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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate-disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Until the decision below, the courts of appeals had uniformly concluded that tolling under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345 (1983), ceases after denial of class certification for lack of commonality, and does not resume in a successive (or "stacked") class action. This Court, too, has recognized that tolling ends after decertification, at which point a former class member must "file an individual claim or move to intervene in the suit." *Smith* v. *Bayer Corp.*, 131 S. Ct. 2368, 2379 n.10 (2011). The decision below, which extends tolling to a subsequent class action after a definitive ruling on commonality, squarely conflicts with the decisions of *every* other circuit to have considered this issue. The Court should grant review to ensure nationwide uniformity on this important and recurring question.

I. THE DECISION BELOW DIVERGES SHARPLY FROM THE ANTI-STACKING PRECEDENTS OF OTHER CIRCUITS

Respondents do not dispute that this Court has previously required "individual actions" to be "instituted within the time that remains on the limitations period" after a denial of class certification in the initial action. *Crown, Cork*, 462 U.S. at 346-47; *see* BIO 17-18. Yet, the class they seek to represent is comprised almost entirely of individuals who failed to abide by this rule. The claims of those absent individuals are now time-barred and thus ineligible for tolling under *American Pipe* or *Crown, Cork*. The court below, however, allowed them to proceed.

Respondents admit that the Sixth Circuit created an "extension of *American Pipe* tolling" in order to

apply it "to a subsequent class action." BIO 18. And they concede that the Sixth Circuit's decision is the first and *only* appellate decision to extend *American Pipe* past an initial attempt at class certification that failed for lack of commonality. *See id.* at 8-9. This unprecedented transformation of *American Pipe* tolling into a Lazarus-like rule that brings dead claims to life would warrant this Court's review even absent a circuit split. And respondents cannot credibly deny the glaring conflict between the Sixth Circuit's approach and the anti-stacking rule followed by *every* other circuit that has considered whether *American Pipe* tolling may be so extended.

Contrary to respondents' contentions, the "circumstances of *this* case" (BIO 8) highlight the circuit conflict: Following this Court's decertification of the nationwide class in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), follow-on regional class actions were brought by the identical lawyers, reasserting materially identical claims, on behalf of identically situated persons, against the identical defendant in various jurisdictions. District courts dismissed the claims of absent persons pursuant to controlling anti-stacking precedents in the Fifth and Eleventh Circuits, and those circuits each declined requests to review those dismissals on an interlocutory basis. Pet. 9-10. The Sixth Circuit here, in contrast, allowed these claims to proceed. There is no way to reconcile these disparate outcomes.

Indeed, respondents concede that, under the Eleventh Circuit's long-standing "rule against piggybacked class actions," "'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.'" *Griffin* v. *Singletary*, 17

F.3d 356, 359 (11th Cir. 1994) (quoting *Andrews* v. *Orr*, 851 F.2d 146, 149 (6th Cir. 1988)); BIO 13-14. This is *verbatim* the "bright line rule" rejected by the Sixth Circuit here (Pet. App. 18a-19a), and (almost simultaneously) reaffirmed by the Eleventh Circuit in *Ewing Industries Corp.* v. *Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1327-28 (11th Cir. 2015).

Respondents' acknowledgement that *Ewing* is "*in tension with* the decision below" (BIO 14 (emphasis added)) is thus a considerable understatement. In *Ewing*, the Eleventh Circuit unequivocally reaffirmed the continuing validity of its anti-stacking precedent, reiterating that "there is no tolling for a subsequent class action based on the same conduct" once "class certification is denied" for the initial class. *Ewing*, 795 F.3d at 1326, 1328. That approach cannot be reconciled with the decision below. Respondents implausibly suggest that the Eleventh Circuit may resolve this conflict in *Morris* v. *Wal-Mart Stores, Inc.*, No. 15-25260 (11th Cir.), in which proposed intervenors are attempting to appeal the dismissal of yet another follow-on *Dukes* class action. BIO 14-15. But there is no reason to believe that a different panel of the Eleventh Circuit would or could reach a different result from *Ewing* and *Griffin*.

Indeed, underscoring the Sixth Circuit's faulty reasoning and the broad consensus on the anti-stacking rule, the *plaintiffs* in the *Ewing* case agree "there can be no further class tolling once class certification has been denied on the merits" because "[t]his one-bite rule is a sensible and practical approach that properly balances the interests of defendants and absent class members while furthering the purposes of Rule 23." Cert. Petition at 8-9, *Ewing*, No. 15-844 (docketed Dec. 31, 2015).

Respondents' observation that some courts have "allowed later class actions to benefit from *American Pipe* tolling" (BIO 8) is irrelevant; their follow-on class action would have been dismissed under each of these decisions. For example, respondents could not have pursued their sequential class action in the Third Circuit, where tolling may apply to "a new class action where certification was denied in the prior suit based on the lead plaintiffs' deficiencies as class representatives," but "not … where the earlier denial of certification was based on a Rule 23 defect in the class itself." *Yang* v. *Odom*, 392 F.3d 97, 99, 104 (3d Cir. 2004). The Ninth Circuit too would have rejected respondents' attempt to stack class actions; that court allowed a limited extension of *American Pipe* where the first "properly certified" class was dismissed on jurisdictional grounds because of a change in the underlying statutory scheme. *Catholic Soc. Servs., Inc.* v. *INS*, 232 F.3d 1139, 1149 (9th Cir. 2000) (en banc). But this Court held that the *Dukes* class was *not* properly certified, and the Ninth Circuit has been clear its narrow exception does *not* extend to a subsequent class "attempting to relitigate an earlier denial of class certification, or to correct a procedural deficiency in an earlier would-be class." *Ibid.*

Respondents agree that the numerous other appellate "decisions Wal-Mart cites declined" to extend *American Pipe* tolling to "follow-on class actions that sought to relitigate certification issues decided adversely to the proposed class in the prior case." BIO 9. That is precisely what has happened here: *This* Court decided commonality—a "certification issu[e]"—"adversely to the proposed class" in *Dukes*, 131 S. Ct. at 2556. Respondents' follow-on class action, in turn, seeks to "relitigate" that issue. *See* Pet.

19-24. As the Second Circuit has explained, "the tolling rule established by *American Pipe* … was not intended to be applied to suspend the running of statutes of limitations for class action suits filed after a definitive determination of class certification." *Korwek* v. *Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *id.* at 877-78 (collecting cases).

II. THE CIRCUIT SPLIT CREATED BY THE SIXTH CIRCUIT IS INTRACTABLE ABSENT THIS COURT'S REVIEW

Contrary to respondents' suggestion (BIO 2, 15, 23), this Court's decisions in *Smith* v. *Bayer Corp.,* 131 S. Ct. 2368 (2011), and *Shady Grove Orthopedic Associates, P.A.* v. *Allstate Insurance Co*., 559 U.S. 393 (2010), do not countenance the circuit split created by the decision below.

Respondents admit, as they must, that *Smith* accurately "described th[is] Court's [tolling] cases as holding 'that a putative member of an uncertified class may wait until after the court rules on the certification motion to file an individual claim or move to intervene in the suit,'" and they further concede that this description "reflects" the only "two circumstances" in which this Court has approved the use of *American Pipe* tolling. BIO 18 (quoting 131 S. Ct. at 2379 n.10). This is the *only* discussion of tolling in *Smith.* Respondents' argument that *Smith*'s discussion of issue preclusion nonetheless "compel[s]" the "extension" of *American Pipe* tolling (BIO 15, 18) blinks reality. *See Menominee Indian Tribe of Wis.* v. *United States*, No. 14-510, 2016 WL 280759, at *4 (U.S. Jan. 25, 2016) (limiting tolling to circumstances "expressly characterized" in prior decisions).

Smith's parallel holding that preclusion doctrines cannot be used to prevent non-parties from relitigating class certification denials in no way requires that tolling be extended to *enable* such relitigation where the claims would otherwise be untimely. The anti-stacking rule has nothing to do with the "'the preclusive effect of a judicial decision in the initial suit applying the criteria of Rule 23.'" BIO 9 (quoting *Sawyer* v. *Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 563 (7th Cir. 2011)). Instead, it flows directly from this Court's holding in *American Pipe* that tolling in a particular context must be "consistent *both* with the procedures of Rule 23 *and* with the proper function of the limitations statute." 414 U.S. at 555 (emphases added). *Sawyer*'s contrary dicta, on which respondents place extensive reliance, was wrong when rendered and does not survive *Smith* in any event.

Respondents' reliance on *Shady Grove* similarly rests on a fundamental misunderstanding of basic class action principles. *See* BIO 15-16. Because there is no "entitlement to class proceedings for the vindication of statutory rights" (*Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013)), *Shady Grove* does not, as they suggest, create a "categorical rule" that allows any litigant to automatically bring a class action. BIO 2, 19-20; *see also* Pet. App. 31a-32a. For the same reason, respondents' reference to "class claims" (BIO 28) is meaningless.

Shady Grove holds that Rule 23 is a procedural rule that applies to every putative class action in federal court, but it does not (and, under the Rules Enabling Act, 28 U.S.C. § 2072, *cannot*) require that *statutes* of limitations be cast aside whenever class action *rules* are invoked. *Cf. Guar. Trust Co.* v. *York*,

326 U.S. 99, 109-10 (1945) (holding that while a federal court sitting in diversity may ignore state procedural law, it may not similarly ignore statutes of limitations). As respondents acknowledge, a putative class action must "consis[t] entirely of individuals whose claims are likewise timely" because an absent class member "cannot acquire substantive rights that she would not have individually by becoming a member of a class." BIO 15, 20.

Judge Breyer generously extended the limitations periods within which former *Dukes* class members were required to bring EEOC charges and individual claims (Pet. App. 108a-109a), and the "overwhelming majority" of the unknown persons who respondents seek to represent chose not to act. Pet. 5. Their individual claims are now statutorily time-barred. *See Crown, Cork*, 462 U.S. at 346-47, 354. Nothing in *Shady Grove* suggests that untimely claims may be resurrected in the name of Rule 23. On the contrary, the Judiciary may not further extend tolling doctrines without invading the prerogative of Congress. *Cf. Gabelli* v. *SEC*, 133 S. Ct. 1216, 1224 (2013).

There is no reason to wait and see if still more circuit courts will flout this Court's precedents, as respondents suggest. *Cf. Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). This Court should grant review to restore the clarity, uniformity, and efficiency underlying the longstanding, widely accepted anti-stacking rule.

III. THIS CASE PRESENTS THE IDEAL VEHICLE FOR RESOLVING THE CIRCUIT SPLIT ON THE SCOPE OF *AMERICAN PIPE* TOLLING

This case provides the ideal vehicle for this Court to resolve the circuit split created by the Sixth Circuit on this important and recurring issue. The Court is already intimately familiar with the procedural and factual history of this case, having previously concluded that class treatment was inappropriate. Given the conflicting reception the regional class actions received in the wake of *Dukes*, and the circuit split created by the Sixth Circuit on the scope of *American Pipe*, clarification of the effect that ruling had on the timeliness of claims held by former class members would benefit the bench and bar.

The Sixth Circuit has declared that *Dukes* was merely a dress rehearsal on class certification and that a subset of that failed class should be allowed to do it all over again—almost two decades after the events in suit allegedly took place. Such disregard for this Court's precedents alone warrants review. *Cf. James* v. *City of Boise*, No. 15-493, 2016 WL 280883, at *1 (U.S. Jan. 25, 2016) (per curiam) ("It is this Court's responsibility to say what a [federal] statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law") (alteration original; citation and internal quotation marks omitted).

Respondents try to cover up this reality by insisting that this class action is "material[ly] different" than *Dukes*. BIO 1. Of course, if they were right their claims indisputably would be time-barred: *American Pipe* tolling by definition applies only to the *same claims*. *See Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring) (*American Pipe* does not al-

low plaintiffs "to raise different or peripheral claims following denial of class status"); *American Pipe*, 414 U.S. at 561-62 (Blackmun, J., concurring) (same). In any event, they are wrong: This follow-on class action cannot reasonably be viewed as anything other than an attempt to "relitigate" or cure the deficiencies that led to decertification of the *Dukes* class. *Contra* BIO 1; *compare id.* at 5 (citing supposedly "new Region-specific allegations") (internal quotation marks omitted), *with Dukes*, 131 S. Ct. at 2563 (Ginsburg, J., dissenting) (noting same allegations).

And respondents are simply incorrect to suggest that the Sixth Circuit's decision does anything other than invite "indefinite" tolling. BIO 7-8. The decision below allows former absent class members to restart the clock each time class certification is denied. This Matryoshka approach to federal litigation would prevent defendants from obtaining finality in class action litigation through judicial decision *or* settlement. *See* Pet. 27-28. It has nothing to commend it. *Cf. Menominee Indian Tribe of Wis.*, 2016 WL 280759, at *2, *5-6.

It is no answer to say, as respondents do, that lawyers will eventually run out of "plausible ways to redefine" a class, thereby allowing preclusion or comity principles to halt the perpetual litigation. BIO 8, 26-27. The *Dukes* lawyers have already filed three rounds of putative class actions (*Dukes* itself, the regional follow-ons of which this case is one, and follow-ons to the follow-ons after the regional cases were dismissed)—with no end in sight.

A rose is a rose is a rose. The *Phipps* case is nothing more than an impermissible bid "to attract and save members of the purported class who have slept on their rights." *American Pipe*, 414 U.S. at

561 (Blackmun, J., concurring). The district court properly dismissed the claims of such unknown persons as untimely, and the Sixth Circuit's unprecedented resurrection of those claims warrants review.

Finally, as individual named plaintiffs whose claims were *not* dismissed as untimely, respondents lacked standing to appeal the dismissal of the untimely claims of absent persons. *See* Pet. 30 n.4. "[U]nder this Court's precedents," a named plaintiff "does not have standing to seek relief based solely on the alleged injuries of others." *Campbell-Ewald Co.* v. *Gomez*, No. 14-857, 2016 WL 228345, at *15 (U.S. Jan. 20, 2016) (Roberts, C.J., dissenting). Respondents do not even address, and therefore concede, this point, which also warrants review if not summary reversal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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