NO. 2021-19-5309

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2021

GANSEVOORT COLE, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

LANCELOT TODD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

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BRIEF FOR RESPONDENT

Team # 32

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether unnamed members of a class action gain personal jurisdiction-by-proxy by joining the valid claims of a named member in a class action.

2. Whether a district court, when interpreting a choice-of-law analysis, may rely on the law of the state of incorporation as outlined in the Restatement (Second) of Conflict of Laws.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

UNITED STATES DISTRICT COURT CASES:

STATE COURT CASES:

CONSTITUTIONAL PROVISIONS:

FEDERAL STAUTES:

FEDERAL RULES:

RESTATEMENTS OF LAW AND LAW REVIEWS:

SECONDARY SOURCES:

OPINIONS BELOW

The opinions issued by the U.S. Court of Appeals for the Thirteenth Circuit are unreported but available in the Record. *See* Pet. App. 1a–16a (majority opinion); *see* Pet. App. 17a-22a. (Arroford, J. dissenting). The order issued by the U.S. District Court of New Tejas affirming Todd's motion to strike is unreported and is not available in the record.

JURISDICTION

The U.S. District Court for the District of New Tejas had original jurisdiction of this federal question action under 28 U.S.C. § 1331. The U.S. Court of Appeals for the Thirteenth Circuit had jurisdiction of this appeal under 28 U.S.C. § 1291 and entered judgement on May 10, 2020. Pet. App. 1a. This Court has jurisdiction of this appeal under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUORY PROVISIONS

This case involves the proper interpretation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

Additionally, this case also concerns the proper scope of jurisdiction regarding specific personal jurisdiction under Federal Rule of Civil Procedure 4. The pertinent provisions of Rule 4 are reproduced in Appendix A.

Finally, this case concerns the of interpretation of the procedural standards for class actions under Federal Rule of Civil Procedure 23. The full text is available within the Federal Rules of Civil Procedure and is too expansive to reproduce here.

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

This matter involves the latest venture of renowned entrepreneur Lancelot Todd ("Todd"). Pet. App. 2a. Todd is best known for his renowned products of the Vettura automobile and the Khaki Khomfort Trench Bench, among many other adventurous products. *Id.* Ever the crafty businesses man, while looking for the latest cutting-edge products, Todd acquired the patent rights to "Spicy Cold" flavoring in early 2015. *Id.* Through a groundbreaking chemical reaction, the flavoring, primarily used on potato chips, causes the consumer's tongue to go numb, hence the name. *Id.*

Later that year, sensing that he had a future crowd-pleaser, Todd began Spicy Cold Foods, Inc.'s ("Spicy Cold") principal place of business in West Dakota, his place of domicile. Pet. App. 3a, 4a. However, Todd made a strategic decision to incorporate Spicy Cold in New Tejas, a state that is ideal for new corporations to incorporate within. Pet. App. 2a. Todd was the primary, and only investor, resulting in him personally owning all of the corporation's shares. *Id.*

The operations began as many small culinary businesses do with reaching out to local restaurants and grocery stores. Pet. App. 3a. However, these attempts were futile, and Todd decided that a new marketing program was the key to success. *Id.* Which led to his purchasing of an "automatic telephone dialing system" in 2017, which he planned to use on behalf of Spicy Cold. *Id.* Todd used the system to interact with consumers on cellular and residential phones to deliver an innocuous message advertising the Spicy Cold chips. *Id.*

Gansevoort Cole ("Petitioner"), a resident of New Tejas, alleged that she received at least ten calls from the system regarding Spicy Cold. *Id.* She denies that she has any business connections with Todd and further denies that she consented to the calls in any manner. *Id.* These calls incensed Petitioner, causing her supposed distress and annoyance. *Id.* The repetitive nature of the calls eventually caused Petitioner to reach a breaking point. *Id.*

PROCEDURAL HISTORY

District Court

In 2018, Petioner filed suit in the District Court of New Tejas against Spicy Cold, and Mr. Todd individually, alleging that the corporation's actions were in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. *Id.* She brought these allegations personally and for all similarly situated persons throughout the United States. *Id.* Following jurisdictional discovery, Petitioner claimed that her reason for naming Todd was due to his considerable personal wealth and that his Spicy Cold venture was "judgement proof." Pet. App. 4a. The parties are not in dispute over the district court's ability to exercise general jurisdiction over Spicy Cold since it is incorporated in New Tejas. *Id.*

Todd moved to strike these allegations since he properly asserts that the district court lacks personal jurisdiction to bring him under the power of the court. *Id.* Todd, who is domiciled in West Dakota, is only subject to general jurisdiction within that state. *Id.* Though he does agree that the court could exercise jurisdiction

over him regarding the New Tejas residents, he asserts that the court's jurisdiction ends at the borders of New Tejas. *Id.*

Petitioner cited two improper theories of personal jurisdiction in her argument to the district court. *Id.* First, that within class actions, unnamed class members need not demonstrate personal jurisdiction over the defendant, Todd. *Id.* Second, in the alternative, she asserts that under the federal common law test Todd is the "alter-ego" of Spicy Cold. Pet. App. 5a. Todd agreed that under the federal test that he would be the alter-ego of Spicy Cold and subject to the general jurisdiction of the Court. Pet. App. 6a. The district court agreed that if they were to apply that test that Todd would be subject to liability for all unnamed members. Pet. App. 5a.

However, Todd asserted that under federal choice-of-law analysis that the alter-ego law of New Tejas should apply regarding questions of jurisdictional reach. Pet. App. 6a. Under the New Tejas law, it requires that the corporation be formed "for the specific purpose of defrauding a specific individual." *Id.* Petitioner agrees with Todd that under this standard that Todd would not be subject to the general jurisdiction of the court. *Id.* Following jurisdictional discovery, the district court rejected both of Petitioner's arguments and granted Todd's motion to strike the nationwide class allegations. Pet. App. 7a. Petitioner interlocutory appealed the denial of her class certification request, which the U.S. Court of Appeals for the Thirteenth Circuit subsequently granted. *Id.*

Court of Appeals

The circuit court rejected Petitioner's primary argument that the personal jurisdiction of named members would properly transfer to unnamed members by proxy. Pet. App. 9a. Additionally, the court found that F.R.C.P. 23 is only a procedural mechanism that begins class actions but does not replace the jurisdictional standards established by F.R.C.P. 4. *Id*. The circuit court found that the unnamed members of this case must also meet the jurisdictional requirements, in opposite of Petitioner's contention. Pet. App. 10a. Applying the *Bristol-Myers Squibb* decision, the circuit court held that for unnamed members to remain in the suit they must demonstrate proper personal jurisdiction over the claims. Pet. App. 11a.

Responding to Petitioner's alternative argument, the court, and the parties, agreed that the "validity of the theory" reduced to a choice-of-law inquiry. Pet. App. 12a. The Court acknowledged that there is little direction from other Circuits and what is available is conflicting. Pet. App. 12a, 13a, 14a. Looking to federal choice-of-law precedent, the court held that federal common law looks to the Restatement (Second) of Conflict of Laws. Pet. App. 14a, 15a. Extensively citing the Restatement and caselaw, the Court held that the correct decision was to apply the laws of the state of incorporation, New Tejas. Pet. Ap. 15a, 16a. Finding that this result most respected the jurisprudence, since "corporations are creatures of state law," and to use another standard would be counter to the precedent. *Id.*

Petitioner petitioned this Court for a writ of certiorari, which this Court granted on October 1, 2021. *See*. Pet. App. 1

SUMMARY OF THE ARGUMENT

Bristol-Myers Squibb Application

The Thirteenth Circuit correctly ruled in striking the nationwide class allegations and their ruling should be affirmed. The unnamed class members in this case are without personal jurisdiction and should be removed from the class. To preserve the function of class actions the rules acknowledge that the federal court's requirement of complete diversity will not be defeated by a non-diverse class. 28 U.S.C. § 1332(d)(2). However, allowing unnamed members to participate without an individual personal jurisdiction assessment will transform class actions past their intended purpose. Creating a mechanism by which diverse plaintiffs can skirt the fundamental requirements and limitations of the class action procedure.

Class actions will still subject defendants like Todd to a multitude of claims while still maintaining judicial efficacy by eliminating duplicative litigation. However, potential plaintiffs who only have an illusion of proper personal jurisdiction should be excluded from the class. This Court should not allow for free-rider litigants to disrupt the valid exercise of personal jurisdiction. The class action's original design was not to allow the circumvention of constitutional requirements and should not morph into that now for short-term gains of some claimants. Respondent asks this Court to recognize the danger posed by this sort of litigation tactic and to affirm the ruling of the Thirteenth Circuit Court. Doing so provides the lower courts with clear guidance and rectifies the incorrect jurisprudence established by the Sixth and Seventh Circuits.

New Tejas Alter-Ego Law

The Thirteenth Circuit correctly concluded that the application of New Tejas's Alter-Ego Theory was proper, and that Petitioner should not be granted personal jurisdiction over Todd as an individual. As outlined in the Restatement, the district court must use federal choice-of-law rules to determine the proper substantive law to apply. These rules establish that the court should use the Restatement if there is no binding precedent. The Restatement's primary focus is on the local law of the state of incorporation before examining other possible statutes. Additionally, the court should consider the state that has the most interest in the resolution of the dispute and the state that has the most significant relationship with the matter. Todd chose to incorporate in New Tejas for their deferential treatment of the corporate form and relied on the expectation that matters would be litigated under the state's laws.

Deference to the corporate form is paramount in corporate litigation since the primary purpose of incorporation is to protect the shareholder from unecessary corporate liability. This deference is extended virtually automatically to Delaware Corporate Laws and the same approval should be extended to New Tejas. The states have the power and right to establish their own corporate standards and laws and to rule otherwise would be a harsh blow to state autonomy and small-business owners.

Finally, this Court must settle the ever-changing and confusing jurisprudence of alter-ego theory. There is little to no agreement among the circuits, and this provides for uneven application and results to occur across the United States. This Court should affirm the ruling of the Thirteenth Circuit and hold that district courts should first look to the law of the state of incorporation in similar cases.

ARGUMENT AND AUTHORITIES

Both issues before this Court pose questions of law, which are reviewed de novo. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014).

I. THE COURT'S RULING IN *BRISTOL-MYERS SQUIBB* SHOULD CONTROL, REQUIRING THAT PERSONAL JURISDICTION BE PRESENT FOR ALL PLAINTIFFS, NAMED OR UNNAMED.

This Court should affirm the ruling of the Thirteenth Circuit court because it is in accordance with the long history of precedent that this Court has developed since *International Shoe v. Washington*. The Court's recent ruling in *Bristol-Myers Squibb* should apply to not only mass tort suits, but also class actions. Ruling otherwise would create a dangerous precedent allowing improper personal jurisdiction. The *Bristol-Myers Squibb* case concerned California residents who were injured by a prescription drug, *Plavix. Bristol-Myers Squibb v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1777–78 (2017). They subsequently filed a mass tort action in the state of California including resident and non-resident plaintiffs. This Court held that not only standing, but specific personal jurisdiction, had to be established by the non-resident plaintiffs, shifting the burden off of the defendants.

Though the present case involves a class action rather than a mass tort action, these two aggregation mechanisms should be evaluated equally regarding personal jurisdiction. Looking to the D.C. Circuit, Respondent advocates for the theories promulgated within the writings of *Molock v. Whole Foods Market*. 952 F.3d 293, 296 (D.C. Cir. 2020). The majority held that a ruling on personal jurisdiction over the claims of unnamed class members would be premature. *Id.* However, the dissent notes that "a class action is just a species of joinder," logically requiring that "claims

asserted on behalf of absent class members must be analyzed on a claim-by-claim basis." *Id.* at 306 (Silberman, J. dissenting). The *Bristol-Myers Squibb* holding should be applied to afford defendants facing federal class action suits the same protections as those facing aggregation suits brought under state mechanisms. The holding of the Thirteenth Circuit Court requiring that personal jurisdiction be present for unnamed class members should be affirmed.

A. This Court's precedent in analyzing personal jurisdiction clearly requires individualized assessments of all plaintiffs.

This Court has consistently held that for a ruling to be valid and enforceable, the forum itself must have appropriate jurisdiction over the defendant. This includes the adherence to established precedent of performing individualized assessments of jurisdiction as *Rush* requires. *Rush v. Savchuk*, 444 U.S. 320, 332 (1980). The unnamed class members are not able to circumvent jurisdictional analysis simply by virtue of being unnamed. Todd cannot lose the protections afforded by this Court's jurisprudence simply for the sake of an efficient judgement. The district court allowing the unnamed class members to "tag-along" to named members enables these members to avoid the required individualized assessments of jurisdiction.

The minimum contacts test arising out of *International Shoe* requires the plaintiffs demonstrate their injury arose out of the contacts that the defendant *actually* had with the forum. *See generally*, 326 U.S. 310 (1945). By allowing unnamed members to gain jurisdiction-by-proxy, the district court would eviscerate this seminal ruling in analyzing where a defendant may be subject to suit. As this Court noted more recently, "The mere fact that other plaintiffs were [injured] in

California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims." *Bristol-Myers Squibb*, 137 S. Ct. 1773, 1781 (2017). The mere similarity between the claims of the named and unnamed plaintiffs is insufficient grounds for the district court to seize personal jurisdiction over the disputed claims. This Court's jurisprudence demands that the district court's power to issue a binding judgment on Todd is limited to those claims it can exercise proper personal jurisdiction over.

B. Allowing plaintiffs to circumvent due process jurisdiction requirements to litigate in virtually any forum would unravel established longstanding jurisprudence.

One of the bedrock principles of our American legal system is that defendants are only subject to judgements in courts that can exercise proper jurisdiction over them. The elements of general jurisdiction and personal jurisdiction of the named plaintiff are not at issue, this dispute involves specific personal jurisdiction of the unnamed potential plaintiffs. While the exercise of personal jurisdiction based on the defendant's contacts with the forum are valid, they must be in accordance with "traditional notions of fair play and substantial justice" to satisfy the constitutional requirement of due process. *International Shoe v. Washington*, 326 U.S. 310, 326 (1945). By preventing the district court from engaging in a case-by-case personal jurisdictional analysis, this Court would open up Todd to unpredictable and nearly unlimited liability throughout the United States. While the unnamed class members may be similarly situated to the named class members, the personal jurisdiction principles, like standing, "must be met as to each defendant over whom a state court exercises jurisdiction." *Rush*, 444 U.S. 320, 332 (1980). Without this

foundational protection, opportunistic plaintiffs will exploit the jurisdictional requirements and engage in forum shopping, often at the expense of the defendant and the legal system. This Court must not allow constitutional due process protections to be unceremoniously eroded simply for the convenience and efficiency of a potential class action suit.

2. THE CIRCUIT COURTS' RULINGS IN *MUSSAT* AND *LYNGAAS* ARE NOT BINDING, AND THIS COURT SHOULD NOT ABIDE BY THEM.

The ruling of the Thirteenth Circuit Court is the most in-line with the ruling of this Court in *Bristol-Myers Squibb*. The circuit courts, in the stylized cases, held that unnamed members of a class are not required to establish proper personal jurisdiction to participate in a class action. These rulings failed to afford the defendants their proper due process guarantees. The courts in both *Mussat* and *Lyngaas* held that the unnamed members need not meet the jurisdictional requirements the named members were required to satisfy. *Mussat v. IQVIA*, 953 F.3d 441, 446 (7th Cir. 2020); *Lyngaas v. Curaden AG*, 992 F.3d 412, 433 (6th Cir. 2021). Both these cases are somewhat similar to the present case, however, both circuit courts have drawn misleading inferences to avoid following the precedent set out in *Bristol-Myers Squibb*.

These courts rely on the difference between the two claim aggregation devices of California's mass tort action and the federal class action. However, this difference is purely semantic as they are both simply joinder devices. *Molock*, 952 F.3d 293, 306 (D.C. Cir. 2020) (Silberman, J. dissenting). Mass tort actions are a mechanism governed by state codes and precedent, while class actions are governed by the

Federal Rules of Civil Procedure. *See generally* F.R.C.P. 23. Any differences in the California Code of Civil Procedure must still be in line with constitutional principles. However, since Petitioner brings her case through federal court, the Federal Rules of Civil Procedure are controlling. Failing to ensure that unnamed members have personal jurisdiction would contradict the well-established procedural mechanisms designed to protect defendants, such as Todd. These rules and the binding precedent of this Court should overturn this misinterpretation by the lower courts and affirm the judgement of the Thirteenth Circuit Court.

A. Despite the circuit courts' incorrect interpretations, Justice Sotomayor recognized in her dissent that Bristol-Myer Squibb could apply to class actions.

As noted above, a mass tort action and a class action are functionally equivalent. The dissent in *Bristol-Myers Squibb* acknowledged that it was unclear whether the holding could apply to class action suits as well. 137 S. Ct. 1773, 1789 (2017) (Sotamayor, J., dissenting). This functional similarity is based on both actions' goals to consolidate claims of plaintiffs and preserve or increase judicial efficacy overall. However, this protection of judicial resources cannot displace the constitutional protections designed to ensure due process. Justice Sotomayor sees this ruling as a danger to the functionality of class actions along with the ability of plaintiffs to bring together enough claims to be meaningful. *Id.* However, her concern that this will make it "impossible to bring certain mass actions at all" is overblown. *Id.* While it may decrease the size of certain class actions, it would simply limit the class to those who have proper jurisdictional claims.

As this Court laid out in *International Shoe*, jurisdiction must be in line with "traditional notions of fair play and substantial justice," a standard which has remained a foundational principle regarding due process. 326 U.S. 310, 326 (1945). Subjecting Todd to the claims of unnamed plaintiffs without proper standing would run counter to these basic notions. This Court's holding in *Daimler AG v. Bauman* enhanced the requirements of corporate personal jurisdiction by restricting where corporations could be subject to it. *See*, 571 U.S. 117, 121–22. (2014). This Court found that broad exercise of personal jurisdiction was "barred by due process constraints on the assertion of adjudicatory authority." *Id*. Enabling plaintiffs to avoid the personal jurisdiction requirements, as opposed to the limits set forth in *Daimler,* would create an immense imbalance among potential parties and contradictory jurisprudence. This Court should disregard the incorrect interpretations of the Sixth and Seventh Circuit Courts and re-affirm the principles established in *International Shoe* and *Daimler*.

B. Even if this Court determines that Bristol-Myers Squibb does not apply, the rulings of the circuit courts in these cases do not comply with the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure exist to promote efficiency, fairness, and consistency within the federal court system. Rule 4 establishes the requirements for jurisdiction to be properly exercised over a specific defendant. The elements for determining proper jurisdictional reach laid out in *International Shoe* and later restricted by *Daimler* are still the operational standards the district court must abide by. Personal jurisdiction cannot be conjured up by plaintiffs by being somewhat similarly situated to another. They must be able to individually satisfy the standards

established by this Court and the Federal Rules of Civil Procedure. The goal of class actions is not to lower jurisdictional requirements, but to promote the efficient adjudication of claims. *See Bristol-Myers Squibb*, 137 S. Ct. 1773, 1787 (2017) (Sotamayor, J., dissenting). The standards created by Rule 4 and subsequent jurisprudence are not abrogated by the aggregation of claims under class action procedural provisions. This is equally true under Rule 23, the operative rule controlling class actions.

The controlling federal rule on class actions, Rule 23, does not address jurisdiction specifically. This absence should not be interpreted as an active departure from applying all of the applicable rules concurrently. Looking at Rule 23 in isolation does not provide a coherent picture of how the federal class action suits proceed. In *TransUnion LLC v. Ramirez*, a class of plaintiffs filed a class action suit for financial injuries suffered after alerts were placed in their files by a credit reporting agency. 141 S. Ct. 2190, 2200 (2021). Though *TransUnion* primarily focused on standing required for recovery of damages, its holding that "every class member must have Article III standing" is still applicable in this present case. *Id.* at 2208. This ruling does not delineate between the named and unnamed members of the class in finding they must have proper standing. *Id.* Instead, it found that each member of the class must have "concrete" injury to have standing, regardless of their status as named or unnamed. *Id.* Under this analysis, the district court would be required to engage in case-by-case jurisdictional analysis of the unnamed plaintiffs.

To find that personal jurisdiction is not required for unnamed plaintiffs represents a departure from this Court's history in developing these requirements and is unsupported by the language of Rule 23. Rule 23 simply lays out the relevant procedure for class action proceedings, it does not change foundational aspects of due process. Instead of over valuing the desire for judicial efficacy, this Court should stay true to its jurisprudence by protecting the due process of defendants like Todd. The circuit courts have incorrectly "read-in" meaning to Rule 23 and ignored the importance of Rule 4 by allowing unnamed members to avoid individualized jurisdictional analysis. Rule 4's language undergirds the jurisprudence this Court has built since its earliest rulings involving personal jurisdiction. *See Pennoyer v. Neff*, 95 U.S. 714 (1878).

The procedural mechanisms of class actions are not able to untether the jurisprudence of mass claim actions from the constitutional guarantees of due process. Even this Court, though empowered to create or delegate the creation of rules of federal procedure, is prohibited by the Rules Enabling Act from instituting rules that would "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. This statute expressly denies the Court the power to promulgate rules which would deny defendants due process in any case, including class actions. The similarly situated claims and concern of judicial efficacy are not enough to justify the deprivation of Todd's due process protections. If this Court interprets Rule 23 to do away with jurisdictional requirements of some members of a class, it goes beyond the scope of the Federal Rules of Civil Procedure.

Precedent provides the governing procedural rules in this case require the court to have proper jurisdiction to issue a valid ruling. The suit against Todd arises under the TCPA, a federal statute, and is brought in federal court. Making the Federal Rules of Civil Procedure the operative rule set. The Rules explicitly require that the federal exercise of jurisdiction must be "consistent with the United States Constitution and laws." Rule 4(k)(2)(b). Creating improper personal jurisdiction over Todd based solely on the fact that unnamed members are similarly situated runs counter to the intent of the Rules themselves. Adherence to these rules allows for the development of rigorous standards to protect the rights of all defendants' guarantees of due process.

3. THE UNFETTERED EXPANSION OF PERSONAL JURISDICTION AND LIABILITY WOULD INCREASE THE COST OF LITIGATION IN CLASS ACTIONS WHILE IMMENSELY LOWERING JUDICIAL EFFICACY.

While the public ire is only drawn to class action suits brought against large mega-corporations, the extension of personal jurisdiction to unnamed plaintiffs would negatively impact small corporations even more substantially. While large corporations have the economic means to handle class actions, or the assets to successfully navigate a bankruptcy, smaller corporations do not have these abilities. Spicy Cold is rather small, producing only a single product. Pet. App. 2a. While the robo-calls are sufficient action to bring an initial claim under the TCPA, they are not adequate to allow the joining of numerous, unnamed plaintiffs who clearly lack proper personal jurisdictional standing. The contacts that Bristol-Myers Squibb had in California were far more substantial than Todd's contacts, yet Bristol-Myers Squibb was not subjected to personal jurisdiction by the claims of nonresident

members. *See Bristol-Myers Squibb v. Super. Ct. of Cal.*, 137 S. Ct. 1773 (2017). Todd did not create a highly tailored advertising campaign, nor use a sophisticated third-party as was the case in *Bristol-Myers Squibb*. *Id.* Therefore, it would be improper to extend the power of the district court to outside the boundaries of the above case.

Potentially adding an unknown and unqualified subset of unnamed class members only adds to uncertainty of the case, an impact that amplifies when experienced by small corporations with limited resources. Todd's company, which engaged in a customer calling campaign, is clearly a non-nationwide brand. Without proper jurisdictional analysis of the unnamed class members, it would theoretically open Todd up to liability in every jurisdiction of the United States. This lack of predictability could come at immense cost, both in dollars and unnecessary labor. Corporations of meager means could face litigation in a variety of unpredictable forums, inflating the cost of possible legal services to unsustainable amounts.

In order for class actions to serve their original just purpose, the defendant must be guaranteed due process, a right we deliver by ensuring appropriate jurisdiction exists.

A. Class actions should not be a means by which plaintiffs are able to circumvent the requirements of personal jurisdiction.

The unnamed class members in this lack proper personal jurisdiction over the claims against Todd personally. To preserve the function of class actions, the rules already acknowledge that the federal court's requirement of complete diversity will not be defeated by a non-diverse class. 28 U.S. Code § 1332(d)(2). However, allowing unnamed members to participate without this assessment will transform class

actions into a mechanism to avoid the federal diversity requirements. Granting illusory personal jurisdiction to unnamed class members based simply on the relationship of the claims will allow plaintiffs to distort the original purpose of class actions.

While class actions may often subject defendants like Todd to a multitude of claims at once, they still benefit defendants by reducing duplicative litigation. However, litigants who would not otherwise be able to bring suit in the particular forum should be excluded. Unnamed members should not be able to take advantage of and tag along to otherwise valid litigation. The class action is not and never has been a tool to circumvent constitutional requirements. We ask this Court to recognize the danger posed by this sort of litigation tactic and to affirm the ruling of the Thirteenth Circuit Court. Doing so provides the lower courts with clear guidance and corrects the course presently set by the Sixth and Seventh Circuits.

II. THIS COURT SHOULD IMPLEMENT THE RESTATEMENT OF CONFLICT OF LAWS'S PROCEDURE AND APPLY NEW TEJAS'S ALTER-EGO THEORY.

1. THE RESTATEMENT CLEARLY ESTABLISHES THAT THE STATE OF INCORPORATION'S LAW SHOULD BE APPLIED WHEN THERE IS NO ESTABLISHED PRECEDENT REGARDING CHOICE-OF-LAW.

This Court should apply the New Tejas Alter-Ego Law, for the purpose of personal jurisdiction, since it the state of incorporation for Spicy Cold. There are three options regarding personal jurisdiction available to this Court: (1) The law of the state of incorporation; (2) The law of the state of the forum; or the (3) federal common law. Though the state of incorporation and the forum state are identical, it is imperative that this Court use the state of incorporation as the controlling substantive law. As

Todd and Petitioner agree, under the federal common law standard, Todd would be within the specific personal jurisdiction of the district court. Pet. App. 6a.

A recurring issue regarding veil piercing litigation is that certain circuit courts' choice of law analyses include dividing the "alter-ego" statute into either purely a jurisdictional grant or purely an imposition of liability, with others combining them. *See In re Lyondell Chem. Co.*, 543 B.R. 127, 139 n.38 (Bankr. S.D.N.Y. 2016). The elements of application differ greatly when deciding to apply the theory for either personal jurisdiction or the imposition of liability. In theory, this should not be an issue, but courts often fail to distinguish which theory is being applied or decline to inform why either theory is being applied. *See PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163 (Tex. 2007). However, the easiest, and correct interpretation, is to treat them as a single—although more complex—prong of analysis, like the Thirteenth Circuit did below. In this case specifically it would be repetitive, since bringing Todd under the jurisdiction of the Court would open him up to potential liability under the TCPA.

A district court exercising federal-question jurisdiction is required to utilize federal choice-of-law rules to determine the applicable substantive law. *Enter. Grp. Planning, Inc. v. Falba*, 73 F.3d 361 (6th Cir. 1995); *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991). Federal choice-of-law principles follow the approach outlined in the Restatement (Second) of Conflict of Laws in resolving choice-of-law issues. *Eli Lilly Do Brasil, Ltda. v. Fed. Express Corp.*, 502 F.3d 78, 81 (2nd Cir. 2007); *Hunyh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th

Cir. 2006). This Court previously settled the issue of choice-of-law under federal diversity jurisdiction requiring that the district court use the choice-of-law statute of the state in which it is located. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

However, with no major agreement among the circuit courts we must look to more than just the cherry-picked cases that Petitioner relies on. "Issues involving the rights and liabilities of a corporation . . . are determined by the local law of the state which . . . has the most significant relationship to the occurrence." Restatement (Second) of Conflicts of Laws § 302 (1971); *see also Feedman v. MagicJack Vocaltec Ltd.*, 963 F.3d 1125, 1132 (11th Cir. 2020) ("Application of [the law of the state of incorporation] achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation."). When the court finds "no such directive" though, there are certain factors relevant to the choice, such as, "the protection of justified expectations"; "certainty, predictability, and uniformity of result"; and "the relevant policies of the forum." Restatement (Second) of Conflicts of Laws § 6 (lists seven factors for courts to consider in the analysis process).

This policy preference has been long enshrined in the Federal Rules of Civil Procedures within Rule 4. *See* F.R.C.P. 4(K). Which places the outer limit of "Effective Service" against a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." *Id.* Additionally, the

exceptions of subsections B and C are non-applicable in this case. *Id.*; Pet. App. 8a. ("Under Rule 4(k)(1), apart from various exceptions not relevant to this appeal.").

Prior to statehood, New Tejas adopted its version of alter-ego liability and preserves it through today. Pet. App. 6a. Requiring that the "company have been organized for the *specific* purpose of defrauding a *specific* individual." *Id. (emphasis added).* The Thirteenth Circuit, and the New Tejas Supreme Court, have repeatedly affirmed that this standard, though stringent, is constitutional and operable. *Id.* In undertaking an analysis such as this, a court may consider, inter alia, Restatements of Law, treatises, decisions from other jurisdictions, and the majority view of other states. *See* Federal Practice and Procedure § 4507. However, a major issue, discussed below, is that there is no majority opinion of the circuit courts, let alone the states. This lack of continuity has created a multiplicity of established "rules" and results all arising out of various patch-work tests applied by these circuit courts. This is an unfeasible and unjust system that is currently in place and situates Todd in the crosshairs of an unfortunate jurisprudential history.

The Restatement minces no words, requiring that "[t]he local law of the state of incorporation will be applied to determine the existence and extent of a shareholder's liability to the corporation." Restatement (Second) of Conflicts of Laws § 307, cmt. a. (1971). In addition, some courts have acknowledged that, the state of incorporation is the jurisdiction that has the most interest in the outcome of the potential suit. *Volvo Const. Equipment Rents, Inc. v. NRL Rentals, LLC,* 614 Fed. Appx. 876, 79 (9th Cir. 2015); *see Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130,

133 (2nd Cir. 1993) ("[t]he law of the jurisdiction having the greatest interest in the litigation will be applied."). The state in which the corporation is located will have a greater investment in the outcome of the potential suit. Especially in comparison to a random forum which potential plaintiffs could attempt to shop around for in search of ideal statutory interpretation and lack of corporate deference.

When Todd incorporated Spicy Cold, he considered the highly deferential corporate laws of New Tejas when deciding where to establish his business. He understood that being the sole owner-operator of a corporation came with increased risk of liability and potential financial turmoil. Therefore, he chose a state that was deferential to the corporate form, which allowed for him to take necessary risks to produce an innovative product. The law of the state of incorporation "is the law which the shareholders . . . would usually expect to have applied to determine their liability." Restatement (Second) of Conflict of Laws § 307, cmt. a. (1971). The traditional principles of the "Internal Affairs" doctrine would dictate that if there were a conflict of law, then the law of the place of incorporation should trump. *In re Washington Mutual, Inc.*, 418 B.R. 107 (Bankr. D. Del. 2009).

It is imperative that this Court protect the ability of small-business owners to create future corporations in the states that they deem advantageous without fear of overreaching federal corporate liability. The uneven application of the federal common law test results in not only an inequitable outcome for Todd, but also further obfuscates the already complex jurisprudence regarding choice-of-law analysis. This

Court should affirm the ruling of the Thirteenth Circuit Court and endorsement of the Restatement would provide a bright line rule for subsequent cases.

2. THIS COURT SHOULD GRANT THE SAME LEVEL OF DEFERENCE TO NEW TEJAS AS IS AFFORDED TO DELAWARE REGARDING CORPORATE LAW

The protection of state autonomy is paramount to the functionality of the American democracy. States are much more adept at handling local issues and in a swifter than the federal government. While the balance of power must be maintained between the two, States must be given the autonomy to create, test, and ratify their own interpretations of laws. This deference should extend to all reaches of law, especially that of Corporate Law. Which is the driving force behind the largest economy in the world.

A. This Court should continue to protect the rights of shareholders who choose to invest in all forms of limited liability business entities.

The corporate form has existed for centuries and yet the intricacies of liability, dividends, investment, and responsibility for the actions of these legal fictions still cause significant issues globally. The first major corporations of the world, the East India Company, and the Dutch East India Company, paved the way for the globalization of the world economy and the corporate fiction. These developments were necessary so that shareholders would be able to insulate themselves from the major risks of traditional partnerships, while still investing large sums of money into the new global economy. This idea of a corporate fiction has created a system in which corporations are separate and distinct entities from their shareholders and are considered a "person" for most purposes. *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003) ([a] basic tenet of American corporate law is that the corporation and its

shareholders are distinct entities.); Karen L. Hart & Anneke Cronje, *Leggo My Alter Ego! What You Need to Know About Piercing the Corporate Veil*, NACM Credit Congress 1, 4 (2014). It is the belief of some scholars that the advent of the American corporate form "stems from democracy itself, giving small business owners the opportunity and foundation . . . to fairly compete in the world of cutthroat capitalism." David K. Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMOR L. J. 1305 (2007).

When corporations are formed, they gain "personhood" and they are required to follow the "corporate formalities" of the respective state, which includes establishing an agent, availing themselves to the laws of the land, and agreeing to abide by them. Hart, *supra*, at 8. The most important aspect of this "personhood" is that it comes with a variety of rights, duties, and laws it must follow. *Id.* at 4. The most significant right, and the one at issue here, is the protection from personal liability via the "shield" or corporate "veil." The entire reason that corporations are formed by shareholders and investors is to limit their personal liability to, at a maximum, the amount they have personally invested. By piercing the corporate veil, this Court would create a dangerous precedent for not only small business owners, but possibly even the more diverse larger corporations.

This veil allows for shareholders to invest in a corporation "without fearing that their person or individual assets, beyond what they are investing into the corporation, might be exposed" to various risks and obligations. Hart, *supra*, at 4. This protection allows for investments to be made with a substantially lower risk,

which in theory, will drive up overall investment and bolster the economy as a by-product. Millon, *supra,* at 1312. Limited liability also saves shareholders the costs involved in attempting to protect themselves from failed corporate ventures. *Id.* It is a "bedrock principle of corporate law" "that an individual can incorporate a business and thereby . . . shield himself from personal liability." *Willis v. Donnelly*, 199 S.W.3d 262, 271 (Tex. 2006). When Todd incorporated Spicy Cold, he considered many, if not more, of these factors when choosing to invest a limited amount of his capitol into the venture.

However, courts can use the alter-ego theory to disregard the corporate entity when "these individuals abuse the corporate privilege" and "hold them individually liable." *Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986). However, this doctrine should only be applied by courts when such egregious actions occur that holding otherwise would be an injustice. *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 228 (Tex. 1990). If liability was unlimited, or nearly unlimited as Petitioner argues, shareholders would have to actively consider the possibility of "poor" corporation decisions creating liability exposure. Milton, *supra*, at 1312. The use of the alter-ego theory is "like lightning, it is rare, severe, and unprincipled." Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and Veil Piercing*, 52 U. CHI. L. REV. 89, 90 (1985). This Court should not place Todd at risk of injustice simply because Petitioner has found a jurisdictional loophole that needs to be slammed closed.

B. Delaware's Corporate Code should not receive exclusive preferential treatment at the exclusion of other states seeking to pass innovative legislation.

A long-standing and resolute opinion of this Court is that "corporations are creatures of state law." *Rodriguez v. Fed. Deposit Insurance Corp.*, 140 S. Ct. 713, 718 (2020); *see Cort v. Ash*, 422 U.S. 66, 84 (1975). Which, while using the powers of dual federalism, allowed New Tejas to establish differing standards and statutes for their corporations. This power originates out of the founding of our nation and the powers delegated from the states to the federal government. U.S. CONST. amend. X. The rationale behind this power is to allow "a single courageous State [to], if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

By preserving the power of daily governance, we allow for states to respond to their citizens and local needs more aptly. This is the backbone of the New Tejas Alter-Ego Theory which was premised on defeating the "scum and villainy" that once inhabited their state. Pet. App. 6a. This legislation aimed to give deference to the corporate form and encourage long-term business development and investment. *Id.* This Court must continue to allow for states to engage in their own forms of corporate governance, especially regarding theories that are unique and for specific purposes. This Court should afford the same approval of New Tejas corporate law that it has afforded Delaware for over a century.

With over sixty-six percent of the Fortune 500 corporations being incorporated within its borders and over one million incorporated in the state in total, the

dominance of Delaware Corporate Law and its influence cannot be understated. Delaware Department of Commerce, *About the Division of Corporations* (Oct. 7, 2021), www.corp.deleware.gov/aboutagency.com. This dominance can be attributed to its highly efficient, but overly deferential, corporate code designed to attract all sizes and manners of businesses, including those with innovative products like Spicy Cold. This dominance has been reviewed in countless law review articles, legal treatises, and even casual observation. The two main factors facilitating this growth are that of codified and intentional deference and the snowball like effect of "networking" with other corporations, lawmakers, and investors. Peter Molk, *Delaware's Dominance and the Future of Organizational Law*, 55 Georgia Law Review 1111, 1122–29 (find 2020).

Todd is requesting that the same deference—realistically rubber stamping—of Delaware Law be applied to that of New Tejas. Taken further, he is asking that the rights of other sole corporation owners be protected. Todd is a small business owner who is trying to establish an innovative product and has taken reasonable steps to do so. If this Court allows an over-reaching and over-broad federal common law test to apply, it places Todd, along with many other current and future business owners, at risk of liability that they sought to avoid when incorporating. Todd is not seeking to defraud his investors, create injustice, or abuse the corporate form. He is simply seeking to use the tools made available to his company as a New Tejas corporation. One of, if not the most crucial aspect, in deciding where to incorporate is the

predictability that the laws of that state will be applied in disputes and the basic functions of the company.

3. THIS COURT SHOULD ESTABLISH A BRIGHT-LINE RULE THAT THE STATE OF INCORPORATION BE FAVORED, UNLESS TO DO SO WOULD CREATE INJUSTICE.

In addition to ruling in favor of Todd, this Court should settle the ongoing circuit court split by establishing the precedent that the state of incorporation is the preferred substantive law to apply in a choice-of-law analysis. As noted above, protecting the states and their "creatures" is an important goal in maintaining a robust and diverse economy. Despite the dissent's claim of a settled area of jurisprudence, choice-of-law analysis regarding piercing the veil is anything but. As the Thirteenth Circuit established below, the jurisprudence surrounding choice-of-law analysis regarding alter-ego theory is inconsistent and irregular throughout the circuits. Below is a small cataloging of the diversity of opinions and outcomes that are interwoven with little predictability throughout the circuits.

The First Circuit established no uniform application regarding choice-of-law. Some of its rulings apply the federal common law if the questioned statute requires "uniformity." *Brotherhood of Locomotive Eng'r v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 25 (1st. Cir. 2000) ("If the federal statute in demands national uniformity, federal common law…provides the determinative rules of decision."). While also applying state alter-ego laws in some cases of piercing the veil, most notably in labor disputes. *Lothrop v. North Am. Air Charter, Inc.*, 95 F.Supp.3d 90, 99 (D. Mass. 2015) (referencing First Circuit jurisprudence); *see also InterGen N.V. v. Grina*, 244 F.3d 134 (1st Cir. 2003).

The Second Circuit relies more heavily on state law when deciding choice-of-law issues. It focuses primarily on the state that would have the most interest in the litigation being handled within its borders and under its interpretation of the law. *Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132 (2nd Cir. 1993); *see Blue Whale Corp. v. Grand China Shipping Development Co., Ltd.*, (2nd Cir. 2013). However, it has left the door open to applying the federal common law when it deems it appropriate. *In Re Lydondell Chemical Company*, 543 B.R. 127, 140-41 (S.D.N.Y. 2016) (using Second Circuit precedent); *see Wm. Passalacque Builders, Inc. v. Resnick Devs. South, Inc.*, 933 F.2d 131 (2nd Cir. 1991).

The Third Circuit relies on the Restatement (Second) of Conflict of Laws "most significant relationship test" in deciding choice-of-law issues. *Carrick v. Zurich-American Ins. Grp.*, 14 F.3d 907, 909 (3d Cir. 1994). It adds an additional focus requiring an "interest analysis" of the states involved along with the federal government. *Id; see Lacey v. Cessna Aircraft Co.*, 934 F.2d 170, 187 (3d. Cir. 1991). It focuses on employing the law "of the state whose interests would be most harmed if its laws were not applied." *Id.* However, these often overlap making this secondary inspection moot.

The Fourth Circuit jurisprudence is inconclusive. Almost all alter-ego theory references being made concern diversity jurisdiction in which the court is required to use the forum state's statute. *Gourdine v. Karl Storz Endoscopy-America, Inc.*, 223 F.Supp.3d 475, 490 (D.S.C. 2016); *see also Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 434 (4th Cir. 2011).

The Fifth Circuit has established that courts are to "look to the law of the state of incorporation" when engaging in choice-of-law analysis involving alter-ego claims. *Lone Star Indus., Inc. v. Redwine*, 757 F.2d 1544, 1548 n.3 (5th Cir. 1985); *see also In re Am. Intern. Refinery*, 402 B.R. 728, 734 (W.D. La. 2013). The Fifth Circuit is extremely wary of forum shopping, however, and gives an escape valve if a party is able to raise a significant "federal interest" so as to apply federal common law. *ASARCO LLC v. Americas Min. Corp.*, 382 B.R. 49, 61 (S.D. Tex. 2007).

The Sixth Circuit has clearly established a preference in using the federal common law. Giving the directive to "use the federal common law of veil-piercing when a federal interest is implicated." *Anwar v. Dow Chem. Co.*, 876 F.3d 841, 848 (6th Cir. 2017). They have created a uniquely low standard for veil piercing only requiring that the respective court need "substantial reasons for doing so" after examining a three-factor weighing test. *Laborers' Pension Trust Fund v. Sidney Weinberger Homes, Inc.*, 872 F.2d 702, 704 (6th Cir. 1988) (focusing on fraud, intention, and respect of the corporate form).

The Seventh Circuit is heavily deferential to the choice-of-law provisions of the states involved, whether those be the state of incorporation or forum. *Judson Aktinson Candies, Inc. V. Latini-Hohberger Dhimantec*, 529 F.3d 371, 378 (7th Cir. 2008); *see Trinity Indus. Leasing Company v. Midwest Gas Storage, Inc.,* 33 F.Supp.3d 947, 964 (N.D. Ill. 2014). However, this does not prevent the use of federal common law, it only has a preference to use the states involved choice-of-law principles at the outset.

The Eight Circuit has established a hardline rule that it applies "state law to determine whether and how to pierce the corporate veil." *Tang v. Northpole Ltd.*, 314 F.R.D. 612, 618 (W.D. Ark. 2016) *citing Epps v. Stewart*, 327 F.3d 642, 649 (8th Cir. 2003). The Ninth Circuit has shown a willingness to apply the federal common law for veil piercing in some cases. *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1072–74 (9th Cir. 2015). It also "appl[ies] state law to questions of jurisdiction" in cases involving federal question jurisdiction regarding alter-ego theory. *Iconlab, Inc. v. Basuch Health Cos.*, No. 19-55683, 2020 WL 5640599, at *1 (9th Cir. Sept. 22, 2020).

The Tenth Circuit has a long history of relying on the federal common law test and continues to prescribe it in piercing the veil contexts. *N.L.R.B. v. Greater Kansas City Roofing*, 2 F.3d 1047, 1052 (10th Cir. 1993); *see United States v. Van Diviner*, 822 F.2d 960, 964–5 (10th Cir. 1987) (seminal piercing the veil case in the Tenth Circuit.). Review of Eleventh Circuit jurisprudence was inconclusive with the only semi-related case involving an international choice-of-law provision within a yacht purchasing and service contract. *See Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1161–63 (11th Cir. 2009).

The D.C. Circuit additionally relies on the implication of federal interests in choosing to apply the federal common law in almost all cases. *U.S. Through Small Bus. Admin v. Pena*, 731 F.2d 8, 12 (D.C. Cir. 1984); *see also District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 10 (D.C. Cir. 1988). Finally, the Federal Circuit is an inconsistent mixture on the application of this rule and there is no prevailing jurisprudence for either direction. Stephen B. Presser, *Piercing the*

Corporate Veil, § 3:15 The Federal Circuit, September 2021. Analyzing the cases above, it is clear that there is no true continuity among the majority of circuit courts.

While New Tejas's Alter-Ego Law is a stringent standard, it is not so excessive that it violates the Constitution and notions of Due Process. Despite the dissent's claim of a settled area of jurisprudence this is clearly an assertion in error. This Court should establish that the law of the state of incorporation is the preferred choice, unless to do so would promote injustice. For the entirety of the reasons stated above, Respondent humbly requests that this Court affirm the ruling of the Thirteenth Circuit.

CONCLUSION

The Thirteenth Circuit correctly held that both of Petitioner's claims of personal jurisdiction over Todd with respect to the claims out-of-state class members class allegations were properly struck. Holding that unnamed class members, like their named counterpart, must individually demonstrate personal jurisdiction. Additionally, holding that under a choice-of-law analysis the law of New Tejas should be applied which would prevent Todd from being found the alter-ego of Spicy Cold. This Court, accordingly, should affirm the judgment of the Thirteenth Circuit.

Respectfully Submitted,
/s/
Team # 32
Counsel for Respondent

APPENDIX A

Federal Rules of Civil Procedure

Federal Rule of Civil Procedure 4 provides, in pertinent part:

(k) Territorial Limits of Effective Service.

(1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

> (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;
>
> (B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or
>
> (C) when authorized by a federal statute.