No. 20-1434

IN THE
SUPREME COURT OF THE UNITED STATES

GANSEVOORT COLE, ET AL.,

Petitioner,

v.

LANCELOT TODD,

Respondent.

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

BRIEF FOR PETITIONER

Team #65
Counsel of Record

Questions Presented

(1) Whether settled principles of personal jurisdiction limit federal courts to consider unnamed class members as "parties" in a class action?

(2) Whether a party's alter ego status should be determined using uniform federal common law or varied and unusual state laws in cases implicating federal interests brought under federal law?

Parties to the Proceeding

Petitioner is Gansevoort Cole, individually and as proposed class representative of all affected persons in the action, as the plaintiff-appellant in the proceedings below.

Respondent is Lancelot Todd, individually and as the owner of Spicy Cold Food, Inc, as the defendant-appellee in the proceedings below.

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Statement of Jurisdiction

The United States Court of Appeals for the Thirteenth Circuit entered its final judgment on May 10, 2020. R. at 1a. Petitioner timely filed a petition for a writ of certiorari, which this Court properly granted on October 4, 2021, pursuant to 28 U.S.C § 1254 (2020).

Opinions Below

The Thirteenth Circuit Court of Appeals' decision is unpublished and is available on pages 1a-22a of the Record. The United States District Court for the District of New Tejas decision is unpublished and is available at No. 18-cv-1292.

Constitutional Provisions and Statutes Involved

The Appendix contains the relevant text of the Constitutional and statutory provisions involved in this case: U.S. Const. amend. V; U.S. Const. amend. XIV; and the Telephone Consumer Protection Act, 47 U.S.C. § 227.

Statement of the Case

This case is an appeal of the decision of the Court of Appeals for the Thirteenth Circuit, which affirmed the striking of class allegations related to out-of-state class members. Gansevoort Cole ("Petitioner") brought this case in New Tejas, the state of domicile of Spicy Cold Foods, Inc. ("Spicy Cold"), asserting that Lancelot Todd ("Respondent") violated the Telephone Consumer Protection Act ("TCPA"). The TCPA prohibits telemarketers, banks, debt collectors, and other companies from using an autodial system or robocalls to contact consumers either at home or on a cell phone without prior consent or a business relationship.

I. Factual Background

Respondent is a resident of West Dakota, where he is an active entrepreneur of several business ventures. R. at 2a. The current business model presents a new flavoring for potato chips that, upon eating, causes a numbing sensation in the consumer's mouth. *Id*. To capitalize on this unpopular new product, Respondent established Spicy Cold in New Tejas. *Id*. Through jurisdictional discovery, Petitioner learned that Spicy Cold has one principal business location: West Dakota. More to the point, Spicy Cold has one shareholder: Lancelot Todd. Even more oddly, Spicy Cold has no monetary assets, as all profits are immediately issued as dividends to Respondent. Spicy Cold has no property assets, as its primary office space rests on premises leased from Respondent. Essentially, the actions of Respondent have left Spicy Cold, as a distinct entity, judgment proof. R. at 2a-3a. Moreover, Spicy Cold, while legally domiciled in New Tejas, has few

contacts with that state. Seemingly the only connection with New Tejas is the strategic choice of placing a business in a jurisdiction with such a friendly corporate form. R. at 4a, 6a.

New Tejas's corporate law—a rare minority among the state jurisdictions—is highly deferential to the corporations formed within its borders. R. at 6a. The current alter ego test was enacted in the frontier days of New Tejas when the territory was characterized as a "wretched hive of scum and villainy." *Id*. The territorial legislature at the time determined that to attract business, New Tejas would adopt laws that were extremely friendly to the corporate form. Among these laws—which have continued in effect through New Tejas's statehood and to the present day—is the extremely stringent standard for piercing the corporate veil and treating a corporation as an alter ego of its subsidiaries. This standard requires that the company be incorporated for the specific purpose of defrauding a specific individual. *Id*. Under this unusually stringent standard, there are few plaintiffs that could succeed in piercing the corporate veil.

After struggling to establish Spicy Cold in grocery stores and restaurants as a wholesale product, Respondent moved to other means of advertisement. To commercialize beyond West Dakota, Respondent shifted the primary advertising focus to automated telephone calls which began calling consumers in 2017. R. at 3a. The automated calls were far-reaching, calling consumers across the country with a prerecorded message that offered the new chip flavor via online purchase. One of the unsuspecting recipients of these automated calls was Petitioner who had no

prior contact with Spicy Cold or Respondent, and clearly had no established business relationship with the same. *Id.*

Petitioner filed suit in 2018 claiming violation of the TCPA, as she was contacted at least ten times—with five being calls to her cell phone and five to her residence phone—without her prior consent or permission for such calls. *Id.* Petitioner brought the instant claim on behalf of herself and all persons across the country who received the automated calls. Petitioner brought both claims against Spicy Cold and Respondent individually. In naming Respondent personally, Petitioner argues, *inter alia*, that Respondent caused Spicy Cold to become judgment proof and that Respondent was acting as the alter ego of Spicy Cold such that he could be held personally liable for the enumerated claims. R. at 4a-6a.

II. Proceedings Below

In the district court, Respondent moved to strike the nationwide class allegations for lack of personal jurisdiction. Respondent insisted that he is only subject to general jurisdiction in West Dakota, or, specifically related to the claims of New Tejas residents, he would be subject to personal jurisdiction in New Tejas. Upon completion of jurisdictional discovery, and after declining to apply Petitioner's theories of personal jurisdiction, the district court dismissed the nationwide class allegations against Respondent for lack of personal jurisdiction. R. at 7a.

The Court of Appeals for the Thirteenth Circuit affirmed following the same logic, finding that the district court properly determined a lack of personal jurisdiction over Respondent with respect to the out-of-state members' claims and

upheld the striking of the class allegations. *Id*. Further, the majority at the Thirteenth Circuit analyzed alter ego status under the laws of New Tejas and not federal common law. *Id*.

This Court granted the writ of certiorari on October 4, 2021.

Summary of the Argument

The Thirteenth Circuit's decision prematurely authorizes federal courts within New Tejas to evaluate personal jurisdiction over unnamed class members' claims without support from this Court, settled principles of personal jurisdiction, or federal policies of fairness and judicial efficiency. Additionally, the Circuit's decision to apply the alter ego analysis of New Tejas rather than the federal common law test cuts against important federal interests at stake in this case.

1. Unnamed class members should not be regarded as parties for purposes of personal jurisdiction.

First, this Court has unequivocally held that unnamed class members are never parties for the purposes of a personal jurisdiction inquiry—especially prior to certification where the unnamed members are not yet subject to courts' power. In fact, it is premature for courts to analyze whether there is specific jurisdiction over a defendant by nonresident unnamed class members because their claims are not before the court.

Second, neither the Thirteenth Circuit nor Respondent may rely on this Court's decision in *Bristol-Myers* to extend Fourteenth Amendment principles to federal courts. *Bristol-Myers* involved a multi-plaintiff mass action in state court that "neither reached nor resolved" how federal courts should analyze personal

jurisdiction "in a Rule 23 class action." Indeed, the *Bristol-Myers* decision confined state courts' authority to exercise personal jurisdiction under the Fourteenth Amendment and grounded long-established principles of sovereignty. But the Court expressly described its holding in *Bristol-Myers* as a "straightforward application [. . .] of settled principles of personal jurisdiction." Additionally, those settled principles have never been understood to bar a federal court's otherwise proper exercise jurisdiction over a class because the class happens to include out-of-state absent class members.

Third, Respondent is protected by the enhanced due process protections associated with class actions. Rule 23 incorporates numerosity, commonality, typicality, and adequacy requirements that mass actions omit—which, in part, influenced *Bristol-Myers* decision. Further, Rule 23 already serves to protect parties from unfair litigation. It was carefully promulgated and implemented decades before *Bristol-Myers*, so why the Thirteenth Circuit aims to change its structure is unclear. Fourth, the Thirteenth Circuit attempts to alter settled principles of federalism. The Fourteenth Amendment has never limited federal courts' authority to exercise personal jurisdiction. That is left solely within the confounds of the Due Process Clause of the Fifth Amendment, and the Thirteenth Circuit does not cite any case law that would suggest otherwise—because there is none. Instead, the Thirteenth Circuit interprets Rule 4 to extend to federal courts. But federal courts need only inquire into whether service was proper on defendant within the forum,

which is not at issue in this case. Finally, rearranging the class action device could destroy it, and result in unwanted piecemeal litigation.

2. Federal common law is the proper alter ego analysis when a case implicates federal interests.

In using the corporate laws and alter ego analysis of New Tejas, the Thirteenth Circuit admits that it applied a rare and unusual form of veil-piercing analysis. The lower court failed to account for the federal interests underlying the TCPA and cases brought under its scheme by allowing an outlier, minority rule to frustrate the purpose of the federal statute.

This Court has held that when a federal interest is at issue, federal common law—not state law—should govern. In this case, the federal interests abound. First, there is a necessary concern for uniform application of federal statutes across the various federal courts. Second, allowing a disjointed patchwork of state law to govern an area that Congress clearly intended to regulate would upend Congressional intent. More importantly, though, this Court has recognized that the Restatement, upon which the Circuit relies, is not always applicable in cases that balance federal interests. Even so, circuits that have applied state alter ego rules did not disturb the federal interests at play. Not because state law was appropriate, but because the state law was so similar to federal common law, that any choice-of-law analysis would have been inefficient. That is clearly not the case here, as the laws of New Tejas would be outcome determinative and would disturb the underlying premise of Congressional action in this area.

Argument

I. Unnamed class members are not parties for personal jurisdiction purposes and any change violates this Court's longstanding precedent and jurisdictional doctrine.

Traditionally, unnamed class action members have not been understood as parties for personal jurisdiction purposes and this Court's decision in *Bristol-Myers* gives no indication that courts should regard it otherwise. Moreover, evaluating personal jurisdiction for named parties *only* does not offend procedural or substantive due process concerns, supports settled principles of personal jurisdiction, and serves principles toward judicial efficiency.

A. Unnamed class members have never been regarded as parties for personal jurisdiction purposes.

First, this Court has long recognized that "nonnamed class members . . . may be parties for some purposes and not for others" and "[t]he label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ in context." *Delvin v. Scardelletti*, 536 U.S. 1, 9-10 (2002). This is hardly groundbreaking—this Court "has regularly entertained cases involving nationwide classes . . . without any comment about the supposed jurisdictional problem." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Furthermore, this principle extends to situations where, as here, personal jurisdiction over unnamed class members is evaluated *before certification*. Undoubtedly, this Court agrees. For example, in *Smith v. Bayer Corp.*, this Court specified that unnamed class members are not parties to class action litigation before the class is certified. 564 U.S. 299, 313 (2011) (deeming any contrary view as

"novel and surely erroneous"). Before certification, it would be difficult to adjudicate unnamed class members as parties because a proposed class action may not bind unnamed parties any more than a rejected one. *Id.* at 315. ("Neither a proposed class action nor a rejected class action may bind nonparties."); *see In re Checking Acct. Overdraft Litig.*, 780 F.3d 1031, 1037 (11th Cir. 2015) ("Certification of a class is the critical act which reifies the unnamed class members and, critically, renders them subject to the court's power."). Stated differently, unnamed plaintiffs' complaints are merely speculative and thus are beyond the reach of courts' authority.

The structure of class action litigation proves this point. Unnamed class members do not have an obligation to appear before the court, nor are they required to secure service over defendants. *See* Fed. R. Civ. P. 23. Rather, a "properly conducted class action . . . come[s] about in federal courts in just one way—through the procedure set out in Rule 23." *In re Checking Acct. Overdraft Litig.*, 780 F.3d at 1037. Until then, only named plaintiffs' claims are relevant to the personal jurisdiction inquiry.[1] *Id.* ("Absent class certification, there is no justiciable controversy between [the defendant] and the unnamed putative class members."); *see also Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017) ("In class actions, the citizenship of the unnamed

[1] There is not a question whether courts must inquire into personal jurisdiction of unnamed class members post-certification because unnamed class members' claims are imputed into the claims of named members' claims. *See* Fed. R. Civ. P. 23.

plaintiffs is not taken into account for personal jurisdiction purposes . . . [and t]here is no support for this proposition.").

In accord with this Court are at least four circuit courts that refuse to analyze personal jurisdiction over unnamed class members. *See Mussat v. IQVIA, Inc.*, 953 F.3d 441, 445 (7th Cir. 2020) ("The Supreme Court has regularly entertained cases involving nationwide classes where the plaintiff relied on specific, rather than general, personal jurisdiction in the trial court, without any comment about the supposed jurisdictional problem [defendant] raises."); *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 298 (D.C. Cir. 2020) ("Because the class in this case has yet to be certified . . . [the] motion to dismiss the putative class members is premature."); *AM Tr. v. USB AG*, 78 F. Supp. 3d 977, 986 (N.D. Cal. 2015) ("[c]laims of unnamed class members are irrelevant to the question of specific jurisdiction."); *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 250 (5th Cir. 2020) ("Jackson's objection to personal jurisdiction concerned only class members who were non-residents of Texas. Those members, however, were not yet before the court when Jackson filed its Rule 12 motions."); *Lyngaas v. Ag*, 992 F.3d 412, 433 (6th Cir. 2021) ("Long-standing precedent shows that courts have routinely exercised personal jurisdiction over out-of-state defendants in nationwide class actions, and the person-jurisdiction analysis has focused on the defendant, the forum, and the *named plaintiff*, who is the putative class representative.").

1. *Bristol-Myers* gives no indication that courts should change class action jurisdiction determinations.

Second, there is nothing to stipulate that this Court's decision in *Bristol-Myers* changed class action jurisprudence. In fact, Justice Sotomayor explicitly said it did not. *See Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1789 n. 4 (2017) (Sotomayor, J., dissenting) ("The Court today does not confront the question whether its opinion here would also apply to a class action."). Indeed, the *Bristol-Myers* Court did make clear, as the Thirteenth Circuit relies, that courts must evaluate personal jurisdiction over a defendant on a claim-by-claim, plaintiff-by-plaintiff basis. R. at 11a; *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781. But it did so because it took issue with a state's "sliding scale approach to specific jurisdiction" which relaxed the requisite "connection between the forum contacts and the *claim*" depending on how "wide ranging the defendant's forum contacts" were—not because there were unnamed out-of-state litigants. *Id.* (emphasis added).

In fact, the Court gave its reasoning, in part, because nearly seven-hundred individual plaintiffs consolidated their claims into a mass tort action—not a class action. *Id.* The Thirteenth Circuit mistakenly conflates the two. R. at 11a. In a mass tort action, each plaintiff is a real party in interest, meaning that each plaintiff is personally named in their own complaint, and required to effect service. *See Bristol Myers Squibb Co.*, 137 S. Ct. at 1778. In contrast, claims asserted in a class action, such as those in this case, are prosecuted through representatives on behalf of absent class members. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155

(1982) ("The class action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'"). Stated differently, Petitioner functions as a stand-in for the entire class, whereas every plaintiff in *Bristol-Myers* represented themselves. The unnamed class members, here, are not procedurally equipped to advance their individual claims, but rather, only seek to obtain an enforceable judgment.

2. Rule 23 protects parties from due process violations.

Third, the differences between class actions and mass actions have critical due process implications. Recall, the *Bristol-Meyers* Court sought to enforce the defendant's due process protections by reiterating that specific jurisdiction over the defendant must be based on the named plaintiffs' *claims*. But Rule 23 has built-in due process safeguards aimed to protect defendants from litigating multiple claims at once, while also remaining consistent with settled principles of personal jurisdiction. For example, Rule 23 requires a class to satisfy prerequisites of numerosity, commonality in law or fact, typicality of claims or defenses, and adequacy of representation *in order to achieve certification*—a much higher burden than mass actions. Brief for American Association for Justice as Amici Curiae Supporting Plaintiff-Appellant at 16-17, Mussat v. IQVIA, Inc., 953 F.3d 441 (7th Cir. 2020) ("To be certified as a class action under Rule 23 . . . a 'suit must satisfy due process procedural safeguards that do not exist in mass tort actions.' These include Rule 23's requirements of 'numerosity, commonality, typicality, adequacy of

representation, predominance and superiority.'") (internal citations omitted) (quoting *Knotts v. Nissan N. Am., Inc.*, 346 F. Supp. 3d 1310, 1333 (D. Minn. 2018)).

At bottom, Rule 23 ensures uniformity of the claims of various plaintiffs, so that "no unfairness in hailing the defendant into court to answer to it in a forum that has specific jurisdiction over the defendant based on the representative's claim." *Sanchez v. Launch Technical Workforce Solutions, LLC*, 297 F. Supp. 3d 1360, 1366 (N.D. Ill. 2018). This case illustrates this point. Here, Petitioner presents a single claim that Respondent sent unsolicited, prerecorded telemarketing calls in violation of the TCPA. *See* R. at 3a (citing 47 U.S.C. § 227). If Petitioner is provided the opportunity to obtain certification—through a traditional analysis—then it will be clear that Respondent faced a "unitary, coherent claim to which [he] need only respond with a unitary coherent defense." *Sanchez*, 297 F. Supp. 3d at 1366.

This feature is not only critical but exclusive to federal courts. *See generally* Fed. R. Civ. P. 23. It eliminates potential unfairness towards a defendant because he must only answer class claims in a forum with jurisdiction over him. In other words, the defendant is only responding to *one* claim in *one* forum. These same fairness principles cannot apply to mass actions, on the other hand, because generally each plaintiff presents significant variations of their claims. *Sanchez*, 297 F. Supp. 3d at 1365-66 (explaining that mass actions "like the one in *Bristol-Myers* [. . .] present significant variations in the plaintiffs' claims"). The effect, then, is that each joined plaintiff may make *different* claims requiring *different* responses from

the defendant. It is perceivable, then, that the *Bristol-Myers* Court could identify these procedural disadvantages when it formed its reasoning.

Additionally, decades before *Bristol-Myers* this Court agreed that due process did not require a jurisdictional inquiry into each unnamed class member. For example, this Court in *Phillips Petroleum v. Shutts* held that courts "may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant." 472 U.S. 797, 811 (1985). There is nothing in *Bristol-Myers* that suggests any intent to curtail *Shutts*. In fact, the Court maintained that its holding was a "straightforward application . . . of settled principles of personal jurisdiction." *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781. Surely, if this Court intended to extend its decision to Rule 23 on due process grounds, it would have done so in the several class action cases where defendants challenged personal jurisdiction—not behind the mystique of a mass action.[2]

B. Rule 4 does not govern federal courts' personal jurisdiction inquiry over unnamed class members.

Fourth, because this Court has never accorded unnamed class members as parties the Thirteenth Circuit's assertion that Rule 4 requires unnamed plaintiffs to establish personal jurisdiction over defendants is futile. Under Rule 4(k)(1)(A) a

[2] Rule 23 does not work outside the bounds of the Rules Enabling Act ("REA"). The REA provides that the Federal Rules of Civil Procedure cannot "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b) (2018). However, generally, defendants have never had a substantive right to exclude unnamed class members from the class based on inadequate personal jurisdiction claim because, procedurally, all unnamed class members' claims disappear upon certification. *See, e.g.*, *Bristol-Myers*, 137 S. Ct. at 1780. ("[R]estrictions on personal jurisdiction are more than a guarantee of immunity from inconvenient or distant litigation.").

"federal district court's authority to assert personal jurisdiction in most cases is *linked to service of process* on a defendant 'who is subject to the jurisdiction of a court general jurisdiction in the state where the district court is located.'" Fed. R. Civ. P. 4(k)(1)(A) (emphasis added). Although this rule appears to accord Fourteenth Amendment limitations on personal jurisdiction to federal courts, this Court "has never required defendants to be served by unnamed class members—before or after certification." Daniel Wilf-Townsend, *Did Bristol-Myers Squibb Kill the Nationwide Class Action?*, 129 Yale L.J. 205, 223 (2019).

More importantly, the Thirteenth Circuit does not cite any authority supporting its application of Rule 4(k)(1)(A) to unnamed class members. R. at 10a. Rather, it overreads Rule 4(k)(1)(A) to apply a constraint on federal-court jurisdiction broadly. However, Rule 4(k)(1)(A) serves to guide federal courts in clearing the initial hurdle of obtaining valid service. This matters here because in a class action, a defendant needs to be served with process by the named plaintiff *only*, not by unnamed class members. This means that at the time of service, this case was effectively an individual action because pre-certification, the absent class members could not procedurally be parties to the suit. *See Smith*, 564 U.S. at 315 (2011) (describing that class actions involve only the named plaintiffs and defendants until a class is certified). Were it otherwise, this Court would have applied Rule (4)(k)(1)(A) to unnamed class members long before *Bristol-Myers*.

The Thirteenth Circuit also erroneously concludes that Rule 4 imputes the Due Process Clause of the Fourteenth Amendment to federal class action suits. Not

even *Bristol-Myers* does that. Although the Court's decision was animated by federalism and the territorial limits of state power, it was also a case that arose under state law, not *federal* law. It even declined to address "the question [of] whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." *Bristol-Myers*, 137 S. Ct. at 1783-84 (explaining that the case "concerned the due process limits on the exercise of specific jurisdiction by a state"). It is true, this Court has concluded that in diversity cases exercising jurisdiction over pendent state-law claims may encroach on a state's sovereign power. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Int'l Shoe v. Wash.*, 326 U.S. 310 (1945); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

Where a federal question is raised in federal court, such as here, "federalism concerns which hover over the jurisdiction equation" are "absent." *SEC v. Carrillo*, 115 F.3d 1540, 1543 (11th Cir. 1997); *Handley v. Ind. & Mich. Elec. Co.*, 732 F.2d 1265, 1271 (6th Cir. 1984) ("When a federal court is hearing and deciding a federal question case there are no problems of 'coequal sovereigns.'"). In other words, there cannot be state-sovereignty concerns where no states are involved. For example, if Petitioner sued Respondent in a New Tejas state court, the New Tejas Supreme Court would act as the final arbiter of the question before it, even if Respondent wished to change venue. In that scenario, there is no outcome where a state court sitting in one of New Tejas's sister states would have jurisdiction. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). But because this case is in

federal court, Respondent could request to move this suit to another jurisdiction and, the laws, rules, and procedures that apply to courts within the Thirteenth Circuit would still apply equally in other federal forums.

To suggest that a purely procedural rule applies an amendment designed strictly for states to federal courts, disrupts the very structure of the Constitution. *Compare* U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property . . . without due process of law."), *with* U.S. Const. amend. XIV ("No *state* shall deprive any persona of life, liberty, or property, without due process of law." (emphasis added)). Stated plainly, the Constitution does not work backward. *See Hanson v. Denckla*, 357 U.S. 235, 251 (1958) ("Constitutionally, federal courts, because of their national character, are not inhibited in exercising their jurisdiction by state territorial limitations."); *see also Ethanol Partners Accredited v. Wiener*, *Zuckerbrot, Weiss & Brecher*, 635 F. Supp. 15, 17 (E.D. Pa. 1985) ("[it] is the states rather than judicial districts within the federal court system whose jurisdiction is constrained in adjudicating parties who do not have the required minimum contacts[,] [i]t does not necessarily follow that a party must have certain minimum contacts with the district in which the district court sits before the district court can adjudicate matters relevant to the party."); *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 369 (3d Cir. 2002) ("a federal court sits as a unit of the national government and, therefore, the territorial limitations that apply to the exercise of state court jurisdiction—or, for that matter, federal jurisdiction in diversity cases—are

inapposite."). Indeed, the Fourteenth Amendment buttresses the Fifth Amendment–not the other way around.

Curiously, the Thirteenth Circuit relies heavily on Rule 4 but conveniently disregards Rule 4(k)(1)(C) which also permits personal jurisdiction over the defendant when "authorized by a federal statute" as an alternative to Rule 4(k)(1)(A). *Compare* Fed. R. Civ. P. 4(k)(1)(A) (establishing personal jurisdiction over a defendant "who is who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located," *with* Fed. R. Civ. P. 4(k)(1)(C) (providing another alternative to gaining personal jurisdiction over a defendant when a federal statute expressly authorizes). Also, the TCPA expressly allows federal courts to have jurisdiction where "the defendant transacts business or wherein the violation occurred." 47 U.S.C. § 227(f)(2)-(4). So why the Thirteenth Circuit uses Rule 4(k)(1)(A) to cite federalism concerns when Rule 4 provides alternatives consistent with the Constitution is unclear.

C. Regarding unnamed members as parties curtails the class action device.

Finally, the efficiency of our federal judicial system's ability to handle interstate claims is threatened if this Court requires every unnamed class member to either reside or have sufficient contacts with the forum. *World-Wide Volkswagen Corp.*, 444 U.S. at 292; *Hoffman-La Roache, Inc. v. Sperling*, 493 U.S. 165, 170 (1989) ("[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact."); *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1982)

(explaining that class actions were an invention of equity to allow a court to proceed to decree in suits where the number of those interested in the litigation was too great to permit joinder). Indeed, class actions serve as an efficient and fair way to resolve legal claims, and defendants benefit from this just as much as plaintiffs. For example, Respondent is further disadvantaged if he must defend against unnamed class members' claims in a different state while simultaneously litigating the exact claim in New Tejas versus if he litigated the entire class members' claims in one forum.

Furthermore, federal courts have a fundamental interest in discouraging repetitive litigation. Especially where the defendant faces no burden. So, in the absence of procedural unfairness, "considerations of judicial efficiency, the federal policy against, piecemeal litigation, and the plaintiff's convenience weigh in favor of requiring a defendant who already is before the court to defend against all pending claims, particularly when they fall within the same common nucleus of operative fact." Wright & Miller, *Federal Practice and Procedure* § 1069.7 (4th ed. 2018).

II. Federal common law should be used to determine alter ego status with respect to claims that, like this one, implicate federal interests.

This Court should follow the federal common law test to determine whether Respondent is the alter ego of Spicy Cold and thus subject to general jurisdiction in New Tejas. The federal common law test generally holds: "(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would

result in fraud or injustice." *Anwar v. Dow Chem. Co.*, 876 F.3d 841, 848 (6th Cir. 2017) (quoting *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1073 (9th Cir. 2015)). Neither party disputes that under the federal common law test, Respondent is the alter ego of Spicy Cold. This Court should look to the Sixth Circuit and the D.C. Circuit in finding that courts should "use federal common law of veil-piercing when a federal interest is implicated by the decision of whether to pierce the corporate veil." *Id.* at 849 (discussing *Flynn v. Greg Anthony Constr. Co.*, 95 F. App'x 726, 732 (6th Cir. 2003)); *see also U.S. Through Small Bus. Admin. v. Pena*, 731 F.2d 8, 12 (D.C. Cir. 1984). Furthermore, federal choice-of-law rules direct this Court to consider alter ego under federal common law and not the unusual laws of New Tejas. Finally, the underlying purposes of the alter ego analysis demand a uniform application to support the intent of Congress in passing federal statutory schemes such as the TCPA.

A. The federal common law rule is the appropriate alter ego test when a case implicates federal interests.

First, the Thirteenth Circuit mistakenly argues that state law should determine whether Respondent is the alter ego of Spicy Cold. Additionally, it admits that this choice-of-law question is novel and suggests that circuits provide little guidance on the choice-of-law issue. However, the Sixth, Ninth, and D.C. Circuits have each analyzed this question and decided that the federal common law test should apply. *See Anwar*, 876 F.3d at 849; *Ranza*, 793 F.3d at 1071.; *Pena*, 731 F.2d at 8, 12. Each Circuit has specified that federal common law is the proper analysis when a federal interest is involved. Specifically, the D.C. Circuit explained that

federal alter ego law should apply in "situations in which some federal interest was implicated by the decision whether to pierce the corporate veil." *Pena*, 731 F.2d at 12.

Second, and more importantly, this Court has explained that in cases of controlling law, "the answer to be given necessarily is dependent upon a variety of considerations [including] specific governmental interests and to the effects upon them of applying state law." *United States. v. Standard Oil Co. of Cal.*, 332 U.S. 301 (1947). The Court continued that "[t]hese include not only considerations of federal supremacy in the performance of federal functions, but of the need for uniformity[.]" *Id.*

This Court's decision in *Mims v. Arrow Fin. Svcs., LLC*, 565 U.S. 368 (2012), is instructive regarding the specific federal interests in this case. In *Mims*, this Court examined the authority of federal courts to hear TCPA claims. While the enacting legislation of TCPA stated that private parties *may* bring actions in any state court, this Court held that federal and state courts have concurrent jurisdiction over such claims. In doing so, this Court noted that "[t]he federal interest [. . .] is evident from the regulatory role Congress assigned to the FCC." *Id* at 383. Further, it explained that "Congress' design would be less well served if consumers had to rely on 'the laws or rules of court of a State.'" *Id.*

1. Uniform application of the TCPA is a sufficient federal interest to support applying federal common law.

When evaluating federal common law in other contexts, this Court has held that "[u]ndoubtedly, federal programs that 'by their nature are and must be

uniform in character throughout the Nation' necessitate formulation of controlling federal rules.'" *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979). Moreover, this Court reaffirmed that proposition by stating that there is a "general assumption that 'in the absence of a plain indication to the contrary, [. . .] Congress, when it enacts a statute, is not making the application of the federal act dependent on state law." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (citing *Jerome v. United States*, 318 U.S. 101, 104 (1943)). In explaining that assumption, the Court further proffered that "federal statutes are generally intended to have uniform nationwide application." *Id.*

Even in the absence of such a presumption, the Second Circuit has held that cases arising under federal question jurisdiction, and which involve federal statutes require uniformity such that "federal common law, not [state law] presumably controls the question of whether the corporate veil should be pierced." *United States v. Peters*, 732 F.3d 93, 104 n.4 (2d Cir. 2013). Additionally, the First Circuit has held that "[i]f the federal statute in question demands national uniformity, federal common law provides the determinative rules of decision." *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 26 (1st Cir. 2000).

This Court further explained in *United States v. Standard Oil Co.*, "[w]hether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.'" 332 U.S. at 310.

Considering these cases, this Court has clearly shown that the mismatched application of fifty different state laws should not be used to disrupt federal statutory schemes. This applies to the TCPA. Congress intended to regulate and control the parties utilizing automated calling, like the Respondent, across the country. A stroke of luck should not be the difference between a successful plaintiff in one jurisdiction versus a doomed plaintiff in another. Stated plainly, uniform application of the TCPA is paramount to its successful accomplishment of the federal goals intended by Congress.

2. Applying various state laws to the TCPA would frustrate Congressional intent.

Moreover, though, this Court has held that even if uniformity is not enough, "we must also determine whether application of state law would frustrate specific objectives of the federal programs." *United States. v. Kimbell Foods, Inc.*, 440 U.S. at 729. This Court continued to explain in *Boyle v. Tech. Corp.*, 487 U.S. 500, 507 (1988), stating that displacement of state law is proper when a "significant conflict exists between an identifiable 'federal policy or interest and the [operation] of state law.'" *See also First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 630 (1983) ("The Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies."). As the First Circuit announced, "[i]n federal question cases, courts are wary of allowing the corporate form to stymie legislative policies." *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp*., 960 F.2d 1080, 1091 (1st Cir. 1992); *see also*

Jerome, supra, 318 U.S. at 104 ("[federal programs] would be impaired if state law were to control.").

As explained by legal scholars, the "automatic application of state law [to federal statutes,] ignores legal realities." *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 Harv. L. Rev. 853, 857 (1982). Although Congress may predict the general relationship between state and federal law, "in actual practice [. . .] loopholes will remain." *Id.* at 857-858. As stated by this Court, "[silence. . .] in federal legislation is no reason for limiting the reach of federal law [because] the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts." *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973). Adding to the problem, the federal implementation would change "whenever state courts issue[d] new decisions on piercing the corporate veil." *United States v. Pisani*, 646 F.2d 83, 87 (3d Cir. 1981).

Maintaining Congressional intent has been the core federal interest in multiple cases brought under federal statutes. For example, in *Capitol Telephone Co. v. FCC*, 498 F.2d 734 (D.C. Cir. 1974), the D.C. Circuit applied a liberal veil-piercing doctrine to control to fulfill the purposes of the Communications Act of 1934. In that case, the FCC denied an application for a radio license on the theory that the corporate applicant was wholly owned and controlled by an individual who exercised similar control over another corporation that already had a license to broadcast in the area. *Id.* at 738. The court reasoned, "Where the statutory purpose

could be easily frustrated through the use of separate corporate entities a regulatory commission is entitled to look through corporate entities and treat the separate entities as one for purposes of regulation." *Id.* at n 10.

Outside the D.C. Circuit, other courts have found it proper to institute veil-piercing more broadly to protect the intent of Congressional action. *See Thomas v. Peacock,* 39 F.3d 493, 502–03 (4th Cir. 1994) (concluding that federal law is proper when determining whether to pierce the corporate veil in ERISA cases), *rev'd on other grounds,* 516 U.S. 349, 353–54 (1996); *Stotter & Co. v. Amstar Corp.*, 579 F.2d 13, 18-19 (3d Cir. 1978) (holding that liberal veil-piercing was necessary to protect the purposes of the Clayton Act); *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710, 716-17 (7th Cir. 1965) (holding that broad veil-piercing was necessary to fulfill the purpose of Dealers' Day in Court Act); *I.A.M. Nat'l Pension Fund v. Wakefield Indus., Inc.,* 1991 WL 511071, at *3 (D.D.C.1991) (noting that when the court determines whether an individual has incurred alter-ego liability under ERISA, it follows the "federal common law of veil piercing"); *United Food & Com. Workers Union v. Fleming Foods E., Inc.,* 105 F. Supp. 2d 379, 388 (D.N.J.2000) ("[I]t is settled that federal law governs liability for breach of a labor contract between a union and employer, including liability based on a theory of corporate veil piercing."); *Anderson v. Abbott,* 321 U.S. 349 (1944) (piercing corporate veil of bank-stock holding company for purposes of Federal Reserve Act and National Bank Act); *Quinn v. Butz,* 510 F.2d 743 (D.C.Cir.1975) (upholding the Secretary of Agriculture

attribution of a corporation's violations of a federal statute to that corporation's vice-president.).

Other circuits have followed the reasoning and case law that the D.C. Circuit established on this issue. The Sixth Circuit answered this choice-of-law question in *Flynn v. Greg Anthony Constr. Co., Inc.,* 95 Fed. App'x. 726, 732 (6th Cir. 2003). In *Flynn*, the Sixth Circuit determined that they would follow the D.C. Circuit and instruct lower federal courts to use the federal common law of veil-piercing when a federal interest is implicated. *Id*. *Flynn* considered a claim under ERISA. *Id.* The court reasoned that it was proper for the district court to evaluate the defendants' motion to dismiss for lack of personal jurisdiction using the D.C. Circuit's federal common law with respect to piercing the corporate veil and alter-ego liability and announced the Sixth Circuit would follow the guidance of the D.C Circuit. *Id.* at 733.

3. Applying the federal common law alter ego test is the only appropriate protection of the federal interests in this case.

Petitioner alleges that these phone calls violate the TCPA. The TCPA grants regulatory power to the Federal Communications Commission and intends to protect "any person within the United States, or any person outside the United States if the recipient is within the United States." 47 U.S.C. § 227. It is only logical that Congressional intent would be further frustrated if the TCPA could be ignored simply because a state's unusual corporate law dismantles the entire enforcement scheme. Obviously, Congress instituted the TCPA as a federal response to a federal problem. Since state laws in this area were not doing enough, Congress stepped in

to provide a uniform statute and enforcement scheme. *See Mims*, 656 U.S. at 372 ("Congress believed that federal law was needed because 'telemarketers could evade [state] law.); S. Rep. No. 102-178, p. 3 (1991) ("[B]ecause States do not have jurisdiction over interstate calls[,] [m]any States have expressed desire for Federal legislation."). Therefore, to apply an ill-fitting patchwork of state laws in its enforcement is violative of this Court's precedent in similar cases.

Here, there is a clear federal interest in adjudicating the claims brought against Respondent as the alter ego of Spicy Cold. As the majority opinion stated, there is no question that the district court could exercise general jurisdiction over Spicy Cold because it is incorporated in New Tejas. *See, e.g.*, *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021) (noting that a corporation's "place of domicile" is its "place of incorporation and principal place of business") (citing *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.19 (2014)).

In contrast, here, Petitioner is bringing a federal claim under the TCPA, a federal statute, in a federal court. The claim under the TCPA in and of itself is a federal claim. Despite the strength of federal interest here, the majority rejects the *Pena* test without any reasoning. Rather than analyzing whether this case implicates a federal interest, the majority decides to analyze which state law is relevant. Clearly, the majority asks the wrong question. The relevant analysis is whether the application of federal common law rule is proper here. Without reviewing the implicated federal interests, the majority incorrectly relied on state law to answer the question. The majority ignores the similarities between our case

and other cases, not only in the D.C. Circuit but others as well, where similar facts implicated similar interests.

Application of New Tejas alter ego theory here would seriously undermine the federal interest in adjudicating this claim. The law of alter ego, for purposes of personal jurisdiction with respect to federal claims in federal courts, is an area in which there are "uniquely federal interests" that "are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced [. . .] by federal law of a content prescribed (absent explicit statutory directive) by the courts—[. . .] 'federal common law.'" *Boyle,* 487 U.S. at 504.

Analysis under the New Tejas test would lead to wildly different results in alter ego law between courts that each choose to apply state law. Specifically, plaintiffs that bring a claim under the same federal statute, here the TCPA, would not reach the same result or even consider the same factors when deciding whether to pierce the corporate veil. Unlike the Comments to the Restatement suggests, the state here does not have the dominant interest in the determination of this issue. Conflict of Laws § 307, cmt. a. There is a much clearer federal interest in maintaining consistent results for claims brought under federal statutes in federal courts. In the admittedly unusual test used in New Tejas, this Court cannot base a decision on the usual considerations the Restatement relies on to suggest state law is proper. While the majority rejects the idea of a general federal common era, there is a growing consensus among states to have consistent alter ego law. Here, federal

courts must prioritize plaintiffs having clarity in adjudicating claims implicating a federal interest.

Furthermore, the corporate laws of New Tejas, and the favorable outcome that this case could provide the Respondents, will lead to a race to the bottom among the states. Many states might follow New Tejas and adjust their own corporate laws to encourage and incentivize corporations to domicile within their borders. This move would leave the entire statutory scheme of federal laws like the TCPA at the mercy of the states and the varying corporate laws. While the corporate form is intentionally protective of the officers and employees of the corporation, the corporate form should not become an impenetrable shield.

4. The Court of Appeals' reliance on the Restatement is misplaced.

In line with federal interests, the majority recognizes that a district court exercising federal question jurisdiction must apply federal choice-of-law rules to determine the applicable substantive law. *Enter. Grp. Plan., Inc. v. Falba*, 73 F.3d 361 (6th Cir. 1995). Federal common law generally looks to the Restatement (Second) of Conflict of Laws to resolve choice-of-law issues. *See Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006) ("Federal common law follows the approach outlined in the Restatement (Second) of Conflict of Laws."). The question thus becomes, under the principles of the Restatement (Second) of Conflict of Laws, what law would apply when considering alter ego for purposes of personal jurisdiction: (1) federal common law; (2) the law of the forum state; or (3) the law of

the state of incorporation. Restatement (Second) of Conflicts of Laws § 302 (Am. Law Inst. 1971) ("Conflict of Laws").

Under the Restatement (Second) of Conflict of Laws, arguments about alter ego are typically governed by the law of the state of incorporation. Restatement (Second) of Conflicts of Laws § 302 (Am. Law Inst. 1971). The comments shed light on the policy behind such an analysis, reasoning that the law of the state of incorporation is the proper choice because it "is the law which the shareholders, to the extent that they thought about the question, would usually expect to have applied to determine their liability." Conflict of Laws § 307, cmt. a. Further, "[the state of incorporation] will usually have the dominant interest in the determination of this issue." *Id*.

The Restatement should not apply here. Primarily, the policy concerns behind the comments to the Restatement are absent in our facts. The majority at the Court of Appeals did not dive into the vast difference between the state laws used in alter ego analyses and the alter ego law of New Tejas. The New Tejas standard requires incorporation to be for the specific purpose of defrauding a specific individual. R. at 6a. There is no analysis of the relationship between the corporation and the shareholder. It is equally unusual that the New Tejas test has no mention of the level of control exercised over the corporation. Finally, the New Tejas rule concerningly lacks any language about piercing the corporate veil when a court has no other means to achieve justice.

When facing unusual state laws like the one of New Tejas, many courts and scholars have called for the Restatement's position to be ignored or at least shifted. As noted, "[o]ne could perhaps argue that the courts that have misinterpreted section 307 have [. . .] been covertly attempting to make their jurisdictions more attractive as a locus of business." Gregory Crespi, *Choice-of-law in Veil-Piercing Litigation: Why Courts Should Discard the Internal Affairs Rule and Embrace General Choice-of-Law Principles*, 64 N.Y.U. Ann. Surv. Of Am. L. 85, 124 (2008). Further, a strict textual analysis of the Restatement misses the "underlying policy considerations," and fails to account for the interests "of all affected jurisdictions." *Id*. Clearly the "application of general choice-of-law principles is a superior approach for accommodating the interests involved [. . . compared to] treating such controversies [. . .] by the law of the state of incorporation." *Id.* at 91.

More importantly, though, this Court has held that Section 307 may not always be applicable to settle alter ego choice-of-law disputes. In *First National City Bank*, the Court concluded that "the law of the state of incorporation determines issues relating to the *internal* affairs of a corporation[.]" 462 U.S. at 621 (emphasis in original). The Court continued, "[d]ifferent conflicts principles apply, however, where the rights of third parties *external* to the corporation are at issue." *Id*. The rights at issue in this case are those of third parties—not those of internal affairs of the corporation.

B. Comparable cases applying state alter ego theories were not outcome determinative.

Second, Respondent asks this Court to follow the Federal Circuit and the Ninth Circuit, which have applied state alter ago law in federal-question cases. However, the cases in these jurisdictions are distinguishable because the state law applied was nearly identical to the federal common law test. For each court that analyzes under state law, the state law is consistent with the underlying purpose of piercing the corporate veil. Courts seek to strike a balance between "the principle of limited shareholder liability and the reality that the corporate fiction is sometimes used by shareholders to protect themselves from liability for their own misdeeds." *Belvedere Condo. Unit Owners' Ass'n v. R.E. Roark Cos., Inc.*, 617 N.E.2d 1075 (Ohio 1993).

1. Other state alter ego theories are similar to the federal common law, so any choice-of-law analysis would be wasteful.

This Court has acknowledged that state law may properly serve federal interests such that the state law solution is acceptable. In doing so, this Court recognized that "state law may furnish convenient solutions in no way inconsistent with adequate protection of federal interest." *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 309 (1947).

The Federal Circuit, in *System Division, Inc. v. Teknek Electronics, Ltd.*, 253 F. App'x 31, 35 (Fed. Cir. 2007), held that California state alter ego law would control the question of whether the defendants were alter egos of Teknek LLC. The California alter ego law requirements for disregarding the corporate entity holds

there must be "such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist," and it must be demonstrated that "if the acts are treated as those of the corporation alone, an inequitable result will follow." *Automotriz De Cal. v. Resnick,* 306 P.2d 1 (Cal. 1957).

The court in *Teknek* did not enter a choice-of-law inquiry, because to do so would have been inconsequential to the outcome of the case. *Sys. Div., Inc, 253 F. App'x* at 35. The language of the federal common law test and the California alter ego test are nearly identical. This is clearly not the case regarding the New Tejas test. Therefore, the policy concern present in this jurisdiction was not relevant to the Federal Circuit's analysis. The Federal Circuit did not choose state law after an actual analysis of choice-of-law. *Id.* While *Teknek* did involve a patent claim, a federal question, the result of whether the defendants were alter egos would be identical under either standard.

The Ninth Circuit also does not analyze choice-of-law for alter ego when doing so would not yield different results. The alter ego test at issue in the case before the Ninth Circuit mirrored the federal common law test. *Iconlab, Inc. v. Bausch Health Co., Inc.*, 828 F. App'x 363, 364 (9th Cir. 2020). The court stated the rule, "[t]o support personal jurisdiction under an alter ego theory, Iconlab must show (1) 'such unity of interest and ownership' [between parent and subsidiary] that the separate personalities of the two entities no longer exist" and (2) the "failure to disregard' the separate entities 'would result in fraud or injustice.'" *Id.* (quoting *Ranza*, 793 F.3d at 1073.).

Finally, the Thirteenth Circuit looks to the Fourth Circuit's decision in *Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 433 (4th Cir. 2011), that chooses state law over the federal common law test. There, the court followed the Virginia state alter ego test, which required "(i) a unity of interest and ownership between [the individual and the corporation], and (ii) that [the individual] used the corporation to evade a personal obligation, to perpetrate fraud or a crime, to commit an injustice, or to gain an unfair advantage." *Id.* (quoting *C.F. Tr., Inc. v. First Flight Ltd. P'ship,* 306 F.3d 126, 132 (4th Cir. 2002)). Unlike in New Tejas, the state tests to establish a defendant as an alter ego of a corporation in the Federal, Fourth and Ninth Circuits are analyzed identically to the federal common law test. Therefore, unlike in D.C., the courts did not enter into choice-of-law analysis because the question was inconsequential to the result.

The majority describes a "Gordian Knot" and stresses the lack of substantive choice-of-law analysis. However, it is routine for federal courts to decline to conduct a choice-of-law inquiry when, no matter which law is applied, such an analysis would not change the outcome of the case. *See, e.g.*, *Invesco High Yield Fund v. Jecklin*, No. 19- 15931, 2021 WL 2911739, at *1 (9th Cir. July 12, 2021) ("The parties dispute whether Nevada or Delaware's alter ego law applies, but we need not decide this choice-of-law question because the result is the same under either state's law[.]"); *Volvo Constr. Equip. Rents, Inc. v. NRL Rentals, LLC*, 614 F. App'x 876, 879 (9th Cir. 2015) ("The parties and the district court proceeded under the assumption[. . .] that there were no substantive differences between Nevada and

Texas law concerning alter ego liability."); *Fillmore E. BS Fin. Subsidiary LLC v. Capmark Bank*, 552 F. App'x 13, 15 (2d Cir. 2014) ("[T]he same result would obtain under either California or New York standards for pleading an alter ego claim."); *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1161 (5th Cir. 1983) ("We too decline to answer the choice-of-law question, since our examination of Pennsylvania and Texas law also reveals an identity of result concerning the alter ego issue."). Rather than inconsistency, the lack of choice-of-law precedent reflects a consensus among the majority of states on the law of alter ego.

2. Even in states where the alter ego analysis differs from federal common law, the application of state law served the same underlying purposes.

Some district courts have applied state alter ego law where the language of the state test differs from that of the federal common law test. In *BASF Corporation v. Willowood*, 359 F. Supp. 3d 1018, 1026 (D. Colo. 2019), the Colorado district court applied Colorado state alter ego law. The standard in Colorado was not a bright line test. The court looked to "facts concerning the amount of control exercised by the corporate parent over its subsidiary are relevant for both theories." *First Horizon Merch. Servs., Inc. v. Wellspring Cap. Mgmt., LLC*, 166 P.3d 166, 177 (Colo. App. 2007). The question of control was determined by "evidence that the subsidiary is the parent's alter ego because the subsidiary has no real separate corporate existence." *SGI Air Holdings II LLC v. Novartis Int'l AG*, 239 F. Supp. 2d 1161, 1166 (D. Colo. 2003). Finally, the court in *BASF* looked to policy considerations stating that the corporate veil may be pierced, "if not doing so would defeat public convenience, justify wrong, or protect fraud." 359 F. Supp. 3d at 1026 (quoting *Great*

Neck Plaza, L.P. v. Le Peep Rests., LLC, 37 P.3d 485, 490 (Colo. App. 2001)); *see also Est. of Thomson ex rel. Est. of Rakestraw v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008) (using the Ohio state text for alter ego which requires a parent company to exert so much control over the subsidiary that the two do not exist as separate entities but are one and the same for purposes of jurisdiction).

While the wording of the Colorado standard is not identical to the federal common law test, the underlying goals remain the same. The court analyzed the level of control the defendant exercises over the corporation. The court did not enter into a choice-of-law inquiry because the balance of limiting shareholder liability and discouraging corporate misdeeds is accomplished under the state law test.

Unlike in the above-discussed cases, the laws of New Tejas lead to a different outcome and do not serve the underlying purposes of piercing the corporate veil, and thus, a more in-depth choice-of-law analysis is necessary.

C. The New Tejas test would destroy the purposes of alter ego and lead to more jurisdictions adopting a similar analysis, undermining Congressional power and federal statutory schemes.

Finally, the New Tejas alter ego test is based on outdated, and overly friendly concerns for corporate entities entering the state. The concerns in early New Tejas are no longer relevant to the policy goals of the state. The goals of the judicial system cannot allow such a law to govern claims that concern a federal interest. Shockingly, there is no inquiry into the relationship between the entity and the individual. Without clear evidence of fraud, no individual can meet this ironclad standard of alter ego in New Tejas. But even that fraud must be individualized to a

specific plaintiff—a stretch of alter ego law that this Court has never seen before. Under New Tejas law, a plaintiff's claim against a shell corporation is dead on arrival unless that plaintiff has the most revealing of evidence that a normal plaintiff would rarely see.

Under this rigorous New Tejas standard, the policy behind alter ego law is frustrated. The essential legal test behind alter ego law in all jurisdictions is whether it would be equitable to allow the stockholders to invoke the corporate mantle to shield themselves from personal liability. 1 *Fletcher, Cyclopedia of Corporations*, § 41.30 at 431 (1983). Here, it would be deeply inequitable for Respondent to shield himself from personal liability.

While there is sound policy behind the general purpose of sustaining a corporate veil, that policy does not ring true here. The common purpose of statutes providing limited shareholder liability is to offer a valuable incentive to business investment. *Labadie Coal Co. v. Black*, 672 F.2d 92, 96 (D.C. Cir. 1982). However, certain contexts merit a deeper look into circumstances. Thus, when particular circumstances merit—e.g., when the competing value of basic fairness outweighs the incentive value of limited liabilities—courts may look past a corporation's formal existence to hold shareholders or other controlling individuals liable for "corporate" obligations. *Id* at 96. The *Labadie* court recognized the importance of considering fairness and described the essence of the fairness test is simply that an individual businessman cannot hide from the normal consequences of carefree dealings by doing so through a corporate shell. *Id*. at 100.

Equally important, are the purposes behind veil-piercing and alter ego analyses. As scholars have noted, and this Court has recognized, there are clear reasons to have lenient veil-piercing tests. First, veil-piercing helps achieve regulatory and statutory goals. Second, more lenient tests help avoid misrepresentations by shareholders and business owners. Jonathan Macey, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 Cornell L. Rev. 99 (2014). Even more specifically, the purposes behind alter ego tests are to prevent shell corporations that are empty of assets and capital to shield shareholders or parent corporations from liability. Franklin Gevurtz, *Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil*, 76 Or. L. Rev. 853 (1997). Especially when a party has abusive dealings with the shell company's assets or used the shell to institute wrongful dealings with a third party. *Id*. Altogether, "piercing should depend on the underlying policies behind the type of liability," which includes federal common law controlling in federal cases. These policy concerns, when integrated into specific grounds for veil-piercing, help accomplish the overall goals served by such a theory. *Id*.

Much deference is given to the alter ego theory of the state of incorporation because that is the law the shareholders chose to abide. R. at 14a. However, here, that is exactly the problem—those incorporating in New Tejas are doing so because of the stringent standards of alter ego and veil-piercing. It is possible that Respondent knew that the laws of New Tejas would protect him if he left Spicy Cold

as a shell and used it to violate federal law. This Court should not reward such actions.

Here, the New Tejas test for alter ego law offers no language or consideration of fairness. Fraud alone is the analysis. While fraud has always been a consideration for alter ego and veil-piercing, it cannot stand alone. There must be an inquiry into the overall impact that a shell corporation, like Spicy Cold, could have on the public if the laws of New Tejas shield Respondent from all liability under federal law. To allow such a result would allow Respondent to hide from the consequences of his actions. But more importantly, it would allow Respondent to curtail the intent of Congress and avoid all liability from his violations of duly passed federal law. If the law of New Tejas is applied, no federal statute would be safe from the dismantling that Respondent has used here, and this Court would be drawing the road map for future violators of federal law to avoid liability. This Court must balance the interests of a corporation and that of equity. The federal common law test strikes that balance in a much more equitable fashion than the New Tejas test. Indeed, under the federal common law test, the court would consider the relationship between Respondent and Spicy Cold. As Respondent concedes, he would undoubtedly be the alter ego of Spicy Cold.

Conclusion

Supreme Court class action jurisprudence is clear: unnamed class members are not parties to litigation because they cannot procedurally act as such. Unnamed members are represented through their named counterparts, appear informally before courts, do not secure service over any defendant, and bear no obligation to individually establish personal jurisdiction in the forum. To disturb this settled understanding would fundamentally alter the class action device well-structured by this Court as well as alter settled principles of personal jurisdiction.

Furthermore, to preserve the uniformity of federal statutes and Congressional intent, federal law should govern questions of alter ego status under the TCPA. Applying the unusual laws of New Tejas would frustrate the purposes of federal action in this area and will lead to a mismatch of state laws preempting important federal legislation.

For these reasons, this Court should reverse the ruling of the Thirteenth Circuit Court of Appeals.

Certificate of Service

The undersigned, counsel for the Petitioner, certifies that a true and correct copy of Petitioners' brief on the merits was forwarded to Respondent, Lancelott Todd, through the counsel of record by certified U.S. mail, return receipt requested, on this, the 15th day of November, 2021.

/s/ Team #65
Team 65
Counsel for
Petitioner
November 15, 2021

Certificate of Compliance

The undersigned, counsel for the Petitioner, hereby certifies that, in compliance with Competition Rule 2.5 and Supreme Court Rule 33.1, the Brief of the Petitioner contains 10,426 words beginning with the Statement of Jurisdiction through the Conclusion.

/s/ Team #65
Team 65
Counsel for
Petitioner
November 15, 2021

Appendix A: Constitutional Provisions

The Fifth Amendment of the Constitution of the United States of America provides, in pertinent part:

> No person shall [. . .] be deprived of life, liberty, or property, without due process of law[.]

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

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

Appendix B: Statutory Provisions

47 U.S.C. § 227 (TCPA) provides, in pertinent part:

(b) RESTRICTIONS ON THE USE OF AUTOMATED TELEPHONE EQUIPMENT.

(1) PROHIBITIONS. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment;

or (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(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, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement to a telephone facsimile machine, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

Appendix C: Federal Rules and Other Authorities

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.

Federal Rule of Civil Procedure 23 provides, in pertinent part:

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Restatement (Second) of Conflicts of Laws § 302 (1971) provides:

(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 Conflicts of Laws § 307 (1971) provides:

> 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.