No. 20-1434

In The

SUPREME COURT OF THE UNITED STATES

January Term, 2021

Gansevoort Cole, et al.,

Petitioner,

v.

Lancelot Todd,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Counsel for Respondent
Team 30.

November 15, 2021

QUESTIONS PRESENTED

I. Whether a federal court should evaluate personal jurisdiction over Mr. Todd in a class action with respect to the unnamed class members in addition to the named members.

II. Whether personal jurisdiction over Mr. Todd under an alter ego theory for a claim under federal law should be determined by the law of New Tejas, the place of Spicy Cold Foods' incorporation, or federal common law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION

U.S. SUPREME COURT CASES

U.S. COURT OF APPEALS CASES

U.S. DISTRICT COURT CASES

STATUTES

RULES

RESTATEMENT

TREATISES & ARTICLES

STATEMENT OF JURISDICTION

The United States District Court for the District of New Tejas had federal question jurisdiction pursuant to 28 U.S.C. § 1331, based on an alleged violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227. The Court of Appeals for the Thirteenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1292. That final judgment was entered on May 10, 2020. This appeal was timely filed and the Supreme Court of the United States granted a writ of certiorari on October 4, 2021.

STATEMENT OF THE CASE

Respondent Lancelot Todd, a West Dakota resident, is a well-known entrepreneur who promotes various ventures, most notably the Veturra automobile and the Khaki Khomfort Trench Bench. R. at 2a.

In 2015, Mr. Todd acquired the rights to his latest venture, a unique "spicy cold" flavoring of potato chips that causes one's mouth to get cold and go numb upon consumption. *Id.* at 2a. To commercialize this novel idea, Mr. Todd incorporated "Spicy Cold Foods, Inc." ("SCF") in New Tejas but retained its principal–and only–place of business in West Dakota. *Id.* at 2a–3a. Mr. Todd also retained ownership of all the shares of SCF. *Id.* at 2a.

In 2017, in an effort to boost sales of its products via advertising, SCF acquired an automatic telephone dialing system. *Id.* at 3a. To better market its products, SCF began ringing cellular and residential phone lines to deliver a pre-recorded voice message. *Id.* at 3a. The short voice message simply introduced the spicy cold chips to consumers, informed them that they could purchase the chips online, and encouraged them to ask for the chips at their local grocery store. *Id.* at 3a.

Petitioner Gansevoort Cole, a New Tejas resident, alleges that she received a total of ten pre-recorded voice messages on her cellular and residential phone lines. *Id.* at 3a. Petitioner additionally claims that she never consented to receiving any of the telephone calls from SCF. *Id.* at 3a.

In 2018, Petitioner filed suit against Spicy Cold Foods, Inc. and Mr. Todd in the district of New Tejas. *Id.* at 3a. She brought suit on behalf of herself and a class of everyone in the country who had received the aforementioned phone calls from SCF. *Id.* Petitioner alleged that SCF's phone calls to Petitioner and the other members of the class action violated the Telephone Consumer Protection Act ("TCPA"). *Id.*

While it is undisputed that the district court could exercise general jurisdiction over SCF, Petitioner also brings suit against Mr. Todd personally, claiming that he is the "alter ego" of SCF. *Id.* at 4a-5a. At the district court, Petitioner provided two theories of personal jurisdiction over Mr. Todd. *Id.* at 4a. First, she claimed that there was no need to show that the unnamed class members had personal jurisdiction over Mr. Todd, considering that Petitioner herself has personal jurisdiction over Mr. Todd. *Id.* Petitioner further argued that Mr. Todd, under the federal common law test, qualified as the alter ego of SCF. *Id.* at 5a. Because Mr. Todd owns all stock in SCF, operates the company without a board of directors, and has used SCF's bank account for personal expenses, he acknowledges that under Petitioner's federal common law test, he is the alter ego of SCF. *Id.*

In response to both theories, however, Mr. Todd denies that there is personal jurisdiction over him personally. *Id.* at 4a, 6a. Mr. Todd moved to strike the class allegations against himself, arguing that he is only subject to general jurisdiction in West Dakota, his domicile, and the district court only had personal jurisdiction over him with respect to the claims of New Tejas residents. *Id.* at 4a. As such, there is no

personal jurisdiction against Mr. Todd for the claims of class members from other states besides New Tejas. *Id.* In addition, Mr. Todd alleges that the alter ego for SCF should be identified under the law of New Tejas, not federal common law. *Id.* at 6a.

New Tejas has a stricter standard for "peirc[ing] the corporate veil." *Id.* at 5a. As held by the New Tejas Supreme Court, under New Tejas law, in order to treat a corporation as the alter ego of a subsidiary, the corporation must "have been incorporated for the specific purpose of defrauding a specific individual." *Id.* at 6a. This law was enacted by the New Tejas legislature in an effort to attract more businesses to the state. *See id.* Petitioner acknowledges that under this standard, Mr. Todd is not the alter ego of SCF. *Id.*

The district court rejected Petitioner's arguments and struck the class allegations of out-of-state class members against Mr. Todd. *Id.* at 7a. Petitioner filed a petition for interlocutory appeal with the United States Court of Appeals for the Thirteenth Circuit. *Id.* A motions panel of the Thirteenth Circuit treated the district court's order as one denying class certification and granted the petition as an interlocutory appeal. *Id.* The Thirteenth Circuit affirmed the district court's finding that there was not personal jurisdiction over Mr. Todd and that Mr. Todd was not the alter ego of SCF. *Id.* at 16a. Petitioner appealed, and this Court granted her Writ of Certiorari on October 4, 2021. *Id.* at 1.

SUMMARY OF ARGUMENT

The Court must consider unnamed members of a class when determining if a court has personal jurisdiction over Mr. Todd. In *Bristol-Myers Squibb v. Superior Court*, this Court recently held that a court does not have personal jurisdiction over a defendant for non-residents' claims that arose outside the forum; to do so would violate a defendant's due process rights. 137 S. Ct. 1773, 1782 (2017). While that case did not discuss class actions, there is no meaningful distinction between mass tort actions and class actions, as the focus of personal jurisdiction is on the specific claims and not the character of the parties. To interpret the Federal Rules of Civil Procedure to empower a court to exercise personal jurisdiction over a defendant based on only the form of the action would abridge that defendant's due process rights, violating both the Rules Enabling Act and the constitutional requirements of Article III.

Furthermore, this Court should consider the issue of alter ego under the state law of New Tejas, the state of Spicy Cold Foods' incorporation, not under an amorphous federal common law standard. First, this Court's jurisprudence, as well as the Federal Rules of Civil Procedure, often require federal courts to apply state law for questions of a federal court's personal jurisdiction over a party. While New Tejas' long-arm statute reaches the constitutional limits for personal jurisdiction, New Tejas' approach to alter ego is far narrower than the federal common law standard. Second, under federal choice-of-law principles, it is clear that the state interests of New Tejas are far stronger than the limited federal interests involved in

this particular issue. Finally, the federal common law standard for alter ego does not preempt the state law of New Tejas, because there is no relevant federal statute on alter ego law, Congress has left room for states to govern in the context of the Telephone Consumer Protection Act (TCPA), and New Tejas's alter ego law does not obstruct or conflict with the Congressional purposes behind the TCPA.

ARGUMENT

I. THE COURT MUST CONSIDER UNNAMED MEMBERS OF A CLASS WHEN DETERMINING IF A FEDERAL COURT HAS PERSONAL JURISDICTION OVER A DEFENDANT.

When determining whether a court has personal jurisdiction over Mr. Todd, that court must consider unnamed members of a class. In this case, the United States District Court for the District of New Tejas has personal jurisdiction over the defendant with respect to Petitioner's claim, as well as the claims of other New Tejas residents. However, the district court does not have personal jurisdiction over the defendant with respect to the unnamed class members' claims who are not New Tejas residents.

Federal courts typically follow state law when determining its jurisdiction over the parties. *See Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014); Fed. R. Civ. P. 4(k)(1)(A).[1] The New Tejas long-arm statute authorizes the exercise of personal jurisdiction to the outer bounds of what is permitted under the Constitution. R. at 8a. Therefore, personal jurisdiction must be exercised in a manner consistent with due process. *Daimler*, 571 U.S. at 125.

To comport with the requirements of due process, a court may exercise personal jurisdiction over a defendant when it has either general or specific jurisdiction. General jurisdiction exists when a defendant is at-home in the forum state. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011).

[1] While the Fifth Amendment places due process limits on a federal court's personal jurisdiction, Rule 4(k)(1)(A) incorporates the Fourteenth Amendment and its due process protections so state law and the Fourteenth Amendment must be considered when determining personal jurisdiction. *Lyngaas v. Curaden AG*, 992 F.3d 412, 438-39 (6th Cir. 2021) (Thapar, J., dissenting).

An individual is at home in the state where they keep their domicile, while a corporation is at home in the state of incorporation or in the state of its principal place of business. *Id.* Specific jurisdiction exists when the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 923 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). In this case, Respondent keeps his domicile in West Dakota, so the district court must have specific jurisdiction. R. at 2a.

Recently, this Court clarified the specific jurisdiction standard in the mass action context in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. at 1781. In that case, over six-hundred plaintiffs filed suit against the defendant in California, but most of the plaintiffs had no connection to California. *Id.* at 1777. This Court held that the California court did not have specific jurisdiction over the non-residents' claims. *Id.* at 1782. In reaching that holding, this Court reiterated the longstanding principle that a court can only exercise specific jurisdiction over a suit if it "'aris[es] out of or relat[es] to the defendant's contacts with the forum,'" *id.* at 1781 (quoting *Daimler*, 571 U.S. at 118), and that "a defendant's relationship with . . . a third party, standing alone, is an insufficient basis for jurisdiction." *Id.* (quoting *Walden v. Fiore*, 571 U.S. 277, 286 (2014)). This Court stressed that in order for a court to have personal jurisdiction, there must be "a connection between the forum and the specific claims at issue." *Id.*

In a footnote to the dissenting opinion, Justice Sotomayor highlighted the fact that this Court's holding in *Bristol-Myers Squibb* did not address the same issue for a nationwide class action with class members who were not injured in the forum state. *Id.* at 1789, n.4 (Sotomayor, J., dissenting). Because of this, lower courts have debated whether that holding applies in national class actions where there are unnamed, non-resident class members. *See, e.g.*, *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 445 (7th Cir. 2020); *Practice Mgmt. Support Servs. v. Cirque Du Soleil, Inc.*, 301 F. Supp. 3d 840, 846 (N.D. Ill. 2018). At the same time, other courts have refused to directly address the issue, delaying the question until after class certification, *see, e.g.*, *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 296 (D.C. Cir. 2020). However, this Court's holding in *Bristol-Myers Squibb* – that due process limits a court's power to exercise personal jurisdiction over an out-of-state defendant for claims that are unconnected to that state – must apply when there are unnamed, non-resident members of a class action.

A. Both precedent and the requirements of due process require that *Bristol-Myers Squibb* apply in cases with absent class members.

Based on this Court's precedent and the requirements of due process, *Bristol-Myers Squibb* must apply in class actions where there are unnamed, non-resident class members. *Bristol-Myers Squibb*, 137 S. Ct. at 1783; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808-12 (1985). This Court has made it clear that a third-party's relationship with the defendant is insufficient to establish a court's personal jurisdiction, even when third-parties have similar claims to a plaintiff. *Bristol-Myers Squibb*, 137 S. Ct. at 1781; *Walden*, 571 U.S. at 286. Not applying *Bristol-*

Myers Squibb in this case and other cases of its kind would deprive Respondent and other defendants of their due process rights.

There are three reasons *Bristol-Myers Squibb* must apply in cases like this. First, there is no meaningful distinction between mass actions and class actions that would preclude its application. *See Molock*, 952 F.3d at 306 (Silberman, J., dissenting). Second, the Federal Rules of Civil Procedure cannot abridge Respondent's due process rights. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 613 (1997). Third, a court may not exercise power beyond the limits of Article III and grant a judgment to an unnamed plaintiff it otherwise could not. *Cf Molock v. Whole Foods Mkt. Grp., Inc.*, 297 F. Supp. 3d 114, 124–26 (D.D.C. 2018).

1. Bristol-Myers Squibb applies to both mass actions and class actions.

There is no meaningful distinction between mass tort actions and class actions that would preclude applying *Bristol-Myers Squibb* to class actions. While this Court decided *Bristol-Myers Squibb* in the mass action context, that is not dispositive. Both mass actions and class actions are types of joinder "which 'merely enable[] a federal court to adjudicate claims of multiple parties at once, instead of in separate suits.'" *Molock*, 952 F.3d at 306 (Silberman, J., dissenting) (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion)). Nothing in the Court's opinion distinguishes a class action from a mass action, beyond a footnote in the dissent. *Cf. Bristol-Myers Squibb*, 137 S. Ct. at 1789, n.4 (Sotomayor, J., dissenting). In the majority opinion, the Court never distinguished *Shutts* from *Bristol-Myers Squibb* because it was a class action;

rather the Court distinguished *Shutts* because that case "concerned the due process rights of *plaintiffs*," not of defendants. *Id.* at 1783 (emphasis in original). The Court's analysis focused on the fact that personal jurisdiction must be satisfied for the "specific claims at issue," and that applies in both the mass action and class action context. *See id.* at 1781.

Additionally, that analysis also precludes the argument that absent class members are not considered parties. *See Molock*, 952 F.3d at 306 (Silberman, J. dissenting). Some courts have relied on *Devlin v. Scardelletti*, *see, e.g*, *id.* at 295; *Lyngaas*, 992 F.3d at 437, which held that in class actions, absent class members are parties for some purposes, such as appealing a decision, and not others, including venue and subject matter jurisdiction, *Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2002). But again, the key question a court must answer when determining whether it has personal jurisdiction over a defendant is whether there is personal jurisdiction for the "specific claims at issue." *Bristol-Myers Squibb*, 137 S. Ct. at 1781. The inquiry does not turn on party status of absent class members; it turns on whether a defendant is subject to a court's power for the specific claims. *See id.*

In this case, it is clear that Respondent is subject to the New Tejas District Court's power for the claims of Petitioner and other New Tejas residents. *See* R. at 4a. However, there is no connection between the unnamed members' claims and New Tejas. These absent class members are not residents of New Tejas, they did not receive calls from New Tejas, they did not receive calls while in New Tejas, nor do they have any connection to Respondent's actions in New Tejas. This situation does

not change, regardless of whether they bring their claim in a mass action or in a class action – the absent class members do not have a connection to the forum to give rise to personal jurisdiction.

2. The Federal Rules of Civil Procedure cannot abridge a defendant's due process rights.

The Federal Rules of Civil Procedure cannot abridge a defendant's due process rights. As federal rules, Rule 4 and Rule 23 must be interpreted to keep with the Rules Enabling Act. *See Amchem Prods.*, 521 U.S. at 613. The Rules Enabling Act provides that the federal rules of practice and procedure "shall not abridge, enlarge or modify any substantive right," which includes a defendant's due process rights. 28 U.S.C. § 2072(b). Courts have held that the Due Process Clause prevents "nonresident plaintiffs injured outside the forum from aggregating their claims with an in-forum resident." *Practice Mgmt. Support Servs*, 301 F. Supp. at 861.

This Court's precedent has firmly established that to comply with the Rules Enabling Act, a rule "must 'really regulat[e] procedure, – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress. . . .'" *Shady Grove Orthopedic Assocs. P.A.*, 559 U.S. at 406. While the Court has never upheld a statutory challenge to the federal rules, the rules must be interpreted to comply with the Rules Enabling Act. *See id.* In this case, this prevents the district court from exercising personal jurisdiction over Respondent with respect to the absent class members. Respondent's due process interest here is the same as the pharmaceutical company in *Bristol-Myers*

Squibb. *See* 137 S. Ct. at 1781. Regardless of the type of action – individual, mass, or class – the "constitutional requirements of due process do[] not wax and wane." *In re Dental Supplies Antitrust Litig.*, No. 16-CIV-696-BMC-GRB, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017).

While some courts that have addressed this absent class member issue have interpreted the Federal Rules of Civil Procedure to authorize personal jurisdiction, they are mistaken. *See Mussat*, 953 F.3d at 448. In *Mussat v. IQVIA, Inc.*, the United States Court of Appeals for the Seventh Circuit held the district court did not need to consider the absent class members for personal jurisdiction purposes. *Id.* In reaching this decision, that court reasoned that the absent class members were not parties, looking to the statutes governing subject matter jurisdiction and venue. *Id.* at 447 (citing 28 U.S.C. §1332; 28 U.S.C. §1367; 49 U.S.C. §16(4)). However, unlike subject matter jurisdiction and venue, personal jurisdiction is not governed by statute. *Cf. id.* at 448. Personal jurisdiction is governed by the Federal Rules of Civil Procedure and limited by due process. *See Bristol-Myers Squibb*, 137 S. Ct. at 1781; FED. R. CIV. P. 4(k). In *Mussat*, that court erred when it interpreted the Federal Rules of Civil Procedure to permit the district court to exercise personal jurisdiction over the defendant; with this holding, the court interpreted the Federal Rules in a way that abridged the defendant's due process right in violation of the Rules Enabling Act. *Cf. Mussat*, 953 F.3d at 448. While Congress could authorize a federal court to exercise specific personal jurisdiction over the absent members'

claims, it has not and until it does, the courts may not interpret the Federal Rules to do so. *See Molock*, 952 F.3d at 308.

Rule 4(k) governs service of process and provides that "serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." FED. R. CIV. P. 4(k)(1)(A). This rule explains the limits on federal courts to adjudicate claims; a court may not exercise personal jurisdiction over a defendant who could not be sued by the plaintiffs in the state where the court is located. *See id.* This limitation is not an independent limitation on a court's power, *see* FED. R. CIV. P. 82, rather, it is an application of due process. Due process requires that a court cannot adjudicate claims against an out-of-state defendant for claims that are unconnected to the state and personal jurisdiction protects a defendant's due process rights, *see Bristol-Myers Squibb*, 137 S. Ct. at 1781. To interpret Rule 4 otherwise would authorize federal courts to hear claims they could not hear, which would abridge a defendant's due process rights in violation of the Rules Enabling Act.

Additionally, Rule 23, which governs class actions, cannot be interpreted to expand a federal court's jurisdiction and to abridge a defendant's due process rights. *See* 28 U.S.C. § 2072(b); FED. R. CIV. P. 82. Rule 23 focuses on the relationship between the named class representative and the other members of the class. *See* FED. R. CIV. P. 23; *Molock*, 952 F.3d at 307. The rule requires the claims of the named representative and the absent members to share common claims; nothing in

the text of the rule changes personal jurisdiction requirements. *See* FED. R. CIV. P. 23. To interpret Rule 23 to relax personal jurisdiction standards simply because the plaintiffs have similar claims would violate the Rules Enabling Act and would fly in the face of this Court's precedent. This Court was clear in *Bristol-Myers Squibb* that mere similarity of the claims did not give the lower court the power to exercise personal jurisdiction; to hold otherwise would violate the defendant's due process rights. 137 S. Ct. at 1779-81. Ignoring the dictates of due process in favor of Rule 23's convenience would violate the Rules Enabling Act.

3. Exercising personal jurisdiction over the claims of absent class members would impermissibly expand Article III.

Permitting courts to exercise personal jurisdiction over claims unconnected to the forum state would expand Article III beyond its limits. This Court's recent holding in *TransUnion LLC v. Ramirez* established that, in a class action, "every class member must have Article III standing in order to recover individual damages." 141 S. Ct. 2190, 2208 (2021). In reaching its holding, the Court explained "that federal courts exercise 'their proper function in a limited and separated government.'" *Id.* at 2203 (quoting John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1224 (1993)). While not directly analogous to standing, personal jurisdiction is similar; in both instances, the courts must evaluate each claim to determine if it can exercise its power over the parties. *Cf. id.* And both standing and personal jurisdiction are similar because mere commonality of the claims of the resident class members and the absent class

members is not enough to create standing or personal jurisdiction. *See id.* at 2212; *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

In this case, it would be improper for the court to exercise its power over Respondent for claims without a connection to the forum state. To do so would permit an unnamed plaintiff to obtain a judgment in a court they would be unable to obtain a judgment from as a named plaintiff. *See Molock*, 297 F. Supp. At 124-26. The only justification is the convenience of the class action form, but that does not permit a court to exercise power beyond its constitutional limits. Courts must exercise their power in accordance with Article III, and here, Article III requires that the district court have personal jurisdiction over Mr. Todd for each specific claim. Without personal jurisdiction, the court may not constitutionally adjudicate those claims.

B. Courts may address the personal jurisdiction issue before class certification.

It is appropriate for courts to address personal jurisdiction before certifying a class. At least two circuit courts that have addressed personal jurisdiction over absent class members have avoided the issue on the basis that jurisdiction should not be addressed before class certification. *See Molock*, 952 F.3d at 296-99; *Crusson v. Jackson National Life Ins. Co.*, 954 F.3d 240, 250-51 (5th Cir. 2020). These courts have focused on distinctions between non-parties and parties, while ignoring the requirements that jurisdictional issues be raised at the earliest opportunity. *See Molock*, 952 F.3d at 298, 303-04.

In *Molock v. Whole Foods Market Group*, the D.C. Circuit Court of Appeals held that the defendant could not raise the personal jurisdiction issue before class certification. *Id.* at 300. First, the court explained that unnamed class members are not considered parties until class certification and that until a class is certified, due process protections limiting the court's exercise of personal jurisdiction are not triggered. *Id.* at 297. Second, the court pointed to this Court's holding in *Amchem Products v. Windsor*, explaining that jurisdictional issues cannot be decided until after class certification. *Id.* at 298 (citing *Amchem Prods., Inc*, 521 U.S. at 612-13). Similarly, In *Crusson v. Jackson National Insurance Co*, the Fifth Circuit held that the personal jurisdiction objection to the unnamed class members "was not available" until class certification. 954 F.3d at 250-51.

However, the courts' reliance on party status and the D.C. Circuit's reliance on *Amchem Products* is misplaced. As discussed earlier in this brief, personal jurisdiction is based on the specific claims, rather than party status. *Molock*, 952 F.3d at 307. While *Amchem Products* did hold that it was appropriate to address certification before standing in that case, the Court explained that in some cases, "jurisdictional issues would loom larger." *Amchem Prods., Inc.*, 521 U.S. at 613, n.15. Because the Court highlighted that there are instances where the jurisdictional issues should be decided before certification, *Amchem Products* does not create a *per se* rule that certification issues must be decided before jurisdiction. *Id.* at 612-13. Furthermore, nothing in the Federal Rules of Civil Procedure permits parties or the courts to defer issues of personal jurisdiction until class certification.

See, e.g., FED. R. CIV. P. 12(h). Federal Rule of Civil Procedure 12 provides that if a party does not raise the lack of personal jurisdiction in its responsive pleading, it waives consideration of the issue. *Id.*

In this case, Mr. Todd timely raised a personal jurisdiction defense in his motion to strike. R. at 4a. The issue is not about the party status of the unnamed class members Petitioner purports to represent, rather it is about whether the District Court for New Tejas has jurisdiction over the specific claims of unnamed class members with no connection to New Tejas. There is no reason to require the district court to continue to handle this case when it is clear that the court cannot exercise personal jurisdiction over Mr. Todd with regards to the non-resident, unnamed class members. To require the court to deny Mr. Todd's motion to strike, to certify the class, and then to readdress the personal jurisdiction issue, just to decide there is no personal jurisdiction, is a waste of the court's and the parties' resources. Beyond that, it would be improper for the court to exercise jurisdiction over a claim it lacks the authority to adjudicate, as it would violate Mr. Todd's constitutional rights.

II. ALTER EGO SHOULD BE DETERMINED BY THE LAW OF THE STATE OF INCORPORATION.

This Court should hold that the alter ego of Spicy Cold Foods, Inc. ("SCF") should be determined under the law of New Tejas, not under the federal common law test rejected by the Thirteenth Circuit Court of Appeals. State law provides the proper test for alter ego in this case for two reasons: (1) under a choice-of-law analysis, the law of the state of incorporation, New Tejas, is more appropriate for

determining a federal court's personal jurisdiction over SCF's alleged alter ego; and (2) the proposed federal common law test does not preempt the state law of New Tejas regarding jurisdiction over a corporation's alter ego. It would be not only unnecessary, but also inappropriate to apply federal common law to the question of personal jurisdiction over a New Tejas corporation, particularly where the issue of jurisdiction is not essential to the application of the relevant federal statute, and where the law of the state of incorporation differs greatly from the proposed federal common law test for jurisdiction. There are important state interests implicated by piercing the corporate veil in the case, while federal interests in this case are minimal and inferior to those of New Tejas. For these reasons, this Court should follow the decisions of the Fourth, Ninth, and Federal Circuits and apply state law for consideration of piercing the corporate veil for jurisdictional purposes.

A. Under federal choice-of-law rules, New Tejas state law should govern the determination of whether Mr. Todd is the alter ego of SCF for the purpose of personal jurisdiction.

There is only one state whose law could determine the proper alter ego test to apply in this case, but a potential conflict-of-law exists between the law of New Tejas and the federal common law proposed by Petitioner. Specifically, the question presented by this case is whether to apply the alter ego test required under the law of New Tejas, the state of incorporation, or the alter ego test used in federal common law. The appropriate solution, given choice-of-law principles and considerations of vertical uniformity, is to apply the law of the state of incorporation, New Tejas.

Petitioner's claim against SCF, and allegedly Mr. Todd, arises under federal law, the particular law being the Telephone Consumer Protection Act. Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. SCF is incorporated in New Tejas, and the law of the state of incorporation usually determines when a court may pierce the corporate veil. 1 Fletcher Cyc. Corp. § 41.90. However, when a federal interest is implicated by the decision of whether to pierce the corporate veil, most prominently in federal question cases, federal courts sometimes look to federal choice-of-law principles to choose between state and federal common law. *Brotherhood of Locomotive Eng'rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 25 (1st Cir. 2000); *see also Tomlinson v. Combined Underwriters Life Ins. Co.*, No. 08-CV-259-TCK-FHM, 2009 WL 2601940, at *2 (N.D. Okla. Aug. 21, 2009); *In re Melo*, No. 17-43644-BDL, 2019 WL 2588287, at *5 (Bankr. W.D. Wash. June 21, 2019). As the Thirteenth Circuit explained, federal courts have adopted the Restatement (Second) of Conflict of Law for choice-of-law issues involving federal common law. *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006); R. at 15a.

In accordance with this Court's precedent and the Federal Rules of Civil Procedure, state law generally governs a federal court's personal jurisdiction over a private party. Further, applying the Restatement (Second) demonstrates that the law of the state of incorporation should guide the determination of personal jurisdiction over SCF's alleged alter ego, not federal common law. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAW §§ 302, 307 (1971).

1. *The Federal Rules of Civil Procedure and this Court's jurisprudence direct federal courts to apply New Tejas law to determine general personal jurisdiction.*

This Court should apply New Tejas' alter ego test to determine whether or not a federal court in New Tejas has general personal jurisdiction over Mr. Todd as an alter ego of SCF. Under the Federal Rules of Civil Procedure, federal courts can serve a summons to establish personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." FED. R. CIV. P. 4(k)(1)(A). "Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Daimler*, 571 U.S. at 125. New Tejas' long-arm statute reaches the outer bounds allowed by the U.S. Constitution, R. at 8a, but New Tejas' state law also dictates when a court has personal jurisdiction over the alter ego of a corporation, *id.* at 12a. This Court has held that state law governs personal jurisdiction and certain other rights of parties in claims in federal court. *See, e.g.*, *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98-99 (1991) (explaining need to incorporate state law into federal common law in certain areas of law like corporate law). Therefore, given that New Tejas is both the state of incorporation and the forum in which the district court sits, this Court should follow New Tejas law in determining whether general personal jurisdiction exists over Mr. Todd as the alter ego of SCF.

In *Kamen v. Kemper Financial Services*, this Court articulated the presumption that federal courts incorporate state law into federal common law, "particularly . . . in areas in which private parties have entered into legal

relationships with the expectation that their rights and obligations would be governed by state-law relationships." *Id.* at 98. While that case did not specifically deal with jurisdictional corporate veil piercing, the principles articulated in *Kamen* apply to this case as well. *See id.* Corporations expect that "their rights and obligations [will] be governed by state-law relationships," *id.*, and whether or not an individual or stakeholder qualifies as the alter ego of that corporation certainly affects the rights and obligations inherent in that state-law relationship. *See id.* With this in mind, it is clear why other federal courts have applied state law to the specific issue raised in this case.

In *Systems Division, Inc. v. Teknek Electronics*, the Federal Circuit applied state law in determining whether the court had jurisdiction over the corporation's alter ego. 253 Fed. Appx. 31, 35 (Fed. Cir. 2007). The case was clearly a federal question case, since the underlying law was patent law, and federal courts have exclusive jurisdiction over patent cases. *Id.* However, the court applied the law of the state of incorporation when deciding whether to pierce the corporate veil and add another entity as a party as the alter ego of the corporation. *See id.* at 37.

Following in the Federal Circuit's footsteps, the District of Colorado similarly applied state law to the jurisdictional question of alter ego. *BASF Corp. v. Willowood, LLC*, 359 F. Supp. 3d 1018, 1025 (D. Colo. 2019). In *BASF Corporation v. Willowood, LLC*, the court determined that while personal jurisdiction should ultimately be determined by Federal Circuit law in a patent case, state law should govern the question of "whether an alter ego relationship exists." *Id.* The underlying

cause of action was Defendants' alleged violation of two patents, and so the case arose under federal law. *Id.* As a result, there was an important federal interest in determining whether there was personal jurisdiction over a defendant's potential alter ego who violated a patent. *See id.* at 1025. Despite this federal interest in personal jurisdiction, the court applied Colorado law to the question of alter ego. *See id.*

The decisions in these cases reflect a common trend among federal courts to apply state law to questions of jurisdiction over corporate alter egos, and even jurisdiction generally. *See* King Fung Tsang, The Interdependence of Conflict of Laws and Piercing the Corporate Veil at 167 (2016) (S.J.D. dissertation, Georgetown University Law Center) (on file at the Georgetown University Library); *see also Williams v. Yamaha Motor Co.*, 851 F.3d 1015 (9th Cir. 2017) (explaining that "[f]ederal courts apply state law to determine the bounds of their jurisdiction over a party"); *Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 433 (4th Cir. 2011) (applying Virginia alter ego test in case arising under federal statute); *Iconlab, Inc. v. Bausch Health Cos.*, 828 Fed. Appx. 363, 364 (9th Cir. 2020) ("We apply state law to questions of jurisdiction."). This Court has even approved of similar practices when federal rules might conflict with state approaches. *See Kamen*, 500 U.S. at 98-99. With that presumption in mind, application of federal choice-of-law principles reveals that the law of the state of incorporation, which is here the forum state, should be used when piercing the corporate veil to establish personal jurisdiction over a corporation's alter ego.

In this case, Petitioner seeks to apply a federal common law test for alter ego. R. at 5a. The applicable law, however, is that of the state of incorporation, and so the district court should apply the New Tejas alter ego test. *Id.* at 6a. The New Tejas test requires that the company in question have been incorporated for the specific purpose of defrauding a specific individual. *Id.* The federal common law test, however, requires: "(1) that there [be] such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice." *Anwar v. Dow Chem. Co.*, 876 F.3d 841, 849 (6th Cir. 2017) (quoting *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1073 (9th Cir. 2015)). Because both parties concede that they would lose under the other party's proposed test, the only issue is which test should be applied to establish personal jurisdiction. R. at 6a. But specifically because each party loses under the other party's proposed test, the choice-of-law in this case is vital to the outcome of the test. *See id.*

While the law underlying Petitioner's claim is a federal statute, the precise legal issue in question is entirely unconnected to the substance of the TCPA. *See* 47 U.S.C. § 227. Rather, the legal question presented is whether the district court can pierce the corporate veil in order to establish personal jurisdiction. Whether or not the court could pierce the veil in order to establish liability for the corporate alter ego is arguably a separate question that need not be addressed in a discussion solely concerning jurisdiction. *Tsang*, *supra* at 98 (Georgetown University Law Center). A federal court's personal jurisdiction over defendants is guided by state law, and while the New Tejas long-arm statute reaches the outer bounds of

constitutional permissibility, the New Tejas alter ego test imposes a very specific restriction on personal jurisdiction. It then makes sense to consider and apply all elements of New Tejas' jurisdictional law, thereby treating the New Tejas corporation the same way in federal courts as it would have been treated in a state court. This approach not only accords with this Court's approach to personal jurisdiction, *see Daimler*, 571 U.S. at 125, but it also upholds vertical uniformity between state and federal courts in New Tejas and discourages forum shopping.

2. The state of incorporation, New Tejas, has the most significant relationship with the issue of jurisdictional corporate veil piercing.

Applying federal choice-of-law rules, namely the Restatement (Second) of Conflict of Law, this Court should choose the law of New Tejas to govern the test for a corporation's alter ego. The Restatement (Second) states that "[i]ssues involving the rights and liabilities of a corporation . . . are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6." RESTATEMENT (SECOND) OF CONFLICT OF LAW § 302(1).[2] Further, the law of "the state of incorporation will be applied to determine the existence and extent of a

[2] Under § 6 of the Restatement (Second) of Conflict of Law, when there is no statutory directive for choice-of-law,

> the factors relevant to the choice of the applicable rule of law include[:] (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAW § 6(2).

shareholder's liability to the corporation for assessments or contributions and to its creditors for corporate debts." *Id.* § 307. Given these considerations, a federal court should only consider applying federal common law to jurisdictional veil piercing "when a federal interest is implicated by the decision of whether to pierce the corporate veil." *Flynn v. Greg Anthony Constr. Co.*, 95 Fed. Appx. 726, 732 (6th Cir. 2003) (citing *United States v. Pena*, 731 F.2d 8, 12 (D.C. Cir. 1984)). When considering both federal interests and the interests of the state and corporation, the proper choice-of-law decision is to choose the alter ego test of New Tejas.

While the precedent on this particular legal issue is sparse, federal courts have analyzed federal interests in determining whether to apply federal common law or state law to corporate alter egos. In *Enterprise Group Planning v. Falba*, the Sixth Circuit applied "choice of law principles . . . derived from federal common law" and analyzed the "significant contacts" in the case, using language similar to that of the Restatement (Second). 1995 U.S. App. LEXIS 38844 at *6 (6th Cir. 1995). The insurance plan at issue was drafted, approved by, administered in, and executed in the state of Ohio, presenting significant contacts to the state. The underlying claim arose under federal law, but the court applied state law given the significant connection between the state insurance law issue and the state of Ohio. *Id.* at *5–6.

The First Circuit applied similar principles when analyzing federal interests in a labor case arising under the federal Railway Labor Act. *Brotherhood of Locomotive Eng'rs*, 210 F.3d at 25–26. The court first established that federal choice-of-law principles applied. *Id.* at 25. Then, the court examined whether or not

the federal statute at issue "demand[ed] national uniformity." *Id.* at 26. Because labor law has unique considerations relating to collective bargaining agreements, potentially with companies in different states, there is a valid federal interest in uniformity for veil-piercing. *Id.* The court, therefore, held that federal common law should apply for veil-piercing. *Id.*

Absent such a significant federal interest, federal courts have applied state law to veil-piercing problems. In *In re Melo*, the United States Bankruptcy Court for the Western District of Washington interpreted § 307 as requiring "that claims to impose corporate liability on shareholders should be determined by the law of the state of incorporation of the relevant corporate entity." 2019 WL 2588287, at *5; *see also Tomlinson*, 2009 WL 2601940, at *2 (finding § 307 of Restatement (Second) of Conflict of Law to require application of state law for an alter ego question). That court then concluded that Washington state law "should govern the alter ego determination." *In re Melo*, 2019 WL 2588287, at *5. The Second Circuit Court of Appeals also cited § 307 in holding that state law should guide the veil-piercing inquiry, since states have a "greater interest in determining when and if" to pierce the corporate veil. *Kalb, Voorhis & Co. v. American Financial Corp.*, 8 F.3d 130, 132 (2d Cir. 1993) (quoting *Soviet Pan Am Travel Effort v. Travel Comm., Inc.*, 756 F. Supp. 126, 131 (S.D.N.Y. 1991)).

Looking at this case, the facts fail to show a significant federal interest that overrides the state's interest in governing stakeholder liability for New Tejas corporations. *See Kalb*, 8 F.3d at 132. This Court articulated the purpose behind the

TCPA in *Barr v. American Association of Political Consultants*. 140 S. Ct. 2335, 2344 (2020). The TCPA was designed to protect consumer privacy and prevent the nuisance of robocalls in the face of new technology that allowed telemarketers to send out mass automated marketing calls. *Id.* at 2344. Whether or not a federal court can pierce the corporate veil and assert personal jurisdiction over a corporate alter ego has little to do with the overriding purpose of the TCPA. *See id.* Whether or not there is jurisdiction over Mr. Todd, there is personal jurisdiction over SCF, the alleged wrongdoer. Piercing the corporate veil might increase the scope of liability, but this could be said about any number of liability-increasing measures, making the federal interest here minimal without greater justification for why piercing the corporate veil is necessary to effectuate the goal of the TCPA. This is particularly true when one compares that federal interest with the state interests in governing the internal affairs and corporate structure of New Tejas corporations.

This Court has already held that there is a strong presumption that state law governs issues of corporate law. *Kamen*, 500 U.S. at 98–99. Corporate parties that enter into legal relationships governed by state law reasonably expect that their liability will be governed by the law of the state of incorporation. *See Edgar v. Mite Corp.*, 457 U.S. 624, 645 (1982); Restatement (Second) of Conflict of Law § 302. It is for this reason that the "internal affairs doctrine" exists, encouraging courts to apply only state law when regulating a corporation's internal affairs, because to do otherwise risks the creation of conflicting demands on corporations. *Edgar*, 457 U.S. at 645; *see also* Restatement (Second) of Conflict of Law § 6(2)(f) ("[T]he factors

relevant to the choice of the applicable rule of law include[:] . . . (f) certainty, predictability and uniformity of result . . . ."). Choosing the law of New Tejas for the appropriate alter ego test respects the expectations of the parties, and guarantees a greater predictability of results, particularly for the shareholder in question, Mr. Todd. Restatement (Second) of Conflict of Law § 6(2). Even if the question is simply jurisdiction, as it is in this case, whether a shareholder is subject to personal jurisdiction in any court where the corporation as a whole is subject to personal jurisdiction drastically affects that individual's rights and personal exposure to liability.

A significant federal interest warranting the application of federal common law over state law is not present here, and state and corporate interests in applying state law are strong and clear. Therefore, this Court should apply federal choice-of-law principles to conclude that the law of New Tejas should govern the test for identifying a corporate alter ego for jurisdictional purposes.

B. New Tejas state law is not preempted by federal common law.

New Tejas alter ego law should apply because Petitioner has failed to satisfy any of the requirements for federal law to preempt state law. Under the Supremacy Clause of the United States Constitution, Congress has the power to preempt certain state laws. U.S. CONST. art. VI; *Arizona v. United States*, 567 U.S. 387, 399 (2012). However, state law can only be preempted by federal law when (1) Congress determines that the particular field of law is to be regulated exclusively by federal law; (2) Congress cannot fulfill the objectives behind a federal law due to a conflict

with a state law; or (3) Congress creates a law that contains an express preemption provision. *See Arizona*, 567 U.S. at 399; *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015). Here, Congress has passed no statute that expressly preempts state alter-ego law in the TCPA context, so Petitioners can only rely on theories of implicit preemption. Even under those theories, there are no valid reasons to preempt New Tejas state law because there is no Congressional foreclosure of state action in the TCPA and there is no direct conflict between the purposes behind the TCPA and the application of New Tejas alter ego law.

1. New Tejas alter ego law is not field preempted by federal common law.

New Tejas's state law on corporate veil piercing should not be subordinated here because Congress has not foreclosed the ability of state governments to create laws regarding corporate veil piercing in the TCPA context. Field preemption occurs when Congress properly determines that an area of law is to be exclusively governed by federal legislation, foreclosing any state regulation in the field. *Id.* at 377. "The intent to displace state law altogether can be inferred from a framework of regulation so pervasive . . . that Congress left no room for the States to supplement it." *Arizona*, 567 U.S. at 339 (internal citations omitted). Furthermore, when there are gaps in federal legislation pertaining to the law of corporations, the gaps in these statutes . . . should be filled with state law . . . 'unless [state law's] application would be inconsistent with the federal policy underlying the cause of action.'" *Kamen*, 500 U.S. at 99 (quoting *Burks v. Lasker*, 441 U.S. 471, 479 (1979)).

In several areas of law, including tax, banking, and labor law, Congress has specifically laid out federal statutory provisions that govern when and whether to pierce the corporate veil. *See Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 Harv. L. Rev. 853, 856 n.20 (1982) (listing statutes). In *Anderson v. Abbott*, the Court recognized the importance of having a federal statute that expressly and directly conflicts with a state law in order to preempt the application of state alter ego law. *See* 321 U.S. 349, 365 (1944). There, the Court refused to apply Delaware's alter ego law only because there was an *express* federal banking alter ego law that directly conflicted with the state law on corporate veil piercing. *See id.* Notably, there is no alter ego provision in the text of the TCPA. *See generally* 47 U.S.C. § 227. In this case, the only relevant federal alter ego theory is a judge made common law theory that has no basis in Congressional statute. *See* R. at 5a.

Furthermore, there are several instances when Congress expressly sought to permit and include state regulation in the text of the TCPA. Section 227, the statute under which Petitioner is suing, allows state officers to bring enforcement actions against violators on behalf of the constituents of their respective states. *Id.* § 227(e)(6)(A). In fact, Section 227 explicitly leaves room for both the federal government and state governments to co-regulate the use of automatic telephone dialing systems, the use of prerecorded voice messages, and the making of telephone solicitations. *Id.* § 227(f).

The TCPA is unlike other federal laws that have been held to field preempt the relevant state laws. In *Arizona*, the Court analyzed a federal scheme to register non-citizen aliens and concluded that Congress created a "complete system of alien registration." *Arizona*, 567 U.S. at 401. The Court noted that the federal system was designed to be a single, all-encompassing scheme because it "touched on foreign relations [and] it did not allow the States to curtail or complement federal law or to enforce additional or auxiliary regulations." *Id.* (internal citations omitted). As such, the Court concluded that the federal law field preempted the relevant Arizona law that imposed its own, different penalties for violations of that same federal statute. *Id.* at 402-03.

Furthermore, the Sixth Circuit has already refused to preempt Michigan's state alter ego law with federal common law when analyzing a federal claim under the TCPA. *Lyngaas*, 992 F.3d at 420. Instead, the court applied Michigan state law to the alter ego claim. *Id.* The court applied Michigan law to determine whether to pierce the corporate veil and consequently whether the federal court had personal jurisdiction regarding the TCPA claim. *Id.* In its ruling, the Sixth Circuit went further and noted that "[o]utside of labor law or ERISA claims, courts tend not to supplant state corporate liability doctrine with federal common law." *Id.* (internal citations committed).

As described above, there are several instances in which Congress sought to specify that federal courts should apply federal alter ego law. The TCPA was not one of those areas. If Congress saw fit to abrogate state law in the alter ego context

for the TCPA, Congress could have and should have codified such a law in the TCPA. However, unlike in other areas of law where Congress did specify the application of federal alter ego law, Congress sought to specifically exclude such a provision in the TCPA. Absent any explicit Congressional delegation of federal authority, courts should not needlessly superimpose an amorphous "federal common law" onto the valid New Tejas state law.

Additionally, Congress did not foreclose state regulation in either the area of corporate law or the area of telephonic consumer protection. By specifically allowing states to bring suits and enforce the provisions of the TCPA and by reserving the right of states to co-regulate consumer protection in the telephonic space, Congress left open the possibility of states to apply their pre-existing state regulations in conjunction with the TCPA. Furthermore, there is no valid rationale for field preemption here. Unlike the law in *Arizona v. United States*, Congress does in fact let state governments enforce provisions of the TCPA. *Arizona*, 567 U.S. at 410. Also, in *Arizona*, one of the rationales the Court gave for preempting state law was because the federal law touched on foreign relations, an area traditionally regulated by the federal government. *Id.* But, corporation law and whether to pierce the corporate veil are primarily areas of state responsibility and should thus be left to the purview of state law. *See Kamen*, 500 U.S. at 98.

Lastly, the application of New Tejas alter ego law would not be inconsistent with the federal policy underlying the TCPA. If New Tejas alter ego law applies, Petitioner will still be able to bring her TCPA suit against SCF and still garner

personal jurisdiction over SCF. R. at 4a. Nothing in the TCPA can be read as a Congressional policy of seeking to extract the most amount of recovery possible from potentially infringing Defendants. Rather, the TCPA was designed with the purpose of protecting consumer privacy and preventing the nuisance of robocalls. *Barr*, 140 S. Ct. at 2344. The idea that state law should apply is further supported by judicial action as the only circuit to have taken up the issue of alter ego in the TCPA context, chose to apply state alter ego law. *See Lyngaas*, 992 F.3d at 420.

Given that there is no federal alter ego provision in the TCPA, there is no Congressional foreclosure of state action, and that the application of New Tejas law would be consistent with the purpose behind the TCPA, the Court should adopt the position of the Sixth Circuit and apply New Tejas alter ego law and not preempt it with the federal common law.

2. New Tejas alter ego law is not conflict preempted by federal common law.

This Court should apply New Tejas's alter ego law because it neither conflicts with any federal law nor frustrates the objectives of the TCPA. When there is no express Congressional preemption provision nor any field preemption of an entire area of the law, federal courts should only preempt state law when there is a direct conflict with federal law. *Arizona*, 567 U.S. at 399. A direct conflict arises when compliance with both federal and state laws is impossible or the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal citations omitted). To determine if a state law is a sufficient obstacle to federal law, courts must "examin[e] the federal statute as

a whole and identify[] its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000). Additionally, as noted above, this Court has held that there is a strong presumption of incorporating state law into federal common law when private parties have long standing expectations that their obligations and rights will be governed by state law. *Kamen*, 500 U.S. at 98.

In *Barr*, this Court explained the reasons behind the enactment of the TCPA. 140 S. Ct. at 2344. In the 1990s, a growing number of telemarketers had obtained access to technology that could automatically dial a number and play a pre-recorded voice message when a consumer answered the phone. *Id.* As a result of consumer complaints, Congress sought to place onerous restrictions on the usage of automated telephone equipment. *Id.* In order to safeguard consumer privacy and prevent the nuisance of robocalls, Congress codified the 47 U.S.C. § 227 prohibition on certain robocalls. *Id.* To illustrate that the purpose of the law was not to maximize the monetary award for plaintiffs suing under the TCPA, Congress limited the recovery for a private cause of action to the "actual "monetary loss from such a violation, or . . . $500 in damages for each such violation." 47 U.S.C. § 227(b)(3)(B).

In *Kamen*, the Court refused to apply federal common law over state law when attempting to discern the powers of shareholders and directors in controlling the ability of the corporation to pursue litigation. 500 U.S. at 103. In its ruling, the Court noted that corporations were creatures of state law and that private parties enter into legal relationships expecting that the corporate law of the state will govern corporate affairs. *Id.* at 98. The Court went on to hold that the corporate law

gap in the prevailing federal regulatory framework should be filled with state corporate law. *Id.* at 108. In its analysis, the Court noted that nothing in the federal regulatory regimes in question "evidenced a congressional intent that federal courts . . . fashion an entire body of federal corporate law out of whole cloth." *Id.* at 99. A major reason why the Court refused to apply a federal common law rule that differed from state law was its worry about the disruption that competing laws would cause for internal corporate affairs. *Id.* at 106. Additionally, the Court cited the Second Restatement of Conflict of Laws when it noted that "[u]niform treatment of directors, officers and shareholders is an important objective which can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law." *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302, cmt. e).

In this case, there is no Congressional intent to allow the Petitioner to extract the maximum amount of damages possible out of SCF. The TCPA was designed to protect consumer privacy and prevent the nuisance of robocalls by allowing suits against infringers. A basic objective of the TCPA is the ability to bring enforcement actions against alleged infringers for abusive robocalls. *See generally* 47 U.S.C. § 227. Application of New Tejas alter ego law does not frustrate the federal objectives of holding infringers liable because the federal court is still able to exercise personal jurisdiction over SCF and thus determine whether or not the defendant violated the statute. *See* R. at 4a. The Petitioner's attempt at extracting the highest possible monetary award by applying a federal common law alter ego standard is not a

central purpose or an objective of the TCPA. This is most evident in the fact that the law caps the damages at $500 or the actual monetary loss that the plaintiff suffered. While it is true that New Tejas law would prevent Petitioner from receiving a monetary windfall, New Tejas alter ego law does not pose a substantial obstacle to any of the purposes behind the TCPA because federal courts are still able to attain personal jurisdiction over the alleged corporate infringers.

While it is true that TCPA is a federal statute and the Petitioner is suing on a federal cause of action, both personal jurisdiction and corporate law (of which alter ego theory is a part of) are determined by state law. *See Daimler*, 571 U.S. at 125 ("Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons."); *Kamen*, 500 U.S. at 98. Like in *Kamen*, the gap in the TCPA should be filled with state alter ego law because it would preserve the private expectations of parties, treat the rights and liabilities of corporations uniformly, and retain the states' long standing regulation of the corporate form.

Furthermore, applying federal common alter ego law to the TCPA would create great uncertainty as it would then beg the question as to whether the Court will apply federal common alter ego law to other federal schemes. If the Court would only apply federal common law in this instance, then the Court will create great uncertainty as to which aspects of the corporate form are governed by state law and which are governed by the amorphous federal common law. If the Court were to apply federal common alter ego law to all federal schemes, then the Court would be unilaterally extending federal law to the jurisdiction of states without the

authorization of Congress. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981). ("The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law . . . nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts."). Thus, this Court should apply New Tejas alter ego law and not preempt it with federal common law because there is no direct conflict between New Tejas law and the objective of the TCPA, and there is a strong presumption favoring the application of state corporate law in the absence of an explicit Congressional directive.

CONCLUSION

Courts must consider unnamed class members when determining whether they have personal jurisdiction over a defendant. This Court's precedent clearly establishes that courts exercise personal jurisdiction over claims, not parties, and the claims a court can adjudicate must be connected to a defendant's actions in the forum. Furthermore, exercising personal jurisdiction over unnamed, non-resident class members would violate a defendant's due process rights and violate Article III. Ignoring unnamed class members in this case, and others like it, would impermissibly extend the district court's jurisdiction and violate Respondent's due process rights.

With respect to Mr. Todd's alleged status as alter ego to SCF, this Court should apply New Tejas law, not federal common law, to determine whether or not the federal court has personal jurisdiction over Mr. Todd. Federal courts generally apply state law to questions of personal jurisdiction, and the state interests involved here suggest further that the appropriate choice-of-law is New Tejas law. Despite the fact that the underlying claim arises under federal law, New Tejas law is not preempted by federal common law, since there are no significant federal interests that imply the preemption of state law by the federal common law of corporate veil-piercing.

For the foregoing reasons, the Respondent respectfully asks this Honorable Court to uphold the Court of Appeals' decision to apply the rules of personal

jurisdiction to claims of unnamed class members and to apply New Tejas alter ego law in determining whether Mr. Todd is an alter ego of Spicy Cold Foods, Inc.

Respectfully submitted,

/s/ Team 30

Team 30

Counsel for Respondent

November 15, 2021