No. 15-597

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,
v.

CHERYL PHIPPS, BOBBI MILLNER, AND SHAWN GIBBONS,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

SCOTT L. NELSON
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

JOSEPH M. SELLERS
Counsel of Record
CHRISTINE E. WEBBER
COHEN MILSTEIN SELLERS
& TOLL PLLC
1100 New York Avenue NW
Suite 500
Washington, DC 20005
(202) 408-4600
jsellers@cohenmilstein.com

(Additional counsel listed on signature page)

Counsel for Respondents

January 2016

QUESTION PRESENTED

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), this Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." The question presented is:

Whether plaintiffs whose claims are timely as a result of *American Pipe* tolling may bring those claims in a class action.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

FEDERAL RULES

INTRODUCTION

In this case, plaintiffs who were members of the class decertified on the basis of this Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and whose individual claims were tolled during the pendency of that case under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), brought a subsequent action advancing those claims on behalf of themselves and a much smaller class, defined to meet the criteria of Federal Rule of Civil Procedure 23 as construed by this Court in *Dukes*. Wal-Mart did not contest that those timely claims could be pursued in a multiplicity of individual actions, but argued that the claims could not be pursued in a subsequent class action. Rejecting Wal-Mart's argument, the U.S. Court of Appeals for the Sixth Circuit ruled that the plaintiffs could attempt to pursue their claims, with the benefit of tolling, on behalf of the very different class proposed in this case.

The Sixth Circuit's decision that claims that are timely under *American Pipe* may be pursued in a class action, as well as in an individual action, presents no conflict among the circuits requiring resolution by this Court. Contrary to Wal-Mart's assertion, the courts of appeals have not adopted a general rule that *American Pipe* tolling does not apply to otherwise timely claims brought in subsequent class actions. Rather, the courts of appeals have generally held that tolling is inapplicable only where a subsequent class action represents an attempt to relitigate an earlier determination that the same class is uncertifiable. That circumstance is not presented here, given the material differences between the class this Court rejected in *Dukes* and the one these plaintiffs seek to certify.

Moreover, as the court of appeals pointed out, denying respondents the ability to pursue their timely claims through a class action would run squarely against this Court's ruling in *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), that Rule 23 permits any plaintiff whose claims meet its criteria to pursue those claims on behalf of a class, and this Court's ruling in *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), that denials of class certification are not binding on absent class members in subsequent cases. Those decisions lay to rest any lingering notion that denial of certification in an earlier case can bar plaintiffs with live claims from seeking certification in a later case. They also refute and render irrelevant the policy arguments Wal-Mart offers to support the result it seeks.

STATEMENT

1. On June 19, 2001, a group of plaintiffs filed *Dukes v. Wal-Mart Stores, Inc.*, asserting claims on behalf of a nationwide class of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices." *Dukes*, 131 S. Ct. at 2549. The *Dukes* plaintiffs asserted that "local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees," and "that a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice." *Id.* at 2541.

The district court certified a class under Rule 23(b)(2), and an interlocutory appeal followed. The Ninth Circuit, en banc, affirmed class certification under Rule 23(b)(2) for all women within the class who were employed by Wal-Mart as of the date the complaint was filed, and remanded for consideration of the certification of a class of former employees under Rule 23(b)(3). *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). Wal-Mart petitioned for certiorari, and this Court subsequently reversed the Rule 23(b)(2) certification.

This Court ruled that the evidence presented did not demonstrate commonality. Specifically, the Court stated that "bridging the gap" between different class members required "significant proof" that Wal-Mart "operated under a general policy of discrimination," which it found was absent. *Dukes*, 131 S. Ct. at 2553. Further, the Court criticized the failure to identify a "specific employment practice" challenged, other than delegated discretion. *Id.* at 2555. Finally, the Court concluded that statistical evidence proffered by the plaintiffs in that case failed to establish disparities that presented issues common to a class nationwide in scope. *Id.* Each ground for the Court's decision on commonality went to the quantity or quality of evidence presented in support of the nationwide class. The Court explained that the plaintiffs were "subject to a variety of regional policies that all differed." *Id.* at 2557.

As courts since then have recognized, this "Court's decision rested not on a total rejection of plaintiffs' theories, but on the inadequacy of their proof." *Dukes v. Wal-Mart Stores, Inc.*, No. C 01-02252, 2012 WL 4329009, at *5 (N.D. Cal. Sept. 21, 2012); *see* Pet. App. at 102a n.27 ("the Supreme Court decision in *Dukes* reflected a failure of proof, not a bar to addressing the

viability of an appropriately discrete geographic subclass within Wal-Mart's nationwide operations."). The Court "decided whether Plaintiffs' evidence established that there was a general policy of discrimination throughout Wal-Mart's operations nationwide. The answer was no." *Dukes*, 2012 WL 4329009, at *5. Thus, the Court did not consider "and did not foreclose" a narrower class claim. *Id.*

2. During the pendency of *Dukes*, pursuant to this Court's decisions in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the claims of all putative class members were preserved and the statute of limitations was tolled until decertification. With Wal-Mart's agreement, the California district court presiding over the *Dukes* litigation on remand acknowledged the tolling by setting deadlines for individuals who had been members of the nationwide class to file charges of discrimination with the Equal Employment Opportunity Commission (EEOC). Complaint ¶ 147.

In accordance with the tolling order, respondents Cheryl Phipps, Bobbi Millner, and Shawn Gibbons each filed timely charges of discrimination with the EEOC. Those charges asserted claims of systemic discrimination and disparate impact affecting not only the charging parties but other similarly situated employees. On October 2, 2012, respondents filed the instant action on behalf of themselves and all female retail sales employees in Wal-Mart's Region 43—a region centered in Tennessee and including portions of neighboring states. *Id.* ¶ 5. Respondents' lawsuit challenges Wal-Mart's discriminatory pay and promotion policies in Wal-Mart Region 43 dating back to December 26, 1998, and respondents all work or worked at Wal-Mart retail

locations within Region 43. *Id.* ¶ 6. As noted by the district court below, respondents' class claims focus on the regional policies, regional management, and regional decision makers within a single Wal-Mart region, thereby asserting "new Region-specific allegations that were not contained in the *Dukes* complaint." Pet. App. 41a.

Respondents' complaint differs from the *Dukes* complaint in several material ways. First, respondents' proposed class encompasses just one Wal-Mart region, as opposed to the 41 Wal-Mart regions encompassed within the class proposed in *Dukes*. *See Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 145 (N.D. Cal. 2004). Within that one region, respondents challenge the decisions of a discrete group of managers who made, and were responsible for, the discriminatory pay and promotion decisions challenged in this litigation. Second, even without the benefit of discovery focused on Region 43, respondents' complaint relies on specific evidence of gender bias attributable to managers involved in the contested decisions. Third, to address the concern that regional analyses could mask different behavior by store-level decision makers, respondents allege disparities in pay and promotion decisions adverse to women derived from statistical analyses substantially more refined than those used in the *Dukes* nationwide class. Fourth, the complaint alleges that Wal-Mart's personnel processes are "not capable of separation for analysis" and therefore may be analyzed as a functionally integrated practice pursuant to 42 U.S.C. § 2000e-2(k)(1)(B). Fifth, the complaint challenges specific employment practices not identified in *Dukes*. Complaint ¶¶ 43, 45–47, 51–55, 57. Finally, the complaint alleges claims for monetary relief capable of certification under Rule 23(b)(3), as well as claims for injunctive relief capable of certification under

Rule 23(b)(2). *Id.* The district court agreed that the alleged facts distinguish the class claims in this action from the class claims addressed by the Court in *Dukes*. Pet. App. 41a–42a, 94a–95a.

Wal-Mart moved to dismiss the class allegations, claiming in pertinent part that they were time-barred. Wal-Mart did not challenge the claims of the class representatives as untimely. On February 20, 2013, the district court granted Wal-Mart's motion to dismiss the class allegations, finding dismissal was required by *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988), which had held *American Pipe* tolling unavailable in a subsequent class action under the circumstances of that case. Pet. App. 103a. The district court certified its order dismissing the class claims for interlocutory review pursuant to 28 U.S.C. § 1292(b).

The Sixth Circuit granted respondents' petition for review and reversed. The court started its analysis with this Court's rulings in *American Pipe* and *Crown, Cork*. Noting that the *American Pipe* rule was adopted to promote efficiency and avoid a multiplicity of actions, the court explained that "class members who refrain from filing suit while the class action is pending 'cannot be accused of sleeping on their rights.' … 'Tolling the statute of limitations thus creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights upon denial of class certification.'" Pet. App. 12a (quoting *Crown, Cork*, 462 U.S. at 352-53). The court rejected the argument that its prior decision in *Andrews* established a bright-line rule barring tolling in a subsequent class case. It noted that *In re Vertrue Inc. Marketing & Sales Practices Litigation*, 719 F.3d 474, 478-80 (6th Cir. 2013), rejected that interpretation of *Andrews* and held that where "no court had definitively

addressed the requested class certification," tolling permitted not only individual but class claims to proceed. Pet. App. 19a (collecting cases from other circuits reaching the same conclusion). The Sixth Circuit held that nothing "bar[red] the plaintiffs' present effort to *certify for the first time* this timely-filed Rule 23(b)(3) class comprised of current and former female employees of Wal-Mart in Region 43." Pet. App. 24a (emphasis original).

The Sixth Circuit also explained that its result was consistent with this Court's recent decisions in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 559 U.S. 393 (2010), and *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011). *Shady Grove*, the court explained, holds that under Rule 23, a plaintiff with a valid claim may maintain her case as a class action if the terms of the Rule are satisfied; thus, if the individual class representatives' claims were timely as a result of *American Pipe* tolling, their case "may proceed [as a class action] *if* the Rule 23 class action prerequisites are satisfied." Pet. App. 32a. Moreover, holding that a previous denial of certification would bar a new class representative with a timely claim from seeking to represent other plaintiffs whose individual claims have the benefit of *American Pipe* tolling would be inconsistent with *Smith*'s holding that decisions rejecting class certification are not binding on class members who are not named plaintiffs. *Id.*

REASONS FOR DENYING THE WRIT

I. The decision below does not present the question stated in the petition.

Wal-Mart asks this Court to review the court of appeals' supposed holding that tolling can be used to "extend[] indefinitely" the statute of limitations for class claims. Pet. i. The court below reached no such

conclusion. To the contrary, while declining "to approve the blanket rule advocated by Wal-Mart that *American Pipe* bars *all* follow-on class actions," Pet. App. 31a, the court did not adopt an alternative blanket rule allowing indefinite stacking. Rather, the court stated that, in this case or others, "[c]ourts may be required to decide whether a follow-on class action or particular issues raised within it are precluded by earlier litigation." *Id.* In addition, the court acknowledged Wal-Mart's concerns about stacking, explaining that "existing principles in our legal system, such as *stare decisis* and comity among courts, are suited to and capable of addressing these concerns." *Id.* at 32a. No fair reading of the opinion endorses the scenario of indefinite stacking on which Wal-Mart's fears—and its question presented—are based.

II. There is no disagreement among the circuits on the question presented.

Neither the decision below nor the decision of any other court of appeals has endorsed indefinite stacking of class actions. The premise of Wal-Mart's question presented is thus incorrect. Moreover, contrary to Wal-Mart's contention, the prevailing view among the courts of appeals *rejects* a blanket rule barring certification of a class that consists of plaintiffs whose individual claims are timely because of the tolling effect of an earlier action that was pleaded, but not certified, as a class action. Rather, courts have generally allowed later class actions to benefit from *American Pipe* tolling when certification of the later class action does not require relitigating the basis for the earlier denial of certification. And Wal-Mart cites no appellate case addressing the circumstances of *this* case, where a subsequent class action proposes a substantially

narrower and differently framed class and thus the effort to certify the new class would not challenge an earlier ruling rejecting a differently defined class. *See supra* at 5–6.

Thus, with one possible exception discussed below, "'[t]here is no conflict' in the circuits 'on the question whether a second case may proceed as a class action.'" Pet. App. 29a (quoting *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 563 (7th Cir. 2011) (Easterbrook, J.)). The cases on which Wal-Mart relies, Pet. 20,—most of which predate this Court's holding in *Smith v. Bayer*, 131 S. Ct. 2368, that denials of class certification lack preclusive effect on absent class members—are more properly viewed as "concern[ing], not the statute of limitations or the effects of tolling, but the preclusive effect of a judicial decision in the initial suit applying the criteria of Rule 23." *Sawyer*, 642 F.3d at 563. "Whether the *American Pipe* rule applies to subsequent class actions [thus] depends on the reasons for the denial of certification of the predecessor action." *Great Plains Trust Co. v. Union Pac. R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007). In general, the decisions Wal-Mart cites declined to allow follow-on class actions that sought to relitigate certification issues decided adversely to the proposed class in the prior case, but allowed subsequent class actions where the denial of certification in the earlier case did not address questions presented by the later proposed class action.[1]

---

[1] As explained below, the Court's decisions in *Shady Grove* and *Smith v. Bayer* suggest that a plaintiff who is entitled to *American Pipe* tolling of her individual claims because she was an absent member of a putative class in an action where certification was ultimately disallowed may still bring a class action if she meets the requirements of Rule 23, regardless of the reasons for the denial of

(*Footnote continued*)

For example, Wal-Mart cites *Yang v. Odom*, 392 F.3d 97 (3d Cir. 2004), as a case refusing to allow tolling in a successive class action. But *Yang* held that tolling *applied* to class claims where the earlier denial of certification was based on lack of an adequate representative, but did *not* apply where the denial was based on lack of numerosity—a class defect that the subsequent case could not correct. *Id.* at 108. Indeed, the court expressly rejected the position that Wal-Mart advances here: "it would be at odds with the policy undergirding the class action device, as stated by the Supreme Court, to deny plaintiffs the benefit of tolling, and thus the class action mechanism, when no defect in the class itself has been shown." *Id.* at 106.

Wal-Mart also relies on *Robbin v. Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987), in which the court refused to allow tolling in a second case alleging the same violations on behalf of the same class as to which class certification was previously denied. The Ninth Circuit, however, rejected Wal-Mart's reading of *Robbin*—that *American Pipe* tolling extends only to subsequent individual claims—in *Catholic Social Services v. INS*, 232 F.3d 1139 (9th Cir. 2000), a case not cited by Wal-Mart. There, the court applied tolling to allow a subsequent class action where, unlike in *Robbins*, the plaintiffs were not

---

certification in the earlier case. Thus, this Court's recent decisions suggest the cases denying tolling when certification of the later class action would conflict with the earlier decision denying certification were wrongly decided. Right or wrong, however, those cases do not conflict with the decision of the Sixth Circuit here, because the request for certification in this case would not require relitigating the certification issues decided adversely in the differently-framed class in *Dukes*.

"attempt[ing] to relitigate the correctness of the earlier class certification decision." *Id.* at 1147.

Likewise, other cases cited by Wal-Mart for the proposition that "*American Pipe* tolling extends only to the time to bring *individual* claims," Pet. 20, do not stand for that broad positon. Rather, as Wal-Mart later concedes, those cases instead disallow tolling in a subsequent class action "where … 'the earlier denial was based on a Rule 23 defect in the class itself.'" *Id.* (quoting *Yang*, 392 F.3d at 104). A more complete and accurate description would be that the cases Wal-Mart cites did not allow a later class action to rely on tolling from a prior class case where the earlier denial was based on a Rule 23 defect that would also bar certification of the proposed class in the later case. For example, Wal-Mart cites *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987). There, the Second Circuit held that tolling would exceed *American Pipe*'s parameters where the complaint alleged "class claims identical theoretically and temporally to those raised in a previously filed class action suit which was denied class certification mainly because of overwhelming manageability difficulties." *Id.* at 879. Likewise, *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998), addressed a putative class action in which certification had been denied for failure to satisfy the "similarly situated" requirement of the Age Discrimination in Employment Act. *Id.* at 8 n.4. The scope of the class and the claims alleged in the second case were "identical" to the ones in the prior case.

These cases pose no conflict here, where the successor class has been framed more narrowly than the national class for which this Court found a lack of commonality. Thus, the plaintiffs here do not seek to "relitigate the correctness of the earlier class certifica-

tion decision," *Catholic Soc. Servs.*, 232 F.3d at 1147; they seek a chance to move for certification of a class that no court has ever addressed.[2] As the Seventh Circuit explained, these class members should be permitted a "full and fair opportunity to litigate the question whether a class action is proper." *Sawyer*, 642 F.3d at 564; *see also In re Vertrue*, 719 F.3d at 479.[3]

Contrary to Wal-Mart's suggestion, *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985), does not address the issue in this case. In *Salazar-Calderon*, the court considered whether a second class action had further tolled the statute of limitations as to individual plaintiffs in a third case—that is, whether the *individual* claims had been twice tolled. Under those circumstances, the court stated that successive class actions cannot be used to toll the statute of limitations "indefinitely," *id.* at 1351—again, a proposition the court below did not endorse. *Salazar-Calderon* has no applicability to the circumstances here, where there is no dispute that the limitations period was tolled, and the question is whether the timely claims of the class members can be asserted together in a class

---

[2] Likewise, the pursuit of claims under Rule 23(b)(2) here is not a relitigation of the prior grounds for denying certification. In *Dukes*, plaintiffs sought to certify claims for back pay under Rule 23(b)(2); here, respondents only seek to certify injunctive and declaratory relief claims under Rule 23(b)(2).

[3] Wal-Mart also cites the unpublished opinion in *Angles v. Dollar Tree Stores, Inc.*, 494 Fed. Appx. 326 (4th Cir. 2012). Although *Angles* states that *American Pipe* tolling does not apply to the statute of limitations "for the proposed class," the holding in the non-precedential decision was based on several alternate grounds, including that, even if tolling applied, "the rule still requires the actual filing of an action in the first instance, which never occurred in this case with respect to the Title VII claims." *Id.* at 331.

action rather than just individually. Indeed, whether a second class action should be have the same *American Pipe* tolling effect as the first class action (the issue decided in *Salazar-Calderon*) is a question not remotely presented here, as this case concerns the tolling effect of the *first* class action (*Dukes*) and Wal-Mart has never disputed that *Dukes* had the effect of tolling the *Dukes* class members' claims. *Salazar-Calderon* is inapposite.[4]

In short, the cases on which Wal-Mart relies turned on whether certification of the later proposed class would call for relitigation of the grounds on which the earlier class certification was denied, which present a fact-intensive inquiry unique to each case. That the different facts here would lead to a different result is in no way inconsistent with the reasoning of those cases.

The only court of appeals that appears to have given any credence to the bright-line rule advanced by Wal-Mart is the Eleventh Circuit. In a recent case, *Ewing Industries Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324 (11th Cir. 2015), that court found that its 1994 decision in *Griffin v. Singletary*, 17 F.3d 356, (11th Cir. 1994), controlled and that *Griffin* precluded a court, when deciding whether to allow tolling in a subsequent class action, from considering the reason the earlier class failed. The court thus refused to allow *American Pipe* tolling in a subsequent class action where class certification was denied earlier on grounds that the representative was inadequate, causing concern over "the potential

---

[4] Wal-Mart also cites a subsequent Fifth Circuit decision arising from the same case, in which the court considered a question about when tolling starts. Pet. 21 (citing *Calderon v. Presidio Valley Farmers Ass'n*, 863 F.2d 384, 390 (5th Cir. 1989)). That timing question is also inapposite here.

for multiple rounds of litigation as the class seeks an adequate representative." *Ewing*, 795 F.3d at 1328.

Ewing, unlike this case, involved the same class as the earlier class action, but a different class representative. *Ewing* thus did not consider whether members of a *narrowed class* can obtain certification of claims to which *American Pipe* tolling applies. Nonetheless, the decision is in tension with the decision below. That tension, however, does not require resolution by this Court at this time, for three reasons.

First, the *Ewing* panel considered *Griffin* controlling, and an Eleventh Circuit "panel cannot overrule a prior panel's holding." *Id.* *Ewing* therefore did not consider the issue in light of this Court's decisions in *Shady Grove*, 559 U.S. 393, and *Smith v. Bayer*, 131 S. Ct. 2368: The opinion mentions neither decision, and the parties' briefing (available on PACER) mentions *Shady Grove* just once, in a block quote. As discussed below, *see infra* Part III, those recent decisions of this Court demonstrate that the decision below is correct, and where tolling applies to individual cases, it must likewise apply in a class action. In an appropriate case, in which the parties raised and briefed the issue, the Eleventh Circuit would have an opportunity to revisit the issue in light of these later, pertinent decisions of this Court.

Second, the Eleventh Circuit may have that chance very soon. The issue presented in this case is currently pending before the Eleventh Circuit in *Morris v. Wal-Mart Stores,* No. 15-15260. *Morris* will provide a better opportunity than did *Ewing* to determine the effect of *Shady Grove* and *Smith v. Bayer* on the availability of tolling in a successive class action. Accordingly, the tension between the Eleventh Circuit's outlier position and its sister circuits may soon be resolved.

Finally, the petition incorrectly suggests that the decision below conflicts with decisions in other regional class actions filed against Wal-Mart after the nationwide class was reversed in *Dukes*. Pet. 9. But other than the decision below, the courts of appeals have not yet considered whether *American Pipe* tolling is available in successor class actions brought by former members of the *Dukes* national class.[5] The pendency of those cases, with the opportunity they present for the courts of appeals to consider and clarify the legal principles applicable in cases such as this one, offers another reason to deny review here.

III. The result below is compelled by this Court's decisions.

The Sixth Circuit's holding that a plaintiff whose individual claim is timely because of the tolling effect of a prior, putative class action may seek certification of another class consisting entirely of individuals whose claims are likewise timely is fully consistent with this Court's precedents. Indeed, the principles underlying this Court's recent decisions in *Shady Grove* and *Smith v. Bayer* compel the outcome reached by the Sixth Circuit. *Shady Grove* held that an individual who has an

---

[5] The Fifth Circuit recently remanded a case that presented the issue to allow the district court an opportunity to address a pending motion to intervene filed by the unnamed class members who sought to appeal the denial of class certification after the named plaintiffs settled their claims with Wal-Mart and dismissed the case with prejudice. *See Odle v. Wal-Mart Stores*, No. 15-10571, Order (5th Cir. Dec. 16, 2016) (per curiam). In two other cases, district courts denied class certification on the merits, not on the basis of the unavailability of tolling. *See Ladik v. Wal-Mart Stores*, 291 F.R.D. 263 (W.D. Wis. 2013); *Dukes v. Wal-Mart Stores*, 964 F. Supp. 2d 1115 (N.D. Cal. 2013).

actionable claim against a defendant is entitled under Federal Rule of Civil Procedure 23 to represent a class of individuals with like claims if the requirements of the Rule are met. *See* 559 U.S. at 398–406. *Smith v. Bayer* held that the denial of certification of a class does not bind absent class members from seeking certification in a subsequent case. *See* 131 S. Ct. at 2380. Taken together, those principles foreclose the possibility that an individual with a timely claim can be barred from seeking certification of a class of similarly situated plaintiffs merely because an earlier attempt to certify a different, more broadly defined class failed.

American Pipe itself held that a putative class action tolled the statute of limitations for plaintiffs who, following the denial of class certification, sought to intervene or join in the action in which certification had been sought. 414 U.S. at 553. The reasoning of the opinion, however—that "the filing of a class action complaint commences the action for all members of the class" and thus stops the running of the limitations period, *id.* at 764—logically could not be limited to those who joined in the original action: If a particular plaintiff's claims are not time-barred, there is no reason why he should be limited to intervening in an existing action, as opposed to bringing a new one.

Thus, in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Court recognized that, "[w]hile *American Pipe* concerned only intervenors, … the holding of that case is not to be read so narrowly." *Id.* at 350. Rather, the Court held, "[t]he filing of a class action tolls the statute of limitations 'as to all asserted members of the class,' … not just as to intervenors." *Id.* (quoting *American Pipe*, 414 U.S. at 554). Thus, *American Pipe* "appl[ies] to class members who choose to file separate

suits." *Id.* at 352. As the Court explained, "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied," at which point "class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id.* at 354.

In short, under the *American Pipe* tolling rule, each class member who had a live claim at the time a putative class action asserting that claim was filed benefits from the commencement of the action to suspend the running of the applicable statutory limitations period on that claim, and thus retains that live claim if and when class certification is denied (or a certified class is decertified). That claim may thus be asserted in a new action filed before the limitations period, which is no longer tolled, expires.

Wal-Mart's effort to discern from language in this Court's prior decisions an intention to limit *American Pipe* tolling to those who pursue their claims individually is mistaken. In *Crown, Cork*, the Court referred to the actions that were not time-barred as "individual actions," and at one point characterized the question presented as "whether the filing of a class action tolls the applicable statute of limitations, and thus permits all members of the putative class to file individual actions in the event that class certification is denied." *Id.* at 346-47; *see also id.* at 349, 353 n.5. But that usage reflects the facts of the case, in which only individual actions were at issue. Moreover, the Court used the term "individual action" not to distinguish follow-on individual actions from follow-on class actions, but to differentiate a separate action filed by a class member from intervention in the original, putative class action on which tolling was based. *See id.* at 350 ("There are many reasons why a class

member, after the denial of class certification, might prefer to bring an individual suit rather than intervene."). The Court's holding that *American Pipe* "permits" such a separate "individual action," as opposed to requiring intervention in the original action, by no means suggests that it does *not* permit an individual who has a timely claim from bringing a class action.[6]

Likewise, in *Smith v. Bayer*, a footnote matter-of-factly described the Court's previous cases as holding "that a putative member of an uncertified class may wait until after the court rules on the certification motion to file an individual claim or move to intervene in the suit." 131 S. Ct. at 2379 n.10. That passing description merely reflects that those two circumstances have been the subjects of the Court's previous cases, not that *American Pipe*'s principle is limited to those circumstances. As *Crown, Cork* demonstrates, that the Court's cases apply a principle to a particular set of circumstances does not mean that it is inapplicable to other circumstances. Just as *American Pipe*'s holding that a class member may intervene after the denial of class certification without facing a time bar did not mean that class members could not bring separate actions, *Crown, Cork*'s holding that a class member may bring an individual action does not mean he may not bring a class action. Nor does *Smith v. Bayer*'s brief summary of those cases in a footnote transform those decisions into holdings that foreclose the logical extension of *American Pipe* tolling to a subsequent class action.

---

[6] Similarly, only individual actions were at issue in *Chardon v. Fumero Soto*, 462 U.S. 650 (1983), where the Court held that "individual actions under § 1983" were timely under the *American Pipe* rule in light of a prior class action. *Id.* at 652-53.

Although this Court's decisions have not specified that *American Pipe* tolling permits a plaintiff whose claims are not time-barred to bring another class action on behalf of similarly situated persons with timely claims, the Court's recent decisions in *Shady Grove* and *Smith v. Bayer* leave no doubt that plaintiffs whose individual claims are not time barred may pursue such claims in a class action to the same extent that they may assert them in an individual case.

Shady Grove holds expressly that a plaintiff with a valid claim is entitled to pursue that claim on behalf of a class of similarly situated persons if the claim satisfies the requirements of Rule 23. As this Court explained:

> [Rule 23] states that '[a] class action may be maintained' if two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b). Fed. Rule Civ. Proc. 23(b). By its terms this creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.

559 U.S. at 398. Thus, "what Rule 23 does" is "empower[] a federal court 'to certify a class in each and every case' where the Rule's criteria are met." *Id.* at 399. If a plaintiff has a claim, and it meets the Rule's requirements, "[h]e may bring his claim in a class action if he wishes." *Id.* at 400. "Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met." *Id.* at 406 (emphasis original).

Here, a plaintiff with a claim that is concededly not time-barred because of the tolling effect of a prior class

action has filed an action asserting that claim. Other similarly situated persons have similar claims that are, likewise, not time-barred. *Shady Grove* holds that if those claims satisfy Rule 23's requirements—a point not at issue here—the claims that otherwise could be the subject of thousands of individual actions can be pursued on a class basis by a plaintiff who possesses a typical claim.

The contrary rule advocated by Wal-Mart would have the perverse consequence of making a plaintiff's substantive rights differ depending on whether they were pursued in a class action or an individual action: A plaintiff in an individual action would have a timely claim, while the same plaintiff could not assert the same timely claim in a class action. That consequence would conflict with "the bedrock rule that the sole purpose of classwide adjudication is to aggregate claims that are individually viable." *Brown v. Plata*, 563 U.S. 493, __, 131 S. Ct. 1910, 1952 (2011) (Scalia, J., dissenting). A class action thus "leaves the parties' legal rights and duties intact and the rules of decision unchanged"; it can "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights," but "alter only how the claims are processed." *Shady Grove*, 559 U.S. at 408 (plurality opinion).[7]

Just as a plaintiff cannot acquire substantive rights that she would not have individually by becoming a member of a class, she cannot lose substantive rights,

---

[7] Although the quoted language is from the plurality portion of *Shady Grove*, it was subsequently endorsed in Justice Ginsburg's dissenting opinion in *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 696 (2010). Thus, six sitting Justices have explicitly endorsed it.

either. Indeed, if plaintiffs had fewer or lesser substantive claims in a class action than an individual action, Rule 23 would conflict with the Rules Enabling Act's prohibition on rules that "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a); *Shady Grove*, 559 U.S. at 406–09 (plurality opinion); *id.* at 422–25 (Stevens, J., concurring); *id.* at 438 (Ginsburg, J., dissenting).

Of course, if a plaintiff were barred by the denial of certification in a prior case from asserting that her new action satisfied Rule 23's criteria, reliance on *Shady Grove* would be unavailing. But *Smith v. Bayer* precludes that outcome. *Smith v. Bayer* holds unequivocally that when certification is *denied* in a case, a class member other than the named plaintiff is not precluded from seeking certification in a later case because she is not bound by the prior adjudication of the certification issue. As *Smith v. Bayer* holds, an absent class member is bound by an adjudication of an issue in a class action only if the action is certified, because the very point of certification is to determine whether it is fair to bind absent parties to an adjudication. 131 S. Ct. at 2380. When a court holds that an action may not be maintained as a class action, the essential "precondition" for binding an absent class member to any adjudication in the action—including the adjudication of the certification issue itself—is absent. *Id.* "Neither a proposed class action nor a rejected class action may bind nonparties." *Id.*

Shady Grove and *Smith v. Bayer* combine to compel rejection of Wal-Mart's view that a class action brought by plaintiffs whose claims were tolled by a prior, ultimately uncertified class action is impermissible. If an individual named plaintiff has timely claims, *Shady*

Grove permits her to pursue them in a class action together with other plaintiffs with like claims, if Rule 23's criteria are satisfied. And *Smith v. Bayer* forecloses the possibility that the named plaintiff's attempt to satisfy Rule 23's certification criteria can be precluded by the outcome of a prior case in which another plaintiff failed to succeed in obtaining certification of a class.

Wal-Mart's argument to the contrary attempts an end-run around *Smith v. Bayer* by applying another label (tolling) to preclude what it considers to be the relitigation of certification decisions. The problem for Wal-Mart is that its gambit violates fundamental class-action principles—in particular, the principle that plaintiffs have the same substantive rights whether their claims are pursued on an individual or class basis—just as much as the preclusion-based approach attempted in *Smith v. Bayer*. Moreover, the policy argument Wal-Mart invokes to cover the legal deficiencies of its position is the very same one rejected in *Smith v. Bayer*: namely, that the consequence of applying normal class action doctrines would allow "class counsel [to] repeatedly try to certify the same class 'by the simple expedient of changing the named plaintiff in the caption of the complaint.'" 131 S. Ct. at 2381. That policy argument is no more a reason for distorting the *Shady Grove* principle that a plaintiff with a valid individual claim can assert it on behalf of a class that satisfies Rule 23 than it was for turning standard preclusion principles upside down in *Smith v. Bayer*. The Sixth Circuit's decision that a plaintiff whose claim is not time-barred because of the tolling effect of a prior putative class action can seek to pursue that claim in a class action is therefore compelled by this Court's opinions in *American Pipe*, *Crown, Cork*, *Shady Grove*, and *Smith v. Bayer*.

The Sixth Circuit's opinion, moreover, is one of only two court of appeals decisions to date that have discussed the impact of *Shady Grove* on the *American Pipe* tolling analysis in a case involving a successor class action. The other case, the Seventh Circuit's decision in *Sawyer v. Atlas Heating and Sheet Metal Works, Inc.*, 642 F.3d 560, reached the same conclusion as to the implications of *Shady Grove*. And the decision below is, so far, the *only* appellate decision to consider both *Shady Grove* and *Smith v. Bayer* in connection with the availability of *American Pipe* tolling. Even if there were any doubt as to the proper application of *Shady Grove* and *Smith v. Bayer* here, this Court would benefit from allowing the issue to percolate further and obtaining the considered views of other courts of appeals on the subject before addressing the issue. Until other federal appellate courts have grappled with the principles of *Shady Grove* and *Smith v. Bayer* in this context and reached a different conclusion, there is no need for this Court to review the Sixth Circuit's decision.

IV. Wal-Mart's policy arguments are misguided.

Wal-Mart contends that review is necessary to avoid interminable "stacking" of class actions that seek to relitigate adverse certification or decertification decisions. That argument overlooks the substantial interests in efficiency and fairness that support application of the normal rule that a plaintiff who has a timely claim and who is not bound by any preclusive effects of an earlier certification ruling may seek to represent a class of plaintiffs with similar claims. And Wal-Mart's assertion that tolling in these circumstances will allow endless relitigation of the same certification arguments overlooks the principles of comity and stare decisis that this Court invoked in response to similar concerns in

Smith v. Bayer, as well as the practical realities of litigation, which will deter plaintiffs from repeatedly refiling class actions that cannot be certified. Rather, as in this case, plaintiffs relying on *American Pipe* tolling to bring later class actions will seek certification of different classes whose susceptibility to certification has not already been litigated. Giving such plaintiffs a first chance to certify a class that has never previously been considered by a court is neither unfair to defendants nor an imposition on the courts.

This Court's decisions in *American Pipe* and *Crown, Cork* rested substantially on concerns of efficiency and fairness that would be lost if class members could not rely on the tolling effect of a class action presenting their claims. *See Crown, Cork*, 462 U.S. at 350–51; *American Pipe*, 414 U.S. at 553. The same concerns are present here: If class members are barred from presenting timely claims in a narrower class action after a broader class action encompassing their claims is denied certification or is decertified, they will be prompted to file multiple class actions of varying scope asserting the same claims against the same defendant before class certification can be determined in the original action. "The result would be a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Crown, Cork*, 462 U.S. at 351.

The principle announced by this Court in *Shady Grove*—that Rule 23 permits a plaintiff with a viable claim to pursue a class action if the action satisfies the Rule's criteria—likewise reflects the rulemakers' policy choice to allow aggregate litigation, under the circumstances defined by the Rule, by plaintiffs who could otherwise proceed individually. *See Shady Grove*, 559

U.S. at 398–406; *see also id.* at 447 (Ginsburg, J., dissenting) ("Rule 23 authorizes class treatment for suits satisfying its prerequisites because the class mechanism generally affords a fair and efficient way to aggregate claims for adjudication."). The benefits of aggregation, however, would be lost if plaintiffs with timely individual claims were forced to litigate those claims separately under circumstances where the Rule would otherwise allow certification.

Smith v. Bayer's holding that absent class members are not bound by a denial of class certification reflects an even more fundamental principle underlying the judicial system: "A court's judgment binds only the parties to a suit, subject to a handful of discrete and limited exceptions"—exceptions absent when a court has ruled that a case may *not* proceed on a class basis. 131 S. Ct. at 2379–81. Barring plaintiffs from proceeding as a class because of an earlier denial of certification would run afoul of that principle central to the fairness of the judicial system.

These considerations have particular force where, as here, no previous court has held that the class action these plaintiffs seek to certify cannot be certified. The plaintiff class members in such circumstances do not seek a second bite at the apple; they ask a court to consider, for the first time, whether this class satisfies Rule 23's requirements. Thus, as the Sixth Circuit recognized, permitting the plaintiffs to attempt "to certify for the first time this timely-filed Rule 23(b)(3) class compris[ing] [] current and former female employees of Wal-Mart in Region 43," Pet. App. 24a (emphasis omitted), is fully consistent with the fairness and efficiency concerns that drive judicial policy in this area.

Wal-Mart's concerns that the result below would allow indefinite tolling and repeated efforts to certify classes rejected in earlier cases are unwarranted. To begin with, those concerns have no application here, where Wal-Mart does not dispute that each plaintiff has a timely individual claim as a result of the tolling achieved by *Dukes*, and there is no attempt to relitigate the propriety of the class reversed in *Dukes*.

More broadly, Wal-Mart's fear of perpetual tolling ignores the facts that limitations periods will continue to run after class certification is denied, and that there are limited plausible ways to redefine a potential class. Wal-Mart points to no cases where third- or fourth-generation class actions have resulted in extending limitations periods indefinitely. The rule applied below will not lead to endless litigation.

Further, allowing tolled claims to be pursued in class actions is not likely to result in unjustifiable relitigation of certification decisions. As this Court pointed out in *Smith v. Bayer* in response to exactly the same policy argument Wal-Mart advances here, doctrines of stare decisis and comity exist to "mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." 131 S. Ct. at 2381. Those tools are fully available to redress abusive efforts to relitigate questions already resolved. In this case, for example, any decision on certification will necessarily give stare decisis effect to applicable legal principles established by this Court in *Wal-Mart v. Dukes*.

Moreover, if plaintiffs (unlike plaintiffs here) seek to certify classes identical to classes previously rejected by sister courts, this Court may justifiably "expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common

dispute." *Id.* at 2382. District courts after *Smith v. Bayer* have applied this principle, giving persuasive, though not dispositive, weight to decisions denying certification of identical or very similar classes. *See, e.g., Ott v. Mortgage Inv. Corp.*, 65 F. Supp. 3d 1046 (D. Ore. 2014); *Murray v. Sears, Roebuck & Co.*, 2014 WL 563264, at *6 (N.D. Cal. Feb. 12, 2014); *Williams v. Winco Foods*, 2013 WL 4067594 (N.D. Cal. Aug. 1, 2013). And because it is unlikely that federal courts will disregard a decision denying certification of an identical class, the fear that plaintiffs will waste time and money repeatedly attempting to certify the same uncertifiable class is unjustified. As one court observed, the application of comity principles to reject a second attempt to certify a class "aptly illustrates why future copycat suits would be ill-advised." *Williams*, 2013 WL 4067594, at *2. "Lawyers must eat, so they generally won't take cases without a reasonable prospect of getting paid." *Moreno v. City of Sacramento,* 534 F.3d 1106, 1111 (9th Cir. 2008).

Wal-Mart's suggestion that tolling of class claims is inconsistent with the statute of limitations and permits litigating stale claims is also meritless. As this Court has repeatedly explained, "[l]imitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." *Crown, Cork*, 462 U.S. at 352 (citing *Delaware State Coll. v. Ricks,* 449 U.S. 250, 256-257 (1980)). Limitations periods "promote justice by preventing surprises through [plaintiffs'] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (quoting *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.,* 321 U.S. 342, 348–349 (1944)). Since the inception of the

Dukes case, Wal-Mart has had timely notice of the nature of the claims against it and the general identities of the plaintiffs. Accordingly, this case presents no possibility of the unfair surprise that the statute of limitations was meant to protect against. Certainly, there is no more "surprise" associated with a regional class claim than with an individual claim, about which Wal-Mart raises no such concern. Nor are the class claims stale: they have been the subject of active litigation since 2001.

Wal-Mart would use limitations law as a backdoor means of giving preclusive effect to decisions that are not entitled to such effect and of denying litigants with valid, timely claims the ability to use the mechanisms provided by the Federal Rules of Civil Procedure for the pursuit of those claims. Neither objective is legitimate, and neither has anything to do with the purposes of limitations periods.

CONCLUSION

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

Respectfully submitted,

SCOTT L. NELSON
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

DAVID W. GARRISON
SCOTT P. TIFT
SETH M. HYATT
BARRETT JOHNSTON MARTIN & GARRISON, LLC
414 Union Street
Suite 900
Nashville, TN 37219
(615) 244-2202

JOSEPH M. SELLERS
Counsel of Record
CHRISTINE E. WEBBER
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue NW
Suite 500
Washington, DC 20005
(202) 408-4600
jsellers@cohenmilstein.com

JOCELYN D. LARKIN
THE IMPACT FUND
125 University Avenue
Suite 102
Berkeley, CA 94710
(510) 845-3473

Counsel for Respondents

January 2016