No. 15-597

In The

Supreme Court of the United States

WAL-MART STORES, INC.

Petitioner,

v.

CHERYL PHIPPS, BOBBI MILLNER, AND SHAWN GIBBONS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers. *See* 1a-5a, *infra* (listing members). These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product-liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed over 1,050 briefs as *amicus curiae* in state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

The petition for a writ of certiorari filed by Wal-Mart Stores, Inc. in this case presents a recurring

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[1] Counsel for all the parties received notice of the Product Liability Advisory Council, Inc.'s intent to file this brief at least 10 days before its due date. The parties have submitted letters to the Clerk giving blanket consent to the filing of amicus curiae briefs. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Product Liability Advisory Council, Inc. and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

issue of great importance to PLAC's members—namely, whether a statutory limitation period that applies to the claims of countless individuals may be tolled indefinitely by the filing of successive (or "stacked") class actions on behalf of a plaintiff class that allegedly includes the individuals.

PLAC's members are frequent targets of class action law suits and are interested in ensuring that statutes of limitations are interpreted and applied in a manner that is reasonable, predictable, and consistent with their traditional purposes. PLAC's members have substantial experience with efforts to toll the running of limitations periods, including, efforts by plaintiffs (and their lawyers) to extend *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 552-553 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983), in ways this Court never contemplated or could have intended.

SUMMARY OF ARGUMENT

PLAC believes that this Court's intervention is urgently needed to ensure that judge-made tolling rules are not used to nullify the ordinary effect of statutes of limitations and to stop the abusive filing of successive class actions that burden courts and litigants, frustrate businesses' abilities to plan for litigation costs and liabilities, and undermine public confidence in the efficiency and integrity of the judicial system.

The Sixth Circuit's decision in this case dramatically expands what heretofore has been a narrow, equitable exception to statutory limitations periods—an exception for individuals who seek to inter-

vene and assert personal claims in an existing action or to bring their individual claims, after a definitive ruling that a pending action cannot be certified as a class action. Under the Sixth Circuit's decision, the claims of thousands of individuals can be tolled indefinitely by the filing of successive class actions on behalf of a plaintiff class that allegedly includes the individuals.

The Sixth Circuit's decision effectively abolishes statutes of limitations in class actions and establishes a regime where the class-action bar can extend litigation over stale claims indefinitely. The decision warrants review, first and foremost, because it subverts congressional control over the timing of private actions to redress alleged violations of federal law. The decision also is inconsistent with *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 552-553 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983), both of which warned the class-action bar *not* to abuse the class action device. And it conflicts with numerous decisions of other circuits.

The decision also has great practical significance. It does not avoid the filing of protective motions to intervene or actions by individuals seeking to assert their personal claims (as was the case in *American Pipe* and *Crown, Cork & Seal*). Rather, the decision encourages *would-be class representatives* to delay, for years and even decades, in bringing alternative or competing class actions and permits them to bring multiple, alternative class actions, in succession, in different fora, long after the statute of limitations has run. That piecemeal approach to class action litigation will burden federal courts, impair business

and commerce, and undermine public confidence in the integrity and efficiency of the judicial system.

Finally, the decision warrants review because it actively discourages the filing of class actions that comport with the requirements of Rule 23 and encourages strategic abuse of the class action device.

The Court should intervene to restore the carefully crafted parameters of *American Pipe* and *Crown, Cork & Seal*.

ARGUMENT

I. The Sixth Circuit's Decision Subverts Congressional Control Over The Timing Of Private Actions To Redress Alleged Violations Of Federal Law.

The Sixth Circuit's decision in this case merits this Court's review because it subverts congressional control over the timing of private actions to redress alleged violations of federal law. The Sixth Circuit has dramatically expanded what heretofore has been a narrow, equitable exception to statutory limitations periods to the point of effectively abolishing such limitations in class actions. *See*, *e.g.*, Pet. App. 30a-31a ("The principle we draw from … the current caselaw we have discussed is that subsequent class actions timely filed under *American Pipe* are not barred.").

1. "Statutes of limitations establish the period of time within which a claimant must bring an action." *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S.Ct. 604, 610 (2013). Such statutes "are found and approved in all systems of enlightened jurisprudence,"

serve multiple purposes, and reflect the legislature's judgment about how best to balance a variety of social interests. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (internal quotations and citations omitted). Statutes of limitations: (1) give plaintiffs an incentive to investigate the circumstances surrounding alleged injuries, retain a lawyer, and prepare legal claims diligently; (2) ensure that defendants are able to estimate potential litigation costs and risks related to past transactions and make plans for the future; and (3) promote the efficient use of judicial resources and public confidence in the operation of the judicial system by reducing the overall volume of litigation, directing resources to recent claims and injuries, and ensuring that the search for truth is not "impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, [or] disappearance of documents." *Id.* "[T]he length of the period allowed for instituting suit inevitably reflects [the legislature'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." *Johnson v. Ry. Exp. Agency, Inc.*, 421 U.S. 454, 463-64 (1975).

2. While a court may "toll" the statute of limitations for a period of time in certain circumstances where the facts and principles of equity support tolling, equitable tolling is supposed to be "a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace v. Kato*, 549 U.S. 384, 396 (2007); *see also Rotella v. Wood*, 528 U.S. 549, 561 (2000) (describing the tolling of a statute of limitations "as the exception, not the rule"); *Gabelli v. S.E.C.*, 133 S.Ct. 1216, 1224

(2013) (same). "[A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000); *Chao v. Va. Dep't of Transp.*, 291 F.3d 276, 283 (4th Cir. 2002) (same).

In *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 552-54 (1974), this Court held that: (1) the commencement of a class action for alleged violations of the Sherman Act tolled the statutory limitations period for the Sherman Act claims of all members of the putative class until such time as the district court ruled that the putative class failed to satisfy Rule 23(a)'s numerosity requirement; and (2) after the denial of class certification, members of the failed plaintiff class could intervene in the action to assert their individual Sherman Act claims.

The Court's decision was based on precedents applying the federal common-law doctrine of equitable tolling, the Court's assessment of the text and purposes of the Sherman Act's statute of limitations, and the specific history of the class action (which failed for lack of numerosity). *Id.* at 558-59 (citing *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424 (1965) (tolling based on a reasonable mistake in venue), *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231 (1959) (tolling based on a defendant's fraudulent inducement), and *Holmberg v. Armbrecht*, 327 U.S. 392 (1946) (tolling based on a defendant's fraudulent concealment)).

In the words of the Court, limited tolling to allow approximately 60 members of the failed plaintiff

class to intervene and assert their individual Sherman Act claims was compatible "with the functional operation of the [Sherman Act's] statute of limitations" and "consonant with the [Sherman Act's] legislative scheme." *Id.* at 554, 557-58. The Court noted that a "contrary" rule would not actually "promote the purposes of the [Act's] statute of limitations, but would instead "induce[]" "[p]otential class members" to file "protective motions" to intervene or to join in the event that the putative class was found uncertifiable. *Id.* at 553, 555.

In a concurring opinion, Justice Blackmun wrote specifically to emphasize that tolling was permitted only because it was compatible with the ordinary operation and effect of the Sherman Act's statute of limitations and because "the defendant will not be prejudiced by later intervention" of a limited number of individuals asserting their personal claims. *Id.* at 561-62 (Blackmun, J., concurring). Justice Blackmun further cautioned that, the Court's decision "must not be regarded as an encouragement to lawyers … 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. No member of the Court disagreed with these cautionary points.

Nine years later, in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. at 346-47, the Court considered whether members of a failed plaintiff class could commence their own "individual" Title VII actions, based on the *American Pipe* tolling rule, following a district court decision holding that that the putative plaintiff class was not sufficiently numerous and the proposed class representative was inadequate and

did not have typical claims. In ruling that the statute of limitations was tolled and that members of the failed plaintiff class could commence their own individual Title VII actions, the Court again was careful to describe its holding narrowly as permitting only "individual" actions. *Id.* at 350-53.

Justice Powell, joined by Justices Rehnquist and O'Connor, specifically reiterated that tolling was permissible *only* because it was compatible with the ordinary operation and effect of Title VII's statute of limitations and because the defendant would not be prejudiced by the later individual actions and that the *American Pipe* rule should not "'be regarded as an encouragement to lawyers … 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 354-55 (Powell, J., concurring) (quoting *Am. Pipe*, 414 U.S. at 561-62 (Blackmun, J., concurring)). Once again, no member of the Court disagreed.

In sum, this Court has endorsed the equitable tolling of a federal statute of limitations based on the pendency of a class action only twice—in *American Pipe* and *Crown, Cork & Seal*. In each case, tolling was permitted only after a court ruled that the putative class did not satisfy Rule 23 and was permitted only to allow a member of the failed class to assert individual claims that otherwise would have been time-barred. And, in each case, the Court emphasized the extraordinary nature of the equitable relief being provided to the individual and warned lawyers not "to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights.'" In the years

since *Crown, Cork & Seal*, the Court has never revisited the subject, much less approved an extension of *American Pipe* and *Crown, Cork & Seal* beyond their specific procedural circumstances. To the contrary, when the Court has spoken of the *American Pipe* tolling rule, it repeatedly has confirmed that the rule only permits putative class members to assert an "individual claim" following the denial or decertification of a plaintiff class. *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2379 n.10 (2011).

3. Despite this Court's warnings, the class-action bar has fought vigorously—and largely unsuccessfully—to extend *American Pipe* and *Crown, Cork & Seal* beyond the limits of those narrow precedents. For example, courts have been urged to hold that the filing of a class action asserting one set of claims tolls the statute of limitations applicable to other claims allegedly arise from the same transactions or occurrences.[2] Courts also have been urged to hold

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[2] *See*, *e.g.*, *Zarecor v. Morgan Keegan & Co., Inc.*, 801 F.3d 882, 888 (8th Cir. 2015) ("*American Pipe* tolling should be limited to claims filed in a later action that are the same as those pleaded in the putative class action."); *Williams v. Boeing Co.*, 517 F.3d 1120, 1136 (9th Cir. 2008) (same); *Raie v. Cheminova, Inc.*, 336 F.3d 1278, 1283 (11th Cir. 2003) (per curiam) (same where plaintiff claimed tolling of wrongful death claims based on prior putative class action asserting product liability claims); *Weston v. AmeriBank*, 265 F.3d 366, 368–69 (6th Cir. 2001) (same); *In re Vertrue Mktg. and Sales Practices Litig.*, 712 F.Supp.2d 703, 718-19 (N.D. Ohio 2010) (same); *Hutton v. Deutsche Bank*, 541 F.Supp.2d 1166, 1172 (D. Kan. 2008) (tolling under *American Pipe* is only available for the same claims asserted in the previous case); *Spann v. Cmty. Bank of N. Va.*, No. 03-C-7022, 2004 WL 691785, at *6 (N.D. Ill. March 30, 2004) ("[T]he *Davis* complaint only tolled the statute of limitations as to those claims actually alleged against [defendant] in the *Davis* action.");

that the filing of a class action against one defendant or group of defendants tolls the statute of limitations as to other potential defendants who had actual or constructive notice of the initial class action.[3]

Those rejected expansions of tolling, however, pale in comparison to the what the Sixth Circuit allowed here—decades-long tolling through allowance of multiple, successive class actions. The class-action bar has argued for years that, after a ruling denying or decertifying a plaintiff class, putative members of the rejected class should be allowed to file actions asserting, not only their individual claims, but also the claims of others members of the failed plaintiff class whose claims would yet again be preserved

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Stutz v. Minn. Mining Mfg. Co., 947 F.Supp. 399, 404 n.2 (S.D. Ind. 1996) ("For the legal fiction of tolling to be equitable to the defendant, the claims ... must be identical."); *cf. Johnson*, 421 U.S. at 467 (noting that "the tolling effect given to the timely prior filings in *American Pipe* … depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted").

[3] *See*, *e.g.*, *Guy v. Lexington-Fayette Urban Cnty. Gov't*, 488 Fed. App'x 9 (6th Cir. 2012) ("[T]olling of limitations periods against a defendant by a class action would not apply to a subsequent action against a different defendant, even if the claims arise out of the same or a similar transaction."); *Wyser-Pratte Mgmt. Co., Inc. v. Telxon Corp.*, 413 F.3d 553, 567 (6th Cir. 2005) (*American Pipe* does not support the tolling of a limitations period with respect to claims against a person not named as a defendant in the class action); *Arneil v. Ramsey*, 550 F.2d 774, 782 n.10 (2d Cir. 1977) (same); *Baker v. Aegis Wholesale Corp.*, No. C-09-5280, 2010 WL 2853915, *5 (N.D. Cal. July 21, 2010) (rejecting argument "that equitable tolling should be applied to a plaintiff's subsequent claims based on the pendency of an earlier filed action that was never brought against the later defendant").

during the pendency of the new class action. Prior to the Sixth Circuit's decision in this case, the courts of appeals universally rejected such "piggybacking" or "stacking" of successive class actions in situations (like those present here) where a court had ruled that the putative plaintiff class could not be certified because of a defect inherent in the class itself, such as lack of numerosity or commonality. *See Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985) (extending *American Pipe* to permit putative class members to "piggyback one class action onto another" would allow plaintiffs and their lawyers to toll a statute of limitations "indefinitely" and lead to "abuse" of the class action device); *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987) (extending *American Pipe* to permit putative members of a failed class action to bring a successive class action would be "inimical" to the traditional operation of statutes of limitation and lead to abuse of the class action device); *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987) (same); *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988) (same); *Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998) (same); *Yang v. Odom*, 392 F.3d 97, 104-08 (3d Cir. 2004) (same); *Angles v. Dollar Tree Stores, Inc.*, 494 F. App'x 326, 331 & n.10 (4th Cir. 2012) (same); *Ewing Indus. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1327-28 (11th Cir. 2015) (same).[4]

[4] A few cases have allowed putative members to bring successive class actions, notwithstanding the statute of limitations, where the original lead plaintiff was inadequate to represent that putative class, or where subject matter jurisdiction was lost prior to appellate review of a certified plaintiff class. *See Yang*, 392 F.3d at 112 (inadequate class representative of ini-

4. The Sixth Circuit's decision in this case is the first federal appellate decision to condone the filing of a successive class action outside the applicable statutory limitations period and despite a definitive ruling that the proposed plaintiff class may not be certified because of a defect inherent in the class itself. *See*, *e.g.*, Pet. App. 30a-31a.

The Sixth Circuit's decision warrants review because it subverts congressional control over the timing of private causes of action by dramatically expanding the *American Pipe* tolling rule to embrace entire classes of plaintiffs. In Title VII, Congress placed very strict temporal limitations on private rights of action and mandated that potential plaintiffs follow specific procedures and bring actions to redress alleged violations of Title VII within a certain *number of days*, rather than months or years. *See Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980); *Del. State Coll.* v. *Ricks*, 449 U.S. 250 (1980). The short deadline for filing a private action reflects Congress's determination that Title VII claims ordinarily should be brought quickly or not at all—a

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tial class action); *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 563 (7th Cir. 2011) (initial class action voluntarily dismissed); *In re Vertrue Inc. Mktg. & Sales Practices Litig.*, 719 F.3d 474, 477-78 (6th Cir. 2013) (initial class action dismissed due to lead plaintiff's lack of standing); *Catholic Social Servs., Inc. v. I.N.S.*, 232 F.3d 1139, 1149 (9th Cir. 2000) (en banc) (initial class action dismissed after enactment of jurisdiction-stripping statute). None of those defects, however, were inherent in the classes that had been proposed. Until this case, it had been settled that *American Pipe* did not toll a statute of limitations for successive class actions where the putative plaintiff class suffered an inherent defect, such as lack of numerosity or commonality.

quintessential legislative judgment that balances the competing interests of employees, employers, courts, and the general public in the specific context of employment discrimination.

The Sixth Circuit's decision in this case is neither compatible with the "functional operation of [Title VII's] statute of limitations" nor "consonant with" the general "legislative scheme" enacted by Congress. *Am. Pipe*, 414 U.S. at 554, 557-58. The relevant statute of limitations in this case required the plaintiffs to initiate complaint procedures for alleged violations of Title VII within 180 or 300 days of the alleged acts of discrimination, but, in this case, Plaintiffs now seek to assert claims for themselves and thousands of absent individuals for conduct dating back to December 26, 1998. Pet. 126a (Compl. ¶6). Thus, under the Sixth Circuit's decision, the statutory limitations period that applies to Title VII claims of countless individuals may be tolled *for decades* by the filing of successive class actions. *See* Pet. App. 28a ("These substantive claims are within the scope of those asserted by the nationwide class in *Dukes*, and Wal-Mart had notice of them"). All plaintiffs' lawyers need to do to continue the tolling is file revised class action complaints *in seriatim* with new class representatives under a different subsection of Rule 23(b) or with revised class or subclass allegations. *See* Pet. App. 24a, 29a.

Furthermore, if the Sixth Circuit's decision is allowed to take root, it is likely to cause mischief in a wide variety of cases where Congress has imposed a specific statute of limitations that stands in the way of plaintiffs' pursuit of class-wide relief. Nothing limits the Sixth Circuit's decision to actions arising un-

der Title VII; plaintiffs' lawyers routinely assert *American Pipe* tolling whenever class actions have been filed based on federal law. *See*, *e.g.*, *Salazar-Calderon*, 765 F.2d at 1351 (violations of the Federal Labor Contractor Registration Act); *Korwek*, 827 F.2d at 879 (federal antitrust violations); *Robbin*, 835 F.2d at 214 (federal securities violations); *Basch*, 139 F.3d at 11 (violations of the Age Discrimination in Employment Act); *Sawyer*, 642 F.3d at 563 (violations of the Telephone Consumer Protection Act); *Vertrue*, 719 F.3d at 478 (Electronic Funds Transfer Act); *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 409 (3d Cir. 2015) (Truth In Lending Act violations).

Nothing in *American Pipe* or *Crown, Cork & Seal* supports such a sweeping usurpation of congressional power to control the timing of private actions to enforce alleged violations of federal law. Courts must enforce statutes of limitations, not abet efforts to circumvent and nullify them. This Court's intervention is needed to restore the "carefully crafted parameters" of *American Pipe* and *Crown, Cork & Seal* and ensure that statutes of limitations governing the claims of putative class members are interpreted and applied in a manner that is reasonable, predictable, and consistent with the traditional purposes of statutes of limitations.

II. The Sixth Circuit's Decision Will Burden Courts, Impair Business And Commerce, And Undermine Public Confidence In The Judicial System.

The question presented in Wal-Mart's petition is not only of great legal significance but also great

practical importance. If the Sixth Circuit's decision is not reviewed by the Court, it will burden federal courts, impair business and commerce, and undermine public confidence in the integrity and efficiency of the judicial system.

1. The tolling rule articulated in *American Pipe* and *Crown, Cork & Seal* was adopted in part to avoid the filing of a "multiplicity" of purely "protective" complaints or motions to intervene by individual class members who did not wish to represent any group or assert the legal claims of others but who simply wished to preserve their personal claims. *Am. Pipe*, 414 U.S. at 551, 553-54; *Crown, Cork & Seal*, 462 U.S. at 350-51. That was never a threat here.

The Sixth Circuit's decision cannot be justified on this ground. *Contra* Pet. App. 31a. The decision does not avoid the filing of any purely "protective" complaint or motion to intervene by absent members of a putative class. To the contrary, the Sixth Circuit's decision encourages *would-be class representatives* to delay for years and even decades in bringing multiple class actions based on alternative and competing class and subclass allegations, in succession, in different fora, long after the statute of limitations has run. Such a piecemeal approach to class litigation over years and decades is anything but efficient.

Those who are interested in asserting claims on behalf of identical or related classes of non-parties should not be permitted to lie in the weeds for years. They should be expected to act diligently and zealously on behalf of the class that they seek to represent. In other words, they should be required to come forward within the applicable statutory limitations

period, so that their alternative and competing class actions can be coordinated and adjudicated in a fair and efficient way.

2. In *American Pipe* and *Crown, Cork & Seal*, the Court recognized that statues of limitations are enacted, in part, to ensure that defendants receive adequate notice of the "subject matter" of the prospective litigation, the "size" of the litigation, and the "number" and "generic identities" of those who might participate in a judgment and thus are able to prepare an adequate defense. *Am. Pipe*, 414 U.S. at 555; *Crown, Cork & Seal*, 462 U.S. at 352.

The Sixth Circuit's decision in this case flouts this notice principle. The decision simply assumes that once a defendant has received notice of the potential claims of a putative class, the defendant knows everything it needs to know to defend itself against every possible permutation of that class action. *See* Pet. App. 12a, 28a.

This assumption is demonstrably wrong. Many class actions fail precisely because the proposed class definition is inadequate and does not allow the defendant (or the court) to ascertain who is and is not within the proposed plaintiff class. *E.g.*, *Carrera v. Bayer Corp.*, 727 F.3d 300, 312 (3d Cir. 2013) (vacating a class certification order because the class members were not ascertainable); *Adashunas v. Negley*, 626 F.2d 600, 603-05 (7th Cir. 1980) (same); . Furthermore, even when the original class definition does provide the defendant with the information necessary to estimate the "size" of the litigation and the "number" and "generic identities" of those who might participate in a judgment, the original class

definition tells the defendant *nothing* about the size and structure of all possible alternative class actions that could be brought in the future. *See*, *e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 255-56 (2011) (plaintiffs "identified no 'specific employment practice'—much less one that ties all their 1.5 million claims together"). Thus, in a real sense, the defendant is in the dark about its potential exposure in successive class actions that may be filed 10, 15, or 20 years down the road.

Such uncertainty impairs business and commerce by making it impossible for defendants to make reasonable business judgments concerning potential litigation costs and liabilities. *Cf. McCann v. Hy-Vee, Inc.*, 663 F.3d 926, 930 (7th Cir. 2011) ("[B]usiness planning is impeded by contingent liabilities that linger indefinitely.").

3. Finally, if the claims of putative class members are tolled for 10, 15, or 20 years based on the stacking of successive class actions, "the search for truth" will be "impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, [or] disappearance of documents." *Kubrick*, 444 U.S. at 117. Despite the best efforts of parties to preserve evidence, it becomes incredibly difficult, if not impossible, to reconstruct transactions, events, decisions, or motives and determine "what actually happened" 10, 15, or 20 years after the fact. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 631-32 (2007). As this Court observed in *Kubrick*, 444 U.S. at 117, "the right to be free of stale claims in time comes to prevail over the right to prosecute them." (internal quotations and citation omitted).

III. The Sixth Circuit's Decision Encourages Forum Shopping And Abuse Of The Class Action Device.

Last, but certainly not least, the Court should intervene because the Sixth Circuit's decision creates a moral hazard in class action litigation. The decision actively discourages the class-action bar from investigating the adequacy of putative class representatives before filing suit, defining putative classes carefully, and bringing only those class actions that could comport with the requirements of Rule 23. Indeed, the decision gives plaintiffs' lawyers powerful incentives to "frame their pleadings" in the broadest terms possible in order "to attract and save" the claims of thousands of individuals who generally are unaware that actions are being brought on their behalf and are content to sleep on any hypothetical claims they might have. *Am. Pipe*, 414 U.S. at 561-62 (Blackmun, J., concurring); *Crown, Cork & Seal*, 462 U.S. at 354-55 (Powell, J., concurring).

Under the Sixth Circuit's decision, whenever one class action fails, plaintiffs' lawyers can simply start over by filing a new class action, in a new forum, with a new representative, and with a revised set of class allegations. Should that effort still fail, they can repeat this trick over and over until they find a district judge who is willing to certify the class or they force the defendant into a lucrative settlement. *Yang*, 392 F.3d at 113-14 (Alito, J., concurring in part). Indeed that is precisely the strategy of the plaintiffs' lawyers in this action.

The Court should intervene, restore the "carefully crafted parameters" of *American Pipe* and *Crown,*

Cork & Seal, and stop such deliberate manipulation and abuse of the class action device.

CONCLUSION

Wal-Mart's petition for a writ of certiorari should be granted.

Respectfully submitted.

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