No. 20-1434

In the Supreme Court of the United States

GANSEVOORT COLE, ET AL.,
Petitioners,

v.

LANCELOT TODD
Respondent.

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

BRIEF FOR RESPONDENT

TEAM 57
COUNSEL FOR RESPONDENT
DATED NOVEMBER 15, 2021

QUESTIONS PRESENTED

I. Whether, in a class action, a court may ignore the claims of unnamed nonresident class members asserted against a nonresident defendant for purposes of extending personal jurisdiction over that nonresident defendant?

II. Whether, in an action arising under a federal statute with no expressed congressional intent as to choice of law, a court applies state or federal law to alter ego theory when used for purposes of creating personal jurisdiction?

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STATEMENT OF JURISDICTION

The United States District Court for the District of New Tejas ruled that it lacked personal jurisdiction over the respondent regarding the claims of unnamed nonresident class members. *Cole v. Todd*, D.C. No. 18-cv-1292 (D.N.T. 2018). The petitioner appealed to the United States Court of Appeals for the Thirteenth Circuit, which affirmed the District Court's ruling. *Cole v. Todd*, No. 19-5309 (13th Cir. 2020). The petitioner then filed a writ of certiorari to this Court, which was granted on October 4, 2021. *Cole v. Todd*, No. 19-5309 (13th Cir. 2020), *cert. granted*, 595 U.S. 1234 (U.S. Oct. 4, 2021) (No. 20-1434). Thus, this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns both the Fifth and Fourteenth Amendments to the U.S. Constitution. The Telephone Consumer Privacy Act (the "Act") is printed in part in Appendix A. The Federal Rules of Civil Procedure, Rule 4, is also printed in part in Appendix A.

STATEMENT OF THE CASE

I. Facts

Lancelot Todd ("Todd") is a visionary entrepreneur and the sole shareholder of Spicy Cold Foods, Inc. ("Spicy Cold"). (R. at 2a). Todd founded Spicy Cold Foods in 2015 after acquiring the rights to a new flavor of potato chips, which he wanted to sell to consumers. *Id.* Spicy Cold operates its principal place of business in West Dakota, and Todd is also a resident of West Dakota. However, realizing the potential benefits to both himself and the emerging corporation, Todd intentionally chose to incorporate Spicy Cold under the laws of New Tejas. *Id.* Todd's decision to incorporate in New Tejas is not uncommon, as New Tejas has historically adopted laws that are friendly to corporations in an attempt to attract new businesses to the state. (R. at 6a). For example, New Tejas corporate law provides greater protection to entrepreneurial proprietors than most states by making it more difficult for claimants to pierce the corporate veil. (R. at 6a).

In 2017, in an attempt to grow its fledgling business, Spicy Cold acquired a new telephone system to market its products to potential customers through telephone calls. (R. at 3a). Petitioner Gansevoort Cole ("Cole") alleges that some of these calls ran afoul of the Telephone Consumer Protection Act ("TCPA" or the "Act"), 47 U.S.C. § 227 (2018). *Id.* Although Cole could have sued Spicy Cold and Todd in federal court in West Dakota, where Todd resides and where Spicy Cold principally operates, Cole sued both parties for these

alleged violations in the United States District Court for the District of New Tejas ("District of New Tejas"). *Id.*

II. Procedural History

Cole sued on behalf of herself and other similarly situated individuals who received those calls across the United States. *Id.* After conducting jurisdictional discovery, the District of New Tejas determined, and both parties agreed, on two things. (R. at 4a). First, the court could exercise general jurisdiction over Spicy Cold. *Id.* Second, the court could exercise specific jurisdiction over Todd with regards to Cole's claims and the claims of any other New Tejas residents. *Id.* However, Todd moved to strike the allegations of unnamed nonresident class members on the grounds that the District of New Tejas lacked personal jurisdiction over those claims. *Id.* Cole challenged Todd's motion, arguing that the District of New Tejas could exercise personal jurisdiction over Todd with respect to the claims of the unnamed nonresident class members for two alternative reasons. *Id.* First, Cole asserted that the District of New Tejas could exercise jurisdiction over the claims of unnamed, non-resident class members because it is undisputed that the court had personal jurisdiction over the claim of the named plaintiff, (i.e., her claim). (R. at 4a-5a). Alternatively, Cole asserted that the District of New Tejas could exercise general jurisdiction over Todd because, under a federal common law analysis, Todd would be the alter ego of Spicy Cold. (R. at 5a).

Ultimately, the District of New Tejas rejected both of Cole's arguments and granted Todd's motion to strike the nationwide class allegations, determining that it lacked personal jurisdiction over Todd as to these claims. (R. at 7a). After granting Cole's petition for interlocutory appeal, the Thirteenth Circuit affirmed the lower court's ruling. *Id.* Subsequently, Cole filed a petition for writ of certiorari, which this Court granted on October 4, 2021.

STANDARD OF REVIEW

"Traditionally, decisions on questions of law are reviewable *de novo*, decisions on questions of fact are reviewable for clear error, and decisions on matters of discretion are reviewable for abuse of discretion." *Highmark Inc. v. Allcare Health Mgmt. Sys. Inc.,* 572 U.S. 559, 563 (2014) (quoting *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)). Both issues before this Court are questions of law, and thus are reviewed *de novo*.

SUMMARY OF THE ARGUMENT

The United States District Court for the District of New Tejas and the United States Court of Appeals for the Thirteenth Circuit were correct in holding that the District Court for the District of New Tejas lacked personal jurisdiction over Lancelot Todd as to the claims of unnamed, non-resident class members. There are three ways that a state court can exercise personal jurisdiction over a defendant: (1) the court may establish general jurisdiction, (2) the court may establish specific jurisdiction, or (3) the parties may consent to personal jurisdiction. With rare exceptions, these jurisdictional limits on

state courts also apply to federal district courts. There is no dispute that Lancelot Todd has not consented to personal jurisdiction as to the claims of out-of-state class members in this case. Additionally, the petitioner has failed to show that the District Court of New Tejas has specific jurisdiction or general jurisdiction over Lancelot Tood as to the claims of out-of-state class members. As such, this Court should affirm the lower courts' decision and dismiss the claims of out-of-state class members against Todd for lack of personal jurisdiction.

First, the Thirteenth Circuit correctly held that the District Court of New Tejas lacks jurisdiction over the claims of out-of-state class members because federal district courts must evaluate personal jurisdiction over the claims of both named and unnamed class members. Under Federal Rule of Civil Procedure 4(k)(1)(A), federal district courts are generally subject to the same personal jurisdiction limitations imposed on states by the 14th amendment. Notably, Congress can and has enacted exceptions to this general rule. However, no such exception applies in this case. The TCPA in no way extends the personal jurisdiction of federal district courts, and despite petitioner's contentions, there is no special rule expanding personal jurisdiction over unnamed class members in class action suits. Indeed, Federal Rule of Civil Procedure 23 makes no mention of expanding personal jurisdiction over class action claims in federal court.

Consequently, this Court's 14th amendment jurisprudence regarding personal jurisdiction applies in this case, and the fundamental principles of specific personal jurisdiction require a court to have jurisdiction over the defendant with regards to each individual plaintiff's claims. Since this Court's seminal decision in *International Shoe v. State of Wash., Office of Unemployment Comp. & Placement*, the crux of whether a defendant is subject to specific personal jurisdiction under the Fourteenth Amendment is whether the defendant has adequate "minimum contacts with the [forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." This Court has carefully elucidated when such minimum contacts exist. And in *Bristol-Myers Squibb Co.*, this Court made clear that for specific personal jurisdiction to exist, there must be an" affiliation between the forum and the underlying controversy" for each individual plaintiff's claim. In other words, a nonresident plaintiff's claims do not arise out of or relate to the defendant's contact with a forum simply because the claims are similar to those of another plaintiff who is a resident of the forum state.

This Court has never once stated that this analysis does not apply to out-of-state claims in class action suits. In fact, this Court's decision in *Phillips Petroleum Co. v. Shutts* strongly suggests that the opposite is true. In *Phillips*, this Court established that the 14th amendment requires a state court to have personal jurisdiction over the claims of unnamed out-of-state

plaintiffs. And there is no reason to think that this analysis is one-sided. Indeed, this Court has repeatedly stressed that while the interests of the forum state and the plaintiffs are important for determining when personal jurisdiction is present, "the 'primary concern' is the burden on the defendant." Thus, it would be contrary to this Court's prior rulings to hold that *Phillips* does not apply to personal jurisdiction over the defendants with regards to the claims of out-of-state class members.

Second, the Thirteenth Circuit correctly held that the District Court of New Tejas lacked jurisdiction over the claims of out-of-state class members because personal jurisdiction on an alter ego theory should be determined under the applicable state law, not federal law. In *Erie Railroad Company v. Tompkins*, this Court made clear that there is no general federal common law. Courts cannot brush aside state law simply because they do not like the outcome under state law. In fact, there is a general presumption against federal preemption of state law unless congress explicitly states an intent to override state law in a federal statute. Absent this express preemption, a court must engage in a two-part test to determine when federal common law applies. First, a court must determine whether the application of state law poses a significant threat to an identifiable federal policy or interest. If there is no significant threat, the test stops there: state law should be applied. Second, even if there is a significant threat to an identifiable federal policy or

interest, a court must then consider the strength of the state interest in having its own rule govern and the feasibility of creating a judicial substitute.

Applying a state law alter-ego theory in this case does not present a significant threat to an identifiable federal interest. Federal interests are typically implicated in areas that require federal intervention, such as areas involving the duties of the federal government, the distribution of power in the federal system, or matters necessarily subject to federal control even in the absence of statutory authority. Federal interests may also be implicated in areas of the law that are essential to interstate commerce and thus require national uniformity of the law. Neither of these federal interests are implicated in this case. Restrictions on the use of telephonic equipment are not invariably under federal control, thus the TCPA does not involve matters necessarily subject to federal intervention. And the fact that the TCPA gives deference to states and even contains an express non-preemption clause, strongly suggests that the TCPA in no way requires national uniformity.

However, even if this Court finds a significant threat to a federal policy, the interests of New Tejas and the lack of a feasible judicial substitute weigh against applying a federal common law alter-ego test in this case. Corporations are creatures of state law. Consequently, congressional legislation has historically been enacted against the backdrop of this state corporate law. In fact, this Court has recognized that "Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based on a federal statute." Furthermore, the federal alter-ego doctrine is not a feasible judicial substitute for the state law alter-ego doctrine. Although a "generalized federal substantive law" has emerged regarding the

alter-ego doctrine, this generalized principle gives little guidance on how to apply this federal common law doctrine. Instead, what has resulted is a "jumble of federal decisions" and a different federal common law test for different circuits. Moreover, most courts only apply this vague federal common law standard in cases involving labor law or ERISA claims, neither of which are at issue in this case.

Thus, because personal jurisdiction must be evaluated with respect to the claims of unnamed class members and because a federal court should apply state law in determining personal jurisdiction based on an alter-ego theory, Respondent respectfully requests this Court to affirm the decisions of the District of New Tejas and the Thirteenth Circuit to strike the nationwide class allegations against Lancelot Todd.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT'S DECISION TO STRIKE THE CLASS ALLEGATIONS OF UNNAMED NONRESIDENT CLASS MEMBERS BECAUSE THE FOURTEENTH AMENDMENT REQUIRES THAT PERSONAL JURISDICTION IN A CLASS ACTION BE EVALUATED WITH RESPECT TO THE CLAIMS OF UNNAMED CLASS MEMBERS.

It is well-established that the Fourteenth Amendment places certain limitations on a state court's ability to subject a defendant to its coercive power through a binding judgment. *See, e.g., Pennoyer v. Neff*, 95 U.S. 714, 733 (1877). These limitations are meant to protect an individual's liberty interest and are manifested in the requirement that a state court have personal jurisdiction before exercising its authority over a defendant. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03 (1982). For over seventy-five years, the determinative question of whether a state court has personal jurisdiction over a defendant is whether the defendant has "certain

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 (internal quotations omitted). Since its seminal decision in *International Shoe*, this court has continuously clarified when such minimum contacts exist through subsequent case law. *See Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024-25 (2021) (outlining this Court's minimum contacts jurisprudence). Building on this case law, this Court recently made clear that a defendant does not have sufficient minimum contacts with a forum state to subject him to personal jurisdiction with regards to claims made by out-of-state plaintiffs simply because the court has personal jurisdiction over the defendant with regards to similar claims made by plaintiffs in the forum state. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781-82.

There is no reason these principles do not apply to unnamed members in federal class action suits. First, federal district courts are generally subject to the same limits under the Fourteenth Amendment as state courts and no exceptions to this general rule apply in class action cases brought under the TCPA. Second, the fundamental principles of specific personal jurisdiction require a court to have jurisdiction over the defendant with regards to each individual plaintiff's claims. Third, this Court's decision in *Phillips* forecloses the idea that personal jurisdiction over a defendant is evaluated only with respect to the claims of named class members. And finally, applying specific

jurisdiction on a claim-by-claim basis deters exploitative forum shopping and protects interstate federalism.

A. Federal district court are generally subject to the same limits on personal jurisdiction as states under the Fourteenth Amendment and no exceptions to this general rule apply in class action cases brought under the TCPA.

Federal Rule of Civil Procedure 4(k)(1)(A) provides that a district court can establish personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. R. Civ. P. 4(k)(1)(A). As a result, federal district courts "ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Daimler AG*, 571 U.S. at 125. While Congress could extend the personal jurisdiction of federal district courts to the limits of the Fifth Amendment, it has typically chosen not to do so. *See* Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L.Rev. 1313, 1376-77 (2005) ("The broader constitutional reach of federal courts . . . is rarely seen in practice because Congress has not given federal courts the full range of their potential jurisdiction."). Yet, there are certain instances where Congress has allowed federal courts to expand the reach of their personal jurisdiction. For example, federal district courts have broader jurisdiction over certain parties joined under Federal Rule of Civil Procedure 14 and 19, and federal district courts also have broader jurisdiction when "authorized by a federal statute." Fed. R. Civ. P. 4(k)(1)(B)-(C); *see also* 18 U.S.C. § 1965(d) (extending the personal

jurisdiction of federal district courts over RICO claims). However, no party has been joined under Rule 14 and 19 in this case, and the TCP does not authorize federal courts to expand their personal jurisdiction.

Some courts have erroneously argued that Federal Rule of Civil Procedure 23 implicitly expands federal courts' personal jurisdiction with regards to class action claims. *See, e.g., Molock v. Whole Foods Mkt. Grp., Inc.*, 297 F. Supp. 3d 114, 129-31 (D.D.C. 2018); *Sanchez v. Launch Tech. Workforce Sols., LLC*, 297 F. Supp. 3d 1360, 1366 (N.D. Ga. 2018). However, this notion is wrong for three reasons. First, the authors of the Federal Rules of Civil Procedure clearly knew how to expand the personal jurisdiction of federal courts in certain situations. As noted above, the authors did just that with FRCP 4(k)(1)(B)-(C); however, they did no such thing for Rule 23. This suggests that the authors of the Rules did not intend to give federal courts broader jurisdiction in class action cases. Second, because Rule 23 is a procedural rule, granting courts additional authority under Rule 23 would violate the Rules Enabling Act, 28 U.S.C. § 2072(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act . . . ."); *Cole v. Todd*, No. 18-cv-1292 (13th Cir. 2020). The Rules Enabling Act provides in relevant part that the Federal Rules of Civil Procedure "shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b). Clearly, granting additional jurisdiction to federal courts under Rule 23 abridges the

substantive rights of defendants by stripping them of the protections afforded to them under FRCP 4(k)(1)(A). And finally, Rule 23 is not an adequate substitute for personal jurisdiction because it "primarily focuses on the relationship between the claims of the named representatives and the absent class members" and the similarities of those claims. *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 307 (D.C. Cir. 2020) (Silberman, J., dissenting). However, this Court has made clear that "using the similarity of claims to relax the standards of personal jurisdiction" is not allowed. *Id.* at 307-08 (citing *Bristol-Myers*, 137 S. Ct. at 1779, 1781).

Summarily, as a result of Rule 4(k)(1)(A) federal courts are generally bound by the same personal jurisdiction limitations imposed on state courts by the Fourteenth Amendment. Furthermore, no exceptions apply in this case, and it is clearly wrong for courts to use Rule 23 to bypass a personal jurisdiction analysis. Thus, "until the rules change" the distinction between federal and state courts with regards to when they can exercise personal jurisdiction over a defendant is a "distinction without a difference." *Lyngaas*, 992 F.3d at 439 (Thapar, J., concurring in part and dissenting in part). In other words, "[t]he Fourteenth Amendment matters just as much in federal court" as it does in state court. *Id.* Consequently, this Court's Fourteenth Amendment jurisprudence regarding personal jurisdiction is binding on federal courts, and this jurisprudence leaves no doubt that personal jurisdiction in a class action

must be evaluated with respect to the claims of named and unnamed class members.

B. The fundamental principles of specific personal jurisdiction require a court to have jurisdiction over the defendant with regards to each individual plaintiff's claims.

It is long established that a state court cannot bind citizens of another state, absent their consent, unless those citizens have certain minimum contacts with the forum state. *Int'l Shoe Co.*, 326 U.S. at 316. This Court has established three fundamental principles as to when a defendant has sufficient minimum contacts to subject him to personal jurisdiction in a state. First, a court may assert general jurisdiction over a defendant when "their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A*, 564 U.S. at 919. Second, a court may assert specific jurisdiction over a defendant if "the suit . . . arise[s] out of or relate[s] to the defendant's contacts with the forum [state]." *Bristol-Myers*, 137 S. Ct. at 1780 (quoting *Daimler*, 571 U.S. at 754). And third, a party can consent to a state court's exercise of personal jurisdiction either expressly or by failing to appropriately raise the issue. Fed. R. Civ. P. 12(h)(1); *Burger King Corp.*, 471 U.S. at 473 n.14 (1985).

Both parties concede that neither Spicy Cold nor Todd consented to personal jurisdiction in the District of New Tejas with regards to the claims of nonresident class members. Furthermore, although Spicy Cold is undoubtedly "at home" in New Tejas and thus subject to general jurisdiction there, Todd is

only "at home" in West Dakota.[1] Therefore, the only way that nonresident class members can establish personal jurisdiction over Todd is through specific jurisdiction by showing that their claims arise out of or relate to Todd's contacts with the forum state.

While specific jurisdiction is broader than general jurisdiction in that it can cover a defendant less intimately connected with a State, it is narrower in that it only applies to certain claims. *Ford Motor Co.*, 141 S. Ct. at 1024. The necessary contacts needed to subject a defendant to specific personal jurisdiction are met when a defendant "purposefully avails itself of the privilege of conducting activities within the forum State." *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). These contacts "must be the defendant's own choice and not 'random, isolated, or fortuitous.'" *Id.* at 1025 (quoting *Keeton v. Hustler Mag.*, 465 U.S. 770, 774 (1984)). However, even when a defendant has 'purposefully availed' itself of the law of a certain state, "the forum State may exercise jurisdiction in only certain cases" where "the plaintiff's claims . . . arise out of or relate to the defendant's contacts with the forum." *Id.* (citing *Bristol-Myers,* 137 S. Ct. at 1780). A nonresident plaintiff's claims do not arise out of or relate to the defendant's contact with a forum

[1] Respondents recognize that the petitioner alternatively argues that Todd is subject to general jurisdiction in New Tejas because he is the alter-ego of Spicy Cold for purposes of establishing personal jurisdiction. For the sake of clarity, respondents will ignore this issue for now and address it separately in the second part of this brief.

simply because the claims are similar to those of another plaintiff who is a resident of the forum state. *Bristol-Myers*, 137 S. Ct. at 1781. Rather, there must be an "affiliation between the forum and the underlying controversy" for each individual plaintiff's claim. *Id.* (quoting *Goodyear*, 564 U.S. at 919).

These principles of specific jurisdiction reflect two fundamental values: "treating defendants fairly and protecting interstate federalism." *Id.* (citing *World-Wide Volkswagen Corp.*, 444 U.S. at 293). Indeed, while courts must consider a "variety of interests" in determining whether personal jurisdiction exists, "the 'primary concern' is 'the burden on the defendant.'" *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780 (quoting *World Wide-Volkswagen*, 444 U.S. at 292). In considering the burdens on the defendant, a court should not just consider practical issues arising from litigation. *Id.* Rather, it must also consider the "more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Id.* Thus, "even if [a] defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another state" and "even if the forum State is the most convenient location for litigation," the Due Process clause may prevent a court from exercising jurisdiction over that defendant. *Id.* This allows a defendant to "structure its primary conduct to lessen or avoid exposure to a given State's courts." *Ford Motor Co.*, 141 S. Ct. at 1025 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

Subjecting Todd to personal jurisdiction in New Tejas with regards to the claims of nonresident class members would violate this Court's established principles of specific personal jurisdiction and violate Todd's due process protections under the Fourteenth Amendment. Even if Todd purposefully availed himself of the laws of New Tejas, the nonresident plaintiffs' claims do not arise out of or relate to Todd's contacts with New Tejas. While Todd may be subject to specific personal jurisdiction in New Tejas as a result of the telephone calls made to Cole and other New Tejas residents, there is no affiliation between New Tejas and the calls Todd made to unnamed class members in other states. Consequently, the District of New Tejas correctly determined and the Thirteenth Circuit correctly affirmed that it could not exercise personal jurisdiction over the claims of nonresident class members simply because their claims were similar to Cole's. It does not matter that Todd might suffer minimal inconvenience or that New Tejas might be the most convenient location for litigation, Todd purposefully structured his conduct to lessen his exposure to out-of-state claims in New Tejas courts. And disregarding these expectations would be unduly burdensome and violate Todd's protections under the Fourteenth Amendment.

Many courts have erroneously attempted to use the doctrine of pendent personal jurisdiction to circumvent the jurisdictional problems caused by class actions in federal courts. *See* Andrews, *supra*, at 1382; Louis J. Capozzi, *Relationship Problems: Pendent Personal Jurisdiction After Bristol-Myers*

Squibb, 11 Drexel L. Rev. 215, 236-37 (2018). Under this doctrine, federal courts first consider whether a federal statute authorizes nationwide jurisdiction as to any part of the suit. Andrews, *supra*, at 1382. If the statute does, then the court can "piggy-back" off of this main claim and exercise personal jurisdiction over related claims that it would not ordinarily have personal jurisdiction over. *Id.* This doctrine is problematic in the class action context, however. When pendent personal jurisdiction is applied in the context of class actions, courts assert that if they can exercise personal jurisdiction over the claims of the named class member under Rule 4(k)(1)(A), then the doctrine of pendent jurisdiction will allow personal jurisdiction over the similar claims of unnamed nonresident class members. *Id.* Yet, this analysis is faulty because Rule 4(k)(1)(A) does not provide for national service of process; rather, is limited to that of the local state court. *Id.*; *see* Fed. R. Civ. P. 4(k)(1)(A). As such, the anchor claim present when courts assert pendent jurisdiction under a federal statute that authorizes national service of process is typically absent in the class action context. Andrews, *supra*, at 1382. Consequently, as previously established, federal courts are bound by the same personal jurisdiction limitations as state courts. And this Court has made it abundantly clear that the fact that the claims of an in-state plaintiff are similar to the claims of nonresident plaintiffs is not sufficient to subject a defendant to specific personal jurisdiction as to the claims of the nonresident plaintiffs. *Bristol-Myers*, 137 S. Ct. at 1781.

The issue of whether personal jurisdiction in a class action must be evaluated with respect to unnamed class members is clearly answered by this Court's case law discussing specific personal jurisdiction. The primary concern of the Fourteenth Amendment's limitations on personal jurisdiction is the burden on the defendant. To ensure that the defendant's due process is protected, a court must analyze whether the defendant had sufficient contacts with the forum state to subject himself to personal jurisdiction. These contacts are not satisfied as to the claims of nonresidents simply because the claims of a forum resident are similar in nature. Rather, there must be a connection between each individual plaintiff's claims and the forum state. To ignore these fundamental rules of personal jurisdiction in a class action suit by ignoring unnamed members when determining personal jurisdiction violates a defendant's due process protections. Furthermore, this Court has expressly foreclosed the idea that personal jurisdiction over a defendant is evaluated only with respect to the claims of named class members.

C. **This Court's decision in *Phillips Petroleum Co. v. Shutts* forecloses the idea that personal jurisdiction over a defendant is evaluated only with respect to the claims of named class members.**

In *Phillips Petroleum Co v. Shutts*, the plaintiffs brought a nationwide class action against the defendant alleging that the defendant owed them interest on delayed royalty payments. 472 U.S. 797, 799 (1985). Interestingly, the defendant objected to personal jurisdiction with regards to the claims of out-of-state plaintiffs, not on behalf of itself, but on behalf of the unnamed out-of-

state plaintiffs.[2] *Id.* at 806. Although this Court ultimately ruled against the defendant on this issue, it never suggested that a court did not have to consider the personal jurisdiction of unnamed nonresident plaintiffs in a class action suit at all. *See id.* at 811. Rather, this Court clearly stated that "[t]he Fourteenth Amendment does protect 'persons,' not 'defendants,' . . . so absent plaintiffs as well as absent defendants are entitled to some protection from the jurisdiction of a forum State which seeks to adjudicate their claims." *Id.* After ruling that a state court must have personal jurisdiction over out-of-state plaintiffs to adjudicate their claims, it determined that the due process requirements for plaintiffs in class actions were less stringent than the traditional minimum contacts test applied to defendants. *Id.* It reasoned that "[b]ecause States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and

[2] As numerous sources note, the likely reason that the defendant did not object to personal jurisdiction on behalf of itself with regards to the claims of out-of-state plaintiffs is that it probably assumed that the Kansas court could exercise general jurisdiction over it as it was a "giant multinational corporation" that had "continuous and systematic contacts in all fifty states." *See Lyngaas,* 992 F. 3d at 442 (Thapar, J.,concurring in part and dissenting in part) ("At the time, the prevailing view was that a company with such pervasive contacts was subject to the general jurisdiction of courts in every state."); Andrews, *supra*, at 1331 ("Thus, regardless of whether Phillips was registered to do business in Kansas, the parties in Shutts probably assumed general personal jurisdiction over Phillips on all claims, even claims unrelated to Kansas because Phillips had been doing business in Kansas.")

does not afford the former as much protection from state-court jurisdiction as it does the latter." *Id.*

Thus, it is clear after *Shutts* that "in a class action as in all actions, a court must have personal jurisdiction to bind the parties to its judgments." *Lyngaas*, 992 F. 3d at 440 (Thapar, J., concurring in part and dissenting in part). And although *Shutts* dealt with the personal jurisdiction rights of absent plaintiffs and not defendants, "there is no reason to think that the analysis [in *Shutts*] is one-sided." *Id.* at 441. As noted above, the 'primary concern' of personal jurisdiction is the 'burden on the defendant,' and in *Shutts* this Court noticed as much. *See Shutts*, 472 U.S. at 808-10. ("Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything). As such, it would be contrary to this Court's established jurisprudence to subject a defendant to the claims of nonresident class members in a class action suit.

Some courts have rejected this Court's personal jurisdiction jurisprudence and its holding in *Shutts*, and instead relied on this Court's decision in *Devlin v. Scardelletti*, 536 U.S. 1 (2002), to argue that unnamed class members are not parties for purposes of establishing personal jurisdiction. *See, e.g.*, *Mussat v. IQVIA, Inc.*, 953 F. 3d 441, 447 (7th Cir. 2020). In *Devlin*, this Court stated that "[n]onnamed class members . . . may be parties for some purposes and not for others." 536 U.S. at 10. Specifically, this Court noted that nonnamed class members are not parties for purposes of determining complete diversity. *Id.*

However, this reliance on *Devlin* for purposes of personal jurisdiction is misplaced for two reasons.

First, some courts have incorrectly held that *Devlin* stands for the proposition that unnamed class members do not have to be considered for purposes of subject-matter jurisdiction. *See, e.g.*, *Mussat*, 953 F. 3d at 447. Yet, in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, this Court clearly stated that a court must establish supplemental jurisdiction under 28 U.S.C. § 1367 for all claims of unnamed class members. 545 U.S. 546, 558-59 (2005). Thus, it is inaccurate to state that unnamed class members are completely overlooked for purposes of subject-matter jurisdiction. Instead, it is only certain statutory constraints on subject matter jurisdiction in diversity cases that a court may overlook, such as the complete diversity requirement and the amount in controversy requirement. *See Devlin*, 536 U.S. at 10 (stating that unnamed class members are not parties for purposes of establishing complete diversity); *Exxon Mobil Corp.*, 545 U.S. at 559 (stating that it is not necessary for all unnamed class members to meet the amount in controversy requirement). This distinction is important because these are not Constitutional requirements. Rather, they are statutory requirements that Congress can and has created exceptions to. *Lyngaas*, 992 F. 3d at 443 (Thapar, J., concurring in part and dissenting in part); *see also* 28 U.S.C. § 1332(d) (modifying the statutory prerequisites to diversity jurisdiction for class action cases). Similarly, personal jurisdiction has both constitutional and statutory requirements, and

Congress can modify these requirements. However, unlike the complete diversity requirement and amount in controversy requirement for purposes of diversity jurisdiction, Congress has not modified the requirements for personal jurisdiction in class action cases. And until Congress does make such modifications, "nothing about the class action changes the basic rule [that] a court cannot adjudicate claims without jurisdiction." *Lyngaas*, 992 F. 3d at 443 (Thapar, J., concurring in part and dissenting in part).

Second, a court's reliance on *Devlin* to assert that unnamed class members are not parties for purposes of personal jurisdiction is misplaced because the requirements of diversity jurisdiction and personal jurisdiction affect the personal rights of litigants differently. *See* Capozzi, *supra*, at 278. Whereas special rules for diversity jurisdiction primarily concern a federal court's power to hear a claim and only affects the personal rights of litigants indirectly, the primary concern of personal jurisdiction is "a defendant's personal right to Fourteenth Amendment due process." *Id*. at 278-79. Consequently, adjusting the requirements of diversity jurisdiction may be justified to provide federal courts more flexibility in hearing class actions; however, the same cannot be said for personal jurisdiction. Indeed, "defendants have a practical interest in seeing [their personal jurisdiction] right[s] respected." *Id*. at 279.

D. Applying specific jurisdiction on a claim-by-claim basis deters exploitative forum shopping and protects interstate federalism.

While straightforward application of the settled principles of specific jurisdiction reflects the value of treating defendants fairly, *Ford Motor Co.*, 141 S. Ct. at 1025 (citing *World-Wide Volkswagen Corp.*, 444 U.S. at 293), it also serves as a deterrent to the "irresistible pressures for forum shopping." Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 Ind. L.J. 597, 612 (1987) (cleaned up). After all, the due process limits are not intended for plaintiff convenience. *Walden v. Fiore*, 571 U.S. 277, 284 (2014). Rather, if the focus were on plaintiff convenience, a potential cascade of distant claims results. If a court could ignore the claims of the unnamed nonresident class members for specific jurisdiction, then an endless number of claims with no connection to the forum state could proceed through a single named plaintiff. Such a permissibly lopsided approach naturally invites forum shopping in an exploitative manner. *See, e.g., DeBernardis v. NBTY, Inc.*, No. 17 C 6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018) ("possible forum shopping is just as present in multi-state class actions").

Additionally, the lopsided approach contravenes another stated value of the principles of specific jurisdiction: "protecting 'interstate federalism.'" *Ford Motor Co.*, 141 S. Ct. at 1025 (citing *World-Wide Volkswagen*, 444 U.S. at 293). While not directly a concern to this instant dispute, nonetheless, courts in a forum state could adjudicate an endless number of claims arising elsewhere,

where the forum state lacks a legitimate interest. A court-created exception to specific jurisdiction for class actions would then permit class actions to function as a mechanism "in which a state can most aggressively assert its court system at the expense of other states." Capozzi, *supra*, at 279. This is improper; restrictions on personal jurisdiction "are a consequence of territorial limitations on the power of the respective States." *Hanson*, 357 U.S. at 251; *see also World-Wide Volkswagen,* 444 U.S. at 293 *("*The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States. . .").

While straightforward application of specific jurisdiction serves as a deterrent for exploitative forum shopping and preserves interstate federalism, it does not unduly close off other forums. Jurisdiction would of course be proper wherever the defendant is subject to general jurisdiction. For instance, here, the claims of the unnamed nonresident class members could then proceed in federal court in West Dakota.

Federal district courts are generally subject to the same limits under the Fourteenth Amendment as state courts and no exceptions to this general rule apply in class action cases brought under the TCPA. As a result, the fundamental principles of specific personal jurisdiction require a court to have jurisdiction over the defendant with regards to each individual plaintiff's claims. This applies equally in class action cases because this Court's decision in *Phillips* forecloses the idea that personal jurisdiction over a defendant is evaluated only with respect to the claims of named class members. Moreover,

this principle promotes sound policy because applying specific jurisdiction on a claim-by-claim basis deters exploitative forum shopping and protects interstate federalism.

II. THE COURT SHOULD AFFIRM BECAUSE DETERMINING PERSONAL JURISDICTION BASED ON AN ALTER-EGO THEORY WHEN THERE IS A FEDERAL QUESTION IS DETERMINED UNDER STATE LAW.

It is axiomatic that "[t]here is no federal general common law." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). This truth is rooted in the Tenth Amendment, which states that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively . . . ." U. S. Const. amend. X. Consequently, "[s]upervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specially authorized or delegated to the United States." *Erie*, 304 U.S. at 78 (quoting Baltimore *& O.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J. concurring in part and dissenting in part)). Thus, when judges use federal common law to "brush[] aside the law of a state in conflict with their views," it is an unlawful "invasion of the state and . . . a denial of its independence." *Id.*

Yet, undoubtedly, federal law can supplant state law within the bounds of the Constitution. U.S. Const. art. VI, para. 2. However, this decision is "generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 312-13

(1981) (citing *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)). In fact,

> absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the right and obligations of the United States, interstate and international disputes implicating the conflict rights of the State or our relations with foreign nations, and admiralty cases.

Texas Industries, Inc. v. Radcliff Materials, Inc. 451 U.S. 630, 642 (1981). Therefore, preemption of state law often turns on congressional intent. *See Wisconsin Public Intervenor v. Mortient,* 501 U.S. 597, 604-05 (1991).

The initial analysis of whether Congress intended to preempt state law begins with the presumption against congressional preemption unless proven otherwise. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "Preemption may either be expressed or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose'." *Gade v. Nat'l Solid Wastes Mgmt Ass'n*, 505 U.S. 88, 98 (1992) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

Preemption is appropriate if Congress explicitly stated an intent to preempt state law via the plain language of a federal statute. *See Wisconsin Public Intervenor*, 501 U.S. at 604-05 ("Congress' intent to supplant state authority in a particular field may be expressed in the terms of the statute."); *See also Ingersoll-Rand Co.v. McClendon*, 498 U.S. 133, 138 (1990) ("To discern Congress' intent we examine the explicit statutory language and the structure

and purpose of the statute."). Congress has expressly indicated an intent for federal law to supplant state law through preemption provisions in several statutes. *See, e.g.,* 15 U.S.C. § 1334(b) ("No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."); 8 U.S.C § 1324a(h)(2) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions...upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."); 15 U.S.C. § 2617 (section entitled "Preemption"). However, Congress included no such preemption provision anywhere in the TCPA. It follows then that Congress did not explicitly displace state law in this context.

Absent an express preemption clause, Congress' intent to supersede state law may nonetheless be implicit. *Wisconsin Public Intervenor,* 501 U.S. at 605. Indeed, unless there is a "significant threat to [an] identifiable federal policy or interest," Congress must determine "whether latent federal power should be exercised to displace state law." *Wallis*, 384 U.S. at 68. And even if there is a threat to an identifiable federal policy or interest, a court should still consider the "strength of the state interest in having its own rule govern, the feasibility of creating a judicial substitute, and other similar factors" before invoking federal common law. *Id.* at 68-69 (citing *United States v. Yazell*, 382 U.S. 341, 351-53 (1966); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers*

of Am. (UAW), AFL-CIO v. Hoosier Cardinal Corp., 383 U.S. 696, 701 (1966)). Though this issue involves the application of the state law alter-ego doctrine, we must first address whether the TCPA falls within the few and restricted instances where federal common law must be applied. Applying the state law alter-ego doctrine under the TCPA poses no significant threat to an identifiable federal policy. But even if the Court finds a significant threat present in applying state law within the context of the TCPA, this Court must still consider the strength of the state interest in having its own alter-ego law govern and the feasibility of creating a federal common law substitute to the alter-ego doctrine before actually applying federal common law.

A. Applying the state law alter-ego theory does not present a significant threat to an identifiable federal interest.

Ultimately, "federal interests" are shown through the underlying policies and congressional intent of a particular federal statute. *See Johnson v. Railway Exp. Agency, Inc.,* 421 U.S. 454, 465 (1975) (finding that state law may be displaced if its application is inconsistent with the federal policy underlying the cause of action); *Kamen v. Kemper Financial Services*, 500 U.S. 90, 107 (1991) (determining whether state law conflicted with the federal policies of the Investment Company Act of 1940); *Wallis,* 384 U.S. at 69 (determining whether state law displaced the policies of the Mineral Leasing Act of 1920). However, the fact that a federal question is involved does not, in and of itself, make state law irrelevant. *Id.* at 477. "Federal interests" may include areas of law that necessarily require federal intervention, such as areas involving "the

duties of the Federal Government, the distribution of powers in [the] federal system, or matters necessarily subject to federal control even in the absence of statutory authority." *Texas Industries,* 451 U.S. at 642 (citing *Bank of America v. Parnell*, 352 U.S. 29, 33 (1956)). "Federal interest" also may include areas of the law that are "essential to interstate commerce" and require national uniformity of the law. *Brotherhood of Locomotive Engineers v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 26 (2000). State laws that are "unreasonable" or are "specific aberrant or hostile state rules" in regards to an identifiable federal interest will not be applied in federal question cases. *Burks,* 441 U.S. at 479-80 (citing *Wallis*, 384 U.S. at 70)(also citing *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 596).

If the state-law concept does not frustrate the policies of a federal statute, then state law should govern even within the context of a federal question. *Kamen,* 500 U.S. at 107. In *Kamen*, the petitioner shareholder filed a derivative suit against Kemper Financial Service, Inc. (KFS) for an alleged violation of the Investment Company Act of 1940 ("the ICA"). The claim alleged that KFS caused Cash Equivalent Fund, Inc. ("the Fund") to issue a proxy statement that materially misrepresented the character of KFS's fees. Before reaching this Court, the appellate court affirmed the dismissal of the shareholder's claims, adopting the "universal demand" rule under federal common law and abolishing the futility exception established under state law. This Court found that federal courts should incorporate state law as the federal rule of decision

unless applying state law would frustrate specific federal objectives. *Id*. at 97-98. This Court ultimately held that, because the ICA works tangentially with the state law authority governing shareholders and directors, applying state law in the context of the ICA did not frustrate federal policy objectives, and thus state law should govern. *Id*. at 109.

Applying the state law alter-ego doctrine does not frustrate the federal objectives of the TCPA. Congress created the Act to address the disdain most Americans have for robocalls. *Barr v. American Ass'n of Pol. Consultants, Inc.*, 140 S.Ct. 2335, 2344 (2020). Accordingly, the Act "protect[s] the well-being, tranquility, and privacy of the individual's residence," furthering a "compelling state interest." *American Ass'n of Pol. Consultants v. Sessions*, 323 F.Supp.3d 737, 744 (E.D.N.C. 2018) (vacated and remanded on other grounds). Similarly to the ICA referenced in *Kamen*, the TCPA, by the essence of its creation, acknowledges and operates tangentially with state interests. In fact, the TCPA gives deference to certain state regulations regarding the restrictions on the use of telephone equipment. The Act provides: "[N]othing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulation." 47 U.S.C. § 227(f) (2018). Given the fact that the restrictions on the use of telephone equipment are not invariably under federal control, the TCPA does not involve matters necessarily subject to federal intervention. And therefore, applying the

state law alter-ego doctrine in determining liability under the Act does not frustrate federal interests.

If a federal statute is essential to interstate commerce, then the statute requires national uniformity, and thus federal common law should apply. *Bhd. of Locomotive Eng'rs,* 210 F.3d at 26. In *Brotherhood of Locomotive Engineers*, two railroad unions disputed an alleged violation of their collective bargaining agreement with a railway company. The lower court issued an injunction under the Railway Labor Act ("RLA") against the railway company, which was using a third party to violate their collective bargaining agreement with the unions. The railway company contested the lower court's decision, stating that the RLA only applies to carriers, which the third party was not. In addition, the railway company argued that, as an independent company, the third party was neither subject to the RLA nor an actual party in the dispute. Because the collective bargaining agreement was between the unions and the railway company, the RLA would only apply to the third party if the alter-ego doctrine applied, making the third party the alter-ego of the railway company. The First Circuit found that, when a federal statute demands national uniformity, federal common law alter-ego doctrine applies as opposed to the state law alter-ego doctrine. *Id.* at 26. The Court reasoned that because labor relations are essential to interstate commerce, "[n]ational uniformity is essential in the interpretation of labor law." *Id.* Thus, the Court held that because the federal

statute at issue, the RLA, was created to prevent disruptions to interstate commerce, federal common law must apply in this case. *Id.*

The TCPA does not involve an area of the law that requires national uniformity. "[W]hen there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision." *U.S. v. Kimbell Foods, Inc.,* 440 U.S. 715, 728 (1979)*; see also U.S. v. Yazell,* 382 U.S. 341, 354 (1966) ("This Court's decisions applying 'federal law' supersede state law typically relate to programs and actions which by their nature are and must be uniform in character throughout the Nation."). As stated above, the TCPA gives deference to the states regarding certain regulations that may exceed the restrictions of the Act. 47 U.S.C. § 227(f). This non-preemption clause allows states to regulate their own intrastate telemarketing, showing that Congress had no intent to create a uniform telemarketing policy under the Act. *See Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1052 (7th Cir. 2013). As the Eighth Circuit concluded:

> The TCPA carries no implication that Congress intended to preempt state law; the statute includes a preemption provision expressly not preempting certain state laws. If Congress intended to preempt other state laws, that intent could easily have been expressed as part of the same provision.

Van Bergen v. Minnesota, 59 F.3d 1541, 1548 (8th Cir. 1995). Congress intentionally created the statute not to preempt state law, but to "provide interstitial law preventing evasion of state law by calling across state lines." *Id.; see also* 47 U.S.C. § 227, Congressional Statement of Findings (7). Based

on the language of the statute and the Congressional Findings, Congress intended for at least some governing powers to remain with the states when regulating certain telephonic communications. Accordingly, there is little need for a nationally uniform body of law under the TCPA.

Uniformity alone does not justify applying federal common law. *Whelco Indus., Ltd. v. United States*, 526 F.Supp.2d 819, 825-27 (N.D. Ohio 2007). Thus, any reliance the TCPA may have on national uniformity is outweighed by the diminution of the relevance of uniformity as well as the lack of Congressional preemption of state law. Therefore, given that applying the state law alter-ego doctrine would not frustrate an identifiable federal interest and that the TCPA does not require national uniformity, the Act does not pose a significant threat to federal interests, and thus state law should be applied to the alter-ego theory in this case.

B. Even if the Court finds a significant threat to a federal policy, it must still consider other relevant factors before applying a federal common law alter-ego doctrine.

"[F]ederal courts must be ever vigilant to [ensure] that application of state law poses 'no significant threat to any identifiable federal policy or interest." *Burks,* 441 U.S. at 479 (citing *Wallis,* 384 U.S. at 68). When determining whether a state law poses a significant threat to federal interest, a state statute "cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Id.* (citing *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978)). Applying the state law alter-ego theory

to the TCPA does not frustrate an identifiable federal interest. However, should this Court find that there is a significant threat to federal interest, this Court must still consider "other questions relevant to invoking federal common law, such as the strength of the state interest in having its own rules govern, the feasibility of creating a judicial substitute, and other similar factors." *Wallis*, 384 U.S at 68–69 (citations omitted). The significant state interest in applying the state law alter-ego doctrine and the fact that the federal common law alter-ego doctrine is not a feasible judicial substitute prove that the state law alter-ego doctrine should be applied.

i. State interests in applying the state corporate law alter-ego doctrine outweigh any federal interest, preventing the preemption of state law.

"Corporations are creatures of state law. . . and it is state law which is the font of corporate directors' power." *Burks*, 441 U.S at 478 (quoting *Cort v. Ash*, 422 U.S. 66, 84 (1975)); *see also* Model Bus. Corp. Act (1969) (Am. Bar Ass'n, amended 1973) (stating that domestic corporations are incorporated under the law of the state of incorporation). While there are federal laws that govern certain aspects of corporations, "the foundation of U.S. corporate law started, and currently resides, in the state, rather than the federal domain." Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 Am. U.L. Rev. 81, 83–84 (1999). Accordingly, "in this field congressional legislation is generally enacted against the background of existing state law; Congress has never indicated that the

entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based on a federal statute." *Burks,* 441 U.S. at 478 (citing *Cort*, 422 U.S. at 84). In other words, state corporate law is such an area of law where "state law should be incorporated into federal common law". *See Kamen*, 500 U.S. at 98. "The presumption that state law should be incorporated into federal common law is particularly strong in areas [such as state corporate law] in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Id.* at 98. As such, the state of incorporation "will usually have the dominant interest in the determination of [the issue of shareholder liability]." Restatement (Second) of Conflicts of Laws § 307 cmt. a (Am. L. Inst. 1971).

Well-established state law should not be rejected in favor of adopting a federal common law standard. *Kimbell Foods, Inc.*, 440 U.S. at 739-40. In *Kimbell Foods*, this Court reviewed two cases together. The first involved Kimbell Foods, Inc. ("Kimbell Foods"). Kimbell Foods filed suit, claiming their security interest was due priority over the security interest of the Small Business Administration ("SBA"). The primary issue focused on which creditor—Kimbell Foods or SBA—perfected their security interest first. The district court found that, even under state law, SBA had priority while the appellate court granted Kimbell Foods priority by fashioning a new federal rule. The second case involved a similar situation involving the Farmers House Administration ("FHA"). Creditor Crittenden claimed their security interest

held priority over the security interest of the United States. The district court in this case found that, even under state law, Crittenden had priority, and the appellate court affirmed, creating a federal rule to determine which creditor had priority. This Court held that the state interests outweighed the federal interest in both cases. *Id.* at 729. This Court found that both the FHA and the Small Business Act adapted to and incorporated state law, proving an acknowledgment of the significant state interest in commercial law. *Id.* at 730-32. This Court also reasoned that creditors justifiably rely on state law when obtaining liens, and thus implementing a federal common law standard would "create new uncertainties". *Id.* at 739-40. This Court ultimately decided to "adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *Id*. at 740.

Corporate law, including the alter-ego theory, is a well-established body of state law. Like the commercial law referenced in *Kimbell Foods*, applying federal common law to the alter-ego doctrine would cause uncertainties for corporations that justifiably rely on the laws of the state in which they incorporate. The alter-ego doctrine, impacting the liability of a corporation's shareholders, is a fundamental principle of corporate law. *See United States v. Bestfoods,* 524 U.S. 51, 62 (1998). As such, the state law alter-ego doctrine has a significant impact on state interests, and thus preempting state corporate law for the sake of federal common law would not be justified based on this factor.

Alternatively, when using the alter-ego doctrine to establish jurisdiction, the law of the forum state applies. Although federal common law may apply to veil-piercing in certain federal question cases, without clear Congressional intent to the contrary, federal courts look to the nature of the issue involved—not the grounds for federal jurisdiction—to determine which law governs. *See Maternally Yours v. Your Maternity Shop*, 234 F.2d 538, 541 n.1 (2d. Cir. 1956); *see also Menses v. U.S. Postal Serv.*, 942 F. Supp. 1320, 1322 (D. Nev. 1996); *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, No. 14 CIV. 6228, 2015 WL 1500181 (S.D.N.Y. Mar. 30, 2015); *accord A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1463 (D.C. Cir. 1995). The nature of the issue here is establishing personal jurisdiction: Cole seeks to create general jurisdiction over Mr. Todd. While she attempts to do this using the alter-ego theory, a distinction exists between veil piercing for liability purposes and veil piercing for jurisdictional purposes. *In re Lyondell Chem. Co.*, 543 B.R. 127, 139 n.38 (Bankr. S.D.N.Y. 2016). When veil piercing for jurisdictional purposes, the law of the forum state governs the analysis. *Harte-Hanks Direct Mktg./Baltimore, Inc. v. Varilease Tech. Fin. Grp., Inc.*, 299 F. Supp. 2d 505, 514 (D. Md. 2004) (internal citations omitted); *Virginia Elec. and Power Co. v. Peters*, No. 3:17-CV-259-JAG, 2018 WL 1995523, at *2 (E.D. Va. Apr. 27, 2018); *Poulsen Roser A/S v. Jackson & Perkins Wholesale, Inc.*, No. 10 C 1894, 2010 WL 3419460 (N.D. Ill. Aug. 26, 2010), *adhered to on reconsideration sub nom. Roser v. Jackson & Perkins Wholesale, Inc.*, No. 10 C

1894, 2010 WL 4823074 (N.D. Ill. Nov. 15, 2010). As shown above, the personal jurisdiction analysis in federal courts begins with Rule 4(k)(1)(A), which equates a federal court's jurisdiction with that of the forum state. And because of Rule 4(k)(1)(A), a forum state "has a valid interest in the jurisdictional reach of the forum state's courts." *Int'l Bancorp, LLC v. Societe Des Baines De Mer Et Du Cercle Des Etrangers A Monaco*, 192 F. Supp. 2d 467 (E.D. Va. 2002), *aff'd on other grounds sub nom. Int'l Bancorp, LLC v. Societe des Bains de Mer et du Cercle des Estrangers a Monaco*, 329 F.3d 359 (4th Cir. 2003). The state of New Tejas, which is the forum state and the state of incorporation for Spicy Foods, has a significant interest in having its laws govern. Therefore, given the nature of the corporate alter-ego doctrine and the jurisdictional basis for piercing the corporate veil in this case, the state interests of New Tejas outweigh any federal interests.

ii. The federal alter-ego doctrine is not a feasible judicial substitute for the state law alter-ego doctrine.

The application of federal common law is reserved for the "few and restricted" cases where "judicial creation of a special federal rule would be justified." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)). However, neither jurisdiction in the federal courts nor congressional authority under Article I, absent congressional action, justify the creation or application of federal common law. *See Texas Indus.*, 451 U.S. at 640–41. Regarding the alter-ego doctrine, a

"generalized federal substantive law" has emerged; however, this generalized principle gives little guidance when actively applying this federal common law doctrine. *See Seymour v. Hull & Moreland Eng'g*, 605 F.2d 1105, 1111 (9th Cir. 1979); *see also In re Acushnet River & New Bedford Harbor Proc. Re Alleged PCB Pollution*, 675 F. Supp. 22, 33 (D. Mass. 1987). This has resulted in a "jumble of federal decisions" and a Circuit-dependent federal common law alter-ego doctrine. *See Seymour*, 605 U.S. F.2d at 1111. Even in the presence of this vague federal common law standard, "courts tend not to supplant state corporate liability doctrine with federal common law" unless a case involves labor law or ERISA claims, neither of which are at issue in this case. *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Courtad, Inc.,*No. 12-2738, 2014 WL 3613383, at *4 (N.D. Ohio July 18, 2014); *see also See Whelco Indus., Ltd. v. United States*, 526 F.Supp.2d 819, 826–27 ("many of the decisions [to apply federal common law to federal question cases as opposed to state law] were isolated to specific areas of law [i.e., ERISA and labor law]"). The simple fact that the TCPA does not involve labor law or ERISA claims shows that this is not one of the few and restricted instances where "federal statutes authorize the federal courts to fashion a complete body of federal law." *Burks,* 441 U.S. at 477. Therefore, the federal common law alter-ego doctrine is not a feasible judicial substitute for the state law alter-ego doctrine.

CONCLUSION

Because personal jurisdiction must be evaluated with respect to the claims of both named and unnamed class members in a class actions suit and because a federal court should apply state law in determining personal jurisdiction based on an alter ego theory arising under a federal law with no choice of law provision, Respondent respectfully requests this Court to affirm the decisions of the District of New Tejas and the Thirteen Circuit to strike the nationwide class allegations against Lancelot Todd.

CERTIFICATE OF SERVICE

The Undersigned HEREBY CERTIFIES that a copy of the foregoing "Brief for Respondent" was served upon all appropriate parties via Electronic Mail to mcncboard@gmail.com on this 15th day of November, 2021.

/s/ Team 57
Counsel for Respondent

APPENDIX A

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.

The Telephone Consumer Privacy Act, 47 U.S.C. § 227 provides in pertinent part:

> (f) Effect on State Law
>
> > (1) State law not preempted
> >
> > Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits –
> >
> > > (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
> > >
> > > (B) the use of automatic telephone dialing systems;
> > >
> > > (C) the use of artificial or prerecorded voice messages; or
> > >
> > > (D) the making of telephone solicitations.