Case No. 13-6194

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.

Appeal from a Certified Order of the
United States District Court for the Middle District of Tennessee
Case No. 3:12-cv-1009
The Honorable Aleta A. Trauger, United States District Judge

BRIEF OF PLAINTIFFS - APPELLANTS

George E. Barrett
David W. Garrison
Scott P. Tift
Seth M. Hyatt
BARRETT JOHNSTON, LLC
217 Second Avenue North
Nashville, TN 37201
Telephone: (615) 244-2202
Facsimile: (615) 252-3798
gbarrett@barrettjohnston.com
dgarrison@barrettjohnston.com
stift@barrettjohnston.com
shyatt@barrettjohnston.com

Joseph M. Sellers
Christine E. Webber
COHEN MILSTEIN SELLERS & TOLL, PLLC
1100 New York Ave, NW
West Tower, Suite 500
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699
jsellers@cohenmilstein.com
cwebber@cohenmilstein.com

Jocelyn D. Larkin
THE IMPACT FUND
125 University Avenue, Suite 102
Berkeley, CA 94710
Telephone: (510) 845-3473
Facsimile: (510) 845-3645
jlarkin@impactfund.org

Counsel for Plaintiffs - Appellants

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-6194 Case Name: Phipps, et al. v. Wal-Mart Stores, Inc.

Name of counsel: Scott P. Tift

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Name of Party
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2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

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CERTIFICATE OF SERVICE

I certify that on September 24, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Scott P. Tift

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-6194 Case Name: Phipps, et al. v. Wal-Mart Stores, Inc.

Name of counsel: Scott P. Tift

Pursuant to 6th Cir. R. 26.1, Bobbi Millner
Name of Party
makes the following disclosure:

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2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

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s/ Scott P. Tift

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-6194 Case Name: Phipps, et al. v. Wal-Mart Stores, Inc.

Name of counsel: Scott P. Tift

Pursuant to 6th Cir. R. 26.1, Shawn Gibbons
Name of Party
makes the following disclosure:

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No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

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s/ Scott P. Tift

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-Appellants respectfully submit that oral argument should be permitted in the present case.

On September 11, 2013, this Court granted Plaintiffs' petition for interlocutory appeal. (Order Permitting Interlocutory Appeal) (RE 73) (Page ID # 2390-91). As part of that Order, this Court expressly noted that "[a]lthough 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." (*Id.*)

As this Court recognized, the legal landscape on equitable class tolling has shifted in recent years, thereby warranting a review of prior authority in this Circuit on the availability of equitable tolling to former putative class members in follow-on subclass actions. As this issue involves the interplay between this Circuit's precedent and recent decisions of the Supreme Court 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), which this Court has not yet addressed in this context, Plaintiffs believe the Court may benefit from oral argument.

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants filed this class action lawsuit against Wal-Mart Stores, Inc. in the Middle District of Tennessee before the Honorable Aleta A. Trauger on October 2, 2012. On behalf of themselves and similarly-situated female employees, Plaintiffs allege that Wal-Mart has engaged in a pattern or practice of gender discrimination in pay and promotions throughout the region it refers to as Region 43. (Class Action Complaint) (RE 1) (Page ID # 1). Plaintiffs brought their claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* (*Id.*) Accordingly, the district court had subject-matter jurisdiction over Plaintiffs' claims pursuant to 42 U.S.C. § 2000e-5(f) and 28 U.S.C. §§ 1331, 1343(a)(4).

On February 20, 2013, the district court dismissed Plaintiffs' class claims with prejudice on the grounds that the statute of limitations had been tolled only for the individual named plaintiffs and not for the claims of absent class members. (Order Dismissing Class Claims) (RE 56) (Page ID # 1596). Because Wal-Mart had never moved to dismiss Plaintiffs' individual claims, the district court's order dismissing the class claims was not a final judgment on the merits and did not give rise to an appeal as of right under Federal Rule of Appellate Procedure 3. However, Plaintiffs moved the district court to certify the question about the availability of equitable class tolling for interlocutory appeal on February 28, 2013,

pursuant to 28 U.S.C. § 1292(b). (Motion to Certify) (RE 57) (Page ID # 1597). The district court granted that motion and stayed the case pending "any appeal and the resolution thereof." (Order Certifying February 20, 2013 Order for Review) (RE 72) (Page ID # 2388). Plaintiffs then petitioned this Court to permit an interlocutory appeal under 28 U.S.C. § 1292(b) (granting courts of appeals jurisdiction to review an interlocutory order where a district court certifies an otherwise non-appealable order).

This Court granted Plaintiffs' petition on September 11, 2013, (Order Permitting Interlocutory Appeal) (RE 73) (Page ID # 2391), which in turn gave this Court jurisdiction over the present interlocutory appeal. As this Court noted in its Order, the district court's order dismissing Plaintiffs' class claims (1) involves a controlling question of law; (2) concerns an issue on which substantial difference of opinion exists; (3) and is a decision for which immediate appeal may materially advance the ultimate conclusion of the litigation. (*Id.* Page ID # 2390-91) (citing 28 U.S.C. § 1292(b); *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002)).

Pursuant to this Court's Briefing Letter of September 30, 2013, Plaintiffs have timely filed their Principal Brief on November 12, 2013.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Can members of a putative class in which class certification was denied lose the right to equitable tolling accorded them pursuant to *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), simply because they seek to pursue their claims in a successor class action rather than individually? Specifically:

1. Did *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), and *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), supersede the limitations imposed on the availability of *American Pipe* tolling by this Court in *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988)?

2. In light of this Court's decision in *In re Vertrue Marketing & Sales Practices Litigation*, 719 F.3d 474 (6th Cir. 2013), can members of a putative class retain their *American Pipe* tolling rights in a subsequent class action if no prior court has ever ruled on whether the specific claims they advance are susceptible to class certification?

STATEMENT OF THE CASE

This case arose in the wake of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), in which the Supreme Court reversed certification of a national class of women who alleged that Wal-Mart had engaged in gender discrimination against female employees when making pay and promotion decisions throughout the country.

On June 21, 2004, the district court presiding over the *Dukes* litigation (the "California district court") certified a nationwide class of female Wal-Mart retail sales employees with pay and/or promotion claims arising on or after December 26, 1998. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 188 (N.D. Cal. 2004). The Ninth Circuit affirmed in significant part the class order. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc). On June 20, 2011, the Supreme Court reversed the Ninth Circuit's decision, thereby denying certification of the alleged nationwide class. *Dukes*, 131 S. Ct. at 2561.

On July 25, 2011, the California district court, presiding over the *Dukes* litigation on remand, set deadlines for individuals who had been members of the nationwide class to file charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") in order to continue the tolling of their claims provided by *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974). (Northern District of California July 25, 2011 Order) (RE 1-9) (Page ID # 66-67).

Plaintiffs-Appellants Cheryl Phipps, Bobbi Millner, and Shawn Gibbons each filed timely charges of discrimination with the EEOC. (Phipps Charge of Discrimination) (RE 1-1) (Page ID # 37-38); (Millner Charge of Discrimination) (RE 1-4) (Page ID # 48-49); (Gibbons Charge of Discrimination) (RE 1-7) (Page ID # 58-59). Then, on October 2, 2012, Plaintiffs filed the instant action, on behalf of themselves and all female retail sales employees in Wal-Mart Region 43—a region centered in Tennessee and also including portions of several neighboring states. (Class Action Complaint) (RE 1) (Page ID # 1-35). As noted by District Judge Aleta A. Trauger below, Plaintiffs' class claims focus on the regional policies, regional management, and regional decision makers within a single Wal-Mart region, thereby asserting "new Region-specific allegations that were not contained in the *Dukes* complaint." (District Court Memorandum to Order Dismissing Class Claims) (RE 55) (Page ID # 1547).

On October 25, 2012, Wal-Mart moved to dismiss Plaintiffs' class allegations, claiming in pertinent part that they were time-barred. (Motion to Dismiss Class Claims) (RE 19) (Page ID # 105-07). On February 20, 2013, the district court granted Wal-Mart's motion to dismiss the class claims, finding that they were time-barred, as a result of this Court's decision in *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988). (District Court Memorandum to Order Dismissing Class Claims) (RE 55) (Page ID # 1550-51). After a detailed analysis of the

Andrews decision, as well as subsequent case law, however, Judge Trauger expressed the view that "*Andrews* merits refinement for several reasons." (*Id.*) (Page ID # 1585). Because the district court dismissed Plaintiffs' class claims as time-barred, the court did not address whether Plaintiffs' class claims warranted class treatment under Rule 23, Fed. R. Civ. P. (*Id.*) (Page ID # 1546).

On June 13, 2013, the district court certified its order dismissing the class claims for interlocutory review pursuant to 28 U.S.C. § 1292(b). (Order Certifying February 20, 2013 Order for Review) (RE 72) (Page ID # 2388). On September 11, 2013, this Court granted Plaintiffs' petition. (Order Permitting Interlocutory Appeal) (RE 73) (Page ID # 2389).

STATEMENT OF THE FACTS

Plaintiffs-Appellants Cheryl Phipps, Bobbi Millner, and Shawn Gibbons, on behalf of themselves and all others similarly situated, filed this lawsuit to challenge Wal-Mart's discriminatory pay and promotion policies in Wal-Mart Region 43 dating back to December 26, 1998. (Class Action Complaint) (RE 1) (Page ID # 1-35). Specifically, Plaintiffs allege that these pay and promotion policies have had both the intent and the effect of discriminating against female employees on the basis of gender in violation of Title VII of the Civil Rights Act of 1964. (*Id.*).

Plaintiffs Phipps, Millner, and Gibbons (collectively "Plaintiffs") all work or worked at Wal-Mart retail locations within Region 43, which is centered in middle and western Tennessee, and also includes portions of Alabama, Arkansas, Georgia, and Mississippi. (*Id.*) (Page ID # 2). Whereas in *Dukes v. Wal-Mart Stores, Inc.* the plaintiffs alleged that Wal-Mart maintained ***nationwide*** discriminatory pay and promotion policies, Plaintiffs herein allege that Wal-Mart maintains ***regional*** discriminatory pay and promotions policies in Region 43.

Although Plaintiffs' complaint and the *Dukes* complaint arise from the same gravamen, Plaintiffs' complaint differs in several material ways. (District Court Memorandum to Order Dismissing Class Claims) (RE 55) (Page ID # 1589-91) (addressing the similarities and differences between the *Dukes* complaint and the instant complaint). First, Plaintiffs' proposed class encompasses just one Wal-

Mart region, as opposed to the 41 Wal-Mart regions encompassed within the class proposed in *Dukes*. *Compare* (Class Action Complaint) (RE 1) (Page ID # 1), *with Dukes*, 222 F.R.D. at 145. Within that one region, Plaintiffs challenge the decisions of the discrete group of managers who made, and were responsible for, the discriminatory pay and promotion decisions challenged in this litigation. (RE 1) (Page ID # 9-10).

Second, even without the benefit of discovery focused on Region 43, Plaintiffs' complaint attributes specific evidence of gender bias to managers involved in the contested decisions. (*Id.*) (Page ID # 17-22). Third, Plaintiffs allege disparities in pay and promotion decisions adverse to women derived from statistical analyses substantially more refined than those used in the *Dukes* nationwide class. (*Id.*) (Page ID # 12, 15).

Fourth, Plaintiffs contend that Wal-Mart's personnel processes are "not capable of separation for analysis" and therefore may be analyzed as a functionally integrated practice pursuant to 42 U.S.C. § 2000e-2(k)(1)(B). (*Id.*) (Page ID # 12, 17, 32). Finally, Plaintiffs allege monetary relief claims capable of certification under Rule 23(b)(3), or (c)(4) as an alternative, rather than Rule 23(b)(2), under which the California district court had certified the nationwide class. (*Id.*) (Page ID # 6).

Without determining whether the Plaintiffs' claims were susceptible to class certification, the district court confirmed that these alleged facts distinguish the class claims in this action from the class claims in the *Dukes* litigation. (District Court Memorandum to Order Dismissing Class Claims) (RE 55) (Page ID # 1547).

STANDARD OF REVIEW

On appeal, this Court reviews *de novo* a lower court's ruling granting a motion to dismiss on statute of limitation grounds. *In re Vertrue Marketing & Sales Practices Litigation*, 719 F.3d 474, 478 (6th Cir. 2013); *Fallin v. Commonwealth Indus, Inc.*, 695 F.3d 512, 515 (6th Cir. 2012).

Here, there is no dispute that the timeliness of Plaintiffs' class claims hinges entirely on the question whether these class claims retain *American Pipe* tolling. Because this is a question of law, "no deference [is] due to the district court's conclusion." *Williams v. Pollard*, 44 F.3d 433, 434 (6th Cir. 1995)

SUMMARY OF THE ARGUMENT

On February 20, 2013, the district court dismissed Plaintiffs-Appellants' class allegations as time-barred pursuant to this Court's decision in *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988). Through this interlocutory appeal, Plaintiffs request that the district court's order be reversed (1) because *Andrews v. Orr* has been superseded by recent Supreme Court authority or (2), in the alternative, because this Court's recent authority makes clear that *Andrews v. Orr* does not bar Plaintiffs' class claims.

I. *ANDREWS V. ORR* HAS BEEN SUPERSEDED.

The Supreme Court's recent opinions in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), and *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), supersede the holding in *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988), that absent members of a failed class action lose their *American Pipe* tolling rights when they pursue their claims in a subsequent class action rather than individually.

In *Bayer*, the Supreme Court held the denial of class certification in one case does not preclude members of a failed putative class from pursuing the same claims in a separate class action. In addition, the Supreme Court rejected the argument that allowing absent members of a failed class action to pursue their claims in another class proceeding would constitute an abuse of the class action

process. As a result, the Plaintiffs in this action cannot be bound by the decision reversing certification of a national class action in *Wal-Mart Stores, Inc. v. Dukes*, nor can the pursuit of their claims in a follow-on class action rather than individually be foreclosed out of concern for abuse of the class action device.

In *Shady Grove*, the Supreme Court ruled that plaintiffs who can pursue their claims individually must be permitted to pursue them together as a class action, as long as they can satisfy the requirements of Fed. R. Civ. P. 23. As there is no dispute that absent members of the failed class action in *Dukes* retain their *American Pipe* tolling rights when they pursue their claims individually, they must be granted the opportunity to pursue their claims together if they can satisfy the requirements of Rule 23.

Taken together, these decisions supersede *Andrews v. Orr* and warrant reversal of the district court's order dismissing the class claims.

II. EVEN IF *ANDREWS V. ORR* REMAINS VIABLE, IT DOES NOT BAR PLAINTIFFS' CLASS ALLEGATIONS AS UNTIMELY.

In *In re Vertrue Marketing & Sales Practices Litigation*, 719 F.3d 474 (6th Cir. 2013), this Court recently held that *Andrews v. Orr* does not create a bright-line rule precluding the extension of *American Pipe* tolling to members of a putative class in a follow-on class action. Rather, this Court determined that members of a failed putative class retain *American Pipe* tolling to pursue a follow-

on class action where no prior court has ruled on certification of the particular claims the plaintiffs seek to pursue.

Here, Plaintiffs allege class claims that arise from the same gravamen as the *Dukes* litigation while setting forth claims narrower in scope, focusing on particular employment practices and relying upon more granular evidence of discrimination, none of which was before the Supreme Court. (District Court Memorandum to Order to Dismiss Class Claims) (RE 55) (Page ID # 1547). Therefore, no court has ruled on Plaintiffs' class allegations, and *Andrews v. Orr* does not require dismissal of Plaintiffs' class allegations as time-barred.

For these reasons, and in accordance with the Supreme Court's *American Pipe* doctrine, the district court's order should be reversed, and Plaintiffs should be permitted to seek certification of their class allegations.

ARGUMENT

Through this interlocutory appeal, Plaintiffs challenge the continued viability of this Court's decision in *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988), as a bar precluding *American Pipe* tolling for individual members of a failed putative class who seek to pursue a follow-on subclass action.[1]

Judge Trauger's dismissal of Plaintiffs' class claims below relied entirely on *Andrews v. Orr*, noting that the court was "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." (District Court Memorandum to Order Dismissing Class Claims) (RE 55) (Page ID # 1551). Yet, in dismissing Plaintiffs' class claims, Judge Trauger engaged in substantial, detailed analysis of "recent jurisprudential trends" to suggest *Andrews* merits reconsideration or, at the very least, refinement. (*Id.*) (Page ID # 1551).

For the reasons set forth below, Plaintiffs submit that Judge Trauger is correct and that *Andrews* should be reconsidered in light of authorities issued subsequently by the Supreme Court and this Court. The Supreme Court's decisions in *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), and *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), supersede

[1] Like the district court below, Plaintiffs herein refer to follow-on lawsuits seeking to certify a subclass of a previously rejected broader class as "follow-on subclass actions." (RE 55) (Page ID # 1548).

Andrews, and accordingly *Andrews* is no longer good law.

Even if *Andrews* remains viable, subsequent decisions by this Court make clear that *Andrews* does not create a bright-line bar precluding *American Pipe* tolling for all follow-on class actions. Instead, as this Court explained in *In re Vertrue Marketing and Sales Practices Litigation*, 719 F.3d 474 (6th Cir. 2013), the proper analysis is to look to "the risk motivating our decision in *Andrews*" and the "purposes of *American Pipe* tolling." *Id.* at 480 (quoting *Wyser-Pratte Management Company v. Telxon Corporation*, 413 F.3d 553, 569 (6th Cir. 2005)). Under this analysis, Plaintiffs should be entitled to *American Pipe* tolling **even if** *Andrews* remains good law.

Accordingly, Plaintiffs ask that this Court reverse the Order dismissing Plaintiffs' class claims as untimely and remand this case for further consideration of whether Plaintiffs' claims are entitled to class certification.

I. SUPREME COURT PRECEDENT SUPPORTS AVAILABILITY OF *AMERICAN PIPE* TOLLING TO CLASS MEMBERS IN FOLLOW-ON SUBCLASS ACTIONS.

The sole issue presented in this appeal is whether Plaintiffs, and members of the class they seek to represent, may rely upon *American Pipe* tolling in pursuing their class claims in this case. The Supreme Court's decisions in *Shady Grove* and *Bayer*, along with the earlier decisions of the Supreme Court in *American Pipe* and *Crown, Cork*, leave no doubt that the answer to this question is yes.

A. Pursuant to *Smith v. Bayer*, Plaintiffs' Class Allegations are not Time-Barred.

This Court held in *Andrews* 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." 851 F.2d 146, 149 (6th Cir. 1988). The *Andrews* decision relied almost entirely on the decisions of its sister circuit courts and the concern expressed by Justice Powell, in his concurrence in *Crown, Cork*, that a broad application of the tolling doctrine adopted by the Court would "invit[e] abuse." *Id.* (citations omitted). The Supreme Court's decisions in *Smith v. Bayer* and *Shady Grove v. Allstate*, however, supersede *Andrews*. When read together, *Bayer* and *Shady Grove* clearly establish that members of follow-on subclass actions retain the same *American Pipe* tolling rights as plaintiffs pursuing their rights individually.[2]

1. *Smith v. Bayer* permits follow-on class actions.

In *Smith v. Bayer*, 131 S. Ct. 2368 (2011), the Supreme Court unanimously held that the denial of class certification in one case does not preclude absent members of the failed putative class from pursuing the same claims in a separate class action.

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[2] Prior decisions of this Court remain controlling unless an inconsistent decision of the United States Supreme Court "requires modification of the decision" or unless the Sixth Circuit, sitting en banc, overrules the decision. *See, e.g., Gor v. Holder*, 607 F.3d 180, 188 (6th Cir. 2010) (internal citations omitted).

The Plaintiffs in *Bayer* were individuals who had taken cholesterol-lowering medication made by Bayer and who alleged that Bayer had breached its warranties and violated West Virginia consumer protection laws. *Id.* at 2373-74. An earlier class action, raising substantially identical claims, had been removed to federal court and then transferred through the multidistrict litigation process to the District of Minnesota. *Id.* Accordingly, for a period of six years, two class actions alleging the same basic claims proceeded in parallel—one in federal court, and one in West Virginia state court. *Id.* After the federal court declined to certify a West Virginia class, the defendant moved the federal district court to enjoin the state court proceeding, contending that denial of class certification in the federal action precluded certification of the same claims in another case. The district court granted that injunction, and the Eighth Circuit affirmed. *Id.* at 2374.

The Supreme Court, however, reversed. Citing the longstanding rule against nonparty preclusion, the Court held that one court's denial of class certification cannot bar members of the failed class from pursuing the same claims in a second class action. Therefore, a federal court cannot enjoin another court from considering the second class action. *Id.* at 2379-80. The Court further explained that unless a class is properly certified, absent class members are not parties before the initial court and that the denial of class certification in the original action

cannot collaterally estop absent class members of the original class from pursuing class relief in a subsequent proceeding. *Id.* at 2380-81.

In reaching this conclusion, the *Bayer* Court squarely rejected the view expressed in the decisions on which *Andrews* relied, that successive class actions by absent class members are barred by the preclusive effect of the initial denial of class certification. *I.e.*, *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987) ("The Supreme Court . . . certainly did not intend to afford plaintiffs the opportunity to argue and reargue the question of class certification by filing new but repetitive complaints."); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985) ("Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely. . . ."); *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987) (adopting reasoning of *Korwek*). In no uncertain terms, and in clear contrast to these circuit decision, the Supreme Court stated: "Neither a proposed class action nor a rejected class action may bind nonparties." *Bayer*, 131 S. Ct. at 2380. Lower courts that have faced this question since *Smith v. Bayer* have reached the same conclusion.[3] Thus, an absent member of a failed class cannot be precluded from pursuing a second class action on the same issue. *Id.*

[3] *See Villanueva v. Davis Bancorp, Inc.*, No. 09 C 7826, 2011 WL 10970932, at *3 (N.D. Ill. Sept. 13, 2011) ("[T]he way in which courts analyze successive class action suits brought under . . . Rule . . . 23 is evolving," citing *Bayer* and

While the circumstances of *Bayer* involved a federal court injunction against a state court class action, its holding clearly applies more broadly. In *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 852-54 (7th Cir. 2010), for example, the Seventh Circuit had ordered a district court to enjoin another ***federal*** court from considering a successive class action after the first district court denied certification of a similar class. The Supreme Court vacated the Seventh Circuit's ruling and remanded "in light of *Smith v. Bayer Corp.*" *Thorogood v. Sears, Roebuck & Co.*, 131 S. Ct. 3060, 3061 (2011). Relying on *Smith v. Bayer*, the Seventh Circuit ordered the district court to vacate the injunction and permit the successive class action to proceed. *Thorogood v. Sears, Roebuck & Co.*, 678 F.3d 546, 551-52 (7th Cir. 2012). Taken together, *Bayer* and *Thorogood* clearly establish that denial of class certification by one court cannot preclude an absent

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finding tolling permitted in a second class case); *In re Sears, Roebuck & Co.*, No. 05 C 4742, 2011 WL 2745772, at *2-5 (N.D. Ill. July 11, 2011) (relying on *Bayer* and rejecting defendant's request that plaintiffs who were unsuccessful in seeking class certification in prior case be enjoined from seeking class certification in the case before it); *Brown v. Am. Airlines, Inc.*, 285 F.R.D. 546, 552-53 (C.D. Cal. Aug. 29, 2011) (relying on *Bayer* and refusing to find denial of class certification in prior case precluded attempt to certify in pending case); *Mitchell v. Acosta Sales, LLC*, 841 F. Supp. 2d 1105, 1116-17 (C.D. Cal. 2011) (rejecting defendant's argument that conditional certification should be denied because similar class was decertified in one case, and dismissed with prejudice in another case, based on *Bayer*); *Heibel v. U.S. Bank Nat. Ass'n*, 2:11-CV-00593, 2012 WL 4463771, at *4 (S.D. Ohio Sept. 27, 2012) (same); *Thompson v. Northstar Cos.*, No. 10CV1044-BTM (JMA), 2011 U.S. Dist. LEXIS 100830, at *1-3 (S.D. Cal. Sept. 7, 2011) (denying defendant's motion for summary judgment on plaintiff's claim for class certification based on prior denial of class certification in case where plaintiff would have been class member, citing *Bayer*).

member of the failed class from pursuing similar claims in a follow-on subclass action.

2. *Bayer* affirmatively rejects *Andrews*'s concern that class-wide tolling in follow-on class actions would abuse the class action device.

In *Bayer*, the Supreme Court expressly rejected the argument on which this Court relied in *Andrews v. Orr* that allowing absent members of a failed class action to pursue their claims in another class proceeding would constitute an abuse of the class action process. *See Andrews*, 851 F.2d at 149.

The defendant in *Bayer* raised the same risk of "abuse" as grounds to limit absent members of a failed class from pursuing follow-on class actions, but the Supreme Court found it unpersuasive. 131 S. Ct. at 2381. The Court explained that ample protections existed to avoid abuse in follow-on class actions, as "our legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." *Id*. In addition, the Court also cited the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453 (2006 ed. and Supp. III), as well as the availability of consolidated multi-district litigation, as further protections against potential abuse. *Id.* at 2381-82.

Moreover, Justice Powell's concern expressed in *Crown, Cork & Seal*, that the *American Pipe* tolling doctrine was "a generous one, inviting abuse," 462 U.S.

at 354, was directed at an entirely different problem than the one for which the *Andrews* Court cited it. As Justice Powell explained, "[t]he rule should not be read . . . as leaving a plaintiff free to raise different or peripheral claims following denial of class status." *Id.* Thus, the potential for abuse about which Justice Powell was concerned was the risk that members of a failed class might rely upon the original *American Pipe* tolling to bring claims sufficiently different from the gravamen of the originally-framed class action as to exceed the notice that the original action provided the defendant. *Id.* at 354-55. Justice Powell's concern for abuse, therefore, was not directed at the prospect that members of a failed class might rely upon *American Pipe* tolling in a successor class action.

Accordingly, *Smith v. Bayer* supersedes *Andrews v. Orr* to the extent *Andrews* denies to absent members of a failed class action the full opportunity to seek certification of their claims in a subsequent class action by application of preclusion or based on the policy argument that subsequent class cases are abusive. *Bayer* removes the basis for *Andrews*'s conclusion, and thus the conclusion cannot stand.

B. *Shady Grove* bars courts from interposing policies as grounds to deny class certification when the parties' claims have met the requirements of Rule 23.

The Supreme Court's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), provides yet another basis to conclude

that *Andrews v. Orr* has been superseded.

In *Shady Grove*, the Supreme Court ruled that plaintiffs who can pursue their claims individually in the federal courts must be permitted to pursue their claims together as a class action, as long as they can satisfy the requirements of Fed. R. Civ. P. 23. *Id.* at 398. As the Court held, Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," and "provides a one-size-fits-all formula for deciding the class-action question." *Id*. at 398-99. In reaching this decision, the Court rejected a New York statute that authorized the award of punitive damages but only if those invoking the statute refrained from aggregating their claims in the pursuit of a class action. Writing for a Court that was unanimous on this question, Justice Scalia explained that while the statute may have been prompted by sound policy, it cannot impede access to class certification, nor can it override Rule 23's clear text. *Id.* at 403.

The policy underlying the *Andrews* decision, that extension of *American Pipe* tolling to claims pursued in follow-on class actions could permit indefinite extension of the limitations period, can no longer serve as a basis to deny to absent members of a failed class whose individual claims were timely the opportunity to pursue those claims collectively. *Shady Grove* requires that individual members of the failed *Dukes v. Wal-Mart* class be entitled to pursue their claims as a class if they satisfy the requirements of Rule 23, free from any impediments prompted by

policies a court or legislature may interpose to class certification. Like the policy underlying the statute at issue in *Shady Grove* that permitted the award of punitive damages but prohibited class certification to avoid the aggregate financial effect that certification could impose, *Shady Grove*, 559 U.S. at 402-03, the policy underlying *Andrews* here must also accede to the "one-size-fits-all" formula for deciding class certification. By depriving members of the failed *Dukes v. Wal-Mart* class the opportunity to pursue as a class action claims that were timely encompassed within the original failed class action, *Andrews* has interposed an impermissible obstacle to satisfying the "one-size-fits-all" formula for class certification. *Shady Grove* does not permit the denial of *American Pipe* tolling simply because the individuals wish to pursue their claims as a class rather than individually.

Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 560 (7th Cir. 2011) reached this same conclusion. Writing for a unanimous panel, Judge Easterbrook rejected the view that "Rule 23 must be set aside when a suit's timeliness depends on a tolling rule" as it "cannot be reconciled with the Supreme Court's . . . decision in *Shady Grove Orthopedic Associates*, which holds that Rule 23 applies to ***all*** federal civil suits, even if that prevents achieving some other objective that a court thinks valuable." *Id.* at 564 (emphasis supplied). Since then, numerous other courts have followed *Sawyer* in recognizing this impact of *Shady*

Grove. *See, e.g., City Select Auto Sales, Inc. v. David Randall Assocs., Inc.*, CIV.A. 11-2658 JBS, 2012 WL 426267, at *3-4 (D.N.J. Feb. 7, 2012) (citing *Sawyer* and permitting putative class to benefit from tolling based on an earlier case in which class certification was denied as untimely); *Villanueva v. Davis Bancorp, Inc.*, No. 09 CV 7826, 2011 WL 2745936 (N.D. Ill. July 8, 2011) (citing *Sawyer* for the proposition that "the rationale for class action tolling does not depend on whether the first class action was resolved before or after a class was certified"); *Hershey v. Exxon Mobil Oil Corp.*, 278 F.R.D. 617, 621-23 (D. Kan. Dec. 22, 2011) (noting trend in federal courts of allowing members of follow-on class actions to retain their *American Pipe* tolling rights as "reflected in" *Shady Grove*); *In re Toys "R" Us - Delaware, Inc. - Fair & Accurate Credit Transactions Act (FACTA) Litig.*, MDL 08-01980 MMM, 2010 WL 5071073, at *15-16 (C.D. Cal. Aug. 17, 2010) (extending original tolling for claims in successive class actions that were narrower than the claims for which class certification was denied).

Under the combined weight of *Smith v. Bayer* and *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, the holding of *Andrews v. Orr*, that absent members of a failed class action lose their *American Pipe* tolling rights simply because they pursue their claims in another class action rather than individually, cannot stand. Taken together, these holdings in *Bayer* and *Shady Grove* preclude

courts from denying absent members of the original national class in *Dukes v. Wal-Mart Stores, Inc.* the opportunity to pursue their claims in the kind of successor subclass action that was pending below.

C. *American Pipe* and *Crown, Cork* support tolling in follow-on subclass actions.

Even before the Supreme Court decided *Smith v. Bayer* and *Shady Grove*, its decisions in *American Pipe* and *Crown, Cork* strongly supported the relief Plaintiffs seek in this appeal.

Before this Court decided *Andrews*, the Supreme Court twice addressed the tolling rights class members acquire upon commencement of a class action and retain after certification is denied. In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the Court established that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class," and held that absent class members may intervene in an individual action after denial of class certification. *Id.* at 554. Then, in *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983), the Court clarified that *American Pipe* tolling extends beyond those who intervene in the original action. It also permits class members to file new, separate actions after class certification is denied. *Id.* at 353-54. Thus, "[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 intervene as plaintiffs in

the pending action." *Id*. at 354.

Because the plaintiff in *Crown, Cork* filed a new individual action following the court's denial of class certification, the Court did not address whether class members who retain *American Pipe* tolling rights as individuals may pursue their claims in a successive class action. *Id.* at 347. However, the Court's reasoning strongly suggests that the answer is yes.

In addressing the underlying purpose of *American Pipe* tolling, the *Crown, Cork* Court explained that "unless the filing of a class action toll[s] the statute of limitations, potential class members would be induced to file motions to intervene or to join in order to protect themselves against the possibility that certification would be denied." *Id.* at 349. Such an event, the Court worried, would lead to "a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* tolling were designed to avoid." *Id.* at 351. Though *Crown, Cork* only addressed the availability of tolling when a follow-on action is brought individually, its reasoning applies with equal force to follow-on subclass actions.

In her lengthy and thorough opinion, Judge Trauger reached this same conclusion after analyzing these two cases in depth. As Judge Trauger explained: "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." (District Court Memorandum to Order Dismissing Class Claims) (RE 55) (Page ID # 1585).

The Seventh Circuit reached the same conclusion that *American Pipe* tolling should be available to members of follow-on class actions. In *Hemenway v. Peabody Coal Co.*, the Seventh Circuit addressed a mineral lease dispute involving a failed class action suit in Kentucky followed by an overlapping class action filed in Indiana. 159 F.3d 255, 265 (7th Cir. 1998). On appeal, plaintiffs in the Indiana case argued that they should have received the benefit of tolling from the date of filing the earlier Kentucky case, as the plaintiffs were members of the proposed Kentucky class and the applicable Indiana state tolling doctrine mirrored *American Pipe*. *Id.* Although the narrow question before the court was whether Indiana's state tolling doctrine followed *Crown, Cork*, the Seventh Circuit's decision specifically embraced a broad, practical approach to *American Pipe* tolling. In the Seventh Circuit's view, the underlying purpose of such tolling was "to protect reliance interests and dissuade potential plaintiffs from filing a plethora of suits to protect their interests while the chance remains that one suit will be enough." *Id.* at 265.

More recently, district courts within the Seventh Circuit have relied upon *Hemenway* in concluding that *American Pipe* tolling can and should extend to successor class actions. *See Gomez v. St. Vincent Health, Inc.*, 622 F. Supp. 2d

710, 716-723 (S.D. Ind. 2008) (permitting tolling in second class action consistent with reasoning in *American Pipe*); *Ladik v. Wal-Mart Stores, Inc.*, No. 13-cv-123-bbc, 2013 WL 2351866, at *6 (W.D. Wis. May 24, 2013) ("[O]nce a plaintiff has filed a complaint that is timely under *American Pipe*, the tolling issue is resolved, regardless of whether the plaintiff wishes to proceed individually or as a class.").

Accordingly, the provision of *American Pipe* tolling to members of follow-on subclass actions, like the instant case, is consistent with both the *American Pipe* and *Crown, Cork* decisions.

II. THIS COURT'S RECENT AUTHORITY SUPPORTS EXTENSION OF *AMERICAN PIPE* TOLLING TO INDIVIDUALS WHO PURSUE FOLLOW-ON SUBCLASS ACTIONS.

Even if *Andrews v. Orr* remains viable authority, it does not impose a bright-line rule withholding *American Pipe* tolling from all individuals who seek to pursue follow-on claims collectively, as the lower court believed. (District Court Memorandum to Order Dismissing Class Claims) (RE 55) (Page ID # 1573) ("[U]nless this court finds that *Andrews* is no longer good law, the court is constrained to apply the holding in *Andrews* to this case."). Just months after the lower court's dismissal of Plaintiffs' class claims, this Court decided *In re Vertrue Inc. Marketing and Sales Practices Litigation*, 719 F.3d 474 (6th Cir. 2013), which concluded *Andrews* does not withhold *American Pipe* tolling from individuals

pursuing a follow-on class where "no court has definitively ruled on class certification." *Id.* at 479.

In light of this decision, *Andrews* should not extend to the facts of this case. As in *Vertrue*, no court has ever ruled on the subclass that Plaintiffs seek to represent, and the risk of repetitive and indefinite class actions is absent. Accordingly, *Andrews*'s ban precluding *American Pipe* tolling for individuals who seek to pursue their claims in a follow-on class action should not apply here.

A. *In re Vertrue* establishes that *Andrews v. Orr* does not create a bright-line rule.

In *Vertrue*, this Court recently held that *Andrews* ***does not*** categorically preclude *American Pipe* tolling in follow-on class actions. Defendants in that case had moved to dismiss the class claims as untimely—much as Wal-Mart has done here—arguing that *American Pipe* tolling did not apply because an earlier class action, alleging the same claims, had been dismissed. The district court disagreed. *In re Vertrue Marketing and Sales Practices Litigation*, 712 F. Supp. 2d 703, 715 (N.D. Ohio 2010).

On appeal, this Court affirmed the district court's ruling and explicitly held that *Andrews* does not draw a bright-line rule withholding *American Pipe* tolling in all follow-on class actions. *In re Vertrue Inc.*, 719 F.3d at 479. Instead, this Court explained that "we dealt in *Andrews* with a situation in which class certification had already been denied. Here, no court has definitively ruled on class

certification, as the district court dismissed the plaintiffs' actions in *Sanford* [the original class action] before ruling on the plaintiffs' motion for class certification." *Id.* As this Court further recognized, a critical difference between the facts in *Vertrue* and those in *Andrews* was that "no court has definitively ruled on class certification," and, therefore, "the risk motivating our decision in *Andrews*—namely repetitive and indefinite class action lawsuits addressing ***the same claims***—is simply not present here." 719 F.3d at 479-80 (emphasis supplied). That same distinction applies here.

B. In light of *In re Vertrue*, equitable tolling should remain available to members of a follow-on subclass whose particular claims have never been the subject of a prior class certification ruling.

Under *Vertrue*, Plaintiffs in the instant action should be permitted to proceed with their class claims because their class allegations have not been adjudicated by any court. Although the Supreme Court addressed the merits of class certification in *Dukes*, it rejected a class of different scope and terms than the one alleged here and found the **evidence** in that record insufficient to satisfy its interpretation of the Rule 23 requirements. As the Supreme Court explained, the plaintiffs had provided "no convincing proof of a companywide discriminatory pay and promotion policy," and accordingly held that plaintiffs had "not established the existence of any common question." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556-57 (2011). The Court's ruling did not address, and certainly did not

foreclose, certification of claims brought by absent class members challenging policies at the district or regional level that meet the requirements of Rule 23.[4]

In *Andrews*, by contrast, the plaintiffs sought to pursue in a follow-on class action the same claims that the district court had ruled previously were lacking questions common to the proposed class. *Brown v. Orr*, 99 F.R.D. 524, 526-27 (S.D. Ohio 1983). As the Southern District of Ohio explained, the one potentially common question—the existence of a discriminatory promotion test—had already been resolved by an earlier consent decree. *Id.* Accordingly, the district court concluded that "the disparate impact issue would be resolved in any and all further suits by Plaintiffs similarly situated, without the need to establish the prima facie case and, consequently, ***without the need to resort to the class action form of litigation sought herein***." *Id.* at 527 (emphasis supplied). Unlike the *Dukes* decision, which rejected certification of a class because of its scope, the way the claims were framed, and the record there presented, the *Brown* Court found not only that the particular class proposed failed to warrant certification but also that, as a matter of law, the claims presented would not benefit from class certification. *Id.*

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[4] In fact, the *Dukes* opinion specifically left open the possibility that some managers "may be guilty of intentional discrimination that produces a sex-based disparity" at something less than a company-wide level. *Dukes*, 131 S.Ct. at 2554. Further, the Court noted the existence of differing regional policies, further supporting consideration of region-level classes. *Dukes*, 131 S. Ct. at 2557.

This distinction between *Brown* and *Dukes* is critical to the present case. In *Andrews*, extension of *American Pipe* tolling to subsequent class claims would have permitted plaintiffs to relitigate certification of the same question on which *Brown* had ruled. Even though the plaintiff in *Andrews* sought to certify a subclass of *Brown*, allowing the class claims to proceed could have resulted in a certification order directly contradicting the *Brown* Court's holding that there was no need ***at all*** for plaintiffs "to resort to the class action form of litigation." *Brown*, 99 F.R.D. at 527.

Here, as in *Vertrue*, the subsequent class claims do not seek to re-litigate the particular claims on which class certification previously was denied. Rather than seeking to re-litigate certification of the same proposed class that the Supreme Court rejected in *Duke*, the Plaintiffs here have pled claims differing in scope and contours in accord with the legal standards announced by the Court. While challenging the same type of discrimination and its exercise in the same types of personnel policies, therefore, the Plaintiffs advance claims here that differ materially from those that the Supreme Court rejected. Accordingly, the risk of re-litigating the same claims in a successor class proceeding that *Andrews* sought to avoid does not exist here. Therefore, Plaintiffs' class claims should be permitted to proceed.

III. JUDICIAL ECONOMY AND FAIRNESS WARRANT PROVISION OF *AMERICAN PIPE* TOLLING IN FOLLOW-ON SUBCLASS ACTIONS.

The same interests of judicial economy and fairness to the parties that prompted the *American Pipe* doctrine favor extension of the tolling to absent members of the original, failed class who elect to pursue their claims in a follow-on subclass action rather than individually.

A. Provision of tolling in follow-on subclass actions serves the same interests in judicial economy that are served by Rule 23.

As the Supreme Court explained in *American Pipe*, tolling the limitations period of claims for absent members of a putative class upon commencement of the litigation eliminates the incentive for such persons to file protective actions while the court determines whether to certify the putative class. 414 U.S. at 553 (Absent tolling, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable."). This same interest in protecting against duplicative litigation while class certification is determined requires that putative class members retain their tolling rights where, upon denial of certification, they elect to pursue their claims in a follow-on subclass action rather than individually. Otherwise, individual members of putative class actions will be compelled to file protective subclass actions while awaiting adjudication of class certification in the originally-pled case–exactly the result *American Pipe* sought to avoid.

In *American Pipe* and *Crown, Cork*, the Supreme Court sought to prevent the "needless multiplicity of actions" that would occur without extending tolling to the claims of putative class members, at least until class certification is resolved. *See Crown, Cork*, 462 U.S. at 351. As the Court in *American Pipe* warned:

> 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.

American Pipe, 414 U.S. at 553. This Court endorsed the same principle in *Wyser-Pratte Management Co., Inc. v. Telxon Corp.*, 413 F.3d 553 (6th Cir. 2005), when it held that "[t]he 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." *Id.* at 569.

Left undisturbed, the district court's decision runs afoul of *American Pipe* by creating the incentive to file protective subclass actions. All three Plaintiffs could have filed regional class actions 12 years ago when the *Dukes* litigation commenced. (Class Action Complaint) (RE 1) (Page ID # 4). However, such filings would have been needlessly duplicative and would have undermined the interests of judicial economy. The ruling below, however, would prohibit the named Plaintiffs, and those women they seek to represent, from pursuing regional claims whose susceptibility to class certification has ***never*** been adjudicated. *See*

Bayer, 131 S. Ct. at 2380 ("Neither a proposed class action nor a rejected class action may bind nonparties.").

Notwithstanding that the Plaintiffs were entitled to rely upon tolling of their claims from the inception of the *Dukes* litigation in 2001 until the Supreme Court's decision in 2011, and notwithstanding that the Plaintiffs cannot be bound by the Supreme Court's class certification decision, the ruling below deprives the Plaintiffs of the ability to prosecute their claims in a regional follow-on subclass action.

As Judge Trauger explained, the ruling below will bar the Plaintiffs from bringing claims they could have brought in the past, as a direct product of "Supreme Court tolling rules that intentionally discouraged the class plaintiffs from filing additional 'protective' lawsuits to preserve the timeliness of their claims." (District Court Memorandum to Order Dismissing Class Claims) (RE 55) (Page ID # 1588).

A contrary result, however, which permits the Plaintiffs to retain their *American Pipe* tolling rights in pursuit of a follow-on subclass action, would not constitute the abuse of which Justice Powell expressed concern in *Crown, Cork.* 462 U.S. at 354-55. While the claims pled in this action have been recast to satisfy the new legal standards announced by the Supreme Court in *Dukes*, the gravamen remains the same. And the national class pled in *Dukes* encompassed claims

advanced by women within the regional class pled below. As such, the national class case provided *Wal-Mart* with "the essential information necessary to determine both the subject matter and size of the prospective litigation." *Id.* at 355 (quoting *American Pipe*, 414 U.S. at 555). Denying the putative class members their *American Pipe* tolling rights simply because they elected to pursue their claims in a follow-on subclass action rather than individually, therefore, would cause unfairness to the Plaintiffs but not to Wal-Mart.

The ruling at issue here will leave absent class members in future class litigation with the unmistakable message that they should file separate, potentially-viable subclass actions to protect their continued access to *American Pipe* tolling in the event a broader class certification request is later denied.[5]

CONCLUSION

For the reasons stated above, Plaintiffs-Appellants respectfully request that the Court REVERSE the district court's order dismissing their class allegations and REMAND this matter for further proceedings.

[5] As Judge Trauger aptly explained below, denial of certification in an initial case like this one also poses the risk of flooding the court system with thousands of post-denial individual cases that could have been efficiently pursued in a single subclass action but for timeliness. (*See* District Court Memorandum to Order Dismissing Class Claims) (RE 55) (Page ID # 1592-93).

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Respectfully Submitted,

/s/ Scott P. Tift

George E. Barrett
David W. Garrison
Scott P. Tift
Seth M. Hyatt
BARRETT JOHNSTON, LLC
217 Second Avenue North
Nashville, TN 37201
Telephone: (615) 244-2202
Facsimile: (615) 252-3798
gbarrett@barrettjohnston.com
dgarrison@barrettjohnston.com
stift@barrettjohnston.com
shyatt@barrettjohnston.com

Joseph M. Sellers
Christine E. Webber
COHEN MILSTEIN SELLERS & TOLL, PLLC
1100 New York Ave, NW
West Tower, Suite 500
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699
jsellers@cohenmilstein.com
cwebber@cohenmilstein.com

Jocelyn D. Larkin
THE IMPACT FUND
125 University Avenue, Suite 102
Berkeley, CA 94710
Telephone: (510) 845-3473
Facsimile: (510) 845-3645
jlarkin@impactfund.org

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/s/ Scott P. Tift
SCOTT P. TIFT
BARRETT JOHNSTON, LLC

Attorney for Plaintiffs

Dated: November 12, 2013

CERTIFICATE OF SERVICE

In compliance with Fed. R. App. P. 25 and 6th Cir. R. 25, I hereby certify that on this 12th day of November, 2013, I electronically filed with the Clerk's Office of the United States Court of Appeals for the Sixth Circuit this *Brief of Plaintiffs - Appellees*. Notice of this filing will be sent by operation of the Court's electronic filing system to the following counsel of record for the Defendant-Appellee in this matter:

Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071

Rachel Susan Brass
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105

Karl G. Nelson
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201

Mark Andrew Perry
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

/s/ Scott P. Tift
SCOTT P. TIFT
BARRETT JOHNSTON, LLC

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record	Description	Pages
1	Class Action Complaint (Page ID # 1-35)	2, 6, 8, 9, 35
1-1	Phipps Charge of Discrimination (Page ID # 36-38)	6
1-4	Millner Charge of Discrimination (Page ID # 47-49)	6
1-7	Gibbons Charge of Discrimination (Page ID # 57-59)	6
1-9	Northern District of California July 25, 2011 Order (Page ID # 65-67)	5
19	Motion to Dismiss Class Claims (Page ID # 105-107)	6
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56	Order Dismissing Class Claims (Page ID # 1596)	2
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72	Order Certifying February 20, 2013 Order for Review (Page ID # 2388)	3, 7
73	Order Permitting Interlocutory Appeal (Page ID # 2389-2391)	1, 3, 7