No. 20-1434

In The

Supreme Court of the United States

January Term, 2022

Cole, Gansevoort, et al.

Petitioner,

v.

Todd, Lancelot

Respondent.

On Writ of Certiorari from the
United States Court of Appeals
For the Thirteenth Circuit

No. 19-5309

Brief for Petitioner

Team 74
Attorneys for Petitioner

Oral Argument Requested

QUESTIONS PRESENTED

I. Under the Fifth and Fourteenth Amendments, must a federal district court have specific jurisdiction over unnamed class members' claims in a Rule 23 class action when historical federal practice has not required such a finding, Rule 23 certification requirements ensure only one unified claim is brought, and the claim is a federal claim in federal court based on nationwide conduct?

II. Should New Tejas's veil piercing law apply where applying that law would allow shareholders to escape liability for almost all legal wrongs committed by corporations observing no formalities, would prevent the federal district court from exercising personal jurisdiction, and would prevent recovery by an injured third-party under a Congressionally created cause of action?

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OPINION BELOW

The opinion issued by the U.S. Court of Appeals for the Thirteenth Circuit is unreported but available in the Record. See Pet. App. 1a–16a (majority opinion); Pet. App. 17a–22a (Arroford, J., dissenting).

JURISDICTION

The U.S. District Court for the District of New Tejas had original jurisdiction of this federal question action under 28 U.S.C. § 1331 (2018). The U.S. Court of Appeals for the Thirteenth Circuit had jurisdiction of this appeal under 28 U.S.C. § 1291 (2018). This Court has jurisdiction of this appeal under 28 U.S.C. § 1254(1) (2018). This Court granted certiorari on Monday, October 4, 2021. Pet. App. 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns whether the Fifth or Fourteenth Amendments to the United States Constitution require federal courts to assess personal jurisdiction over the claims of unnamed, out-of-state claimants in a Federal Rule of Civil Procedure 23 class action based on a federal cause of action. The Fifth Amendment provides in pertinent part: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Fourteenth Amendments provides in pertinent part: "[N]or shall any state deprive any person life, liberty, or property without due process of law." The pertinent provisions of Rule 23 are reproduced in Appendix A.

This case also concerns whether the personal jurisdiction of federal courts – the constitutional parameters of which are defined by the Fifth and Fourteenth

Amendments to the United States Constitution – may be limited by the states absent permission from Congress. The states may restrict the personal jurisdiction in an ancillary fashion with permission from Congress under Federal Rule of Civil Procedure 4. The pertinent provisions of Rule 4 are also reproduced in Appendix

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. *Respondent's Struggling Business Venture*

Respondent, an entrepreneur from West Dakota, Pet. App. 4a, with a knack for promoting gimmicky products, decided to promote another such product when in 2015 he acquired the rights to "spicy cold" potato chips flavoring, which causes numbness of the tongue and mouth when eating the chip, Pet. App. 2a. To commercialize spicy cold potato chips, Respondent incorporated "Spicy Cold Foods, Inc." ("Spicy Cold, Inc.") under the incredibly favorable corporate laws of New Tejas. *Id.* Much to Respondent's surprise, most of the general population despises the numbing sensation caused by spicy cold flavoring, which in turn caused the attempt to sell this product to restaurants and grocery stores to fail. Pet. App. 2a–3a. Respondent decided the only ingredient missing in his business model was advertising. Pet. App. 3a.

B. *Violations of Telephone Consumer Protection Act ("TCPA")*

To reverse the stagnation in sales and right the ship, Respondent purchased an "automatic telephone dialing system" to get out the word about Spicy Cold Inc.'s potato chips. Pet. App. 3a. This automated dialing system sent out a prerecorded message, which said: "Sure you can handle the heat, but can you handle the cold? Face the challenge of spicy cold chips—the coolest chips ever made. Available online now. Ask for them at your local grocery store. Frost-bite into the excitement!" *Id.* This telephone marketing campaign spanned coast to coast. *Id.* Petitioner was

burdened with numerous calls, including at least five calls to her cellular phone and five calls to her residential phone. *Id.* The targets of these calls were apparently random, as Petitioner had no previous business relationship with Respondent or Spicy Cold, Inc., and she had done nothing to solicit these calls as a consumer. *Id.*

In an attempt to recover damages, Petitioner, on behalf of herself and a nationwide class of persons similarly situated, sued Respondent in the District Court for the District of New Tejas for violating Section 227 of the TCPA. *Id.* Section 227 restricts the use of automated telephone dialing equipment. 47 U.S.C. § 227 (2018). Suing Spicy Cold, Inc. was not an option because it was essentially "judgment proof." Pet. App. 4a. Respondent, as the sole shareholder of Spicy Cold, Inc., left the corporation severely undercapitalized. *Id.* Whenever Spicy Cold, Inc. made any profits, Respondent immediately siphoned those corporate profits into his personal account. *Id.* Presumably, this type of practice contributed to his immense personal wealth. See *id.* Furthermore, Spicy Cold, Inc. held no assets, as even the building it operated out of was leased from Respondent himself. *Id.*

II. PROCEDURAL HISTORY

After Petitioner filed this action in the district court, Respondent moved to strike the nationwide class action for lack of personal jurisdiction. Pet. App. 4a. Respondent argued that, since he was domiciled in West Dakota, there was no general jurisdiction over him. *Id.* Furthermore, Respondent argued specific jurisdiction could not be exercised over him with respect to out-of-state class

members' claims because those claims bore no relation to the State of New Tejas, as those class members are not residents of New Tejas and were not injured there. *Id.*

Petitioner contended the court had general jurisdiction over Respondent based on a federal common law "alter ego" theory of personal jurisdiction. Pet. App. 5a. Under the federal common law test, which requires a showing "(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," Respondent agreed that he would be the alter ego of Spicy Cold, Inc. Pet. App. 6a. The district court agreed that the federal common law alter ego test would be satisfied, noting that Respondent was the sole stockholder of Spicy Cold, Inc., the corporation had no board of directors, Respondent often paid for personal expenses using funds from Spicy Cold, Inc.'s bank account, and "the entity was left severely undercapitalized for the enterprise it undertook." Pet. App. 5a. Further, the district court found that "enforcing the corporate form would inflict significant injustice on Petitioner and others injured by Spicy Food's conduct." *Id.* Despite all of this, the district court applied New Tejas's veil piercing law, Pet. App. 7a, which required that Spicy Cold, Inc. "ha[d] been incorporated for the specific purpose of defrauding a specific individual," Pet. App. 6a, and found that Respondent was not the alter ego of Spicy Cold, Inc. Pet App. 7a. The district court also held that specific jurisdiction was required over unnamed, out-of-state class members' claims and that none existed; therefore, the court dismissed the suit. *Id.*

On appeal, the Thirteenth Circuit first affirmed the district court's holding that "for a case to proceed as a class action, there must be personal jurisdiction over the claims of unnamed class members." Pet. App. 11a. In so holding, the circuit court first noted that enabling Federal Rule of Civil Procedure 23 to alter normal rules of personal jurisdiction would violate the Rules Enabling Act ("REA") by altering Respondent's substantive rights. Pet. App. 2a. Next, the court reasoned that while exercising personal jurisdiction over unnamed, out-of-state class members' claims would not offend the Fifth Amendment to the United States Constitution, Pet. App. 8a, Federal Rule of Civil Procedure 4(k) limits that jurisdiction by imposing Fourteenth Amendment requirements, which could not be met as to out-of-state claimants as the court felt was required by this Court's decision in *Bristol-Meyers Squibb v. Superior Court*. Pet. App. 11a.

The Thirteenth Circuit then turned its attention to Respondent's alter ego theory of personal jurisdiction and held that, because New Tejas's alter ego law applied, Respondent was not the alter ego of Spicy Cold, Inc. Pet. App. 16a. The court followed the Restatement (Second) of Conflicts of Laws, which it said was required of a federal court sitting with federal question jurisdiction. Pet. App. 14a. Under Section 307 of the Restatement, which governs alter ego claims, the law of the state of incorporation governs. Pet. App. 15a.

Petitioner petitioned this Court for a writ of certiorari, which this Court granted on Monday, October 4, 2021. Pet. App. 1.

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit incorrectly held that personal jurisdiction is required over unnamed class members' claims in a federal question class action brought under Federal Rule of Civil Procedure 23. Furthermore, not only did the Thirteenth Circuit incorrectly hold that New Tejas's veil piercing law applies in this case, but it was also incorrect in applying the Restatement (Second) of Conflicts of Laws in arriving at that conclusion. This Court should reverse the Thirteenth Circuit and hold that personal jurisdiction is not required over unnamed, out-of-state class members' claims and that federal common law should be applied when a federal court is considering a federal question.

To begin, there is no historical precedent supporting Respondent's proposition that personal jurisdiction must be had over a defendant with regard to unnamed, out-of-state claimants' claims in class actions. Prior to this Court's decision in *Bristol-Meyers*, the common practice was to restrict the personal jurisdiction inquiry to the relationship between the forum, the defendant, and the named class representative. Indeed, this Court has consistently entertained nationwide class actions such as the one here without so much as a mention about potential personal jurisdiction issues. This Court's decision in *Bristol Meyers* did not change this historical practice.

Respondent incorrectly relies on *Bristol-Meyers* as support for his contentions because that case contained a mass action under California law, while nationwide class actions such as the one in this case are brought under Rule 23. Indeed, Justice

Sotomayor, in her dissent, highlighted the fact that class actions and mass actions are not analogous and stated that this Court was not ruling on whether its decision would also apply in the class action context. An overwhelming majority of federal courts have recognized the differences between the two. Aside from the fact that *Bristol-Meyers* was not analogous to class actions, there exists practical, substantive differences that counsel against extending *Bristol-Meyers* to class actions.

Class actions brought under Rule 23 abide by certain procedures that protect the due process rights of defendants. Applying traditional Fourteenth Amendment due process principles shows that no due process rights are violated. First, because the named plaintiff must make a showing of personal jurisdiction, minimum contacts must be shown between the defendant, the forum, and the plaintiff. Therefore, notice of amenability to suit within a particular forum is not an issue. Moreover, this Court has noted that the primary concern in due process analyses is the burden on the defendant. Because Rule 23's procedural protections serve to ensure a class action defendant is defending against one coherent claim, there is no extra burden on the defendant. Lastly, Rule 4(k) limits only the effectiveness of service. In class actions such as the one here, the Fifth Amendment should govern defendant's amenability to suit in federal court with regard to claimants not required to serve Respondent. No interests of interstate federalism should override this, since state interests are very low in federal question cases being heard in federal court. Even if this Court finds that specific jurisdiction is required over the

claims of unnamed, out-of-state class members, this Court should still hold general jurisdiction may be had over Respondent by applying the federal common law alter ego test.

Section 307 of Restatement (Second) of Conflicts of Laws is inapplicable in this case because principles underlying that section deal only with instances of imposing liability based on a corporation's internal affairs. As this Court held in an analogous case, where third-party rights are involved, deference to state law is not appropriate where the internal affairs of the corporation are not at issue and third-party rights would be thwarted by applying the law of the place of incorporation.

Further, state law may not restrict personal jurisdiction of federal courts outside of permission granted by Congress. Personal jurisdiction of the federal courts is reserved to the federal government by the Constitution and laws of the United States. The only permissible state role in determining personal jurisdiction in the federal courts comes from Federal Rule of Civil Procedure 4(k), which Congress authorized. Indeed, the requirements of both the Fifth and Fourteenth Amendments, which are sources of a defendant's due process rights, have been defined by this Court in federal case law. Therefore, any state law that is at odds with federal law and restricts the personal jurisdiction of a federal court must yield to federal law.

Nor is deferring to state interests under the principles of federalism a reasonable option. A state's interest in protecting the shareholders of corporations incorporated within its borders is strong where a matter relates to the internal

governance of a corporation or protecting shareholders from corporate creditor liability. Neither of those concerns are present in this case, as piercing the corporate veil is only relevant for the purpose of obtaining personal jurisdiction over Respondent. Even if this Court finds state interests to be strong in this case, applying New Tejas's aberrant and unreasonable veil piercing law would frustrate the ability to enforce not only the TCPA but all other federal laws with private rights of action as well.

ARGUMENT AND AUTHORITIES

Standard of Review

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

I. SPECIFIC JURISDICTION OVER UNNAMED, OUT-OF-STATE CLASS MEMBERS' CLAIMS IS NOT REQUIRED BECAUSE IT DOES NOT COMPORT WITH HISTORICAL PRACTICE, BRISTOL-MEYERS DOES NOT OVERRULE THAT PRACTICE, AND DUE PROCESS DOES NOT REQUIRE SPECIFIC JURISDICTION OVER SUCH CLAIMS.

Rule 23 of the Federal Rules of Civil Procedure authorizes a representative party to sue a defendant on behalf of unnamed class members provided certain procedural requirements are complied with. Fed. R. Civ. Pro. 23(a)-(b). This Court has never addressed the question of whether its decision in *Bristol-Meyers Squibb Co. v. Superior Court*, which applied in the context of a state tort mass action, "would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured

there." 137 S. Ct. 1773, 1789 n. 4 (2017) (Sotomayor, J., dissenting). Indeed, this Court suggested the answer may lie in analyzing the due process requirements of the Fifth Amendment. *See Bristol-Meyers*, 137 S. Ct. at 1784. Under Fifth Amendment principles, personal jurisdiction over a defendant is permissible over a defendant who has sufficient contacts with the United States as a whole. *See Lyngaas v. Ag*, 992 F.3d 412, 433 (6th Cir. 2021).

If this Court finds that Fourteenth Amendment due process principles apply to class actions generally, this Court should apply the requirements of its specific jurisdiction jurisprudence to find that the way Rule 23 currently operates complies with said requirements. "*International Shoe* recognized . . . that 'the commission of some single or occasional acts of the [defendant] in a state may sometimes be enough to subject the [defendant] to jurisdiction in that [s]tate's tribunals with respect to suits relating to that in-state activity." *Daimler AG v. Bauman*, 571 U.S. 117, 126–27 (2014) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)). Aside from a showing of minimum contacts, other factors such as "burden on the defendant, the forum State's interest in adjudicating the dispute, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

Respondent finds no support in historical common law or recent precedent to support his argument that a federal district court must have specific jurisdiction

over the claims of out-of-state class members in a class action lawsuit. Furthermore, specific jurisdiction over such claims is not required by Rule 4k(1)(A), Rule 23, or the overarching principles of interstate federalism present in the Constitution and this Court's decision in *Bristol-Meyers*. Lastly, an interpretation of Rule 23 permitting status quo class action practice to proceed does not violate the Rules Enabling Act. Accordingly, this Court should reverse the Thirteenth Circuit's holding requiring specific jurisdiction over out-of-state class members' claims and remand for further proceedings.

A. Respondent Relies on No Historical Practice or Precedent in Arguing that Specific Jurisdiction Is Required Over the Claims of Unnamed, Out-of-State Class Members.

Respondent argues there is no personal jurisdiction over him with regard to the out-of-state class members due to a lack of specific jurisdiction over their claims, that is, a lack of connection between the out-of-state claimants' injuries and the forum state. Pet. App. at 4a. Respondent's contention that there need be any specific jurisdiction over such claims flies in the face of the historical jurisprudence of the nation. *See Lyngaas*, 992 F.3d at 433 ("Long-standing precedent shows that courts have routinely exercised personal jurisdiction over out-of-state defendants in nationwide class actions, and the . . . analysis has focused on the defendant, the forum, and the *named plaintiff*. . . ."); *see also Mussat v. IQVIA, Inc.*, 953 F.3d 441, 445 (7th Cir. 2020); *Al Haj v. Pfizer, Inc.*, 338 F. Supp. 3d 815, 818–19 (N.D. Ill. 2018) ("Pfizer did not cite, and the court has no knowledge of, any pre-Bristol-Myers decision holding that, in a class action where the defendant is not subject to general

jurisdiction, specific jurisdiction must be established not only as to the named plaintiff(s), but also as to the absent class members.").[1]

Moreover, the historical practice of this Court has been to entertain class action cases relying on specific jurisdiction without any mention of a jurisdictional issue relating to unnamed, out-of-state class members. *See Mussat*, 953 F.3d at 445 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (entertaining a nationwide class action brought in a federal court in California based on specific jurisdiction over just the class representative)); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (entertaining a nationwide class action brought in a Kansas state court based on specific jurisdiction over just the class representative).

Respondent relies heavily on this Court's decision in *Bristol-Meyers*, which is not applicable in this case. In *Bristol-Meyers*, a group of plaintiffs filed a mass action against the defendant for injuries caused by a drug manufactured by the defendant. 137 S. Ct. at 1778. The California Court of Appeals held that the trial court lacked general jurisdiction over the defendant, but that it still had specific jurisdiction over the out-of-state plaintiffs' claims. *Id.* After the California Supreme Court affirmed, this Court found specific jurisdiction did not exist with regard to out-of-state plaintiffs' claims because the state trial court had no general jurisdiction over the defendant, and there was not a sufficient relationship between

[1] The *Aj Haj* court went on to state, "[t]he pre-*Bristol-Meyers* consensus, rather, was that due process neither precluded nationwide or multistate class actions nor required the absent-class-member-by-absent-class-member jurisdictional inquiry urged by Pfizer." *See Al Haj*, 338 F. Supp. 3d at 818–19.

those plaintiffs' injuries and the State of California to establish specific jurisdiction. *Id.* at 1783.

This Court's decision in *Bristol-Meyers* cannot be considered applicable here for several reasons. First, *Bristol-Meyers* involved a mass action in state court based on a state cause of action, *id.* at 1778, while this case involves a nationwide class action in federal court based on a federal cause of action, Pet. App. 4a. For reasons discussed in Section I.B.2, such an action implicates much less of a due process concern than a mass action. Furthermore, this Court explicitly recognized that its decision did not answer the question of what due process would require if a federal court were the court attempting to exercise jurisdiction. 137 S. Ct. at 1784. Second, Justice Sotomayor, in her dissent, recognized the distinction between a mass action and class action, stating, "[t]he Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum state seeks to represent a class of plaintiffs, not all of whom were injured there." *Id.* at 1789 n. 4 (Sotomayor, J., dissenting). Finally, in *Ford Motor Co. v. Montana Eighth Judicial District Court*, this Court cabined the holding of Bristol-Meyers by noting that case was particularly concerned with forum-shopping. 141 S. Ct. 1017, 1031 (2021). The issue was that plaintiffs were bringing their individual claims to California because "it was thought plaintiff-friendly." *Id.* Here, this is no evidence that such forum shopping is occurring, as this case concerns a federal cause of action under the TCPA. Pet. App. 3a. Moreover, had the class members realized an alter ego theory of personal jurisdiction would be

required, New Tejas would have been the last state they chose as a forum due to New Tejas's extremely stringent standard for piercing the corporate veil. Pet. App. 6a.

These distinctions have been widely recognized by federal courts since *Bristol-Meyers*. Currently, the weight of authority across the nation shows that federal courts are mostly adhering to traditional class action practice. Of the four circuit courts that have been presented with this issue, none have extended *Bristol-Meyers*' analysis to the class action context. *See Lyngaas*, 992 F.3d at 433 (declining to extend *Bristol-Meyers*' analysis to nationwide class actions); *see also Mussat*, 953 F.3d at 445; *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 296 (D.C. Cir. 2020) (holding that the defense of lack of personal jurisdiction over putative class members was premature because the class was not yet certified, but noting that unnamed class members are not considered parties for other jurisdictional questions); *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 249 (5th Cir. 2020) (declining to rule on whether *Bristol-Meyers* should extend to nationwide class actions). Furthermore, as of late 2019, four out of every five judges who had considered the arguments put forth by Respondent in this case has rejected them. Daniel Wilf-Townsend, *Did* Bristol-Meyers Squibb *Kill the Nationwide Class Action?*, 129 Yale L. J. 205, 214 (2019). Therefore, while a consensus has not formed, Respondent's personal jurisdiction arguments stand on shaky footing in a vast majority of federal courts.

B. Exercising Personal Jurisdiction Over Respondent Does Not Violate Due Process Because Specific Jurisdiction Exists Regarding the Named Plaintiff's Claim and Due Process Does Not Require Specific Jurisdiction Over Unnamed, Out-of-State Class Members' Claims.

Respondent did not object to the district court's exercise of personal jurisdiction over the named class representative's claim. Pet. App. 4a. However, this Court's precedent emphasizes the importance of analyzing the different factors courts should weigh when conducting a due process analysis because the result shows that Rule 23 class actions do not violate due process. Comporting with the Fourteenth Amendment's due process demands requires that a defendant have certain minimum contacts with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316. One purpose of requiring minimum contacts is to put a person on notice that "a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Burger King Corp.*, 471 U.S. at 472 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., Concurring)). Further, requiring minimum contacts also protects "the defendant against the burdens of litigating in a distant or inconvenient forum [and] ensure[s] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide*, 444 U.S. at 292. Because several factors are at play, the bounds of personal jurisdiction are not mechanical or static, but rather, they are flexible due to the balancing exercise of weighing the various interests involved. *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978).

1. *Respondent and other defendants similarly situated in nation-wide class actions have notice that they may be subject to a court's coercive power by purposefully directing their activity at residents of the forum state.*

The notice requirement of the Fourteenth Amendment's Due Process Clause serves as "fair warning" to defendants, such that they may order their affairs with knowledge of where they may be hauled into court. *Burger King Corp.*, 471 U.S. at 472. Required notice is had if a defendant purposefully directs his activity at the residents of a forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), and the injury giving rise to suit arises out of or relates to that activity, *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414 (1984). Unilateral activity on the part of the forum resident should not be considered when considering whether the defendant has sufficient contacts with the forum state for the exercise of jurisdiction. *Kulko*, 436 U.S. at 93.

Purposefully directing activity at a particular state, with that activity giving rise to the injury complained of, is a sufficient ground for personal jurisdiction in a court within that state's boundaries. *See World-Wide*, 444 U.S. at 297. In *World-Wide*, this Court reasoned that when one purposefully avails themselves of the privilege of conducting activities in the forum state, "[that person] has *clear notice* that [they are] subject to suit there," and they therefore have the benefit of ordering their activities accordingly to reduce or eliminate the risk of such litigation. *Id.* Applying that reasoning to World-Wide's activity, the car that caused the injury was not sold in the forum state, and other connections, such as service stations, marketing, advertising, and other cultivation of the Oklahoma market were

insufficient to find specific jurisdiction. *Id.* at 298. Ultimately, the unilateral action of the plaintiff (driving the vehicle into that state) created the connection between World-Wide and the forum state and that is insufficient to create specific jurisdiction. *Id.* (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (discussing the insufficiency of unilateral activity)).

In this case, Respondent clearly targeted all states, particularly New Tejas, through a nationwide phone marketing campaign. Pet. App. 3a. There was no unilateral activity on the part of Petitioner, as the record shows she did not solicit advertising or have any prior connection to Respondent or Spicy Cold, Inc. Pet. App. 3a. Such will be the case in all nationwide class actions because a specific jurisdiction analysis, if no general jurisdiction exists, is required regarding the named, representative plaintiff's claim. There can be no argument that Respondent, or any other defendant in a class action, lacks notice that they may be subject to the jurisdiction of a court within the boundaries of the forum state.

2. *Specific jurisdiction is not required over unnamed, out-of-state class members' claims because those claims do not heavily burden Respondent.*

The "primary concern" of a personal jurisdiction due process analysis is "the burden on the defendant." *World-Wide*, 444 U.S. at 292. For the sake of efficiency, Rule 23's "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." *Califano v. Yamaski*, 442 U.S. 682, 700–01 (1979). Despite this exception to the usual rule, allowing a named plaintiff to represent numerous unnamed, out-of-state

class members in a nationwide class action does not offend a defendant's due process rights because Rule 23 incorporates added due process protections not found in the context of a mass action. *See Lyngaas*, 992 F.3d at 435 (citing *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (recognizing that the procedural requirements of class certification quell due process concerns of unnamed class plaintiffs being bound by the outcome of class litigation)); *see also Sanchez v. Launch Tech. Sols., LLC*, 297 F. Supp. 3d 1360, 1366 (N.D. Ga. 2018) (discussing procedural due process protections of Rule 23).

"Nonnamed class members . . . may be parties for some purposes and not for others." *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002). Indeed, this is the case after a class has been certified. Prior to certifying a class, a class representative must show that their claim has "questions of law or fact common to the class," and "the claims . . . of the representative . . . must be typical of the claims . . . of the class." *Sanchez*, 297 F. Supp. 3d. at 1366 (citing Fed. R. Civ. P. 23(a)(2), (3)). Further, the representative plaintiff is required to prove that the relief granted to her would be the appropriate relief to grant the class as a whole. Fed. R. Civ. P. 23(a)(1). Otherwise, it must be shown that "questions of law or fact common to class members predominate" over the claims of individual class members and a class action would be superiorly fair and efficient compared to other adjudicatory options when considering, among other things, "desirability or undesirability of concentrating the claims in the particular forum," as well as "the likely difficulties in managing a class action." Fed. R. Civ. Pro. 23(b)(3). Based on the certification

process, this Court's statement in *Devlin* rings true in the sense that, besides being interested in the outcome of the litigation, mere class members are not practically parties for the sake of active litigation.

These procedural requirements for class certification ensure that a class action defendant "is presented with a unitary, coherent claim to which it need respond only with a unitary, coherent defense." *Sanchez*, 297 F. Supp. 3d at 1366. Two decisions from the Sixth Circuit perfectly illustrate the distinction between the due process protections of class action litigation and the lack thereof in other aggregate litigation, as well as that distinction's impact on due process requirements. *See Lyngass*, 992 F.3d at 435 (holding specific jurisdiction was not required over unnamed class members' claims); *contra Canaday v. Anthem Cos., Inc.*, 9 F.4th 392, 395 (6th Cir. 2021) (holding specific jurisdiction was required over out-of-state claims in a collective action authorized by federal statute). In *Lyngaas*, as in this case, the defendant was sued in a nationwide class action under Section 227 Telephone Consumers Protection Act ("TCPA"), 47 U.S.C.§ 227 (2018). 992 F.3d at 417. The defendant claimed the court lacked specific jurisdiction over the unnamed, out-of-state class members' claims, and, therefore, the suit should be dismissed. *Id.* at 419. The court rejected that argument, stating that due to the protective procedural mechanisms in Rule 23, "the only 'suit' before the court is the one brought by the named plaintiff," and, thus, specific jurisdiction need only be analyzed with regard to "claims raised by the named plaintiff." 992 F.3d at 435.

In contrast, the Sixth Circuit reached an entirely different conclusion in *Canaday*, which involved a collective action authorized under the Fair Labor Standards Act ("FLSA"). 9 F.4th at 394. The defendant moved to dismiss for lack of specific jurisdiction over out-of-state claims. *Id.* at 395. The Sixth Circuit granted the motion to dismiss, *id.* at 397, highlighting the absence of due process protections in the FLSA provision, *id.* at 402. The court reasoned that "Rule 23 actions are fundamentally different from collective actions under the FLSA," and that those differences required different approaches to personal jurisdiction. *Id.* (quoting *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013)).

Although Justice Sotomayor was correct in *Bristol-Meyers* that a collective or mass action allows for more convenience through consolidated discovery and shared counsel, 137 S. Ct. at 1787 (Sotomayor, J., dissenting), nothing is shared or consolidated in a class action – the defendant in a class action simply defends against one claim from one plaintiff. Simply put, while a defendant in a mass action is still defending against separate claims and plaintiffs in a consolidated proceeding, a defendant in a class action has no such burden – there is absolutely no aspect of the litigation that would upset "notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316.

3. *The principle of interstate federalism does not control in this case because there are insufficient state interests to justify limiting this Court's personal jurisdiction.*

In federal courts, the controlling due process principles come from the Constitution's Fifth Amendment. *Bristol-Meyers*, 137 S. Ct. at 1784. Fifth

Amendment due process analysis is the same as the Fourteenth Amendment except the factors typically involved in the Fourteenth Amendment analysis are "only in reference to the United States as a whole." *Lyngaas*, 992 F.3d at 422. However, under Rule 4(k)(1)(A) service of process is only effective if served on a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. R. Civ. Pro. 4(k)(1)(A). Furthermore, Rule 82 states "[t]hese rules do not extend or limit the jurisdiction of the district courts." Fed. R. Civ. Pro. 82. Based on Rule 82, Rule 4(k) is best read as solely a rule regulating the effectiveness of service of process with only an incidental effect on personal jurisdiction. Because Rule 23 only requires the class representative to serve the defendant, there is no other restriction in rule 4(k) that limits jurisdiction with regard to the remaining out-of-state class members' claims. Here, this Court should find jurisdiction over those claims because of Respondents contacts with the United States as a whole, as evidenced by Respondent being domiciled in West Dakota, Pet. App. 4a, and all of the injuries complained of occurring in different parts of the United States, Pet. App. 3a.

Still, federalism may, in some circumstances, justify limiting a federal court's jurisdiction. In *Bristol-Meyers*, "[t]he majority's animating concern appear[ed] to be federalism." 137 S. Ct. at 1788 (Sotomayor, J., dissenting). Despite there being no issues with notice and no litigative burdens on a defendant in a class action such as the one here, the interests of our several states, operating under our system of interstate federalism, may operate as a decisive factor outweighing other

factors weighing in favor of exercising personal jurisdiction. *See World-Wide*, 444 U.S. at 294. Each state has an interest in ensuring "that the States, through *their courts*, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* at 291–92 (emphasis added). However, as Justice Sotomayor put it in her dissent in *Bristol-Meyers*, there was "little reason to apply such a principle in a case brought by a large corporate defendant arising out of its nationwide conduct. What interest could any single State have in adjudicating respondents' claims that the other States do not share?" 137 S. Ct. at 1788. While that argument did not carry the day in *Bristol-Meyers*, it is much more applicable to this case. The applicability of the principle of interstate federalism is even less apparent in this case where a *federal* cause of action arising from *nationwide* conduct is brought in a *federal* court.

The need for federalism to cast aside the Fifth Amendment's due process requirements in favor of the Fourteenth Amendment's analysis is more apparent in cases involving either state causes of action or actions being brought in state court. *See, e.g.*, *Bristol-Meyers*, 137 S. Ct. at 1778 (involving several state tort actions for "products liability, negligent misrepresentation, and misleading advertising claims" in state court); *see also World-Wide*, 444 U.S. at 288 (involving state product-tort liability claims in federal district court). Moreover, one may conceive that it may serve the interests of federalism in a federal court sitting in diversity, where that court must apply state substantive law. Such is not the case here since a federal court is entertaining Petitioner's claim brought under the TCPA.

Therefore, Fifth Amendment analysis should apply when a federal court, exercising federal question jurisdiction, attempts to exercise personal jurisdiction over a class defendant with respect to unnamed, out-of-state class members' claims. When considering the traditional factors that courts take into account in personal jurisdiction due process requirements, and when discounting the federalism factor that played a major role in this Court's *Bristol-Meyers* analysis, it is apparent that nationwide class actions based on a federal cause of action, brought in federal court under Rule 23, do not violate Respondent's due process rights.

C. Federal Rule of Civil Procedure 23 Does Not Violate the Rules Enabling Act Because the Rule Regulates Procedure and Any Effect on the Substantive Rights of Litigants is Incidental.

The Rules Enabling Act ("REA") gives this Court authority to promulgate "general rules of practice and procedure . . . for cases in the United States district courts." 28 U.S.C. § 2072(a) (2018). Congress, in conferring this authority, specifically commanded that "[s]uch rules shall not abridge, enlarge or modify any substantive right." § 2072(b). In determining whether a rule violates the Rules Enabling Act, "the test must be whether a rule really regulates procedure – the judicial process for enforcing rights and duties recognized by substantive law." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). In *Hanna v. Plumer*, this Court recognized:

> Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any substantive rights of litigants was obviously not addressed to such *incidental effects* as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants . . . .

380 U.S. 460, 465 (1965) (emphasis added). Rules promulgated by this Court under the REA must also comply with the Constitution. *Id.* at 470. When determining the constitutionality of a rule, this Court applies the standard set forth in *Sibbach*, which explains that the question of a rule's constitutionality and the question of whether a rule complies with the REA are one in the same. *Id.* at 470–71. Further, the fact that the Advisory Committee, Congress, and this Court agree to publish a rule is prima facie evidence that said rule violates neither the Constitution nor the REA. *Id.* at 471.

Incidental impacts on the substantive rights of litigants is not enough to invalidate a Federal Rule where the purposes of that rule is to regulate procedure. *Plumer*, 380 U.S. at 465. In *Plumer*, the defendants attacked the validity of FRCP 4(d)(1), which provided for service of process rules.[2] *Id.* at 461. Although the plaintiff, a creditor to an estate, complied with the federal rule, a state rule prevented an estate's creditor or administrator from being subject to suit if not served within a year of the deceased's death unless the executor or administrator was served in a very particular way, which conflicted with Rule 4(d)(1). *Id.* at 462. Although the state law in question was substantive in that it limited the liability of executors and administrators of estates except for when certain procedures were followed, this Court found that that was not determinative. *Id.* at 465. Because the

[2] Rule 4(d)(1) specifically required "[t]he summons and complaint to be served at the same time." *See Plumer*, 380 U.S. at 461. In addition, the rule specified who were suitable persons to be served. *Id.*

aim of Rule 4(d)(1) was simply to regulate procedure, any incidental effect on substantive law did not render the rule invalid. *Id.*

Nor will a Federal Rule be invalidated on the ground that such a rule, albeit procedural in nature, affects a "substantial" or "important" right. *Sibbach*, 312 U.S. at 13. In *Sibbach*, the petitioner argued that although Rules 35 and 37, which allowed a court to order a physical or mental examination, were "rules of procedure," the rules impacted "substantial" and "important" rights and therefore violated the mandate given to this Court in the REA. *Id.* This Court rejected an interpretation that translated "substantive" into "important" or "substantial" and announced the test ultimately used in this Court's jurisprudence going forward – "whether a rule really regulates procedure." *Id.* at 14.

In this case, the Thirteenth Circuit concedes that Rule 23 is a "purely procedural" rule. Pet. App. 9a. However, the court argues that the REA, which does not permit a rule to "abridge, enlarge, or modify any substantive right," §2072(b), prohibits Rule 23's operation without a showing of personal jurisdiction over all out-of-state class members, Pet. App. 9a. This application of the REA's and the Constitution's requirements is plainly incorrect. Regardless of whether this Court permits Rule 23 to operate with or without requiring personal jurisdiction over out-of-state class members, this does not change the fact that Rule 23's aim is, in the words of the Thirteenth Circuit, "purely procedural." Pet. App. 9a. As noted below in Section I.B.2, there is practically no impact on a class action defendant's due process right; however, to the extent such an impact exists, it is merely incidental to

the true goal of Rule 23, which *Plumer* clearly states does not invalidate a Federal Rule under either the REA or Constitution. *See Plumer*, 380 U.S. at 465. Further, although due process rights are indeed important and substantial, invalidation cannot rest on the ground that Rule 23, however so slightly, if at all, affects that right. *See Sibbach*, 312 U.S. at 13. As such, this Court should reverse the Thirteenth Circuit's holding that specific jurisdiction is required over the claims of unnamed, out-of-state class members.

II. FEDERAL COMMON LAW SHOULD BE USED TO PIERCE SPICY COLD INC.'S CORPORATE VEIL BECAUSE UNIQUELY FEDERAL INTERESTS ARE IMPLICATED, NEW TEJAS'S LAW IS ABERRANT, UNREASONABLE, AND INTERFERES WITH FEDERAL POLICY, AND JURISDICTIONAL PIERCING IS ONLY CONCERNED WITH DUE PROCESS.

"The question whether a corporate veil ought to be pierced for purposes of applying some federal statute is distinct from whether a corporate veil ought to be pierced for purposes of allocating state tort or contract liability." *United States v. Pena*, 731 F.2d 8, 12 (D.C. Cir. 1984). The supremacy of federal law is established in Article VI of the United States Constitution, which states "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI. On the other hand, this Court has recognized that our constitutional federalism requires deference to state law, including common law, where state interests are sufficiently implicated. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 73 (1938) (requiring federal courts sitting in diversity jurisdiction to apply

the substantive law of the state in which the federal district court is located); *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) (stating that as a baseline, federal courts should incorporate state law into federal rules of decision).

In this case, New Tejas's interest in applying its veil piercing law is low because this case does not involve traditional dangers a shareholder seeks to insulate himself from. Corporate liability is not being imposed on a shareholder, and internal governance is not affected by the outcome of this case. Moreover, federal law does not permit state law to be applied in this case. Personal jurisdiction is an area of law uniquely reserved to the federal sphere of the Constitution and laws of the United States. Further, permitting New Tejas's aberrant and unreasonable veil piercing law to govern would upset federal policy announced by Congress in the TCPA and other federal statutes.

A. The Restatement (Second) of Conflict of Laws Is Inapplicable Because This Case Involves a Choice Between State and Federal Law, The Internal Affairs Doctrine Does Not Apply, and Policy Concerns Weigh Against Its Application.

Section 307 of the Restatement (Second) of Conflicts of Laws 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." Restatement (Second) of Conflicts of Laws § 307 (1971). The Thirteenth Circuit cited several cases applying this test to support its holding that New Tejas's alter ego law should control in this case. Pet. App. 14a–15a. First, none of the cases cited by the Thirteenth Circuit involve a choice between applying state and federal alter ego law. *See In re Melo*, 2019 WL 2588287, at *5

(Bankr. W.D. Wash. 2019) (stating "[f]ederal choice of law rules follow the Restatement (Second) of Conflicts of Laws in determining *which state's* law to apply" in determining whether to pierce the corporate veil for liabilities incurred from *state* tort claims) (emphasis added); *see also Tomlinson v. Combined Underwriters Life Ins. Co.*, 2009 WL 2601940, at *2 (N.D. Oklahoma) (applying the Restatement in a diversity action because the court felt that is what Oklahoma substantive law would require).

Furthermore, Section 307 should not be followed in this case because applying the test in that section would not serve the policy underlying that section. The main policy underlying application of Section 307 in federal courts is the "internal affairs doctrine." *See Dassault Falcon Jet Corp. v. Oberflex, Inc.*, 909 F. Supp. 345, 349 (M.D.N.C. 1995); *see also Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132–33 (2d Cir. 1993) (applying substantive law of the place of incorporation to an alter ego claim because the claim involved the corporation's internal affairs); *Soviet Pan Am Travel Effort v. Travel Comm., Inc.*, 756 F. Supp. 126, 131 (S.D.N.Y. 1991).

Section 307's language, which refers specifically to "*shareholder* liability for *corporate* debts," limits its application to situations in which liability is incurred "by virtue of his status as a shareholder, not as someone who incurred liability to another through his use of the corporation as his alter ego." *Jenkins v. Comm'r*, 2021 WL 1853402, at *13 (T.C. May 10, 2021) (citing *Chrysler Corp. v. Ford Motor Co.*, 972 F. Supp. 1097, 1101–02 (E.D. Mich. 1997). In *Chrysler Corp.*, the district

court highlighted Section 301 of the Restatement (Second) of Conflicts of Laws, which states "[t]he rights and liabilities of a corporation with respect to a third person that arise from a corporate act of a sort that can likewise be done by an individual are determined by the same choice-of-law principles as are applicable to non-corporate parties." 972 F. Supp. at 1102 (citing Restatement (Second) of Conflicts of Laws § 301). In other words, if the acts giving rise to corporate liability with respect to third persons could have been or were perpetrated by an individual, Section 307 does not apply.

Moreover, in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, this Court pointed out that when third party rights are at stake, internal affairs principles should not control:

> As a general matter, the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation. Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation . . . . Different conflicts principles apply, however, where the rights of third parties *external* to the corporation are at issue.

462 U.S. 611, 621 (1983) (emphasis added), *rev'd on other grounds*. In *First National*, a supposedly independent credit institution in the Republic of Cuba sought to collect on a letter of credit issued by Citibank, the petitioner. *Id.* at 613. After receiving the request to collect from the credit institution, the Cuban government seized all of Citibank's assets held in Cuba. *Id.* After the credit institution brought a claim in a United States district court to collect on the letter of credit, Citibank counterclaimed, and sought to offset the value the assets seized by

the Cuban government. *Id.* In arguing that Cuban government should not stand in the shoes of the credit institution for the seizure of Citibank's assets, the Cuban credit institution argued that this Court should apply "internationally recognized conflict of law principles," which required "application of the law of the state that establishes a governmental instrumentality." *Id.* at 621. In rejecting that argument, this Court worried that giving effect to "the law of the chartering state . . . would permit the state to violate with impunity the rights of third parties." *Id.* at 622.

In this case, the implication of third-party rights counsels against applying Section 307. The rights of Petitioner are implicated, as she received at least 10 unsolicited calls to her residential and cellular phones, which were prohibited by the TCPA. Pet. App. 3a. Similar to *First National*, where this Court declined to apply international choice of law that favored the state establishing the government instrumentality, 462 U.S. at 621, this Court should decline to apply Section 307, which favors the state of incorporation, Restatement (Second) of Conflict of Laws §307. In *First National*, this Court was principally concerned that applying such a law where third-party rights were implicated would permit the state to violate with impunity the rights of third parties." *Id.* at 622. That case could not illustrate the issue in this case in a more analogous fashion. If Section 307 is applied in this case and others like it, every undercapitalized corporation in states with unusually corporate-friendly veil piercing laws would be able to violate the rights of third parties without fear of retribution because they are, in effect, "judgment proof." Pet. App. 4a.

Moreover, the Thirteenth Circuit erred in applying Section 307 because the language of that section does not cover situations where liability arises from an individual acting as the corporation itself. As highlighted in *Chrysler Corp.*, Section 301 states that "rights and liabilities of a corporation *with respect to a third person* that arise from a corporate act *of a sort that can likewise be done by an individual*" do not receive the benefit of the doubt of Section 307's deference to alter ego law of the incorporating state. 972 F. Supp. at 1102 (citing Restatement (Second) of Conflicts of Laws § 301) (emphasis added). The liability sought to be imposed on Respondent by Petitioner, a third-party, did not arise by virtue of his shareholder status. Rather, the potential liability arose because Respondent was "not at all" respectful of the corporate form, as he acted as the corporation. Pet App. 5a. As such, the Thirteenth Circuit erred in applying Section 307's choice of law test, and this Court should resort to weighing the federal and state interests involved in this case.

B. Federal Common Law Should Be Used to Determine Whether Personal Jurisdiction Exists Over Respondent Because Federal Interests are Implicated and Applying New Tejas's Aberrant and Unreasonable State Law Would Frustrate Federal Policy Announced by Congress.

"Resolution of all claims that arise under state law, whether brought in federal court or not, is controlled by the substantive law of the state that creates the cause of action." *Pena*, 731 F.2d at 11 (citing *Erie*, 304 U.S. at 73). In areas of law where "private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards," those state standards should apply. *Kamen*, 500 U.S. at 98. Corporate law is such an area of

law where a state possesses a unique interest in ensuring private parties can rely on state corporate law governing their rights and obligations. *See id.* at 98. However, when a district court exercises jurisdiction over a claim arising under a federal statute, states are not permitted to enable their corporations in violating federal policy announced by Congress. *Anderson v. Abbott*, 321 U.S. 349, 365 (1944).

1. *State interests in this case are weak because it is not a state cause of action and liability is not being imposed for internal corporate governing activity.*

Where a claim is based on a federal cause of action, *Erie* does not require state law to apply "of its own force." *See Burks v. Lasker*, 441 U.S. 471, 476 (1979) (citing *Sola Elec. Co. v. Jefferson Co.*, 317 U.S. 173, 176 (1942)). States possess a strong interest in ensuring state law governs corporate affairs when those affairs relate to the internal governance of the corporation. *See Burks*, 441 U.S. at 486. Furthermore, state interests are high when a shareholder is sought to be held personally liable by a creditor, as the corporation is typically seen as an insulator from such liability. *See Anderson*, 321 U.S. at 361.

State law should be applied in cases bearing on the governing powers of a corporation's board of directors. *See Burks,* 441 U.S. at 486. In *Burks*, this Court addressed the question of whether corporate directors could dismiss a claim brought under a federal statute. *Id.* at 474. That question necessarily required a determination of whether federal or state law should govern corporate directors' power to terminate a derivate suit brought by shareholders. *Id.* at 475. Although the case involved a federal question, this Court reasoned that, because state law is the

origin of corporate directors' powers, state law should govern. *Id.* at 478. In rending this holding, this Court broadly stated that matters related to the internal governance of corporations should typically be left to state law. *Id.* at 486.

As a threshold matter, this action is a federal question case based on the TCPA, so *Erie* does not require state law to govern. *Sola Elec.*, 317 U.S. at 176. Nonetheless, state law should still be applied where a claim bears on the powers of a corporation's governing body. *See Burks*, 441 U.S. at 486. This case cannot be analogized to *Burks*, where this Court was concerned with common power of internal corporate governance – whether disinterested directors may dismiss a shareholder derivative suit. *Id.* at 473. Here, Respondent violated the rights of a third party, Petitioner, in violating a federal statute. Pet. App. 3a. Indeed, nothing in this lawsuit relates to the internal affairs or governance of Spicy Cold, Inc. because the corporation operates with no formal governing body. Pet. App. 5a. Furthermore, while state interests are high when protecting corporate shareholders from the claims of corporate creditors, *Anderson*, 321 U.S. at 361, preexisting liability is not being imposed on Respondent. While Respondent and others may form corporations to avoid such liability, they do not typically form corporations to avoid personal jurisdiction of federal courts. Therefore, state interests are not compelling in this case. Even if this Court feels they are, federal law does not permit New Teja's veil piercing law to be applied in this case.

2. *Federal common law should be applied to pierce the corporate veil under an alter ego theory of personal jurisdiction because federal substantive and jurisdictional interests are implicated and applying state law would frustrate federal policy.*

In "a few areas involving 'uniquely federal interests,' state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts – so called 'federal common law'." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979); *see also United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592 (1973). When substantive and jurisdictional federal interests are implicated by a decision of whether to pierce the corporate veil, a district court should employ federal common law. *See Pena*, 731 F.2d at 12 (citing *Cap. Tel. Co. v. FCC*, 498 F.2d 734 (D.C. Cir. 1974); *see also Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975); *Ranza v. Nike*, 793 F.3d 1059, 1073 (9th Cir. 2015). Moreover, "[f]ederal courts should incorporate[] [state law] as the federal rule of decision, unless the application of [the particular] state law [in question] would frustrate specific objectives of the federal programs." *Kamen*, 500 U.S. at 98 (internal quotations omitted); see also *Anderson*, 321 U.S. 349 at 365; *Little Lake*, 412 U.S. at 596 (stating that "specific aberrant or hostile state rules do not provide appropriate standards for state law.").

In areas where uniquely federal interests "are so committed by the Constitution and laws of the United States to federal control," federal common law replaces and preempts conflicting state law where necessary. *See Kimbell Foods*, 440 U.S. at 726. In *Kimbell Foods*, this Court was faced with the question of

whether federal or state law should govern the priority of contractual liens arising out of a federal loan program and liens arising from private contracts, which are traditionally governed by state law. *Id.* at 718. Ultimately, this Court held the source of law to govern this situation was federal law. *Id.* This Court noted, "[w]hen the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. . . . The authority [to do so] had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws [of any State]." *Id.* at 726 (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366–67 (1943)).

Similarly, in *Little Lake*, this Court relied on the same reasoning when it considered whether state law could abrogate the written terms of an agreement made by the United States when it acquired land for purposes authorized by Congress. 412 U.S. at 582. Initially, the court of appeals held that state law should govern because "at bottom, it [was] an 'ordinary' 'local' land transaction to which the United States happen[ed] to be a party." *Id.* at 591. Although this Court recognized the strong local nature of land transactions, federal law was to apply since the question "raise[d] serious questions of national sovereignty [because it arose] in the context of a specific constitutional or statutory provision." *Id.* at 592.

Some circuits have pierced the corporate veil using federal law when federal substantive and jurisdictional interests are implicated. *See Anwar*, 876 F.3d at 848; *see also Ranza*, 793 F.3d at 1073; *Cap. Tel.*, 498 F.2d at 738. In *Anwar*, the plaintiff sued a defendant located abroad for sex discrimination in violation of Title VII, as

well as marital and status discrimination. 876 F.3d at 846. Because the defendant was incorporated outside of the United States, *id.*, the plaintiff sought to gain personal jurisdiction over the defendant by imputing the jurisdictional contacts of the defendant's subsidiary, which would undoubtedly be subject to the personal jurisdiction of the court, *id.* at 848. In deciding whether to apply state or federal veil piercing law, the Sixth Circuit gave full weight to the fact that the plaintiff's claims involved federal law and thereby applied the federal common law veil piercing test. *Id.* at 849. The same principle has been employed by the Ninth Circuit in *Ranza* and the D.C. Circuit in *Capital Telephone*. See *Ranza*, 793 F.3d at 1073 (applying federal common law when analyzing a veil piercing claim in an action based on alleged violations of Title VII of the Civil Rights Act of 1964); *see also Cap. Tel.*, 498 F.2d at 738 (applying federal common law to pierce the corporate veil for the sake of ensuring licenses were allotted in accordance with the Communications Act of 1934).

Where application of state law will frustrate specific objectives of a federal law or policy, federal courts need not incorporate state law into its rules of decision. *See Kamen*, 500 U.S. at 98; *see also Anderson*, 321 U.S. at 365. In *Kamen*, this Court addressed the question of whether it should fashion a federal common law rule requiring an absolute demand requirement for a claim brought under a federal statute, even though a demand would be excused as futile under state law. 500 U.S. at 92. Since this was a corporate law matter, which is an area where "private parties have entered legal relationships with the expectation that their rights and

obligations would be governed by state-law standards," it was preferred that state law be incorporated into federal rules of decision. *Id.* at 98. Although this Court incorporated state law into its analysis, it also noted it "would nonetheless be constrained to displace state law in this area were [it] to conclude that the futility exception to the demand requirement is inconsistent with the policies underlying the [federal statute]." Id. at 107. In *Anderson*, this Court, consistent with its reasoning in *Kamen*, explicitly stated that "no state may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy which Congress has announced." 321 U.S. at 365.

In this case, the federal common law test for veil piercing should be applied because the exercise of personal jurisdiction by federal courts is an area of law where uniquely federal interests permit the fashioning of federal common law. In certain areas of the law, which "are so committed by the Constitution and laws of the United States to federal control," federal common law is fashioned to displace conflicting state law. *Kimbell Foods*, 440 U.S. at 726. In *Kimbell*, this Court decided that prioritization of federal liens under a federal program created by Congress was such an area of the law because the authority to disburse funds and pay debts was a power provided to the federal government by the Constitution, totally independent of the authority of any State. *Id.* Moreover, in *Little Lake*, federal law was applied because the case involved questions of national sovereignty arising from "a specific constitutional or statutory provision." 412 U.S. at 592.

Similar to the areas of law in those cases, the rules governing the exercise of personal jurisdiction by federal courts arise from the Due Process Clause of the Fifth Amendment to the Constitution. Pet. App. 7a–8a. The reason states can restrict that jurisdiction in an ancillary fashion is because Congress has limited the effectiveness of service in the district courts through Rule 4(k)(1)(A). Pet. App. 8a. Even then, this Court has set the parameters of acceptable personal jurisdiction in the state courts through case law interpreting the requirements of the Fourteenth Amendment's Due Process Clause. As such, personal jurisdiction of federal courts is a matter committed to due process, which is based solely on the Constitution and federal law interpreting due process requirements.

Moreover, federal common law should be applied because federal substantive and procedural interests are involved, which would be in accordance with the practices of the Sixth, Ninth, and D.C. Circuits. While this Court has declined to apply federal common law in the area of corporate law when supplanting a substantive futility exception to the demand requirement for a claim against corporate directors, *Kamen*, 500 U.S. at 98, the aforementioned circuit courts have merely pierced the corporate veil to give effect to some federal regulatory program or statute, *see Anwar*, 876 F.3d at 848; *see also Ranza*, 793 F.3d at 1073; *Cap. Tel.*, 498 F.2d at 738. In *Kamen*, supplanting the futility requirement would affect the claim itself, while in this case, piercing the corporate veil with federal common law merely determines personal jurisdiction, which does not affect the underlying claim.

Even if this Court feels that, because a corporation is involved, state interests are strong enough to require incorporation of state law into the rules of decision, federal common law must supplant that state law due to the conflict between New Tejas's law and federal policy announced by Congress. The problems posed by New Tejas's veil piercing law extend far beyond this case. The very purpose of the State's incredibly favorable veil piercing test was to attract corporations during a time where New Tejas was "a wretched hive of scum and villainy." Pet. App. 6a. To pierce the corporate veil under New Tejas's test, it must be proven that the corporation was formed with the specific purpose of defrauding a specific individual. Pet. App. 6a. Therefore, a shareholder such as Respondent, who acts as a corporation existing only in the state database due to no actual or formal separation between the corporation and a sole shareholder, Pet. App. 5a, may violate any federal statute and claim a lack of personal jurisdiction in all district courts but those located in his state of domicile. This Court recognized in *Little Lake* that "specific aberrant or hostile state rules do not provide appropriate standards for federal law." 412 U.S. at 596. As such, New Tejas's veil piercing law cannot be appropriately applied.

C. New Tejas's Veil Piercing Law Should Not Be Applied Because It Focuses on Substantive Veil Piercing Factors Unrelated to Federal Due Process Concerns at The Heart of Jurisdictional Piercing.

This Court has supported the proposition that the corporate veil can be pierced for purposes of obtaining personal jurisdiction. *See Daimler AG v. Bauman*, 571 U.S. 117, 134 (2014) (rejecting an argument for personal jurisdiction based on agency principles but noting that petitioner had not put forth an argument for

personal jurisdiction based on an alter ego theory); *see also Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335 (1925) (holding that personal jurisdiction could not be had over subsidiary but finding that corporate formalities were observed). Several lower courts have recognized that there is a distinction between "substantive veil piercing" and "jurisdictional veil piercing," and that those different concepts "involve different elements of proof." *PHC-Minden, L.P. v. Kimberly Clark Corp.*, 235 S.W.3d 163, 174 (Texas 2007) (citing *AT&T Co. v. Campagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996) ("[L]iability is not to be conflated with amenability to suit in a particular forum.")). Personal jurisdiction in federal court is governed by federal due process considerations, which may not be overridden by statutory or common law inconsistent with those considerations. *AT&T Co.*, 94 F.3d at 591; *see also Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 425 (9th Cir. 1977).

1. *Substantive veil piercing involves removing the liability barrier from between shareholders and the corporate entity for the purposes of imputing corporate liability on those shareholders, which is a state law issue.*

Corporations enjoy many benefits, a primary benefit being a separate legal existence that protects shareholders of a corporation from the liability that a corporation incurs. Substantive veil piercing is an equitable effort to impute corporate liability unto shareholders, and typically concerns itself with important factors such as preventing fraud or avoiding injustice, along with whether there is a unity of interest. *See In re Foxmeyer Corp.*, 290 B.R. 229, 235 (Bankr. D. Del. 2003) (applying Delaware veil piercing doctrine); *see also Southeast Texas Inns, Inc. v.*

Prime Hospitality Corp., 462 F.2d 666 (6th Cir. 2006) (applying Tennessee veil piercing doctrine); *Wells Fargo*, 556 F.2d at 425 (noting that in applying state veil piercing doctrine, the lower court focused heavily on undercapitalization).

Substantive veil piercing occurs in the context of attempting to impose liability on another entity because the other entity lacks assets; the factors to be considered are equitable in nature, serving to prevent fraud or injustice, but factors also consider whether the liability can fairly be imputed to an entity that was not truly separate. *See, e.g.*, *In re Foxmeyer*, 290 B.R. at 235. *In re Foxmeyer* included an attempt by a Chapter 7 bankruptcy trustee to pierce the corporate veil in order to impute liability for the sake of preventing a company from getting away with a fraudulent conveyance. *Id.* at 233. The factors to be considered, among others, were whether the entity operated as a "façade for the dominate shareholder," whether corporate directors "siphoned corporate funds," and whether the corporation was "adequately capitalized for the corporate undertaking." *Id.* at 235. Derived from these factors is a sense that substantive veil piercing seeks to prevent unfairness in situations where a corporation is either setup with the intent of perpetrating fraud or is being used for fraudulent purposes after creation to the benefit of the shareholder.

Similar to *In re Foxmeyer*, where state veil piercing law focused on equitably preventing fraud or injustice, New Tejas's veil piercing doctrine also seeks to prevent fraud, albeit only under circumstances where fraud was intended to be perpetrated from the very genesis of the corporation. Pet. App. 6a. However, the

difference is that New Tejas's law is solely focused on preventing fraud and contains no inquiry into whether two entities are separate or are indeed the same. *Id.* New Tejas's veil piercing doctrine can safely be deemed to be singularly focused on substantive piercing.

2. *Jurisdictional veil piercing imputes a corporate entity's contacts with a forum unto an alter ego to obtain personal jurisdiction over that alter ego, which involves only due process considerations.*

On the other hand, for federal courts, the personal jurisdiction inquiry focuses on due process as the controlling law. *See City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 667 (6th Cir. 2005). Therefore, the focus of any inquiry for piercing the corporate veil for jurisdictional purposes must be whether two entities, although separate legally, are the same in reality. S*ee Wells Fargo*, 556 F.2d at 425. While the Sixth and Ninth Circuits apply federal common law when determining whether to pierce the corporate veil for jurisdictional purposes, *see Anwar v. Dow Chemical Co.*, 876 F.3d 841, 848 (6th Cir. 2017); *see also Ranza*, 793 F.3d at 1073; the application of state veil piercing law would usually be of no consequence because most state veil piercing laws are akin to federal law and work in conjunction with due process concerns, *see Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1161 (5th Cir. 1983); *see also Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 363 (6th Cir. 2008).

Jurisdictional piercing on an alter ego theory must involve an inquiry focused on due process considerations. *See Bridgestone Corp.*, 399 F.3d at 667; *see also AT&T Co.*, 94 F.3d at 591. In *Bridgestone Corp.*, the plaintiff sued, among other

defendants, Bridgestone's past CEO, who resided at the time resided in Japan, *id.* at 665, for violations of certain provisions of federal securities laws, *id.* at 661–62. The defendant then moved to dismiss for lack of personal jurisdiction. *Id.* at 664. The plaintiff argued that there was personal jurisdiction under federal due process principles, but if the court did not find that to be the case, the court had jurisdiction based on the Securities Exchange Act, which provided for imposition of liability if the defendant exercises a certain level of control over those violating the law. *Id.* at 667. In rejecting that argument, the court wrote, "Congress cannot override the due process clause, the source of protection for non-resident defendants." *Id.* (quoting *AT&T Co.*, 94 F.3d at 590–91).

Identical reasoning carried the day in *Wells Fargo*, where the Ninth Circuit entertained an argument that a corporate veil should be pierced to obtain personal jurisdiction over the parent company of an operating division. 556 F.2d at 425.

> [Undercapitalization], which is important to deciding whether to pierce the veil raised by a subsidiary corporation in order to hold the parent corporation liable . . . may not be relevant to a showing that the two corporations are in fact one so as to establish that the out-of-state corporation be it parent or subsidiary is present within the forum for jurisdictional purposes . . . . Rather, the operative question is whether the two corporations are in fact mere "divisions" or "branches" of a larger whole. Nevertheless, except for the factor of "undercapitalization," it does appear that the same factors which would demonstrate an "alter ego" relationship between a corporation and its shareholders for purposes of holding the shareholders liable . . . are for the most part relevant in the jurisdictional context as well.

Id. at 425–26 (internal citations omitted). In concluding that the lower court relied on factors not pertinent to an alter ego theory of jurisdiction, the Ninth Circuit remanded the case for reconsideration. *Id.* at 426.

This Court implicitly noted the importance of due process concerns when it held that if corporate formalities are followed, forum contacts of one entity cannot be imputed to another entity to gain personal jurisdiction under an alter ego theory. *See Cannon*, 267 U.S. at 335. In *Cannon*, this Court rejected to exercise jurisdiction over a parent company even though the subsidiary was dominated entirely by the parent company. *Id.* at 336. However, this Court noted that the subsidiary was in all formal respects still separate and distinct in that the two corporation's books were kept separate and all transactions between the two corporations were done as if between two totally independent corporations. *Id.* at 335. Therefore, this Court seemed to suggest that if the two entities disregarded formalities and could be deemed the same entity, jurisdictional entities could be imputed.

In many circumstances, where a state's alter ego tests incorporate due process considerations, applying state law is harmless. *See Hargrave*, 710 F.2d at 1161 (applying state law, which considered whether corporate separateness was a reality, while sitting in diversity); *see also Estate of Thomson*, 545 F.3d at 363 (applying Ohio law in federal court based on diversity jurisdiction). In *Hargrave*, the court stated that, other than ensuring the defendant was amenable to service, it merely had to determine whether "assertion of jurisdiction over the defendant comports with due process." 710 F.2d at 1159. The rationale for exercising jurisdiction based on alter ego is that the parent corporation exerts such domination and control over its subsidiary 'that they do not in reality constitute separate and distinct corporate entities but are one and the same corporation for purposes of

jurisdiction." *Id.* Because the court sat in diversity jurisdiction, it was faced with the question of whether to apply Texas or Pennsylvania law. *Id.* However, the court declined to choose which law to apply due to the similar nature of both states' tests, which looked to "failure to adhere to corporate formalities, substantial intertwining of affairs, undercapitalization, and use of the corporation and its assets to further the shareholder's own interests." *Id.*

In this case, New Tejas's substantive veil piercing doctrine cannot be applied in the jurisdictional piercing context because it bears no relationship to due process considerations. The crux of imputing forum contacts to a different entity to obtain personal jurisdiction over that entity necessarily requires a showing that the two entities are in fact one in the same, which is required by due process. *See Bridgestone Corp.*, 399 F.3d at 667; *see also Wells Fargo*, 556 F.2d at 425. Like *Wells Fargo*, where the court noted that questions about undercapitalization "may not be relevant to a showing that the two corporations are in fact one so as to establish that the out-of-state corporation . . . is present within the forum for jurisdictional purposes," 556 F.2d at 425–26, New Tejas's veil piercing law is also totally unrelated to whether Respondent and Spicy Cold, Inc. are one in the same. New Tejas allows the corporate veil to be pierced upon a showing that the corporation was formed with the specific intent to defraud a particular person. Pet. App. 6a. Not only is that test practically impossible to meet, but it also bears the same problem as the undercapitalization factor faced in *Wells Fargo*, which is that the test focuses on whether shareholders are deserving of being protected from

liability, instead of whether two entities are one in the same for personal jurisdiction and due process purposes. In contrast, the federal common law test sought to be applied in this case focuses on whether "there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist" and whether "that failure to disregard [their separate identities] would result in fraud or injustice." Pet. App. 5a. The unity of interest prong concerns itself with federal due process and would be appropriately applied in this case.

Furthermore, the Thirteenth Circuit was incorrect to apply New Tejas's veil piercing doctrine because it replaces federal due process jurisprudence with a liability analysis. Three circuits recognized that liability cannot be confused with and replace the requirements of due process. *See AT&T Co.*, 94 F.3d at 591; *see also Bridgestone Corp.*, 399 F.3d at 667; *Wells Fargo*, 556 F.2d at 425. Further, those holdings are supported by this Court's holding in *Cannon*, which requires a showing that the corporate formalities have dissipated before imputing personal jurisdiction. 267 U.S. at 335. The Thirteenth Circuit notes, and the parties agree, that imputing general jurisdiction to Respondent through an alter ego theory would comport with due process. Pet. App. 12a. The Thirteenth Circuit then goes on to conclude that the key to doing so is applying New Tejas's substantive veil piercing law, which confuses liability with personal jurisdiction, which in turn supplants federal due process concerns with a test for liability. As such, this Court should find the Thirteenth Circuit erred in concluding that New Tejas's substantive veil piercing law should apply.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, Petitioner respectfully requests this Court REVERSE the decision of the United States Court of Appeals for the Thirteenth Circuit.

DATED: November 15, 2021

Respectfully Submitted,

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APPENDIX A

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

(k) Territorial Limits of Effective Service.

> (1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:
>
> > (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;
> >
> > (B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or
> >
> > (C) when authorized by a federal statute.

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.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> > (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> >
> > (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other

> members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.