No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that the filing of a class action tolls the limitations periods applicable to the individual claims of putative class members (*American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 552-53 (1974)); that this tolling comes to an end when class certification is denied or reversed (*Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 354 (1983)); and that former class members must then individually file a timely lawsuit or motion to intervene in another pending action (*Smith* v. *Bayer Corp.*, 131 S. Ct. 2368, 2379 n.10 (2011)). Following this Court's decertification of a nationwide class in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), three former class members filed a new lawsuit asserting substantively identical claims on behalf of both themselves and, ostensibly, a class of former *Dukes* class members who took no action to prosecute their own claims. The question presented is:

Whether the Sixth Circuit erred in concluding, in conflict with the decisions of seven other Circuits, that statutory limitations periods applicable to the claims of absent and unknown persons can be extended indefinitely by filing successive (or "stacked") class actions.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel states that Wal-Mart Stores, Inc. has no parent corporation and no other publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Wal-Mart Stores, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-34a) is reported at 792 F.3d 637. That court's order granting interlocutory appeal (App., *infra*, 105a-107a) is unreported. The opinion of the district court (*id.* at 35a-103a) is reported at 925 F. Supp. 2d 875.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2015. A timely petition for rehearing was denied on August 10, 2015. App., *infra*, 110a-111a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, the Due Process Clause of the Fifth Amendment, the Rules Enabling Act, pertinent provisions of Title VII (42 U.S.C. § 2000e-5(b) & (e)(1)), and Federal Rule of Civil Procedure 23 are reproduced in the Appendix, *infra*, at 112a-124a.

STATEMENT

This is a textbook example of the ills that beset both litigants and the Judiciary when congressional determinations regarding limitations and repose are disregarded and litigation is allowed to run amok. In the wake of this Court's decision in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), three former members of that rejected nationwide class filed this

follow-on suit seeking to reassert the same allegations on behalf of a proposed class of thousands of former *Dukes* class members who had worked in the so-called "Tennessee Region." Under this Court's longstanding precedent, following decertification of the nationwide class, the former class members were required *individually* to file timely lawsuits or motions to intervene in pending actions if they wished to continue pursuing claims against Wal-Mart. *See American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 552-53 (1974); *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 354 (1983); *Smith* v. *Bayer Corp.*, 131 S. Ct. 2368, 2379 n.10 (2011). The three named plaintiffs in this case did so, but the absent persons on whose behalf they purported to sue did nothing to pursue their individual claims and instead allowed them to expire. The district court correctly dismissed the claims of those absent individuals as untimely, while allowing the named plaintiffs' individual claims to proceed. The Sixth Circuit reversed, erroneously holding that the filing of this successive class action revived the time-barred claims of absent individuals who failed to take action on their own behalf. That ruling cannot be reconciled with this Court's tolling decisions and directly conflicts with the decisions of every other Circuit to have considered similar issues.

1. On June 19, 2001, Betty Dukes and five other women filed a complaint in the Northern District of California on behalf of a nationwide class that included "[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 (alteration in original; internal quotation marks omitted). The basic theory alleged in the *Dukes* case

was that Wal-Mart had delegated too much discretion over pay and promotion decisions to local managers without sufficient guidance based on objective criteria, purportedly leading to violations of Title VII. *Id.* at 2548.

In 2004, the district court certified the nationwide class under Rule 23(b)(2). *Dukes*, 131 S. Ct. at 2549. The Ninth Circuit largely affirmed, although it narrowed the class to exclude "women who were not employed by Wal-Mart as of June 8, 2001, the date on which the complaint was filed," because they did not have standing to seek declaratory or injunctive relief. *Dukes* v. *Wal-Mart Stores, Inc.*, 603 F.3d 571, 623 (9th Cir. 2010) (en banc).

This Court reversed the class certification order in its entirety because (among other reasons) the *Dukes* plaintiffs had failed to identify any "questions of law or fact common to the class," and thus could not satisfy Rule 23(a)(2)'s commonality requirement. *See* 131 S. Ct. at 2551-52. The Court explained that "Wal-Mart's 'policy' of *allowing discretion* by local supervisors" was "just the opposite of a uniform employment practice that would provide the commonality needed for a class action." *Id.* at 2554. The class thus failed for one "fundamental" reason: "Other than the bare existence of delegated discretion," the *Dukes* plaintiffs "ha[d] identified no 'specific employment practice'—much less one that tie[d] all their 1.5 million claims together." *Id.* at 2555-56. To the contrary, "Wal-Mart's announced policy forbids sex discrimination," and "the company imposes penalties for denials of equal employment opportunity." *Id.* at 2553. The Court also held that the class could not proceed under Rule 23(b)(2) because that provision "does not authorize class certification when each

class member would be entitled to an individualized award of monetary damages." *Id.* at 2557.

Under *American Pipe*, the limitations periods applicable to the individual claims of absent members of the nationwide class were tolled while the *Dukes* case proceeded as a class action. 414 U.S. at 553. That tolling came to an end upon reversal of the certification order. *Crown, Cork*, 462 U.S. at 354. At that time, former class members had to individually file suit or move to intervene in a pending action. *See Smith*, 131 S. Ct. at 2379 n.10 ("[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").

Following this Court's decertification decision, the Northern District of California—acting "in the interest of justice and to avoid any confusion that might exist among former class members regarding when the time limit for them to take action expires"—adopted clear deadlines for former class members to file individual charges and claims. App., *infra*, 108a. Judge Breyer ruled that "[a]ll former class members who ha[d] never filed an EEOC charge shall have until January 27, 2012 to file charges with the EEOC in those states with 180 day limits and until May 25, 2012 to file charges with the EEOC in those states with 300 day limits." *Id.* at 108a-109a. "All former class members who ha[d] an EEOC notice to sue" were given "until October 28, 2011 to file suit." *Id.* at 108a. These extended periods, which Wal-Mart did not oppose, ensured that each former class member had ample opportunity to individually bring administrative charges or judicial claims following this Court's decertification decision.

2. On October 2, 2012, three former *Dukes* class members—respondents Cheryl Phipps, Bobbi Millner, and Shawn Gibbons—filed a complaint against Wal-Mart in the Middle District of Tennessee, alleging that Wal-Mart had discriminated against them in pay or promotion decisions. *See* App., *infra*, 125a-126a. Like the *Dukes* plaintiffs, the *Phipps* plaintiffs challenged conduct dating back to December 26, 1998. *Id.* at 126a. By the time they filed their complaint, the deadline for other former *Dukes* class members to file charges with the EEOC had passed. The overwhelming majority of the putative class members did not file EEOC charges and none filed their own suits or moved to intervene in another pending suit to pursue their individual claims.

The *Phipps* complaint sought certification of a proposed class comprised of a substantial subset of the former *Dukes* class, consisting of women who had worked in a "region" spanning 74 stores, 12 districts, and five states. App., *infra*, 126a-128a. Despite this Court's reminder that delegated discretion is "a very common and presumptively reasonable way of doing business" (*Dukes*, 131 S. Ct. at 2554), the *Phipps* plaintiffs—like the *Dukes* plaintiffs before them—sought to challenge Wal-Mart's alleged failure to provide local managers with objective "job-related compensation and promotion criteria." App., *infra*, 128a.

Even though they continued to challenge discretionary decisionmaking, the named plaintiffs in *Phipps* argued that their proposed class "cure[d]" this Court's "principal concerns in *Dukes*" because it included only "one Wal-Mart region." Pls.' Resp. to Def.'s Mot. to Dismiss (Dist. Ct. Dkt. No. 35) at 1. They alleged that an "Injunctive Relief Class [was]

properly certifiable under Federal Rule of Civil Procedure 23(b)(2)," and a "Monetary Relief Class [was] properly certifiable under Federal Rule of Civil Procedure 23(b)(3)." App., *infra*, 127a.

Wal-Mart moved to dismiss as untimely the claims purportedly brought on behalf of absent individuals—but not the claims of the three named plaintiffs. Wal-Mart argued that these unknown persons' claims were time-barred under Judge Breyer's order and longstanding Sixth Circuit precedent holding that "the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class." *Andrews* v. *Orr*, 851 F.2d 146, 149 (6th Cir. 1988). As the Sixth Circuit had acknowledged, a contrary rule would allow "'putative class members [to] piggyback one class action onto another and thus toll the statute of limitations indefinitely.'" *Ibid*. (quoting *Salazar-Calderon* v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985)). In order to avoid "abuse" of the already "generous" tolling provided under *American Pipe* (*Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring)), every other Circuit to consider the issue had similarly adopted an "anti-stacking" rule. *See Andrews*, 851 F.2d at 149 (collecting cases); *Angles* v. *Dollar Tree Stores, Inc.*, 494 F. App'x 326, 331 n.10 (4th Cir. 2012) ("Courts have consistently concluded that *American Pipe*/*Crown, Cork & Seal* do not permit class actions to toll the statute of limitations for additional classes to be stacked upon them").

Applying the anti-stacking rule, the district court here dismissed as time-barred the claims asserted on behalf of persons other than the named plaintiffs. *See* App., *infra*, 103a (citing *Andrews*). Although

they were not personally aggrieved by this ruling, the named plaintiffs sought review under 28 U.S.C. § 1292(b). *See* App., *infra*, 105a. While acknowledging that "[t]he parties ha[d] not identified any circuit split on this issue," and that it was not "one of first impression before this court," the Sixth Circuit granted review. *Id.* at 106a.

3. On July 7, 2015, a divided panel reversed. Judge Stranch, writing for the majority, initially concluded that the named plaintiffs had standing to pursue the appeal because the dismissal order "preclude[d] [them] from pursuing the pattern-or-practice theory of gender discrimination" and might prevent the district court from granting "injunctive relief" to "address region-wide gender discrimination." App., *infra*, 10a.

Turning to timeliness, the Sixth Circuit panel distinguished *Andrews* and the other anti-stacking precedents into oblivion, ruling that tolling under *American Pipe* could be extended indefinitely to sequential class complaints. According to the Sixth Circuit, the anti-stacking rule was limited to "a situation in which a subsequent class action was brought after class certification already had been denied," and that it had no application where "no court had denied class certification." App., *infra*, 19a. Despite this Court's decision in *Dukes*, which had unequivocally reversed the order certifying a nationwide class, the Sixth Circuit then misapplied its new rule to hold that continued tolling was appropriate here.

The Sixth Circuit reasoned that "no court in any jurisdiction had denied certification of a Rule 23(b)(3) class." App., *infra*, 20a. On that basis, it held that the *Phipps* plaintiffs' filing of a putative Rule 23(b)(3) class action revived the otherwise-untimely

claims of absent class members, who in the court's view could benefit from a second round (and, indeed, potentially infinite rounds) of *American Pipe* tolling. The panel did not even try to reconcile this reasoning with this Court's holding that the *Dukes* class failed to satisfy Rule 23(a)'s commonality requirement, which *necessarily* precluded a finding of predominance under Rule 23(b)(3). *See Dukes*, 131 S. Ct. at 2566 (Ginsburg, J., dissenting); *see also Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013) (explaining the "predominance criterion is even more demanding" than the commonality requirement, citing *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623-24 (1997)).

The majority next held that an extension of tolling was also appropriate as to the proposed Rule 23(b)(2) class because the plaintiffs were neither "seek[ing] … relitigation nor correction of the earlier class claims," but instead supposedly sought "certification for the first time of a *regional* class under Rule 23(b)(2)." App., *infra*, 28a-29a (emphasis added). It was irrelevant to tolling, the majority insisted, that these regional claims were "within the scope of those asserted by the nationwide class in *Dukes*." *Id.* at 28a. It was also irrelevant in the majority's view that the *absent* individuals had taken no steps to timely pursue their claims, because the *named* plaintiffs had "pursued EEOC charges and filed this class action." *Id.* at 25a. In other words, so long as the named plaintiffs propose a class that is a subset of the rejected class, the majority concluded, the filing of the subsequent class action automatically revives the untimely claims of absent class members and thus permits indefinite tolling.

Judge Cook concurred in part and dissented in part. She disagreed with the panel majority on the Rule 23(b)(2) claims, agreeing with Wal-Mart that *Andrews* "binds us to dismiss [those] claims absent reconsideration by the full court." App., *infra*, 34a. But, like the panel majority, she believed that "*Andrews* does not bar consideration" of a Rule 23(b)(3) class, again without acknowledging this Court's ruling that the *Dukes* class failed for lack of Rule 23(a) commonality. *Ibid*.

4. The *Phipps* case was not the only attempt to revive the claims originally asserted on a nationwide basis in *Dukes*. Plaintiffs' counsel promised to launch an "armada of cases" across the country. Margaret Cronin Fisk & Karen Gullo, *Wal-Mart Accused in Suit of Shortchanging Women on Pay*, Bloomberg, Oct. 29, 2011. They filed four parallel lawsuits by former *Dukes* class members, including this one, and the plaintiffs in the original *Dukes* action amended their complaint seeking to certify regional subsets of the nationwide *Dukes* class. App., *infra*, 7a. These five regional "ships" included former members of the nationwide class employed in 37 of the 50 states.

The Texas and Florida courts, like the district court in this case, dismissed the absent individuals' claims as time-barred. *See Odle* v. *Wal-Mart Stores, Inc.*, No. 3:11-cv-2954-O, 2012 WL 5292957, at *8-9 (N.D. Tex. Oct. 15, 2012) (citing, *inter alia*, *Salazar-Calderon*, 765 F.2d at 1351), *rev'd in part only as to Ms. Odle's individual claims*, 747 F.3d 315 (5th Cir. 2014); *Love* v. *Wal-Mart Stores, Inc.*, No. 12-cv-61959, 2013 WL 5434565, at *2-*3 (S.D. Fla. Sept. 23, 2013) (citing, *inter alia*, *Griffin* v. *Singletary*, 17 F.3d 356, 359 (11th Cir. 1994)). The Fifth Circuit

and the Eleventh Circuit denied requests for interlocutory review. *See Odle* v. *Wal-Mart Stores, Inc.*, No. 13-90002 (5th Cir. Mar. 19, 2013); *Love* v. *Wal-Mart Stores, Inc.*, No. 13-90026-B (11th Cir. Apr. 2, 2014). After the parties settled the individual claims of the named plaintiffs in the Texas case, several individuals filed a motion to intervene in order to appeal the dismissal of the claims brought on behalf of absent persons. That appeal is currently pending before the Fifth Circuit. *See Odle* v. *Wal-Mart Stores, Inc.*, No. 15-10571 (5th Cir.).

The Wisconsin court dismissed the claims of absent class members, and the California court denied a renewed motion for class certification—both on the ground that the named plaintiffs had again failed to plead or prove commonality. *See Ladik* v. *Wal-Mart Stores, Inc.*, 291 F.R.D. 263 (W.D. Wis. 2013) (Rule 12); *Dukes* v. *Wal-Mart Stores, Inc.*, 964 F. Supp. 2d 1115 (N.D. Cal. 2013) (Rule 23). These courts recognized that, "[b]y limiting the class geographically, plaintiffs simply … created a smaller version of the same problem." *Ladik*, 291 F.R.D. at 270; *Dukes*, 964 F. Supp. 2d at 1118 ("[the] newly proposed class continues to suffer from the problems that foreclosed certification of the nationwide class"). The Seventh Circuit and the Ninth Circuit denied requests for interlocutory review. *See Ladik* v. *Wal-Mart Stores, Inc.*, No. 13-8013 (7th Cir. June 13, 2013); *Dukes* v. *Wal-Mart Stores, Inc.*, No. 13-80184 (9th Cir. Nov. 18, 2013). The Western District of Wisconsin subsequently granted Wal-Mart's motion for "summary judgment because [the individual] plaintiffs … failed to adduce evidence from which a reasonable jury could find that [the] defendant violated Title VII." *Ladik* v. *Wal-Mart Stores, Inc.*, No. 13-cv-123-bbc, 2014 WL 4187446, at *1 (W.D. Wis. Aug. 22, 2014).

REASONS FOR GRANTING THE PETITION

Recognizing the importance of repose for litigants and judges alike, this Court has articulated a comprehensive and coherent framework for tolling individual claims in the class-action context. Tolling begins when a putative class-action complaint is filed (*American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 553 (1974)) and ends when certification is denied or reversed. *Crown, Cork, & Seal Co.* v. *Parker*, 462 U.S. 345, 354 (1983). As the Court confirmed when it most recently addressed *American Pipe* tolling, once certification has been denied, absent class members must timely "file an *individual* claim or move to intervene in the suit." *Smith* v. *Bayer Corp.*, 131 S. Ct. 2368, 2379 n.10 (2011) (emphasis added). No further tolling is provided, and for good reason: the *American Pipe* rule is already a "generous one, inviting abuse." *Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring).

Until the decision below was announced, the courts of appeals, including the Sixth Circuit, were "in unanimous agreement that the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class." *Andrews* v. *Orr*, 851 F.2d 146, 149 (6th Cir. 1988); *see also Basch* v. *Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998); *Korwek* v. *Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *Yang* v. *Odom*, 392 F.3d 97, 104 (3d Cir. 2004); *Angles* v. *Dollar Tree Stores, Inc.*, 494 F. App'x 326, 331 n.10 (4th Cir. 2012); *Salazar-Calderon* v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985); *Robbin* v. *Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987); *Griffin* v. *Singletary*, 17 F.3d 356, 360 (11th Cir. 1994).

Breaking from four decades of consistent precedent, however, the Sixth Circuit held in this case that plaintiffs (and their lawyers) can file sequential class actions without regard to statutes of limitations, extending tolling indefinitely for absent class members who will never be responsible for taking any action to preserve or pursue their individual claims. In other words, the Sixth Circuit concluded that absent persons need not file their own claims or move to intervene in a pending action following decertification; instead, strangers can simply revive (repeatedly) their untimely claims by filing yet another class action. That invitation to perpetual litigation cannot be reconciled with the congressional design of statutes of limitations, runs counter to this Court's decisions in *American Pipe*, *Crown, Cork*, and *Smith*, and creates a direct and irresolvable conflict with the many circuit-level decisions applying the anti-stacking rule.

Not only is the decision below unprecedented and wrong, but it will encourage forum shopping, create confusion among absent class members, and destroy the nationwide uniformity that until now has prevailed in this important area of civil procedure. The Sixth Circuit's unwarranted expansion of *American Pipe* tolling creates uncertainty as to the rights and obligations of absent class members and defendants alike. It eviscerates Congress's considered policy decisions in enacting Title VII's intentionally short limitations periods by allowing putative class-action plaintiffs to toll statutes of limitations indefinitely by filing *seriatim* class actions. It creates different rules in different jurisdictions about when, if at all, absent class members must step forward in order to assert timely claims. And it removes not only the right to repose but to finality in any form; even where class

certification has failed and individual claims have been resolved, those who have slept on their rights may attempt to restart the process again, and again, and again.

The Court should grant this petition to bring the Sixth Circuit's case law back in line with this Court's tolling precedents and the rule unanimously followed by every other court of appeals, as well as to prevent the abuse of Rule 23 in a manner that both guts the operation of statutes of limitations for sequential class-action complaints and places the rights of defendants and absent class members at risk.

I. *AMERICAN PIPE* TOLLING ENDS WITH THE DENIAL OR REVERSAL OF CERTIFICATION IN THE INITIAL CLASS ACTION

Under this Court's precedent in *American Pipe* and *Crown, Cork*, the rule is clear: Once class certification is denied or reversed, absent class members must "enforce their [own] rights" (*Crown, Cork*, 462 U.S. at 353) by "fil[ing] an individual claim or mov[ing] to intervene in the [existing] suit." *Smith*, 131 S. Ct. at 2379 n.10. The Sixth Circuit, however, has held that tolling under *American Pipe* may be extended beyond the initial denial or reversal of class certification by the simple tactic of filing *seriatim* class actions.

Review by this Court is warranted to restore the longstanding principle that tolling starts with the "filing of a class action" and ends once "class certification is denied" or reversed in the initial suit, at which point individuals must act "within the time that remains on the limitations period" if they wish to pursue claims previously brought on their behalf. *Crown, Cork*, 462 U.S. at 346-47, 354.

A. The Sixth Circuit Erred In Refusing To Follow This Court's Tolling Precedents

The panel's determination that the absent individuals' claims are not time-barred departs wildly from this Court's tolling precedents, and runs afoul of the Rules Enabling Act and the Due Process Clause.

As this Court has repeatedly held, statutes of limitations "inevitably reflec[t] [Congress's] value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Del. State Coll.* v. *Ricks*, 449 U.S. 250, 260 (1980) (citation omitted). These legislative judgments are "not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin Cty. Welcome Ctr.* v. *Brown*, 466 U.S. 147, 152 (1984) (per curiam). Nor may they be cast aside in the name of Rule 23, which "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072; *see also Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013) (holding that there is no right to proceed via class action).

1. *American Pipe* tolling ensures the timeliness of individual claims for "all purported members of [a] class who make timely motions to intervene after the court has found the suit inappropriate for class action status." 414 U.S. at 553. The Court extended this rule in *Crown, Cork* to apply to former class members who, instead of intervening in an existing suit, filed separate "individual actions." 462 U.S. at 346, 354. This Court's most recent articulation of the *American Pipe* tolling doctrine confirms that this remains the correct rule today: Once class certification is denied (or reversed), former class members

must timely "file an *individual* claim or move to intervene in the suit." *Smith*, 131 S. Ct. at 2379 n.10 (emphasis added).

Judicially created tolling doctrines, including *American Pipe*, are "very limited in character, and are to be admitted with great caution; otherwise, the court would make the law instead of administering it." *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1224 (2013) (citation omitted). Indeed, consistent with the Rules Enabling Act, *American Pipe* itself made clear that tolling is only available when it is compatible with the "functional operation of a statute of limitations" and "consonant with the legislative scheme." 414 U.S. at 554, 557-58; *see also Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring) (warning courts to remain vigilant in guarding against the "abuse" of tolling).

The Sixth Circuit's unprecedented expansion of *American Pipe* completely disregards the constraints that this Court has heretofore imposed on this tolling doctrine, adopting a new approach under which tolling may be passed from one class action to another like a baton in a relay race, thereby extending indefinitely the time within which absent and unknown individuals must take responsibility for asserting their own claims.[1]

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[1] *American Pipe* tolling is premised on the doctrine of constructive notice—*i.e.*, putative class members are presumed to know that claims have been brought on their behalf by the proposed representatives, and they may reasonably rely on the named plaintiffs to represent their interests. *Crown, Cork*, 462 U.S. at 352-53. When class certification is denied, class members are equally presumed to know that the named plaintiffs

[Footnote continued on next page]

2. The Sixth Circuit's approach is particularly problematic in the context of Title VII claims, for which Congress deliberately enacted "short deadlines." *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618, 630 (2007), *superseded on other grounds by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. Congress determined that Title VII claimants must act within "deadlines measured by numbers of days—rather than months or years," and certainly not decades—if they wish to proceed against their employer. *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 825-26 (1980). The Sixth Circuit's expansion of tolling removes all meaning from this "carefully prescribed … series of deadlines." *Id.* at 825.

The Sixth Circuit's vast expansion of tolling also prejudices "defendant's right to a fair trial" (*United States* v. *Marion*, 404 U.S. 307, 322 & n.14 (1971)), even though Congress acted specifically to "protect employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-57; *see also* U.S. Const. amend. V ("No person shall be … deprived of life, liberty, or property, without due process of law"). "[E]vidence relating to intent," in particular, "fade[s] quickly with time," and thus "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually hap-

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[Footnote continued from previous page]

can no longer act on their behalf, and they must take individual action within the time period remaining on the statute of limitations if they wish to continue to pursue the asserted claims. The Sixth Circuit's approach to tolling destroys this symmetry.

pened" in employment-discrimination cases. *Ledbetter*, 550 U.S. at 631-32. Employment-discrimination claims should be resolved when the events are fresh and the witnesses and documents readily available. The Sixth Circuit has disregarded Congress's determination in this respect by authorizing litigation involving employment decisions made years and years ago.

Moreover, in extending the *American Pipe* doctrine far beyond its already generous scope, the Sixth Circuit has eliminated the possibility of repose. *See Gabelli*, 133 S. Ct. at 1223. This Court has directed lower courts to "assess the influence of the policy of repose inherent in a limitation period" before tolling a statute of limitations (*Johnson* v. *Ry. Express Agency, Inc.*, 421 U.S. 454, 468 n.14 (1975)), but the Sixth Circuit did no such thing. Rather than assessing whether Wal-Mart should be entitled to repose following more than a decade of litigation that resulted in a definitive denial of class certification by this Court, the Sixth Circuit held that tolling should be extended indefinitely in order to enable a new round of litigation over the same substantive allegations and would permit even more litigation of smaller classes after the rejection of the regional classes. In other words, after 14 years of litigation, Wal-Mart may be nearer the beginning of this litigation than the end.

3. The Sixth Circuit wrongly suggested that two recent decisions of this Court justified its radical expansion of the *American Pipe* tolling doctrine. *See* App., *infra*, 31a-33a (discussing *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393 (2010), and *Smith* v. *Bayer Corp.*, 131 S. Ct. 2368 (2011)). *Shady Grove* held only that Rule 23 applies

to all claims brought in federal court (notwithstanding state laws that purport to restrict the use of class actions). *See* 559 U.S. at 398-406. Of course, it does not follow that judicial tolling can be used to revive the untimely claims of absent class members. *Cf. id.* at 408 (plurality opinion) (Rule 23 "leaves the parties' legal rights and duties intact and the rules of decision unchanged").

To the extent that *Smith* speaks to tolling, it expressly confirms that *American Pipe* requires former class members to assert "individual claim[s]" following decertification. 131 S. Ct. at 2379 n.10. The remainder of the opinion addresses the scope of the Anti-Injunction Act and non-party issue preclusion, holding that former putative members of a denied class are not barred by the doctrine of preclusion from seeking to litigate timely claims on a class basis in a subsequent case. *Id.* at 2380-82. As neither the Anti-Injunction Act nor issue preclusion is implicated here, that holding has no application in this case.

The Sixth Circuit characterized *Smith* as holding only that "'nonparties sometimes may benefit from, even though they cannot be bound by, former litigation.'" App., *infra*, 26a (quoting 131 S. Ct. at 2379 n.10). But this explanation disregards this Court's description of its decision in *American Pipe*: It "held 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." *Smith*, 131 S. Ct. at 2379 n.10 (emphases added). *That* is the relevant portion of the *Smith* decision, which the Sixth Circuit simply ignored.

* * *

The infinite tolling bestowed upon unknown persons by the Sixth Circuit under the guise of Rule 23 impermissibly extends the limitations period well "'beyond any limit that Congress could have contemplated.'" *Gabelli*, 133 S. Ct. at 1223 (quoting *Rotella* v. *Wood*, 528 U.S. 549, 554 (2000)). For the former *Dukes* class members, the statutory limitations period for filing EEOC charges was already extended from 300 days to more than a decade by the initial suit. After this Court's decertification decision, Judge Breyer generously established extended dates certain by which individuals were required to act if they wished to pursue claims against Wal-Mart. App., *infra*, 108a-109a. Indeed, Wal-Mart agreed with an extension that provided precise dates on which *American Pipe* tolling ended to ensure that all individual claimants who wanted to pursue a timely claim were able to do so. Yet, the Sixth Circuit's vast and unprecedented expansion of tolling to revivify the untimely claims of thousands of absent individuals who failed to abide by these clear deadlines stands in direct conflict with this Court's carefully circumscribed *American Pipe* tolling doctrine and warrants the Court's review. "*American Pipe* does not," cannot, and should not "resurrect expired claims." *Beavers* v. *Met. Life Ins. Co.*, 566 F.3d 436, 441 (5th Cir. 2009).

B. The Decision Below Conflicts With Decisions Of Seven Other Courts Of Appeals

As then-Judge Alito recognized, continuing tolling in subsequent class actions "could extend the statute of limitations almost indefinitely." *Yang*, 392 F.3d at 113 (opinion concurring in part). Accordingly, every other Circuit to have considered whether

the *American Pipe* doctrine extends to "stacked" class actions has concluded that it does not under (at least) the circumstances presented here. *See*, *e.g.*, *Basch*, 139 F.3d at 11 (1st Cir.); *Korwek*, 827 F.2d at 879 (2d Cir.); *Yang*, 392 F.3d at 104 (3d Cir.); *Angles*, 494 F. App'x at 331 n.10 (4th Cir.); *Salazar-Calderon*, 765 F.2d at 1351 (5th Cir.); *Robbin*, 835 F.2d at 214 (9th Cir.); *Griffin*, 17 F.3d at 359 (11th Cir.).[2]

These courts have uniformly recognized that *American Pipe* tolling extends only the time to bring *individual* claims; it is not a mechanism to revive the claims of absent persons who fail to bring timely claims of their own following decertification or reversal of a certification order, particularly where, as here, "the earlier denial of certification was based on a Rule 23 defect in the class itself." *Yang*, 392 F.3d at 104; *see also*, *e.g.*, *Korwek*, 827 F.2d at 879 (no tolling for "class action suits filed after a definitive determination of class certification").

The Eleventh Circuit, for example, recently and specifically rejected the position that "every purport-

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[2] In *Sawyer* v. *Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 563 (7th Cir. 2011), the Seventh Circuit acknowledged that there was "no conflict" among the Circuits, but went on to conflate the anti-stacking rule with issue preclusion. It held that the question of tolling was irrelevant because, under the doctrine of issue preclusion, "[c]lass members must abide by the first court's understanding and application of Rule 23." *Id.* at 564. *Sawyer* does not survive *Smith*, in which this Court held that the denial of Rule 23 class certification does not, under the preclusion doctrines, prohibit the pursuit of a timely class action in state court, where the standards for class certification may be different. *See* 131 S. Ct. at 2376.

ed class should get at least one attempt at class certification." *Ewing Indus.* v. *Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1326 (11th Cir. 2015). *But see* App., *infra*, 23a, 24a, 29a (holding that the plaintiffs should have an opportunity to certify "*for the first time*" regional classes under Rule 23(b)(3)). As that court explained, a "contrary result would allow a purported class almost limitless bites at the apple as it continuously substitutes named plaintiffs and relitigates the class certification issue." *Ewing*, 795 F.3d at 1326.

The Fifth Circuit has similarly held that plaintiffs may not "piggyback one class action onto another and thus toll the statute of limitations indefinitely" (*Salazar-Calderon*, 765 F.2d at 1351), but instead must "intervene or file individual claims after certification [is] denied" in the initial suit. *Salazar-Calderon* v. *Presidio Valley Farmers Ass'n*, 863 F.2d 384, 390 (5th Cir. 1989) (per curiam). Heeding Justice Powell's warning that "'the tolling rule [in class actions] is a generous one, inviting abuse,'" the Fifth Circuit explained that a contrary rule would "presen[t] just such dangers." 765 F.2d at 1351 (first alteration in original) (quoting 462 U.S. at 354 (concurring opinion)).

The Sixth Circuit's decision creates a direct conflict with these well-established precedents by extending tolling to a subsequently filed class action so long as plaintiffs seek certification under a different subsection of Rule 23(b) or seek to bring claims on behalf of a subset of the initially asserted class. App., *infra*, 24a, 29a. Under the Sixth Circuit's rea-

soning, plaintiffs are allowed to do that which other Circuits have expressly disallowed—extend tolling beyond a definitive ruling on class certification.[3]

The Sixth Circuit's conclusion that "no court in any jurisdiction had denied certification of a Rule 23(b)(3) class" (App., *infra*, 20a), moreover, cannot be reconciled with this Court's decision in *Dukes* or a basic understanding of Rule 23. The dissenting Justices made this point in so many words: They would have allowed a Rule 23(b)(3) class to proceed, but, unlike the Sixth Circuit, they acknowledged that the *Dukes* majority definitively "disqualifie[d] the class at the starting gate, holding that the plaintiffs cannot cross the 'commonality' line set by Rule 23(a)(2)." 131 S. Ct. 2541, 2561-62 (2011) (Ginsburg, J., dissenting); *see also* Fed. R. Civ. P. 23(b) (a "class action may be maintained if Rule 23(a) is satisfied," along with one of the categories in Rule 23(b)); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997) (Rule 23(a)'s "threshold requirements" are "applicable to all class actions").

And distinguishing between the "regional" scope of the class proposed here and the "nationwide" class rejected in *Dukes* only highlights the conflict with this Court's decision. Regardless of the size or scope of the class they seek to represent, the *Phipps* plain-

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[3] A few Circuits have allowed "tolling to apply to subsequent class actions where the original class was denied [solely] because of the lead plaintiffs' deficiencies as class representatives." *Yang*, 392 F.3d at 112. But these courts have universally recognized that such tolling must end when, as here, "a court has definitively determined that the claims are not suitable for class treatment." *Ibid.*

tiffs continue to challenge "Wal-Mart's 'policy' of *allowing discretion* by local supervisors," which this Court has explained is a "very common and presumptively reasonable way of doing business." *Dukes*, 131 S. Ct. at 2554. That the named plaintiffs now seek to raise the same claims on behalf of a regional subset of the original nationwide class cannot justify an extension of tolling. *See Ladik* v. *Wal-Mart Stores, Inc.*, 291 F.R.D. 263, 271 (W.D. Wis. 2013) ("Plaintiffs do not even attempt to distinguish the common questions they identify from those found lacking in *Dukes*"); *Dukes* v. *Wal-Mart Stores*, *Inc.*, 964 F. Supp. 2d 1115, 1127 (N.D. Cal. 2013) ("Plaintiffs' proposed class suffers from the same problems identified by the Supreme Court, but on a somewhat smaller scale").

Indeed, the Sixth Circuit's attempts to distinguish the uniform rule applied by its sister Circuits do not change the fact that its departure from the anti-stacking rule stretches the *American Pipe* "doctrine … beyond its carefully crafted parameters into the range of abusive options." *Robbin*, 835 F.2d at 214 (internal quotation marks omitted). As *every* other appellate court has recognized, "[w]ithout this restriction on tolling, lawyers seeking to represent a plaintiff class could extend the statute of limitations almost indefinitely," thereby eviscerating the functional operation of statutes of limitations for class-action complaints so long as one class action broad enough to encompass all the subsequent claims is timely filed. *Yang*, 392 F.3d at 113 (Alito, J., concurring in part); *see also Salazar-Calderon*, 765 F.2d at 1351 (prohibiting indefinite tolling); *Griffin*, 17 F.3d at 359 (same); *Korwek*, 827 F.2d at 879 (finding this reasoning "compelling"). And this concern has become a reality for Wal-Mart, which finds itself still

litigating class certification years after this Court resolved exactly that issue.

Review by this Court is warranted to correct the Sixth Circuit's unjustifiable departure from long-settled legal principles and to restore the proper and uniform operation of statutes of limitations in class-action litigation.

II. THE CORRECT APPLICATION OF TOLLING DOCTRINES PRESENTS A RECURRING QUESTION OF NATIONAL IMPORTANCE

Before the Sixth Circuit's decision in this case, there was "unanimous agreement" that tolling could not be extended to stacked class actions following a definitive ruling on class certification. *Andrews*, 851 F.2d at 149. Class-action plaintiffs will unquestionably seek to leverage the Sixth Circuit's flawed decision to challenge the longstanding anti-stacking rule in other Circuits. This split, however, is unlikely to be resolved without intervention from this Court. Indeed, in the weeks after the Sixth Circuit's decision, the Eleventh Circuit reaffirmed the continued validity and wisdom of the anti-stacking rule. *See Ewing*, 795 F.3d at 1328; *see also In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 409 n.27 (3d Cir. 2015) (explaining that when "class certification is denied or when the member ceases to be part of the class," she must "intervene or file an individual suit").

Even if no other court adopts the Sixth Circuit's faulty reasoning, its opinion is nonetheless likely to have widespread effects. The split among the Circuits will encourage forum shopping by "attract[ing]" to the Sixth Circuit untimely "actions in which courts in other circuits have denied class certification."

Yang, 392 F.3d at 113-14 (Alito, J., concurring in part). A successive class action asserting claims that would be dismissed as untimely in Texas or Florida would be allowed to proceed in Tennessee—as, in fact, happened here in the wake of *Dukes*. It is intolerable that similarly situated claimants (*i.e.*, former *Dukes* class members) proceeding against the same defendant (Wal-Mart) should face different outcomes in substantively identical cases based solely on geography.

The ruling also encourages shoot-the-moon attempts at class certification that destroy the efficiency afforded by appropriate use of Rule 23 and place at risk the rights of absent class members. Far from enhancing efficiency, the decision below creates perverse incentives for class-action plaintiffs to seek certification of the broadest possible class, knowing full well that they will have a second, third, or fiftieth chance at narrowing the proposed class should their initial bid be rebuffed. Such an approach fosters the "needless multiplicity of actions" that *American Pipe* tolling was in part designed to prevent. *Crown, Cork*, 462 U.S. at 351.

As demonstrated by this case, these concerns are far from theoretical. The original *Dukes* plaintiffs brought suit in 2001 based on an EEOC charge filed in 1999. Taking an all-or-nothing approach, they sought and obtained certification of a nationwide class comprised of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998." *Dukes*, 131 S. Ct. at 2549 (alteration in original; internal quotation marks omitted). In total, it took more than a decade for the courts to resolve definitively the class certification issues raised by that overbroad complaint; this Court did so

in 2011, when it reversed the certification order on the grounds, among others, that the putative class members had "little in common but their sex and [the *Dukes*] lawsuit," and that the named plaintiffs had proposed to use procedures that violated the due process rights of both the absent class and Wal-Mart. *Id.* at 2557, 2559, 2561 (citation omitted).

Still another year later, the very same lawyers, in the *Phipps* case, only slightly narrowed the scope of their proposed class, seeking to revive the same claims dating back to 1998 under the identical theory of classwide harm. *See*, *e.g.*, App., *infra*, 126a. Three more years have passed since the filing of that complaint, and yet the class certification issues have yet to be resolved.

And of course, that would not be the end. If this regional attempt is rejected, plaintiffs' counsel intend to pursue a matryoshka approach to class actions, filing ever-smaller suits until (if ever) some court finds commonality, reinvigorating their promised "armada." *See* Appellants' Sixth Cir. Br. at 31-32 (arguing that *Dukes* "certainly did not foreclose, certification of claims brought by absent class members challenging policies at the district or regional level"). Nothing in the Sixth Circuit's opinion prevents this process, all but promising many years more of litigation over the propriety of class certification at some (region, district, store or manager) level. Allowing this decision to stand, moreover, will undoubtedly spawn the filing of additional regional class actions by these same plaintiffs' lawyers in other courts.

As the Eleventh Circuit put it in similar circumstances:

> This case illustrates the wisdom of the rule against piggybacked class actions. Fifteen years after the … lawsuit was filed, the class action issues are still being litigated, and we decline to adopt any rule that has the potential for prolonging litigation about class representation even further.

Griffin, 17 F.3d at 359 (citations omitted). The Sixth Circuit's departure from well-settled precedent is inconsonant with the "basic policies of all limitations provisions"—"repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella*, 528 U.S. at 555. Statutes of limitations ensure that claims are adjudicated before "evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers* v. *Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). Permission to file class-action complaints *ad infinitim* strips them of these "vital" ends. *Gabelli*, 133 S. Ct. at 1221 (citation omitted).

The mischief caused by this decision will also adversely affect litigants' ability to settle claims following the defeat of certification. Under proper application of *American Pipe*, judicial disposition of the initial certification request will lead to resolution of the litigation. But under the approach adopted by the Sixth Circuit, nothing would prevent an attorney from identifying new named plaintiffs and refiling slightly reconfigured class actions in perpetuity until they "find a district court judge who is willing to certify the class," or they force the defendant into a large settlement. *Yang*, 392 F.3d at 113 (Alito, J.,

concurring in part). In fact, the nationwide *Dukes* counsel are pursuing precisely that strategy, seeking to restore the claims of still-absent individuals each time those of the individual named plaintiffs are resolved, defeating any possibility of an end to the litigation started by the initial filing of a class-action complaint in 2001. *See Odle* v. *Wal-Mart Stores, Inc.*, No. 15-10571 (5th Cir.).

The Sixth Circuit expressed a concern that, if class allegations were not sequentially tolled, the plaintiffs' bar would have to file several versions of a particular proposed class simultaneously, in case one or more of them fail. App., *infra*, 31a. But this is not a compelling objection. First, would-be class counsel will be motivated to propose a class that actually comports with the requirements of Rule 23, and therefore best protects the rights of absent class members—after all, Rule's 23 criteria are not mere "checks shorn of utility," but rather set "standards … for the protection of absent class members." *Amchem*, 521 U.S. at 621. Second, proposed classes can be pled in the alternative, as they frequently are. And third, even if multiple class complaints were filed separately, they could be readily consolidated or coordinated for pretrial purposes, a preferable alternative to filing them *seriatim*, apparently forever, as the *Dukes* attorneys are trying to do.

Allowing the circuit split created by the decision below to continue will create confusion among absent class members about whether and when they need to act to preserve their individual claims following the denial of class certification. Nationwide and other wide-ranging class actions are not unique to the Title VII context. They are filed in cases involving everything from product liability to consumer protection to

antitrust claims. If these broad requests for certification fail, the rights and obligations of absent persons with respect to their individual claims will vary based on geographic happenstance. This lack of certainty and clarity as to the application of statutes of limitations is bad for claimants and defendants alike.

* * *

The distortions and disruptions created by the Sixth Circuit's aberrational decision are inimical to the "vital" function served by statutes of limitations in our society of "giving security and stability to human affairs." *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879). This Court has considered questions relating to the proper scope of judicial tolling on numerous occasions over the past several Terms. *See*, *e.g.*, *United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625 (2015); *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014); *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224 (2014); *McQuiggen* v. *Perkins*, 133 S. Ct. 1924 (2013); *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817 (2013); *Credit Suisse Secs. (USA) LLC* v. *Simmonds*, 132 S. Ct. 1414 (2012).

The Sixth Circuit's decision here upsets the settled expectation, enforced for nearly four decades in every Circuit to have considered this issue, that *American Pipe* may not be used to toll the statute of limitations indefinitely following a definitive determination on the propriety of class certification in the initial class action. The Sixth Circuit's unprecedented expansion of *American Pipe* tolling not only eviscerates the functional operation of statutes of limitations, but simultaneously creates perverse incentives for class-action plaintiffs to file sequential class complaints. In the process, it destroys the efficiencies that otherwise might be gained through the proper

use of Rule 23 and places at risk the rights of both defendants and absent class members.

This Court's review is warranted to restore certainty in the administration of the *American Pipe* tolling doctrine and to enforce the finality and repose inherent and intended in the proper functioning of statutes of limitations.[4]

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[4] The Sixth Circuit's standing analysis (App., *infra*, 9a-11a) also warrants this Court's review. The district court did not dismiss "[t]he named plaintiffs' individual claims," which "were not subject to [Wal-Mart's] motion" to dismiss and "will proceed" regardless. *Id.* at 104a. The Sixth Circuit's conclusion that the named plaintiffs had standing to appeal cannot be reconciled with the constitutional requirement that they "personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) (citation omitted). Contrary to the Sixth Circuit's ruling, a private litigant has no legal right to use the pattern-or-practice evidentiary framework (*see Parisi* v. *Goldman, Sachs & Co.*, 710 F.3d 483, 487-88 (2d Cir. 2013)); nor does an inability to seek injunctive relief broader than necessary to redress one's own injuries confer standing to "protect the rights of third parties." *Thomas* v. *Met. Life Ins. Co.*, 631 F.3d 1153, 1159 (10th Cir. 2011). The Sixth Circuit's standing ruling cannot be squared with this Court's precedents (*e.g.*, *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992)), and conflicts with the decisions of at least three other Circuits in analogous circumstances. *See In re Checking Account Overdraft Litig.*, 780 F.3d 1031, 1039 (11th Cir. 2015); *Thomas*, 631 F.3d at 1159; *Chevron USA Inc.* v. *Sch. Bd. Vermilion Par.*, 294 F.3d 716, 720 (5th Cir. 2002). It also aggravates the deleterious consequences of the erroneous ruling on tolling by allowing litigation to be prolonged by persons with no stake in the outcome.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 6, 2015

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 15a0140p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHERYL PHIPPS; BOBBI MILLNER; SHAWN GIBBONS, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellants,* *v.* WAL-MART STORES, INC., *Defendant-Appellee.*	No. 13-6194

Appeal from the United States District Court for the Middle District of Tennessee at Nashville.
No. 3:12-cv-01009—Aleta Arthur Trauger, District Judge.

Argued: May 1, 2014

Decided and Filed: July 7, 2015

Before: MERRITT, COOK, and STRANCH, Circuit Judges.

COUNSEL

ARGUED: Joseph M. Sellers, COHEN MILSTEIN SELLERS & TOLL, PLLC, Washington, D.C., for Appellants. Theodore J. Boutrous, Jr., GIBSON, DUNN & CRUTCHER LLP, Los Angeles, California, for Appellee. **ON BRIEF**: Joseph M. Sellers, Christine E. Webber, COHEN MILSTEIN SELLERS & TOLL, PLLC, Washington, D.C., George E. Barrett, David W. Garrison, Scott P. Tift, Seth M. Hyatt, BARRETT JOHNSTON, LLC, Nashville, Tennessee, Jocelyn D. Larkin, THE IMPACT FUND, Berkeley, California, for Appellants. Theodore J. Boutrous, Jr., GIBSON, DUNN & CRUTCHER LLP, Los Angeles, California, Rachel S. Brass, GIBSON, DUNN & CRUTCHER LLP, San Francisco, California, Mark A. Perry, GIBSON, DUNN & CRUTCHER LLP, Washington, D.C., Karl G. Nelson, GIBSON, DUNN & CRUTCHER, Dallas, Texas, for Appellee.

STRANCH, J., delivered the opinion of the court which MERRITT, J., joined, and COOK J., joined in part. COOK, J. (pg. 22), delivered a separate opinion concurring in part and dissenting in part.

OPINION

STRANCH, Circuit Judge. This putative class action lawsuit began after the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). There the Supreme Court rejected certification, under Federal Rule of Civil Procedure 23(b)(2), of a nationwide class of current female employees of Wal-Mart Stores, Inc., who alleged that Wal-Mart discriminated against them in pay and promotions based on their gender. Plaintiffs Cheryl Phipps, Bobbi Millner, and Shawn Gibbons, unnamed class members in *Dukes*, thereafter filed suit against Wal-Mart in federal district court in Tennessee alleging individual and putative class claims under Rule 23(b)(2) and Rule 23(b)(3) on behalf of current and former female employees in Wal-Mart Region 43. Plaintiffs claim gender discrimination in pay and promotions as the result of regional Wal-Mart management policies and decisions.

Before us for review is the district court's order granting Wal-Mart's motion to dismiss the class claims as time-barred under the tolling principles of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983). This interlocutory appeal concerns only whether the plaintiffs may initiate this suit. Whether the proposed classes are appropriate for certification is not at issue here.

We hold that the putative class claims are not barred by *American Pipe* or *Crown, Cork & Seal Co.* and that the case before the district court may pro-

ceed. Accordingly, we REVERSE the district court's order dismissing the class claims under Federal Rule of Civil Procedure 12(b)(6) and we REMAND the case to the district court for further proceedings.

I. PROCEDURAL HISTORY

Wal-Mart is the country's largest private employer, operating approximately 3,400 stores and employing more than one million people. *Dukes*, 131 S. Ct. at 2547. Wal-Mart divides its stores into nationwide divisions and subdivides the divisions into regions. *Id.*

On June 8, 2001, six named plaintiffs filed suit under Title VII of the Civil Rights Act of 1964, as amended, in the Northern District of California on behalf of all former and current female employees of Wal-Mart. *Id.* The suit alleged a company-wide pattern or practice of gender discrimination in pay and promotions since December 26, 1998.[1] *Id.* at 2548. The plaintiffs also claimed that management decisions concerning pay and promotions disproportionately favored men, leading to unlawful disparate impact on female employees. *Id.* The plaintiffs further claimed that, because Wal-Mart knew of this dis-

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[1] "In a pattern-or-practice case, the plaintiff tries to 'establish by a preponderance of the evidence that . . . discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice.'" *Dukes*, 131 S. Ct. at 2552 n.7 (quoting *Teamsters v. United States*, 431 U.S. 324, 358 (1977)). If she "succeeds, that showing will support a rebuttable inference that all class members were victims of the discriminatory practice, and will justify 'an award of prospective relief,' such as 'an injunctive order against the continuation of the discriminatory practice.'" *Id.* (quoting *Teamsters*, 431 U.S. at 361).

criminatory effect, its refusal to modify the corporate culture amounted to unlawful disparate treatment. *Id.* The plaintiffs sought certification of a nationwide class of current and former female employees under Rule 23(b)(2), or alternatively, under Rule 23(b)(3), and requested injunctive and declaratory relief, backpay, and punitive damages. *Id.* at 2548, 2561 n.1 (Ginsburg, J., concurring in part and dissenting in part).

In 2004, following extensive discovery, the district court certified a nationwide class under Rule 23(b)(2) for purposes of liability, injunctive and declaratory relief, back pay, and punitive damages. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 187-88 (N.D. Cal. June 21, 2004). In 2007, the Ninth Circuit affirmed, *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1193 (9th Cir. 2007), but on rehearing en banc, the Ninth Circuit affirmed in part and remanded in part. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 628 (9th Cir. 2010). The court affirmed the district court's certification of a nationwide class under Rule 23(b)(2) only for current Wal-Mart employees—defined as those employed on the date the complaint was filed—with respect to their claims for declaratory and injunctive relief and back pay. *Id.* at 624. The court remanded the case to the district court to consider whether certification under Rule 23(b)(2) or Rule 23(b)(3) was appropriate for the punitive damages claims of current employees and whether an additional class or classes should be certified under Rule 23(b)(3) for former employees—defined as those no longer employed on the date the complaint was filed. *Id.* The court reasoned that "putative class members who were no longer Wal-Mart employees at

the time Plaintiffs' complaint was filed do not have standing to pursue injunctive or declaratory relief," and it was "difficult to say that monetary relief does not predominate with respect to claims by plaintiffs who lack standing to seek injunctive or declaratory relief." *Id.* at 623.

The California district court did not have an immediate opportunity to consider the issues remanded by the Ninth Circuit. The Supreme Court granted certiorari, and in June 2011 reversed the certification of the nationwide class of current Wal-Mart employees under Rule 23(b)(2). *Dukes*, 131 S. Ct. at 2561. The Court held that the plaintiffs did not demonstrate questions of law or fact common to the class as required by Rule 23(a)(2) to warrant certification of a nationwide class of current employees. *Id*. at 2252-57. The Court reasoned that, because the plaintiffs had not provided "significant proof" of a nationwide policy or other "specific employment practice" that discriminated against all 1.5 million class members in the same way, the case was not suitable for nationwide class treatment. *Id.*

The Court further concluded that the plaintiffs' requests for backpay were improperly certified under Rule 23(b)(2) because such relief was not incidental to injunctive or declaratory relief, and "individualized monetary claims belong in Rule 23(b)(3)." *Id.* at 2557-58. The Court outlined the differences between classes certified under Rule 23(b)(2) and Rule 23(b)(3), noting that (b)(3) requires notice to class members and a chance to opt out, while (b)(2) does not. *Id.* at 2558. Accordingly, the Supreme Court reversed the Ninth Circuit's certification of a na-

tionwide class of current Wal-Mart employees under Rule 23(b)(2). *Id.* at 2561.

After *Dukes*, the plaintiffs promptly filed a motion in the California district court to extend tolling of the statute of limitations under *American Pipe & Constr. Co.*, 414 U.S. at 553-54. The district court granted the motion in part, providing that all class members who possessed right-to-sue letters from the Equal Employment Opportunity Commission (EEOC) could file suit on or before October 28, 2011. *Dukes v. Wal-Mart Stores, Inc.*, No. C 01-02252 CRB, Order at *1-2 (N.D. Cal. Aug. 19, 2011). The court further provided that all class members who had not filed administrative charges with the EEOC were required to do so on or before January 27, 2012 in non-deferral states and on or before May 25, 2012 in deferral states. *Id.*

The *Dukes* plaintiffs then amended the complaint in the California case to narrow the scope of the proposed class to current and former female Wal-Mart employees who had been subjected to gender discrimination within four Wal-Mart regions largely based in California. *Dukes v. Wal-Mart Stores, Inc.*, No. C 01-02252 CRB, 2012 WL 4329009, *2 (N.D. Cal. Sept. 21, 2012). The California district court denied Wal-Mart's motion to dismiss, determined that this narrowed class action was not barred from proceeding, and set a date for filing of the motion for class certification. *Id.* at *10. The district court ultimately denied class certification. *Dukes v. Wal-Mart Stores, Inc.*, 964 F. Supp. 2d 1115 (N.D. Cal. Aug. 2, 2013).

Four parallel putative class action lawsuits were filed in other jurisdictions to bring individual and

class claims concerning other Wal-Mart regions, including Tennessee, *Phipps v. Wal-Mart Stores, Inc.*, 3:12-cv-1009 (M.D. Tenn. filed Oct. 2, 2012); Texas, *Odle v. Wal-Mart Stores, Inc.*, No. 3:11-cv-2954-O (N.D. Tex. filed October 28, 2011); Florida, *Love v. Wal-Mart Stores, Inc.*, No. 0:12-cv-61959-RNS (S.D. Fla. filed Oct. 4, 2012); and Wisconsin, *Ladik et al., v. Wal-Mart Stores, Inc.*, 291 F.R.D. 263, 264 (W.D. Wisc. filed Feb. 20, 2013). *Phipps* is currently before us.

Two of the named plaintiffs, Cheryl Phipps and Bobbi Millner, were Wal-Mart employees when the *Dukes* complaint was initially filed; only Gibbons is still employed by Wal-Mart. The plaintiffs alleged individual Title VII disparate treatment claims and, on behalf of a class of current and former female Wal-Mart employees in Region 43, they alleged Title VII pattern-or-practice and disparate impact claims. The plaintiffs requested class certification under Rule 23(b)(2) and Rule 23(b)(3). Specifically, the plaintiffs alleged that policies and management decisions in Wal-Mart Region 43 resulted in gender discrimination by denying current and former female employees equal pay for hourly positions and salaried management positions and by denying female employees equal opportunities for promotion to management track positions. Region 43 is centered in middle and western Tennessee, but also includes portions of Alabama, Arkansas, Georgia, and Mississippi. R. 1.

Wal-Mart moved to dismiss the putative class claims under Rule 12(b)(6), arguing that *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1998), established a bright-line rule prohibiting *American Pipe* tolling for

any purported class action brought after a previous denial of class certification. The district court concluded that it was bound by that rule and dismissed the class claims with prejudice under Rule 12(b)(6), never addressing whether the plaintiffs could satisfy the Rule 23 standards for class certification. *Phipps v. Wal-Mart Stores, Inc.*, 925 F. Supp. 2d 875, 893 (M.D. Tenn. Feb. 20, 2013). The court, however, expressed doubt about its decision, suggesting that in light of recent cases, *Andrews* should be reconsidered or at least refined to permit *American Pipe* tolling for a follow-on class action in appropriate circumstances. *Id.* at 880-81; *Phipps v. Wal-Mart Stores, Inc.*, No. 3:12-cv-1009, 2013 WL 2897961, *2-4 (M.D. Tenn. June 13, 2013). The court certified its decision for interlocutory appeal under 28 U.S.C. § 1292(b), *Phipps*, 2013 WL 2897961 at *4, and we granted plaintiffs' petition for permission to appeal.

II. ANALYSIS

A. Article III Standing

Before turning to the merits, we address Wal-Mart's threshold argument that the plaintiffs lack standing to pursue this appeal. "To have standing, a litigant must seek relief for an injury that affects [her] in a 'personal and individual way.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)). We have no difficulty concluding that the plaintiffs have standing because they "suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Id.* at 2661.

The district court's decision to dismiss the class allegations with prejudice precludes the plaintiffs from pursuing the pattern-or-practice theory of gender discrimination pled in the complaint. If the plaintiffs could establish a pattern or practice of gender discrimination, then each named plaintiff and each unnamed class member could rely on a presumption that each was affected by the allegedly discriminatory policies, placing the burden to prove otherwise on Wal-Mart. *See Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 875 (1984); *Teamsters*, 431 U.S. at 360; *Serrano v. Cintas Corp.*, 699 F.3d 884, 894-95 (6th Cir. 2012). Because the pattern-or-practice theory is not available to individual plaintiffs, *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 575 (6th Cir. 2004), the named plaintiffs in this case would be unable to benefit from the presumption of discrimination arising from the theory in the absence of class allegations. This is a significant loss to the plaintiffs' prosecution of the case and gives them a direct stake in the outcome of the appeal. *See Hollingsworth*, 133 S. Ct. at 2662. In addition, the dismissal of the class allegations impairs the plaintiffs' ability to secure the scope of injunctive relief that may be necessary to address region-wide gender discrimination, if plaintiffs ultimately prove their claims. Broad injunctive relief to benefit an entire class is "rarely justified" in an individual suit. *Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003).

For these reasons, we conclude that the named plaintiffs have standing to appeal the district court's interlocutory decision dismissing the class allegations. *See Hollingsworth*, 133 S. Ct. at 2662. This brings us to the question whether the district court

properly dismissed the class allegations under Rule 12(b)(6). Our review of this issue is de novo. *In re Vertrue Inc. Mktg. & Sales Litig.*, 719 F.3d 474, 478 (6th Cir. 2013).

B. *American Pipe* Tolling

The timely filing of a class-action complaint commences suit and tolls the statute of limitations for all members of the putative class who would have been parties had the suit been permitted to continue as a class action. *American Pipe & Constr. Co.*, 414 U.S. at 550, 553-54. Tolling continues until a court decides that the suit is not appropriate for class action treatment. *Id.* At that point, the putative class members may protect their rights by moving to intervene as plaintiffs in the pending action, *id.*, or they may file their own lawsuits, *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983).

American Pipe tolling of the limitations period guards the principal function of the class action suit—the fair and efficient adjudication of common claims aggregated in one suit. *American Pipe & Constr. Co.*, 414 U.S. at 551. The policy inherent in Rule 23 to avoid a "multiplicity of activity" is protected through *American Pipe* tolling because class members need not take action to protect their individual rights until after a court decides that class action treatment is inappropriate. *Id.* The litigation efficiency and economy of Rule 23 would be lost for the parties and the court if class members filed motions to intervene in the suit or filed independent protective actions before the court has the opportunity to rule on the viability of a putative class action. *Id.* at 553; *Crown, Cork & Seal Co.*, 462 U.S. at 354.

In light of these important policy interests, class members who refrain from filing suit while the class action is pending "cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." *Crown, Cork & Seal Co.*, 462 U.S. at 352-53. The class action complaint places the defendant on notice of the substantive claims brought against it and of the number and generic identities of the potential plaintiffs who may participate in a judgment. *American Pipe & Constr. Co.*, 414 U.S. at 555. "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."[2] *Crown, Cork & Seal Co.*, 462 U.S. at 353. Wal-Mart has been on notice of the claims brought against it and the generic identities of the plaintiffs who would potentially participate in any judgment since the nationwide class action complaint was filed in *Dukes* in 2001. *Id.*

The named plaintiffs in this action were members of the class when *Dukes* was initially filed,

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[2] Wal-Mart argues that two recent cases, *Gabelli v. SEC*, 133 S. Ct. 1216 (2013) and *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224 (2014), suggest that tolling is disfavored by the Supreme Court. These cases are inapposite because neither involved Rule 23 class actions or *American Pipe* tolling. *Lozano*, 134 S. Ct. at 1228 (addressing whether equitable tolling was appropriate for a father seeking the return of his child under the Hague Convention); *Gabelli*, 133 S. Ct at 1218-19 (addressing whether the "discovery rule" tolled the statute of limitations in an SEC fraud case).

though they were not the named plaintiffs. As permitted by Supreme Court law, they have relied on the named plaintiffs in *Dukes* to "press their claims" since 2001 until the Supreme Court rejected the nationwide class. *See Crown, Cork & Seal Co.*, 462 U.S. at 352-53. All three plaintiffs then filed administrative charges with the EEOC within the deadline ordered by the California district court. The EEOC issued right-to-sue letters, and the plaintiffs timely filed suit within the required ninety days. *See* 42 U.S.C. § 2000e-5(f)(1). Wal-Mart concedes that the individual claims of the named plaintiffs are timely brought, but the company urges us to affirm the district court's conclusion that, under *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1998), the claims of the unnamed class members in Region 43 do not fall within the tolling protection of *American Pipe*.

Proper application of *Andrews* and our subsequent case, *In re Vertrue*, requires close attention to the history of this litigation and particularly to the specifics of the class at issue. Recall that the Supreme Court addressed in *Dukes* a nationwide class of *current* Wal-Mart employees that had been certified under Rule 23(b)(**2**) for the purpose of seeking declaratory and injunctive relief against Wal-Mart.[3] *Dukes*, 131 S. Ct. at 2546-49, 2550 & n.4. The Court

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[3] The *Dukes* opinion referred to the three named plaintiffs as "current or former Wal-Mart employees," *Dukes*, 131 S. Ct. at 2546, but the Supreme Court explained that two of the named plaintiffs were presently employed by Wal-Mart and one named plaintiff, Edith Arana, was a Wal-Mart employee at the time the suit was filed. *Id.* at 2548. Arana's employment ended in 2001 when Wal-Mart fired her. *Id*.

expressly recognized that the Ninth Circuit had excluded from the certified class the putative class members who—at the time the original complaint was filed—were no longer employed by Wal-Mart because former employees, who are no longer subject to Wal-Mart's employment supervision, lack standing to seek Title VII injunctive or declaratory relief against Wal-Mart under Rule 23(b)(2). *Dukes*, 131 S. Ct. at 2547 n.1, 2550 n.4. When the Supreme Court issued *Dukes*, no class of *current* Wal-Mart employees had been certified under Rule 23(b)(3) for the purpose of determining Wal-Mart's liability for monetary relief. The Supreme Court left that question open when it ruled that the certified class could not seek monetary relief under Rule 23(b)(2), *id.* at 2557-61, and explicitly stated that the applicability of Rule 23(b)(3) "to the plaintiff class is not before us." *Id.* at 2549 n.2.

Furthermore, at the time the Supreme Court ruled in *Dukes*, no class of *former* Wal-Mart employees had been certified under Rule 23(b)(3) for the purpose of seeking monetary relief. The Ninth Circuit, sitting en banc, preserved the right of the former employees to seek monetary relief through class action by instructing the district court on remand to analyze "whether an additional class or classes may be appropriate under Rule 23(b)(3) with respect to the claims of former employees. The court may, if appropriate, certify an additional class or classes under Rule 23(b)(3)." *Dukes*, 603 F.3d at 624. Wal-Mart did not ask the Supreme Court to decide whether the Ninth Circuit erred by remanding the putative class claims of former Wal-Mart employees to the district court for consideration of class certifi-

cation under Rule 23(b)(3). Petition for a Writ of Certiorari, *Dukes*, 131 S. Ct. 2541 (No. 10-277), 2010 WL 3355820 at *9, 17. In fact, Wal-Mart did not specifically request review on whether the Rule 23(b)(2) class demonstrated a question of law or fact common to the class under Rule 23(a), *id.*; the Supreme Court added that issue for briefing when it granted certiorari. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 795 (2010) (Mem).

1. Rule 23(b)(3) class of current and former employees seeking monetary relief in Wal-Mart Region 43

With the litigation history of *Dukes* firmly in mind, we begin with the Rule 23(b)(3) class. We conclude that *Andrews v. Orr* cannot bar the request of the named plaintiffs to certify a class of current and former employees seeking monetary relief against Wal-Mart in Region 43 under Rule 23(b)(3). To explain why, we first explore the *Andrews* opinion and then our more recent case, *In re Vertrue*.

Andrews concerned federal employees who wished to bring employment discrimination claims against their employing federal agency. *Andrews*, 851 F.2d at 147. Federal regulations required them to submit an administrative charge to the agency's Equal Employment Opportunity Counselor "within 30 calendar days" of the alleged date of discrimination, *id.* (quoting 29 C.F.R. § 1613.214), and if they sought class-wide relief, they were required to meet a 90-day time limit. *Id.* (citing 29 C.F.R. § 1613.602(a)). Because the timing and sequence of events were "critical to the decision of the appeal,"

the *Andrews* court set forth the facts in detail, which we recount below. *Id.*

Andrews was the third of three class action lawsuits brought to challenge the disparate impact of the government's Professional and Administrative Career Examination (PACE) used in hiring and promotion decisions. *Id.* at 147-48. The first class action was *Luevano v. Campbell*, 93 F.R.D. 68 (D.D.C. 1981), but the *Andrews* opinion did not discuss the significance or outcome of the *Luevano* case. *Id.* at 148. The second class action, captioned *Brown v. Orr*, 99 F.R.D. 524, 526 (S.D. Ohio 1983), was filed in Ohio by one plaintiff on behalf of all African-American employees of the Air Force Logistics Command (AFLC) who were denied promotions because of PACE. *Id.* The district court denied class certification in *Brown* on March 15, 1983, because the plaintiff failed to establish commonality or typicality under Rule 23(a), *Brown*, 99 F.R.D. at 528; however, the unnamed class members took no action to protect their rights. *Andrews*, 851 F.2d at 148. The 30-day statute of limitations for filing individual claims with an EEO counselor began to run on March 15, when class certification was denied, and expired on April 15. *Id.* at 149. On April 18, the *Brown* plaintiff filed a second motion to certify a class, narrowing the class to employees of Wright-Patterson Air Force Base (WPAFB). *Id.* Before the district court could rule on that motion, the plaintiff settled her individual claim on July 12, 1983, and the court dismissed the *Brown* case with prejudice. *Id.* at 148. The unnamed class members again took no immediate action with regard to the *Brown* case. *Id.* Between July 26 and July 28, 1983, however, the *Andrews* plain-

tiffs, who were unnamed members of the *Brown* class, initiated the administrative process by contacting an EEO counselor, and they later filed suit. *Id.*

Although the *Andrews* court did not elaborate on the district court's analysis, the lower court's opinion establishes that the court applied the 30-day limitations period for filing individual claims to the *Andrews* plaintiffs, even though they sought class-action relief under the 90-day limitations period. *Andrews v. Orr*, 614 F. Supp. 689, 691 (S.D. Ohio June 14, 1985). The court so held for two reasons. First, a federal regulation implicitly recognized that different members of the same putative class of federal employees could not repeatedly initiate class actions based on the same conduct. *Id.* at 691-92 (citing 29 C.F.R. § 1613.604(b)). Second, the court pointed to the Supreme Court's statement in *Crown, Cork & Seal* that *American Pipe* tolling ends when class certification is denied, and thereafter, class members may file their own suits or intervene in the pending action. *Id.* The court looked to district court opinions in two other jurisdictions to support its conclusion "that the statute of limitations is *not* tolled for purposes of initiating a new class action." *Id.*

The *Andrews* court approved the district court's reasoning with little analysis, quoting short excerpts from *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987), *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987), and *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985) (*Calderon I*). *Id.* at 149. We will say more about these three cases later in this opinion. The *Andrews* court expressed a concern, similar to that voiced by Justice Powell in his concurrence in *Crown, Cork &*

Seal, that the *American Pipe* tolling rule "is a generous one, inviting abuse." *Id.* (citing 462 U.S. at 354).

Finally, the *Andrews* court affirmed the district court's ruling that the plaintiffs' individual claims were untimely filed, observing that "[e]ven if the *Brown* plaintiff's second motion for class certification somehow revived or reactivated tolling, it came too late. More than thirty days had gone by in which neither a class action nor a motion for class certification was pending." *Id.* at 150. Under *American Pipe* and *Crown, Cork & Seal*, the court emphasized that "[i]t is the filing of a class action and the pendency of a motion to certify that suspend the running of a limitations period for putative class members, and the period for filing begins to run anew when class certification is denied." *Id.* Ultimately, the *Andrews* court extended equitable tolling to the plaintiffs on their individual claims, vacated the judgment dismissing the case, and remanded for further proceedings on the individual claims. *Id.* at 150-52.

Our court recently had an opportunity to interpret the meaning of *Andrews*. *See In re Vertrue*, 719 F.3d at 478-80. In that case, the success of the purported class action depended on whether the plaintiffs were "entitled to tolling during the pendency of a prior putative class action suit." *Id.* at 477. We observed that an out-of-circuit district court had dismissed a prior, related class action lawsuit, *Sanford v. West*, without ever ruling on a motion for class certification. *Id.* After discussing *Andrews* at length, we turned to Vertrue's argument that *Andrews* established a "bright line rule that *American Pipe* tolling never applies to subsequent class actions

by putative class members," and thus the class action subsequent to *Sanford* was time-barred. *Id.* at 479.

We rejected Vertrue's proposed bright-line rule. We reasoned that *Andrews* concerned a situation in which a subsequent class action was brought after class certification already had been denied whereas in *Vertrue* no court had definitively addressed the requested class certification because the *Sanford* court had dismissed the initial suit before ruling on a pending motion for class certification. *Id.* at 479-80. Because no court had denied class certification and "[b]ecause the risk motivating our decision in *Andrews*—namely, repetitive and indefinite class action lawsuits addressing the same claims" was "simply not present," we held that the commencement of the *Sanford* class action tolled the statute of limitations under *American Pipe* for subsequent class claims. *Id.* at 480.

Significantly, we observed that "[o]ther courts have followed this same approach when faced with a situation in which a previous court has not made a determination as to the 'validity of the class.'" *Id*. at 480 n.2. In support, we cited *Yang v. Odom*, 392 F.3d 97, 104, 112 (3d Cir. 2004), for the proposition "that tolling applies to a subsequent class action when the prior denial of class certification was 'based solely on Rule 23 deficiencies of the putative representative.'" *Id.* We also cited *Catholic Social Services, Inc. v. I.N.S.*, 232 F.3d 1139, 1149 (9th Cir. 2000) (en banc), for the holding "that tolling applies to a subsequent class action when class certification was granted in a prior case." *Id.* We drew further support from *Great Plains Trust Co. v. Union Pacific Railroad Co.*, 492 F.3d 986, 997 (8th Cir. 2007),

where the Eighth Circuit assumed "without deciding that *American Pipe* analysis applies in cases where one putative class action suit was dismissed without prejudice and one was voluntarily dismissed." *Id.* We also observed that, "[e]ven those circuits that apply a categorical ban against tolling for the benefit of subsequent class actions"—and the *Vertrue* court certainly did not place *Andrews* in that group—"have addressed situations in which class certification has been affirmatively denied." *Id.* (citing *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994); *Calderon I*, 765 F.2d at 1349-50; *Basch v. Ground Round, Inc.*, 139 F.3d 6, 7, 11 (1st Cir. 1998); *Korwek*, 827 F.2d at 878). The *Vertrue* court held that *American Pipe* tolling applied to make the class claims timely filed, affirmed the district court's denial of the defendants' motion to strike the class allegations, and allowed the subsequent class action to proceed. *Id.* at 476, 480.

The reasoning of *Vertrue* applies with equal force to the putative Rule 23(b)(3) class action brought against Wal-Mart by Phipps, Millner, and Gibbons on behalf of current and former female employees in Region 43. The Rule 23(b)(3) class action claims are timely filed under *American Pipe*, *Crown, Cork & Seal*, and the California district court's 2011 tolling order entered after the Supreme Court announced its decision in *Dukes*. When the instant complaint was filed, no court in any jurisdiction had denied certification of a Rule 23(b)(3) class of current and former female employees seeking monetary relief against Wal-Mart under Title VII. *Vertrue* permits the Rule 23(b)(3) class to proceed in Region 43, and *Andrews* does not bar it.

We draw further support from the Fifth Circuit's recent decision reaching an outcome similar to ours in class litigation brought subsequent to *Dukes* in Wal-Mart's Texas regions. *Odle v. Wal-Mart Stores, Inc.*, 747 F.3d 315 (5th Cir. 2014). Stephanie Odle's Wal-Mart employment terminated in late 1998. *Id.* at 316. In 1999, she filed an administrative charge of gender discrimination with the EEOC and received a right-to-sue letter in May 2001. *Id.* at 317. Odle was one of the original named plaintiffs in the *Dukes* lawsuit filed in the Northern District of California. *Id.* Although the California district court certified a Rule 23(b)(2) nationwide class of current and former Wal-Mart employees, the Ninth Circuit pared away the individual and class claims of former Wal-Mart employees, including Odle's, from the Rule 23(b)(2) certified class that eventually reached the Supreme Court. *Id.* at 318-19. After the Supreme Court decided *Dukes*, Odle filed a new action in the Northern District of Texas asserting individual and putative class claims on behalf of employees in Wal-Mart's Texas regions. *Id.* at 318. The district court granted Wal-Mart's motion to dismiss Odle's individual and putative class claims as time-barred, *id.* at 319, but the Fifth Circuit reversed and remanded for further proceedings. *Id.* at 323.

The Fifth Circuit concluded that *American Pipe* tolling of Odle's claims continued after *Dukes*, 131 S. Ct. 2541, because the Ninth Circuit's en banc opinion had expressly instructed the California district court to consider on remand whether to certify a class of former employees under Rule 23(b)(3), a form of relief that the *Dukes* plaintiffs had sought in their initial motion for class certification, but never obtained.

Id. The Fifth Circuit further concluded that the Ninth Circuit's opinion remanding the case to the California district court did not give Odle notice that her claims could not be pursued in a subsequent class action. *Id.* at 320.

Opposing Odle's efforts to certify a Rule 23(b)(3) class, Wal-Mart relied on *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 863 F.2d 384 (5th Cir. 1989) (per curiam) (*Calderon II*). *Id.* at 321. The Fifth Circuit distinguished that case "on significant procedural grounds." *Id.* To explain why, the court began with its previous opinion, *Calderon I*, 765 F.2d 1334, a case we cited in *Andrews*, 851 F.2d at 149, and *Vertrue*, 719 F.3d at 480 n.2. The Fifth Circuit wrote:

> In *Calderon I*, the district court denied class certification. On appeal the first time, we affirmed the district court's refusal to certify the class, but we remanded the case on other grounds. We further noted that the district court nevertheless could, despite our affirmance, reconsider the class certification issue on remand. In the meantime—after the district court denied certification but before the *Calderon I* appeal was decided—the two-year statute of limitations expired. On remand, the district court certified the class.
>
> We next determined, in *Calderon II*, that tolling had ceased when the district court denied class certification at the outset of the litigation. We held that, because the *Calderon* putative class members had failed to protect their rights by either intervening or by filing

> individual lawsuits after the district court's initial denial of certification and before the two-year statute of limitations had run, the district court's subsequent, post-remand certification order could not resurrect the time-barred claims.

Odle, 747 F.3d at 321. Although Wal-Mart argued that *Calderon II* controlled *Odle*, the Fifth Circuit distinguished *Calderon II*: "The *Calderon* district court initially *denied* certification, whereas the California district court in *Dukes* certified the class at the *outset* of the litigation." *Id.* The Ninth Circuit's subsequent instruction to the California district court to consider the potential for Rule 23(b)(3) certification of a class of former Wal-Mart employees "did not invite the California district court to reconsider a denial of class certification; rather, it directed the lower court to consider certifying—*for the first time*—the carved-out class of former employees under a different subsection, *viz.*, Rule 23(b)(3)." *Id.* at 321-22. "The fact that the California district court did not consider, much less deny, certification of the class of former employees under Rule 23(b)(3) is a crucial distinction that makes *Calderon II* inapposite." *Id.* at 322. If Odle and the putative class members were denied the benefit of *American Pipe* tolling, the policy of Rule 23 would be undermined by encouraging the class members to make "repetitious and unnecessary filings . . . to prevent their claims from expiring if certification of the class is denied." *Id.* at 320 (internal quotation marks omitted). Holding that Odle's claims were timely filed, the Fifth Circuit reversed the district court's dismissal of the suit, and remanded for further proceedings. *Id.* at 323.

Odle is fully consistent with the analysis in *Vertrue* and our reasoning in this case. *Andrews*—which precluded a subsequent class action after the district court had already *denied* class certification at the outset of the litigation—cannot bar 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. *See In re Vertrue*, 719 F.3d at 479-80; *Odle*, 747 F.3d at 321-22. The *Andrews* court recognized, moreover, that the limitations period is suspended if a class action is filed and a motion to certify is pending. *Andrews*, 851 F.2d at 150. The *Dukes* class action complaint and the original motion to certify a Rule 23(b)(3) class remained pending in the California district court after the Supreme Court decided *Dukes*. The limitations period was suspended under *American Pipe*, pursuant to the extension order entered by the California district court after *Dukes*, until May 25, 2012. The plaintiffs timely filed their EEOC charges before that date, and they filed suit under Title VII within ninety days of receiving their right-to-sue letters. Under these circumstances, the plaintiffs' claims were timely filed. Wal-Mart's reliance on *Andrews* does not carry the day, and the company's motion to strike the Rule 23(b)(3) class allegations as time-barred by *American Pipe* and *Andrews* must be denied.

2. The Rule 23(b)(2) class of current female employees seeking declaratory and injunctive relief in Wal-Mart Region 43

A different question is presented by the request of the named plaintiffs to certify a Rule 23(b)(2) class of current female employees for the purpose of ob-

taining declaratory and injunctive relief against Wal-Mart in Region 43. Wal-Mart contends that *Andrews* bars plaintiffs from asserting this new class action. We disagree because *Andrews* does not control, and plaintiffs brought the class action in a timely manner. The issue is whether the class action is precluded by the Supreme Court's decision in *Dukes*, not whether it was timely filed.

It is important to recall that the *Andrews* plaintiffs were unnamed members of a preceding class action, *Brown v. Orr. Andrews*, 851 F.2d at 148. When the district court denied class certification in *Brown*, *American Pipe* tolling ended and the applicable 30-day statute of limitations started running. *Id.* The *Andrews* plaintiffs took *no* steps to protect their rights. *Id.* The limitations period expired months before the *Andrews* plaintiffs filed administrative charges with their EEO counselor and later filed the new class action. *Id.* Because the *Andrews* plaintiffs' individual claims were untimely filed, it is no surprise that the district court and this court refused to allow them to proceed with a new class action on behalf of themselves and unnamed members of the *Brown* and *Andrews* classes.

In this case, plaintiffs took action to protect their rights and the rights of Wal-Mart employees working in Region 43 when they pursued EEOC charges and filed this class action during the tolling period set by the California district court. Plaintiffs and the unnamed members of the Region 43 class were entitled to rely on the California district court to protect their rights on remand from the Supreme Court. This is particularly true because the nationwide *Dukes* class was mandatory under Rule 23(b)(2) and its unnamed

members, including plaintiffs and the Region 43 current Wal-Mart employees, received neither notice of the pending nationwide class nor a right to opt out of that class. *Dukes*, 131 S. Ct. at 2558. As directed by the California district court, plaintiffs timely pursued their own individual claims and those of the unnamed members of the *Dukes* class who work in Region 43.

Wal-Mart contends that footnote 10 in *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), supports an anti-stacking rule, but Wal-Mart misses the Supreme Court's point. In *Smith,* Bayer Corporation relied on *American Pipe* and *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), in an unsuccessful bid to bind Smith—"an unnamed member of a proposed but uncertified class"—as a party to a separate class action suit in which class certification had been denied. *Id.* at 2379-80 & n.10. The Supreme Court rejected Bayer's attempt, holding instead that unnamed members of a class action are not parties to nor bound by a case judgment in which certification is denied. *See Smith*, 131 S. Ct. at 2379-81 & n.11. The Court explained that *American Pipe* and *McDonald* are "specifically grounded in policies of judicial administration" and "demonstrate only that a person not a party to a class suit may receive certain benefits (such as the tolling of a limitations period) related to that proceeding. . . . That result is consistent with a commonplace of preclusion law—that nonparties sometimes may benefit from, even though they cannot be bound by, former litigation." *Id.* at 2379 n.10.

Moreover, the concern that animated *Andrews*—the abusive use of *American Pipe* tolling to resurrect

already time-barred individual and class claims—is not present in this case. The three cases cited in *Andrews* to support the statement "that the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class," *Andrews*, 851 F.2d at 149, cannot bear the weight Wal-Mart places on them. In *Korwek v. Hunt*, 827 F.2d at 879, the Second Circuit expressed concern about affording "plaintiffs the opportunity to argue and reargue the question of class certification by filing new but repetitive complaints." The court explicitly left open "for another day the question of whether the filing of a potentially proper subclass would be entitled to tolling under *American Pipe*." *Id.* Thus, *Korwek* provides support for a "potentially proper subclass" of the nationwide *Dukes* class that current Wal-Mart employees timely filed under *American Pipe*, as directed by the California district court.

The Fifth Circuit case, *Calderon I*, also does not support the bright-line rule Wal-Mart draws from *Andrews*, nor does it preclude the instant class claims. The Fifth Circuit recently explained in *Odle* that *Calderon I* did not bar a subsequent class action. *Odle*, 747 F.3d at 321. Although the Fifth Circuit initially affirmed the district court's refusal to certify a class, the court "further noted that the district court nevertheless could, despite our affirmance, reconsider the class certification issue on remand." *Id.* at 321 & n.33 (quoting *Calderon I* ("[W]e in no way restrict the court's discretion to change that decision [to deny class certification] on remand. It is well-settled that decisions on class certification are always interlocutory.").

The Ninth Circuit case cited in *Andrews*, *Robbin v. Fluor Corp.*, 835 F.2d at 214, is likewise inapposite to both *Andrews* and this case. The Ninth Circuit has since explained that *Robbin* "interpreted *American Pipe* not to allow tolling when the district court in the previous action had denied class certification, and when the second action sought to relitigate the issue of class certification and thereby to circumvent the earlier denial." *Catholic Social Servs. Inc.*, 232 F.3d at 1147. The Ninth Circuit permitted tolling for a subsequent class claim where "[t]he substantive claims asserted [were] within the scope of those asserted" in the earlier class action, satisfying the requirement of notice to the opposing party, but where the plaintiffs were "not attempting to relitigate an earlier denial of class certification, or to correct a procedural deficiency in an earlier would-be class." *Id*. at 1149. The same is true here, where plaintiffs represent a class of current Wal-Mart employees in Region 43 who allege that they have been subjected to a pattern or practice of gender discrimination resulting from regional company policies and practices that were not addressed in *Dukes*. These substantive claims are within the scope of those asserted by the nationwide class in *Dukes*, and Wal-Mart had notice of them, but the class seeks neither relitigation nor correction of the earlier class claims.

Korwek, *Calderon I*, and *Robbin* thus do not support the blanket rule that Wal-Mart seeks to draw from *Andrews*. We have previously rejected the position that *Andrews* sets a bright-line rule, and instead looked to the particular facts of the case to determine that "the risk motivating our decision in *Andrews*—namely, repetitive and indefinite class action law-

suits addressing the same claims—is simply not present here." *In re Vertrue*, 719 F.3d at 479. Plaintiffs, for themselves and all other current Wal-Mart employees in Region 43, seek certification for the first time of a regional class under Rule 23(b)(2), seeking declaratory and injunctive relief, but not monetary relief, against Wal-Mart.

Precision in characterizing the central issue is critical. The question is not whether the class claims are timely asserted under the statute of limitations. They are. The issue is whether plaintiffs may use the class action device to litigate the claims of unnamed class members. *See Catholic Social Services, Inc.*, 232 F.3d at 1147. Although the circuits seem to be at odds about this, Judge Easterbrook has explained that "[t]here is no conflict" in the circuits "on the question whether a second case may proceed as a class action." *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 563 (7th Cir. 2011) (citing cases). Decisions from various circuits "concern, 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." *Id.* This issue was addressed by a Wisconsin district court in Wal-Mart litigation following the Supreme Court decision in *Dukes*. *Ladik v. Wal-Mart Stores, Inc.*, 291 F.R.D. 263 (W.D. Wis. May 24, 2013). There Wal-Mart moved to dismiss the class allegations in the Wal-Mart Region 14 class action. The district court allowed the timely new class action to proceed to the question of class certification because "once a plaintiff has filed a complaint that is timely under *American Pipe*, the tolling issue is resolved, regardless whether the plaintiff wishes to proceed individually

or as a class. Although the previous class action that failed may have implications on a new motion for class certification, the statute of limitations is not one of them." *Id.* at 268. *See also Gomez v. St. Vincent Health, Inc.*, 622 F. Supp. 2d 710, 716-23 (S.D. Ind. 2008) (permitting subsequent class action to proceed).

Similarly, the California district court denied Wal-Mart's motion to dismiss the California Regions class and proceeded to the question of class certification. *Dukes*, 2012 WL 4329009 at *4. That court relied on *In re Initial Public Offering Securities Litigation*, 483 F.3d 70, 73 (2d Cir. 2007), where the Second Circuit's "earlier order reversing certification of broad classes without further instruction did not bar the district court from considering different or narrower proposed classes in the same action, because district courts 'have ample discretion to consider (or decline to consider) a revised class certification motion after an initial denial.'" *Id.* The court also looked to *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 987-88 (9th Cir. 2011), where the Ninth Circuit reversed class certification, but permitted the district court to consider whether a different type of class could be certified on remand. *But see Love v. Wal-Mart Stores, Inc.*, No. 12-61959, 2013 WL 5434565 (S.D. Fla. Sept. 23, 2013) (holding follow-on class action barred under Eleventh Circuit precedent, *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994), but questioning whether recent Supreme Court cases undermine the Eleventh Circuit's "no-piggybacking rule").

The principle we draw from *Andrews* and the current caselaw we have discussed is that subse-

quent class actions timely filed under *American Pipe* are not barred. Courts may be required to decide whether a follow-on class action or particular issues raised within it are precluded by earlier litigation, but we would eviscerate Rule 23 if we were to approve the blanket rule advocated by Wal-Mart that *American Pipe* bars *all* follow-on class actions. *See Sawyer*, 642 F.3d at 564. Rule 23 expressly provides that "[a] class action may be maintained if Rule 23(a) is satisfied and if" one of the subsections of Rule 23(b) is also met. *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). "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." *Id.* If each unnamed member of a class that is not certified were barred from ever again proceeding by class action, each class member would have an incentive to multiply litigation by filing protective suits or motions to intervene at the outset of the initial class action suit. The weight of individual filings would strain the federal courts. This is precisely the scenario that "Rule 23 was designed to avoid" in cases where adjudication of claims by class action is a fair and efficient method of resolving a dispute. *American Pipe & Constr. Co.*, 414 U.S. at 551, 553-54; *Wyser-Pratte Mgt. Co. v. Telxon Corp.*, 413 F.3d 553, 569 (6th Cir. 2005) ("The purposes of *American Pipe* tolling are not furthered when plaintiffs file independent actions before decision on the issue of class certification, but are when plaintiffs delay until the certification issue has been decided.").

Plaintiffs and the current Wal-Mart employees of Region 43 are entitled to seek class certification un-

der Rule 23. All of them were unnamed members of the nationwide *Dukes* class. Under *American Pipe*, the Wal-Mart Region 43 class action brought under Rule 23(b)(2) was timely filed, and it is not barred: it may proceed *if* the Rule 23 class action prerequisites are satisfied. *Shady Grove Orthopedic Assoc.*, 559 U.S. at 398.

Wal-Mart warns us, like Bayer Corporation warned the Supreme Court in *Smith*, that our approach will allow serial class action litigation and force corporate defendants to settle to buy peace. *See Smith*, 131 S. Ct. at 2381. Wal-Mart claims that it is unfair to permit absent class members to stack one class action onto another and benefit from the EEOC claims filed by the named plaintiffs. But representative claims are the nature of class actions, and the Supreme Court rejected similar concerns in *Smith*—as we do here—because "this form of argument flies in the face of the rule against non-party preclusion." *Id.* "That rule perforce leads to relitigation of many issues, as plaintiff after plaintiff after plaintiff (none precluded by the last judgment because none a party to the last suit) tries his hand at establishing some legal principle or obtaining some grant of relief." *Id.* But that apprehension need not bar legitimate class action lawsuits or distort the purposes of *American Pipe* tolling. Instead, we follow the Supreme Court's lead and trust that existing principles in our legal system, such as *stare decisis* and comity among courts, are suited to and capable of addressing these concerns.

III. CONCLUSION

For the reasons explained above, we hold, under *In re Vertrue*, that *Andrews* does not bar the Wal-Mart Region 43 Rule 23(b)(3) putative class action brought by the named plaintiffs for themselves and on behalf of all former female Wal-Mart employees. Their action was timely filed under *American Pipe*, and no court has ever ruled on whether certification of the Rule 23(b)(3) class is appropriate. We further hold that *Andrews* does not bar the Wal-Mart Region 43 Rule 23(b)(2) putative class brought by plaintiffs for themselves and on behalf of all current female employees of Wal-Mart. *Andrews* barred a follow-on class action because it was filed months after the statute of limitations applicable to the named plaintiffs' individual claims had run. By contrast, plaintiffs timely filed the Rule 23(b)(2) class action under *American Pipe*. Further, the Rule 23(b)(2) putative class may proceed under *Smith* and *Shady Grove* if the necessary class action prerequisites specified in Rule 23 are met.

Accordingly, we **REVERSE** the order of the district court dismissing the class claims with prejudice and we **REMAND** the case for further proceedings consistent with this opinion.

CONCURRING IN PART AND DISSENTING IN PART

COOK, Circuit Judge, concurring in part and dissenting in part. I agree with the majority that *Andrews* does not bar consideration of the proposed Rule 23(b)(3) class. *See* Maj. Op. at 9-15; *see also In re Vertrue*, 719 F.3d at 479-80. I cannot agree, however, that we can read *Andrews* so narrowly as to allow the proposed 23(b)(2) class to go forward. Though the plaintiffs and the district court offer persuasive reasons to doubt the wisdom of *Andrews*, I believe it binds us to dismiss the 23(b)(2) claims absent reconsideration by the full court. *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 479 (6th Cir. 2003) (noting that we do not "enjoy greater latitude" in departing from prior published decisions "where our precedents purportedly are tainted by analytical flaws"). I would therefore vacate and remand the district court's judgment only as to the putative 23(b)(3) class.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CHERYL PHIPPS, BOBBI MILLNER, AND SHAWN GIBBONS, on behalf of themselves and all others similarly situated,	**Case No. 3:12-cv-1009**
Plaintiffs,	**Judge Aleta A. Trauger**
v.	
WAL-MART STORES, INC.	
Defendant.	

MEMORANDUM

The defendant, Wal-Mart Stores, Inc. ("Wal-Mart"), has filed a Motion to Dismiss in Part Plaintiffs' Complaint or in the Alternative to Strike Class Claims (Docket No. 19) ("Partial Motion to Dismiss"), to which the plaintiffs have filed a Response in opposition (Docket No. 35), and the defendants have filed a Reply (Docket No. 39). The court heard oral argument on the motion on January 30, 2013. For the reasons set forth herein, the motion will be granted and the court will dismiss the class claims with prejudice.

BACKGROUND

I. Procedural History

A. *Dukes* (N.D. Cal.), *Odle* (N.D. Tex.), *Love* (S.D. Fla.), and *Phipps* (M.D. Tenn.)[1]

This case has its origins in the federal district court for the Northern District of California (hereinafter "California district court"), where several named plaintiffs brought a putative national class action against Wal-Mart (*Dukes v. Wal-Mart Stores, Inc.* ("*Dukes*")) in June 2001 on behalf of themselves and others similarly situated, alleging that Wal-Mart had systematically discriminated against female employees nationwide with respect to pay and promotion, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e).[2]

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[1] Without converting the pending motion into a motion for summary judgment, the court takes judicial notice of materials attached to or incorporated by reference into the Complaint in this case (Docket No. 1). *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007). In briefing the merits of Wal-Mart's Partial Motion to Dismiss, the parties have also filed and relied upon various materials from other similar lawsuits against Wal-Mart, including orders, opinions, pleadings, and legal briefs, of which this court also takes judicial notice without converting the motion. *See Buck v. Thomas M. Cooley Law Sch.*, 597 F.3d 812, 816 (6th Cir. 2010); *see also* Docket No. 28 in this case.

[2] To be more specific, the *Dukes* action was originally filed as a *pro se* complaint by Betty Dukes alleging California state law claims, which she subsequently amended to add a sex discrimination and retaliation claim under Title VII. *See Dukes v. Wal-Mart Stores, Inc.*, No. C01-2252 MJJ, 2001 WL 1902806, at *1 (N.D. Cal. Dec. 3, 2001). Thereafter, Dukes filed a First

After extensive class discovery and briefing, the district court, pursuant to Fed. R. Civ. P. 23, certified a nationwide class consisting of all current and former female Wal-Mart employees who had worked at Wal-Mart during a specified time frame.[3] *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 188 (N.D. Cal. 2004). On appeal, after rehearing *en banc*, the Ninth Circuit substantially affirmed the district court's certification order. *See Dukes v. Wal-Mart Stores, Inc.*, 474 F.3d 1214 (9th Cir. 2007) (panel decision affirming in full); *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (*en banc* decision affirming in part and remanding in part). However, in a landmark decision concerning the standards of Rule 23, the United States Supreme Court reversed the Ninth Circuit, holding that, for purposes of certifying a nationwide class, the plaintiffs had failed to demonstrate the requisite commonality under Rule 23(a)(2). *Wal-Mart Stores, Inc. v. Dukes*, — U.S. — , 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011).

Amended Complaint that added five named plaintiffs, including Stephanie Odle, and formally asserted a putative nationwide class action against Wal-Mart for violations of Title VII. *Id.* The California district court then dismissed four of the named plaintiffs for failure to meet Title VII's special venue requirements (*id.* at *9-*10), after which it granted leave for the remaining plaintiffs to file further amended complaints that added several additional named plaintiffs to the case caption. *Dukes v. Wal-Mart Stores, Inc.*, No. C 01-2252 MJJ, 2002 WL 32769185, at *1 (N.D. Cal. Sept. 9, 2002).

[3] For reasons not relevant here, the California district court limited the requested nationwide class in certain respects.

Following the Supreme Court's decision in *Dukes*, the parties continued to litigate before the California district court. Pursuant to the United States Supreme Court decision in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), the California district court issued an opinion tolling the statute of limitations applicable to sex discrimination claims by the former class members, with respect to whom the court set deadlines for filing EEOC charges and/or lawsuits concerning their discrimination charges. (*See* Docket No. 1, Compl., Ex. 9, July 25, 2011 order.)

Following that order, certain former nationwide class members filed EEOC charges (to the extent that they had not done so already) and, ultimately, filed three putative class action lawsuits in other jurisdictions: (1) *Odle v. Wal-Mart Stores, Inc.*, No. 3:11-cv-2954-O (N.D. Tex. filed Oct. 28, 2011) ("*Odle*") (relating to "Wal-Mart's regions located in whole or in part in Texas");[4] (2) *Phipps, et al. v. Wal-*

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[4] As explained in *Dukes*, 2002 WL 32769185, at *8-*9, Stephanie Odle had filed EEOC charges against Wal-Mart in 1999 and 2000, which collectively charged that Wal-Mart had engaged in a "pattern and practice of discrimination toward females in management positions" and that "[t]he 'glass ceiling' has been the common experience of all women throughout Wal-Mart who want to apply to advance within management, due to Wal-Mart's longstanding practice of not treating women equally." The California district court initially construed Odle's charges as placing Wal-Mart on notice of the nationwide Title VII claims, *see* 2012 WL 4329009, at *9 n.9 (["Having carefully considered the Odle charge, this Court finds that Wal-Mart was notified of the subject matter and the number of potential plaintiffs in the instant suit through Odle's charges . . . . "), a

Mart Stores, Inc., 3:12-cv-1009 (M.D. Tenn. filed Oct. 2, 2012) ("*Phipps*") [*i.e.*, this case]; and (3) *Love, et al. v. Wal-Mart Stores, Inc.*, No. 0:12-cv-61959-RNS (S.D. Fla. filed Oct. 4, 2012) ("*Love*"). These three lawsuits broadly share the following characteristics: (1) they were filed by named plaintiffs who purported to have complied with the deadlines set forth in the California district court's July 25, 2011 order concerning *American Pipe* tolling; (2) the named plaintiff(s) in each case filed a class action complaint on behalf of current and former employees within a specific geographic "Region" (or Regions) within Wal-Mart's nationwide network – *i.e.*, a geographic subclass of the nationwide class at issue in *Dukes*; (3) the Title VII claims in each case are broadly similar to those originally asserted in *Dukes*; (4) each complaint contains new Region-specific allegations; and (5) each complaint, in some respects, supplements and/or re-characterizes the allegations that the Supreme Court in *Dukes* had found were insufficient to satisfy Rule 23 as to a nationwide class.

Within the original *Dukes* action, certain California-based plaintiffs also filed a motion for leave to file a Fourth Amended Complaint, which sought to certify a class related only to Wal-Mart's "Region 41," a Region based largely in California. Wal-Mart sought to dismiss or strike the class claims on several grounds. On September 21, 2012, the California

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finding it reaffirmed after the Supreme Court decision in *Dukes*. *See Dukes v. Wal-Mart Stores, Inc.*, No. C 01-02252 CRB, 2012 WL 4329009, at *8-*9 (N.D. Cal. Sept. 21, 2012) (addressing whether Odle's EEOC charges provided sufficient notice relative to putative subclass of California-based plaintiffs).

district court denied Wal-Mart's motion and permitted class discovery to proceed with respect to Region 41. *See Dukes*, 2012 WL 4329009, at *8-*9. In reaching this holding, the California district court found, *inter alia*, that (1) the Supreme Court's *Dukes* decision merely "rested not on a total rejection of plaintiffs' theories, but on the inadequacy of their proof" with regard to a nationwide class, *id.* at *5; (2) "Plaintiffs now bring a narrower class-action claim, which the Supreme Court has yet to consider and did not foreclose," *id.* at *6; (3) district courts traditionally retain continuing jurisdiction to revisit the class certification issue, even after a district court's certification of a broader class is overturned on appeal, *id.* at *4-*5; and (4) *American Pipe* tolling extended to the (narrowed) class claims, because the case was not a "new" action, but rather a continuation of the previously filed action. *Id.* at *8.[5]

Accordingly, as of October 4, 2012 – the date the *Love* complaint was filed – four parallel putative class action lawsuits were proceeding against Wal-Mart, each asserting Region-specific gender discrimination claims under Title VII: (1) *Dukes* (N.D. Cal.), which was a continuation of the original nationwide class action lawsuit; (2) *Odle* (N.D. Tex.); (3) *Love* (S.D. Fl.); and (4) *Phipps* (M.D. Tenn.) – *i.e.*, this case.

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[5] The California district court denied Wal-Mart's motion to reconsider and its motion to certify the issue for interlocutory appeal. *See Dukes v. Wal-Mart Stores, Inc.*, No. C 01-02252 CRB, 2012 WL 6115536 (N.D. Cal. Dec. 10, 2012); *Dukes v. Wal-Mart Stores, Inc.*, No. C 01-02252 CRB, 2013 WL 149685 (N.D. Cal. Jan. 14, 2013).

B. *Phipps* Allegations

As discussed herein, because the court is constrained to find that the putative class members' claims are presumptively barred by the statute of limitations, the court need not address the sufficiency of the *Phipps* complaint under the Rule 23 standard. However, the *Phipps* complaint allegations are relevant insofar as they demonstrate that the allegations in this lawsuit are substantively similar to those at issue in *Dukes* in certain important respects and different from the allegations in *Dukes* in others.

Broadly, like the complaint the Supreme Court considered in *Dukes*, the *Phipps* Complaint asserts that Wal-Mart systematically discriminated against women in hiring and promotion. The Complaint also contains some of the same allegations concerning national meetings that involved District Managers. Furthermore, the basic theory of the case is broadly similar to the theory of the case rejected in *Dukes*, albeit with customized allegations specific to Region 43. (*See* Docket No. 25, Conway Decl., Ex. 6 (chart comparing *Phipps* complaint to the plaintiffs' arguments to the Supreme Court in *Dukes*).

However, the Complaint also contains new Region-specific allegations that were not contained in the relevant *Dukes* complaint. The plaintiffs in this case allege that, within Region 43, Wal-Mart denied women (1) equal pay for hourly retail store positions and certain salaried management positions, and (2) equal opportunities for promotion to certain man-

agement track positions, in violation of Title VII.[6] In support of these claims, it contains the following types of Region 43-specific information:

- A description of the Region 43 structure, which includes scores of retail stores operated by Wal-Mart and, at least as of 2011, is subdivided into "Districts" of 6-8 stores each.
- Allegations concerning commonalities across retail stores within Region 43, including, *inter alia*, common job titles and job hierarchies, common departments, common management structure in each store, and common District Manager roles in the approval of compensation and promotion decisions in each store.
- Allegations concerning the Region 43 hierarchy, including the roles of a single Regional Vice President and a single Regional Personnel Manager.
- Allegations concerning common forms of pay discrimination within Region 43.
- Anecdotal information relating to the experiences of various employees within Region 43 that reflect racial stereotyping by supervisors at various levels within Region 43, as well as various examples of discrimination in pay and promotion at retail stores within Region 43.

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[6] The Complaint asserts claims under Title VII on the basis that Wal-Mart has engaged in a "pattern or practice of gender discrimination" and/or that Wal-Mart's policies have had a disparate impact not justified by business necessity.

The Complaint identifies two putative subclasses: (1) an "Injunctive Relief Class" consisting of all women who are currently employed, or will be employed, at any Wal-Mart retail store in Region 43; and (2) a "Monetary Relief Class" consisting of all women employed at any Wal-Mart retail store in Region 43 at any time beginning on December 26, 1998 who have been, or may be, subject to discrimination in pay or promotion for certain job titles. (Compl. ¶ 15.)[7] For ease of reference only, this court will refer to these subclasses collectively as the "Region 43 class" or "Region 43 subclass" of the former nationwide class. Also for ease of reference, the court will at times refer to a follow-on lawsuit seeking to certify a subclass of a previously rejected broader class – such as *Odle*, *Love*, and this case – as a "follow-on subclass action."

C. Recent Relevant Developments in the Sister Subclass Actions

On October 15, 2012, the Texas district court issued an opinion in *Odle* dismissing the class allegations and dismissing plaintiff Odle's individual claim.[8] *Odle v. Wal-Mart Stores Inc.*, No. 3:11-CV-

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[7] All three named plaintiffs seek to be named as class representatives for the Monetary Relief Class, while only Gibbons seeks to be named as the class representative for the Injunctive Relief class. (*See* Compl. at p. 33, Prayer for Relief ¶ 1.)

[8] In the original class action complaint in *Odle*, Stephanie Odle was the only named plaintiff. Before Wal-Mart answered that complaint, Odle amended the complaint to add six additional named plaintiffs. As this court construes the Texas district court's October 15, 2012 opinion, the court permitted the individual claims of the remaining named plaintiffs in that case to proceed.

2954-O, 2012 WL 5292957 (N.D. Tex. Oct. 15, 2012). In most relevant part, the Texas district court held that, under *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985), which it construed as controlling precedent, it was constrained to find that the putative class members did not benefit from *American Pipe* tolling of the statute of limitations retroactive to the *Dukes* lawsuit. *Id.* at *9. In reaching this holding, the Texas district court analyzed whether the United States Supreme Court decisions in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, — U.S. —, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010) and *Smith v. Bayer*, — U.S. —, 131 S. Ct. 2368, 180 L. Ed. 2d 341 (2011), impacted *Salazar-Calderon* in such a way as to implicitly overrule it. *Odle*, 2012 WL 5292957, at *6-*9. The court narrowly construed the holdings in *Shady Grove* and *Smith* and found that the *Odle* plaintiffs had not met the high threshold to justify ignoring otherwise controlling Fifth Circuit precedent. *Id.* On January 7, 2013, the *Odle* court granted the plaintiffs' motion to certify the issue of *American Pipe* tolling to the Fifth Circuit for immediate interlocutory review. *See Odle v. Wal-Mart Stores Inc.*, No. 3:11-CV-2954-O, 2013 WL 66035 (N.D. Tex. Jan. 7, 2013).

In the narrowed *Dukes* action, the court has set a future date for the plaintiffs to submit a motion for class certification, which, as of the date of this opinion, has not yet been filed.

In *Love*, Wal-Mart has filed a Motion to Dismiss Class Allegations, which remains pending before the Florida district court.

D. The Parties' Arguments[9]

Here, Wal-Mart's Partial Motion to Dismiss concerns only the viability of the putative class claims, not the named plaintiffs' individual claims. Wal-Mart argues that the class claims are not viable for a host of reasons, including, *inter alia*, that (1) the putative class members' claims are time-barred because, under *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988), *American Pipe* tolling does not extend to follow-on class actions filed by members of a former putative class; (2) the putative class members who have not yet filed EEOC charges cannot "coattail" on otherwise timely charges filed by the named plain-

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9 In support of its Partial Motion to Dismiss, Wal-Mart has filed the following materials: (1) a Memorandum of Law (Docket No. 20) with an associated Appendix of unreported decisions cited therein (Docket No. 21); (2) the Declaration of Catherine Conway (Docket No. 25); (3) a Reply brief (Docket No. 39) with an associated Appendix of unpublished cases cited therein (Docket No. 40; refiled at Docket No. 42); and (4) a second Declaration of Catherine Conway (Docket No. 41). In support of their opposition to the Partial Motion to Dismiss, the plaintiffs have filed the following materials: (1) a Memorandum of Law (Docket No. 35) with an associated Appendix of unpublished decisions cited therein (Docket No. 36); (2) a Notice of Filing of the *Odle* court's January 7, 2013 certification order (Docket No. 43); and (3) a Notice of Filing a copy of *In re Vertrue Mktg. & Sales Practices Litig.*, 712 F. Supp. 2d 703 (N.D. Ohio 2010). The Complaint also attaches the EEOC charges filed by, and notice of right to sue issued to, each named plaintiff in this case, along with the California District Court's July 25, 2011 order setting forth the limitations deadlines for the former members of the putative nationwide class.

tiffs;[10] (3) the Complaint allegations do not satisfy the Rule 23(a)(2) deficiencies identified by the Supreme Court in *Dukes*;[11] and (4) the proposed class violates Title VII's particularized venue requirements. In response, the plaintiffs argue that *Andrews* is no longer good law, that the putative class members should benefit from coattailling, that the Complaint allegations establish a plausible basis that the putative Region 43 class will meet the *Dukes* Rule 23 standard (thereby justifying class discovery), and that only the named plaintiffs must meet Title VII's special venue requirements, which plaintiffs argue they do.

Were it not for the *American Pipe* tolling issue, the court would address the viability of the Region 43 class allegations – under the relevant Rule 12 legal standard set forth in the next section – and would be disinclined to dismiss those allegations without class discovery and the benefit of a fully briefed Rule 23 motion supported by material evidence. However,

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[10] Wal-Mart also argues that the plaintiffs have not identified any timely filed charge on which they can coattail. The dispute essentially concerns whether the plaintiffs may coattail on the administrative charge filed by Stephanie Odle in October 1999. Although the court need not reach the issue, resolving it would involve a sensitive analysis, particularly where the Texas district court recently dismissed Odle's individual claim as time-barred. *See Odle*, 2012 WL 5292957, at *10.

[11] Wal-Mart has only challenged the sufficiency of the Complaint allegations as they relate to Rule 23(a)(2)'s "commonality" requirement. However, Wal-Mart has expressly reserved the right to challenge whether the asserted class claims satisfy any of the other Rule 23 requirements.

for the reasons described herein, the court is constrained by *Andrews* to find that the claims of the putative class members do not benefit from *American Pipe* tolling and, therefore, are time-barred. Accordingly, the court need not reach the merits of the class allegations, whether under the Rule 12 standard now or, if class discovery were justified, the Rule 23 standard later.

Nevertheless, in light of more recent jurisprudential trends, the court believes that *Andrews* merits reconsideration – or at least refinement – to permit follow-on subclass actions to benefit from American Pipe tolling under appropriate circumstances, such as those presented here.

STANDARD OF REVIEW

In deciding a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the court will "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 619 (6th Cir. 2002). The Federal Rules of Civil Procedure require that a plaintiff provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) (quoting Fed. R. Civ. P. 8(a)(2)). The court must determine whether "the claimant is entitled to offer evidence to support the claims," not whether the plaintiff can ultimately prove the facts alleged. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511, 122

S. Ct. 992, 152 L. Ed. 2d 1 (2002) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)).

The complaint's allegations, however, "must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). To establish the "facial plausibility" required to "unlock the doors of discovery," the plaintiff cannot rely on "legal conclusions" or "[threadbare] recitals of the elements of a cause of action," but, instead, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009).

Rule 23 confers "substantial discretion" on the trial court to decide whether to certify and how to manage a proposed class. *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 643 (6th Cir. 2006). A party seeking class certification must first meet all four prerequisites of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – before a class action can be certified. Fed. R. Civ. P. 23(a). "Once those conditions are satisfied, the party seeking certification must also demonstrate that it falls within at least one of the subcategories of Rule 23(b)." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996); *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 945-46 (6th Cir. 2011). The Sixth Circuit has recognized that, where there is no reasonable prospect that discovery or additional time would assist the named plaintiffs in demonstrating the potential viability of a proposed class, a

court may strike class allegations pursuant to Rule 23(c)(1)(A) and Rule 12(f). *See Pilgrim*, 660 F.3d at 949 (affirming district court dismissal of class claims on the pleadings, where putative class member's claims were "governed by different States' laws, a largely legal determination, and no proffered or potential factual development offers any hope of altering that conclusion, one that generally will preclude class certification"). Nevertheless, absent such a showing, courts will typically address the viability of a class in the context of a fully briefed class certification motion following class discovery. *See, e.g.*, *Allen v. Anderson Windows, Inc.*, — F. Supp. 2d — , 2012 WL 6644387, *21 (S.D. Ohio Dec. 20, 2012).

ANALYSIS

I. Early Supreme Court Tolling Cases: *American Pipe* and *Crown, Cork*

In its 1974 decision in *American Pipe*, the Supreme Court articulated a tolling doctrine that has come to be referred to as "*American Pipe* tolling." The threshold question presented here is whether *American Pipe* tolling permits the named plaintiffs in this case to pursue classwide relief on behalf of a subclass, after the Supreme Court in *Dukes* held that certification of the broader class was not appropriate. If they are not, the claims of any putative class members who otherwise failed to file EEOC charges in compliance with the California district court's July 25, 2011 order are time-barred.

A. *American Pipe*

The *American Pipe* decision addressed the application of the then-recent 1966 amendments to Fed.

R. Civ. P. 23. 414 U.S. at 545-46.[12] In *American Pipe*, the state of Utah had filed a putative class action 11 days before the relevant limitations period expired on a set of price-rigging claims under the federal Sherman Act. *Id.* at 541-42. After consolidation into MDL proceedings, the MDL court held that the suit could not be maintained as a class action because joinder of the putative class members with potentially viable claims was practicable and, therefore, the proposed class did not satisfy Rule 23(a)(1). *Id*. at 541-43. Eight days after that decision by the MDL court, several members of the former putative class filed motions to intervene in the case under Rule 24, *id.* at 543-44, but the MDL court found that Utah's previous lawsuit had not tolled the statute of limitations as to any putative class members, meaning that the statute of limitations had run 11 days after the lawsuit was filed. *Id.* at 544.

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[12] Prior to those amendments, Rule 23 did not contain any mechanism for certifying a class before final judgment, which essentially permitted putative class members to await trial developments (or even final judgment) before deciding whether to join the class. *Id.* at 546-48. However, in 1966, Congress amended Rule 23 to require a district court to make a decision on the class certification issue "[a]s soon as practicable after the commencement" of the putative class action and, if certification was granted, to timely notify the class members of their option to "opt out" of the class. *Id.* at 547-49. Thus, at an early stage in the litigation, putative class members of a certified class would be required to opt out (and thereby not be bound by a final judgment and/or share in any recovery) or to remain in the class (and thereby be bound by a final judgment and/or share in any recovery). *Id.* at 549.

On appeal, the Supreme Court found that the trial court had erred in refusing to toll the putative class members' claims during the pendency of Utah's certification motion. The Court expressed concern about frustrating the purposes of Rule 23, particularly where the district court had found that the substantive factors other than numerosity (including commonality, typicality, and adequacy of representation) had been met:

> A contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure. Potential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable. In cases such as this one, where the determination to disallow the class action was made upon considerations that may vary with such subtle factors as experience with prior similar litigation or the current status of a court's docket, a rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions.

Id. at 553-54. Thus, the Court was "convinced that the rule most consistent with federal class action procedure must be 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." *Id.* at 554.

Significantly, the Court also rejected the defendants' argument that, because the Sherman Act specified a one-year statute of limitations, tolling the statute of limitations as to the putative class members effectively deprived the defendants of a substantive right conferred by the Sherman Act, in violation of the Rules Enabling Act, 28 U.S.C. § 2072, which provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." *See id.* at 556-559. The Court found that "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *Id.* at 559. Applying these principles, the Court found that, because the original statute of limitations had been tolled as to the putative class members with 11 days to spare, the former putative class members who filed motions to intervene within 11 days of the trial court's ruling denying class certification had done so within the limitations period. *Id.*

In a short concurring opinion, Justice Blackmun expressed concern that the *American Pipe* tolling rule could be abused. *See id.* at 561-62 (Blackmun, J., concurring). He stated that the rule "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." *Id.* at 561. He stressed that "the purpose of statutes of limitations is to prevent surprises through the revival of claims that have been allowed to slumber until

evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* (internal quotation marks omitted). He was comforted by the fact that intervenors as of right necessarily "have an interest relating to the property or transaction" that "invariably will concern the same evidence, memories, and witnesses as the subject matter of the original class suit," with respect to which "the defendant will not be prejudiced by later intervention, should class relief be denied." *Id.* at 562. On the other hand, he cautioned district courts to exercise discretion before admitting permissive intervenors after class certification is denied, based on whether their intervention would force the defendants to defend claims with respect to which they had "no prior notice." *Id.*

B. *Crown, Cork & Seal*

In *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983), the Court extended the *American Pipe* tolling rule to former class members who file individual actions after the denial of class certification. There, Parker, a black male employee, had filed an EEOC race discrimination charge against his employer. *Id.* at 347. While that charge was pending, two other employees of the same employer filed a putative class action lawsuit in federal district court ("*Pendleton*"), which included Parker as a member of the putative class. *Id.* Parker received a right to sue letter from the EEOC, but withheld filing suit pending the *Pendleton* court's decision whether to certify the case as a class action. Two years later, the *Pendleton* court declined to certify the class on the basis that it failed to meet Rule 23's typicality, numerosity, and adequacy of representation requirements. *Id.* at 347-48.

The *Pendleton* court permitted the named plaintiffs to pursue their individual claims. Rather than moving to intervene in *Pendleton*, Parker filed a separate action ("*Parker*") in federal court on his own behalf (in the same district) within 90 days of that denial, in compliance with the statutory 90-day limitations period to file suit after receiving a right to sue letter. Parker then moved the *Parker* court to consolidate his individual case with the *Pendleton* case. *Id.* at 348. The *Parker* court denied the motion to consolidate and granted judgment to the employer, finding that Parker's claims were time-barred because, following the denial of class certification, *American Pipe* tolling was limited only to intervenors, not individual actions. *Id.*

On appeal, the Supreme Court found that the district court had interpreted *American Pipe* too narrowly. "While *American Pipe* concerned only intervenors, we conclude that the holding of that case is not to be read so narrowly. The filing of a class action tolls the statute of limitations 'as to all asserted members of the class,' not just as to intervenors." *Id.* (citing *Am. Pipe*, 414 U.S. at 554). In support of this finding, the Court cited the following policy rationale for extending *American Pipe* tolling to former putative class members who file individual actions after the denial of class certification:

> The *American Pipe* Court recognized that unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights. Only by intervening or taking other action prior to the running of the statute of limitations would

> they be able to ensure that their rights would not be lost in the event that class certification was denied. Much the same inefficiencies would ensure if *American Pipe*'s tolling rule were limited to permitting putative class members to intervene after the denial of class certification. 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 forum in which the class action is pending might be an inconvenient one, for example, or the class member might not wish to share control over the litigation with other plaintiffs once the economies of a class action were no longer available. Moreover, permission to intervene might be refused for reasons wholly unrelated to the merits of the claim. *A putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations*. 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.

Id. at 350-51 (emphasis added).

The Court also expounded upon its previous finding in *American Pipe* that tolling the statute of limitations for putative class members did not frustrate the purposes served by statutes of limitations:

> Limitations periods are intended to put defendants on notice of adverse claims and to

> prevent plaintiffs from sleeping on their rights, but these ends are met when a class action is commenced. Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; *Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims*. And a class complaint notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. The defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class. 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*.

Id. at 352-53 (emphases added) (internal citations and quotations omitted). Furthermore, the Court indicated that the use of other procedural means to handle complex actions following the denial of class certification would be appropriate:

> Restricting the rule of *American Pipe* to intervenors might reduce the number of individual lawsuits filed against a particular defendant but, as discussed above, this decrease in litigation would be counterbalanced by an increase in protective filings in all class actions. Moreover, although a defendant may prefer not to defend against multiple actions in multiple forums once a class has

> been decertified, this is not an interest that statutes of limitations are designed to protect. Other avenues exist by which the burdens of multiple lawsuits may be avoided; the defendant may seek consolidation in appropriate cases, see Fed. Civ. P. 42; 28 U.S.C. § 1404 (change of venue), and multidistrict proceedings may be available if suits have been brought in different jurisdictions, see 28 U.S.C. § 1407.

Id. at 353. Thus, ruling on the case before it, the Court held that, "[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 that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id.* at 354.

Justice Powell, joined by Justices Rehnquist and O'Connor, issued a short concurring opinion that expressed concerns about the application of the *American Pipe* rule in future class action litigation. *Id.* at 354-55 (Powell, J., concurring). Justice Powell stated that "[t]he tolling rule of *American Pipe* is a generous one, inviting abuse." *Id.* at 354. Accordingly, "[t]he rule should not be read [] as leaving a plaintiff free to raise different or peripheral claims following denial of class status." *Id.* Justice Powell noted that a rationale behind *American Pipe* was that a class action put defendants on notice within the statutory limitations period of the substantive claims being brought against them, along with the generic identities of the potential plaintiffs who could participate in the action. *Id.* at 354-55. However, Justice Powell advised courts as follows:

> . . . [T]o make certain [] that *American Pipe* is not abused by the assertion of claims that differ from those raised in the original class suit . . . [,] when a plaintiff invokes *American Pipe* in support of a separate lawsuit, the district court should take care to ensure that the suit raises claims that concern the same evidence, memories, and witnesses as the subject matter of the original class suit, so that the defendant will not be prejudiced. Claims as to which the defendant was not fairly placed on notice by the class suit are not protected under *American Pipe* and are barred by the statute of limitations.

Id. (internal citations and quotation marks omitted). Accordingly, as with Justice Blackmun's concurrence in *American Pipe*, Justice Powell expressed concern that *American Pipe* tolling could be abused to force defendants to defend otherwise untimely claims for which they had never been put on notice. That is, as this court construes Justice Powell's concurrence, he seemed to fear that, after a class was decertified, a district court might permit a putative class member to file an otherwise untimely lawsuit that included causes of action that were not at issue in the prior putative class action.

Following *American Pipe* and *Crown, Cork*, it was clear that the statute of limitations would remain tolled for putative class members who, following decertification, timely sought to file their own individual suits or to intervene as plaintiffs in the pending action. Furthermore, *Crown, Cork* suggested that, following the refusal to certify a class, parties could later seek to consolidate follow-on individ-

ual lawsuits under the federal rules and/or MDL procedures. However, neither *American Pipe* nor *Crown, Cork* addressed whether or under what circumstances *American Pipe* tolling could extend to former putative class members who file a follow-on *class action*.

II. Pre-*Andrews* Circuit Court Decisions

Prior to the Sixth Circuit decision in *Andrews v. Orr*, 851 F.2d 146, 149 (1988), three circuits addressed the question of extending *American Pipe* tolling to follow-action class actions in particularized procedural contexts. *See Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1349-1351 (5th Cir. 1985); *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987). Because the Sixth Circuit relied on these three cases in reaching its holding in *Andrews*, the court will analyze these cases in detail.

A. *Salazar-Calderon* (Fifth Circuit)

In *Salazar-Calderon*, the Fifth Circuit considered whether, after class certification was denied on the merits in an initial case, the statute of limitations would be tolled on the putative class members' individual claims during the pendency of a second action seeking to relitigate the same class certification issue.

In the lower courts, a set of plaintiffs had originally filed one class action in a federal district court in El Paso ("*Lara*") in April 1979, seeking to represent a class of 809 migrant farm workers, but the El Paso court denied the named plaintiffs' motion to certify that putative class on March 30, 1981. *Id.* at 1349-50. Following the El Paso court's class certifi-

cation denial in *Lara*, 251 members of the former putative class filed two parallel lawsuits in a district court in Pecos ("*Salazar*" and "*Primero*"), both of which sought to certify the *same* class of 809 workers that the El Paso court had rejected in *Lara*.[13] *Id.* at 1350. The district court in *Salazar* and *Primero* denied class certification in both cases on February 2, 1982, on essentially the same grounds as the *Lara* court. *Id.* at 1350. Thereafter, 235 additional members of the former putative class – *i.e.*, former members of the *Lara* and *Salazar*/*Primero* putative classes who had not filed as named plaintiffs in either case – sought to intervene in the *Salazar*/*Primero* cases, but were denied. *Id.* Those 235 individuals then jointly filed a separate action ("*Zuniga*") in the Pecos court, alleging the same two causes of action at issue in *Salazar* and *Primero*, apparently on an individual basis. *Id.* All four cases (*Lara, Salazar, Primero*, and *Zuniga*), were consolidated before the *Pecos* court.

The *Zuniga* plaintiffs' individual claims were governed by a two-year statute of limitations. *Id* at 1351. The district court reasoned that these plaintiffs, who originally were putative class members in *Lara*, had benefitted from *American Pipe* tolling from the date *Lara* was filed to the date the *Lara* court denied class certification – approximately two years. *Id.* Even with the benefit of tolling for two years, the statute of limitations apparently expired at some

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[13] The only difference between *Salazar* and *Primero* was that *Salazar* asserted a federal statutory claim, while *Primero* asserted a state law contract claim.

point between the date on which *Salazar* and *Primero* were filed and the date *Zuniga* was filed. The Pecos court held that no additional *American Pipe*/*Crown* tolling applied to the *Zuniga* plaintiffs' individual claims and, therefore, dismissed them as time-barred. *Id*.

On appeal, the Fifth Circuit found that the Pecos court was correct in denying class certification on the merits in *Salazar*/*Primero*. *Id.* at 1350. As to *Zuniga*, the *Zuniga* plaintiffs argued that their claims were timely because, in addition to extending *American Pipe* tolling relative to *Lara*, the district court should have tolled their individual claims between the date *Salazar* and *Primero* were filed and the date on which the Pecos court denied certification in *Salazar*/*Primero*. That is, the *Zuniga* plaintiffs argued that they benefitted from *American Pipe* tolling not just from the *Lara* action (*i.e.*, through the date of class certification denial by the El Paso court in *Lara*), but also from the *Salazar* and *Primero* actions, which sought to relitigate before the Pecos court the same class certification issue that the El Paso court had rejected in *Lara*. That is, the plaintiffs argued that *American Pipe* tolling applied "not only for the first certification petition filed but also for any subsequent petitions involving the same class." *Id.* at 1351.

Under these circumstances, the Fifth Circuit rejected the *Zuniga* plaintiffs' argument, finding that the *Zuniga* plaintiffs only benefitted from *American Pipe* tolling relative to the *Lara* action. The court was "not persuaded" that *American Pipe* tolling applied "not only for the first class certification petition filed but also for any subsequent petitions involving

the same class." *Id.* at 1351. The court observed that the plaintiffs had not cited to any authority for the position that they could "piggyback one class action onto another and thus toll the statute of limitations indefinitely." *Id.* The court also cited to Justice Powell's concurrence in *American Pipe* for the proposition that "the tolling rule [in class actions] is a generous one, inviting abuse," (brackets in original), concluding that, "to construe the rule as plaintiffs would have us [do] presents just such dangers." *Id.* Accordingly, the Fifth Circuit held that the individual *Zuniga* plaintiffs did not get a further extension of the statute of limitations from the *Salazar*/*Primero* lawsuit. *Id.*

Notably, however, the Fifth Circuit did not suggest that the *Salazar*/*Primero* plaintiffs – *i.e.*, the follow on class-actions following denial of class certification in *Lara* – should not have benefitted from tolling after *Lara*. Indeed, the district court and the Fifth Circuit both addressed the *Salazar*/*Primero* class certification petitions on the merits. Moreover, the Fifth Circuit reiterated that the district court in *Salazar*/*Primero* could revisit the class certification issue on remand: "Although we affirm the district court's refusal to certify the class, *we in no way restrict the court's discretion to change that decision on remand*. It is well-settled that decisions on class certification are always interlocutory." *Id.* at 1350 (emphasis added).

Accordingly, as this court construes *Salazar-Primero*, the relevant issue decided by the Fifth Circuit was relatively narrow. The court seems to have found that: (1) where a district court had held that a particular class did not meet the requirements of

Rule 23, former class members could, within the applicable *American Pipe* tolling period, file a second putative class action seeking to relitigate essentially the same class; but (2) remaining former class members could not utilize this second action as an excuse to benefit from *further* tolling of their individual claims.

B. *Korwek v. Hunt* (Second Circuit)

Following *Salazar*/*Calderon*, the next circuit to address the boundaries of *American Pipe* tolling was the Second Circuit in *Korwek v. Hunt*, 827 F.2d 874 (1987). Like *Salazar-Calderon*, *Korwek* involved a particularized set of circumstances that influenced the case's holding.

Korwek concerned allegations that several defendants had conspired to manipulate the silver futures market. *Id.* at 875. A named plaintiff, Ronald Gordon, had initially filed a putative class action against these defendants in *Gordon v. Hunt* ("*Gordon*"), in which he moved to certify a broad class. *Id.* The district court, however, certified a "drastically" narrower class than Gordon had sought. *Id*. at 875-76. Three months after that decision, Gordon moved to expand the class (essentially arguing for the same class the court had rejected), and several putative class members simultaneously filed a motion to intervene. *Id.* at 876. The district court in *Gordon* construed Gordon as improperly seeking to relitigate the court's previous denial of class certification with respect to the broader class and also denied the putative intervenors' motion to intervene, informing them that they could file their own "plenary suit." *Id.* at 876. Three days after the district court contempora-

neously issued these decisions, the disappointed putative intervenors filed a separate lawsuit, *Korwek v. Hunt*, asserting "claims virtually identical to those previously asserted in *Gordon v. Hunt*." *Id.* The new lawsuit named nearly all of the same defendants as *Gordon* and sought to certify a nearly identical class to the broad class that the *Gordon* court had previously rejected and refused to reconsider. *Id.* In relevant part, the district court in *Korwek* found that the pendency of the *Gordon* action tolled the statute of limitations on the *Korwek* plaintiffs' individual claims, but did not toll the limitations period for the class claims. *Id.*

On appeal, the Second Circuit stated that "*[t]he specific question presented on this appeal is a narrow one*: whether the tolling rule established by the Supreme Court in its seminal decision, *American Pipe* [], applies to permit the filing by putative class members of a subsequent *class* action nearly identical in scope to the original class action which was denied certification." *Id.* at 876 (internal citation omitted) (emphasis in original). The Second Circuit appropriately observed that *Salazar-Calderon* and several district court decisions each "arose in a slightly different procedural context, making them distinguishable from each other . . . ." *Id.* at 879.[14] Neverthe-

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[14] *Korwek* relies in part on the district court decision in *Andrews v. Orr*, 614 F. Supp. 689 (S.D. Ohio 1985), which the Sixth Circuit ultimately vacated on appeal in *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988). Although the Second Circuit stated that the district court in *Andrews* had granted certification to "a more limited class" than that requested by the original class representative, *see Korwek*, 827 F.2d at 879, no class of

less, the Second Circuit found that these cases reflected an "oft-repeated refrain which echoes through these cases []: the tolling rule established by *American Pipe*, and expanded upon by *Crown, Cork*, was not intended to be applied to suspend the running of the statute of limitations for class action suits filed after a *definitive determination of class certification*; such an application of the rule would be inimical to the purposes behind statutes of limitations and the class action procedure." *Id.* at 879 (emphasis added).

Also, in another part of the *Korwek* opinion, the Second Circuit characterized *Salazar-Calderon* (in addition to several district court decisions) as holding that "the *American Pipe* tolling rule does not apply to permit putative class members to a file a subsequent class action." *Id*. at 878. As discussed above, this court at least construes *Salazar-Calderon* as articulating a more case-specific principle than that for which *Korwek* cited it. Notwithstanding its potential over-characterization of the holding in *Salazar-Calderon*, the remainder of the *Korwek* opinion makes clear that the Second Circuit's holding was

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any kind was certified in *Andrews* or its predecessor putative class action, as explained herein. Notably, based on its apparent misinterpretation of the procedural history preceding the *Andrews* district court decision, the Second Circuit in *Korwek* characterized *Andrews* as "the most closely analogous" case to the situation presented in *Korwek*. *Korwek*, 827 F.2d at 879. Under this reading of *Andrews*, the Second Circuit appears to have been persuaded by the district court's statement in *Andrews* that "'perpetual tolling of the statute of limitations by the filing of repeated class actions' is impermissible." *Id.* at 879 (quoting *Andrews*, 614 F. Supp. at 692).

narrower than the broad language might otherwise indicate.

At any rate, applying the principle that *American Pipe* tolling should not apply to a follow-on action on behalf of the same class that a previous court had definitively rejected on the merits under Rule 23, the *Korwek* court reasoned as follows:

> Appellants filed a complaint alleging 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. Appellants ignored the district court's express finding that the original action was unwieldy, first when attempting to intervene and expand the *Gordon* class, and again when filing [] *what was essentially a duplicate of the original complaint* [in *Gordon*]. The Supreme Court in *American Pipe* and *Crown, Cork* certainly did not intend to afford plaintiffs the opportunity to argue and reargue the question of class certification by filing *new but repetitive complaints*. While appellants are correct in noting that appellees were apprised fully of the pending adverse claims, this fact alone is insufficient to justify filing a class action of a nature already determined to be unmanageable.

Id. (emphases added).

Finally, in language that is crucial to the question presented in the instant case, the Second Circuit explicitly stated that "it leaves for another day the question of whether *the filing of a potential proper*

subclass would be entitled to tolling under American Pipe." *Id.* (emphasis added). Thus, the Second Circuit explicitly left open the possibility that, if certification of a broad class were denied in Putative Class Action 1, former putative class members could file Putative Class Action 2 and seek certification of a "proper subclass" – *i.e.*, a narrower class – than that rejected in Putative Class Action 1.

C. *Robbin* (Ninth Circuit)

The last circuit to address the potential extension of *American Pipe* tolling to follow-on class actions before the Sixth Circuit *Andrews* decision was the Ninth Circuit in *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987). There, a set of named plaintiffs had originally filed a putative class action in federal district court in New York ("*Schlesinger*"), alleging securities fraud claims against two defendants. *Id.* at 213-14. The New York district court denied class certification and the matter was voluntarily dismissed. *Id.* at 214. Over two years later, Leon Robbin, a former putative class member from the initial lawsuit, filed a class action complaint in the Central District of California, alleging the same class claims that the *Schlesinger* court had rejected. *Id.*

With limited analysis, the *Robbin* court overcharacterized the *Salazar-Calderon* and *Korwek* decisions as "squarely rejecting" the proposition that "the tolling doctrines of *American Pipe* and *Crown, Cork* should be extended to include class members who file subsequent class actions." *Id.* at 214 (emphasis added). The *Robbin* court purported to "agree with the Second Circuit that to extend tolling to [subsequent] class actions 'tests the outer limits of

the *American Pipe* doctrine and . . . falls beyond its carefully crafted parameters into the range of abusive options.'" *Id.* (quoting *Korwek*, 827 F.2d at 879). The court then held that Robbin's class claims, which asserted the same class that had previously been rejected by the district court in New York, did not benefit from tolling relative to *Schlesinger* and, therefore, were time-barred. *Id.* at 214.

In sum, although *Salazar-Calderon*, *Korwek*, and *Robbin* each contained some broad language concerning the application of *American Pipe* to follow-on class actions, they arose in specific procedural contexts that led to relatively narrow case-specific holdings. In *Salazar-Calderon*, the Fifth Circuit held that, after an initial class certification denial, the *Zuniga* plaintiffs were not entitled to wait for the results of separate follow-on class actions (*Salazar*/*Primero*) before filing individual lawsuits. In *Korwek* and *Robbins*, the Second Circuit and Ninth Circuit held that, after an initial denial of class certification, putative class members could not benefit from *American Pipe* tolling for class claims relating to the *same class* that the previous court had found did not satisfy Rule 23. Under the specific circumstances presented in each of these cases, the circuit courts understandably viewed the follow-on actions as potentially seeking to abuse the *American Pipe* tolling rule.

Moreover, in *Salazar-Calderon*, the Fifth Circuit specifically permitted the district court on remand to revisit its denial of class certification in *Salazar* and *Primero*, which were follow-on putative class actions on behalf of the same class that the *Lara* court had previously rejected on the merits. Similarly, the

Second Circuit in *Korwek* explicitly "left for another day" whether a follow-on class action asserting a subclass could benefit from *American Pipe* tolling.

D. *Andrews v. Orr* (Sixth Circuit)

Following *Salazar-Calderon*, *Korwek*, and *Robbin*, the Sixth Circuit confronted the issue of extending *American Pipe* tolling to a follow-on subclass action in *Andrews v. Orr*. As with the preceding circuit court cases, the procedural history in *Andrews* was complex and merits a detailed explanation before addressing the Sixth Circuit's ultimate holding.

Andrews was the third in a succession of class action racial discrimination lawsuits against the government relating to the use of the Professional Administrative Career Examination (the "PACE") in government hiring and/or promotion. The first lawsuit was filed in 1979, when a group of named plaintiffs filed a class action complaint on behalf of all blacks and Hispanics who suffered from discrimination in government hiring by the government's use of the PACE. *Luevano v. Campbell*, 93 F.R.D. 68 (D.D.C. 1981). *Luevano* was ultimately resolved through a consent decree that bound all class members except those who had opted out.[15] *Id.*

Following *Luevano*, Joan Brown, a black employee of the Air Force Logistics Command ("AFLC") at the Wright Patterson Air Force Base ("WPAFB"), filed a putative class action complaint against the

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15 The *Luevano* court informed the opt-out plaintiffs that they would be entitled to *American Pipe* tolling with respect to their individual claims. 93 F.R.D. at 91-92.

government related to the PACE examination ("*Brown*"). *Brown v. Orr*, 99 F.R.D. 524, 524 (S.D. Ohio 1983). Her complaint alleged that the government's use of the PACE had a disproportionate impact on black employees seeking promotion within the AFLC, in violation of Title VII.[16] *Id.* The PACE was utilized by the AFLC with respect to promotional opportunities at the WPAFB (located in Dayton, Ohio) and at bases located in Oklahoma, Utah, Texas, California, and Georgia, and Brown purported to sue on behalf of all black employees denied promotions at any of those six bases. *Id.* at 524-25. After Brown moved to certify this broad class of AFLC employees, the district court held that Brown had not satisfied the commonality requirement of Rule 23(a)(2) or the typicality requirement of Rule 23(a)(3), nor had she shown that the defendant had acted on grounds generally applicable to the class as required by Fed. R. Civ. P. 23(b)(2).[17] *Id.* at 528. With respect to the commonality requirement, the district court appeared to construe each putative class member's claim as necessarily requiring an individualized inquiry. *See id.* at 526 ("Plaintiff's individual claim for relief will then depend on an exami-

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16 The claims at issue in *Luevano* related only to discriminatory failure to hire, not to discrimination in promotion. *See Brown*, 99 F.R.D. at 525 n.2.

17 The district court's opinion in *Brown* does not state whether the parties had conducted any class discovery. However, given that the opinion makes several references to Brown's "allegations", cites to the complaint, and does not reference any evidentiary materials, it appears that the district court ruled on the pleadings.

nation of the facts particular to her situation . . . . The substantial questions of fact related to a showing of proximate cause and damages are unique to each proposed class member.")

Eight days after the *Brown* court denied certification of the broad class, Brown informed the district court that she intended to file a motion under Rule 23 to certify a *narrower* putative class consisting only of employees at the WPAFB (the Ohio base) – *i.e.*, a subclass of the six-base class that the *Brown* court had previously rejected. *Andrews*, 851 F.2d at 149. On March 23, 1983, two days after that conference, the court ordered Brown to file the motion to certify a narrower class within 30 days, which Brown did. *Id.* While this second class certification motion was pending, Brown (the only named plaintiff) settled her claim with the defendants, at which point the court dismissed the case with prejudice, thereby mooting the pending subclass certification motion. *Id.* at 148.

Following the district court's dismissal of *Brown*, multiple members of the WPAFB subclass (*i.e.*, the class subject to the second class certification motion that was mooted by Brown's settlement in *Brown*) filed administrative charges, after which they filed a putative class action complaint against the government. *Id.* at 148. Their complaint alleged the same claims at issue in *Brown* and sought certification of the same putative subclass (*i.e.*, the subclass restricted to the WPAFB in Ohio) that the *Brown* court had not addressed. *See Andrews*, 851 F.2d at 148 (citing *Andrews*, 614 F. Supp. at 691 n.1) ("This second motion to certify in *Brown* limited the class to employees at WPAFB, precisely the same class as

the Plaintiffs seek to represent herein [in *Andrews*].")

Thus, the *Andrews* district court was presented with the following issues: (1) whether the named plaintiffs' individual claims benefitted from *American Pipe* tolling; (2) if so, when that tolling period began to run and whether it had elapsed; (3) if the tolling period had elapsed, whether the named plaintiffs were entitled to equitable tolling; and (4) whether *American Pipe* tolling extended to the class claims, as well as the individual claims. First, the district court found that (a) the plaintiffs individually benefitted from *American Pipe* tolling only through the date on which the *Brown* court denied the *first* class certification motion, and (b) the plaintiffs failed to file timely administrative charges within 30 days of that date. *See Andrews*, 614 F. Supp. at 692-93. Accordingly, the court found that the individual claims were time-barred. *Id.* at 694. Second, as to the class claims, the district court stated that, because "the tolling principle in *American Pipe* and *Crown, Cork, & Seal* applies only to the initiation of a new personal action and not a new class action," the class claims were also time-barred. *Id.* at 694. Thus, it found that "the time limitation, imposed upon Plaintiffs by the regulations [requiring a timely administrative charge] for requesting classwide relief, as opposed to merely personal relief, was *not* tolled during the pendency of the [second] motion to certify in *Brown*." *Id.* Accordingly, it concluded that "the Plaintiffs' claims for classwide relief were long ago time barred." *Id.* (emphasis added).

On appeal, the plaintiffs argued that *American Pipe* tolling should have extended to their class

claims, which related to the viability of the WPAFB subclass that the *Brown* court had not addressed. The plaintiffs also argued that, even if the class claims were time-barred, their individual claims should benefit from equitable tolling. The Sixth Circuit affirmed the district court as to dismissal of the class claims, but found that the plaintiffs' individual claims benefitted from equitable tolling and, therefore, were not time-barred. *Id.* at 149, 152. In reaching these holdings, the Sixth Circuit first held that the *Andrews* district court was "clearly correct" that the pendency of the *Luevano* and *Brown* class actions tolled the limitations periods for the named plaintiffs' individual claims in *Andrews*. *Andrews*, 851 F.2d at 148. However, with respect to the class claims, the Sixth Circuit stated, without analysis, that "[t]he courts of appeals that have dealt with the issue appear to be in unanimous agreement that the pendency of a previously filed class action does not toll the statute of limitations for additional class actions by putative members of the original asserted class." *Id.* (citing *Korwek*, 827 F.2d at 879; *Salazar-Calderon*, 765 F.2d at 1351; and *Robbin*, 835 F.2d at 214). The Sixth Circuit added that "[t]hese decisions reflect the concern expressed by Justice Powell, concurring separately in *Crown, Cork & Seal*: 'The tolling rule of *American Pipe* [] is a generous one, inviting abuse.'" *Andrews*, 851 F.2d at 149 (quoting *Crown, Cork*, 414 U.S. at 354 (Powell, J., concurring)).

As this court's analysis of *Salazar-Calderon*, *Korwek*, and *Robbin* makes clear, this court views the holdings in those cases as reflecting narrower principles than certain broad language contained

therein might otherwise have suggested. Indeed, in relying on *Korwek*, the Sixth Circuit in *Andrews* appears to have misconstrued *Korwek* as highly persuasive authority on the very issue that the Second Circuit explicitly left open: namely, whether *American Pipe* tolling should extend to a follow-on putative class action on behalf of an otherwise "proper subclass" of the broader class rejected by a previous court. *See Korwek*, 827 F.2d at 879.

At any rate, the Sixth Circuit held that the district court should have equitably tolled the individual claims. *Id*. at 152. The Sixth Circuit found that the *Andrews* named plaintiffs reasonably believed that the *Brown* district court's March 23 order permitting Brown to file a motion to certify a subclass – of which the named plaintiffs in *Andrews* were originally a part – "kep[t] open the class action question" pending Brown's timely filing of that Rule 23 motion. *Id.* at 151. Accordingly, "the circumstances appear to justify the plaintiffs' belief that *the question of whether* Brown *could proceed as a class action was not finally determined until that case was settled and dismissed*" in July 1985. *Id*. at 152 (emphasis added). Because "[t]he plaintiffs acted promptly" to file an administrative charge after receiving a notice sent to all affected class members, and because of the "lack of prejudice to the defendant," the Sixth Circuit found that the named plaintiffs' individual claims benefitted from equitable tolling and were not time-barred. *Id.* at 152.

The Sixth Circuit has not squarely revisited its holding in *Andrews*[18] and the plaintiffs here appear to concede that, unless the court finds that *Andrews* is no longer good law, it bars the class claims here. Indeed, the circumstances in *Andrews* are analogous to the circumstances presented here in several respects: (1) named plaintiffs in an initial putative class action lost on the merits a motion to certify a broad geographic class (military bases in six states in *Brown*; nationwide Wal-Mart operations in *Dukes*), on grounds suggesting that, at least based on the proof provided, individual issues would trump common issues as to the broad putative class; (2) the court that issued that denial did not address the potential viability of a narrower geographic subclass (the WPAFB in *Brown*; Region 43 in *Dukes*); (3) the former putative class members received notice of the adverse decision, at which point certain members of the (rejected) former broad class promptly filed administrative charges; and (4) those former putative class members then filed a putative class action on behalf of a geographic subclass that the earlier court had not addressed on the merits (the WPFAB employees in *Andrews*, the Region-specific subclasses in this case, *Dukes*, *Odle*, and *Love*).[19]

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[18] In an unpublished opinion in *Guy v. Lexington-Fayette Urban Cnty. Gov't*, 488 F. App'x 9, 21 (6th Cir. May 2, 2012), the Sixth Circuit reiterated the *Andrews* rule in a non-analogous context in which the viability of the *Andrews* rule was not at issue. Aside from *Guy*, this court has located no Sixth Circuit authority addressing the *Andrews* rule.

[19] Moreover, in *Andrews*, the original court (*Brown*) was considering a motion to certify the same subclass later at issue in

Accordingly, unless this court finds that *Andrews* is no longer good law, the court is constrained to apply the holding in *Andrews* to this case.

III. Post-*Andrews* Decisions

A. Pre-*Bayer* Circuit Court and District Court Decisions

Subsequent to *Andrews*, several circuit court decisions have construed *Andrews* (and other early circuit court decisions) as articulating a categorical rule that the pendency of a previously filed class action does not toll the statute of limitations period for additional separately filed class actions by putative members of the original asserted class. *See, e.g., Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994); *Catholic Social Servs., Inc. v. I.N.S.*, 232 F.3d 1139, 1147-48 (9th Cir. 2000); *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 564 (7th Cir. 2011) (construing *Andrews* as asserting that *American Pipe* tolling "never" extends to subsequent class actions). Notably, several of these decisions have criticized the application of a categorical rule and/or extended *American Pipe* tolling to follow-on class actions in certain contexts. *See Catholic Social Servs.*, 232 F.3d at 1149 (extending *American Pipe* tolling to follow-on class action, where the plaintiffs

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Andrews, but never reached its merits. Again, the Sixth Circuit in *Andrews* held, in the context of its equitable tolling analysis, that the putative class members in *Brown* reasonably believed that the issue of class certification had not been "finally determined" while that motion to certify a subclass was pending and that, as a consequence, they had reasonably waited to a file a follow-on action.

"are not attempting to relitigate an earlier denial of class certification, or to correct a procedural deficiency in an earlier would-be class"); *McKowan Lowe & Co., Ltd. v. Jasmine, Ltd.*, 295 F.3d 380, 389 (3d Cir. 2002) (class of intervening class members tolled, where class certification had been denied for reasons "unrelated to the appropriateness of the substantive claims for certification"); *Yang v. Odom*, 392 F.3d 97, 111 (3d Cir. 2004) (extending *McKowan* rule to subsequent class actions by former putative class members); *Sawyer*, 642 F.3d at 564 ("[I]f the reason why class certification is denied in the first suit is that the plaintiff was not an appropriate class representative, then there is no basis for binding other members of the putative class, who have yet to receive a judicial decision on the question whether a class is certifiable under Rule 23.")

For example, in *Yang*, the Northern District of Georgia had denied a motion to certify three putative subclasses based on defects in the class representatives, without addressing whether the underlying class would otherwise satisfy Rule 23 with appropriate class representatives. 392 F.3d at 99-100. Following that ruling, several former members of those putative subclasses filed an identical class action complaint in the Northern District of New Jersey against the same defendants, seeking to certify the same three subclasses. *Id.* at 100. The New Jersey district court dismissed the class claims, finding that *American Pipe* tolling did not extend to new class actions filed in a different district court. *Id.* at 101.

On appeal, the Third Circuit reversed. The court carefully examined *American Pipe*, *Crown, Cork*, and the various circuit court decisions concerning the ex-

tension of *American Pipe* tolling, recognizing that the circuit courts had formulated multiple approaches to the issue, some of which appeared to categorically bar the extension of tolling, some of which did not. *Id.* at 104-108.[20] The Third Circuit noted that, in *Catholic Social Services*, the Ninth Circuit had backed away from the categorical rule it had previously articulated in *Robbin* "by allowing certification of a subsequent class comprised of individuals whose individual claims were tolled by an earlier class action." *Yang*, 392 F.3d at 106-107. The Third Circuit also severely criticized the Eleventh Circuit's decision in *Griffin*, which had purported to construe *Korwek* and *Robbin* as establishing a categorical rule precluding the extension of *American Pipe* to follow-on class actions:

> While *Griffin*'s denial of tolling for all sequential class action plaintiffs has the virtue of clarity and ease of application, it is also characterized by a rigidity which we reject for at least three reasons. First, by its terms,

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[20] In a parenthetical, the Third Circuit stated that *Andrews* did not reference the basis for the denial of class certification by the district court. *See Yang*, 392 F.3d at 105 (citing *Andrews*, 851 F.2d at 149). However, as discussed above, the district court in *Brown* (the class action that preceded *Andrews*) had found substantive defects in the broad proposed class itself, as well as defects in the class representatives, a finding that the *Andrews* district court did not revisit. Thus, to the extent that the Third Circuit grouped *Andrews* with other circuit decisions in which class certification was denied only because of defects in the class representatives, rather than a merits-based rejection of the proposed class itself, *see Yang*, 392 F.3d at 105, that categorization may not have been entirely accurate.

> *Korwek* invited refinement, and *Griffin* in effect bootstrapped *Korwek*'s limited holding to be a blanket prohibition on sequential class actions. Moreover, it did so without analysis. Second . . . , to the degree *Griffin* relied on *Robbin*, that foundation has eroded because the Ninth Circuit has since held that at least in certain circumstances, individuals whose claims were tolled by an earlier class action can aggregate their claims in a subsequent class suit. Third, . . . 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.

In light of these considerations, the Third Circuit held that, where class certification was denied because of a defect in the class representatives only, *American Pipe* tolling would extend to putative class members who sought to file a separate action on behalf of the same class. *Id.* at 111. In reaching this holding, the Third Circuit stated as follows:

> [B]ecause we can discern no principled reason to hold otherwise, we hold that where class certification has been denied solely on the basis of the lead plaintiffs' deficiencies as class representatives, and not because of the suitability of the claims for class treatment, *American Pipe* tolling applies to subsequent class actions. Since *American Pipe*, it has been well-established that would be class

members are justified – even encouraged – in relying on a class action to represent their interests with respect to a particular claim or claims, and in refraining from the unnecessary filing of repetitious claims. The policy objectives of the class action device – efficient deployment of court resources and the ability to consolidate claims which would otherwise be too small to warrant individual lawsuits – continue to obtain after the rejection by a court of the proposed class representatives.

Drawing the line arbitrarily to allow tolling to apply to individual claims but not to class claims would deny many class plaintiffs with small, potentially meritorious claims the opportunity for redress simply because they were unlucky enough to rely upon an inappropriate lead plaintiff. For many, this would be the end result, while others would file duplicative protective actions in order to preserve their rights lest the class representative be found deficient under Rule 23. Either of these outcomes runs counter to the policy behind Rule 23 and, indeed, to the reasoning employed by the Supreme Court in *American Pipe* and *Crown, Cork & Seal*.

Nor would the objectives of limitations periods be better served were we to hold otherwise. The defendants were on notice of the nature of the claims and the generic identities of the plaintiffs within the required period, eliminating the potential for unfair surprise and prompting them to preserve evidence which might otherwise have been lost.

> Allowing tolling to apply to subsequent class actions where the original class was denied because of the lead plaintiffs' deficiencies as class representatives will not lead to the piggybacking or stacking of class action suits "indefinitely" as Defendants argue and as the Eleventh Circuit found in *Griffin*. Rather, applying tolling under these circumstances will allow subsequent classes to pursue class claims *until a court has definitively determined that the claims are not suitable for class treatment* . . . . Rather than arbitrarily eliminate the possibly meritorious claims of countless class members, *we prefer to see careful case management employed to avoid the prospect of indefinite tolling*.

Id. at 111-112 (emphases added).

Notably, Judge Alito offered an opinion in *Yang* concurring in part and dissenting in part. *Id.* at 112-114. In that opinion, he concurred in the court's opinion regarding the extension of *American Pipe* tolling to situations involving defects in the original class representatives, but simply dissented with respect to its application to one of the subclasses at issue, which he believed that the Northern District of Georgia had already rejected on substantive grounds "in a substantively identical suit." *Id.* at 113. He also noted that, if plaintiffs were permitted to relitigate substantively identical suits before other district courts, "lawyers seeking to represent a plaintiff class could extend the statute of limitations almost indefinitely until they find a district court judge who is willing to certify the class. The lawyers could simply file a new, substantively identical action with

a new class representative as soon as class certification is denied in the last previous action." *Id.* at 113.

Subsequent to *Andrews*, various district courts have also criticized the "categorical" approach as unduly rigid, finding that extending tolling to follow-on class actions is consistent with the principles of *American Pipe* and *Crown, Cork* under appropriate circumstances. *See, e.g.*, *Gomez v. St. Vincent Health, Inc.*, 622 F. Supp. 2d 710 (S.D. Ind. Dec. 16, 2008) (extending *American Pipe* tolling to follow-on class action seeking to certify same class, where previous court denied certification because of atypicality of proposed class representatives' claims and lack of diligence in prosecuting case by class counsel, and where "individual plaintiffs' claims are not viable without a class action"); *Hershey v. ExxonMobil Oil Corp.*, 278 F.R.D. 617, 621 (D. Kan. 2011) (acknowledging categorical language in *Andrews*, *Basch*, *Korwek*, *Salazar-Calderon*, and *Griffin*, but finding that "more recent, and more persuasive, decisions have supported the application of class action tolling to subsequent class actions, rejecting the view that the doctrine only protects individual lawsuits"); *In re Farmers Ins. Co., Inc., FCRA Litig.*, 738 F. Supp. 2d 1180, 1210 (W.D. Okla. 2010) (extending *American Pipe* tolling to follow-on class action lawsuit, where "there has never been a definitive determination on class certification"); *Villanueva v. Davis Bancorp, Inc.*, No. 09 CV 7826, 2011 U.S. Dist. LEXIS 103473, at *6-*12 (N.D. Ill. Sept. 13, 2011) (extending *American Pipe* tolling to follow-on class action, where "[t]here was no determination in [prior action] as to the propriety of the [proposed] class," and "plaintiffs

have not tried to circumvent an adverse ruling by filing a repetitive complaint").

Furthermore, at least one district court within the Sixth Circuit has attempted to construe *Andrews* narrowly in order to reach a result it considered fair and just. *See In re Vertrue Mktg. & Sales Practices Litig.* 712 F. Supp. 2d 703 (N.D. Ohio 2010). There, the named plaintiffs in an initial putative nationwide class action ("*Sanford*") did not receive a ruling on the merits of their class claims. *Id.* at 709. Thereafter, the named plaintiffs in *Sanford* and certain former putative class members filed several follow-on class actions mirroring the claims at issue in *Sanford*, which were consolidated into MDL proceedings in the Northern District of Ohio. *Id.* at 710. The defendants argued to the Ohio district court that, under *Andrews*, the plaintiffs' claims in these cases were time-barred because *American Pipe* tolling did not apply to follow-on class actions under any circumstances. *Id.* at 712. However, the district court distinguished *Andrews*, construing it as relating only to a situation in which the previous court had denied a class certification motion. *Id.* at 712-713 ("There is a clear distinction between the subsequent filing of an otherwise stale class action where a prior court ruled that class certification is improper and one where no court has spoken on the class certification issue.")[21] Because there had not been any ruling on

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[21] As discussed above, as this court understands the procedural history in *Andrews*, the *Andrews* action actually concerned the viability of a subclass that the previous court in *Brown* had not addressed. Accordingly, this court does not construe *Andrews* quite as narrowly as *In Vertrue*. Nevertheless,

class certification in *Sanford*, the *In re Vertrue* court found that *Andrews* did not apply and that, therefore, extending *American Pipe* tolling to the class claims was appropriate. *Id.* at 716.

In sum, more recent cases have found that *American Pipe* tolling can and should extend to subsequent class actions under appropriate circumstances. These cases have typically focused on two related considerations: (1) whether affording class action tolling would further the key principles articulated in *American Pipe* and *Crown, Cork*, namely judicial economy and adequate notice to defendants; and (2) whether the specific named plaintiffs in the case were attempting either to (a) "abuse" the benefit of *American Pipe* tolling by perpetually re-litigating stale issues or by asserting claims not previously asserted in the earlier action, in which case *American Pipe* tolling would not apply, or (b) obtain a definitive merits-based ruling concerning the suitability of a particular proposed class (or subclass) under Rule 23, which would favor the application of *American Pipe* tolling until a definitive determination was made. As *In re Vertrue* demonstrates, the *Andrews* rule invites refinement and tailoring to particular factual situations so as to balance these considerations.

At any rate, based on the cases cited by the parties here, it does not appear that any of these post-*Andrews* cases specifically addressed the issue pre-

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in *In re Vertrue*, the circumstances were distinguishable from *Andrews*, because there had been no class certification determination of any kind in *Sanford*.

sented in this case: whether a certification denial of a broad geographic class prevents the extension of *American Pipe* tolling to putative class members who file a subsequent class action complaint seeking to certify a narrower geographic subclass.

B. The United States Supreme Court decisions in *Shady Grove* and *Bayer*

In *Shady Grove*, which post-dated most of the relevant circuit court precedent referenced by the parties here, the Supreme Court considered whether New York law prohibiting class actions with respect to certain types of claims could preclude a federal court from applying Rule 23 to certify a class action involving those state law claims.

In a plurality opinion, the Court held that Rule 23 trumped New York law, preventing New York from preempting the application of Rule 23 in a federal district court sitting in diversity. In reaching this holding, the court conducted a traditional analysis of potential conflicts between state law and the Federal Rules of Civil Procedure pursuant to *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-5, 107 S. Ct. 967, 94 L. Ed. 2d 1 (1987), which requires a threshold determination as to whether Rule 23 governs the issue in dispute, in which case the federal rules govern and an *Erie* analysis is unnecessary. *Shady Grove*, 130 S. Ct at 1437. The Court found that Rule 23 did govern the issue, because it "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Id.* The Court characterized Rule 23 as "provid[ing] a one-size-fits-all formula for deciding" whether a plaintiff can maintain a class action,

thereby preempting New York state law purporting to address the same question in a case in federal court on diversity grounds. *Id.*[22]

In *Smith v. Bayer*, the Court considered a different preclusion-related issue. That case concerned claims against Bayer related to an allegedly defective drug, Baycol. *Smith*, 131 S. Ct. at 2373. In August 2001, George McCollins filed a class action complaint against Bayer concerning Baycol in West Virginia state court ("*McCollins*"), seeking to certify a class of West Virginia residents. *Id.* One month later, without knowledge of *McCollins*, Keith Smith and Shirley Sperlazza (collectively, "Smith"), filed a substantially identical class action complaint in another West Virginia state court, seeking to certify the same putative class at issue in *McCollins*. *Id.* Bayer removed the *McCollins* action to federal court on diversity grounds, after which the case was consolidated into MDL proceedings in the District of Minnesota. *Id.* However, Bayer was unable to remove the *Smith* action because the parties were not diverse. *Id.* at 2373-74.[23] Following removal of the *McCollins* action, both cases proceeded through parallel pretrial paths, and the plaintiff(s) in both cases filed motions for class certification. *Id.* at 2374.

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[22] This relevant portion of the Court's opinion was joined by a majority of the Court.

[23] Because the case was filed before 2005, the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), which provides for removal of class action complaints involving non-diverse parties under certain circumstances, did not apply. *See Bayer*, 131 S. Ct. at 2373 n.1.

The federal district court acted on its pending certification motion first, finding that the class proposed in *McCollins* did not meet the requirements of Rule 23 because individual issues of fact predominated. *Id.* Immediately following that decision, Bayer moved the federal district court to enjoin the West Virginia state court in *Smith* from acting on Smith's pending motion to certify pursuant to the federal Anti-Injunction Act, 28 U.S.C. § 2283, *id.*, which permits a federal court to enjoin state proceedings "to protect or effectuate [the federal court's] judgments." *Id.* at 2375. The district court granted the injunction and the Eighth Circuit affirmed. *Id.* at 2374.

On appeal, the Supreme Court reversed. The Court found that the "relitigation exception" in the Anti-Injunction Act was a "strict and narrow" exception to the usual deference to state courts, grounded in the concepts of claim and issue preclusion. *Id.* at 2375. Noting that the preclusive effect of a judgment was typically the province of the second court, not the first, the Court stated that an injunction under the Act's relitigation exception "can only issue if preclusion is clear beyond peradventure." *Id*. at 2376. Thus, the Court construed the specific question presented as "whether the federal court's rejection of McCollins' proposed class precluded a later adjudication in state court of Smith's certification motion." *Id.* For preclusion to apply, the issue decided by the federal court in *McCollins* had to be the same as that presented to the state court in *Smith*, and Smith must either have been a party to *McCollins* or subject to one of several narrow exceptions against binding nonparties. *Id.*

With respect to the first question, the Court concluded that the class certification motion before the *Smith* court (*i.e.*, the West Virginia state court) did not present identical considerations to those previously addressed by the *McCollins* court, because West Virginia applied West Virginia's Rule 23 in a manner substantively different from the manner in which federal courts apply Fed. R. Civ. P. 23. *Id.* at 2376-2379. As to the second question – and in more relevant part here – the Court held that Smith was *not* a "party" to the *McCollins* suit for purposes of preclusion. *Id.* at 2379. It reasoned that, while a putative class member becomes a party to a suit after certification of that class, the putative class member is not a party to a putative class action before certification of the class. *Id.* at 2379-80. Accordingly, it found that "neither a proposed class action nor a rejected class action may bind nonparties." *Id.* at 2380.

The Court also addressed and rejected what it characterized as Bayer's "strongest argument," which "comes not from established principles of preclusion, but instead from policy concerns relating to use of the class action device." *Id*. at 2381. Bayer complained that, "under [the Court's] approach[,] class counsel can repeatedly try to certify the same class by the simple expedient of changing the named plaintiff in the caption of the complaint," which, "in this world of serial relitigation of class certification ," would force defendants "in effect to buy litigation peace by settling." *Id*. (internal citations omitted). The Court dismissed this concern, finding that "principles of *stare decisis* and comity among courts" would "mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." *Id.*

The Court also stated that, to the extent class actions raise special problems of relitigation, Congress had passed CAFA, federal courts could consolidate multiple overlapping suits through federal statutory MDL procedures, and the Court "would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute." *Id.* at 2381-82. In a footnote, the Court also indicated that, to the extent relitigation of the class certification posed a continuing policy concern, the Court's opinion did not foreclose Congress from altering established principles of preclusion by appropriate legislation, nor did it foreclose changes to Rule 23. *Id.* at 2382 n.12.

C. Impact of *Shady Grove* and *Smith* on *Andrews*

Here, the plaintiffs argue that the Sixth Circuit decision in *Andrews* is no longer good law in light of *Shady Grove* and *Smith*. As the Court understands the argument, plaintiffs contend that *Shady Grove* establishes a bright line rule that, where a putative class action satisfies Rule 23, a federal court must certify that class regardless of any countervailing considerations. The plaintiffs also argue that *Smith* specifically undermined the apparent policy rationale behind *Andrews* and the circuit court decisions on which *Andrews* relied: namely, those courts' reluctance to permit plaintiffs to engage in serial relitigation of class claims.

The impact of *Shady Grove* and *Smith* on the *American Pipe* rule, if any, is not clear. As an initial matter, neither *Shady Grove* nor *Smith* address the issue of the statute of limitations; indeed, in *Smith*,

the lawsuits at issue were filed within one month of each other, not "stacked," meaning that the timeliness of the Smith's suit did not depend on *American Pipe* tolling. Furthermore, both cases directly concerned questions of federalism: in *Shady Grove*, whether New York state law could preempt a federal court's application of Rule 23; in *Smith*, whether the Anti-Injunction Act permitted a federal court to enjoin a state court from potentially relitigating its class certification decision. Thus, it is not clear whether the cases stand for broad principles that necessarily apply in all conceivable contexts or simply reflect narrow decisions based on particular aspects of federalism and/or the application of narrow federal preemption or preclusion doctrines.

Indeed, federal courts – among them the *Odle* and *Dukes* district courts – have reached varying conclusions concerning the scope and impact of the holdings in *Shady Grove* and *Smith*. *See, e.g.*, *Thorogood v. Sears, Roebuck & Co.*, 678 F.3d 546, 551 (7th Cir. 2012) (concluding that, with respect to issue preclusion, *Smith* rule applied as between federal courts, not just to the Anti-Injunction Act's application to state courts); *Sawyer*, 642 F.3d at 562 (holding that, to the extent the Eleventh Circuit in *Griffin* articulated a categorical rule against applying *American Pipe* tolling, that holding "cannot be reconciled with the Supreme Court's later decision in *Shady Grove*, which holds that Rule 23 applies to all federal civil suits, even if that prevents achieving some other objective that a court thinks valuable."); *Odle*, 2012 WL 5292957, at *9 (N.D. Tex. Oct. 15, 2012) (finding that "*Smith* does not speak beyond the Anti-Injunction Act's relitigation exception" and interpret-

ing *Shady Grove* as "not speaking more broadly beyond conflicts between state and federal procedure"); *Dukes*, 2012 WL 6115536 (stating, without analysis, that "the issues decided in *[Smith* and *Shady Grove*] are sufficiently distinct from those presented here that little can be reliably inferred from their holdings.").

Given the substantial uncertainty concerning whether *Shady Grove* and *Smith* even apply outside their particular procedural contexts, this court does not find that either or both cases implicitly overruled *Andrews*. However, the combined impact of *Shady Grove* and *Smith* on *Andrews* is at least debatable.[24]

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[24] *Smith* could be interpreted as permitting serial relitigation of class claims only where the cases were initially filed within the statute of limitations period, *i.e.*, without the benefit of *American Pipe* tolling. However, as noted herein, the *Smith* court did not directly address the potential intersection between its holding and the *American Pipe* doctrine. Although the *Smith* case does reference *American Pipe* in a footnote, that reference was simply included to address Bayer's argument that the *American Pipe* tolling doctrine was inconsistent with the notion that putative class members are not a "party" unless and until certification is granted. *See Smith*, 131 S. Ct. at 2379 n.10. In response to that argument, the Court stated a principle that would be consistent with the result that this court urges should occur here: "[A] person not a party to a class suit may receive certain benefits (such as the tolling of a limitations period) related to that proceeding. That result is consistent with a commonplace of preclusion law – that nonparties sometimes may benefit from, even though they cannot be bound by, former litigation." *Id.* (internal citation omitted).

IV. Implications of Applying *Andrews* Rule Here

Taking the analysis full circle, this court is constrained to find that the class claims are time-barred, but the court believes that *Andrews* merits refinement for several reasons.

A. Continuing Reliability of *Andrews*

As an initial matter, this court does not construe the Court's decisions in *American Pipe* and *Crown, Cork* as necessarily precluding the application of *American Pipe* tolling to subsequent subclass actions. At most, the opinions in each case (both for the Court and in the concurrences) implicitly assume that, where a district court finds that a particular asserted class is not viable under Rule 23, the viability of that particular class is finally determined, and the plaintiffs must pursue individual relief through intervention or their own lawsuits. Neither case seems to have contemplated the possibility of a follow-on subclass action, let alone how the *American Pipe* rule might apply in that type of follow-on lawsuit. Indeed, the Court and the concurring opinions seem to have recognized that future procedural contexts would test the limits of the *American Pipe* doctrine. Although Justices Blackmun in *American Pipe* and Justice Powell in *Crown, Cork* each outlined potential scenarios that could invite abuse of the *American Pipe* tolling rule, neither of their opinions purported to delineate the ultimate scope of the *American Pipe* rule, other than to remind courts to be vigilant that any application of *American Pipe* be consistent with notions of judicial economy (served by Rule 23) and

adequate notice to defendants (served by the statute of limitations).

Furthermore, it appears to this court that broad language in certain early circuit court cases, including *Korwek* and *Salazar-Calderon*, may have obscured the limited nature of each holding. For example, as the Third Circuit observed in *Yang*, various circuits courts construed *Korwek* as adopting a bright line rule, even though *Korwek* explicitly left open the possibility of extending *American Pipe* tolling to follow-on subclass actions. Subsequent to *Andrews*, the Ninth Circuit also backed away from the bright-line rule it appeared to have articulated in *Robbin*. These considerations substantially undermine the reliability of the three cases on which the Sixth Circuit relied in *Andrews* for the proposition that circuit courts had unanimously found that *American Pipe* tolling does not extend to any follow-on class actions.

Also, after *Andrews* and before the Supreme Court decisions in *Shady Grove* and *Smith*, various circuit decisions and district court decisions had found that *American Pipe* tolling can and should apply to follow-on class actions under appropriate circumstances, such as where the initial certification denial did not address the viability of the underlying class. Thus, there appears to be an increasing trend that case-specific considerations can merit application of *American Pipe* tolling to some follow-on class actions.

Finally, it may be that *Shady Grove* and *Smith* affect the *American Pipe* rule as applied to follow-on class actions, but the precise impact of those decisions seems to require further clarification from the

appellate courts and the Supreme Court. *Shady Grove* held that Rule 23 provides a "one-size-fits-all formula" for determining whether a case merits class action treatment. *Smith* suggests that, at least in the context of timely filed actions, the problem of serial relitigation of class claims is best resolved through traditional notions of *stare decisis*, comity, case management (such as MDL procedures), federal legislation, and/or amendment to the Federal Rules of Civil Procedure, rather than through a categorical refusal to permit reconsideration under any circumstances. Of course, because of their procedural postures, neither case addressed whether countervailing considerations of judicial economy or repose would justify different rules with respect to the extension of *American Pipe* tolling to follow-on class actions.

B. Policy Implications of Refusing to Extend *American Pipe* Tolling Here

As a policy matter, applying the *Andrews* rule here and in future cases could undermine the principles that animated *American Pipe* and *Crown, Cork* or, at least, strip plaintiffs of their ability to pursue an otherwise viable subclass action without filing a protective lawsuit.

Unlike the situations presented in some of the court circuit cases on which *Andrews* originally relied, the plaintiffs here do not seek to relitigate the same class definition rejected by a previous court. Instead, certain putative class members from the first lawsuit timely filed administrative charges, timely filed this lawsuit following receipt of their notices of right to sue, and now seek to sue on behalf of a *subclass* of the rejected nationwide class at issue in

Dukes – *i.e.*, a subclass that the original court did not address – supported by case-specific allegations. In this court's view, the fact that the *Phipps* named plaintiffs did not file this lawsuit until 11 years after *Dukes* was filed does not reflect any "abuse" or attempt to gain some untoward tactical advantage against Wal-Mart; indeed, the delay in filing this lawsuit was a product of (1) Supreme Court tolling rules that intentionally discouraged the class plaintiffs from filing additional "protective" lawsuits to preserve the timeliness of their claims; and (2) the peculiar circumstance that, unlike many cases, it took ten years for the nationwide class members to receive a definitive decision concerning suitability of a nationwide class under Rule 23. Indeed, between 2004 (when the California district court certified a nationwide class) and 2011 (when the Supreme Court reversed that determination in *Dukes*), the district court and the Ninth Circuit regarded female Wal-Mart employees within Region 43 as proper parties to a nationwide class.

Furthermore, because the initial *Dukes* lawsuit concerned a nationwide class, Wal-Mart was on notice that each Region within that nationwide class was potentially subject to the *Dukes* action; and in fact, when the district certified the nationwide class, each of those Regions – at least for a time – *was* subject to the *Dukes* lawsuit. Indeed, following the Supreme Court decision in *Dukes*, the California district court reaffirmed that the initial *Dukes* complaint placed Wal-Mart on notice of the sex discrimination claims nationwide and held that, by the same token, it placed Wal-Mart on notice of the Region 41 subclass claims that the *Dukes* plaintiffs are now

seeking to certify. Thus, for purposes of *American Pipe* tolling, the "notice" function of the statute of limitations, about which Justice Powell expressed concern in *Crown, Cork*, has been achieved here.

Dismissing the *Phipps* plaintiffs' class claims here as untimely seems particularly unfair when measured against the status of the remaining Region 43/California-based plaintiffs in *Dukes*. As the California district court has found, the California-based *Dukes* plaintiffs retain the ability to press their Region-specific class claims simply because they remain under the same case caption, whereas (under the rule applied here and by the Texas district in *Odle*) all remaining members of the former nationwide class have essentially been stripped of their ability to pursue parallel class relief under Rule 23, which would otherwise further both important substantive federal policy interests and the interests of judicial economy. The prejudice to Wal-Mart, which has been on notice all along that women within Region 43 (among the other Regions nationwide) believed that Wal-Mart had discriminated against them in pay and promotion in violation of Title VII, may be limited only to the fact that it has taken a long time to get to this point. In light of these considerations, it is unclear what overriding policy purpose is served by denying the named plaintiffs the ability to obtain a definitive ruling concerning their asserted geographic subclass, simply because they have filed a new action in a different (and geographically appropriate) district court. In this court's view, stripping these plaintiffs of the ability to pursue subclass relief *ab initio* is unfair relative to the *Dukes* plaintiffs and

reflects a result not dictated by *American Pipe* or *Crown, Cork*.

C. The Same Claims or Different Claims?

Wal-Mart also argues that plaintiffs are taking inconsistent positions by arguing that, on the one hand, the claims at issue here are "the same" as those for which the initial *Dukes* filing placed Wal-Mart on notice but, on the other hand, are sufficiently "different" for purposes of a fresh look under Rule 23. Under the particular circumstances presented here, the court does not interpret these positions as incongruent with respect to the extension of *American Pipe* tolling.

Justice Powell's concurrence in *Crown, Cork* expressed concern that, after class certification had been denied, plaintiffs might attempt to take advantage of *American Pipe* tolling by asserting "different" or "peripheral" claims in a subsequent action. *Crown, Cork*, 462 U.S. at 354. Notably, in articulating this concern, Justice Powell did not distinguish between subsequent individual claims and subsequent requests for class relief. Indeed, from this court's perspective, the concern would be the same "regardless of the method class members choose to enforce their rights upon denial of class certification." *Crown, Cork*, 462 U.S. at 353 (quoting from majority opinion). Here and before the California district court in *Dukes*, Wal-Mart has not contested that *American Pipe* tolling extends to *individual claims* of putative class members following the Supreme Court's decision in *Dukes*. Thus, the California district court and Wal-Mart have essentially acknowledged that each potential individual Title

VII sex discrimination claim against Wal-Mart by former putative class members – including all putative class members within Region 43 – falls within the ambit of sex discrimination claims for which *Dukes* originally placed it on notice. On the other hand, if the individual plaintiffs' claims were truly "different" from or "peripheral" to those asserted in *Dukes*, they would not fairly be subject to *American Pipe* tolling in the first place. The fact that some former putative class members have chosen to pursue class relief on behalf of a subclass does not negate the fact that *Dukes* placed Wal-Mart on notice of the subclass claims. Thus, the Title VII claims asserted in this lawsuit are not "different" or "peripheral" for notice purposes.

On the other hand, the new tailored allegations concerning Region 43 are designed to demonstrate that the Region 43 claims for which Wal-Mart was placed on notice by *Dukes* are suitable for class treatment. Rule 23 does not itself confer substantive rights – but Rule 23 is, *inter alia*, a method for vindicating aggregated causes of action in an efficient manner. Thus, here, the plaintiffs' choice to assert class claims on behalf of a Region 43 subclass, rather than just their own individual claims, concerns "*the method* class members choose to enforce their rights upon denial of class certification," *Crown, Cork*, 462 U.S. at 353 (emphasis added), not the nature of those rights. In the *Dukes* action, the plaintiffs were unable to show that, relative to a nationwide class, Rule 23 provided an appropriate method for aggregating Title VII sex discrimination claims on behalf of all subject female Wal-Mart employees nationwide. Without changing the underlying causes of action –

i.e., in asserting sex discrimination claims for which *Dukes* placed Wal-Mart on notice – the named plaintiffs here seek to show that Rule 23 provides an appropriate method for vindicating their Region 43 subclass claims, with respect to which they have provided tailored allegations. Where the notice function has plainly been satisfied, the court does not view the introduction of subclass-specific allegations as inconsistent with the application of *American Pipe* tolling.[25]

D. Other Policy Considerations

Precluding *American Pipe* tolling for follow-on subclass actions might also have negative or perverse implications for future class actions involving any type of geographic class capable of further subdivision for class action purposes. First, members of a divisible geographic class would be encouraged to file a multiplicity of protective lawsuits relative to each potential geographic subdivision thereof, rather than await a definitive ruling as to whether the broader geographic class satisfies Rule 23. Second, if *American Pipe* tolling does not apply to follow-on class actions, defendants (and the named plaintiffs) could effectively strip the putative class members of their ability to pursue class relief by settling before

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[25] Wal-Mart also argues that extending *American Pipe* tolling here to extend the statute of limitations would violate the Rules Enabling Act, 28 U.S.C. § 2072, which provides, in relevant part, that the Federal Rules of Civil Procedure "shall not abridge, enlarge, or modify any substantive right." The Supreme Court rejected a substantially similar argument by the defendants in *American Pipe*. *American Pipe*, 414 U.S. at 559.

the court ruled on the merits of a proposed class at some point after the statute of limitations had otherwise run.[26] Furthermore, if the value of individual claims is relatively low – *i.e.*, the claims would only be worth litigating if aggregated – stripping the plaintiffs of their ability to pursue class relief under Rule 23 might be tantamount to stripping them of any viable means of relief.

The refusal to extend *American Pipe* tolling under the circumstances presented here could have (or, in this case, could have had) other inefficient effects. Assume *arguendo* that, if this court were to address the issue on the merits, it would find that the proposed Region 43 subclass satisfies Rule 23 – *i.e.*, that the Region 43 subclass is appropriate for class treatment. Accordingly, if *American Pipe* tolling applied here, the claims of the putative class members would be timely and the court would certify a Region 43 class. On the other hand, assume that *American Pipe* tolling does not apply and that, in compliance with the California District court's *post-Dukes* order, every former putative class member within Region 43 (presumably thousands of women) had timely filed an EEOC charge and timely brought properly venued individual lawsuits spread across the multiple federal judicial districts encompassed by Region 43. The courts would be faced with thousands of lawsuits that otherwise would have been appropriate for class treatment, at which point the federal sys-

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[26] As this court construes the relevant procedural history, this was essentially the result in *Andrews* with respect to the WPAFB subclass.

tem would presumably utilize MDL procedures to aggregate the individual claims before one court. By precluding putative class members *ab initio* from pursuing subclass relief with the benefit of *American Pipe* tolling (and precluding federal courts from handling the claims pursuant to Rule 23), the federal courts would thereby be forced to deal with thousands of individual lawsuits and thousands of consolidation motions (among other issues) simply to arrive at essentially the same place: consolidated handling of substantially similar claims that should rise and fall based on sufficiently common facts, albeit without the efficiency of Rule 23.

Of course, plaintiffs could seek to abuse *American Pipe* tolling with respect to geographic classes. First, a named plaintiff could file a putative nationwide class action that is plainly an inappropriate candidate for classwide relief, simply to "buy time" by tolling the statute of limitations. Under that scenario, a subsequent court might be loath to extend *American Pipe* tolling to a follow-on subclass action. Second, after the denial of class certification in an initial putative class action, putative class members could seek to refile a new action with only aesthetic changes to the class allegations and/or the proposed class, thereby effectively seeking to relitigate the same issues the original court had addressed under the guise of avoiding that other court's previous ruling. However, in either of these scenarios, district courts have various means of discouraging abusive practices that could artificially and unreasonably seek to string out the statute of limitations. For example, based on a case-specific assessment, courts could refuse to extend *American Pipe* tolling in the

first place and/or sanction plaintiffs (or their attorneys) for engaging in abusive practices. As the Third Circuit endorsed in *Yang* after canvassing the existing case law, "careful case management," rather than a rigid rule, might alleviate any concerns about potential abuse of the *American Pipe* tolling rule. *Id*. at 112.

In sum, whether or not the class claims asserted here will ultimately meet Rule 23's requirements, this court is satisfied that the plaintiffs here are not attempting to "abuse" the availability of *American Pipe* tolling. Instead, the plaintiffs seek a definitive determination as to whether their proposed geographic subclass, in which this court sits, presents a viable basis for a class action lawsuit.[27] Indeed, for some of the reasons that the *Andrews* court found that equitable tolling should extend to the *Andrews* plaintiffs' individual claims, the court would favor extending *American Pipe* tolling to the subclass claims here.

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[27] This court also agrees with the California district court's opinion (relative to the Region 41/California-based plaintiffs) that 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. *Dukes*, 2012 WL 4329009, at *5. Also, although the district court in *Dukes* expressed a degree of skepticism that the plaintiffs would ultimately be able to demonstrate that Region 41 was an appropriate subclass – a skepticism this court shares with respect to the Region 43 class claims – it found that the plaintiffs would be entitled to present their evidence on that point in the context of a Rule 23 certification motion. *Id.* at 8-9.

Accordingly, absent the still-binding precedent articulated in *Andrews*, this court would at least address the viability of the class claims under the motion to dismiss standard and, assuming that Wal-Mart's other bases for dismissal are not viable, would be inclined to permit class discovery to proceed. However, under *Andrews*, the court must find that the class claims do not benefit from *American Pipe* tolling and, therefore, are time-barred. Because the court finds that the class claims are time-barred, the court need not reach the parties' remaining arguments, with respect to which the court makes no express findings.

CONCLUSIONS

For the reasons set forth herein, Wal-Mart's Partial Motion to Dismiss will be granted and the class claims asserted in the Complaint will be dismissed with prejudice.

Enter this 20th day of February 2013.

s/ Aleta A. Trauger
ALETA A. TRAUGER
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CHERYL PHIPPS, BOBBI MILLNER, AND SHAWN GIBBONS, on behalf of themselves and all others similarly situated,	)	**Case No. 3:12-cv-1009**
Plaintiffs,	)	**Judge Aleta A. Trauger**
v.	)	
WAL-MART STORES, INC.	)	
Defendant.	)	

ORDER

For the reasons set forth in the accompanying Memorandum, the defendant's Motion to Dismiss in Part Plaintiffs' Complaint or in the Alternative to Strike Class Claims (Docket No. 19) is **GRANTED** and the putative class claims are hereby **DISMISSED WITH PREJUDICE**. The named plaintiffs' individual claims, which were not subject to the defendant's motion, will proceed.

It is so **ORDERED**.

Enter this 20th day of February 2013.

s/ Aleta A. Trauger
ALETA A. TRAUGER
United States District Judge

APPENDIX D

No. 13-0503

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 11, 2013
DEBORAH S. HUNT, Clerk

In re: CHERYL PHIPPS; BOBBI MILLNER; and SHAWN GIBBONS, On Behalf of Themselves and all Others Similarly Situated,	)	O R D E R
Petitioners.	)	

Before: BATCHELDER, Chief Judge; SUTTON, Circuit Judge; HOOD, District Judge.*

The petitioners, on behalf of themselves and all others similarly situated, petition for permission to appeal a district court's interlocutory order dismissing their suit, to the extent it alleged class claims, as time-barred. Respondent Wal-Mart Stores, Inc. opposes the petition and separately moves the court to take judicial notice of other court proceedings. The

* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

petitioners have not responded to Wal-Mart's motion for judicial notice.

"[A] court may take judicial notice of other court proceedings." *Buck v. Thomas M. Cooley Law Sch.*, 597 F.3d 812, 816 (6th Cir. 2010). Wal-Mart's motion includes decisions in other courts relevant to the issue in this petition; therefore, judicial notice of those proceedings is appropriate here.

We may, in our discretion, permit an appeal to be taken from an order certified for interlocutory appeal by the district court if: (1) the order involves a controlling question of law; (2) a substantial difference of opinion exists regarding the correctness of the decision; and (3) an immediate appeal may materially advance the ultimate conclusion of the litigation. 28 U.S.C. § 1292(b); *see also In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002). Neither party disputes that the first and third factors are present in this case.

Generally, a substantial difference of opinion exists if an issue is one of first impression or other circuits are split on the issue. *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (citing 3 Federal Procedure, Lawyers Edition § 3:212 (2010)). The threshold issue in this case is whether tolling under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), permits the named plaintiffs in this case to pursue a class action on behalf of a regional subclass after certification of the broader nationwide class was denied. The parties have not identified any circuit split on this issue. Nor is the issue one of first impression before this court. *See Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988). Although our

precedent seemingly establishes a bright-line rule barring follow-on subclass actions by former putative class members, subsequent caselaw from this court, the Supreme Court, and other circuit and district courts have established exceptions to the rule that might extend to the present subclass.

The petition for permission to appeal and the motion to take judicial notice are **GRANTED**. The appeal shall be expedited for submission, and no requests for extension of time to brief the issue(s) involved will be entertained in the absence of extraordinary circumstances.

ENTERED BY ORDER OF THE COURT

s/ Deborah S. Hunt
Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 01-02252 CRB

BETTY DUKES, et al.,
Plaintiffs,
v.
WAL-MART STORES, INC.,
Defendant.

ORDER GRANTING IN PART PLAINTIFFS' MOTION TO EXTEND TOLLING OF THE STATUTE OF LIMITATIONS

The Court hereby orders that Plaintiffs' Motion to Extend Tolling of the Statute of Limitations is GRANTED in part. Specifically, the Court will extend the tolling period awarded to former class members under *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 554 (1974) for a limited time, and below the Court sets forth the dates by which former class members must take action. The Court is granting this limited period of additional tolling in the interest of justice and to avoid any confusion that might exist among former class members regarding when the time limit for them to take action expires.

All former class members who have an EEOC notice to sue shall have until October 28, 2011 to file suit. All former class members who have never filed an EEOC charge shall have until January 27, 2012 to file charges with the EEOC in those states with

180 day limits and until May 25, 2012 to file charges with the EEOC in those states with 300 day limits.

IT IS SO ORDERED.

s/ Charles R. Breyer

Dated: July 25, 2011

CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

APPENDIX F

No. 13-6194

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 10, 2015
DEBORAH S. HUNT, Clerk

CHERYL PHIPPS, ET AL., *Plaintiffs-Appellants,*	)	
v.	)	No. 13-6194
WAL-MART STORES, INC., *Defendant-Appellee.*	)	

BEFORE: MERRITT, COOK, and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX G

U.S. Constitution, article III

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before men-

tioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

U.S. Constitution, amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,

or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

42 U.S.C. § 2000e-5. Enforcement provisions

* * *

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to

end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe

that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

* * *

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has ini-

tially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

* * *

Federal Rule of Civil Procedure Rule 23. Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order.*

(A) *Time to Issue*. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel*. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order*. An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice*.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment*. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues*. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses*. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) *In General*. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders*. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) *Appointing Class Counsel*. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel*. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel*. The court may designate interim counsel to act on behalf of a putative class be-

fore determining whether to certify the action as a class action.

(4) *Duty of Class Counsel*. Class counsel must fairly and adequately represent the interests of the class.

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

APPENDIX H

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CHERYL PHIPPS, BOBBI MILLNER, AND SHAWN GIBBONS, On Behalf of Themselves and all Others Similarly Situated,	)	**CLASS ACTION**
***Plaintiffs*,**	)	**CASE NO.**
v.	)	**JURY TRIAL DEMANDED**
WAL-MART STORES, INC.	)	
***Defendant*.**	)	

CLASS ACTION COMPLAINT

Plaintiffs Cheryl Phipps, Bobbi Millner, and Shawn Gibbons (collectively, "Plaintiffs" or "named Plaintiffs"), on behalf of themselves and all others similarly situated, allege, upon personal knowledge as to themselves and upon information and belief as to other matters, as follows:

INTRODUCTION

1. Over ten years ago, a nationwide class action was filed against Wal-Mart Stores, Inc. ("Wal-Mart"), the largest retailer in the world and the largest private employer in the United States. The action alleged that the company discriminated against its female employees in Wal-Mart and Sam's Club retail

stores based on their gender, with respect to both pay and promotion to management track positions, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*.

* * *

5. Accordingly, this Complaint alleges claims on behalf of a class of present and former female Wal-Mart retail store employees who have been subjected to gender discrimination in the Region Wal-Mart defines as Region 43 as a result of regional policies and/or practices. This Region, referred to herein as "Region 43," is centered in Middle and Western Tennessee, and includes portions of Alabama, Arkansas, Georgia, and Mississippi. Plaintiffs allege gender discrimination in Region 43 as follows:

a. Denial of equal pay for hourly retail store positions;

b. Denial of equal pay for salaried management positions up to, and including, Co-Manager;

c. Denial of equal opportunities for promotion to management track positions up to, and including, Store Manager.

6. The class membership period commences on December 26, 1998, 300 days prior to the filing of the earliest class EEOC charge filed by a former national class member. Based on evidence produced in discovery in the national class action, interviews with class members and witnesses, and publicly available information, Plaintiffs allege that the challenged practices, and therefore the class period, extends at least until June 2004, and, on information and belief,

they allege that members of the class have been denied equal opportunities for promotion and equal pay through the present. With renewed discovery, Plaintiffs will plead more specific time periods for each of their claims.

* * *

CLASS ALLEGATIONS

* * *

21. The Injunctive Relief Class is properly certifiable under Federal Rule of Civil Procedure 23(b)(2) because Defendant has acted or refused to act on grounds generally applicable to this class, thereby making appropriate final injunctive relief or corresponding declarative relief with respect to this class as a whole.

22. The Monetary Relief Class is properly certifiable under Federal Rule of Civil Procedure 23(b)(3) because questions of law and fact common to the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this case.

* * *

ORGANIZATIONAL AND STORE STRUCTURE WITHIN REGION 43

* * *

31. *Regional Organization* — Districts are grouped into "Regions," headed by a Regional Vice President. As of 2003, each of Wal-Mart's 49 Regions contained approximately 75-85 stores. As of 2001, Region 43 contained 74 stores, grouped into 12 dif-

ferent Districts. Six (6) of these Districts contained only Tennessee stores, and three (3) contained stores in both Tennessee and one or more other states.

* * *

WAL-MART MANAGERS RELY ON DISCRIMINATORY STEREOTYPES

71. In the absence of job-related compensation and promotion criteria, Wal-Mart's managers in Region 43 rely on discriminatory stereotypes and biased views about women in making pay and promotion decisions.

* * *

Dated: October 2, 2012

* * *