No. 20–1434

IN THE

Supreme Court of the United States

GANSEVOORT COLE, individually and on behalf of all other similarly situated individuals,
Petitioner,

v.

LANCELOT TODD,
Respondent.

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

BRIEF FOR RESPONDENT

TEAM 88

November 15, 2021

QUESTIONS PRESENTED

1. Whether a court with specific personal jurisdiction to adjudicate the claims of a class representative can bind an out-of-state defendant for the claims of the whole class, even when there is no connection between those claims and the defendant's contacts with the forum state.

2. Whether state alter ego law should be supplanted by a federal common law rule to subject an out-of-state defendant to general personal jurisdiction.

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JURISDICTION

The Thirteenth Circuit issued its decision on May 10, 2020. R. at 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Lancelot Todd, a small business owner and entrepreneur, is the founder and sole shareholder of Spicy Cold Foods, Inc. ("Spicy Cold"). R. at 2a. Todd is a resident of West Dakota, which is also Spicy Cold's sole place of business. *Id.* at 1a. Spicy Cold, incorporated in New Tejas, makes and sells potato chips flavored with a proprietary numbing spice. *Id.* at 2a–3a. In 2018, Gansevoort Cole, a New Tejas resident, commenced a class action in federal court in the district of New Tejas alleging that Todd and Spicy Cold violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, by making advertising calls using an automatic dialing system without her prior consent. *Id.* at 3a. The proposed class is defined to include Cole and "all persons in the country who received similar calls." *Id.* Cole sued Todd in his personal capacity, in part, to ensure recovery if she prevails and Spicy Cold cannot pay a judgement. *Id.* at 4a.

After jurisdictional discovery, Todd moved to strike the nationwide class allegations for lack of personal jurisdiction. *Id.* While Todd does not contest general jurisdiction over Spicy Cold, he asserts that the class cannot proceed as defined

because the New Tejas district court does not have (1) specific personal jurisdiction over him with respect to the claims of the out-of-state class members, or (2) general jurisdiction over him such that the out-of-state class claims are proper. *Id.*

Cole has two theories as to how the District of New Tejas can assert personal jurisdiction over Todd with respect to the out-of-state class claims. First, she argues that specific personal jurisdiction as to the named representative's claim in a nationwide class action is sufficient to confer jurisdiction over a defendant as to all other class claims. *Id.* at 4a. Second, and in the alternative, she argues that the New Tejas district court can exercise general jurisdiction over Todd with respect to all class claims because he is the alter ego of Spicy Cold. *Id.* at 5a. In connection with her second theory, Cole further argues that the district court should look to a federal common law test, and not New Tejas corporate law, to determine whether Todd is the alter ego of Spicy Cold. The parties agree that general jurisdiction over Todd turns on which alter ego test applies. Todd is not Spicy Cold's alter ego under New Tejas law; but under the federal test, he is. *Id.* at 6a.

The district court rejected both of Cole's theories of jurisdiction and granted Todd's Motion to Strike Class Allegations. *Id.* at 7a. The Thirteenth Circuit affirmed on appeal. *Id.* at 2a.

SUMMARY OF ARGUMENT

Cole's procedural woes are a problem of her own making. Rather than bring suit in an appropriate forum, Petitioner asks this Court to set aside foundational

principles of both personal jurisdiction and the preemption of state law as a matter of convenience. There is no reason to do so.

I. The New Tejas district court cannot exert specific personal jurisdiction over Todd. Well-settled principles of personal jurisdiction instruct that jurisdiction is only appropriate if a plaintiff's claim arises from or relates to defendant's contacts with the forum state. Here, it is undisputed that the out-of-state plaintiffs' claims do not relate to Todd's contacts with New Tejas. The out-of-state plaintiffs' only connection to the forum state is that they assert the same claims as in-state plaintiffs. This Court has previously deemed these very facts insufficient to confer personal jurisdiction. In *Bristol-Myers Squibb Co.*, this Court found no jurisdiction over out-of-state plaintiffs' claims that lacked a connection to the defendant's contacts with the forum state, California.

The logic and holding of *Bristol-Myers Squibb Co.* necessarily control here. While Cole attempts to evade the rational application of *Bristol-Myers Squibb Co.* by noting that this case 1) takes place in federal court and 2) involves a class (as opposed to a mass) action, neither compels a departure from this Court's precedent. First, the New Tejas district court's jurisdiction only reaches as far as New Tejas state courts, and since those state courts must follow *Bristol-Myers Squibb Co.*, so too must the federal court. Second, class actions are not distinct enough from mass actions as to warrant a new standard of personal jurisdiction. Even if they were, Cole's new standard would impermissibly privilege class action plaintiffs in violation of the Rules Enabling Act and abridge defendants' due process rights. Finally, adhering to

Bristol-Myers Squibb Co. would not preclude out-of-state plaintiffs from suing Todd in other courts that can lawfully exercise jurisdiction over him. Therefore, the New Tejas district court cannot have specific personal jurisdiction over the out-of-state plaintiffs' claims.

II. Cole's alter ego theory of general jurisdiction fails, too. This Court repeatedly has cautioned against the preemption of state law by federal common law rules in areas like corporate law that are traditionally dominated by the states. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98 (1991). Absent a substantial federal interest in adopting a federal common law rule in this particular case, New Tejas alter ego law controls whether or not Todd is subject to the general jurisdiction of the district court.

No overriding federal interest exists here. Federal courts' personal jurisdiction already varies according to forum state law in federal question cases because their jurisdiction is coextensive with that of state courts. And when Congress sees a need to deviate from this norm under a particular statute, it untethers the jurisdiction of federal courts from state court rules by authorizing nationwide service of process. Congress did not do so under the TCPA because nationally uniform jurisdictional rules are not necessary to further the objective of the statute—regulating automated nuisance calls, which states regulate too.

Incorporating New Tejas alter ego law in this case will not frustrate the substantive objectives of the TCPA. The statute's private right of action expressly acknowledges that TCPA suits will be brought in state court and that jurisdictional

issues will be governed by state law. Thus, to argue that applying New Tejas law to the jurisdictional question here frustrates statutory objectives would contradict the text of the TCPA itself. Abiding by New Tejas alter ego law will not even affect the parties' substantive rights or liabilities under the statute. The alter ego determination will affect only whether this particular plaintiff class can sue this particular defendant in this particular district court. It will not affect Cole's ability to recover from Todd or Todd's liability under the TCPA.

What preempting New Tejas law *would* do is interfere with business relationships and expectations predicated on a traditional area of state law. Upending corporate law principles to apply a federal common law rule is particularly disfavored because instead of providing stability and predictability across jurisdictions, it "infuse[s] corporate decisionmaking with uncertainty." *Kamen*, 500 U.S. at 105. Todd incorporated Spicy Cold in New Tejas with the expectation that state law would determine his liability as a shareholder. Todd's reasonable expectations and New Tejas' reasonable law should not be cast aside to facilitate Cole's nationwide class action.

ARGUMENT

This Court should grant Todd's Motion to Strike Class Allegations. The standard applied to a motion to strike is the "'mirror image' of the standard applied to a Rule 12(b)(6) motion." *Ruggles v. Wellpoint, Inc.*, 253 F.R.D. 61, 65 (N.D.N.Y. 2008); *see also Brown v. Seebach*, 763 F. Supp. 574, 583 (S.D. Fla. 1991) ("A motion to strike can be treated as a motion to dismiss for failure to state a claim upon which

relief could be granted."). Since the plaintiff bears the burden of establishing personal jurisdiction when defendants move to dismiss, plaintiff's burden also applies when defendants move to strike. *Carpenter v. PetSmart, Inc.*, 441 F. Supp. 3d 1028, 1032 (S.D. Cal. 2020). "[T]he court may strike class allegations if the complaint plainly reflects that a class action cannot be maintained." *Roberts v. Wyndham Int'l, Inc.*, 12-CV-5083, 2012 WL 6001459, at *3 (N.D. Cal. Nov. 30, 2012); *see also Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011) (holding that it is proper to strike class allegations when "a largely legal determination" defeats plaintiffs' claims "and no proffered or potential factual development offers any hope of altering that conclusion"). For the reasons set forth below, the district court properly struck the class allegations for lack of personal jurisdiction.

I. TODD'S MOTION TO STRIKE CLASS ALLEGATIONS IS PROPER.

As a threshold matter, Todd's Motion to Strike Class Allegations for lack of personal jurisdiction is proper and timely. Had he instead brought a motion to dismiss for lack of personal jurisdiction before the class was certified, that motion would be premature. *Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 298 (D.C. Cir. 2020) (explaining that a "decision purporting to dismiss putative class members before [certification] would be purely advisory"). But at the pleading stage, a motion to strike under Rule 23(d)(1)(D) or Rule 12(f) is appropriate. *Stacker v. Intellisource, LLC*, 20-2581, 2021 WL 2646444, at *11 (D. Kan. June 28, 2021). "[I]f a [defendant] believes that a court would lack personal jurisdiction for the claims of out-of-state members of the putative class, 'the proper procedural move is to file a motion to strike the

nationwide class allegations.'" *Lyngaas v. Ag*, 992 F.3d 412, 445 (6th Cir. 2021) (Thapur, J., concurring) (quoting *Penikila v. Sergeant's Pet Care Prod. LLC*, 442 F. Supp. 3d 1212, 1214 (N.D. Cal. 2020)); *see also Stacker*, 2021 WL 2646444, at *11 (striking class allegations "because [the class] could include claims of class members that have no connection to [the forum state] and would be subject to dismissal due to lack of personal jurisdiction").

Granting this meritorious motion to strike conserves judicial resources by weeding out claims that, by law, the New Tejas district court cannot adjudicate. Striking the class allegations at this stage also ensures that the out-of-state defendant need not jump through the hoops of "extensive class discovery" when the class is already uncertifiable. *Lyngaas*, 992 F.3d at 445 (Thapur, J., concurring). This Court has recognized that class action claims immensely burden a defendant. "[I]t's also well known that [class actions] can unfairly 'plac[e] pressure on the defendant to settle even unmeritorious claims.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (Ginsburg, J., dissenting)). This fear is even more acute for a small business owner like Todd. Courts that refuse to entertain motions to strike class allegations based on personal jurisdiction arguments until the class is certified do a disservice to the court system and defendants. *Simon v. Ultimate Fitness Grp. LLC*, 19 CIV. 890 (CM), 2019 WL 4382204, at *4 (S.D.N.Y. Aug. 19, 2019) (collecting cases). Granting relief through this motion to strike class allegations is both possible and advisable.

II. THE NEW TEJAS DISTRICT COURT LACKS SPECIFIC PERSONAL JURISDICTION OVER THE CLAIMS OF THE OUT-OF-STATE PLAINTIFFS.

A. The New Tejas District Court Cannot Assert Specific Personal Jurisdiction Over Todd Because Exercising Jurisdiction Would Violate the Requirements of Federal Due Process.

Personal jurisdiction "limits the power of a . . . court to render a valid personal judgment against a nonresident defendant." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). If the statute at issue does not authorize nationwide service of process, a federal court's jurisdiction is co-extensive with the jurisdiction of a state court in the state where that district court sits. Fed. R. Civ. P. 4(k)(1)(A); *see Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) ("Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons."). In turn, the jurisdiction of a state court is authorized by that forum state's long-arm statute. *See CFA Inst. v. Inst. of Chartered Fin. Analysts of India*, 551 F.3d 285, 292 (4th Cir. 2009) (noting that "the forum state's long-arm statute must authorize the exercise of . . . personal jurisdiction"). Pertinent here, a long-arm statute may authorize jurisdiction extending to the outer bounds permitted by the Constitution. When a state court's jurisdiction meets its constitutional limit, "the determination of personal jurisdiction compresses into a due process assessment." *Aviles v. Kunkle*, 978 F.2d 201, 204 (5th Cir. 1992).

In sum, "[i]n order to determine whether the Federal District Court in this case [is] authorized to exercise jurisdiction over [Todd], we ask whether the exercise of jurisdiction 'comports with the limits imposed by federal due process' on the State of

[New Tejas]." *Walden v. Fiore*, 571 U.S. 277, 283 (2014); *see also Daimler AG*, 571 U.S. at 125 ("[The forum state's] long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution. We therefore inquire whether [permitting that court's jurisdiction] comports with the limits imposed by federal due process.").

1. Federal Due Process Requires That the Out-of-State Plaintiffs' Claims Arise from Todd's Contacts with New Tejas.

Due process limitations safeguard a nonresident like Todd from a forum state's potential overreach. "Due process requirements are satisfied when *in personam* jurisdiction is asserted over a nonresident . . . defendant that has 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 (1984) [hereinafter *Helicopteros*] (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Federal due process ensures that a potential defendant, like Todd, is insulated from the coercive power of a court that has no authority to bind him. "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985) (quoting *International Shoe Co.*, 326 U.S. at 319). These limits on a court's exercise of personal jurisdiction provide predictability by "allow[ing] potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

A court can exert two types of personal jurisdiction: general or specific. An individual is subject to general jurisdiction where he is domiciled, and a corporation is subject to such jurisdiction where it is "at home." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). General jurisdiction allows the court to hear "any claim against the defendant, even if all the incidents underlying the claim occurred in a different State." *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cnty.*, 137 S. Ct. 1773, 1780 (2017) [hereinafter *BMS*].

Because Todd is not a resident of New Tejas, a New Tejas court may only assert specific jurisdiction over him if the controversy arose from his contacts with the forum state. Specific jurisdiction is available only when there exists a connection between the defendant's contacts with the forum state and the "underlying controversy." *Id.* at 1781 (quoting *Goodyear*, 564 U.S. at 919). The critical inquiry is "whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp.*, 471 U.S. at 474 (quoting *International Shoe Co.*, 326 U.S. at 316). "General connections with the forum" are insufficient to establish specific jurisdiction when those connections are unrelated to the claims at issue. *BMS*, 137 S. Ct. at 1781. Rather, "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy" at the heart of the suit. *Goodyear*, 564 U.S. at 919 (internal quotation marks omitted). "When a controversy is related to or 'arises out of' a defendant's contacts with the forum," then specific jurisdiction may be appropriate. *Helicopteros*, 466 U.S. at 414 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). In other words, "[t]he exercise of specific jurisdiction thus 'depends

on in-state activity that gave rise to the episode-in-suit.'" *In re Dental Supplies Antitrust Litig.*, 16CIV696BMCGRB, 2017 WL 4217115, at *8 (E.D.N.Y. Sept. 20, 2017) (quoting *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 331 (2d Cir. 2016)).

In *BMS*, this Court found no personal jurisdiction because the out-of-state plaintiffs' claims did not arise from the defendant's contacts with the forum state. 137 S. Ct. at 1777. In that case, over 600 plaintiffs joined together in a mass action and sued Bristol-Myers Squibb, a pharmaceutical company, alleging that a medication it manufactured and sold harmed their health. *Id.* at 1778. Bristol-Myers Squibb contested the California state court's jurisdiction over the 592 plaintiffs who were not California residents. *Id.*

The California court lacked specific jurisdiction because the out-of-state plaintiffs could not articulate a connection between *their* claims and Bristol-Myers Squibb's contacts with California. The out-of-state plaintiffs did not receive their prescriptions for the drug in California, did not buy the drug in California, did not take the drug in California, and were not injured in California. *Id.* at 1781. "The mere fact that other plaintiffs were prescribed, obtained, and ingested [the medication] in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims." *Id.* at 1781. "What is needed—and what is missing here—is a connection between the forum and the specific claims at issue." *Id.* at 1781. Since "all" of Bristol-Myers Squibb's potentially tortious conduct occurred out-of-state for the out-of-state

plaintiffs, California courts had no specific jurisdiction over Bristol-Myers Squibb. *Id.* at 1782. Accordingly, based on *BMS*, a connection between New Tejas and the out-of-state plaintiffs' claims against Todd must exist for a New Tejas court to exercise specific jurisdiction over those claims.

2. Since the Out-of-State Plaintiffs' Claims Do Not Arise from Todd's Contacts with the Forum State, a New Tejas Court Cannot Exert Jurisdiction over Todd.

Here, the out-of-state plaintiffs are identically situated with the out-of-state plaintiffs in *BMS*. The out-of-state plaintiffs did not receive any unsolicited messages in New Tejas, did not listen to any messages in New Tejas, and were not harmed in New Tejas. Likewise, in *BMS*, the out-of-state plaintiffs did not receive their prescriptions for the drug in California, did not buy the drug in California, did not take the drug in California, and were not injured in California. *Id.* at 1781. Only the in-state plaintiffs were allegedly injured in New Tejas. Since the alleged conduct giving rise to the out-of-state plaintiffs' claims occurred out-of-state, their claims fatally "lack a nexus" to Todd's contacts with New Tejas. *In re Dental Supplies Antitrust Litig.*, 2017 WL 4217115, at *9. It makes no difference that the out-of-state plaintiffs make the same claims as the in-state plaintiffs. "The mere fact" that out-of-state plaintiffs allegedly share an injury with Cole, who did suffer injury in the forum state, "does not allow the State to assert specific jurisdiction over the nonresidents' claims." *BMS*, 137 S. Ct. at 1781.

Petitioner attempts to distinguish their situation from *BMS* by noting that this case 1) takes place in federal court and 2) involves a class (as opposed to a mass)

action. Neither of these characteristics require this Court to abandon the "settled principles regarding specific jurisdiction" upon which *BMS* rested. *Id.* at 1781. Therefore, the New Tejas district court cannot exercise specific jurisdiction over the out-of-state plaintiffs' claims.

B. *Bristol-Myers Squibb* Applies in Federal Court.

1. *Bristol-Myers Squibb* Applies to the District Court Because Its Jurisdiction Is Co-Extensive with New Tejas State Courts.

This Court in *BMS* left open whether its holding would apply to a case in federal court. 137 S. Ct. at 1783–84 (explaining that "since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court"). The weight of authority since that decision applies *BMS* to cases in federal court. *See Napoli-Bosse v. Gen. Motors LLC*, 453 F. Supp. 3d 536, 541 (D. Conn. 2020) (noting that "the vast majority of district courts to have addressed the question have concluded that *Bristol-Myers* does govern actions in federal courts"). When a plaintiff's claim is based on a federal statute which does not provide for nationwide service of process and a state's long-arm statute extends to the outer bounds of the Constitution, a federal court sitting in that state has the same jurisdictional reach as a state court. Under these circumstances, the scope of the federal court's jurisdiction is identical to that of a state court. Therefore, the rule of *BMS*—which involved a state court—would apply with equal force in federal court.

The key difference between a federal and state court's exercise of jurisdiction is that in federal court, the Fifth Amendment's Due Process Clause ultimately constrains the court, whereas for the state court, the Fourteenth Amendment does. In practice, however, Congress has circumscribed a federal court's jurisdiction more narrowly by linking it to the forum state's jurisdiction. Rule 4(k)(1) of the Federal Rules of Civil Procedure mandates that a district court only has personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. R. Civ. P. 4(k)(1)(A). Therefore, a federal court's ability to exert personal jurisdiction is functionally equivalent to that of the forum state in most circumstances. *See Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) ("Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons.").

Since the TCPA does not authorize nationwide service of process, the New Tejas district court's jurisdictional reach is identical to that of a New Tejas state court. 47 U.S.C. § 227; *see Napoli-Bosse*, 453 F. Supp. 3d at 542 ("Courts apply the Fourteenth Amendment's specific jurisdiction analysis . . . in federal question cases where the relevant statute has not authorized nationwide service."). The New Tejas state court's jurisdictional reach is, in turn, authorized by New Tejas' long-arm statute, which extends jurisdiction to the constitutional limit. R. at 8a. When plaintiff's "claim is based on the TCPA, which does not provide for nationwide service of process, and [the forum state's] long-arm statute extends personal jurisdiction to the full limits of the due process clause, the Court's focus is solely on whether the

exercise of its jurisdiction in this case satisfies federal due process requirements." *Casso's Wellness Store & Gym, L.L.C. v. Spectrum Lab'y Prods., Inc.*, CV 17-2161, 2018 WL 1377608, at *4 (E.D. La. Mar. 19, 2018).

Since the New Tejas district court's jurisdiction only reaches as far as New Tejas state courts, and those state courts must follow *BMS*, so too must the federal court. A federal court cannot have jurisdiction over claims that cannot be brought in state court because their jurisdiction is co-extensive. Federal courts have thus adhered to *BMS*. *See, e.g.*, *Maclin v. Reliable Reps. of Tex., Inc.*, No. 17-CV-2612, 2018 WL 1468821 (N.D. Ohio Mar. 26, 2018) (finding that *BMS* applied to federal courts in a federal question case); *Gazzillo v. Ply Gem Indus., Inc.*, 117CV1077MADCFH, 2018 WL 5253050, at *7 (N.D.N.Y. Oct. 22, 2018) (same).

2. The Constitutional Constraints on Jurisdiction for Both State and Federal Courts Serve the Common Purpose of Protecting the Out-of-State Defendant.

Attempts to distinguish a federal and state court's jurisdiction based on their underlying constitutional provisions misunderstand their united purpose. Though the jurisdiction of federal courts stems from a different constitutional provision than that of state courts, the Due Process Clauses of the Fifth and Fourteenth Amendments have the same principal objective: protecting out-of-state defendants. "[T]he 'primary concern'" in "determining whether personal jurisdiction [is] present . . . is 'the burden on the defendant.'" *BMS*, 137 S. Ct. at 1780 (quoting *World-Wide Volkswagen*, 444 U.S. at 292). This regard for defendants' fundamental rights does not evaporate depending on whether they are haled into a federal or state court.

The argument that the Fourteenth Amendment primarily serves to promote federalism is belied by this Court's pronouncements to the contrary. "Although [the Fourteenth Amendment] operates to restrict state power, it 'must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause' rather than as a function 'of federalism concerns.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.13 (1985) (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03, n.10 (1982)); *see also J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 899 (2011) (Ginsburg, J., dissenting) ("The constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty."). While there is "an element of federalism" in personal jurisdiction requirements of state courts, the Due Process clause, which "is the only source of the personal jurisdiction requirement[,] . . . makes no mention of federalism concerns." *Ins. Corp. of Ir.*, 456 U.S. at 702–03, n.10 (1982). If federalism was the real motivation for restraining a state court's assertion of jurisdiction, then personal jurisdiction would be unwaivable because "[i]ndividual actions cannot change the powers of sovereignty." *Id.* The Due Process Clause "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Id.* at 702. Not only is the New Tejas district court's reach identical to a New Tejas state court in this instance, but the underlying rationale for their jurisdiction is also the same. Therefore, the limitations on jurisdiction set forth in *BMS* likewise apply to the New Tejas district court.

C. *Bristol-Myers Squibb* Applies to Class Actions.

In *BMS*, the Court left open whether its holding would also apply to a class action. 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting). In response, lower courts have reached inconsistent results. *See* 2 *Newberg on Class Actions* § 6:26 & nn.46-51; *see also Molock v. Whole Foods Mkt., Inc.*, 317 F. Supp. 3d 1, 5 (D.D.C. 2018) (noting that "there is a near even split" on whether *BMS* applies in the class action context). Some courts depart from *BMS*, concluding that they have jurisdiction over the claims of out-of-state plaintiffs against an out-of-state defendant. *See, e.g.*, *Simon v. Ultimate Fitness Grp., LLC*, 19 CIV. 890, 2019 WL 4382204, at *4 (S.D.N.Y. Aug. 19, 2019) (collecting cases). Other courts following *BMS* determine that they do not have personal jurisdiction over the out-of-state defendant. *See, e.g.*, *Wenokur v. AXA Equitable Life Ins. Co.*, No. CV-17-00165, 2017 WL 4357916, at *4 n.4 (D. Ariz. 2017); *Chizniak v. CertainTeed Corp.*, 117CV1075FJSATB, 2020 WL 495129, at *5 (N.D.N.Y. Jan. 30, 2020); *Carpenter v. PetSmart, Inc.*, 441 F. Supp. 3d 1028, 1035 (S.D. Cal. 2020); *In re Dental Supplies Antitrust Litig.*, 16CIV696, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017); *In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d 711, 723 (E.D. Mo. 2019). The latter line of cases stands on firmer ground. First, class actions are sufficiently similar to mass actions such that the same jurisdictional rules should apply to both. Second, class actions cannot enlarge the rights of plaintiffs without running afoul of the Rules Enabling Act. Third, applying *BMS* would not affect the status of the nationwide class action in any way that justifies avoidance of this Court's precedent.

1. Class and Mass Actions Are Not Distinct Enough to Warrant Opposing Jurisdictional Standards.

The argument that *BMS* cannot apply to the instant case because it is a class action is untenable. Courts that have abandoned the teachings of *BMS* draw too great a distinction between mass and class actions. The result is detrimental. Defendants are prejudiced and plaintiffs are impermissibly privileged. Plaintiffs' rights are substantially enlarged simply by virtue of filing as a class, thereby violating the Rules Enabling Act. The out-of-state defendant's due process rights are infringed upon because Rule 23 of the Federal Rules of Civil Procedure cannot adequately protect the defendant from the coercive power of a court that has no authority to bind them.

Long-standing principles of personal jurisdiction cannot be discarded simply because plaintiffs are united as a class. While the plaintiffs in *BMS* were joined in a mass action, the Court did not cabin its opinion to plaintiffs in mass actions. Rather, it left the question of its application to a class action setting open. *BMS*, 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting). "That the Supreme Court did not consider whether its holding in *Bristol-Myers Squibb* would apply to class actions is hardly supportive of a holding that it does not apply to class actions." *Carpenter*, 441 F. Supp. 3d at 1035. In the wake of *BMS*, courts facing analogous cases in the class action context have found its rationale "instructive." *Gazzillo*, 2018 WL 5253050, at *7; *see also Spratley v. FCA US LLC*, No. 17-CV-0062, 2017 WL 4023348, at *6 (N.D.N.Y. Sept. 12, 2017) (rejecting jurisdiction over out-of-state class action plaintiffs when "the Supreme Court recently rejected this very theory of personal jurisdiction" in *BMS*).

Though the Court did not expressly decide that out-of-state plaintiffs in a class action need to meet the same requirements as those in a mass action to establish personal jurisdiction, "logic dictates" that the same requirements hold. *Molock*, 952 F.3d at 306 (Silberman, J., dissenting). As a matter of logic and consistency, a plethora of district courts have applied the rule of *BMS* in the class action context. *See, e.g.*, *Chizniak*, 2020 WL 495129, at *5; *In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d at 723 (holding that the "Court agrees with several courts in the Northern District of Illinois which have held that *BMS* applies with equal force in the class action context"); *Wenokur*, 2017 WL 4357916, at *4 n.4; *Carpenter*, 441 F. Supp. 3d at 1035; *In re Dental Supplies Antitrust Litig.*, 2017 WL 4217115, at *9; *Spratley*, 2017 WL 4023348, at *7; *Gazzillo*, 2018 WL 5253050, at *7. This interpretation best understands the nature of class actions, protects an out-of-state defendant's due process rights, and equalizes the rights of mass and class action plaintiffs.

Class and mass actions are not so distinct as to warrant strikingly differential treatment. Class and mass actions are two procedural devices for plaintiffs to join their claims. "[L]ike the mass action in *Bristol-Myers*, a class action is just a species of joinder." *Molock*, 952 F.3d at 306 (Silberman, J., dissenting). This Court has explained that a class action, a type of traditional joinder, "merely enables a federal court to adjudicate claims of multiple parties at once." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). Class actions "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they

alter only how the claims are processed." *Id.* Given the similarities between class and mass actions, there is no reason for the two joinder devices to have different jurisdictional rules that would lead to disparate burdens on defendants.

2. Class Action Requirements Do Not Adequately Protect Out-of-State Defendants.

That Rule 23 applies to class actions, but not to mass actions, does not mean that it is equipped or adequate to protect an out-of-state defendant. The argument that class actions better protect defendants misunderstands and misrepresents the purpose of Rule 23.

The purposes of Rule 23 and personal jurisdiction are misaligned. The Rule 23 requirements are largely plaintiff-focused, while personal jurisdiction is defendant-focused. Rule 23 requires the plaintiff class to show, among other things, numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a). These "procedural safeguards . . . are meant primarily to protect the absent class members and create criteria for binding the absent class members to whatever settlement or judgment results from a class action." *Carpenter*, 441 F. Supp. 3d at 1037; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (describing Rule 23(a) and (b) as "the standards set for the protection of absent class members"); *Sikes v. Am. Tel. and Tel. Co.*, 841 F. Supp. 1572, 1578 (S.D. Ga. 1993) (explaining that Rule 23 "afford[s] protection to absent class members from the possible risk of named class representatives using the class action device for their own personal gain"). Conversely, the "primary concern" of the personal jurisdiction requirement is the protection of the defendant. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286,

292 (1980). The misalignment between the purposes of Rule 23 and personal jurisdiction forecloses the possibility that class action requirements are an adequate replacement.

Moreover, the Rule 23 requirements do not function to insulate an out-of-state defendant from the coercive power of a court in the forum state. Instead, Rule 23 ensures that unlike claims are not bundled in with the class by requiring "sufficient similarity between [plaintiffs'] claims." *Molock*, 952 F.3d at 308 (Silberman, J., dissenting). "But . . . using the 'similarity' of claims to relax the standards of personal jurisdiction was one of the mistakes that the state court made in *Bristol-Myers*." *Id.* *BMS* "explained that even where the claims at issue are similar, limits on personal jurisdiction guard against more than just inconvenience for a defendant." *Id.* "The fact that [class action] claims involve common questions of fact and law and could be certified as a class action under Rule 23 do not make Defendant's due process rights 'vanish.'" *Stacker v. Intellisource LLC*, 20-2581, 2021 WL 2646444, at *10 (D. Kan. June 28, 2021) (quoting *Lyngaas*, 992 F.3d at 441 (Thapur, J., concurring)). For these reasons, it is erroneous to conclude that the Rule 23 requirements serve as an "adequate substitute for normal principles of personal jurisdiction." *Id.*

3. Expanding the Substantive Rights of Class Action Plaintiffs Would Violate the Rules Enabling Act and Curtail Defendants' Due Process Rights.

Cole asks this Court to arbitrarily privilege class action plaintiffs by affording them rights that mass action plaintiffs do not have. One jurisdictional standard would apply to out-of-state plaintiffs in a mass action, and another, more lenient

standard would apply to out-of-state plaintiffs in a class action. Such a rule would allow class members to sue in a forum that they are not otherwise entitled to. This would elevate the class action above the mass action, granting class plaintiffs access to courts that mass action plaintiffs do not have. Class action plaintiffs cannot justifiably have such an inflated status. *See* 1 *Newberg on Class Actions* § 1:1 ("Rule 23 is . . . fundamentally a procedural device: it cannot ordinarily be construed to extend . . . the jurisdiction . . . of federal courts.").

This Court has recognized that the Rules Enabling Act prohibits procedural devices like class actions from enlarging any substantive right. *Amchem Prods., Inc.*, 521 U.S. at 613; *see also In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 191 (1st Cir. 2009) (explaining that Rule 23 "may not be used to 'abridge, enlarge or modify any substantive right'"). "When a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result." *Shady Grove Orthopedic Assocs., P.A.*, 559 U.S. at 422–23 (2010) (Stevens, J., concurring). Here, Cole requests this impermissible result: by virtue of a procedural device (the class action), out-of-state plaintiffs are not subject to the traditional strictures of personal jurisdiction. But for this class action device, the plaintiffs' situation would be identical to the out-of-state plaintiffs in *BMS*, for whom the court lacked personal jurisdiction. In other words, Plaintiffs assert that "[a]s long as the court has jurisdiction to adjudicate the claims of the class representative, it can bind the defendant for the claims of the whole class. That position means that a class action gives a court the

power to exceed its ordinary jurisdictional reach." *Lyngaas*, 992 F.3d at 441 (Thapar, J., concurring). The class action cannot provide "a license for courts to enter judgments on claims over which they have no power." *Molock*, 952 F.3d at 307 (Silberman, J., dissenting).

Not only would Cole's proposed rule expand the class' substantive rights—it would do so at the expense of Todd's rights. Such a rule would upset the Court's current balance between the interests of plaintiffs and defendants in class actions. *See*, *e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (describing stronger protections for absent defendants than absent class plaintiffs). In the class action context, "[a] defendant's due process interests are even more acute than those of absent class members." *Stacker*, 2021 WL 2646444, at *9 (internal quotations marks omitted). The rights of defendants cannot be subsumed by class members without disturbing settled principles of class actions.

Whether a defendant is subject to a mass or class action suit does not alter their fundamental right to due process. "The constitutional requirements of due process do[] not wax and wane when the complaint is individual or on behalf of a class." *In re Dental Supplies Antitrust Litig.*, 2017 WL 4217115, at *9; *see also Chufen Chen v. Dunkin' Brands, Inc.*, 17CV3808, 2018 WL 9346682, at *5 (E.D.N.Y. Sept. 17, 2018), *aff'd* 954 F.3d 492 (2d Cir. 2020) ("From a constitutional perspective, the Court sees no meaningful difference between the plaintiffs of a mass tort action and the named plaintiffs of a class action."). Abridging defendants' constitutional rights based on something as arbitrary as plaintiffs' particular species of joinder is unjust.

Applying *BMS* here ensures consistency and predictability across plaintiff actions. "[P]rocedural tools like class actions and mass actions are not an exception to ordinary principles of personal jurisdiction." *Molock*, 952 F.3d at 310 (Silberman, J., dissenting). This uniformity promotes the guiding principle that jurisdictional rules "should be simple, easily ascertainable and predictable." *Livnat v. Palestinian Auth.*, 851 F.3d 45, 56 (D.C. Cir. 2017) (internal quotation marks and citation omitted). This predictability serves plaintiffs by pointing them towards "at least one clear and certain forum," and also serves defendants by giving them fair notice of where they are subject to suit. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). Therefore, absent "compelling justification for developing a new personal-jurisdiction doctrine," this Court should remain consistent in its jurisprudence. *Livnat*, 851 F.3d at 56.

4. Applying *Bristol-Myers Squibb* Here Would Not Harm Nationwide Class Actions.

Applying *BMS* to this case will not eradicate nationwide class actions. This Court has stressed that adherence to the rules of personal jurisdiction "will not result in [a] parade of horribles." *BMS*, 137 S. Ct. at 1783. The same holds true when the rule of *BMS* applies in the class action context. *Lyngaas*, 992 F.3d at 444 (Thapar, J., concurring) (stating that the application of *BMS* to class actions will "[c]ertainly not" kill the class action).

There remain multiple avenues for class plaintiffs to seek redress. Plaintiffs can sue a defendant where they are subject to general jurisdiction. *BMS*, 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 [defendant].”). Plaintiffs can also sue “in their own respective states.” *Id. BMS* “does not prevent [plaintiffs] from bringing a nationwide class action[,] . . . it merely requires that [they] file it in a jurisdiction where [the defendant] is subject to general personal jurisdiction.” *Carpenter*, 441 F. Supp. 3d at 1037 (S.D. Cal. 2020). Therefore, while applying *BMS* here may shift *where* class actions are filed, it would not ultimately reduce the total number of class actions. *Id.* at 1038. Conversely, to rule in Plaintiffs’ favor “would fundamentally alter the existing landscape of personal jurisdiction jurisprudence, including *Bristol-Myers Squibb* itself.” *Id.* at 1037.

Finally, on the slim chance that the rule of *BMS* proves unworkable, Congress can act. *See Lyngaas*, 992 F.3d at 444 (Thapar, J., concurring) (noting that Congress has amended Rule 4 in the past and can do so again). It is Congress, not the Constitution, that has narrowed the jurisdiction of federal district courts. *See Sec. Inv’r Prot. Corp. v. Vigman*, 764 F.2d 1309, 1315 (9th Cir. 1985) (“The Constitution does not require the federal districts to follow state boundaries.”). Therefore, congressional action would be sufficient to exempt class actions or federal courts from the rule of *BMS* should the legislature believe that is the best way forward. Until then, a federal court’s jurisdiction is limited to that of the state in which it sits. This congressional intent must be respected and followed.

III. THE DISTRICT COURT CANNOT ASSERT GENERAL JURISDICTION OVER TODD BECAUSE NEW TEJAS ALTER EGO LAW CONTROLS.

The New Tejas District Court does not have jurisdiction to hear out-of-state class claims against Todd because he is not the alter ego of Spicy Cold under New

Tejas law. The Thirteenth Circuit's judgment below rested upon a run-of-the-mill choice-of-law analysis. R. at 14a–16a. The Court of Appeals referenced the Restatement Second of Conflict of Laws and applied the law of the state of incorporation, New Tejas. R. at 16a; *see Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006) ("Federal common law follows the approach outlined in the Restatement (Second) of Conflicts of Laws."); Restatement (Second) of Conflict of Laws § 302 (1971) (instructing courts to adopt the alter ego law of the state of incorporation). This is an adequate basis on which to resolve this case.

This Court, however, has developed a more nuanced analysis that squarely addresses the question presented here: when a federal court hearing a federal statutory claim should pre-empt state law with a federal common law rule to decide a question on which the federal statute is silent. *See United States v. Kimbell Foods*, 440 U.S. 715 (1979); *cf.* 19 Wright & Miller, *Federal Practice and Procedure* § 4514 (3d ed. 2021) (noting that federal common law issues concern both choice of law and pre-emption doctrines). On either theory of the case, Todd prevails.

A. *Kimbell Foods* Governs Whether New Tejas Alter Ego Law Should Be Displaced by a Federal Common Law Rule.

New Tejas law should supply the federal rule of decision in this case. While federal law governs in cases arising under a federal statute, *see Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 (1991), "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law," *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 85 (1994). *Cf. Kimbell Foods*, 440 U.S. at 728 ("Controversies directly affecting the operations of federal programs, although governed by federal

law, do not inevitably require resort to uniform federal rules." (citing *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943))). "[T]he [Supreme] Court has assumed that, when Congress creates a tort action," as it did with the TCPA, "it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003). Unless there is some reason to do otherwise, federal courts look to state law to fill in the gaps when hearing federal statutory claims. *See Mardan Corp. v. C.G.C. Music*, 804 F.2d 1454, 1457 (9th Cir. 1986) ("[A]lthough federal law governs, state law should be incorporated to provide the content of that federal law.").

With this foundational principle in mind, courts first consider whether there is clear congressional intent to either incorporate or displace state law as the federal rule of decision. *See, e.g.*, *Mardan Corp.*, 804 F.2d at 1458 ("[T]he predominant consideration must be Congressional intent. . . ."); *V.K.K. Corp. v. NFL*, 244 F.3d 114, 122 (2d Cir. 2001) ("The first guide . . . is the congressional intent underlying the federal statute involved."). The text of the TCPA does not provide express instructions as to whether federal or state law should govern issues of jurisdiction that turn on corporate law principles. 47 U.S.C. § 227; *cf. Thomas v. Taco Bell Corp.*, 879 F. Supp. 2d 1079, 1084 (C.D. Cal. 2012) (noting that there is no "clear expression of Congressional intent" regarding what law governs vicarious liability issues under the TCPA).

In the absence of clear congressional intent, there is a presumption against preempting applicable state law to "fashion a nationwide federal rule." *Kimbell*

Foods, 440 U.S. at 728; *see O'Melveny & Myers*, 512 U.S. at 85. In *Kimbell Foods*, this Court laid out a three-part test to determine when to displace applicable state law with a federal common law rule of decision: (1) whether there is a need for a nationally uniform body of law; (2) whether the "application of state law would frustrate specific objectives" of the federal statute; and (3) "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." *Id.* Under the *Kimbell Foods* test, New Tejas law should control whether or not the district court can properly exercise general personal jurisdiction over Todd as the alter ego of Spicy Cold.

B. A Uniform National Rule for Jurisdictional Alter Ego Analysis Is Unnecessary Under the TCPA.

The first *Kimbell Foods* factor weighs against adopting a federal rule because there is no need for a nationally uniform rule of alter ego for jurisdiction in TCPA cases. Cases that justify "special federal rule[s]" are "few and restricted." *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 87 (1994) (quoting *Wheeldin v. Wheeler*, 373 U.S 647, 651 (1963)). "[E]ven if the federal question involves the scope of a federal statutory right or the interpretation of . . . a federal statute," federal courts need not establish a uniform federal rule of decision. *Mardan Corp.*, 804 F.2d at 1457–58. Rather, federal courts "should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards." *Kamen*, 500 U.S. at 98.

A uniform rule is unnecessary here because (1) federal courts already look to state law to decide questions of personal jurisdiction, (2) Congress could have, but did

not, extend the jurisdictional reach of federal courts hearing TCPA cases, and (3) the regulatory scheme of the TCPA is distinguishable from those for which federal courts have adopted uniform national rules.

1. Federal Courts Already Look to State Law to Establish Personal Jurisdiction in Federal Question Cases.

Adopting a uniform federal common law rule for determining personal jurisdiction in a federal question case runs against the prevailing practice of federal courts. *See Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) ("Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons."); *Spiegel v. Schulmann*, 604, F.3d 72, 76 (2d Cir. 2010) ("A district court's personal jurisdiction is determined by the law of the state in which the court is located."). Federal Rule of Civil Procedure 4(k)(1)(A) provides that in federal courts, proper service can establish personal jurisdiction over an individual "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Thus, according to both federal practice and federal rules, federal courts apply state law to establish personal jurisdiction over individuals when hearing federal claims.

That the New Tejas District Court's personal jurisdiction over Todd turns on a substantive question of corporate law does not compel a departure from the usual practice of deferring to the jurisdiction of state courts. Numerous federal courts already rely on state alter ego or veil-piercing doctrines with respect to personal jurisdiction in TCPA cases, indicating that adopting state law rules does not hamper enforcement under the statute. *See, e.g.*, *Lyngaas v. Curaden AG*, 992 F.3d 412, 420

(6th Cir. 2021) (applying Michigan law); *Fitzhenry v. Ushealth Grp., Inc.*, No. 2:15-CV-03062-DCN, 2016 WL 319958, at *4 (D.S.C. Jan. 27, 2016) (applying South Carolina law); *United States ex rel. Bibby v. Mortg. Invs. Corp.*, No. 1:12-CV-4020, 2016 WL 11268258, at *8 (N.D. Ga. Aug. 12, 2016) (applying Georgia law), *aff'd in relevant part* 987 F.3d 1340, 1354–55 (11th Cir. 2021); *Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 434 (4th Cir. 2011) (applying Virginia law); *Thomas v. Taco Bell Corp.*, 879 F. Supp. 2d 1079, 1084–85 (C.D. Cal 2012) (applying California law), *aff'd* 582 F. App'x 678 (9th Cir. 2014). While some courts have adopted a more permissive alter ego standard for jurisdictional purposes, they often do so in accordance with the law of the relevant forum state. *See, e.g.*, *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, No. 14 Civ. 6228, 2021 WL 3371938, at *12 (S.D.N.Y. Aug. 3, 2021) (applying Pennsylvania law, which has a lower alter ego standard for personal jurisdiction, in the Multi-District Litigation context); *In re Platinum & Palladium Antitrust Litig.*, No. 14-cv-9391, 2017 WL 1169626, at *47 (S.D.N.Y. Mar. 28, 2017) (noting that the law of New York, the forum state, has a lower alter ego standard for personal jurisdiction).

It is inappropriate to adopt a federal common law rule as a matter of convenience or to overcome a minority state rule. In *O'Melveny & Myers*, this Court declined to adopt a federal common law rule of decision in place of a state law concerning the rights and liabilities of the Federal Deposit Insurance Corporation ("FDIC") when acting as the receiver of a federally insured bank. 512 U.S. 79, 88 (1994). The FDIC argued that the California law at issue varied substantially from

the majority rule in at least 43 other jurisdictions and advocated for a federal common law rule that corresponded to the rule that would "independently be adopted by most jurisdictions." *Id.* at 84. The Court found that state law governed, and further noted that "[i]f there were a federal common law rule . . . we see no reason why it would necessarily conform to that independently adopted by most jurisdictions." *Id.* (internal quotation marks omitted). While the FDIC's proffered rule may have "facilitate[d] nationwide litigation" of such suits by "reducing uncertainty," that was insufficient to justify displacing state law. If a state law's facilitation of litigation under a federal statute were sufficient to compel the adoption of federal common law, the Court warned, "we would be awash in federal common-law rules." *Id.* at 88–89 (internal quotation marks omitted) (cautioning against the "dangers of [a] facile approach to federal-common-law-making").

2. Congress Could Have, But Did Not, Create a Uniform Jurisdictional Rule for Federal Courts Hearing TCPA Claims.

When Congress sees a need for federal district courts to exercise personal jurisdiction uniformly and without regard to forum state rules, it provides for nationwide service of process. Under Federal Rule of Civil Procedure 4(k)(1)(C), Congress can extend the jurisdictional reach of federal courts by authorizing nationwide service of process, which allows for personal jurisdiction over defendants based on their contacts with the United States as a whole, rather than with an individual state or territory. *See* 16 Moore's Federal Practice § 108.123(b)(i) (2021) ("Nationwide service statutes are effective to subject defendants to jurisdiction in federal court in some cases in which they are not subject to jurisdiction in state

courts."); *Fitzsimmons v. Barton*, 589 F.2d 330, 332–35 (7th Cir. 1979) (finding contacts with the United States sufficient to sustain personal jurisdiction over an out-of-state defendant under a nationwide service of process provision). Congress authorized nationwide service under the Securities and Exchange Act of 1934, 15 U.S.C. § 78aa, the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1965, and the Clayton Act, 28 U.S.C. § 1391, to name a few.

Congress declined to allow nationwide service of process under the TCPA, choosing to link personal jurisdiction in federal courts to the rules of the relevant forum state. *See* 47 U.S.C. § 227; *Bilek v. Fed. Ins. Co.*, 8 F.4th 581, 589 (7th Cir. 2021) (noting that the TCPA "does not authorize nationwide service of process"). This Court has interpreted Congress's choice not to provide for nationwide service of process to militate against a district court's assertion of personal jurisdiction beyond applicable state rules. *See Omni Cap. Int'l., Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 106–07 (1987) ("It would appear that Congress knows how to authorize nationwide service of process when it wants to provide for it."). Federal courts hearing TCPA claims recognize that their jurisdiction is limited by forum state rules. *See Bilek*, 8 F.4th at 589 (finding that "a federal court . . . [could] exercise jurisdiction . . . only if authorized *both* by [state] law and by the United States Constitution" (emphasis added, internal quotation omitted)). Congress did not see a need under the TCPA for a uniform national rule for personal jurisdiction, and one should not be adopted here.

3. The TCPA Is Distinguishable from Zones of Federal Regulation That *Do* Warrant a Uniform National Rule.

Federal regulations under the TCPA do not form a comprehensive statutory scheme in furtherance of uniquely federal interests such that uniform national rules are needed to facilitate statutory enforcement. Federal courts have adopted federal common law rules to fill in the gaps of federal statutes only in limited circumstances. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1989) ("[F]ew areas[] involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced . . . by federal law of a content prescribed . . . by the courts—so-called 'federal common law.'" (citation omitted)).

Helpful examples of areas governed almost exclusively by federal law are regulations under ERISA and federal labor law. *See Bd. of Trusts., Sheet Metal Workers' Nat'l Pension Fund v. Courtad, Inc.*, No. 5:12-v-2738, 2014 WL 3613383, at *4 (N.D. Ohio July 18, 2014) (noting that "[o]utside of labor law or ERISA claims, courts tend not to supplant state corporate liability doctrine with federal common law"). Both statutes have "broad preemptive force," *McCleskey v. SWG Plastering,* LLC, 897 F.3d 899, 901–02 (7th Cir. 2018), requiring uniform national standards.

ERISA aims to standardize the administration of benefit plans on a national scale to make "benefits promised by an employer more secure." *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 320–21 (2016). ERISA contains a comprehensive pre-emption provision stating that ERISA "supersede[s] *any and all* State laws" to the extent that they "relate to any employee benefit plan" described in the statute. *Id.* at

138 (emphasis added) (quoting 29 U.S.C. § 1144(a)); *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45–46 (1987) ("[The] pre-emption provisions of ERISA are deliberately expansive, and designed to establish pension plan regulation as *exclusively a federal concern*." (emphasis added, internal quotation and citation omitted)). The need for uniform national rules under ERISA was clear. *Pilot Life Ins. Co.*, 481 U.S. at 56 ("[I]t was intended that a body of Federal substantive law [would] be developed by the courts to deal with issues [relating to ERISA]." (internal quotation marks omitted) (quoting 120 Cong. Rec. 29942 (remarks of Sen. Javits))). "Requiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators—burdens ultimately borne by the beneficiaries." *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 149–50 (2001) (quoting *Ingersoll-Rand Co.*, 498 U.S. 133, 142 (1990)).

ERISA's pre-emption provision was modeled on an analogous one in the Labor Management Relations Act ("LMRA"), which similarly "displaced all state law claims." *Ingersoll-Rand Co.*, 489 U.S. at 144–45; *see* 29 U.S.C. § 185(a). The LMRA "peculiarly . . . calls for uniform law" because "[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence on both the negotiation and administration of collective agreements." *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103–04 (1962) (internal quotation and citation omitted).

In sharp contrast, the TCPA was passed to supplement, not supplant, state-law regulation of intrusive nuisance calls. *See Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 370–71 (2012) (noting that Congress enacted the TCPA to allow plaintiffs to sue *interstate* violators that otherwise "were escaping state-law prohibitions"). The text of the TCPA itself explicitly allows state legislatures to enact more stringent restrictions on regulated activity under the statute. *See* 47 U.S.C. § 227(f)(1) ("[N]othing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on [activity regulated under the TCPA]."). Thus, Congress explicitly *invited* states to share the field of regulation under the TCPA, as opposed to *precluding* state regulation as it did in the ERISA and federal labor law contexts. The text of the TCPA makes clear that the statute does not regulate an area of "uniquely federal interest" such that uniform rules are needed to effectuate the statute. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

C. New Tejas Alter Ego Law Does Not Frustrate the Federal Objectives of the TCPA.

The second step of the *Kimbell Foods* test instructs courts to consider whether the "application of state law would frustrate specific objectives of the federal program[]." *United States v. Kimbell Foods*, 440 U.S. 715, 728 (1979). Adopting New Tejas' alter ego law will not frustrate the federal objectives of the TCPA because: (1) adopting state law actually furthers the objectives of the TCPA, which explicitly

defers to state jurisdictional rules, and (2) the law of alter ego for jurisdictional purposes does not affect substantive rights or liabilities under the TCPA.

1. The TCPA's Text Explicitly Contemplates that Jurisdiction Will Turn on State Law.

Congress excluded a nationwide service of process provision in the TCPA but specifically *included* language deferring to state jurisdictional rules. The text of the TCPA's private right of action reads as follows:

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

47 U.S.C. § 227(b)(3). The language of the private right of action expressly contemplates that TCPA claims would be litigated in the context of "the laws or rules of court of a State" and in "an appropriate court of that State." *Id.* This Court has recognized that the language of the TCPA is "uniquely state-court oriented." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 380 (2012). And until 2012, twenty-one years after Congress passed the TCPA in 1991, there was a circuit split as to whether or not federal courts could adjudicate TCPA claims at all because the text of the private right of action implied the exclusive jurisdiction of state courts, and by extension, the application of state jurisdictional rules. *Mims*, 565 U.S. at 376 (describing the circuit split on this issue). While the *Mims* court determined that federal courts have

concurrent, federal-question jurisdiction over TCPA claims, the text of the statute, and its dominant interpretation in federal courts, indicate that the application of state law for jurisdictional purposes furthers, rather than frustrates, federal statutory objectives. To argue otherwise contradicts the plain text of the statute.

2. New Tejas Alter Ego Law Will Not Affect Parties' Substantive Rights or Liabilities Under the TCPA.

Applying New Tejas alter ego law for jurisdictional purposes does not conflict with federal policy interests because it will determine only whether Todd is subject to general jurisdiction in New Tejas, and not whether or to what extent he is liable under the TCPA. A "significant conflict between some federal policy or interest and the use of state law" is "uniformly . . . a precondition for recognition of a federal rule of decision." *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 87 (1994) (internal quotation marks omitted) (citing *Wallis v. Pan. Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)). But, "[a] statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978). Rather, a substantial conflict arises when a state law is "unreasonable," or "specific[ally] aberrant or hostile" to the federal interest involved. *Burks v. Lasker*, 441 U.S. 471, 479–80 (1979); *see also Bd. of Cnty. Comm'rs v. United States*, 308 U.S. 343, 350 (1939) (indicating that the crux of the conflict inquiry is to prevent states from "destroying the federal right").

Courts have found such conflicts where state law alters substantive rights under a federal statute. *Cf. United States v. Texas*, 507 U.S. 529, 534 (1993) ("[T]o abrogate a common-law principle, the statute must 'speak directly' to the question

addressed by the common law." (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978))). For example, in *United States v. Little Lake Misere Land Co.*, the Supreme Court found a conflict where a Louisiana state rule nullified the terms of a reservation of mineral rights on lands acquired by the United States under the Migratory Bird Conservation Act ("MBCA"), 16 U.S.C. § 715 *et seq*. 412 U.S. 580 (1973). Although state law ordinarily governed the interpretation of federal land acquisitions under the MBCA, *id.* at 590, application of the Louisiana rule amounted to "state abrogation of the explicit terms of a federal land acquisition" and would "deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act," *id.* at 597 (noting that certainty and finality are indispensable in any land transaction, and especially so when the federal fisc is footing the bill). Such a rule was "plainly hostile" to the federal interests involved. *Id.*

The Court engaged in a similar analysis in *De Sylva v. Ballentine* but did not find a state law conflict. 351 U.S. 570 (1956). *De Sylva* concerned the rights of an author's "child" to renew copyrights under the Copyright Act, 17 U.S.C. § 24. *Id.* at 581. The Court held that state property law would govern whether an illegitimate child was a "child," or heir, for purposes of the renewal right under the act. *Id*. The Court was clear to point out that its choice to adopt state law was case specific. *Id.* A different case might lead to a different result if the applicable state law defined "children" in a manner that ran against the purposes of the provision—allowing heirs to renew copyrights—and would lead to an unreasonable result. *Id.*

Unlike in *Little Lake Misere Land Co.* and *De Sylva*, the adoption of New Tejas alter ego law does not touch, and therefore does not abrogate or stymie, substantive federal statutory rights or liabilities—it simply determines whether Todd is subject to general jurisdiction in New Tejas District Court. Alter ego theories are unnecessary under the TCPA because the statute explicitly provides for suits against individual violators. *See* 47 U.S.C. § 227(b)(1)(A) (assigning civil liability to "any *person*" who violates the statute (emphasis added)). Thus, plaintiffs do not need alter ego theories to hold individuals accountable for corporate actions that violate the TCPA. Adopting New Tejas alter ego law will not insulate Todd and Spicy Cold from liability under the TCPA. Cole can sue Todd under the TCPA in New Tejas as an individual or as a statewide class. She could also sue Todd under the TCPA in West Dakota, where he is domiciled, individually, or as a nationwide class. She could also sue Todd under the TCPA individually, or as an appropriately defined class, in any another jurisdiction for which he meets the constitutional minima for personal jurisdiction. Congress further provided for *parens patriae* actions to be brought in federal court by the chief legal officer of a state—or other state official—under section 227(e)(6) of the TCPA.

A federal common law rule is not necessary to protect federal objectives in this case because the application of New Tejas alter ego law will not abrogate, destroy, or frustrate the private rights or liabilities created under the TCPA. The federal interest might have been threatened if the state rule effectively precluded Cole's ability to enforce the TCPA against Todd—but it does not.

D. In Addition to Being Unnecessary, a Federal Common Law Rule Would Upend Expectations Predicated on a Traditional Area of State Law.

The third and final step of the *Kimbell Foods* test asks whether adopting a federal rule would "disrupt commercial relationships predicated on state law." *United States v. Kimbell Foods*, 440 U.S. 715, 728–29 (1979). This prong attempts to strike a balance between federal and state zones of regulation. The "presumption in favor of state law" is based on "the inner logic of federalism, the substantive advantages of local solutions to local problems, the protection of important substantive state policies, and the order and certainty of well[-]developed bodies of state law." 19 C. Wright & A. Miller, *Federal Practice and Procedure* § 4514 (3d ed. 2021); *see also Columbia Gas Transmission Corp. v. Exclusive Nat'l Gas Storage Easement*, 962 F.2d 1192, 1196 (6th Cir. 1992) ("[Supreme Court] precedent suggests an inclination to adopt state law as the federal standard where a private party brings a federal cause of action implicating areas of traditionally state concern."). The degree to which displacing state law will interfere with an area traditionally subject to state control—and upset expectations predicated on state law—is an essential component of the *Kimbell Foods* test.

"Corporate law is overwhelmingly the province of the states." *Marsh v. Rosenbloom*, 499 F.3d 165, 176 (2d Cir. 2007); *see also Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 98–99 (1991) ("Corporations . . . are creatures of state law. . . ."). States have an interest in maintaining stability and predictability in their economies through the effectuation of their corporate laws. "[D]ue regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as

a matter of doctrinaire localism but as a promoter of democracy" counsels against pre-empting state corporate law principles when unnecessary to further a singularly federal interest. *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243 (1959)). While federal statutory law is binding on the states, "Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based on a federal statute." *Burks v. Lasker*, 441 U.S. 471, 478 (1979).

In *Kamen*, the Court considered whether to adopt a federal demand requirement in derivative actions brought under the Investment Company Act ("ICA"), 15 U.S.C. § 80a-1(a), or to use applicable state corporate law to determine if demand on the board of directors was required. 500 U.S. 90, 92 (1991). The Court rejected the call to create a uniform demand requirement under the ICA, finding that a uniform rule would "infuse corporate decisionmaking with uncertainty" and disrupt the expectations of corporate actors as to their powers and liabilities. *Id.* at 105 (noting that the uncertainty created by adopting a federal rule would multiply if a plaintiff brought both federal and state claims in the same case, leaving federal claims to be resolved under federal law and state claims under state law). Adopting a federal rule of alter ego here would risk creating exactly the kind of disruption warned against by this Court in *Kamen.*

Rather than providing uniformity and predictability, pre-empting New Tejas alter ego law would create uncertainty for corporate actors like Todd and upset expectations formed in reliance on state law. The Supreme Court has recognized that

under the *Kimbell Foods* analysis, "the presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Id.* at 98. "Corporations law is one such area" of traditional state concern. *Kamen*, 500 U.S. at 98; *accord United States v. Gen. Battery Corp.*, 423 F.3d 294, 299 (3d Cir. 2005) ("The displacement of state law is particularly disfavored in the area of corporate law, because business decisions typically proceed in reliance on the applicable state standards.").

Todd chose to incorporate Spicy Cold in New Tejas with the rational expectation that its laws would govern his "rights and obligations" as a corporate shareholder. *Kamen*, 500 U.S. at 98. Such "economic decisions" are "critical to society," and "best made in a climate of relative certainty and reasonable predictability." *Polius v. Clark Equip. Co.*, 802 F.2d 75, 83 (3d Cir. 1986). Absent a state law's substantial conflict with federal interests or its leading to an unreasonable result in a particular case, disrupting reasonable expectations like Todd's that are predicated on state law is sharply disfavored. *See Mardan Corp. v. C.G.C. Music*, 804 F.2d 1454, 1460 (9th Cir. 1986) ("In fashioning a statute to further a federal interest, Congress seldom if ever intends to pursue that interest at any cost.").

There is no substantial federal interest in providing a federal common law rule to govern jurisdictional alter ego theory in this case. Accordingly, the New Tejas district court cannot exercise general personal jurisdiction over Todd with respect to the out-of-state class claims.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,
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Counsel for Respondent

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