No. 19-5309

In the Supreme Court of the United States

GANSEVOORT COLE, *et al.*,

Petitioners,

v.

LANCELOT TODD,

Respondent.

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

BRIEF FOR PETITIONER

November 15, 2021

TEAM NUMBER 43
Counsel for Petitioners

QUESTIONS PRESENTED

I. In a class action, is a federal court required to have personal jurisdiction over the defendant as to the claim of every unnamed class member or just the named class member?

II. In a federal question case, does federal common law or state law determine if a shareholder is the alter ego of a corporation for purposes of a federal court's jurisdiction over an out of state defendant?

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page(s)

United States Supreme Court Cases:

United States Court of Appeals Cases:

United States District Court Cases:

Bankruptcy Cases:

Constitutional Provisions:

Statutes:

Rules:

Legislative History:

Treatises:

Secondary Sources:

JURISDICTION

The United States Court of Appeals for the Thirteenth Circuit issued its opinion on May 10, 2020. R. 1a. The petition was timely filed and was granted on October 4, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Thirteenth Circuit is unreported but is reproduced in the Appendix to the Petition for Writ of Certiorari on pages 1a–22a. The district court's decision is not reported and is not available.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States of America and Federal Rule of Civil Procedure 4(k) is reproduced in the Appendix.

STATEMENT OF THE CASE

A. Todd's Unsolicited Calls

Lancelot Todd ("Todd"), through his corporation Spicy Cold Foods, Inc. ("Spicy Cold"), owns a chip flavor that numbs the mouth and tongue of anyone that consumes it. R. 2a. To promote this odd chip, Todd prerecorded an advertisement, acquired an automatic telephone dialing system, and called people across the entire country on both cell phones and home phones, leaving messages on behalf of Spicy Cold. R. 3a. Todd's calls left this unsolicited message:

> Sure, you can handle the heat, but can you handle the cold? Face the challenge of spicy cold chips—the coolest chips ever made. Available online now. Ask for them at your local grocery store. Frost-bite into the excitement!

Gansevoort Cole ("Cole"), a New Tejasan, is the only named plaintiff in this putative class action. R. 4a–5a. Cole received at least five of these unsolicited prerecorded advertisements on her cell phone and at least five on her home phone. R. 3a. Cole did not consent to these calls and Cole did not have a business relationship with Spicy Cold or Todd. *Id.*

B. Spicy Cold is the Alter Ego of Todd

In almost every way imaginable, Todd is Spicy Cold. Todd ran Spicy Cold with no board of directors. R. 5a. Todd commingled Spicy Cold's bank account to pay for his own personal expenses, leaving Spicy Cold "severely undercapitalized." *Id.* Spicy Cold even rents its premises from Todd. R. 4a. Todd also owns *all* of Spicy Cold's stock and any profits earned by Spicy Cold are "swiftly distributed" to Todd. R. 5a.

A notable difference between Spicy Cold and Todd is Spicy cold is "judgment proof" and Todd has "considerable personal wealth." R. 5a.

C. Procedural History

Cole sued Todd, individually, and Spicy Cold "on behalf of herself and a class of all persons in the country who received similar calls" in the district of New Tejas three years ago. R. 3a. Cole alleged Todd and Spicy Cold violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. *Id.* While Todd is a resident of West Dakota, Todd responded by moving to strike Cole's class action claim due to lack of "personal jurisdiction with respect to the claims of out-of-state class members." R. 4a. Todd incorporated Spicy Cold in New Tejas and established Spicy Cold's principal place of business in West Dakota. R. 1a–3a.

Cole argued back "that in a class action, unnamed class members need not demonstrate personal jurisdiction over the defendant" and alternatively, "Todd is the alter ego of Spicy Cold" under federal common law, allowing the district court general jurisdiction over Todd. R. 4a–5a.[1] During the district court proceedings, the district court found it "would readily pierce the corporate veil and hold Spicy Cold to be the alter ego" of Todd and Todd conceded "that under a federal common law test, he would be the alter ego of Spicy Cold and subject to general jurisdiction. R. 6a n.2. In contrast, Todd is not the alter ego of Spicy Cold under the state law of New Tejas.

[1] This brief will use the terms "absent" class member, "unnamed" class member, or "nonnamed" class member as used by the authority cited. These terms have been historically interchangeable and will be used as such in this brief. *See Phillips Petroleum Co. v. Shutts*, 72 U.S. 797 (1985); *Smith v. Bayer Corp.*, 564 U.S. 299 (2011); *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

R. 6a. The district court rejected Cole's arguments and struck Cole's "nationwide class allegations based on the lack of personal jurisdiction." R. 7a. Cole appealed. *Id.*

The United States Court of Appeals for the Thirteenth Circuit accepted Cole's "petition for interlocutory appeal under Rule 23(f)." R. 7a. On appeal Todd conceded again that under the federal common law test, he is the alter ego of Spicy Cold. R. 6a, 6a n.2. Additionally, the Court of Appeals declared that the main jurisdictional consideration was if "the exercise of jurisdiction would be consistent with the Due Process Clause of the Fourteenth Amendment" due to the "New Tejas long-arm statute extend[ing] to the outer bounds permitted by the Constitution." R. 8a. The United States Court of Appeals for the Thirteenth Circuit also rejected Cole's arguments and affirmed the district court's holding. R. 16a. Cole appealed again and the Supreme Court of the United States Granted Certiorari. R. 1.

SUMMARY OF THE ARGUMENT

A federal court is required only to have personal jurisdiction over the defendant as to the claim brought by the named class members. *Bristol-Myers Squibb v. Superior County of California, San Francisco County, et al.* ("BMS") does not and should not govern federal question class actions in federal court because class actions are not mass actions. The BMS reasoning should not extend to federal question class actions in federal court because there are substantial differences between named and unnamed plaintiffs, class actions and mass actions, and the significant federalism problems present in BMS. Federal Rule of Civil Procedure

("Rule") 23 has long governed the scope of class actions. Rule 4 does not geographically limit class actions and therefore should have no bearing on the scope of class action lawsuits. For purposes of class action lawsuits, unnamed class members have not been considered parties for personal jurisdiction determinations. Requiring out of state unnamed class members to be parties for personal jurisdiction would effectively destroy the class action mechanism.

This Court adjudicates Cole's alter ego assertion under federal question jurisdiction because this Court held federal courts have concurrent jurisdiction over TCPA claims and TCPA cases arise under federal question jurisdiction. *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 371–72 (2012). In federal question cases, federal courts resolve conflict of law issues under federal law. A federal court applies state law if no compelling federal interest justifies the application of federal common law.

In this case, the district court has general jurisdiction over Todd. The district court has jurisdiction over Todd because New Tejas state law conflicts with a sufficient federal interest arising from Cole's TCPA claim warranting the court to apply a uniform federal common law rule to pierce the corporate veil and find Todd is Spicy Cold's alter ego. If this court seeks to apply state law, this case should be remanded because the Court of Appeals misapplied the Restatement (Second) of Conflict of Laws ("Second Restatement") by not considering the interest of the law of West Dakota. Ultimately, tolerating Todd's actions under the fiction of Spicy Cold's separate legal personhood is unjust to Cole. Thus, a court should apply federal law

to Cole's alter ego assertion, find Todd to be the alter ego of Spicy Cold, and exercise jurisdiction over Todd.

ARGUMENT

Congress stepped in to defend Americans where states couldn't—spam calls. H.R. REP. 102-317, 2 ("The Congress finds that . . . [o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can ***evade*** their prohibitons [sic] through ***interstate operations***; therefore, Federal law is needed to control residential telemarketing practices.") (emphasis added). States are limited by their geographic boundaries, making citizens vulnerable under state law to interstate, unsolicited phone call advertisements. Congress created the TCPA to unify the country and overcome state differences to hold telemarketers accountable for these vast and unending disruptions. *See* S. REP. 102-178, 1, 1991 U.S.C.C.A.N. 1968, 1968 ("The purposes of the bill are to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate ***interstate*** commerce by restricting certain uses of facsimile (tax) machines and automatic dialers.") (emphasis added). The TCPA works to deter predatory spam calls with prerecorded advertisements and punishes those who violate the federal law. Todd is allegedly one of these spam callers. R. 3a. Cole, and the unnamed plaintiffs she represents, stand up for the Congressional federal interests embodied in the TCPA. Thus, this Court should find the district court has jurisdiction over Todd with respect to unnamed out of state plaintiffs and is the alter ego of Spicy Cold.

I. A COURT SHOULD EVALUATE PERSONAL JURISDICTION ONLY WITH RESPECT TO THE CLAIMS OF NAMED CLASS MEMBERS

The law of personal jurisdiction is widely known to be "rather muddled." Harvard Law Review Association, *Personal Jurisdiction*, 128 HARVARD L. REV. 1, 1 (2014). Parties have to navigate a jurisdictional maze to establish personal jurisdiction in order to rightfully comport with "fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Historically, however, in a class action lawsuit, personal jurisdiction over a defendant has been solely evaluated with respect to claims of named class members. *Al Haj v. Pfizer, Inc.*, 338 F.Supp.3d 815, 818–19 (N.D. Ill. 2018). Plaintiffs, defendants, and courts have relied on this to be true since the inception of the modern class action. *Id.*

Now, Todd is asking this Court to extend this Court's recent BMS reasoning to class actions, undermine the class action mechanism, and dismiss this Court's *Shutts* decision, requiring unnamed class members to establish personal jurisdiction over a defendant – when the named plaintiff already proved personal jurisdiction. Nevertheless, Todd's argument cannot be squared with this Court's precedent. This Court reviews *de novo* a court's "denial of a motion to dismiss for lack of personal jurisdiction." *Lyngass v. Curaden AG,* 992 F.3d 412, 419 (6th Cir. 2021).

A court evaluating personal jurisdiction over a defendant based on named class members is appropriate because (1) BMS does not govern federal question class action in federal court; (2) Rule 23 governs federal question class actions and Rule 4

does not geographically limit the scope of class action; and (3) absent class members have never been considered parties for personal jurisdiction purposes.

A. *Bristol-Myers* does not govern federal question class action in federal court

"It is plain to see that [BMS] is not squarely on point." *Gress v. Freedom Mortg. Corp.*, 386 F.Supp.3d 455, 465 (M.D. Pa. 2019). In 2017, this Court held that all plaintiffs in a mass tort action bringing a claim in state court must establish personal jurisdiction over the defendant. *Bristol-Myers Squibb v. Superior County of California, San Francisco County, et al.*, 137 S. Ct. 1773, 1780 (2017). Very few courts have extended BMS' reasoning to unnamed class action members. *See* Daniel Wilf-Townsend, *Did* Bristol-Myers Squibb *Kill the Nationwide Class Action?*, 129 YALE L.J. FORUM 205, 208 (2019) [hereinafter Wilf-Townsend]. It would be dangerous to extend the "not squarely on point" logic of BMS to federal question class actions in federal court because only claims of named plaintiffs have traditionally been evaluated for personal jurisdiction purposes, the federalism issues in *Bristol-Myers* are not applicable to federal class actions, and federal class and state mass actions have fundamental differences.

1. Only claims of named plaintiffs have traditionally been evaluated for personal jurisdiction purposes

The Supreme Court has long held that courts can exercise personal jurisdiction over nonresident defendant(s) so long as the defendant(s) have "minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe*

Co., 326 U.S. at 316 (citation omitted). The "constitutional cornerstone" of personal jurisdiction is that "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (*quoting World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

This Court has recognized two forms of personal jurisdiction: general and specific. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). General jurisdiction occurs when the defendant is "essentially at home." *Damiler AG v. Bauman*, 571 U.S. 117, 139 (2014); *see also Id.* While general personal jurisdiction allows a plaintiff to bring "*any* claim against a defendant," specific personal jurisdiction requires a plaintiff to bring a claim which is connected to the forum state. *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (emphasis added). Specific jurisdiction's "essential foundation" is "[a] relationship among the defendant, the forum, and the litigation." *Helicopters Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (internal quotation marks omitted).

For a court to exercise specific personal jurisdiction over a claim, "there must be an 'affiliation between the forum and the underlying controversy principally, [an] activity or an occurrence that takes place in the forum State.'" *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (alterations in the original) (quoting *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 919). It is undisputed New Tejas has specific personal jurisdiction over Todd with respect to claims from New Tejas residents – regardless of those residents are named or unnamed. R. 4. Fundamentally, if

specific jurisdiction rests on the cornerstones of the defendant, the forum, and the litigation, New Tejas has personal jurisdiction over Todd.

Todd's motion to strike a nationwide class action due to lack of personal jurisdiction does not square with this Court's long history of *not* requiring courts to have personal jurisdiction over unnamed plaintiffs. In *Phillips Petroleum Co. v. Shutts*, the Court unanimously held "minimum contacts with the forum state" is not necessary for each absent class member to prove. 472 U.S. 797, 811 (1985). As long as absent class members are given the chance to remove themselves from the class action, "by executing and returning an 'opt out' or 'request for exclusion,'" due process of the absent class members has not been violated. *Id.* at 812. That is essentially because personal jurisdiction is fundamentally about a court's "power over the *parties before it*." *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 562 (2017) (emphasis added).

It makes no difference that *Shutts* analyzed personal jurisdiction over unnamed class members instead of the defendant(s). *Lyngass,* 992 F.3d at 435–37. Since it is undisputed New Tejas has personal jurisdiction over Todd for the in-state class members and is already in the forum, there are no additional due process implications if out of state unnamed class members join the litigation. *See, e.g.*, *Sousa v. 7-Eleven, Inc.*, No: 19-CV-2142 JLS (RBB), 2020 WL 6399595 (S.D. Cal. Nov. 2, 2020). If out of state unnamed class members had to bring claims in their respective various forums, Todd would be subject to *significant* additional litigation burdens. A class action defendant, unlike a mass action defendant presents, "a

unitary, coherent claim to which it need respond only with a unitary, coherent defense." *Sanchez v. Launch Tech. Workforce Sols., LLC*, 297 F.Supp.3d 1360, 1366 (N.D. Ga. 2018).

Prior to BMS, "there was a general consensus that due process principles did not prohibit a plaintiff from seeking to represent a nationwide class in federal court . . . ." *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 448 (7th Cir. 2020) *reh'g and reh'g en banc denied* (May 24, 2020), *cert. denied* 141 S. Ct. 1126 (Jan. 11, 2021); *see, e.g.*, *Al Haj*, 338 F.Supp.3d at 818–19 (noting defendant could not produce any case prior to BMS where specific jurisdiction must be proven for absent class members). "Decades of case law show[s]" minimum contacts between absent class members and the forum has never been required. *Mussat*, 953 F.3d at 448. Historically, there has never been an understanding that "due process" principles "requires [an] absent-class-member-by-absent-class-member jurisdictional inquiry. *Id.* In *Shutts*, this Court found there is "little, if any precedent" to support such a proposition. *Shutts*, 472 U.S. at 812.

Interpreting BMS to have implied that due process principles require an unprecedented unnamed class member jurisdictional analysis would be "sideways" because that would mean BMS have then "drastically alter[ed] class action plaintiff's ability to choose their forum." *Allen v. ConAgra Foods, Inc.*, No. 3:13-CV-01279-WHO, 2018 WL 6460451, at *7 (N.D. Cal. Dec. 10, 2018), *on reconsideration*, No. 3:13-CV-01279-WHO, 2019 WL 5191009 (N.D. Cal. Oct. 15, 2019). This drastic alteration would be directly adverse to the Court's assertion BMS was decided on

well "settled principles regarding specific jurisdiction." *Bristol-Myers Squibb*, 137 S. Ct. at 1781. The BMS Court granted review and overruled the California's Supreme Court's "sliding scale approach" which "resemble[d] a loose spurious form of general jurisdiction," because it was "difficult to square with [the Court's] precedents." *Id.* Put simply, the Courts' BMS "holding did not establish some new 'bright line' rule" regarding specific jurisdiction because the ultimate goal of BMS was "to stop the gradual creep of the boundaries of specific jurisdiction." *Gress*, 386 F.Supp.3d at 465.

2. The federalism issues in *Bristol-Myers* are not applicable to federal class actions

BMS applied the due process clause of the Fourteenth Amendment which essentially acts "as an instrument of interstate federalism." *Bristol-Myers Squibb*, 137 S. Ct. at 1781. However, federal courts are not subject to the Fourteenth Amendment's due process restrictions. Rather, federal courts have to follow the Fifth Amendment's due process clause. The Court in BMS concluded its opinion by noting BMS did not address "whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." *Id.* at 1780–84.

If the Fifth Amendment imposed the same due process restrictions on federal courts as the Fourteenth Amendment does to state courts, federal courts would be subject to the same restrictions as state courts. Bryce Saunders, *23 and Me: Bristol-Myers Squibb, Federal Class Actions & The Non-Party Approach*, 71 CASE W. RES.

L. REV. 3, 1129 (2021). Meaning, each member of a class would have to establish minimum contacts for specific personal jurisdiction—as if they were suing the defendant individually. *Id.* The United States Constitution provides no basis for this argument. And in any case, a federal court relying on federal question jurisdiction can exercise jurisdiction over anyone who has minimum contacts with the United States as a whole. *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 418 (9th Cir. 1977); *Canaday v. Anthem Companies, Inc.*, 9 F.4th 392 (6th Cir. 2021); *KM Enterprises, Inc. v. Global Traffic Technologies, Inc.*, 725 F.3d 718, 730–31 (7th Cir. 2013). Therefore, federal courts can take jurisdiction over a defendant who has minimum contacts with the United States as a whole because "[t]he jurisdiction whose power federal courts exercise is the United States of America, not the State" in which the suit is brought. *INS Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 551 (7th Cir. 2001).

But, "federalism concerns are not present" in federal class actions." *In re Chinese – Manufactured Drywall Prods. Liability Litig.*, No. MDL 09-2047, 2017 WL 5971622, at *19 (E.D. La. Nov. 20, 2017). The BMS Court carefully limited the scope of its decision to "due process limits on the exercise of specific jurisdiction by a *State*" and explicitly noted its decision did not touch "on the exercise of personal jurisdiction by a *federal* court." *Bristol-Myers Squibb*, 137 S. Ct. at 1783–84 (emphasis added). The BMS Court's "animating concern, in the end, appears to be federalism . . . ." *Id.* at 1788 (Sotomayor, J., dissenting).

Federalism was at issue because of the special facts of BMS. The "exclusive[] concern[]" of BMS was the "unfairness of submitting an out-of-state defendant to the jurisdiction [of] a foreign sovereign (California) with respect to claims having no connection to California." *Massaro v. Beyond Meat*, Inc. No:3:20-cv-00510-AJB-MSB, 2021 WL 948805, at *35–36 (S.D. Cal. March 12, 2021). Said differently, federalism issues were present because the BMS Court was concerned with California and other states "exceeding the bounds of their sovereignty." *Kelly v. RealPage, Inc.*, 338 F.R.D. 19, 27 (E.D. Pa. 2020); *Sloan v. General Motors, LLC*, 287 F.Supp.3d 840, 858 (N.D. Cal 2018) (noting BMS "was animated by unique interstate federalism concerns").

These federalism issues are absent here. Mrs. Cole brought her claim in federal court—United States District Court for the District of New Tejas, under a federal statute—Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. R. 3a. No state law or state court is involved. Indeed, it is highly "questionable whether cases arising out of federal question jurisdiction—such as this one based on the *TCPA*—present the same [federalism] concerns" at issue in BMS. *Massaro*, 2021 WL 948805, at *35–36 (emphasis added).

Federal courts do not have the same federalism concerns as state courts because "all federal courts, regardless of where they sit represent the same federal sovereign, not the sovereignty of a foreign state government." *Sloan*, 287 F.Supp.3d at 858; *see also Nat'l Fair Hous. All. v. Bank of Am., N.A.*, 401 F.Supp.3d 619, 628 (D. Md. 2019) (noting BMS' federalism concerns "may apply differently in federal

court where the forum tribunal and any alternative tribunal represent the same sovereign."). By necessity, in a "purely federal case"—like a claim invoking the TCPA—the due process concerns regarding a state courts' ability to hail an out-of-state defendant is just simply not present. *Massaro*, 2021 WL 948805, at *35–36.

As a result of these federalism concerns, this Court determined that "mere factual or legal similarity" between the California plaintiffs in BMS and nonresidents of California was not enough for the California state court to establish personal jurisdiction. *Sloan*, 287 F.Supp.3d at 858 (*citing Bristol-Myers*, 137 S. Ct. at 1781); *see also Cole v. Todd*, No. 19-5309, at *9 (13th Cir. May 10, 2020) (noting "[m]ere similarity between an out-of-state plaintiff's claim and an in-state plaintiff's claim cannot give rise to personal jurisdiction over the former").

However, the entire purpose of class actions is to group factual and legal similarity. CONG. RESEARCH SERV., Class Action Lawsuits: A Legal Overview for the 115th Congress, 1–2 (April 11, 2018). If this Court extends BMS reasoning and federalism concerns to class actions, as a minority of courts have, it would effectively "outlaw nationwide class actions . . . where there is no general jurisdiction over the Defendants." *DeBernardis v. NBTY, Inc.*, No. 17 C 6125, 2018 WL 461228, at *6 (N.D. Ill. Jan. 18, 2018) *abrogated by Mussat*, 953 F.3d at 448.

3. Federal class actions and state mass actions have fundamental differences

BMS did not extend its reasoning to "class action[s] [under Rule 23 of the Federal Rules of Civil Procedure] in which a plaintiff in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there."

Bristol-Myers Squibb, 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting); *see also Mussat*, 953 F.3d at 448; *Lyngass*, 992 F.3d at 434; FEDERAL CLASS ACTION DESKBOOK § 1.06 (2020). In essence, even if BMS does apply to federal courts hearing federal questions, "the current case is distinguished from [BMS] because it deals with class action, *not* a mass tort action." *Fabricant v. Fast Advance Funding, LLC*, No. 2:17-cv-05753-AB(JCx), 2018 WL 6920667, at *14 (C.D. Cal. April 26, 2018).

There are two "inherent differences" between mass torts and class action. *Rosenberg v. LoanDepot.com LLC*, 435 F.Supp.3d 308, 326 (D. Mass. 2020); *see also Molock v. Whole Foods Mkt., Inc.*, 297 F.Supp.3d 114, 126 (D.D.C 2018); *In re Chinese – Manufactured Drywall Prods. Liability Litig.*, 2017 WL 5971622, at *12–14; *Cabrera v. Bayer Heatlhcare, LLC*, No. LACV1708525JAKJPRXI, 2019 WL 1146828, at *7 (C.D. Cal. Mar. 6, 2019) (collecting cases).

First, in a mass tort action, "each plaintiff is a real party in interest." *Molock*, 297 F.Supp.3d at 126. Comparatively, a putative class action has "one or more plaintiffs seek[ing] to represent the rest of the similarly situated plaintiffs, and the 'named plaintiffs' are the only plaintiffs actually named in the complaint." *Fitzhenry-Russell v. Dr. Pepper Snapple Grp. Inc.*, No. 17-cv-00564, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017) (quoting FED. R. CIV. P. 23). Class actions were created "as an exception to the usual rule" that individual named parties should be the ones conducting litigation. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982).

For a laundry list of reasons, absent class members, who are not conducting the litigation, are not as burdened as named plaintiff(s) and defendant(s). *Shutts*, 472 U.S. at 810. Absent plaintiffs do not have to hire counsel or pay fees, entertain counterclaims or cross-claims, or participate in discovery. *Id. but c.f.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14, comment f (2000) (explaining a class action lawyer has limited confidentiality responsibilities to absent class action members). Absent plaintiffs "may sit back and allow litigation to run its course," because they are "not required to do anything." *Shutts*, 472 U.S. at 810. A key feature of absent members is there "passivity," because active participation would make the "class action mechanism . . . not work." 3 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 9:1 (5th ed.). Unnamed class members can "obtain a direct seat at the table *only by intervening*." *Coleman v. Labor and Industry Review Comm'n*, 860 F.3d 461, 474 (7th Cir. 2017) (emphasis added).

Second, Rule 23's "numerosity, commonality, typicality, adequacy of representation, and predominance and superiority," must be met in class actions and are not applicable to the mass tort context. FED. R. CIV. P. 23(A)&(B). Mass tort actions are usually not class actions because they cannot meet Rule 23(a) standards. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION § 22.7 (4th ed. 2015) (discussing limited circumstances it is strategically logical for a mass tort action to turn into a class action). "[I]n short . . . [class actions] are different from many other types of aggregate litigation." *Mussat*, 953 F.3d at 446–47.

Rule 23(a) standards impose due process safeguards which ensure limited variation in class action plaintiffs' claims, unlike mass actions. *Sotomayor v. Bank of Am., N.A.*, 377 F.Supp.3d 1034, 1037–38 (C.D. Cal. 2019). Rule 23's due process safeguards which simply "do not exist in mass tort actions." *Knotts v. Nissan N. Am., Inc.*, 346 F.Supp.3d 1310, 1333 (D. Minn. 2018). "At its core, personal jurisdiction is rooted in fairness to the defendant" and that is why Rule 23 has safeguards. *Id.* (*quoting Allen*, 2018 WL 6460451 at *7 (internal quotation mark omitted)). The safeguards rooted in Rule 23 provide Todd with more consideration to his due process than it would if he was faced with a mass tort action.

"[A] majority of the district courts who have faced these questions have determined that [BMS] does not apply to class actions." *Gress*, 386 F.Supp.3d at 464–65 (collecting cases); *see, e.g.*, *Sotomayor*, 377 F.Supp.3d at 1037–38 (finding "weight of authority examining" BMS "does not apply to class actions."). Indeed, a quantitative analysis in 2019 found out of the "sixty-four rulings to reach the question of [BMS] application to out-of-state unnamed class members, fifty have held that the exercise of jurisdiction is permissible—a nearly four-to-one ratio in favor of exercising jurisdiction." Wilf-Townsend at 208. Even though almost all federal decisions which have applied BMS to class actions have "come from the Northern District of Illinois," those cases were abrogated by *Mussat v. IQVIA*, *Inc. Sotomayor*, 377 F. Supp. 3d at1037 n.2; *see also Munsell v. Colgate-Palmolive Co.*, 463 F.Supp.3d 43, 55 (D. Mass 2020) (noting almost all decisions applying BMS to class actions have come from "two judges in the Northern District of Illinois.").

B. Rule 23 governs federal question class actions and Rule 4 does not geographically limit the scope of class actions

Rule 23 has long governed federal question class actions and Rule 4 has traditionally never geographically limited the scope of class actions because Rule 4 is not connected to class actions. If Rule 23 is satisfied, named plaintiffs can represent unnamed plaintiffs, regardless of geographic scope.

1. Historically, Rule 4 does not have any connection with class actions

Rule 4 sometimes requires federal district courts to analyze the law of the state it sits in to determine whether that state court would have personal jurisdiction over the parties involved. Specifically, the Rules' "Territorial Limits of Effective Service," or Rule 4(k)(1), states: "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; . . . (C) when authorized by a federal statute." FED. R. CIV. P. 4(K)(A)&(C).

However, as the *Mussat* court explained, "Rule 4(k)[(1)] addresses *how* and *where* to serve process; it does not specify on *whom* process must be served." *Mussat*, 953 F.3d at 448. This is precisely why the title of Rule 4(k) uses "[s]ervice" and not "jurisdiction." *See* FED. R. CIV. P. 4. It would be improper to "mix[] up the concepts of service and jurisdiction." *Mussat*, 953 F.3d at 448. Rule 4(k) does not explicitly nor implicitly blanketly limit federal court jurisdiction and the rule "does nothing to alter the rules regarding which *parties* to a lawsuit must be served at all." *Progressive Health & Rehab Corp. v. Medcare Staffing, Inc.*, No. 2:19-CV-4710,

2020 WL 3050185, at *10–11 (S.D. Ohio June 8, 2020) (emphasis added). Simply put, Rule 4(k) is a mechanism for establishing personal jurisdiction through service of process.

Even more generally, Rule 4 and the advisory committee's notes do not mention or invoke class actions and their scope. FED. R. CIV. P. 4. Nothing in Rule 4 discusses the geographic scope of class actions. *Id.* Reading Rule 4(k)'s "territorial limits of effective service" as a reason to bar out of state absent class members from establishing personal jurisdiction would require a massive departure from settled personal jurisdiction concepts. *See, e.g.*, In re: Northern Dist. of California "Dalkon Shield" *IUD Products Liability Litigation*, 526 F.Supp. 887, 903–09 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982) ("(Requiring) personal jurisdiction over all class members [including unnamed members] would in effect destroy the class action concept . . . .")

Historically, Rule 4 has only addressed whether a named plaintiff has established personal jurisdiction over the defendant. *Shell v. Shell Oil Co.*, 165 F.Supp.2d 1096, 1107 (C.D. Cal. 2001). It is "well settled" personal jurisdiction must be established "for *each and every named plaintiff* for the suit to go forward." *Id.* (emphasis in the original). Fundamentally—unnamed class members are irrelevant to the question of specific jurisdiction and Rule 4. *See, e.g.*, *Chernus v. Logitech, Inc.*, No.17-673(FLW), 2018 WL 1981481, at *10 (D.N.J. April 27, 2018)*; Senne v. Kan. City Royals Baseball Corp.*, 105 F.Supp.3d 981, 1022 (N.D. Cal. 2015).

The argument that Rule 4(k) limits the personal jurisdiction of class action lawsuits cannot be true under FED. R. CIV. P. 82. *Mussat*, 953 F.3d at 448; *Progressive Health & Rehab Corp.*, 2020 WL 3050185, at *10–11. In fact, the federal "rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts." FED. R. CIV. P. 82. As stated by the Thirteenth Circuit, the Rules Enabling Act—28 U.S.C. § 2072(a)&(b)—establishes that "general rules of practice and procedure" "shall not abridge, enlarge or modify any substantive right." *See Cole*, No. 19-5309, at *9; 28 U.S.C. § 2072(a)&(b).

As argued by Judge Thapar in the dissent of *Lyngass v. Curaden AG*, Rule 4 and Rule 23 can coexist together. 992 F.3d at 444 n.2 (Thapar, J., dissenting). There is no need to "hinder the operation" of either rule. *Id.* Indeed, "it is the duty of the courts . . . to regard each as effective." *Id. (quoting Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Historically, however, Rule 4 has governed named plaintiffs and Rule 23 lets named plaintiffs establish the ability to represent unnamed plaintiffs. Cole, the sole named plaintiff, has undisputedly established that her claim has personal jurisdiction over Todd. It is the purpose of Rule 23 to determine whether she can represent unnamed members.

2. If Rule 23 is satisfied, named plaintiffs can represent unnamed plaintiffs, regardless of geographic scope

Rule 23—not Rule 4—is the correct procedural mechanism for class actions. Since *Califano*, class certification has been a district court discretionary matter under Rule 23 considerations. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

Named or "lead" plaintiffs in a class action "earn the right" to represent unnamed class members by meeting all four criteria of Rule 23(a) and one section of Rule 23(b). *Lyngass,* 992 F.3d at 437 (citing *Mussat*, 953 F.3d at 447). Rule 23 "unambiguously authorizes any plaintiff," to maintain a class action as long as Rule 23's prerequisites are satisfied. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406 (2010) (plurality opinion). Consequently, the "only suit before the court" is the suit brought by the named plaintiff. *Lyngass,* 992 F.3d at 37. When a court analyzes whether the defendant has proper contacts with the forum, the court should only look at the named plaintiff's claims because the named plaintiff represents the unnamed members through Rule 23. *Id.* (citing *Bristol-Myers*, 137 S. Ct. at 1780); *Gen. Tel. Co. of the Sw.*, 457 U.S. at 155; *Payton v. Cnty. of Kane*, 308 F.3d 673, 680-81 (7th Cir. 2002).

Just as Rule 4 does not address class actions, "[n]othing in Rule 23 . . . limits the geographical scope of a class action that is brought in conformity with that Rule." *Califano*, 442 U.S. at 702. Meaning, if the necessary Rule 23 requirements can be met, there is no reason to restrict out of state unnamed plaintiffs from being members of the suit.

C. Unnamed class members have not been considered parties when evaluating personal jurisdiction because the purpose of class actions are to efficiently aggregate claims

If unnamed class members were considered parties when conducting a personal jurisdiction analysis, courts would have to consider every single individual class member's contacts with the forum state. Unnamed class members have not

been considered parties when evaluating personal jurisdiction because requiring them to do so would effectively undermine and frustrate the purpose of the class action mechanism.

1. Unnamed class members are not parties for purposes of personal jurisdiction

Before there can be analysis of whether unnamed class members are parties for purposes of personal jurisdiction, it should be clear that prior to class certification, parties are unequivocally nonparties. "[U]nnamed class members (and their claims) are not before the Court in any real sense," prior to certification. *Penikila v. Sergeant's Pet Care Prods., LLC*, 443 F.Supp.3d 1212, 1213 (N.D. Cal. 2020); *see also Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (rejecting "an unnamed member of a proposes but uncertified class" is a party to the action); *see also Devlin v. Scardelletti*, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting) ("Not even petitioner, however, is willing to advance the *novel and surely erroneous* argument that a nonnamed class member is a party to the class-action litigation *before the class is certified*") (second emphasis added); *Standard Fire Insurance Co. v. Knowles*, 568 U.S. 588, 593 (2013) (A plaintiff in a putative class action is unable to "legally bind members of the proposed class before the class is certified.").

The unnamed class members in Cole's suit are therefore indisputably nonparties at this juncture in the litigation timeline. As *Molock* put it, the unnamed class members prior to certification "are *always* treated as nonparties." *Molock v. Whole Foods Mkt., Inc.*, 952 F.3d 293, 297 (D.C. 2020), *reh'g en banc denied* (May 7,

2020). Unnamed class members should continue to be considered nonparties for purposes of personal jurisdiction after class certification.

"Nonnamed class members . . . [are] parties for some purposes and not for others." *Devlin*, 536 U.S. at 9–10. The "'label' party does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Id.* Essentially, when looking at class action party status for different procedural rules the best answer is age old legal phrase—"it depends." *Coleman v. Labor & Indus. Review Comm'n of Wis.*, 860 F.3d 461, 471 (7th Cir. 2017). For purposes of subject matter jurisdiction, this Court has held absent class members are "not considered parties at all." *Lyngass,* 992 F.3d at 437 (citing *Devlin*, 536 U.S. at 10) *but c.f.*, *TransUnion v. Ramierz*, 141 S. Ct. 2190, 2208 (2021) (holding "[e]very class member must demonstrate Article III standing to recover individual *damages*" (emphasis added)); *Smith*, 564 U.S. at 314 (holding pursuant to res judicata, "unnamed members of a class action [are] to be bound, even though they are not parties to the suit.").

Absent class members are not parties when determining diversity of citizenship cases under 28 U.S.C. § 1332. *Devlin*, 536 U.S. at 10. As long as named class members can satisfy the amount in controversy requirement, jurisdiction is valid over unnamed class members. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 536 U.S. 546, 566–67 (2005) *but c.f. Snyder v. Harris*, 394 U.S. 332, 338 (1969) (finding absent class members are parties if named members cannot satisfy the requisite amount in controversy for diversity suits brought under 28 U.S.C.

§1332(d)). Even though subject matter jurisdiction is a constitutional and statutory requirement, unnamed class members are still not parties. *Steel Co v. Citizens for a Better Env't, 523* U.S. 83, 89 (1998). This is true even though subject matter jurisdiction is more fundamental than personal jurisdiction because it cannot be waived. *Araugh v. Y&H Corp.*, 546 U.S. 500 (2006). Lastly, absent class members are not parties for purposes of venue. *Id.*; 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1757 (3d ed. 2018) (Noting the "general rule" for determining venue is only evaluating the residence of named parties).

Assuming absent class members are parties for personal jurisdiction but are not parties for subject matter jurisdiction, diversity of citizenship, amount in controversy, and venue purposes "cannot be right." *Al Haj*, 338 F.Supp.3d at 820. "Personal jurisdiction shares a key feature" with diversity of citizenship, amount in controversy, and venue — "each governs a court's ability, constitutional or statutory, to adjudicate a particular person's or entity's claim against a particular defendant." *Id.*

2. Requiring out of state unnamed class members to establish personal jurisdiction over a defendant will frustrate the purposes of personal jurisdiction

The "principal purpose" of class actions is their "efficiency and economy of litigation." *Gen. Tel. Co. of Sw.*, 457 U.S. at 159. If this Court extended BMS reasoning to class actions, it would effectively undermine the purpose of Rule 23 and "reinstall the 'strict jural relationship' that was removed from Rule 23 and raise a barrier for a band of plaintiffs seeking to 'pool claims which would be

uneconomical to litigate individually." *Murphy v. Aaron's, Inc.*, No. 19-cv-00601-CMA-KLM, 2020 WL 2079188, at *32 (D. Colo. 2020) (quoting *Shutts*, 472 U.S. 797 at 809); *see also Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997); Roger Bernstein, *Judicial Economy and Class Actions*, 7.2 THE J. OF LEGAL STUDIES 349, 352–53 (1978) (finding "class actions on the whole have had a beneficial . . . effect[] on judicial economy).

Indeed, the purpose of Rule 23 is to "achiev[e] economies of time, effort and expense." FED. R. CIV. P. 23(B)(3) advisory committee's note (1966); *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349 (1983). An extension of BMS to class actions would result in the named and unnamed plaintiffs splitting up and bringing their claims to various federal courts. "[U]nnecessary filings or repetitious papers and motions" would ensure there was no class action mechanism. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551 (1974). As a result, the "multiplicity of activity which Rule 23 was designed to avoid" would occur. *Id.* The ability for federal district courts to "adjudicate claims of multiple parties are once . . ." would be gone. *Shady Grove Orthopedic Associates, P.A*, 559 U.S. at 408.

Congress authorized the class action structure for the very purpose of promoting efficiency and economy. *Dennis v. IDT Corp.*, 343 F.Supp.3d 1363, 1367 (N.D. Ga. 2018) (citing *Sanchez v. Launch Tech. Workforce Sols., LLC*, 297 F.Supp.3d 1360, 1366 (N.D. Ga. 2018)). This Court has continued to "protect the policies behind the class-action procedure . . . " to prevent frustrating the purpose of class actions. *Crown, Cork & Seal Co.*, 462 U.S. at 349. For the sake of judicial

economy and the avoidance of "piecemeal litigation," personal jurisdiction over defendants should be evaluated solely on the claims of named plaintiffs. *See Chicago Tchrs. Union, Local No. 1 v. Bd of Educ. of Chicago*, 797 F.3d 426, 444 (7th Cir. 2015).

If this Court extended BMS to class actions, required unnamed plaintiffs to conform with Rule 4, and held unnamed members 'parties' for purposes of personal jurisdiction, it would "effectively sound[] the death knell for nationwide class actions . . . ." *Cole v. Todd*, No. 19-5309, at *9 (13th Cir. May 10, 2020) (Arroford, J., dissenting).

II. FEDERAL LAW DETERMINES TODD IS THE ALTER EGO OF SPICY COLD BECAUSE THE TCPA IMPLICATES FEDERAL INTERESTS AND EVEN IF STATE LAW APPLIES, THE MOST SIGNIFICANT RELATIONSHIP TEST GOVERNS THE CHOICE OF STATE LAW

Even if this Court does not agree that the district court has jurisdiction over Todd through Cole's class certification, the district court has general jurisdiction over Todd because federal common law is the substantive law a court applies to jurisdictional alter ego concerns. This Court reviews *de novo* the lower court's choice of law "determination" of which law applies and "dismiss[al] for lack of personal jurisdiction". *Eli Lilly Do Brasil, Ltda. v. Fed. Express Corp.*, 502 F.3d 78, 80 (2d Cir. 2007); *see also Lyngaas*, 992 F.3d at 419 ("We review *de novo* a district court's denial of a motion to dismiss for lack of personal jurisdiction . . . .").

The plaintiff "demonstrate[s] that the court has personal jurisdiction over the defendants." *Mahon v. Mainsail LLC*, No. 20-CV-01523-YGR, 2020 WL 4569597, at *3 (N.D. Cal. Aug. 7, 2020) (*see* A. J. Thomas, *Conflict of Laws*, 29 SW L.J. 244

(1975)) ("Federal rule 12(b)(2) . . . places the burden of establishing the existence of jurisdiction upon the party seeking to invoke the jurisdiction of the federal court.") (citation omitted)). Without evidentiary hearings, the plaintiff's burden to demonstrate personal jurisdiction is "relatively slight." *Anwar v. Dow Chem. Co.*, 876 F.3d 841, 847 (6th Cir. 2017). The plaintiff must "only make a prima facie showing of jurisdictional facts." *Mahon*, 2020 WL 4569597, at *3 (*quoting Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004)). While "conclusions" are not sufficient, a plaintiff's "uncontroverted allegations in the complaint must be taken as true." *Id.* (quoting *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011)). When a plaintiff meets the personal prima facie jurisdiction burden "remand is appropriate." *Anwar*, 876 F.3d at 847.

Courts have federal question jurisdiction over claims arising under the TCPA, and the "TCPA is a federal law that both creates the claim . . . and supplies the substantive rules that will govern the case." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 371–72, 377 (2012) ("TCPA claim[s], in 28 U.S.C. § 1331's words, plainly "aris [es] under" the "laws ... of the United States . . . there is no serious debate that a federally created claim for relief is generally a 'sufficient condition for federal-question jurisdiction.'" (quoting *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.,* 545 U.S. 308, 317 (2005)); *see* 28 U.S.C. § 1331; *see* 47 U.S.C. § 227.

The Court of Appeals erred by applying the state law of New Tejas to determine Todd was not the alter ego of Spicy Cold. R. 16a. Without a statutory

directive for determining choice of law, a court "must decide first whether federal or state law governs the controversies; and second, if federal law applies, whether this Court should fashion a uniform priority rule or incorporate state commercial law." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 718 (1979). When a court applies state substantive law as the outcome of a federal choice of law test, state law is only applied "in order to find the rule that will best effectuate the federal policy." *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 859 (1982). Congress provided plaintiffs with a private right of action under the TCPA in Section 227(b)(3). 47 U.S.C. § 227(b)(3). Federal Courts have concurrent jurisdiction over TCPA cases. *Mims*, 565 U.S. at 372. When a court applies the federal common law choice of law test to choose between the law of two or more jurisdictions "[t]he federal common law choice-of-law rule is to apply the law of the jurisdiction having the greatest interest in the litigation." *Eli Lilly Do Brasil, Ltda.*, 502 F.3d at 81 (quoting *In re Koreag, Controle et Revision S.A.,* 961 F.2d 341, 350 (2d Cir.1992)).

Cole brings this action under federal law, here the TCPA, invoking this Court's federal question jurisdiction. Federal question jurisdiction arising from the TCPA encompasses Cole's alter ego assertion, as well. Cole asks this Court to apply substantive federal common law to determine Todd is the alter ego of Spicy Cold because the TCPA embodies a unique federal interest calling for a uniform, federal rule. If this Court contemplates applying state law to advance federal policy, additional discovery is needed to adjudicate which state law under the Second

Restatement's most significant relationship test should be applied. Cole asks this Court to find the district court has general jurisdiction over Todd as the alter ego of Spicy Cold.

A. Federal Common Law governs alter ego because jurisdictional piercing complies with due process, the TCPA provides a sufficient federal interest, and that sufficient federal interest conflicts with state law

Todd exposed himself to liability by ignoring corporate formalities and violating federal law across state jurisdictional boundaries while seeking to generate commerce for Spicy Cold. "[J]urisdiction over an individual cannot be predicated upon jurisdiction over a corporation, courts have recognized an exception to this rule when the corporation is the alter ego of the individual." *Stuart v. Spademan*, 772 F.2d 1185, 1197 (5th Cir. 1985). If "some federal interest is implicated by the veil-piercing inquiry," then "federal common law govern[s] the veil-piercing question." *U.S. ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 191 F. Supp. 2d 17, 20 (D.D.C. 2002), *aff'd*, 322 F.3d 738 (D.C. Cir. 2003). Inspiring a federal interest, the U.S. Senate Committee believed telemarketing calls "can [] be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services." S. REP. 102-178, 5, 1991 U.S.C.C.A.N. 1968, 1972-73.

The Court of Appeals erred when it applied New Tejas state law to determine Todd was not the alter ego of Spicy Cold. Applying New Tejas law was in error because Cole's action under the TCPA provides a sufficient federal interest for this Court to apply a federal rule to pierce the corporate veil. Applying the New Tejas

veil piercing standard undermined and subordinated the TCPA to New Tejas domestic policy, violating the Supremacy Clause. Therefore, Cole asks this Court to apply a uniform federal rule to alter ego claims arising under the TCPA.

1. The federal common law alter ego theory of Jurisdictional Piercing complies with Due Process and the Rules of Civil Procedure

The district court has general jurisdiction over Todd because the Rules of Civil Procedure grant the district court jurisdiction. When federal and state law conflict "where state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress" the Supremacy Clause dictates federal law prevails. *Irwin v. Mascott*, 96 F. Supp. 2d 968, 973 (N.D. Cal. 1999); *see* U.S. CONST. art. VI, cl. 2. Currently, "federal common law is truly federal law and therefore, by virtue of the Supremacy Clause, it is binding on state courts as well as on the federal courts." 19 CHARLES A. WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE § 4514 (3d ed. Apr. 2021).

A court has "personal jurisdiction over a nonresident defendant" when the plaintiff "show[s] both that jurisdiction is proper under the forum state's long-arm statute and that the exercise of personal jurisdiction over the defendant comports with the Due Process Clause of the United States Constitution." *BASF Corp. v. Willowood, LLC*, 359 F. Supp. 3d 1018, 1023 (D. Colo. 2019). When a state's "long-arm statute permits the Court to exercise personal jurisdiction to the full extent of the Due Process Clause" the court's "analysis collapses into a single due process inquiry." *Id.*

New Tejas's "long-arm statute extends to the outer bounds permitted by the Constitution" thus the jurisdiction of this Court "reduces to the question whether the exercise of jurisdiction would be consistent with the Due Process Clause of the Fourteenth Amendment." R. 8a. A federal court complies with due process when the federal court "exercise[s] personal jurisdiction over an individual . . . that would not ordinarily be subject to personal jurisdiction in that court when the individual . . . is an alter ego . . . of a corporation that would be subject to personal jurisdiction in that court." *Anwar*, 876 F.3d at 848 (quoting *Est. of Thomson ex rel. Est. of Rakestraw v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008)).

A court complies with due process when it exercises "jurisdiction over an alter ego . . . because a corporation and its alter ego are the *same entity*—thus, the jurisdictional contacts of one are the jurisdictional contacts of the other for purposes of the *International Shoe* due process analysis." *Sys. Div., Inc. v. Teknek Elecs., Ltd.*, 253 F. App'x 31, 37 (Fed. Cir. 2007). Due process ensures a defendant has "a degree of predictability" in which jurisdictions the defendant may need to defend against a lawsuit. *Stuart*, 772 F.2d at 1190 (quoting *Burger King Corp.*, 471 U.S. at 472). A "defendant's conduct and connection with the forum State" must be "such that he should reasonably anticipate being haled into court there." *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1534 (10th Cir. 1996) (quoting *Burger King Corp.*, 471 U.S. at 474). A court considers if defendants "justifiably rely on state law" when determining whether to apply a uniform, national rule. *Kimbell Foods, Inc.*, 440 U.S. at 739.

The district court's jurisdiction over Todd as the alter ego of Spicy Cold satisfies due process because Todd could reasonably predict he would be called into New Tejas to defend against litigation. Todd incorporated Spicy Cold in New Tejas, subsequently ignored all corporate formalities to sustain limited liability under the common law alter ego test of most jurisdictions, conducted business out of West Dakota, and allegedly attempted to stimulate interstate business through phone calls across state lines putting himself in direct conflict with outside jurisdictions. R. 2a, 3a, 5a. Not only did Todd attempt to gain business across states, Todd autodialed phone numbers to leave advertisements, allegedly violating federal law. Todd could reasonably predict the messages would be recorded across state lines with an automatic telephone dialing system calling people. R. 3a.

Todd's intent to generate interstate commerce while allegedly violating a federal statute foreshadowed Todd would likely be sued either in Spicy Cold's state of incorporation or a jurisdiction somewhere in the United States he autodialed. While Todd may have expected to be protected under New Tejas' unique veil piercing law, the allegedly illegal nature of the phone messages and Todd's disrespect for corporate formalities makes that expectation of limited liability protection unreasonable. It is unreasonable for an individual to disrespect corporate law, as well as violate federal law and retain protection from liability. Thus, due process to pierce the corporate veil is satisfied.

2. Federal Common Law pierces the corporate veil because both the TCPA and personal jurisdiction to adjudicate federal claims are sufficient federal interest that conflict with state law

In this case, the state alter ego law of New Tejas directly conflicts with the federal common law of alter ego and the federal interest of protecting Americans and enforcing the TCPA. The Supreme Court in *Mims* announced the TCPA invokes "'federal question'" jurisdiction." 565 U.S. at 371. A federal court determining federal choice of law selects between "establish[ing] a uniform, national rule" or "incorporat[ing] state rules." Jennifer S. Martin, *Consistency in Judicial Interpretation? A Look at CERCLA Parent Company and Shareholder Liability After United States v. Bestfoods*, 17 GA. ST. U. L. REV. 409, 429 (2000). This Court must apply federal law because a sufficient federal interest that conflicts with state law arises under the TCPA and personal jurisdiction, implicating the alter ego claim.

i. The TCPA implicates a federal interest requiring a national uniform law, thus federal common law governs

This court must create and apply a rule of federal common law to resolve this case because there is sufficient federal interest to warrant a uniform rule, and the underlying federal TCPA claim encompasses Cole's alter ego assertion. A court should apply federal common law when piercing the corporate veil is implicated with a federal interest. *Flynn v. Greg Anthony Constr. Co.*, 95 F. App'x 726, 732 (6th Cir. 2003).

When choosing between applying federal and state law a court should consider 1) if the federal program by its "'nature [is] and must be uniform in character throughout the Nation' [to] necessitate formulation of controlling federal rules," 2) separate from "uniformity, [the court] must also determine whether application of state law would frustrate specific objectives of the federal program[]," and 3) "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." *Kimbell Foods, Inc.*, 440 U.S. at 728–29 (quoting *United States v. Yazell*, 382 U.S. 341, 354 (1966)). If "there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision" but if the "application of state law would frustrate specific objectives of the federal programs" the court "must fashion special rules solicitous of those federal interests." *Id.* at 728. The Supreme Court decisions to apply "'federal law' to supersede state law typically relate to programs and actions which by their nature are and must be uniform in character throughout the Nation." *Yazell*, 382 U.S. at 354.

A sufficient federal interest to warrant a uniform federal law arises under both the TCPA and a federal courts' interest in adjudicating a federal claim in this case. Additionally, New Tejas' veil piercing law conflicts with the federal interest arising from both the TCPA and personal jurisdiction. Congress embodied a federal interest in the TCPA warranting a uniform federal law. This Court in *Mims* announced that the TCPA embodied a federal interest to "regulat[e] telemarketing to protec[t] the privacy of individuals" and that Congress "enacted detailed,

uniform, federal substantive prescriptions" rather than supplement state enforcement measures by filling gaps in state capabilities. *Mims*, 565 U.S. at 383. When "the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 508 (1988). The Commerce, Science, and Transportation Committee concluded in the legislative history of the TCPA that "[f]ederal action is necessary because States do not have the jurisdiction to protect their citizens against those who use these machines to place interstate telephone calls [] [and] [t]he Federal Government has a legitimate interest in protecting the public." S. REP. 102-178, 5, 1991 U.S.C.C.A.N. 1968, 1972-73.

Congress created the TCPA because states were incapable of protecting citizens from telemarketers. States could not protect state citizens from predatory telemarketing because telemarketing is inherently interstate. To defend Americans, Congress had to step in and create a federal statute to apply to all telemarketing across the United States regardless of which state the call was sent or received. Telemarketing does not have state variability, meaning telemarketing experiences do not change based in what state the caller or victim is located. Facts of TCPA violations are similar—telemarketers dial a phone number and leave a message—maybe multiple times.

State geographic boundaries do not impact telephone calls in the same way experience of other highly regulated areas may vary in each state. A voicemail in Missouri is the same as a voicemail in California. Congress created the TCPA as a

consolidated law to protect Americans across the country regardless the location of the parties to dispute. Under the TCPA applying a state law alter ego theory approach would undermine this federal interest for a uniform enforcement and protection of Americans, subverting federal law.

Voicemails are common and vast. A federal court applying state law is "singularly inappropriate" when the transaction "is on a vast scale" and "will commonly occur in several states." *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 367 (1943). The "desirability of a uniform rule is plain" to avoid "making identical transactions subject to the vagaries of the laws of the several states" and "subject the rights and duties of the United States to exceptional uncertainty." *Id.* In this case, Todd's victim's claim arises under similar facts—Todd called Cole and Todd left a pre-recorded message on Cole's phone while acting on behalf of Spicy Cold. Like how Todd left a voicemail on Cole's phone, other victims are connected by similar facts. The TCPA applies on a vast scale because of the enumerable messages an autodialing machine can leave across state jurisdictions daily. To regulate this interstate behavior a uniform law should resolve Cole's assertion of alter ego against Todd rather than the domestic policies of New Tejas.

A court should find the federal interest under the TCPA and personal jurisdiction to be sufficient even though the government is not directly adjudicating the TCPA and alter ego claims. In *Boyle*, this Court extended federal interests to include government contractors because the contractors directly impacted the Government's interest in its contracts, describing the "case [to] involve[] an

independent contractor performing its obligation under a procurement contract, rather than an official performing his duty as a federal employee, but there is obviously implicated the same interest in getting the Government's work done." *Boyle*, 487 U.S. at 505. Like in *Boyle*, the Court should also extend the federal common law to pierce the corporate veil under the TCPA in this case because this "case involves" a privately wronged individual bringing a private right of action under the TCPA "rather than" a government agency enforcing the TCPA "but there is obviously implicated the same interest in getting the Government's work done," namely protecting Americans from and holding accountable predatory advertisers through Cole's claims. *Id.* Cole is adjudicating the federal interest of enforcing the TCPA, supporting the government's work through her federally granted private action. Enforcing federal laws even from a private tort claim still supports applying a uniform rule that benefits Congress' interest.

Unlike the facts in this case, some areas of law do not support a uniform federal law. In *Atherton v. F.D.I.C.*, this Court found that it was not a compelling federal interest sufficient to displace state law for courts to "look to federal law to find the standard of care governing officers and directors of federally chartered banks." *Atherton v. F.D.I.C.*, 519 U.S. 213, 224 (1997). In *Atherton*, the Court found that the different state laws interacting with federally chartered banks revealed that the state laws sufficiently governed this issue; so a federal common law rule was not needed and that the FDIC was "not pursuing the interest of the Federal Government as a bank insurer." *Id.* at 225. When there is no need for a uniform

federal law a federal court will apply state law over a federal common law rule. *Yazell*, 382 U.S. at 357. In *Yazell*, there was "no need for uniformity" when the federal interest complied with state law because "SBA transactions in each State are specifically and in great detail adapted to state law" through individual contracts. *Id.*

This case is distinct from *Atherton* and *Yazell*, because the TCPA does not consider state approaches to bring a private action to punish predatory telemarketers like the laws of federally chartered banks or loan programs. Holding telemarketers accountable for illegal actions is outside a state's competence due to the interstate nature of phone calls. Before the TCPA, state laws were insufficient, and state laws continue to be insufficient now. The state laws for banks and loan programs in *Atherton* and *Yazell* worked well within the standing federal law. In this case, state law is not well adapted to defend Americans from illegal telemarketing actions from shareholders hiding behind corporate veils. A court's decision to pierce the corporate veil is informed and implicated by the TCPA and the facts of this case, so federal law applies to pierce the corporate veil and grants the district court jurisdiction over Todd.

Additionally, Cole is pursuing a federal interest, the enforcement of the TCPA and personal jurisdiction over a violator of a federal statute. The federal interest of personal jurisdiction over Todd also satisfies a sufficient federal interest in relation to TCPA claims as well. Like how Congress wrote the TCPA to overcome state weakness against interstate predatory telemarketers, Cole champions the

federal interest of national enforcement interstate telemarketing violations by not allowing state law to encumber the enforcement of illegal phone calls when those phone calls are not restricted by state jurisdictional lines. Thus, Congress intended to overcome individual states' inability to defend their citizens from telemarketers across state lines. A court applying the federal alter ego approach to Cole's alter ego assertion supports Congress' purpose in the TCPA and a federal court's interest in personal jurisdiction over a federal cause of action.

Finally, the state commercial practices surrounding alter ego are not greatly impacted by applying a federal common law rule in TCPA cases for alter ego considerations. In *Mims*, this Court declared the "federal interest in regulating telemarketing to 'protec[t] the privacy of individuals'" also allowed "permit[ting] legitimate [commercial] practices." *Mims*, 565 U.S. at 383. Most states follow the federal common law veil piercing test. R. 12a. This common law veil piercing test upholds valuable equitable standards that support respect for corporate formalities by piercing the veil when "failure to disregard [their separate identities] would result in fraud or injustice." R. 5a. Thus, the federal common law standard should be applied to Cole's alter ego claim and Todd should be found to be the alter ego of Spicy Cold.

ii. The TCPA conflicts with state law

The federal interest of the TCPA and New Tejas law sufficiently conflict to warrant overriding state law, thus a court should apply the federal common law of alter ego. The existence of "an area of uniquely federal interest" is "a necessary, not

a sufficient, condition for the displacement of state law." *Boyle*, 487 U.S. at 507. The conflict required is not "as sharp as that which must exist for ordinary pre-emption when Congress legislates "in a field which the States have traditionally occupied." *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Either a "significant conflict" must exist between "an identifiable 'federal policy or interest and the [operation] of state law' . . . or the application of state law would "frustrate specific objectives" of federal legislation" to displace state law. *Id.* (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

An area of "unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can." *Id.* at 508. All state laws that conflict with a uniform national federal interest or, more narrowly, "elements of state law are superseded." *Id.* The test to determine if a sufficient federal interest and state law conflict exist is "[i]f the effect of applying state law is virtually to nullify the federal objectives, then there is a conflict that precludes application of state law." *Georgia Power Co. v. Sanders*, 617 F.2d 1112, 1118 (5th Cir. 1980).

In this case, New Tejas' veil piercing law virtually nullifies Congress' intent to regulate telemarketing across the United States with a national rule by not allowing enforcement of the provision against a statute violator. Spicy Cold is judgement proof and Todd is solely in control of all Spicy Cold's actions. New Tejas alter ego nullifies a federal court ability to piercing Spicy Cold's veil and call Todd to defend his alleged actions.

Without jurisdiction over Todd, Congress' federal interest and specific objective in enforcing the TCPA against individual federal statute violators and protecting Americans is virtually nullified and frustrated. Under New Tejas' law the district court has jurisdiction over Spicy Cold, but without reaching Todd, the individual violating the statute will not be held responsible. With Todd able to hide behind the state alter ego test, Cole is unable to adjudicate the private action that Congress provides through the TCPA because damages for Todd's alleged violation will not be reachable. Even if this court disagrees, and the TCPA and federal veil piercing law arguably interfere, New Tejas' relative strength of interest does not outweigh the federal interest because applying New Tejas' law leads to injustice for Cole and the other victims Cole represents.

iii. Federal Common law resolved alter ego in this case because applying New Tejas law undermines federal policy and creates injustice

While finding Todd to be the alter ego of Spicy Cold "is a step to be taken cautiously . . . the ultimate principle is one permitting its use to avoid injustice, and the case at bar presented a situation warranting consideration of just such a step." *Quinn v. Butz*, 510 F.2d 743, 759 (D.C. Cir. 1975). A court may "disregard[]" a corporate entity "when the failure to do so would enable the corporate device to be used to circumvent a statute." *Bruhn's Freezer Meats of Chicago, Inc. v. U. S. Dep't of Agric.*, 438 F.2d 1332, 1343 (8th Cir. 1971). When enforcing a federal statute against a corporation is "futile as the corporations could be dissolved and the

individual petitioners could then, under the cloak of new corporations, engage in the proscribed activities and thereby frustrate the purposes of the Act." *Id.*

In this case, the resolution of federal or state law governing alter ego determines if Todd is liable or not. This means whether the district court applies federal or state law will determine the success of Cole's claims under the TCPA, especially for damages. Courts generally honor limited liability. *Anderson v. Abbott*, 321 U.S. 349, 361–62 (1944). But this Court has declared "that a surrender of that principle of limited liability would be made 'when the sacrifice is so essential to the end that some accepted public policy may be defended or upheld" and that "[a]n obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking, has frequently been an important factor in cases denying stockholders their defense of limited liability." *Id.* at 362 (internal quote omitted). In this case, Todd conceded he satisfied the federal common law test that upholding the corporate veil is unjust to Cole and the other unnamed plaintiffs. R. 5a, 6a n.2.

This Court should not "be blinded or deceived by mere forms of law" rather than enforcing Congress' intent to uniformly protect Americans from interstate telemarketers where the states cannot. *Id.* at 363. In *Newport News Holdings Corp. v. Virtual City Vision, Inc.*, the court found an individual was alone "responsible for the decisions and actions of [an organization] . . . and it would present a manifest injustice if [the individual] were now allowed to hide behind a non-existent corporate veil to avoid personal liability for his actions." 650 F.3d 423, 434 (4th Cir. 2011). After finding "a unity of interest and that the individual "controlled and

used" the organization "to commit an injustice . . the district court found sufficient facts to pierce the corporate veil and, consequently, to exercise its jurisdiction over" the individual. *Id.*

In this case, Todd is the only actor, maneuvering the legal person of Spicy Cold like a marionette, externalizing Todd's liability for allegedly violating a federal statute. As the Court of Appeals opinion stated, to uphold the corporate veil would inflict "injustice" onto Cole. R. 5a. Todd conceded he satisfies the common law test that he and Spicy Cold are alter egos requiring "there is 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." R. 5a, 6a n.2. Thus, this Court should find personal jurisdiction over Todd as the alter ego of Spicy Cold is determined by federal law to stop injustice and hold Todd accountable for his federal violations.

B. The Court of Appeals misapplied the Second Restatement, thus even if state law applies, this Court must remand for further proceedings to examine if another jurisdiction has a more significant relationship than New Tejas

Even if state law applies, a court must examine which state has the most significant relationship to Todd's controversy before adhering to the law of the state of incorporation presumption. Thus, if this Court finds "application of state law would arguably interfere with an identifiable federal policy or interest, but not amount to a conflict which would preclude application of state law, we must proceed

to an examination of the relative strength of the state's interests in having its rules applied." *Georgia Power Co.*, 617 F.2d at 1118.

A court follows two steps to determine choice of law: 1) "the Court must determine whether federal or state choice of law rules govern" then 2) "once the Court has determined which choice of law rules apply, it must apply these rules to the facts of the case to determine the appropriate substantive laws." *In re Cyrus II P'ship*, 413 B.R. 609, 613 (Bankr. S.D. Tex. 2008). "In a federal question case, choice of law principles are derived from federal common law." *Enter. Grp. Plan., Inc. v. Falba*, 73 F.3d 361 (6th Cir. 1995). A court applying the federal common law choice of law test applies "the approach outlined in the Restatement (Second) of Conflict of Laws." *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006). A court applies the Second Restatement approach to determine "choice of law issues involving the application of conflicting state laws." Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B.U. L. REV. 881, 915 (2006) [hereinafter Gardina]. Overall, "[t]he Second Restatement was written primarily to address choice of law issues involving the application of conflicting state laws . . . [thus] [the Second Restatement] does not speak to the issue of choosing between state laws when interpreting and applying federal statutes." *Id.*

The Court of Appeals for the Thirteenth Circuit impermissibly rejected applying the federal common law alter ego test to resolve Cole's alter ego concerns, applying state law instead. The Court of Appeals adhered to the internal affairs presumption of applying the law of the state of incorporation by misapplying a

federal common law choice of law approach in the Second Restatement. The Court of Appeals' finding also conflicts with the district courts' more accurate application which found "under the test for alter ego applied in most states (and found in the Restatement), a court would readily pierce the corporate veil and hold Spicy Cold to be the alter ego of Mr. Todd." R. 5a. The Court of Appeals misapplied the Second Restatement because the Court of Appeals did not consider the relationship of other states to this dispute.

The Second Restatement resolves conflicts between two or more state jurisdictions. Here the Court of Appeals only considered the relationship of New Tejas to this dispute, ignoring the law of West Dakota—Spicy Cold's principal place of business, Todd's residence, and the place where the TCPA violating conduct took place. R. 1a., 3a. Cole asks this court to remand this case for the Court of Appeals to reapply the Second Restatement and apply the most significant relationship test to determine which state law has the most significant relationship to this dispute and should be applied to resolve jurisdiction over Todd.

The Court of Appeals inappropriately applied 307 of the Second Restatement to find that New Tejas, as the state of incorporation, was the best choice of law without conducting a most significant relationship test. R. 15a–16a. As a federal choice of law approach, the Second Restatement incorporates a most significant relationship test to determine which state's law applies—not just the state of incorporation. Gardina at 900–01. A court should not apply Section 307 in isolation in alter ego cases because Section 307 read alone is "misleading." Gregory Scott

Crespi, *Choice of Law in Veil-Piercing Litigation: Why Courts Should Discard the Internal Affairs Rule and Embrace General Choice-of-Law Principles*, 64 N.Y.U. ANN. SURV. AM. L. 85, 109 (2008) [hereinafter Crespi]; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 307 (1971).

Sections of the Second Restatement of Conflicts "297, 302, and 306 and their comments" reveal "that it was not the intent of the drafters of section 307 to mandate the application of the law of the state of incorporation to all piercing claims." *Id.* at 111. Section 297, Section 306, and Section 302 create rebuttable presumptions "that can be overcome by a showing of a more significant relationship of another jurisdiction under general choice-of-law principles." *Id.* at 111–15; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 297 (1971); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 306 (1971); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (1971). Additionally, the Second Restatement does not specify if "corporate debts" in Section 307 "is intended to apply only in those instances in which a shareholder has not fully satisfied his assessment responsibilities or contribution to corporate capital obligations, or instead is intended to apply more broadly to all corporation contract and/or tort obligations as well." *Id.*

While Section 307 predicts the "state [of incorporation] will usually have the dominant interest" Comment a of the Section "concludes with a much more restrictive summary declaration: '[t]hus, only shareholders who have not fully paid for their shares or who have paid otherwise than in cash may be liable to creditors of the corporation for its debts.'" *Id.* at 111–12. Therefore, taking this language with

the language in Sections 302, and 306 "that section 307 is intended to address only the question of shareholder liability for corporate debts under circumstances in which shareholders have not met their initial assessment or capital contribution obligations to the corporation" rather than "to apply more generally to impose the law of the state of incorporation upon [] piercing claims that do not involve such contribution deficiencies." *Id.*

Some courts find Section 307 of the Second Restatement applies in alter ego cases in isolation of other provisions. The court in *In re Melo*, referred to the Second Restatement provision covering alter ego as Section 307. No. 17-43644-BDL, 2019 WL 2588287, at *5 (Bankr. W.D. Wash. June 21, 2019). These courts, like the Court of Appeals, misapply the Second Restatement by only looking only to Section 307.

In contrast, courts that interpret Section 307 in relation to other Sections and apply a most significant relationship analysis more closely adhere to the Second Restatement's intended choice of law analysis. In *Itel Containers Int'l Corp. v. Atlanttrafik Express Service Ltd.*, the "court refused to apply the law of the state of incorporation to the piercing controversy since the defendant corporation had conducted no business in its state of incorporation" interpreting Section 307 to "apply[] only to questions of shareholder liability for corporate obligations that may arise solely on account of the shareholder's owning shares without more; it further held that this provision had no relevance to piercing controversies where it was alleged that the target shareholder had engaged in inequitable conduct." Crespi at 120–21. *Itel Containers Int'l Corp. v. Atlanttrafik Express Service Ltd.*, "flatly

rejects any interpretation of section 307 that would call for application of the law of the state of incorporation to all piercing controversies." *Id.* at 122.

Also, *In Kempe*, the court "subordinates that provision to the Restatement (Second)'s overall policy of favoring a more general choice-of-law analysis." *Id.* Many courts have "rejected an interpretation of section 307 that requires application of the law of the state of incorporation to all piercing controversies, and they have instead applied general choice-of-law principles to choose the governing body of law." *Id.* at 123.

In applying the more general relationship test the Court of Appeals should have applied Section 145 in relation to Section 6(2) to determine between two state jurisdictions which has the greatest relationship to the dispute. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971). The other relevant state forum to be compared is West Dakota as Spicy Cold's principal place of business, Todd's place of residence, and the jurisdiction from which the violating calls were made. Many factors relevant to the most significant relationship test cannot be determined because the record does not contain sufficient information about the law of West Dakota.

Ultimately, the violation of the TCPA and the underlying federal interest are concerned with conduct, the conduct of Spicy Cold and Todd allegedly violating the TCPA. That conduct took place in West Dakota rather than New Tejas. West Dakota may have a more significant interest relating to this dispute than New Tejas because Spicy Cold can be located in and conducts business out of West

Dakota. Therefore, if this Court finds that state law should govern, the law of West Dakota has been neglected and this case should be remanded with instruction to discover if West Dakota has a more significant relationship.

CONCLUSION

The Court should reverse the decision of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,
/s/ #43
Team #43
Counsel for Petitioners
November 15, 2021

CERTIFICATE OF SERVICE

We certify that a true and correct copy of the of Petitioner's brief on the merits was forwarded to Respondent, Lancelot Todd, through the counsel of record by certified U.S. mail, return receipt requested, on this, the 15th day of November 2021.

Respectfully submitted,
/s/ #43
Team #43
Counsel for Petitioners
November 15, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Competition Rule 2.5 and Supreme Court Rule 33.1, the undersigned hereby certifies that the Brief of Petitioner, contains 13,169 words, beginning with the Statement of Jurisdiction through the Conclusion, including all argument headings, but excluding the Certificate of Service, Certificate of Compliance, and the attached Appendix.

Respectfully submitted,
/s/ #43
Team #43
Counsel for Petitioners
November 15, 2021

APPENDIX

Section 1 of the Fourteenth Amendment to the Constitution of the United States of America provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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.