No. 20–1434

In the Supreme Court of the United States

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

-versus-

LANCELOT TODD,
Respondent.

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

BRIEF FOR RESPONDENT

ORAL ARGUMENT REQUESTED

Team 83
Counsel for Respondent

QUESTIONS PRESENTED

1. Is personal jurisdiction over a defendant in a class action properly evaluated with respect to the claims of both named and unnamed members of the suit?

2. Does state law appropriately govern alter ego theory laws to establish personal jurisdiction?

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The opinion and order of the United States Court of Appeals for the Thirteenth Circuit in the case of *Gansevoort Cole, et. al. v. Lancelot Todd*, is unreported, but is available at No. 19-5309 and may be found in the Record at pages 1a–22a. That court reversed the decision of the United States District Court for the District of New Tejas, which is unreported, but is available at Civil Action No. 18-cv-1292.

STATEMENT OF JURISDICTION

The Thirteenth Circuit entered its judgment on May 10, 2020. R. at 1a. Petitioner timely filed a Petition for Writ of Certiorari, which this Court granted on October 2, 2021. R. at 1. If this Court recognizes that a motion to strike the nationwide class action is the functional equivalent of denying class certification, Rule 23(f) permits interlocutory appeals from orders "granting or denying class-action certification . . . ." This Court only has jurisdiction in accordance with 28 U.S.C. § 1254 if this Court accepts that the motion to strike is functionally the same as denying the motion to certify.

STANDARD OF REVIEW

While questions of jurisdiction are issues of law reviewed *de novo*, a district court's finding of alter ego, or lack thereof, is a fact reviewed for clear error. *See Licea v. Curacao Drydock Co.*, 952 F.3d 207, 212 (5th Cir. 2015).

RELEVANT PROVISIONS

The Fourteenth Amendment 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." U.S. CONST. amend. XIV.

For federal claims outside state-court jurisdiction, the Federal Rules of Civil Procedure provide: "For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if . . . the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and exercising jurisdiction is consistent with the United States Constitution and laws." FED. R. CIV. P. 4(k)(2).

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

A. MR. TODD CREATES A NEW BUSINESS VENTURE.

As an avid entrepreneur, Mr. Lancelot Todd succeeds in establishing multiple well-known corporations. R. at 2a. Although a current resident of West Dakota, Mr. Todd operates his numerous businesses outside the state. R. at 2a.

Because of his intuition for innovation, he acquired the rights to a new product—a chip that is so spicy it creates a subjectively pleasant, numbing feeling in your mouth—that resulted in yet another corporation, Spicy Cold Foods, Inc. (Spicy Cold). R. at 2a. Using his sagacious business mind, Mr. Todd set out to incorporate Spicy Cold in the corporation friendly state of New Tejas. R. at 2a. He did so because New Tejas fosters one of the strongest protections for corporations, arising out of its historic roots in frontier settling and the need to attract suitable business. R. at 6a. With his newly incorporated New Tejas entity, and principal place of business in West Dakota secured, Mr. Todd was ready to commercialize his unique product and penetrate the potato chip market. R. at 3a.

B. SPICY COLD ADVERTISES ACROSS THE COUNTRY.

Mr. Todd had impertinent plans to infiltrate the chip market by selling Spicy Food products wholesale to grocery stores and restaurants. R. at 3a. However, this plan was not immediately successful as the sale efforts did not meet expectations. R. at 3a. As such, Mr. Todd identified the issue with Spicy Cold as a lack of advertising to the masses. R. at 3a. To address this problem, acting on behalf of Spicy Cold, Mr. Todd acquired an automatic telephone dialing system to advertise to consumers

across the country. R. at 3a. He did so because he genuinely believed Spicy Cold was the *coolest chip ever made*. *See* R. at 3a (describing the prerecorded voice message used in telephone advertising calls).

C. PETITIONER GANSEVOORT COLE IS DISPLEASED WITH THE PHONE CALLS.

One of the solicited marketing targets was none other than named Petitioner, Gansevoort Cole (Petitioner). Being unreceptive to the occasional phone calls, Petitioner was upset by the advertising tactics employed by Spicy Cold. R. at 3a. The reasoning behind her irritation was that Petitioner denied having established a business relationship with Spicy Cold, having consented to receiving such phone calls, and not even having a particular interest for the illusive taste of a Spicy Cold potato chip. Accordingly, Petitioner filed suit, on behalf of herself and a class of *all persons throughout the countr*y who received similar calls, alleging the phone calls violated 47 U.S.C. § 227—the Telephone Consumer Protection Act (TCPA). R. at 3a; *see infra* Appendix A. Conspicuously, Petitioner filed suit against the entity Spicy Cold itself, and included Mr. Todd personally because of his considerable wealth, and Spicy Cold's apparent lack thereof. R. at 4a.

II. PROCEDURAL HISTORY

D. THE DISTRICT COURT OF NEW TEJAS STRIKES THE NATIONWIDE CLASS ACTION.

In 2018, Petitioner filed suit against Spicy Cold and Mr. Todd in the District of New Tejas. R. at 3a. It is undisputed that the district court could exercise general jurisdiction over Spicy Cold, and specific jurisdiction over Petitioner's individual claim against Mr. Todd. R. at 4a. Thus, the issue turns on whether personal

jurisdiction exists with respect to the nationwide class action claims. R. at 4a. Mr. Todd then moved to strike the class allegations for lack of personal jurisdiction. R. at 4a. Finding Petitioner's arguments to establish personal jurisdiction unsatisfactory, the district court granted Mr. Todd's motion. R. at 7a.

The United States Court of Appeals for the Thirteenth Circuit granted Petitioner's petition for interlocutory appeal. R. at 7a. The court of appeals affirmed the district court's conclusion that personal jurisdiction was lacking over Mr. Todd with respect to the claims of nonresident class members. R. at 16a. Specifically, the court determined neither argument to establish personal jurisdiction was workable in the matter at hand.

E. PETITIONER SEEKS CERTIORARI AS A MEANS TO CREATE NONEXISTENT JURISDICTION.

This Court granted certiorari limited to two specific questions: (1) whether, in a class action, personal jurisdiction over a defendant is evaluated only with respect to the claims of named class members or also with respect to the claims of unnamed members; and (2) whether, with respect to a claim arising under federal law, personal jurisdiction based on an alter ego theory is determined under state law or federal law. R. at 1.

SUMMARY OF THE ARGUMENT

This case arises out of stealthy procedural mechanisms proffered by Petitioner to request a federal court to extend jurisdictional authority over a defendant that would not otherwise be obliged to appear in said court without such means.

I.

In class action suits, personal jurisdiction is evaluated with respect to include the claims of all named and unnamed members. Specifically, to exercise specific jurisdiction over a defendant in class action context, due process requires that each and every claim meet the minimum contacts as established by this Court, including those outside the forum state of New Tejas. Both the Fifth Amendment and New Tejas' long-arm statute recognize the significance in protecting a defendant's due process rights when a court exercises its personal jurisdiction authority.

Hence, each claim within the class action context must arise out of Mr. Todd's forum-related activities. The alleged phone calls were neither initiated nor received within the State of New Tejas with respect to those claims of individuals who reside in other states. Thus, failing to satisfy the minimum contacts necessary for a federal court to exercise specific jurisdiction over all claims involved in the nationwide class action.

Therefore, the unnamed, nonresidents' claims in this class action suit do not satisfy the specific jurisdiction constitutional requirements to establish personal jurisdiction over Mr. Todd in his individual capacity in the District of New Tejas.

II.

Using a sound choice of law analysis, New Tejas law applies here. In federal question jurisdiction, the procedure is to apply the federal choice of law rules in selecting the applicable law. In conjunction, the long-standing *Erie* principles guide federal courts in ultimately selecting state substantive laws.

In doing so, either the state of incorporation or forum state's law governs alter ego theories. Here, New Tejas is both the forum state and the state of incorporation of Spicy Cold, thus New Tejas law must apply. New Tejas' alter ego law specifies that in piercing the corporate veil, the standard requires that the company have been incorporated for the specific purpose of defrauding a specific individual. Both parties acknowledge that this standard is certainly not met in this matter. Mr. Todd is not the alter ego of Spicy Cold; therefore, general jurisdiction over Mr. Todd cannot be imposed upon him in the District of New Tejas.

Because neither specific nor general jurisdiction was established in the matter with respect to the putative nonresident class action members, the district court exercised appropriate discretion in striking the nationwide class action suit. Personal jurisdiction does not exist over such claims; thus, this Court should affirm the holding of the Thirteenth Circuit accordingly.

ARGUMENT

I. IN CLASS ACTION SUITS, PERSONAL JURISDICTION IS EVALUATED WITH RESPECT TO INCLUDE CLAIMS OF ALL NAMED AND UNNAMED MEMBERS.

Personal jurisdiction is an *essential element of judicial authority*, without which courts are powerless to proceed to an adjudication. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (emphasis added). Assuredly, courts have recognized "[w]hen embarking upon the fact-sensitive inquiry of whether a forum may assert personal jurisdiction over a defendant, the court's task is not a rote, mechanical exercise." *Sawtelle v. Farrell*, 70 F.3d 1381, 1388 (1st Cir. 1995). Indeed, determining personal jurisdiction is "more an art than a science." *Id.*; *see also Donatelli v. National Hockey League*, 893 F.2d 459, 468 n.7 (1st Cir. 1990).

Here, because the limits of New Tejas' long-arm statute are coextensive with constitutional due process limits, the inquiry must be whether exercising personal jurisdiction over Mr. Todd comports with federal constitutional guarantees. *See Jackson v. Tanfoglio Giuseppe S.R.L.*, 615 F.3d 579, 584 (5th Cir. 2010) (holding the district court lacked personal jurisdiction, both general and specific over the defendant, because minimum contacts were not established, and a theory of imputed contacts failed). These constitutional guarantees apply to all claims, whether individual in nature or involving numerous claims and plaintiffs.

Accordingly, in *Bristol-Myers*, this Court created new and important personal jurisdiction requirements as to plaintiffs in grouped suits.[1] *See Bristol-Myers Squibb*

[1] *See J. McIntyre Machinery Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (plurality opinion) (noting it is not enough to grant personal jurisdiction merely because the defendant placed a single product into the

Co. v. Superior Court, 137 S. Ct. 1773 (2017). As such, these requirements must be given their due accord in a case such as this one—a class action suit involving multiple plaintiffs' claims. In *Bristol-Myers*, this Court held that due process bars the exercise of specific jurisdiction over nonresident defendants unless plaintiffs—whether individual or part of a group—show a direct and substantial "connection between the forum and the specific claims at issue." *Bristol-Myers*, 137 S. Ct. at 1781. Thus, in nationwide class actions, courts ought to consider if personal jurisdiction exists over all plaintiffs, whether named or not.[2]

This is a putative class action, purportedly brought on appeal to this Court pursuant to Federal Rules of Civil Procedure 23 by Petitioner. R. at 1. Because Mr. Todd's personal domicile is in West Dakota, specific jurisdiction[3] is necessary to authorize the New Tejas court to extend personal jurisdiction over him as to the class action claims. R. at 4a. Thus, the inquiry whether New Tejas may assert such specific jurisdiction over a nonresident defendant must focus on the relationships among the following: (1) the defendant; (2) the forum; and (3) the litigation itself. *See Walden v. Fiore*, 571 U.S. 277, 283–84 (2014) (noting the due process limits of a court's

"stream of commerce" somewhere and it ended up in the forum state). Until a majority of this Court holds otherwise, this Court should narrowly construe *McIntyre*. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (commanding in plurality cases "the holding of the Court may be viewed as the position taken by those Members who concurred in the judgment[t] on the narrowest grounds."). *See generally* E. THOMAS SULLIVAN, RICHARD D. FREER, & BRADLEY G. CLARY, COMPLEX LITIGATION 12–15 (3d. ed. 2019) (discussing the evolution of specific jurisdiction after *McIntyre*).

[2] As a result of this Court's significant *Bristol-Myers* decision, subsequent cases have arisen pertaining to how the holding applies to class action suits. Particularly, "[o]ut of 104 cases, fifty federal courts have held that [*Bristol-Myers*] extends to class actions, forty did not reach a holding, and fourteen held that [*Bristol-Myers*] does not extend to class actions." Bryce Saunders, *23 and Me:* Bristol-Myers Squibb*, Federal Class Actions & the Non-Party Approach*, 71 CASE W. RES. 1121, 1122–23 (2021).

[3] In accordance with footnote three of the court of appeals opinion below Respondent shall also refer to the term "specific jurisdiction" as the court's authority over the defendant limited to the particular claims within the cause of action. *See* R. at 7a n.3.

adjudicative authority principally protects the liberty of the nonresident defendant rather than the convenience of plaintiffs or third parties).

While Petitioner's claim—as the solely *named* party—is undeniably subject to personal jurisdiction in the State of New Tejas, due to her resident status, the unnamed members of her suit across the country do not receive such certainty in jurisdiction. R. at 3a, 9a. Here, personal jurisdiction does not exist over the unnamed nonresident plaintiffs' claims because the requirements for specific jurisdictions over their respective claims are not satisfied. For this reason alone, this Court should affirm the holding of the Thirteenth Circuit.

A. MR. TODD WAS SUCCESSFUL IN A RULE 12(B) MOTION TO STRIKE A NATIONWIDE CLASS ALLEGATION FOR WANT OF PERSONAL JURISDICTION, WHICH IS NOT THE EQUIVALENT OF A RULE 23 ORDER DENYING CLASS CERTIFICATION.

As a preliminary quandary, the circuit court perhaps may have erroneously granted Petitioner's petition for interlocutory appeal. *See* R. at 7a (treating the order to strike the nationwide class allegation as the equivalent to an order denying class certification). This discretionary determination was based upon this Court's language in *Microsoft v. Baker*—determining that an order striking class allegations is functionally equivalent to an order denying class certification, and therefore appealable under Federal Rule of Civil Procedure 23(f). *See Microsoft v. Baker*, 137 S. Ct. 1702, 1711 n.7 (2017); *see also* FED. R. CIV. P. 23(f). However, there is a fundamental problem in utilizing this rationale here: Mr. Todd's motion to strike the class allegations was *based on lack of personal jurisdiction*, whereas the *Microsoft*

order striking class allegation was brought upon a denial of class certification based on lack of comity in issues. *Microsoft*, 137 S. Ct. at 1706.

Here, as opposed to *Microsoft*, the plain language of Rule 23(f) allows immediate appeal *only* from an order "granting or denying class-action certification under this rule . . . ." FED. R. CIV. P. 23(f). In disparity, the order in this case—issued under Rule 12(b)—neither granted nor denied any class certification. R. at 16a; *see* FED. R. CIV. P. 12(b). This distinction is precisely why the court below erred in granting the petition to review the interlocutory appeal. As such, the Thirteenth Circuit did not have appellate jurisdiction under 28 U.S.C. § 1292(e).

Because the circuit court lacked jurisdiction under 28 U.S.C. § 1292(e), as the order was not one "granting or denying class-action certification" under Rule 23, the only option for the court was to dismiss the appeal for want of jurisdiction. *See In re NFL Players Concussion Injury Litig.*, 775 F.3d 570, 572 (3d Cir. 2014) ("[A]s order was not an 'order granting or denying class-action certification' under the plain text of the rule, we have dismissed the petition."); *see also Colella's Super Mkt., Inc. v. SuperValu, Inc. (In re Wholesale Grocery Prods. Antitrust Litig.)*, 849 F.3d 761, 764 (8th Cir. 2017) (same); *Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 636 (9th Cir. 2020) (same); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1191 (10th Cir. 2006) (same).

B. THE DUE PROCESS CLAUSE, COUPLED WITH THE FEDERAL RULES OF CIVIL PROCEDURE, LIMITS THE AUTHORITY OF FEDERAL DISTRICT COURTS TO ADJUDICATE CLAIMS THAT FALL OUTSIDE THE BOUNDS OF ARTICLE III.

At the forefront of federal suits, a defendant's due process rights must be considered. *See generally Bristol-Myers*, 137 S. Ct. at 1771 (emphasizing the primary

concern of specific jurisdiction is the *burden on the defendant* (emphasis added)). Accordingly, federal courts are limited in exercising their constitutional power over a defendant—whether it be an individual, mass, or class action asserted against said defendant. *See Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee,* 456 U.S. 694, 702 (1982) (describing the personal jurisdiction requirement as recognizing and protecting an individual liberty interest, and noting "[i]t represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.").

Although there is no doubt the district court has subject matter jurisdiction, the question is whether the district court has personal jurisdiction—and by that logic whether the circuit court may exercise jurisdiction over the interlocutory appeal.[4] Thus, the constitutional question as to whether personal jurisdiction exists must comport with the Due Process Clause of the *Fifth Amendment*. *See Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 (1987); *see also* FED. R. CIV. P. 4(k)(2)(B) (establishing personal jurisdiction over a defendant only if exercising jurisdiction is consistent with the United States Constitution and laws). Notwithstanding, this by no means changes the constitutional analysis of the necessary due process components in personal jurisdiction, especially given that the TCPA does not provide for nationwide service and New Tejas' long-arm statute governs the applicability of the Fourteenth Amendment Due Process constitutional protections.

The premise of this Court's holding in *Bristol-Myers* is that specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very

[4] Here, the claim is brought pursuant to a federal statute, the TCPA, making this a federal question within the domain of Article III courts under 28 U.S.C. § 1331.

controversy that establishes jurisdiction. *See Bristol-Myers*, 137 S. Ct. at 1780. Therefore, due process precludes nonresident plaintiffs injured outside the forum from aggregating their claims with an in-forum plaintiff. *See Practice Mgmt. Support Svcs. v. Cirque du Soleil*, 301 F. Supp. 3d 840, 861 (N.D. Ill. 2018). Absent such due process protections, this Court should affirm the holding of the Thirteenth Circuit.

1. Aggregated plaintiffs' claims in mass actions are the equivalent of class actions and the same personal jurisdiction rules govern.

In *Bristol-Myers*, over six hundred plaintiffs filed a civil action in California state court alleging a variety of state law claims against the manufacturer of the drug, Plavix. *Bristol-Myers*, 137 S. Ct. at 1777. Notably, the claims of California plaintiffs and nonresident plaintiffs were consolidated into a mass action. This Court determined, although the nonresident plaintiffs allegedly sustained the same injuries as did the forum residents, this "mere fact" did not allow the state to assert specific jurisdiction over the nonresidents' claims. *Id.* at 1781. Therefore, the nonresident plaintiffs' claims did not meet the requisite specific jurisdiction threshold. *See id.* at 1783 ("The bare fact that [*Bristol-Myers*] contracted with a California distributor is not enough to establish personal jurisdiction in the State.").

Accordingly, the same principles that apply to mass actions also apply to class actions. Numerous lower courts have agreed with the proposition, and have applied the personal jurisdiction requirements imposed in *Bristol-Myers* in class actions suits. *See Carpenter v. PetSmart, Inc.*, 441 F. Supp. 3d 1028, 1035 (S.D. Cal. 2020) (addressing the fact this Court did not necessarily consider whether its *Bristol-Myers* holding applies to class actions is hardly supportive of a contrary holding that it does

not); *see also Practice Mgmt. Support Svcs.*, 301 F. Supp. 3d at 861 (determining under the Rules Enabling Act, a defendant's due process interest is the same in the class action context); *see also Chavez v. Church & Dwight Co.*, 2018 U.S. Dist. LEXIS 82642, at *11 (N.D. Ill. May 16, 2018) (concluding *Bristol-Myers* extends to class actions); *Chizniak v. CertainTeed Corp.*, 2020 U.S. Dist. LEXIS 17020, at *5 (N.D.N.Y. Jan. 30, 2020) ("Like the other courts in this District, the [c]ourt interprets [*Bristol-Myers*] to extend to nationwide class actions and declines to exercise specific personal jurisdiction over Defendant CertainTeed with regard to the Out-of-State Plaintiffs' claims."). Therefore, this Court should extend the same due process principles utilized in mass actions to class actions, and hold that the unnamed, nonresident plaintiffs' claims must satisfy such constitutional restraints.

(i) Class actions are a procedural device.

In contrast to the various courts that have recognized the due process nuances in aggregated claims, the Seventh Circuit erroneously held that class actions are not governed by the *Bristol-Myers* principles. *Mussat Inc., v. IQVIA, Inc.*, 953 F.3d 441, 448 (7th Cir. 2020), *cert. denied, IQVIA Inc. v. Mussat Inc.*, 141 S. Ct. 1126 (2021) (concluding class actions are different in kind than mass actions). However, what the Seventh Circuit failed to recognize is this Court's notion that a class action is merely a "species of traditional joinder," and the due process protections are not adjusted based on the number of plaintiffs or the procedural device used to aggregate multiple plaintiffs' claims. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 408 (2010) (plurality opinion) (defining a class action as a species of traditional

joinder that permits the court to adjudicate claims of multiple parties at once rather than separate suits).

2. Allowing the nonresident unnamed class members to proceed would be inconsistent with Federal Rules of Civil Procedure.

According to the duly promulgated rules, where no federal law authorizes nationwide service of process, a federal district court only has personal jurisdiction over a party who would be subject to the jurisdiction of the state court where the federal district court is located. FED. R. CIV. P. 4(k)(1)(A); *see Mussat,* 953 F.3d at 448 (acknowledging this premise).

For example, the District of Massachusetts found in order to exercise personal jurisdiction over a defendant in a TCPA class action, the due process impositions of the Fifth Amendment, and the requirements of Federal Rule of Civil Procedure 4 must be satisfied, "which indirectly bring[s] the strictures of the Fourteenth Amendment into play." *Roy v. FedEx Ground Package Sys.*, 2018 U.S. Dist. LEXIS 85288, at *27 (D. Mass. May 22, 2018). This alludes to the conception that the statutory and constitutional inquiries of exercising personal jurisdiction must merge.

Additionally, in a comparable non-class TCPA claim, the Central District of California also exercised a personal jurisdiction analysis pursuant to Federal Rule of Civil Procedure 4(k)(1)(A) and the state's long-arm statute. *Menichiello v. Ascend Funding LLC*, 2017 U.S. Dist. LEXIS 142554, at *4 (C.D. Cal. Aug. 28, 2017). In doing so, the court reasoned that personal jurisdiction over a defendant must comport with the limits imposed by the Fourteenth Amendment. *Id.* The district court resolved that a plaintiff merely receiving a call in the forum state is not enough to

subject the defendant to specific jurisdiction in that forum. *Id.* at *7. Focusing on the premise that personal jurisdiction is decidedly defendant focused, the court concluded there was no such activity involving the defendant and the plaintiff's phone call arising out of the forum state. *Id.* at *9–*10.

Here, similarly, the exact notion is true. A nonresident class action member merely receiving an automated phone call from a defendant—that is *not* conducting such activity in the forum state—does not satisfy specific jurisdiction requirements. To hold otherwise would be inconsistent with obligations of both due process and the Federal Rules of Civil Procedure; therefore, this court should affirm.

(i) The TCPA does not provide for broader jurisdiction.

The Federal Rules of Civil Procedure provide a mechanism for Congress to authorize personal jurisdiction over a defendant when *expressly provided for* in a federal statute giving rise to the cause of action. *See* FED. R. CIV. P. 4(k)(1)(C).

Alas, the TCPA does not provide specifications for personal jurisdiction requirements in class action suits brought in federal district courts; to put it simply, the TCPA does not authorize nationwide service of process. Had the TCPA provided for limiting instruction on how to assert personal jurisdiction over the defendant, courts would perhaps not need to consider whether the *Bristol-Myers* principles extend to class actions at all.

3. A class action exception to the well-established principles of personal jurisdiction would violate the Rules Enabling Act.

Ever so important in enforcing procedural requirements, it has long been recognized federal rules cannot "abridge" substantive rights. *See* 28 U.S.C. § 2072(b).

Specifically, the Rules Enabling Act bars plaintiffs from using the class action device to abridge a defendant's substantive rights, which include the right to contest personal jurisdiction over any individual's claim—in essence, a right to put on a defense. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).

Using this reasoning, the Northern District Court of Illinois found the Rules Enabling Act, along with interpretations of Article III constraints, supported the conclusion that a defendant's due process interests remain the same in the class context. *Practice Mgmt. Support Svcs.*, 301 F. Supp. 3d at 861. Due process precludes nonresident plaintiffs injured outside the forum from grouping their claims with Petitioner's New Tejas claim.

Therefore, this Court should follow its decision in *Bristol-Myers* by including nonresidents' claims in evaluating personal jurisdiction requirements.

C. PERSONAL JURISDICTION DOES NOT EXIST IN THIS MATTER FOR THE NONRESIDENT UNNAMED CLASS ACTION MEMBERS' CLAIMS.

Because the same due process principles apply in class actions suits as well as mass actions, it is evident unnamed plaintiffs in this case are included in the personal jurisdiction analysis. This type of personal jurisdiction requires that plaintiffs must show a connection between the *specific claims at issue* and the defendant's activities in the forum state by proving the following: (1) the defendant has purposefully directed his activities at the forum state; (2) the alleged injury arises out of the defendant's forum-related activities; and (3) exercising jurisdiction would, "comport with traditional notions of fair play and substantial justice." *See Bristol-Myers*, 137 S. Ct. at 1781; *see also Int'l Shoe Co. v. Washington,* 326 U.S. 310, 315–18 (1945)

(establishing the specific jurisdiction requirements for a court to extend its authority over a nonresident defendant in the forum state). Additionally, where a defendant challenges personal jurisdiction, the party seeking to invoke a court's exercise of jurisdiction bears the burden of proving that jurisdiction exists. *Luv n' Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 469 (5th Cir. 2006); *see also Wyatt v. Kaplan*, 686 F.2d 276, 280 (5th Cir. 1982).

Applying the longstanding requirements here, the unnamed plaintiffs in the putative class action do not satisfy the burden of establishing personal jurisdiction. The specific claim at issue, asserted by each and every plaintiff in this putative class action suit, is that Spicy Cold violated the TCPA by calling consumers to deliver a prerecorded voice message. R. at 3a. Particularly, the plaintiffs deny having established a business relationship to Spicy Cold and deny having consented to such advertising phone calls. R. at 3a.

However, three issues arise as to why personal jurisdiction in New Tejas does not exist with respect to the nonresident unnamed plaintiffs: (1) Mr. Todd did not have contacts with such putative class action members within the forum state; (2) the nonresident putative class action members were not harmed in New Tejas; and (3) exercising jurisdiction would not comport with the due process protections afforded to defendants.

First, specific jurisdiction requires that the defendant purposefully availed himself to the forum state. *Int'l Shoe Co.*, 326 U.S. at 315–18. Unquestionably, Spicy Cold satisfies this requirement as it is incorporated in New Tejas, but Mr. Todd does

not. R. at 2a. Admittedly so, Petitioner and other New Tejas resident's claims in the class action satisfy this requirement.

Second, the alleged injury must arise out of the defendant's forum-related activities. *Int'l Shoe Co.*, 326 U.S. at 315–18. Here, because this Court should look to Mr. Todd's activities specifically in relation to New Tejas, and the putative class action claims, the phone calls made to nonresident putative class action members do not arise out of New Tejas related activities. These are the particular minimum contact requirements that should lead this Court to determine that personal jurisdiction is not satisfied.

Both Mr. Todd and Spicy Cold's principal—and only—place of business is physically located in West Dakota. R. at 3a. Thus, the alleged automatic calls originated from West Dakota, not New Tejas, to plaintiffs across the country. It certainly cannot be said that a West Dakota initiated automated phone call, for example, to a Hawaii resident would result in an injury arising out of New Tejas activities. In fact, New Tejas is not involved whatsoever in that specific circumstance. It is for this precise reason that both the district court and Thirteenth Circuit were correct in affirming the motion to strike the *nationwide* class allegations for a lack of specific personal jurisdiction.

Third, exercising jurisdiction must "comport with traditional notions of fair play and substantial justice." *See Int'l Shoe Co.*, 326 U.S. at 315–18. As this Court recognized in *Bristol-Myers*, due process precludes nonresident plaintiffs injured outside the forum from aggregating their claims with a resident plaintiff if their

claims cannot satisfy the constitutional requirements of minimum contacts. *Bristol-Myers*, 137 S. Ct. at 1782 (finding the connection between the nonresidents' claims and the forum weak; therefore, it follows that the state courts cannot claim specific jurisdiction).

In conclusion, specific jurisdiction is not satisfied with respect to the unnamed, nonresident parties in the putative class action suit. Therefore, the district court exercised the proper discretion in granting Mr. Todd's motion to strike the nationwide class action for lack of personal jurisdiction.

D. CLASS ACTION SUITS OUGHT NOT BE USED AGAINST DEFENDANTS TO BYPASS CONSTITUTIONAL CONSTRAINTS.

Ultimately, what Petitioner and the unnamed putative class action members are seeking in this matter can be encapsulated to one thing: recovery of monetary damages or some other equitable relief. *See* R. at 4a (addressing Petitioner's motivation for personally suing Mr. Todd because he has *considerable wealth* whereas Spicy Cold does not). This Court has already held that each class member must have Article III standing to be awarded such relief. *See TransUnion LLC v. Ramirez,* 141 S. Ct. 2190, 2208 (2021). "Every class member must have Article III standing in order to recover individual damages." *Id.* ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring))).

As the court below identified, "unnamed members are undeniably parties in the sense that they seek to have an enforceable judgment entered in their favor on their individual claims." R. at 10a. After certification, class action members become

parties to the suit for purposes of adjudicating the merits of the claims and allowing for a judgment to be rendered. *See Smith v. Bayer Corp.,* 564 U.S. 299, 313 (2011). Before a court even considers certification, it must first ensure that its assertion of jurisdiction over those claims is compatible with the defendant's rights under due process. *See Moser v. Benyfytt, Inc.*, 8 F.4th 872 (9th Cir. 2021) (providing if a district court lacked personal jurisdiction it would be inappropriate to certify a class).

The District of Columbia Circuit considered the same issue this Court considers today, yet did not render a decision as to personal jurisdiction requirements concerning the unnamed members of a class action because the class was not certified. *See Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 299 (D.C. Cir. 2020) (requiring class certification prior to determining whether personal jurisdiction exists in putative class actions). However, a persuasive remark originates from the *Molock*; class action party status of absent class members seems to be irrelevant. *Id*. at 307 (Silberman, J., dissenting) ("A court that adjudicates claims asserted on behalf of others in a class action exercises coercive power over a defendant just as much as when it adjudicates claims of named plaintiffs in a mass action."). In essence, if a court adjudicates the claims of putative class members before certification, the court is violating the due process rights of the defendant because the putative claims are not constitutionally before the court. To wit: the court lacks the power to hear those claims.

1. Personal jurisdiction should be treated differently from subject matter jurisdiction and venue.

It is Petitioner's contention that unnamed parties may be "parties for some purposes and not for others." *Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2002). Particularly, this argument is misguidedly based on the notion that unnamed plaintiffs are already not among the consideration whether subject matter jurisdiction exists or whether venue is proper. Therefore, such plaintiffs should not be considered in a determination of personal jurisdiction. *See Mussat*, 953 F.3d at 447 (applying this same rationale). While it is true unnamed putative class members cannot defeat complete diversity in class action litigation, this is not an issue in this particular matter.

2. Nationwide class actions are still protected under this analysis.

Neither Petitioner nor the unnamed members of the putative class action are unduly prejudiced by requiring specific jurisdiction over all the unnamed plaintiffs for two salient reasons: (1) nationwide class action suits are still allowed, perhaps even encouraged, in the states where federal courts may exercise general jurisdiction over the defendant; and (2) Petitioner, on her own, could have brought suit against Mr. Todd in the District of New Tejas.

(i) Unnamed class action members have alternative means to seek judicial relief outside of New Tejas.

First, the plaintiffs are not per se precluded from nationwide class actions if this Court renders a favorable judgment for Respondent. As this Court recognized, plaintiffs can file a consolidated action—as in a nationwide class action—anywhere the defendant is subject to *general personal jurisdiction*. *See Bristol-Myers*, 137 S.

Ct. at 1783 ("Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over [*Bristol-Myers*]."). Meaning the plaintiffs in this suit are not prejudiced, as this same suit would have been entirely appropriate in the West Dakota federal district court, where the application of the federal law involving the TCPA would have been the same.

(ii) Petitioner is not prejudiced in this matter.

Second, because Petitioner took it upon herself to file suit—not only in her own interest—but for a class of all persons throughout the country who received similar calls, she is not prejudiced by the district court granting Mr. Todd's motion to strike the nationwide class allegations. *See* R. at 3a. She certainly is allowed to continue her suit against Mr. Todd in the District of New Tejas as personal jurisdiction exists over her claim. *See* R. at 7a (striking only the nationwide class allegations, not including Petitioner nor New Tejas residents' claims). Her claim, if successful on the merits, could potentially result in a favorable judgment for the judicial relief she seeks. This is a persuasive factor as to why applying *Bristol-Myers* in this matter is not detrimental to the parties involved. In fact, doing so protects the due process notions of all parties as protected by the United States Constitution.

For the foregoing reasons, personal jurisdiction has not been established in this matter. This Court should thus hold the *Bristol-Myers* principles apply in this class action and affirm the holding of the Thirteenth Circuit.

II. PERSONAL JURISDICTION BASED ON AN ALTER EGO THEORY IS DETERMINED UNDER NEW TEJAS STATE LAW.

It is well-established that personal jurisdiction may be either specific or general. When a defendant has "continuous and systematic general business contacts" with a forum state, the court may exercise general jurisdiction over the claim. *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 415 (1984). With respect to corporations—as in the context of this matter—both the state of incorporation and principal place of business are paradigm bases for general jurisdiction. *See Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014)

(noting the two places to determine personal jurisdictions over corporations). Therefore, as a means to grasp for nonexistent personal jurisdiction in this matter, Petitioner contends an alternative method to subject Mr. Todd to the province of the New Tejas federal district court. *See* R. at 5a. She seeks to establish general jurisdiction over Mr. Todd by piercing the corporate veil.[5]

It is undisputed that Mr. Todd, in his *individual capacity*, is not subject to general jurisdiction in New Tejas as he is domiciled in West Dakota. R. at 12a. However, because Petitioner pursues her individual claim and those on behalf of similarly situated plaintiffs—against Mr. Todd himself *rather than* Spicy Cold—this Court must determine whether Mr. Todd could potentially be subject to personal jurisdiction in New Tejas as the alter ego of Spicy Foods.[6] Consequently, Petitioner

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[5] *But see* King Fung Tsang, *The Elephant in the Room: An Empirical Study of Piercing the Corporate Veil in the Jurisdictional Context*, 12 HASTINGS BUS. L.J. 185, 230 (2016) (expressing when a piercing fails accordingly, so too does personal jurisdiction).

[6] It is worth noting that piercing the corporate veil and alter ego liability are neither the same nor identical causes of action. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Aguirre*, 410 F.3d 297, 302 (6th Cir. 2005); *see also Church Joint Venture, L.P. v. Blasingame*, 947

seeks to create general jurisdiction over Mr. Todd only if he were to be considered the alter ego of Spicy Cold—an entity that is already subject to general jurisdiction in New Tejas. R. at 5a.

Courts may exercise an alter ego theory of liability to establish jurisdiction in appropriate actions. *See Patin v. Thoroughbred Power Boats, Inc.*, 294 F.3d 640, 653 (5th Cir. 2002)

("[F]ederal courts have consistently acknowledged that it is compatible with due process . . . to exercise personal jurisdiction over an individual or a corporation that would not ordinarily be subject to personal jurisdiction in that court when the individual or corporation is an alter ego or successor of a corporation that would be subject to personal jurisdiction in that court."). Nonetheless, given the constitutional impediments on the exercise of personal jurisdiction over a defendant, it is critical to correctly apply the appropriate alter ego laws in these contexts.

Controlling here, the cause of action was brought pursuant to the TCPA, giving rise to federal question jurisdiction in the federal district court below, which will be the foundation in the choice of law analysis. R. at 3a. Also controlling, however, is both New Tejas' long-arm statute and alter ego statute, applying to suits involving federal questions. R. at 8a. The court below appropriately utilized these principles

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F.3d 925, 930 (6th Cir. 2020) ("A veil piercing claim seeks to hold a second party liable for another's debt, while an alter ego claim asserts that the two parties should be treated as the same party, so the liability is direct, not vicarious."). However, federal district courts essentially treat these two cause of actions the same and use the same type of analysis for each, thus they are used nearly interchangeably. *See Blasingame*, 947 F.3d at 930; *see also All. for Good Gov't v. Coal. for Better Gov't*, 998 F.3d 661, 682 (5th Cir. 2021) (analyzing corporate veil piercing and alter ego together); *Sea-Land Servs., Inc. v. Pepper Source*, 941 F.2d 519, 523 (7th Cir. 1991) (same).

in applying the New Tejas law; thus, Mr. Todd is not subject to general jurisdiction in New Tejas. R. at 16a. This Court should therefore affirm the holding of the Thirteenth Circuit.

A. IN FEDERAL CHOICE OF LAW CONFLICTS, FEDERAL COURTS APPLY STATE SUBSTANTIVE LAWS.

First and foremost, as the court below identified, a district court exercising federal question jurisdiction must apply federal choice of law rules to determine the applicable *substantive law* when posed with conflicting law circumstances.[7] *See* R. at 14a; *see also Enter. Group Planning, Inc. v. Flaba*, 73 F.3d 361 (6th Cir. 1995). In doing so, courts have identified that federal choice of law rules are based on the *Restatement (Second) of Conflict of Laws*. *See First Cmty. Bank v. Gaughan (In re Miller)*, 853 F.3d 508, 516 (9th Cir. 2017); *see also Eli Lilly do Brasil, Ltda v. Fed. Express Corp.*, 502 F.3d 78, 81 (2d Cir. 2007).

Second, the choice of law analysis is governed by the *Erie* Doctrine, which provides the following: when a federal court is confronted with the issue of whether to apply a state or federal law, courts must apply state substantive laws. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. *There is no federal general common law*.

Id. (emphasis added).

[7] Moreover, even the Federal Tax Court has recognized that federal courts exercising federal question jurisdiction look to state law in specifically determining whether a corporation is the *alter ego* of its owner. *Jenkins v. Commissioner*, 2021 Tax Ct. Memo LEXIS 83, at *24 (T.C. May 10, 2021).

Furthermore, as the foundation of *Erie*, the Rules of Decision Act also requires that—in the absence of a constitutional provision, treaty, or federal statute—a court ought to apply state law where applicable. *See* 28 U.S.C. § 1652. Connoting federal courts are required to apply state law in all cases except where there is an applicable federal law—not federal common law—that speaks to the same issue. *Erie*, 304 U.S. at 78.

Here, while a federal *common law* exists as to an alter ego test, no such theory is attributed to a federal statutory law or constitutional requirement. R. at 5a n1. Therefore, New Tejas' alter ego law must apply in this matter to assess whether Spicy Cold's general jurisdiction may be extended to Mr. Todd, and subsequently, whether liability on the matter exists in Mr. Todd personally. The court below fittingly reached the conclusion that it does not.

1. Alter ego laws are substantive in nature, not procedural, because they establish liability.

As this Court has recognized, piercing the corporate veil is not itself an independent cause of action, "but rather is a means of imposing liability on an underlying cause of action." *Peacock v. Thomas*, 516 U.S. 349, 354 (1996). In addition to this principle, substantive laws are defined as those that create and define the rights, duties, and powers of parties.[8] Thus, a theory of alter ego of a corporation does more than merely establish jurisdiction over a defendant, it also establishes liability on the party. *See generally Flynn v. Greg Anthony Constr. Co.*, 95 F. App'x 726, 738 (6th Cir. 2003) (identifying that once the plaintiffs' pleading was sufficient to present

[8] *See Substantive Law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

a prima facie case of alter ego liability for the defendants, then the district court had personal jurisdiction over the defendants).

Recently, in the Second Circuit, the court undertook an alter ego analysis in a federal question matter to determine whether personal jurisdiction existed in the forum state of New York with respect to a gas company and a foreign sovereign, which was the majority shareholder. *Gater Assets Ltd. v. Moldovagaz*, 2 F.4th 42, 49–50 (2d Cir. 2021). Because of the unique nature of assessing alter egos of foreign sovereigns, the Second Circuit looked to this Court's decision in *National City Bank v. Banco Para El Comercio Exterior De Cuba* (Bancec)—which discussed whether a court could pierce the corporate veil between a corporation and a sovereign for the purpose of imposing liability. *See id.* at 55 (rationalizing its use of *Bancec* for personal jurisdiction purposes because: "the standards set out in that case allow us to assess when a corporate entity may share an identity with the sovereign and therefore lack personhood for the purposes of the Fifth Amendment."); *see also First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 625 (1983). Using the *Bancec* liability standard, the Second Circuit ultimately concluded the gas company, Moldovagaz, was not the alter ego of the Republic of Moldova for purposes of establishing personal jurisdiction because neither entity acted in a way that justified denying Moldovagaz's status "as a corporation juridically separate from the Republic." *Moldovagaz*, 2 F.4th at 66.

Additionally, in a matter concerning application of an alter ego test, the Third Circuit recognized piercing the corporate veil results in impositions of alter ego

liability for purposes of personal jurisdiction. *Mark IV Transp. & Logistics v. Lightning Logistics, Inc.*, 705 F. App'x 103, 108 (3d Cir. 2017). Particularly, the court determined that sharing resources and personnel alone did not gratify the imposition of alter ego liability; thus, the Third Circuit concluded the district court in the matter properly dismissed the claims against the non-liable defendants for lack of personal jurisdiction. *Id.* at 107.

Because applying an alter ego theory to Mr. Todd would affect his legal liabilities and obligations, the law at issue is substantive.[9] Pending liability is evident in this matter as the sole reason Mr. Todd was included in this suit was because of the rebuttable presumption Spicy Cold was "judgment proof." *See* R. at 4a (explaining Petitioner's jurisdictional discovery revealed Mr. Todd had considerable personal wealth). As such, the *Erie* analysis dictates that when a federal court is given the choice to apply federal common law or state substantive laws in a particular proceeding, the state law reigns superior. *Erie*, 304 U.S. at 78 ("Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.").

[9] Notably other circuits also hold that state common law, and not federal common law should govern veil piercing claims. *See Donahey v. Bogle*, 129 F.3d 838, 843 (6th Cir. 1997), *vacated on other grounds,* 524 U.S. 924 (1998), *reinstated,* 16 F. App'x 283 (6th Cir. 2000).

2. Courts can apply alter ego laws based on either the forum state or state of incorporation.

In matters involving alter ego theories as the contingency on a court's assertion of jurisdiction, *state law* is viewed to determine whether and how to pierce the corporate veil. *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 642, 649 (8th Cir. 2003). Particularly, the Eight Circuit recognized this necessary caution in piercing the fiction of a corporate entity. *Id.* Using the Arkansas alter ego laws—only applying when the privilege of transacting business in corporate form has been illegally abused to the injury of a third person that the corporate entities should be disregarded—the Eight Circuit concluded general personal jurisdiction did not exist in the matter. *Id.* at 650.

Furthermore, once the correct decision is made that a court must apply "state law" for alter ego inquiries, a court may apply either the law stemming from the forum state or the state of incorporation of the defendant-entity at issue. Here, however, New Tejas is both the forum state and the state of incorporation for Spicy Cold—making the choice of law decision immaterial as under either test, New Tejas law applies.

(i) A federal court may apply forum state laws in the class action context.

This Court has already recognized in a class action context, courts are allowed to apply *forum law* to the claims of particular plaintiffs in a class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Meaning, the federal district court is permitted to apply the New Tejas alter ego law here. The requirements to do so are as follows:

(1) the forum must have significant contacts with the claims asserted by *each member* of the plaintiff class; (2) these contacts must create state interest in applying forum law; and (3) the application of forum law must not unfairly frustrate the parties' expectations about which law governs their cause of actions. *Id*. at 821–22.

In *Shutts*, the Court was faced with a conflict between Kansas or Texas substantive laws regarding interest liability. *Id.* at 817. The *Shutts* Court decided that the parties did not have any idea that Kansas law, the forum state, would control; therefore, the Court concluded the requirements set forth were not satisfied. *Id.* at 822–23.

In contrast, here, the parties certainly had notice New Tejas law could apply to the suit given: (1) that it was the forum state; (2) the state of incorporation for the entity; and (3) it was the state in which Petitioner and the class action members initiated their suit. *See* R. at 3a. In fact, as the *Shutts* Court posited: "In most cases the plaintiff shows his obvious wish for forum law by filing there." *Id*. at 820.

Additionally, New Tejas has a significant interest in claims brought in their state which require alter ego theories to impose both jurisdiction and liability. If this Court were to hold that a federal common law must apply in situations that require piercing the veil, the principles guiding the laws for New Tejas corporations would be entirely contravened. *See* R. at 6a (describing the reasoning for a stringent New Tejas standard for piercing the veil—which even this Court has repeatedly recognized). Thus, corporations would no longer have an incentive to incorporate in New Tejas, leading to potential economic problems.

(ii) Following the *Restatement (Second) of Conflict of Laws*, the state of incorporation laws are best suited to apply in alter ego cases.

Alter ego theories may also appropriately be governed by the laws of the state of incorporation. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (AM. L. INST. 1971) ("*Restatement*"); *see also Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006) (upholding the federal choice of law approach in following the *Restatement*). The *Restatement* provides in pertinent part:

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

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (AM. L. INST. 1971); *see infra* Appendix C.

An example of the *Restatement* approach can be seen in Wisconsin, where the general rule is that a plaintiff's alter ego theory is governed by the law of the state in which the business at issue is organized. *Rual Trade Ltd. v. Viva Trade LLC*, 549 F. Supp. 2d 1067, 1077 (E.D. Wis. 2008). The reason Wisconsin courts are keen in applying the state of incorporation's law to determine alter ego is because corporations are creatures of state statute; thus, the statute statutory scheme should apply to such creations. *Id.* at 1077–78.

Whichever this Court decides is the appropriate assessment of where to locate the state law, whether forum or state of incorporation, New Tejas alter ego law will

govern for matters of establishing jurisdiction. Federal common law simply does not apply here. Therefore, the court below correctly affirmed the district court's determination that New Tejas law applies in this matter.

B. THE CORPORATE VEIL CANNOT BE PIERCED BECAUSE SPICY COLD WAS INCORPORATED FOR CHIP ENTHUSIASTS, NOT FOR THE SPECIFIC PURPOSE OF DEFRAUDING A SPECIFIC INDIVIDUAL.

States are allowed to create laws governing the incorporations of their entities as they see fit. *See Freedman v. magicJack VocalTec Ltd.*, 963 F.3d 1125, 1132 (11th Cir. 2020) (expressing that corporation law is a creature of state law and such standards create the boundaries within which a corporation must operate both internally and externally). Further, this Court has indicated a presumption that federal courts should incorporate state laws in matters where private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state law standards. *See Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98 (1991) (stating corporate law is one such area).

Applying the New Tejas alter ego law, Mr. Todd cannot be found to be the alter ego of Spicy Cold. Particularly, the standard for piercing the corporate veil of a New Tejas corporation requires that the "company have been incorporated for the *specific purpose of defrauding* a specific individual." R. at 6a. (emphasis added). That is certainly not the case here. In fact, Mr. Todd genuinely believed there was a market for people who enjoyed both the spiciness and numbness of a potato chip snack. R. at 2a. As such, he purposefully incorporated Spicy Cold in 2015 in New Tejas—a state that is amenable and deferential to corporate forms. R. at 2a, 6a.

At no point during Spicy Cold's advertising did the company participate in any action that would defraud a specific individual. For purposes of assessing alter ego, defrauding may be outlined as causing injury or loss to a person by deceit or tricking a person in order to get money.[10] There was no trick here; Mr. Todd truly aspired that people try a chip with a kick.

Moreover, utilizing fraud for purposes of establishing an alter ego theory of liability is a well-established practice.[11] In fact, the State of Texas has similar laws in which courts are allowed to pierce the corporate veil in various scenarios, including when a corporate fiction is used as a means of perpetrating fraud. *See Ledford v. Keen*, 9 F.4th 335, 339 (5th Cir. 2021).

Recently, the Fifth Circuit applied Texas alter ego laws to a case involving a barrel-racing horse accident at a Texas Rodeo. *Id*. After filing suit and during discovery, the plaintiff learned one of the defendants, a rodeo operator, historically maintained a low checking balance. *Id*. at 337. Concerned about a potential judgment, the plaintiff added in the directors to the suit, hoping to impose liability by piercing the corporate veil. *Id*. Finding no evidence of fraud perpetration, the Fifth Circuit concluded the evidence presented was not sufficient to pierce the rodeo operator's corporate veil based solely on undercapitalization. *Id*. at 341–42.

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[10] *See Defraud*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[11] *See* Sam F. Halabi, *Veil-Piercing's Procedure*, 67 RUTGERS U. L. REV. 1001, 1012 (2015) ("Closely identified with fraud, veil-piercing lends itself to the heightened standards of pleading demanded by the Federal Rules of Civil Procedure and many state procedural systems, the latter of which also regularly enhance evidentiary burdens for fraud claims. Within this procedural context, judges balance legislative admonitions to safeguard corporate-shareholder separation with their own institutional interests in protecting equitable powers as well as equally potent constitutional norms favoring jury determinations of fact.").

The same determination must be applied here. Petitioner may not pierce Spicy Cold's corporate veil merely because the company was undercapitalized for the creative enterprise it took on. R. at 5a. Therefore, general jurisdiction does not exist in this matter because Mr. Todd is not the alter ego of Spicy Cold under the New Tejas law. Admittingly, Petitioner concedes she cannot satisfy such applicable standard. R. at 6a. This court should therefore affirm the Thirteenth Circuit's conclusion under New Tejas law.

C. APPLYING STATE ALTER EGO LAWS WOULD NOT LEAD TO FORUM SHOPPING OR INJUSTICE FOR SIMILARLY SITUATED PLAINTIFFS.

This Court's decision will not have bearing on future alter ego claims where a choice of law inquiry is required. Here, moreover, the twin aims of choice of law assessments are not burdened. In creating choice of law principles, the *Erie* Court contemplated the need to reduce the risk of (1) forum shopping; and (2) injustice. *See Hanna v. Plumer*, 380 U.S. 460, 468 (1965) ("The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the *Erie* rule: d*iscouragement of forum-shopping and avoidance of inequitable administration of the law*." (emphasis added)); *see also* 17A MOORE'S FEDERAL PRACTICE - CIVIL § 124.01 (2021) (same).

1. Forum shopping will not be an issue because Petitioner is the one who chose New Tejas federal court.

Here, these concerns are not at issue for one primary reason: Petitioner chose the state and forum where the state substantive laws were not in her favor. *See* R. at 3a (stating that in 2018 Petitioner filed suit in the district court of New Tejas).

Perhaps a showing of forum shopping would be more evident if Petitioner chose a state that could easily and readily pierce Spicy Cold's corporate veil—this did not occur. In contrast, Spicy Foods—and entities in general—would suffer injustices if courts were to apply federal common law to establish alter ego requirements because it would contravene the purpose and planning undertaken by a corporation in incorporating their business in a state with the expectation that those laws will govern their liabilities.

2. Not piercing the veil is important to protect corporate defendants reasonable expectations of liability.

Courts should not headfirst walk into piercing the corporate veil and imposing personal liability on individuals, absent a compelling reason. "Courts will pierce the corporate veil only when there is a showing that the corporation was formed for "a fraudulent, illegal[,] or unjust purpose." *Arrow, Edelstein & Gross, P.C. v. Rosco Prods., Inc.*, 581 F. Supp. 520, 525 n.20 (S.D.N.Y. 1984) (quoting *Mysels v. Barry*, 332 So. 2d 38, 40 (Fla. Dist. Ct. App. 1976)); *see also Vantage View, Inc. v. Bali East Development Corp.*, 421 So. 2d 728, 734–35 n.7 (Fla. Dist. Ct. App. 1982).

Further, as a creature of state law, states often interpret veil piercing to require that, "the corporate form has been used as part of a basically unfair device to achieve an inequitable result." *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 454 (Tex. 2008) (quoting *Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986)); *see also* Val D. Ricks, *Fraud is Now Legal in Texas (For Some People)*,

8 TEX. A&M L. REV. 1, 28–29 (2020) (noting the requirements under Texas law for corporate veil piercing liability).[12]

Therefore, this Court should affirm the holding of the Thirteenth Circuit because the New Tejas alter ego law does not impose generally jurisdiction over Mr. Todd.

CONCLUSION AND PRAYER

For the forgoing reasons, Respondent respectfully request this Court affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit granting the order striking the nationwide class action for lack of personal jurisdiction.

Respectfully submitted this 23rd day of November 2021.

/s/ Team 83
Team 83
Counsel for Respondent

[12] *See also* Colin P. Marks, *Piercing the Fiduciary Veil*, 19 LEWIS & CLARK L. REV. 73, 97–98 (2015) ("Piercing the corporate veil is another equitable theory frequently asserted by plaintiffs to attach liability to the owners of a corporation for the wrongs suffered at the hands of the corporation when the assets of the corporation are insufficient to make the plaintiff whole.").

APPENDIX A:

Telephone Consumer Protection Act, 47 U.S.C. § 227 (2018)

§ 227. Restrictions on use of telephone equipment

(b) Restrictions on use of automated telephone equipment

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 . . . 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, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, or is exempted by rule or order by the Commission under paragraph (2)(B).

APPENDIX B:

Federal Rules of Civil Procedure, Rule 23

Rule 23. Class Actions

(c)(1)(A) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(d)(1) Conducting the Action.

In conducting an action under this rule, the court may issue orders that . . . require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or deal with similar procedural matters.

(f) Appeals.

A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1) . . . .

APPENDIX C:

Restatement (Second) of Conflict of Laws (1971)

§ 302 Other Issues with Respect to Powers and Liabilities of a Corporation

(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.