoid trial,” even if it is not actually entitled to do so. *Escobar v. Montee*, 895 F.3d 387, 392-93 (5th Cir. 2018); *see also Waller v. Hanlon*, 922 F.3d 590, 598 (5th Cir. 2019).

By contrast, the circuits that stick to *Swint* would have stuck to reviewing the 2024 order. Pet.16-20, 27-28. This case would have turned out like *Walker v. City of Pine Bluff*, 414 F.3d 989 (8th Cir. 2005), in which the Eighth Circuit rejected but-for causation and refused to exercise pendent jurisdiction over an order that, by allowing leave to amend, ultimately led to an appealable order denying qualified immunity, *see id.* at 993.

Respondents have no real answer to *Walker*. *Contra* BIO.18. Aside from doubling down on their mischaracterization of the 2021 order as “rest[ing] entirely on the appealable issue,” *id.*, respondents have nothing but irrelevant factual distinctions. Yes, the properly appealable order in *Walker* involved qualified immunity, while the one here involves sovereign immunity. *Id.* But respondents cannot explain why that matters; they might as well say the plaintiff in *Walker* was not named Allen.

3. As a last resort, respondents contend that “this case is a poor vehicle” because of its “highly unusual, decade-long procedural history.” BIO.19. But respondents identify nothing about that history that would actually impede this Court’s review. Nor do they engage with any of the reasons the petition identified for why

this case outshines other pendent jurisdiction cases as a vehicle.¹

Respondents' ultimate complaint is that waiting until final judgment for review of the 2021 decision would undermine sovereign immunity. BIO.4, 20. That proves too much. Had the Fourth Circuit decided the properly appealable issue, respondents would have gotten exactly what they demand: An appellate decision on their sovereign immunity defense before the "litigation proceeds past motion practice." BIO.20 (attribution omitted).

What respondents got instead was review of an order the Fourth Circuit previously held was unappealable. *See* Pet.32. Respondents' view that the 2021 order should have been immediately appealable in its own right, despite the earlier unchallenged holding to the contrary, does not satisfy either *Swint* condition and is not the theory on which the Fourth Circuit exercised jurisdiction. This Court should grant certiorari and restore *Swint*'s limits.

II. The Fourth Circuit's defiance of the party-presentation principle warrants summary reversal.

1. Respondents never presented pendent jurisdiction as a basis for appellate authority—not in their opening brief, not in their reply brief, and not at oral

¹ Respondents make much of the district court's comments on *Hans v. Louisiana*, 134 U.S. 1 (1890). BIO.1, 19. The 2024 footnote had no bearing on the result, Pet.App.65 n.7, and the 2021 discussion, Pet.App.120-21, concerns an issue not on appeal, Pet.15 n.1.

argument. Faced with this reality, respondents attempt to conflate their novel merger argument (itself raised only in reply) with pendent jurisdiction, suggesting that the Fourth Circuit adopted their argument with a different label. BIO.21-22.

Not so. The two arguments are different and were treated as different by the parties and the court. For good reason: Pendent jurisdiction has nothing to do with merger. Indeed, the Fourth Circuit expressly distinguished these arguments, stating it was “content to leave” merger “for another day.” Pet.App.21.

The record confirms that respondents recognized the difference and opted for merger, not pendent jurisdiction. Despite denying their express waiver, respondents offer no explanation for saying that “I don’t think this is a pendent appellate jurisdiction kind of a situation.” C.A.Arg.2:29-3:12. Instead, they rely on a later exchange in which the panel—on its own initiative—suggested the orders may be “inextricably linked,” prompting respondents to again reject the premise and again redirect the panel. C.A.Arg.40:00-42:00 (“I have thought of it more in terms of the merger doctrine.”).

But even setting aside respondents’ waiver, the violation of the party-presentation principle remains. What matters is that the court decided the case on a basis the parties did not present. It was the court, and only the court, that brought pendent jurisdiction to bat. And after sallying forth to inject its own potential basis for jurisdiction, the court unsurprisingly found its theory persuasive, adopted it, and left the parties’ arguments “for another day.” Pet.App.21. That is a

quintessential violation of the party-presentation principle.

2. Finally, respondents claim that the Fourth Circuit's departure from party presentation was not significant enough to constitute an abuse of discretion. BIO.22-23. That does not square with what happened. The Fourth Circuit's self-charted course singularly determined the appeal's outcome and resulted in a with-prejudice dismissal—an outcome respondents had not even requested. This is every bit as much an abuse of discretion as those corrected in *Clark*, *Margolin*, and *Walters*. Pet.38-39.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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September 25, 2026