No. 20-1434

In the Supreme Court of the United States

GANSEVOORT COLE, individually and on behalf of herself and all others similarly situated,

Plaintiff–Petitioner,

v.

LANCELOT TODD,

Defendant–Respondent.

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

Brief for Respondent

Team #61

Counsels for Respondent

November 15, 2021

QUESTIONS PRESENTED

I. Whether a federal district court can exercise personal jurisdiction over out-of-state, unnamed plaintiffs in a class action lawsuit when that court possesses only specific personal jurisdiction over a defendant and the defendant does not consent to general jurisdiction.

II. Whether, in a case presenting a federal question, a district court can refrain from applying the substantive law of the state of incorporation against a corporate shareholder when the decision to pierce the corporate veil through the doctrine of alter-ego burdens no federal interest.

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The opinions of the Court of Appeals for the Thirteenth Circuit (Pet. App. 1a-22a) is not published in the Federal Reporter. The order of the District Court of New Tejas (Pet. App. 1a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2020. The petition for a writ of certiorari was timely filed with this Court, and was granted limited to the two questions presented on October 4, 2021. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fifth Amendment to the United States Constitution is relevant in this case. The pertinent part of the Amendment reads "[no person shall] be deprived of life, liberty, or property, without due process of law." *See* U.S. Const. Amend. V.

Additionally, the Due Process Clause of the Fourteenth Amendment is relevant to this analysis. The pertinent part of this Amendment reads "nor shall any state deprive any person of life, liberty, or property, without due process of law." *See id*. at Amend. XIV, § 1.

The Federal Rules of Civil Procedure Rule 4 provides in pertinent part:

> (k) . . . (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 . . . [or] (C) when authorized by a federal statute.

Fed. R. Civ. P. 4(k)(1). The Restatement (Second) of Conflict of Laws governs the conflict of law analysis in this case. At issue are § 302 and § 307. § 302 reads:

> (1) Issues involving the rights and liabilities of a corporation, other than those dealt with in § 301, are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) The local law of the state of incorporation will be applied to determine such issues, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Conflict of Laws § 302 (Am. L. Inst. 1971). § 307 reads "The local law of the state of incorporation will be applied to determine the existence and extent of a shareholder's liability to the corporation for assessments or contributions and to its creditors for corporate debts." *See id.* at § 307.

Finally, portions of the *Telephone Consumer Protection Act* are relevant to this case. The most pertinent parts of this legislation are § 227(b)(1)(B) and § 227(b)(3). The relevant portion of § 227(b)(1)(B) reads, "(1) It shall be unlawful for any person within the United States . . . (B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(B). Additionally, the relevant portion of § 227(b)(3) reads:

> A person . . . may . . . bring in an appropriate court of that State-- (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or (C) both such actions.

Id. at (b)(3).

STATEMENT OF THE CASE

Mr. Lancelot Todd is a venture capitalist best known for his work promoting the Vettura automobile and Khaki Khomfort Trench Bench. He is currently domiciled within the state of West Dakota. Pet. App. at 4a. Mr. Todd acquired the rights to a potato chip flavoring known as "spicy cold." *Id*. at 2a. Consuming spicy cold flavoring causes one's tongue to turn numb because of a chemical reaction. *Id*. Mr. Todd sought to commercialize this product, and created the corporation "Spicy Cold Foods, Inc." for this purpose. *Id*.

Mr. Todd formed Spicy Cold Foods, Inc. in 2015, incorporating it under the laws of New Tejas and establishing its principal place of business within the state of West Dakota. *Id*. at 2a-3a. Mr. Todd elected to incorporate Spicy Cold Foods, Inc. in New Tejas due to the state's business-friendly corporate laws. *Id*. at 6a. For example, under New Tejas law, a Plaintiff must demonstrate that a company was founded with the purpose of defrauding a specific individual before courts will pierce the corporate veil and treat individual defendants as the alter-ego of a corporate entity. *Id*. The state of New Tejas adopted this law during its territorial years in order to promote and attract business to the state. *Id*. Although later admitted to full statehood, New Tejas retained its business-friendly public policy and legal framework regarding corporate structure. *Id*.

Spicy Cold Foods, Inc. began introducing this product into the market by selling wholesale to restaurants and grocery stores. *Id*. at 3a. However, these sales

were cooled due a lack of advertising. *Id*. To heat up sales, Spicy Cold Foods, Inc. purchased an "automatic telephone dialing system" in 2017. *Id*. This allowed Spicy Cold Foods, Inc. to directly contact consumers across the country. Using this machine, Mr. Todd pre-recorded a message to challenge consumers to try spicy cold chips and "[f]rost-bite into the excitement[.]" *Id*. This message was automatically sent to private telephone lines across the country, including those of Mrs. Ganesvoort Cole.

Mrs. Cole received 5 advertising calls from Mr. Todd's machine on her personal home phone and 5 advertising calls on her personal cell phone. *Id*. at 3a. Unmoved by Mr. Todd's challenge, Mrs. Cole filed suit against Spicy Cold Foods, Inc. and Mr. Todd individually under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. She filed a class action utilizing a "fail-safe" national class definition, hoping to enjoin Spicy Cold Food, Inc.'s unsolicited telemarketing and recover damages. *Id*. at 3a. Mrs. Cole, a New Tejas resident, opted to file her claim in her home state. *Id*.

Mrs. Cole's decisions as to how to structure the class action have caused courts difficulty from the outset. *Id*. at 4a-7a. Although presenting a federal question, Mrs. Cole failed to articulate a workable theory of how the District Court of New Tejas could exercise personal jurisdiction over 1) Mr. Todd individually and 2) on behalf of unnamed class members. *Id*. at 4a. Without personal jurisdiction over Mr. Todd individually, Mrs. Cole can only bring a nationwide class against Spicy Cold Foods, Inc., which lacks appreciable recoverable assets. *Id*. Before the District Court, she advanced two theories of personal jurisdiction: (1) that unnamed class members need not demonstrate personal jurisdiction over Mr. Todd because she, the named plaintiff,

has specific personal jurisdiction over Mr. Todd with regards to her claims, and (2) that Mr. Todd, a resident of West Dakota, is subject to general jurisdiction in New Tejas since he is Spicy Cold Food, Inc.'s alter ego. *Id.* at 4a-5a. Each theory is deeply flawed.

The first theory is flawed because Petitioner construes a Rule 23 class action as a special type of action immune from the normal pleading and personal jurisdiction rules. However, Due Process rights are not dependent upon the Civil Rule under which a plaintiff decides to file their case.

The second theory requires the court to apply a federal common law test to hold that Mr. Todd is Spicy Cold Food, Inc.'s alter-ego. *Id.* at 5a. This test is substantively different from the corollary state law test that New Tejas applies to alter-ego questions. *Id.* at 6a. Mrs. Cole, a New Tejas domiciliary, believes this federal test is appropriate despite her choice of New Tejas as a forum district and Spicy Cold Foods, Inc.'s being a New Tejas Company. *Id.* at 2a-3a. Based on these facts, Mrs. Cole asks the Court to save her from the jurisdictional problems created by her construction of this suit.

After jurisdictional discovery, the District Court granted Mr. Todd's motion to strike the national class action, ruling that it lacked jurisdiction to hear the national claims. *Id.* at 4a. Mrs. Cole was granted a Rule 23(f) interlocutory appeal by the Thirteenth Cirtuit, who then affirmed the lack of jurisdiction over Mr. Todd on behalf of out-of-state class members. *Id.* at 16a. Additionally, the majority opinion by Judge Sinclair affirmed that New Tejas alter-ego laws are applicable in this case, and under

these laws Mr. Todd is not Spicy Cold Food, Inc.'s alter ego. Mrs. Cole then appealed to this court and was granted a writ of certiorari.

SUMMARY OF ARGUMENT

On the first certified question, this Court has stated that the Constitutional limits of Federalism provide every State exclusive jurisdiction and sovereignty over persons and property within its territory. Realizing the necessity of this structure for state sovereignty, the federal courts have adopted the same limitations as the states in which they operate with Federal Rule of Civil Procedure Rule 4(k). While the modern understanding of *in personam* jurisdiction has evolved to include purposeful availment of a forum state as a means of personal jurisdiction, state power to coerce conformity with its judgements is still limited. As noted in this Court's recent decision of *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), when in-state and nonresidents' claims lack an adequate link to the defendant's contacts with the forum state, specific jurisdiction over the nonresidents' claims is not warranted. Since class actions are an efficiency substitute for a mass action or numerous individual actions, a court must possess general personal jurisdiction or consent of a defendant in order to proceed with a national class action. In the matter at bar, the District Court has neither. Under this framework, the District Court of New Tejas cannot possess personal jurisdiction over the Respondent with regards to out-of-state, unnamed plaintiffs in a national class action.

Moreover, Petitioner has filed her Rule 23 class action in the District Court of New Tejas. Until the class is certified by the District Court, she cannot make a claim for personal jurisdiction over out-of-state plaintiffs. A district court is given broad discretion in certifying a class under Rule 23, and any ruling is reviewed under an abuse of discretion framework. Because petitioner fails to meet the pleading requirements for a Rule 23 class action, the District Court of New Tejas correctly denied the class certification. Thus, this Court should affirm the ruling of the Thirteenth Circuit.

On the second certified question, this court should affirm the thirteenth circuit ruling that Mr. Todd is not Spicy Cold Food, Inc.'s alter-ego. New Tejas corporate law should apply to the alter-ego analysis in this case rather than the federal common law. Federal common law can only be invoked in cases where there is a federal interest implicated in the decision to pierce the corporate veil. However, the federal government has no interest in merely allocating costs between entities, and alter-ego jurisdictional theories are fundamentally cost-shifting doctrines of expediency. Even if there is some federal interest in adjudicating alter-ego jurisdictional theories, that interest is not analogous to other federal interests which warrant the application of federal common law. Additionally, even if federal interests are burdened by the decision to pierce the corporate veil via alter-ego theories, no such interests are burdened in this case. Therefore, the federal common law standard for piercing the corporate veil through an alter-ego theory does not apply in this case.

As a result, this Court should utilize a choice of law analysis to determine that state law governs the alter-ego dispute. Because alter-ego jurisdictional theories affecting the liability of a corporate shareholder, here Mr. Todd, this dispute should be governed by the Restatement (Second) Conflict of Laws § 307. Given that New Tejas is Spicy Cold Food, Inc.'s state of incorporation, New Tejas law should be the corporate law applied to this case. Even if analyzed under a Restatement (Second) Conflict of Laws § 302 analysis rather than § 307, New Tejas law should apply to this case because it is the only state with an inherent interest in applying its alter-ego law to the case. Under New Tejas state corporate law, Mr. Todd is not Spicy Cold Food, Inc.'s alter-ego since he did not incorporate with the express purpose of defrauding a specific individual. Therefore, the ruling of the Thirteenth circuit denying general jurisdiction over Mr. Cole in New Tejas should be affirmed.

ARGUMENT

I. The District Court of New Tejas does not possess personal jurisdiction over Respondent with regards to out-of-state, unnamed plaintiffs in a national class action

The District Court of New Tejas lacks personal jurisdiction over Respondent regarding out-of-state, unnamed, class action plaintiffs because their claims lack a sufficient link to the Respondent's contacts with New Tejas. The Constitution restricts the power of state courts to assert jurisdiction over a defendant's person or property. *See Pennoyer v. Neff*. 95 U.S. 714 (1877). A fundamental guarantee of the Due Process clauses of the Fifth and Fourteenth Amendments are that a citizen is only subject to a state's *in personam* jurisdiction in those states in which they are domiciled, in which they are personally served with process, or with which they possess some minimum contacts. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Burnham v. Superior Ct.*, 495 U.S. 604, 613 (1990) (ruling that in person service of process within a state geographic boarder confers jurisdiction). The general rule of any civil action is that a state court can either exercise general jurisdiction relating to all claims or specific jurisdiction to pertaining to a single action. *See also Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U. S. 915, 923-924 (2011); *Helicopteros Nacionales de Colombia, S. A.* v. *Hall*, 466 U. S. 408, 414, n. 8 (1984).

It is undisputed that New Tejas possesses general jurisdiction over the corporation Spicy Cold Foods, Inc. since it is incorporated in New Tejas. *See BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014). However, the question in this matter is whether the District Court of New

Tejas has power to exercise personal jurisdiction over the Respondent with regards to out-of-state claims. Merely owning a company incorporated in a given state does not subject an individual to general jurisdiction in that same state. *See Shaffer v. Heitner*, 433 U.S. 186, 211-12 (1977) (ruling that corporate stock cannot be used as a means of *in rem* jurisdiction to force a defendant to come to a state with which they lack minimum contacts). As noted in this Court's recent decision of *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), when nonresidents' claims lacked an adequate link with the defendant's contacts with the forum state, specific jurisdiction over those nonresidents' claims were not warranted. Thus, given that the alleged violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, occurred in the state of West Dakota, the District Court of New Tejas lacks subject matter jurisdiction for claims of non-New Tejas residents. Thus, Mr. Todd's motion to strike the national class action was property granted.

A. The Doctrine of personal jurisdiction relates to the state sovereignty interest in issuing legal rulings

Personal Jurisdiction relates to Federalism state sovereignty interests because it protects defendants from having to defend claims in venues where they have no expectation of defending themselves. The Supreme Court first stated that the Constitution restricted the power of state courts to assert jurisdiction in *Pennoyer v. Neff*. 95 U.S. at 714. This case set the foundation for the modern understanding of *in personam* jurisdiction. The Court in *Pennoyer* asserted that, "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established." *Id.* at 720. Thus, a state court could not constitutionally assert

jurisdiction over a non-consenting defendant who was not served within the state. Pennoyer's territorial framework was therefore justified by the inherent territorial limits of a state's sovereignty. *Id.* at 722 ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.").

While territorial limits on *in personam* jurisdiction still remain a legal standard to this day, this Court extended the boarders of general jurisdiction to comport with technological advances and an increasingly interconnected society in *Int'l Shoe Co. v. Washington*. 326 U.S. 310, 316 (1945). Relying on the notion that fair play contains the concepts of party convenience, this Court focused on reciprocal benefits arising from "the privilege of conducting activities within a state," and "the context of our federal system of government" to expand the basis for jurisdiction. *Id.* at 317, 319. However, this expansion was not limitless. This court clarified the doctrine of general jurisdiction in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and asserted that the doctrine is based in part on the need to ensure that states "do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." Id. at 292. As this Court noted in *World-Wide Volkswagen*:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment. *Id.*, at 294.

This concept has only been expended by the Court in more recent decisions. In *J. McIntyre Machinery, LTD. v. Nicastro*, Justice Kennedy called state sovereignty a

"central concept" of the necessity of personal jurisdiction. 564 U.S. 873, 874 (2011) (Kennedy, J., plurality). He goes on to say it is an "individual's right to be subject only to lawful power. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it." *Id.* at 884. As a result, this Court has consistently construed the doctrine of personal jurisdiction within the context of the limits of state sovereignty.

B. Federal courts have adopted the state limits on *in personam* personal jurisdiction through Federal Rule of Civil Procedure 4(k)(1)

Federal courts have adopted the state limits on *in personam* personal jurisdiction through Federal Rule of Civil Procedure 4(k)(1), and as a result the District Court of New Tejas would lack jurisdiction over non-New Tejas claims if they were raised individually. Federal rules ordinarily require federal courts to "follow state law in determining the bounds of their jurisdiction over persons." *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014). As was noted by the circuit court in Judge Sinclair's majority opinion of the Thirteenth Circuit below, the Rules Enabling Act, 28 U.S.C. § 2072(b), provides that federal procedural rules "shall not abridge, enlarge or modify any substantive right." Pet. App. 9a. Given that federal courts apply the substantive law of the states in which they sit, Congress adopted the same limits on personal jurisdiction for federal courts in Federal Rule of Civil Procedure 4(k)(1) rather than extending the power of personal jurisdiction to the entire United States. This means that the *Bristol-Myers Squibb Co.* personal jurisdiction framework applies with as much force to federal courts as it does to state courts.

In federal courts addressing a federal issue case, there are two means to obtain

personal jurisdiction over a defendant under Rule 4(k)(1). The first is though federal statutes authorizing nationwide service of process. Fed. R. Civ. P. 4(k)(1)(C); *See Canaday v. Anthem Cos.*, 9 F.4th 392, 395-96 (6th Cir. 2021) (noting certain statutes like The Sherman Act, 15 U.S.C. § 5, and The False Claims Act, 31 U.S.C. § 3732(a), allow for nationwide service of process). If the statute does not authorize nationwide service, then the only way to obtain personal jurisdiction over a party is through the same methods as the state courts in which the district court is located or by joining a party under Rule 14 and Rule 19. Fed. R. Civ. P. 4(k)(1)(A-B). As such, the federal district courts incorporate the three basic principles of personal jurisdiction analysis. First, a state court has personal jurisdiction to adjudicate any claims against corporations that are "at home" in the state. *Daimler*, 571 U.S. at 126-27. Second, it can also adjudicate claims against an individual of another state, as long as the claims "arise out of" an individual's contacts with the forum state. *Id*. Third, any party can consent to a state court's exercise of personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985).

Here, the TCPA provides a federal question to enable the District Court to have subject matter jurisdiction, but the TCPA does not authorize nationwide service. Thus, the usual state rules of personal jurisdiction apply to the District Court. There is no question that Petitioner's claim against Respondent arises out of his contacts with the state of New Tejas. Pet. App. 4a. It could even be argued that the claims of any New Tejas-domiciled, unnamed plaintiffs may also arise out of the same contacts as Mrs. Cole. However, just as drugs prescribed, purchased, and consumed out of

state do not relate to a drug company in-state contacts, here telemarketing calls made outside of New Tejas are unrelated to telemarketing calls within New Tejas. *See Bristol-Myers Squibb Co.*, 137 S. Ct. at 1773. While all plaintiffs may share a similar mode of injury, namely unwanted phone calls, these injuries do not share a common jurisdictional nexus in New Tejas. However, they may in West Dakota. Thus, the District Court of New Tejas does not have personal jurisdiction over individual claims.

C. Since class actions are an efficiency substitute for a mass action or numerous individual actions, a court must possess general personal jurisdiction or consent of a defendant to proceed with a national class action

Since class actions are an efficiency substitute for a mass action or numerous individual actions, a court must possess general personal jurisdiction or consent of a defendant plaintiff to issue a judgement on national claims because the court must have jurisdiction to hear each claim in the action. Governed by the Federal Rule of Civil Procedure Rule 23, class actions are a means for numerous plaintiffs who share a common injury to efficiently adjudicate their claims and achieve equitable outcomes. The Petitioner and the dissenting opinion of Judge Arroford below rely on cases such as *Lyngaas v. Curaden AG*, 992 F.3d 412 (6th Cir. 2021), and *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2019), to claim that Class Actions are a special class of legal action and immune from the jurisdictional requirements of other legal actions. However, this interpretation misunderstands the nature of Rule 23 and fundamentally misconstrues this Court's precedent surrounding Rule 23 class action filings. Since the class actions are an efficiency substitute for a mass action, the

jurisdictional rule from *Bristol-Myers Squibb Co. v. Superior Court* applies and a named plaintiff is required to prove a sufficient nexus between the harm suffered by unnamed class action members and the defendant's contact with the forum state.

The history of the class action as a form of action shows the intent for the class action form to serve as a special class of joinder or mass action. Fundamentally, a class action is a type of case that joins multiple suits into single action. *Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 781 (9th Cir. 1994); *cp. Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("Where the district court has jurisdiction over the claim of each individual member of the class, Rule 23 provides a procedure by which the court may exercise that jurisdiction over the various individual claims in a single proceeding"). This means that Class Actions are functionally a form of mass action. As noted by Geoffrey C. Hazard et al., "Indeed, all cases in which resort is made to a class suit are in some sense a kind of mass tort. Our society is increasingly and inevitably characterized by 'mass' phenomena, including mass legal wrongs." Geoffrey C. Hazard et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1858 (1998).

This view of a class action as a special type of mass action is not unique. Indeed, it was the perspective of the drafter of Rule 23. According to the editors of the Columbia Law Review a few years after the first passage of Rule 23:

> [What is] abundantly clear from the history of its formulation and the explanation of its authors, is the conceptual tie-up of Rule 23(a) with joinder of parties. Professor Moore conceived the class suit as a substitute for joinder in situations where the numbers of the group or federal jurisdictional requirements made joinder impracticable.

Federal Class Actions: A Suggested Revision of Rule 23, 46 COLUM. L. REV. 818, 821 (1949). This view is further supported by the fact that the drafters specifically included parallel language between Rule 23 and Rules 26, 27 (which related to Compulsory Joinder of Joint Parties and Joinder of Parties respectively in the 1937 draft rules). *Id.* As scholar Diane W. Hutchinson notes:

> Moore flatly described [Rule 23 class actions] as a "permissive joinder device." His text took (and takes) the position that "[w]hen a suit was brought by or against such a class, it was merely an invitation to joinder-an invitation to become a fellow traveler in the litigation, which might or might not be accepted. It was an invitation and not a command performance."

Diane W. Hutchinson, *Class Actions: Joinder or Representational Device?* 1983 SUP. CT. REV. 459, 470 (1983). Even in Prof. Moore's own words, he described Class Actions as "inextricably bound up with joinder of parties and permissive joinder of parties based on a common question of law or fact." James Moore & Marcus Cohn, *Federal Class Actions,* 32 ILL. L. REV. 307, 318 (1937). This same conclusion is aptly summed up by this Court in the case *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,* where it states:

> A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.

559 U.S. 393, 408 (2010). By leaving the legal rights and duties intact, the Court has embraced the notion that class actions are a de facto class of mass action with joinder. Where the class actions bring claims seeking individual damages, the class action is more akin to a mass action, and thus a court presiding over the claims must possess personal jurisdiction over every claim in the action. *See, e.g., TransUnion LLC v.*

Ramirez, 141 S. Ct. 2190, 2208 (2021) (ruling in a context of a class action with individual damages "[e]very class member must have Article III standing in order to recover individual damages").

This doctrine of law is especially pertinent to the case at bar. Unlike usual punitive class actions under Rule 23(b)(3), the current class action fundamentally involves individual claims. Under the TCPA, each individual suffering an injury has the ability to bring a private right of action for 1) actual money loss or 2) $500 in damages for each violation of the TCPA. 47 U.S.C. § 227(b)(3)(B). This means that a class action under the TCPA is a de facto class action akin to the type of class action in *TransUnion LLC v. Ramirez*. Since each of the claims involve individual damages, the District Court of New Tejas must possess jurisdiction to hear the claims of each individual class member. *Id*. As noted above, the District Court of New Tejas only has the jurisdictional ability to preside over claims of New Tejas residents, and so joining all the resident and non-resident claims in to a joint class action does not remedy the underlying lack of jurisdiction.

Relying on cases such as *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), or *Califano v. Yamasaki*, 442 U.S. 682, Petitioner may contend that jurisdiction in class actions is only determined as to the named plaintiffs since unnamed plaintiffs are not considered for diversity jurisdiction. However, these cases are inapplicable to the current matter because the defendant in *Phillips Petroleum* consented to jurisdiction and the statute at issue in *Califano* (namely 42 U.S.C. § 205(g)) allowed a federal court to certify a nationwide class by statute. While a federal class action

may provide a way to escape the usual litigation rules about individual amount in controversy or complete diversity requirements, it does not bypass the traditional rules for *in personam* jurisdiction. In general, each class member must satisfy all jurisdictional requirements in an action, including jurisdictional requirements imposed by special statutes, or an unnamed class member is not be included in the class. *See. e.g., Hunt v. Schweiker*, 685 F.2d 121, 123 (4th Cir. 1982) (ruling each class member, including unnamed plaintiffs, must satisfy the jurisdictional requirement Section 205(g) of the Social Security Act to be included in the class); *Lunsford v. United States*, 570 F.2d 221, 224–225 (8th Cir. 1977) (ruling all class members must exhaust any administrative remedies for a federal court to have subject matter jurisdiction over the entire class in a Federal Tort Claims Act case).

Additionally, Petitioner may point to Rule 23.2, which states that a court needs only personal jurisdiction over named representatives. Fed. R. Civ. P. 23.2. *See also Curley v. Brignoli, Curley & Roberts Assoc.*, 915 F.2d 81, 87 (2d Cir. 1990) (ruling Fed. R. Civ. P. 23.2 provides litigants with important procedural advantages). However, this rule applies only to unincorporated associations, and has never been applied to traditional Rule 23 class actions. Given that Spicy Cold Foods is incorporated and Respondent is an individual, Rule 23.2 is inapplicable to the case at bar.

II. Petitioner cannot make a claim for personal jurisdiction over out-of-state plaintiffs in her class action since her class action certification was denied by the district court under Federal Rule of Civil Procedure 23 and this decision should not be reversed

Given that the District Court of New Tejas denied Petitioner's national class definition but left open a state class definition, Petitioner lacks the ability to

represent unnamed parties until her class is certified. Until a class action is certified by a court, the named plaintiffs only bring individual claims against the defendant. A district court has broad discretion in deciding whether it should certify a proposed class. *Keele v. Wexler*, 149 F.3d 589, 592 (7th Cir. 1998). Upon review, a district court's decision of whether to certify a class is reviewed under the abuse-of-discretion standard. *See, e.g., Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452, 457 (6th Cir. 2020). This occurs if a court "relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment." *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 850 (6th Cir. 2013). Thus, even if overruled on the jurisdictional determination on abuse of discretion, Petitioner's action still possesses fatal flaws which will prevent a class from being certified, rendering the ruling on personal jurisdiction harmless error.

A. Determination of personal jurisdiction for unnamed plaintiffs is a post-class certification question, and this Court should affirm the denial of certification to force all issues to be brought in a single appeal

Petitioner's Rule 23(f) petition lacks merit because personal jurisdiction for unnamed plaintiffs a post-class certification question and petitioner still has a state level class action which has yet to be certified. As a general rule of class action litigation, determination of personal jurisdiction over unnamed plaintiffs is a post certification question. *Smith v. Bayer Corp.*, 564 U.S. 299 (2011). *See also Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293 (D.C. Cir. 2020); *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240 (5th Cir. 2020). If a class certification is denied or still

pending, a plaintiff cannot claim to have the ability to represent the class and have personal jurisdiction. It is true that an order striking class allegations can be appealed under Rule 23(f) if the Circuit grants permission. *Microsoft v. Baker*, 137 S. Ct. 1702, 1711 n.7 (2017) ("[a]n order striking class allegation is functionally equivalent to an order denying class certification and therefore appealable under Rule 23(f).") However, this Court in *McLish* v. *Roff* noted, "From the very foundation of our judicial system," the general rule has been that "the whole case and every matter in controversy in it [must be] decided in a single appeal." 141 U. S. 661, 665-666 (1891). A final-judgment rule preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice. See *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 374, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981).

Here, petitioner has taken an interlocutory appeal under Rule 23(f) with regards to her national class action definition. While the District Court struck down her national class definition for lack of subject matter jurisdiction, petitioner still possesses a state class cause of action on which the District Court has not ruled. Pet. App. 7a (only striking the nationwide class allegations based on the lack of personal jurisdiction). Even were this court to overrule the ruling of the district court with regards to personal jurisdiction issue, this case would be remanded for further proceedings. If the District Court decided to grant class certification at that point, defendants could still raise another 12(b)(2) motion with regards to state jurisdiction,

since personal jurisdiction is a post-certification question and would raise nearly identical questions again on appeal. Thus, the court should sustain the district court's denial of class certification to force the petitioner to bring a complete record on appeal at the end of all District Court proceedings and after the resolution of all outstanding legal issues.

B. Petitioner's class action fails to satisfy the basic pleading requirements for a Rule 23 class action

Petitioner's class action fails to satisfy the basic pleading requirements for a Rule 23 class action because she has failed to provide an adequate class definition that provides an ascertainable class and as a result fails to sustain the Numerosity, Commonality, and Adequacy of Representation requirements of Rule 23(a). Under rule 23(a), a plaintiff must satisfy 4 preliminary threshold issues. They must show:

- (1) "the class is so numerous that joinder of all members is impracticable"—numerosity;
- (2) "there are questions of law or fact common to the class"—commonality;
- (3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class"—typicality; and
- (4) "the representative parties will fairly and adequately protect the interests of the class"—adequacy of representation.

Fed. R. Civ. P. 23(a). There is an additional unstated rule that the class definition be clearly ascertainable by the District Court and must be susceptible of precise definition. *Astrazeneca AB v. UFCW (In re Nexium Antitrust Litig.)*, 777 F.3d 9, 19 (1st Cir. 2015) (definition of class must be "definite," that is, standards must allow class members to be ascertainable by objective criteria); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592–593 (3d Cir. 2012) ("with respect to actions under Rule

23(b)(3), is that the class must be currently and readily ascertainable based on objective criteria."); *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 728 (4th Cir. 1989) (Fed. R. Civ. P. 23 implicitly requires existence of identifiable class); *John v. National Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of Federal Rule of Civil Procedure 23"); *Carriuolo v. GM Co.*, 823 F.3d 977, 984 (11th Cir. 2016) (plaintiff seeking to represent proposed class must establish that proposed class is adequately defined and clearly ascertainable).

Moreover, this objective standard must comply with a preponderance of evidence standard. *Carrera v. Bayer Corp.*, 727 F.3d 300, 306–307 (3d Cir. 2013) (for all prerequisites to class actions, including ascertainability, court must undertake "rigorous analysis" to determine if standard is met; accordingly, plaintiff must show, by preponderance of evidence, that class is currently and readily ascertainable based on objective criteria); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 354 (3d Cir. 2013) (court must make factual determinations of all prerequisites, including ascertainability, by preponderance of evidence). Objective criteria for class membership cannot include material such as a class member's affidavit merely stating that he or she is a class member without further indicia of reliability. *Carrera*, 727 F.3d at 306–307.

Some plaintiffs attempt to bypass the ascertainably requirement by defining their class as all persons injured by the defendant, rather than providing objective means to determine class membership. This "fail-safe" class definition is generally

disfavored in the circuits. *See, e.g., Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 495-97 (7th Cir. 2012); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 539 (6th Cir. 2012) (ruling that fail-safe class definitions are inherently unfair to defendants because "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment."). Circuits have generally held that a class definition of plaintiff and "others who are similarly situated," without providing any detailed guidance regarding how the class members could be identified, is not sufficiently definite to pass muster. *Coleman v. Watt*, 40 F.3d 255, 259 (8th Cir. 1994). The test employed by the Eighth Circuit requires a plaintiff to show both that (1) the class is defined with reference to objective criteria, and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition. *See Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015).

Here, there is no evidence in the record or the Appendix to the Petition for Certiorari that Petitioner has advanced any class definition beyond a "fail-safe" class definition. Petitioner may attempt to remedy this by arguing the class is ascertainable based on those individuals receiving unsolicited phone calls from Respondent. This argument is closely related to the argument raised by the defendant in the case *Lyngaas v. Curaden AG*. 992 F.3d 412 (6th Cir. 2021). In that case, the named plaintiff contended that the phone logs of the defendant showed who is a presumptive member of the class. However, in the current action, the plaintiff lacks such data. The current matter is more akin to *Sandusky Wellness Center, LLC v. ASD*

Specialty Healthcase, Inc., 863 F.3d 460 (6th Cir. 2017), in which this court upheld the district court's denial of class certification of a "fail-safe" definition due to lack of data. The district court in *Sandusky Wellness Center, LLC* concluded that the plaintiff could not satisfy the predominance and ascertainability requirements for a TCPA class action. Although plaintiff had evidence that the fax in question was successfully transmitted to 75 percent of the individuals targeted, she lacked the fax logs to show which individuals actually received the fax. *Id.* at 470. Because "no circuit court has ever mandated certification of a TCPA class where fax logs did not exist," that court affirmed the district court's decision. *Id.* at 473. Given that petitioner lacks such phone logs in the current case, her class definition is not ascertainable and thus cannot be sustained.

If Petitioner's class definition cannot pass ascertainability, then she cannot satisfy the numerosity, commonality, and adequacy of representation. As noted in Section I.C above, each individual suffering an injury under the TCPA has the ability to bring a private right of action for 1) actual money loss or 2) $500 in damages for each violation of the TCPA. Without a clear class definition, Petitioner is unable to show how her injuries are common to an adequate number of potential class members. Moreover, given the individual nature of TCPA claims, the inadequate class definition leaves any claim for adequacy of representation severely lacking. As a result, even if the court decides to overturn the District Court and the Thirteenth Circuit with regards to the personal jurisdiction issue, the fundamental flaws with the Petitioner's class claims render the personal jurisdiction determination harmless

error. Thus, the ruling of the Thirteenth Circuit upholding the denial of class certification for a national class should be affirmed.

III. The alter-ego jurisprudence of federal common law should not apply to this case because there is no federal interest sufficient to trigger the application of federal common law

Federal common law used to be ubiquitous in federal court jurisprudence. *See Erie R.R. Co.*, 304 U.S. at 71-73. However, this Court determined that expansion of federal common law "rendered impossible the equal protection of the law." *Id.* at 75. What started as an attempt at achieving uniformity of the application of law among courts "prevented uniformity in the administration of the law of the state." *Id.* To remedy this problem, this Court in *Erie* boldly declared "[t]here is no federal general common law." *Id.* at 78.

However, the Court has since softened this stance. In *Clearfield Trust Co. v. U.S.*, this Court determined that the *Erie* Doctrine did not apply to cases when the federal government was acting under a constitutional function or power. *See* 318 U.S. 363, 366 (finding that the rights and duties of the government related to monetary disbursements is an exercise of a "constitutional function or power" to which *Erie* did not apply). In situations where the source of law in a suit is the United States Constitution and related federal statutes, court may create and utilize federal common law. *See Id.* at 367.

Nevertheless, this is not a blank check to create federal common law in all federal question cases. In order to utilize the alter-ego jurisprudence of federal common law to gain jurisdiction over Mr. Todd and pierce the corporate veil, the

Court must determine that "a federal interest is implicated by the decision of whether to pierce the corporate veil." *E.g. Anwar v. Dow Chem. Co.*, 876 F.3d 841, 848 (6th Cir. 2017) (citing to *Flynn v. Greg Anthony Constr. Co. Inc.*, 95 F. App'x. 726, 732 (6th Cir. 2003) to support this rule). No federal interest is implicated by applying alter-ego jurisdiction to this case because (1) the alter-ego theory is a purely cost allocating rule, and the federal government has no interest in who bears liability so long as someone does, (2) the alter-ego theory is unlike other laws and government actions in which federal interests have been found, (3) the alter-ego theory is more a rule of substance than procedure meaning the government's interest in federalism and respecting state sovereignty counsels against utilizing federal common law to determine whether a party is a corporation's alter-ego, and (4) in the alternative, in this case the *TCPA* has no interest in whether Petitioner is able to achieve monetary compensation for violation of the statute so long as the conduct in question stops, and therefore there is no federal interest implicated in *TCPA* actions.

A. The alter-ego theory is a purely cost allocating rule, and the federal government has no interest in allocating the costs of litigation among entities

In order to apply the federal common law version of alter-ego theory to this case, the Court must find there is a federal interest involved in the decision of whether to pierce the corporate veil. *E.g. Anwar*, 876 F.3d at 848. Because the alter-ego theory is primarily a means of shifting cost between entities due to their close relationship, there is no federal interest implicated in the decision to pierce the corporate veil.

Historically, corporations were used as a vehicle to limit the legal liability that shareholders or directors may face as a result of their business ventures. *See* David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1309 (2007) (citing to Model Bus. Corp. Act § 6.22(b) (2002)). The idea of piercing the corporate veil by deeming a shareholder or director to be the alter ego of a corporation was first considered in *Canon Mfg. Co. v. Cudahy Packing Co.*. *See* 267 U.S. 333 (1925). In this case, the Court decided not to impose the liability of an Alabama subsidiary company against a Maine parent company. *See Id.* at 334, 337. The Court expressed it would not enforce the liability of the subsidiary against the parent company. *See Id.* at 337. Thus, when this Court first considered whether to hold a parent company as the alter-ego of a subsidiary, and thus pierce the corporate veil, the Court's primary concern was who should bear the liability of a decision.

This cost-shifting and economic lens did not fall away as the doctrine became more fully developed. Scholars have observed that decisions of whether or not to pierce the corporate veil can be explained by courts trying to achieve economically efficient outcomes. *See* Millon, *supra*, at 1326-27 (finding that the corporate veil was more likely to be pierced in cases involving "close corporations" because it is doubtful that respecting the corporate form in those cases would be economically efficient). In fact, more modern cases considering whether owners should be deemed the alter-ego of their corporation focus almost entirely on the increased ability to recover damages by piercing the corporate veil. *See, e.g., RLS Assocs., LLC v. United Bank of Kuwait*

PLC, 464 F. Supp.2d 206, 222-23 (S.D. N.Y. 2006) (discussing the possibility for United Bank of Kuwait to recover attorney's fees or damages on the back end of the case against an insolvent corporation by piercing the corporate veil in order to access the owners' assets).

While this case concerns utilizing alter-ego and veil piercing to obtain general jurisdiction over Mr. Todd in New Tejas, cases in which parties seek to obtain personal jurisdiction by piercing the corporate veil by using alter-ego theory still focus on the cost-shifting aspects of the doctrine. *See, e.g., Gonzalez v. Drew Indus. Inc.*, 2008 WL 11338569, *2 (C.D. Cal. 2008) (distinguishing this case from cases where alter-ego theories were used to establish jurisdiction because in this case, unlike in cases which successfully invoked alter-ego analysis for this purpose, plaintiff could not demonstrate the subsidiaries assets had actually been stripped). This cost-shifting rationale pervades the legal reasoning for the doctrine of alter-ego because it is the only true reason for using the doctrine. For example, in this case Mrs. Cole asks this Court to find that Mr. Todd is the alter-ego of Spicy Cold Foods, Inc. for the stated purpose of obtaining general jurisdiction over him in New Tejas. However, Mrs. Cole likely would not be attempting this strategy if Mr. Todd were an insolvent defendant. At its heart, alter-ego theory (whether used for jurisdictional or other purposes) is simply a way of shifting costs from one entity to another. *See Horowitz v. AT&T Inc.*, 2018 WL 1942525, *9 (D. N.J. 2018) (refusing to extend alter-ego jurisdiction in a situation where the parent and subsidiary company appeared fully integrated, but

where the plaintiff's analysis ignored financial reliance, undercapitalization, and payment of employee salaries).

Because the interest in using alter-ego to pierce the corporate veil is primarily a doctrine used to allocate loss, no federal interest is implicated in deciding whether to pierce the corporate veil. *See TAC-Critical Systems, Inc. v. Integrated Facility Sys.*, 808 F.Supp.2d 60, 66 (D. D.C. 2011) (refusing to find a federal interest in veil piercing where it was used solely to extend liability); *compare Pena*, 731 F.2d at 10 (finding that the federal government has no interest in which party bears the costs of liability so long as the government receives the money it is owed for a violation of federal law and policy), *with U.S. v. Dawn Props., Inc.*, 2016 WL 7223398, *1, *2-*3 (S.D. Miss. 2016) (applying federal common law analysis to a choice of law question because the government could not achieve an adequate remedy for violation of federal laws and interests if the corporate veil were not pierced). This Court has held that, while there may be a federal interest in ensuring the federal government does not pay out more money than it must to a corporation, there is no interest in how that money is privately dispursed within or between the corporations. *See Rodriguez v. FDIC*, 140 S.Ct. 713, 717-18 (2020) (finding that the government has an interest in controlling how it pays out tax refunds to corporations, but has no interest in how those corporations divide up those tax refunds). Just as there is no federal interest in how a refund is dispersed among entities (provided that the refund is paid), here there is no federal interest in how liability is apportioned as long as an appropriate remedy

is achieved. Without this federal interest, federal common law cannot be applied. *E.g., Clearfield Trust Co*, 318 U.S. at 366-67.

B. The interests in determining that one entity is the alter-ego of another are different from the interests surrounding other federal jurisprudence in which federal common law is utilized

Veil-piercing via alter-ego analysis is not the only area of the law where federal common law is often used. Specifically, federal common law is often used in *Employee Retirement Income Security Act* (herein *ERISA*) cases and interstate controversies. *See, e.g., Rodriguez*, 140 S. Ct. at 717 (discussing the sorts of cases in which federal common law is appropriately applied); *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (explaining that federal courts are to create federal common law of rights and obligations in order to ensure *ERISA*'s public policy goals aren't frustrated). The federal interests in these specific areas of jurisprudence are nothing like the alleged federal interest in piercing the corporate veil via alter-ego analysis.

First, *ERISA*'s primary purpose is to implement minimum standards governing private pension plans in order to ensure more employees are able to reap the benefits of these pension plans. *See* Ronald J. Cooke, ERISA Practice and Procedure § 1:1 (1st. ed. 2021). *ERISA* was passed in response to what was perceived as nationwide tales of "great personal tragedy" in which employees had relied on these private pension plans only to be deprived of the plans' benefits due to termination or other causes. *See Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374-75 (1980). By doing this, *ERISA*'s drafters hoped to enable private wealth building in order to allow more workers to "retire in dignity and security." *See*

H.R. Rep. No. 93-1280, at 5166 (1974) (Conf. Rep.) (statement of Rep. Al Ullman, Ranking Majority Member, H. Comm. on Ways & Means); *see also* H.R. Rep. No. 93-1280, at 5177 (1974) (Conf. Rep.) (statement of Sen. Harrison A. Williams Jr., Chairman of S. Comm. on Labor & Pub. Welfare).

This focus on retirement and social safety created a "uniquely federal interest" such that the application of federal common law is appropriate. *Compare Rodriguez*, 140 S. Ct. at 717 (describing a "uniquely federal interest" as necessary for federal courts to create federal common law), *with Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987) (pointing to the need for federal common law to allow uniform remedial measures under ERISA). Uniformity is needed in these areas because the major goal of ERISA, namely creating a standard, minimum level of protection for these pension plans, would be thwarted if regulation of these private plans varied by circuit or district. *See* Ronald J. Cooke, ERISA Practice and Procedure § 1:1 (1st. ed. 2021) (arguing that achieving a minimum level of protection for pension plans was the goal of *ERISA*). For this reason, it is necessary for federal common law to be developed and applied in this context because, in its absence, the primary goal of the legislation cannot be achieved.

A similar rationale underlies federal common law's application to cases involving interstate conflicts. In this arena, federal common law is viewed as necessary to help the federal government decide interstate claims for which no act of Congress has been passed. *See Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981) (summarizing the use of federal common law in these cases, and elucidating the

reasons why it must be used). Historically, these suits became more common as industry and technology changed requiring federal courts to develop ways of managing these cases over which they had jurisdiction. *See Kansas v. Colorado*, 206 U.S. 46, 80 (1907). Thus, the federal common law was utilized in order to bring order to an interstate system marked by equally sovereign states. *E.g., Id*. at 96-98. Without the existence of a uniform common law in these disputes, there would be no way to settle disputes between the states in a way that respects their equal sovereignty. *E.g., Id*. at 98. The Court surely can imagine that, without a uniform common law or a statute from Congress, feuding states would act in their own self-interest though their own courts and laws rather than in the interests of fairness and administration of justice. Thus, the federal common law in this area was created to achieve the federal interest of fairly resolving conflicts between the states in areas where Congress has not acted. *See Milwaukee v. Illinois*, 451 U.S. 304, 313-15 (1981); *see also Kansas v. Colorado*, 206 U.S. 46, 98 (1907).

The federal interests in these areas which use federal common law differ from the federal interest (or lack thereof) in the alter-ego theory of veil piercing. First, there can be no federal interest because this measure is primarily a cost-allocating/money distributing measure. *See Rodriguez*, 140 S.Ct. at 717-18; *see also Pena*, 731 F.2d at 10. Thus, when viewed in this light, the alter-ego theory of piercing the corporate veil differs from cases arising from both *ERISA* and interstate conflicts because these areas possess clear federal interests.

Alternatively, and perhaps more charitably, the alter-ego theory of piercing the corporate veil could be viewed as a jurisdictional measure because of a federal interest in "personal jurisdiction to adjudicate a federal claim." *See* App. to the Pet. at 22(a) (dissenting Judge Arroford characterizing the rule this way). Even when viewed in this light, there is still either no federal interest or at least no analogously strong federal interest.

For example, even under Judge Arroford's conception of the alter-ego theory of piercing the corporate veil there is no federal interest. When used to establish personal jurisdiction, the only interest present in the alter-ego theory is determining who should be held liable for an adverse judgement. Thus, even when used as a rationale to expand the court's jurisdictional reach, this is a cost-allocating tool in which there is no federal interest. *See Pena*, 731 F.2d at 10; *see also Gonzalez*, 2008 WL at *2. Even in this case, the motivation behind gaining general jurisdiction over Mr. Todd in New Tejas is not because the courts would otherwise be unable to remedy a violation of federal law, but because obtaining jurisdiction over Mr. Todd would expand the pool of assets from which Mrs. Cole hopes to recover. *See* App. to the Pet. at 3(a)-4(a). Whether invoked at the jurisdictional phase or the liability phase, the federal government has no interest in allocating the costs among different parties.

Even if the interest were characterized as an interest in obtaining "personal jurisdiction to adjudicate a federal claim," there is still no federal interest in this case. *See* App. to the Pet. at 22(a). The federal government does not have an interest in obtaining personal jurisdiction over everyone everywhere, but only over specific

people in specific places. In fact, the federal government has an interest in not exercising personal jurisdiction over individuals or entities who lack sufficient contacts with a state to satisfy due process protections. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (observing that the "Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations' "). The interest in obtaining general jurisdiction over entities in many places is even more limited. Here, there is no federal interest in obtaining jurisdiction over entities outside of forum states where they are "at home." *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Mr. Todd is not at home in New Tejas. In fact, he took specific steps to separate himself from New Tejas by creating a corporation which conducted business including in New Tejas rather than conducting business there himself. *See* App. to the Pet. at 3a; *See also In re. JTS Corp.*, 305 B.R. 529, 557 (Bankr. N.D. Cal. 2003) (observing that "[a] corporation is presumed to be separate and distinct entity"). Surely the federal government has no interest in obtaining general jurisdiction over Mr. Todd in a place where he is not at home.

Even if there is some federal interest in the Court having jurisdiction over Mr. Todd in this case, that interest is not analogous the federal interests which trigger the use of federal common law in other contexts. Thus, federal common law should not be used to determine alter-ego in the personal jurisdiction context. *ERISA* cases trigger the federal interest in protecting the uniform minimum standards the

legislation was meant to create. *See* H.R. Rep. No. 93-1280, at 5166 (1974) (Conf. Rep.) (statement of Rep. Al Ullman, Ranking Majority Member, H. Comm. on Ways & Means); *see also* H.R. Rep. No. 93-1280, at 5177 (1974) (Conf. Rep.) (statement of Sen. Harrison A. Williams Jr., Chairman of S. Comm. on Labor & Pub. Welfare); Ronald J. Cooke, ERISA Practice and Procedure § 1:1 (1st. ed. 2021). The federal interest in interstate conflicts cases is to justly settle a type of dispute between independent sovereigns with interests which are increasingly more conflicting. *See Kansas v. Colorado*, 206 U.S. 46, 80, 96-98 (1907). These are interests that are expanding in ways that cannot be predicted by Congress, and so federal common law is necessary to fill the gaps. *See Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981). General jurisdiction, the type of personal jurisdiction in this case, is shrinking, not expanding. *See* Federal Practice and Procedure (Wright & Miller), § 1067.5: General Jurisdiction (Apr. 2021 ed.) (describing the history of general jurisdiction as shrinking from recognizing that systemic contacts with a jurisdiction yield general jurisdiction to only those fora in which a defendant is "at home). While it may make sense to apply federal common law in areas where the law is expanding beyond Congress' ability to legislate effective solutions, it does not make sense to fill gaps with common law when the overall doctrine is shrinking.

The final difference in these interests is that the federal government has already ceded control over their jurisdiction to state governments. For example, when asserting personal jurisdiction over an out of state defendant, a federal court only has jurisdiction over a defendant if a state court would have jurisdiction under the state

long-arm statute (subject to additional constitutional constraints). *E.g., Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774-75 (1984). Thus, state law is already used as a check to the broader grants of federal jurisdiction. There is no similar cession of federal power to states in the *ERISA* or interstate dispute contexts. Given that federal common law should only be permitted where it is " 'necessary to protect uniquely federal interests', " federal common law should not be applied in this context because, unlike federal interests which permit use of federal common law, interests in personal jurisdiction are shared between the state and federal government. In this light, state alter-ego rules are just a limit on the federal court's personal jurisdiction analogous to state long-arm statutes.

C. There is no federal interest in allowing Petitioner to recover monetary damages under the *TCPA*, and thus there is no federal interest requiring the federal common law' alter-ego test

Regardless of the need to apply federal common law rules in other jurisprudence, there is no federal interest regarding the alter-ego theory of piercing the corporate veil in this case. The supposed federal interest in this case is that Mr. Todd will escape facing adjudication by a federal court without the use of a federal common law rule of alter-ego theory to pierce the corporate veil. *See* App. to the Pet. at 21a. However, there is no federal interest in forcing Mr. Todd to face a federal judge for violation of the *TCPA* if the violation of federal law can be remedied via a proceeding against Spicy Cold Foods, Inc. The federal interest in this case can be satisfied without jurisdiction over Mr. Todd because a federal court can enjoin Spicy

Cold Foods, Inc.'s conduct which allegedly breached the *TCPA* thus remedying the federal law violations. *See* 47 U.S.C. § 227 (b)(3)(A).

The *TCPA* was passed with the purpose of protecting Americans from unwanted marketing calls. *See* H. Rep. H11307-15 at H11309 (1991) (statement of Rep. Markey). These calls were not only annoying to the general public, but also caused safety risks by clogging up emergency lines that fire and medical services used. *See id.* at H 11311 (statement of Rep. Rinaldo). Importantly, the bill was not intended to end the practice of telemarketing or to bankrupt businesses who rely on telemarketing. *See Id.* (statement of Rep. Bryant) (stating that he has a large telephone advertising company in his district, and the bill was specifically amended to protect those interests while still regulating specific unwanted calls). In fact, the legislators intended for the *TCPA* to not "unfairly stifle[]" the industry, and to provide federal regulation with "unnecessarily burdening" the telemarketing industry. *See id.* at H 11312 (statement of Rep. Lent). It's inappropriate to view the *TCPA* as punishing or ending telemarketing because Congress specifically designed the bill to, "permit[] telemarketing to continue its important function of promoting commerce." *See Id.* (statement of Rep. Cooper).

Not only does the legislative history reveal Congress' intent was not to penalize telemarketers but to deter dangerous telemarketing practices, but the text of the *TCPA* tangibly shows that this intent was manifested in the bill. First, the bill authorizes state attorney generals to bring suits in order to enjoin the calls or seek monetary damages for each call. *See* 47 U.S.C. § 227(g)(1). This gives state attorney

generals the ability to select the appropriate remedy (either an injunction, money, or both). This provision protects telemarketers because (1) it provides an alternative to monetary damages, and (2) it allows consolidation of what could have been many suits into one suit brought by the state. Additionally, the private right of action provides identical options as to remedy. *See id*. at (b)(3). Notably, the right to seek an injunction is mentioned first in both instances. *See id*. at (b)(3); *see also id*. at (g)(1). Clearly the framers intended, and the bill was written such, that stopping calls which violate the *TCPA* was the legislation's primary objective.

Mrs. Cole asks this Court to use federal common law's standard for determining alter-ego in order to pierce the corporate veil and gain jurisdiction over Mr. Todd in this case. *See* App. to the Pet. 5a. The reason Mrs. Cole wants jurisdiction over Mr. Todd is because she will be able to gain more monetary recovery from Mr. Todd than she would Spicy Cold Foods, Inc. *See id*. at 4a. In light of the statutory goals of the *TCPA* there is no federal interest in allowing Mrs. Cole to have this recovery, and therefore federal common law cannot be used. *See Rodriguez*, 140 S. Ct. at 717.

Because the *TCPA* has dual objectives (stopping certain telemarketing calls while protecting the telemarketing industry) there is no federal interest in ensuring a financial recovery for Mrs. Cole. *See* H. Rep. H11307-15 at H 11311 (1991) (statement of Rep. Rinaldo); *see also* H. Rep. H11307-15 at H 11312 (1991) (statement of Rep. Cooper). If there were evidence that Spicy Cold Foods, Inc.'s calls had burdened emergency service phone lines or other comparable risks, then perhaps

there would be a federal interest as the legislators viewed these calls as especially dangerous. *See id*. at H 11311 (statement of Rep. Rinaldo). However, this alleged class is composed of Mrs. Cole and others who received the calls, and the record does not support that these calls caused any analogous harm. *See* App. to the Pet. at 3a. There is also no argument that an injunction against Spicy Cold Foods, Inc. would stop the calls. Spicy Cold Foods, Inc. is incorporated in New Tejas, and thus would be subject to the general jurisdiction of the courts there. *See id*. at 4a. Thus, no federal interest is implicated in the decision of whether or not to pierce the corporate veil through alter-ego theory in this case because the federal interest in this case can be achieved whether or not the corporate veil is pierced. After all, the federal government has no interest in which entity remedies the wrongful act, so long as the act is remedied. *See Pena*, 731 F.2d at 10.

Because there is no "uniquely federal interest" in this case, the federal common law of alter-ego should not be applied, and the court should next undertake a choice of law analysis in this case to determine which state law should be used. *Rodriguez*, 140 S. Ct. at 717.

IV. This Court should apply the law of New Tejas to determine that Respondent is not the alter-ego of Spicy Cold Foods, Inc.'s. Therefore, the case against Respondent should be dismissed for lack of personal jurisdiction

Having determined that federal common law cannot apply because no federal interest is affected by the decision to not pierce the corporate veil in this case, the court should now determine what state law should apply to the case. Federal Courts utilizing this test rely on the Restatement (Second) of Conflict of Laws. *E.g.,*

Tomlinson, 2009 WL 2601940 at *2. Under this approach, the Court should apply the law of New Tejas. Given that Mrs. Cole concedes Mr. Todd is not Spicy Cold Foods, Inc.'s alter-ego under New Tejas' alter-ego test, the claims against Mr. Todd should be dismissed. *See* App. to the Pet. at 12a.

A. This Court should apply § 307 of the Restatement (Second) of Conflict of Laws to determine that New Tejas law should govern the alter-ego analysis in this case

Federal Courts apply the Restatement (Second) of Conflict of Laws approach to determine which state law applies in cases like this. *See, e.g., Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006) (finding that where a case containing a choice of law question arrives in federal court through federal question jurisdiction, courts use the Restatement (Second) of Conflict of Laws choice of law approach to determine what state law applies).

The Restatement test found in § 302 contains two pieces of guidance: (1) the state law applied should be the state with the most significant relationship to the occurrence and parties, and (2) this will be the law of the state of incorporation except in a "unusual case." *See* Restatement (Second) of Conflict of Laws § 302 (Am. L. Inst. Oct. 2021 Update). However, the comments to this section clarify that a different section, § 307, should apply to questions concerning shareholder liability. *See Id.* at cmt. i. Because Mr. Todd is the sole shareholder in Spicy Cold Foods, Inc. questions of his liability should be determined by § 307. §307 specifies that the law of the state of incorporation will be used to determine the "existence and extent of a shareholder's liability to the corporation." *Id.* at § 307. The restatement itself confirms this is the

correct interpretation as § 302 case has never been used to determine the alter-ego liability of a shareholder. *See Id.* at § 302 case citations by jurisdiction.

Because Spicy Cold Foods, Inc.'s state of incorporation is New Tejas, this Court should find that New Tejas law applies to this case. *Compare* App. to the Pet. at 2a, *with* Restatement (Second) of Conflict of Laws § 307.

B. Even under § 302 of the Restatement (Second) of Conflict of Laws analysis, the New Tejas law of alter-ego is the law that should be applied to this case

Even if this Court erroneously decided to use § 302 to determine which law of alter-ego to apply to this case, the Court should still apply New Tejas law because this is not an "unusual case" where "some other state has a more significant relationship to the occurrence and the parties." *See* Restatement (Second) of Conflict of Laws § 302. The Restatement clarifies that the laws of a state other than a state of incorporation may be applied when the corporation has no contact with the state of incorporation, however the local state (here West Dakota) will not have its law apply rather than the state of incorporation unless "unless that state has the dominant interest" in applying its rule. *See Id*. at cmt. g (describing the rules for when the law of a state other than the state of incorporation should apply). West Dakota has no interest in applying its law in this case.

Mrs. Cole, the plaintiff/petitioner, is a resident of New Tejas. *See* App. to the Pet. at 3a. Mr. Todd is a resident of West Dakota, and West Dakota is the principal place of business for Spicy Cold Foods, Inc. *See id*. at 2a-3a. Further, while petitioner attempts to certify this action as a nationwide class action, there is no evidence in the

record to support that anyone in West Dakota is part of the class or ever received these phone calls. *See id.* at 3a. West Dakota would not have in interest in taking money from its residents and sending it to residents of New Tejas. Additionally, West Dakota does not have an interest in regulating the out of state conduct of an out of state corporation. Finally, West Dakota can have no interest in applying its corporate laws extraterritorially.

New Tejas has a number of interests. First, New Tejas adopted its business friendly alter-ego laws in order to attract business to the state, which is exactly how Spicy Cold Foods, Inc. came to be incorporated in New Tejas. *See id.* at 2a, 6a. Given that New Tejas still has an interest in attracting businesses, it has an interest in applying its corporate laws to its corporations. Next, the allegeded illegal conduct, namely unwanted phone calls, were received in New Tejas, and New Tejas has an interest in having its laws applied to the case as the place where the injury manifested. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 705 (2004) (describing the interest of *lex loci delicti*, or the law of the place of injury). Finally, New Tejas has an interest in adjudicating conflicts between its residents and in state corporations. Thus, even under §302, the alter-ego law this Court should apply is that of New Tejas.

C. Under New Tejas Law, Respondent is not the alter-ego of Spicy Cold Foods, Inc., and this Court should dismiss claims against him for lack of personal jurisdiction

Under New Tejas law, a shareholder is not the alter-ego of a corporation. Unless that corporation was founded "for the specific purpose of defrauding a specific individual." *See* App. to the Pet. at 6a. Mrs. Cole admits she cannot meet this

standard since Spicy Cold Foods, Inc. was not incorporated for the express purpose of defrauding any specific individual. *See id*. Therefore, this court should find Mr. Todd is not the alter-ego of Spicy Cold Foods, Inc. and dismiss claims against him for lack of personal jurisdiction.

CONCLUSION

For all the aforementioned reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

/s/ Team #61
Counsels for Respondent

November 15, 2021