No. 19-5309

IN THE
SUPREME COURT OF THE UNITED STATES

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

Petitioner,

v.

LANCELOT TODD,

Respondent.

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

BRIEF FOR PETITIONER

Team No. 94
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether, in a class action, a court must evaluate personal jurisdiction with respect to the claims of every individual class member, or simply for the representative parties.

II. Whether, with respect to a claim arising under federal law, personal jurisdiction based on an alter ego theory is determined under federal law as opposed to state law.

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The opinions issued by the United States Court of Appeals for the Thirteenth Circuit are unreported but are reprinted in the Record. Pet. App. 1a–22a. The United States District Court for the District of New Tejas's ruling granting Respondent's motion to strike the class allegations is unreported but is discussed in the Thirteenth Circuit's ruling.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Thirteenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1292(e) and issued its decision on May 10, 2020. Gansevoort Cole filed a Petition for a Writ of Certiorari, which was granted on October 4, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the use of 47 U.S.C. § 227 and 28 U.S.C. § 2072, as well as the construction and application of Rules 4 and 23 of the Federal Rules of Civil Procedure. These statutes and rules are reproduced in pertinent part in the Appendix along with the relevant constitutional provisions, the Fifth and Fourteenth Amendments to the United States Constitution. U.S. Const. amend. V, XIV.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Lancelot Todd ("Mr. Todd") is no stranger to capitalist ventures. As an entrepreneur, Mr. Todd is well-known for his work with the Vettura automobile and the Khaki Khomfort Trench Bench. Pet. App. 2a. Spicy Cold Foods, Inc. ("Spicy Cold") is simply the latest enterprise in a line of Mr. Todd's investments. Pet. App. 2a. In

2015, Mr. Todd purchased the rights to "spicy cold" flavoring, which formed both the foundation and namesake of his corporation. Pet. App. 2a. Mr. Todd structured Spicy Cold without a board of directors, and he personally owns all the corporation's shares. Pet. App. 2a. In effect, Mr. Todd is not just the sole owner and operator—he is the only one responsible for Spicy Cold. Pet. App. 2a.

As a corporation Spicy Cold has no significant assets. Pet. App. 4a. Mr. Todd, however, has considerable personal wealth. Pet. App. 4a. Any profits earned by the corporation are immediately transferred to the private accounts of Mr. Todd to fund his personal expenditures. Pet. App. 4a, 5a. This has left Spicy Cold's bank account significantly underfunded. Pet. App. 5a. In fact, Spicy Cold does not even own the property on which it stands. Pet. App. 4a. The corporation leases its West Dakota property from Mr. Todd. Pet. App. 3a, 4a.

Although West Dakota is Spicy Cold's principal place of business, and Mr. Todd's domicile, Mr. Todd chose to incorporate Spicy Cold under the laws of New Tejas. Pet. App. 2a, 3a. To attract business, New Tejas crafted laws of incorporation that are extraordinarily deferential to corporate entities and include stringent requirements for piercing the corporate veil. Pet. App. 2a, 6a. In order to hold an individual responsible for the actions of their corporation, New Tejas law "requires that the company have been incorporated for the specific purpose of defrauding a specific individual." Pet. App. 6a.

Mr. Todd originally incorporated Spicy Cold to commercialize his "spicy cold" products. Pet. App. 2a. To advertise on a nationwide scale, Mr. Todd used an "automatic telephone dialing system" to call consumers on their cellular and

residential lines with a prerecorded message. Pet. App. 2a, 3a. This automated system contacted Gansevoort Cole ("Mrs. Cole") at least ten times. Pet. App. 3a. Mrs. Cole does not have a business relationship with Spicy Cold and did not consent to receive telephone advertisements from either Mr. Todd or Spicy Cold. Pet. App. 3a.

II. PROCEDURAL HISTORY

In 2018, Mrs. Cole filed a class action suit in the United States District Court for the District of New Tejas against both Spicy Cold and Mr. Todd for violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Pet. App. 3a. Mrs. Cole sued as the representative of the nationwide class consisting of every individual who received calls from Mr. Todd's automatic dialing system. Pet. App. 3a. While Mrs. Cole is a resident of New Tejas, the class includes individual residents of other states. Pet. App. 3a. Mr. Todd moved to strike the nationwide class allegations on the theory that the New Tejas court lacked specific jurisdiction over the claims[1] of the out-of-state residents. Pet. App. 4a.

Mrs. Cole asserted two theories by which New Tejas could exercise personal jurisdiction over the claims. Pet. App. 4a. First, specific jurisdiction need only be established over the claims of the class representative, Mrs. Cole. Pet. App. 4a.

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[1] As the Thirteenth Circuit has pointed out, the language used to describe personal jurisdiction can often become convoluted. To avoid confusion, this brief will follow the lead of both this Court and the Thirteenth Circuit in using the phrase "specific jurisdiction over a claim," when referring to specific personal jurisdiction over Mr. Todd with respect to the claims of out-of-state class members. Pet. App. 7a, n.3.

Second, and in the alternative, under the federal common law test Mr. Todd is the alter ego of Spicy Cold which subjects him to general jurisdiction in New Tejas, Spicy Cold's state of incorporation. Pet. App. 5a.

Mr. Todd counters that because Spicy Cold is incorporated in New Tejas, the test for alter ego should be controlled by New Tejas law. Pet. App. 6a. Both parties concede, and the district court found as a matter of fact, that if the federal common law test controls, Mr. Todd would be the alter ego of Spicy Cold, and thus subject to general jurisdiction. Pet. App. 6a. The reverse is also undisputed: if New Tejas law controls, Mr. Todd would not be considered the alter ego of Spicy Cold. Pet. App. 6a.

The district court ultimately rejected Mrs. Cole's arguments and granted Mr. Todd's motion to strike the nationwide class allegations. Pet. App. 7a. Mrs. Cole filed a petition for interlocutory appeal under Rule 23(f), which was granted by the Court of Appeals for the Thirteenth Circuit. Pet. App. 7a. The Thirteenth Circuit issued its Opinion on May 10, 2020, affirming the district court's ruling. Pet. App. 1a. Mrs. Cole then petitioned this Court for a writ of certiorari, which this Court granted on October 4, 2021. R. at 1.

SUMMARY OF THE ARGUMENT

This case concerns the analysis of personal jurisdiction in the context of class action suits. This Court should reverse the Thirteenth Circuit's opinion and remand the suit to the district court for trial because it erred on two levels of personal jurisdiction analysis: first, the court erroneously held that specific jurisdiction must be evaluated for the unnamed class members in a class action suit; and second, the

court improperly determined that federal choice of law would require a state law to control in a federal question case.

I. PERSONAL JURISDICTION NEED ONLY BE EVALUATED WITH RESPECT TO THE NAMED CLASS MEMBERS.

In the context of class actions as formed under Federal Rule of Civil Procedure 23, it does not violate the Rules Enabling Act to treat unnamed class members as nonparties for the purposes of evaluating personal jurisdiction. The Rules Enabling Act merely requires that the Federal Rules of Civil Procedure do not abridge any substantive rights. The substantive right of personal jurisdiction derives from the Due Process Clause; because the underlying principles regarding an analysis of due process include fairness and reasonableness, the key consideration when determining personal jurisdiction is whether it is fair and reasonable to have a specific court bind the defendant with a decision. In the case at hand, both principles of fairness and reasonableness allow Mr. Todd to be bound by a decision by the District of New Tejas regarding all the class members, including the out-of-state claims of the unnamed members.

In erroneously determining that section 2072 Rules Enabling Act ("Section 2072") requires an analysis of specific jurisdiction for every class member, including the unnamed members, the court improperly compared the requirement of standing in the context of class actions to the requirement of personal jurisdiction in class actions. However, the principles behind the two requirements are vastly different and should not be conflated—standing asks whether a claim is even adjudicable in the first place, while personal jurisdiction asks is it fair and reasonable to allow a specific

court to bind a defendant with a decision. Additionally, Thirteenth Circuit misinterpreted the decision of *Bristol-Myers*, and applied the holding, only meant for a narrow line of mass action cases, to the class action case at hand. Finally, the Thirteenth Circuit disregards this Court's intent and the purpose behind creating Rule 23. If this Court were to uphold the decision, it would irreparably handicap Rule 23 and class actions across the country.

II. FOR A CLAIM ARISING UNDER FEDERAL LAW, PERSONAL JURISDICTION BASED ON AN ALTER EGO THEORY IS DETERMINED UNDER THE FEDERAL COMMON LAW TEST.

With respect to a claim arising under federal law, personal jurisdiction based on an alter ego theory is determined by federal law. In other words, federal law controls the choice-of-law issue. In evaluating the federal choice-of-law rules, federal law directs courts to apply the federal common law test for determining personal jurisdiction under an alter ego theory where a federal interest is involved. Based on the existence of federal interests it does not follow that federal law would then direct courts to apply state law through use of the Restatement (Second) of Conflicts of Laws ("Restatement"). Instead, where a federal interest is involved the federal common law test must be used.

Here, Mrs. Cole brought her claim under the TCPA which is a federal statute. This means her claim arises under federal law. There is a federal interest involved in adjudicating the federal claim brought by Mrs. Cole to promote uniformity in the application of the TCPA and to ensure the public policy reasons underlying the Act are upheld. Therefore, the federal common law test must be used to find Mr. Todd is

the alter ego of Spicy Cold for the purposes of asserting personal jurisdiction over him in this class action.

ARGUMENT

The Thirteenth Circuit improperly affirmed the holding of the district court. By allowing the class allegations to be struck, the Thirteenth Circuit has limited the specific jurisdiction of district courts with far reaching consequence for both class action suits and state law. On appeal, the granting of a motion to strike a class definition for lack of specific jurisdiction over the claims of unnamed, out-of-state plaintiffs is reviewed de novo. *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 444 (7th Cir. 2020). Similarly, the choice-of-law determination regarding which federal rules apply to the alter ego analysis is also reviewed de novo. *Jorgensen v. Cassiday*, 320 F.3d 906, 913 (9th Cir. 2003).

I. THE INTERESTS OF FUNDAMENTAL FAIRNESS AND REASONABLENESS DICTATE THAT PERSONAL JURISDICTION NEED ONLY BE EVALUATED FOR THE NAMED MEMBERS IN A CLASS ACTION—HOLDING OTHERWISE WOULD CONTRAVENE THE PURPOSES OF RULE 23.

The requirement of personal jurisdiction in federal courts is derived from the Due Process Clause of the Fifth Amendment. *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *see also Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (stating that the Fifth Amendment applies to federal courts whereas the Fourteenth Amendment applies to state courts). Given that the touchstone of due process is fundamental fairness, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 470 (1985), the key question then, in determining personal jurisdiction over a defendant, is whether it would be fair and reasonable to call the defendant into

a specific court. *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 426 (7th Cir. 2010). Requiring Mr. Todd to answer for his violations of the TCPA in the District of New Tejas is both fair and reasonable.

The TCPA was created to combat invasive automated calls endured by more than 18 million Americans every day. Telephone Consumer Protection Act, Pub. L. No. 102–243, § 2, 105 Stat. 2394, 2394-95 (1991). These automated calls are not just a nuisance—they are an invasion of privacy and even a threat to public safety. *Id.* at 2394 (finding that if left unchecked, unsolicited sales calls may overload emergency telephone lines preventing individuals from contacting emergency and medical services). Violations of the TCPA affect countless Americans across the country, without regard for state lines; therefore, such violations rightfully foster the perfect environment for class actions. Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") creates the framework for class action suits. Fed. R. Civ. P. 23. This Court has emphasized time and time again that the principal purpose of Rule 23 is to avoid the "multiplicity of activity" and to promote the "efficiency and economy of litigation." *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 551, 553 (1974); *see also China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1811 (2018). There is no better way to save judicial resources and promote efficiency than by letting hundreds, if not hundreds of thousands, of Americans suffering from the same invasions of privacy in violation of the TCPA to combine their claims into one suit.

Here, the Thirteenth Circuit erred in determining that, in a class action, personal jurisdiction must be evaluated for the claims of every unnamed class

member, in addition to the class representative(s), for the following reasons. First, the Thirteenth Circuit ignored the core considerations of due process—fairness and reasonableness—thus erroneously interpreting the requirements of the Rules Enabling Act to foreclose specific jurisdiction over the claims of out-of-state class members. The Thirteenth Circuit then improperly equivalates the context of standing in a class action suit to the requirements of personal jurisdiction in attempting to demonstrate why unnamed class members must be treated as parties. Next, the Thirteenth Circuit misinterprets this Court's decision in *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cty.*, 137 S. Ct. 1773 (2017), a decision surrounding a mass action suit, to apply to class action suits. In doing so, the court disregards nearly 200 years of class action jurisprudence. Finally, the Thirteenth Circuit detrimentally overlooked this Court's intent and purpose in creating Rule 23. If this Court were to affirm the Thirteenth Circuit's decision, Rule 23 will effectively cease to exist.

A. Evaluating Personal Jurisdiction Only with Respect to Named Class Members is Consistent with the Rules Enabling Act and Due Process.

By failing to consider the basic underlying principles of the Due Process Clause, the Thirteenth Circuit disposes 200 years of class action jurisprudence in three short pages. The Thirteenth Circuit states that Section 2072 requires a separate specific jurisdictional analysis for every single class member's claim. Pet. App. 9a. In doing so the court contravenes the intent of Congress in passing the Act and promotes rigidity and hollow gestures rather than grappling with purpose of due process and considering what fairness and reasonableness would require. Section

2072 is not violated when specific jurisdiction is only analyzed with respect to the claims of the class representative(s), quite simply because no substantial right is being abridged. Requiring a defendant to answer for all claims arising from their violations of the same law in one suit is both fair and reasonable.

Congress created the Rules Enabling Act, granting this Court authority to promulgate rules of civil procedure. 28 U.S.C. § 2071. The purpose of the Act is to promote efficiency and uniformity in the practice of federal judicial procedure. *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 5 (1987). Section 2072 limits the scope of this authority by providing that any rules created by this Court must "not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). However, a rule does not violate this provision by merely affecting the procedure for administering such a right. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality opinion) (citing *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445 (1946)); *Burlington N. R.*, 480 U.S. at 5; *Hanna v. Plumer*, 380 U.S. 460, 464–65 (1965). To be considered a violation of the provision, the application of the rule must actually go so far as to restrict access of the right. *Burlington N. R.*, 480 U.S. at 5. Moreover, the extensive process required by Congress to draft a rule, specifically the requirement that the rule be submitted to Congress for a period of time before taking effect, inherently creates "presumptive validity under both the constitutional and statutory constraints." *Burlington N. R.*, 480 U.S. at 6.

The test for determining whether the application of a rule abridges a right is not whether it will significantly impact the result of a suit, but whether the rule

"actually regulate[s] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Shady Grove*, 559 U.S. at 405–06 (plurality opinion) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)). If a rule falls into the gray area between substance and procedure, this Court has stated that since it may be rationally categorized as either, the rule will satisfy this standard. *Burlington N. R.*, 480 U.S. at 5. Essentially, the defining characteristic of whether the rule satisfies the constitutional constraints placed on this Court's rulemaking authority is a question of reasonableness. *Id.* Under such standards, this Court has rejected "every statutory challenge to a Federal Rule that has come before [it]." *Shady Grove*, 559 U.S. at 407 (plurality opinion).

The Thirteenth Circuit is correct in stating that Rule 23 is purely a procedural rule. Pet. App. 9a. However, the court was wrong to presume that applying a procedural rule in a manner that merely affects the due process analysis is a violation of Section 2072. Pet. App. 9a. Procedural rules are permitted to affect the application of a substantial right so long as the right is not abridged or restricted. Pet. App. 9a. Here, interpreting Rule 23 as requiring a jurisdictional analysis only with respect to the named class members does not eliminate or abridge Mr. Todd's substantive due process rights.

Application of Rule 23 to named parties in class action is not a violation of the Rules Enabling Act. First and foremost, this Court has found that "[n]othing in Rule 23 . . . limits the geographical scope of a class action that is brought in conformity

with that Rule. . . . Nor is a nationwide class inconsistent with principles of equity jurisprudence." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). This holding is consistent with the plurality's finding in *Shady Grove* which compares class actions to traditional joinder of claims to demonstrate the viability of Rule 23. The plurality stated that it is:

> obvious that rules allowing multiple claims (and claims by or against multiple parties) to be litigated together are also valid [under Section 2072]. Such rules neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights, they alter only how the claims are processed. For the same reason, Rule 23—at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action—falls within § 2072(b)'s authorization. A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits.

Shady Grove, 559 U.S. at 409 (plurality opinion). This Court has taken no issue with Rule 23 because no substantial rights are being abridged.

Personal jurisdiction is derived from the Due Process Clause of the Fifth Amendment. *Ins. Corp. of Ireland*, 456 U.S. at 702. Every personal jurisdiction analysis centers on the question of whether it is fair, reasonable, and just for a court to bind a specific defendant. For example, the landmark case of *Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement*, described that the test for specific jurisdiction is minimum contacts, which requires that the suit "does not offend 'traditional notions of fair play and substantial justice,'" and ultimately asks, whether the contacts make "it reasonable, in the context of our federal system of government, to require the [defendant] to defend the particular suit which is brought" in this court. 326 U.S. 310, 316–17 (1945). Even in the rare circumstances of general

jurisdiction over out-of-state defendants, courts ask whether the contacts are so continuous and systematic that it is "reasonable and just" to subject a defendant to the jurisdiction of the state. *Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437, 445 (1952). Therefore, the right of personal jurisdiction is not the right to have a court conduct one specific "test"—it is the right to ensure that it is fair, reasonable, and just to have a defendant proceed before a specific court.

Here, fairness, reasonableness, and justice allow, if not require, Mr. Todd to answer to all the claims for his violations of the TCPA in the Court of New Tejas. Mr. Todd has already conceded that District Court of New Tejas has met the requirements for asserting specific jurisdiction over him regarding Mrs. Cole's claim, and the claims of all New Tejas residents. Pet. App. 4a. This assertion of jurisdiction would require Mr. Todd to leave his domicile, come to the state of New Tejas, pay for counsel to appear in New Tejas, and ultimately defend himself against the violations of the TCPA in New Tejas. There is no additional burden placed on Mr. Todd by requiring him to answer for all, instead of merely a fraction, of the claims against him in this class action. Rule 23 already requires claims arise from common facts and, if applicable, have common defenses, so there is no additional legal analysis required. Fed. R. Civ. P. 23(a)(2)–(3). Nor are there any additional travel or legal fees associated with including the claims of unnamed, out-of-state class members. Therefore, it would be fair and reasonable for the District of New Tejas to bind Mr. Todd to the claims of all class members.

Additionally, *Shady Grove* demonstrates that consideration of damages does not factor into the jurisdictional determination. While this Court disagreed as to the reasoning in *Shady Grove*, this Court ultimately held that the class action would move forward, despite Allstate's argument that certifying the class "transform[s][the] dispute over a five hundred dollar penalty into a dispute over a five million dollar penalty." *Shady Grove*, 559 U.S. at 408 (emphasis removed). Overall, Mr. Todd's liability does not change. The only effect of severing the class action in this case between in-state and out-of-state class members would be to make it more difficult for class members to seek justice for Mr. Todd's violation of the TCPA. This consideration not only adversely affects the already harmed class members, but also would frustrate the purpose of judicial efficiency for class actions.

In this way, striking the claims of the out-of-state class members actually creates issues of fairness and reasonableness—not only for the class members and courts, but also for Mr. Todd himself. Instead of litigating all the claims in one suit, Mr. Todd may well have to bear the time and cost of litigating multiple statewide class actions, potentially in every other state in the Union. This in turn raises the legal fees required of the plaintiffs, who can no longer split costs across a state-wide claim, meaning potentially greater damages to cover these fees if Mr. Todd is found liable. There is simply no way to square this result with the core principles of the Due Process Clause.

B. The Thirteenth Circuit Erroneously Equates the Context of Article III Standing to the Context of Specific Jurisdiction in Regard to Whether Unnamed Class Members Must Be Treated as "Parties" to a Suit.

Personal jurisdiction is not the only constitutional and statutory requirement this Court analyzes only in regard to the representative(s) of a class action suit. Indeed, there is a long list of requirements, for both plaintiffs and defendants alike, that this Court has determined need not apply to unnamed class members because they are not considered "parties" for such purposes. *See Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2002). However, the Thirteenth Circuits precludes an in-depth explanation as to why unnamed class members must be treated as parties for personal jurisdiction, while not being parties for other purposes such as diversity, venue, or even consent to have their personal claims bound in the class suit. *Smith v. Bayer Corp.*, 564 U.S. 299, 314 (2011); *Devlin*, 536 U.S. at 10; *Mussat*, 953 F.3d at 448. Instead, the circuit conveniently jumps to comparing personal jurisdiction to one of the few analyses that does treat unnamed class members as parties. Pet. App. 9a.

The Thirteenth Circuit contends that if each unnamed class member is considered a party for purposes of determining Article III standing, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021), then there is no reason why unnamed class members should not be considered parties for determining personal jurisdiction. Pet. App. 9a. However, this comparison is fraught. Standing requires an individual to demonstrate that they have suffered an injury and that the injury was caused by the defendant. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Standing is required for every class member simply because it does not comport with any notions of justice to force a defendant to compensate a plaintiff they never harmed, for injuries that

never occurred. Without standing a claim is quite literally unadjudicable—no civil court will be able to hear a claim without some form of an injury to redress. *See e.g.* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 Ky. J. Equine, Agric. & Nat. Resources L. 349, 354–98 (2015).

Here, this Court if not faced with such concern. There is no question as to whether this is even an adjudicable dispute—Mr. Todd concedes that these claims are adjudicable and courts can hear this issue. Pet. App. 4a. Mr. Todd's logic merely dictates these claims must be spread across the United States, fractioned into a multitude of suits. In summation, the underlying principles and purposes of personal jurisdiction and standing are not similar so as to require the same treatment of unnamed parties. Instead, personal jurisdiction in the context of class actions is more akin to other requirements whose sole consideration is not whether a claim is adjudicable, but which court may hear and decide the claim. In that regard, courts have already determined that unnamed class members are not parties for the purposes of diversity and venue analysis. *Devlin*, 536 U.S. at 10; *Mussat*, 953 F.3d at 448. In fact, it is more reasonable to require unnamed class members to be treated as nonparties in all regards as to determining the proper forum, so as to best serve the Congressional intent of promoting efficiency and uniformity in the application of the Federal Rules of Civil Procedure. *Burlington N. R.*, 480 U.S. at 5.

C. This Court Did Not Intend to Eliminate 200 Years' Worth of Class Action Jurisprudence with the Decision of *Bristol-Myers*.

Next, by holding that personal jurisdiction must be evaluated with regard to unnamed class members, the Thirteenth Circuit discards the entire collection of class

action suits litigated in the United States. Despite the Thirteenth Circuit's attempt, this Court's decision in *Bristol-Myers* does not support such a determination. Pet. App. 11a. In recognizing this Court's actual intent, the only other circuit courts which have ruled on this issue have also determined that, even after *Bristol-Myers*, a court need only evaluate specific jurisdiction in respect to the claims of the named parties in a class action. *See Lyngaas v. Ag*, 992 F.3d 412 (6th Cir. 2021); *Mussat*, 953 F.3d.

As far back as 1820, representative suits brought on behalf of others have had a place in the American judicial system. *West v. Randall*, 29 F. Cas. 718, 722 (C.C.D.R.I. 1820).[2] Just over two decades after *Randall*, this Court enacted Equity Rule 48, officially recognizing representative suits where the "interested parties are numerous." *Smith v. Swormstedt*, 57 U.S. 288, 298 (1853); *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 804 (E.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992) (hereinafter "*Asbestos Litig.*"). Most interestingly, this rule also allowed suits to be maintained against multiple defendants, at a time where *in personam* jurisdiction was entirely based off the physical presence of the person, or person's property, within the boundaries of the states. *Swormstedt*, 57 U.S. at 298; *see*, *e.g.*, *Pennoyer v. Neff*, 95 U.S. 714, 721 (1877), *overruled in part by Shaffer v. Heitner*, 433 U.S. 186 (1977). For example, in *Swormstedt*, this Court heard a representative case

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[2] Nor are these the only cases; for where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; . . . in these and analogous cases, if the bill purports to be not merely in behalf of the plaintiffs, but of all others interested, the plea of the want of parties will be repelled, and the court will proceed to a decree.

Randall, 29 F. Cas. at 722.

on behalf of plaintiffs from Alabama, Kentucky, and Tennessee, against defendants from both Ohio and New York, all without any discussion of *in personam* jurisdiction. *Swormstedt*, 57 U.S. at 288–89. Eventually Equity Rule 48 was revised into Rule 38, which was again revised into Federal Rule of Civil Procedure 23 following the passage of the Rules Enabling Act. *Asbestos Litig.* 129 B.R. at 804.

As demonstrated, class action suits have a rich and lengthy history. And, as the Seventh Circuit has duly noted, this Court has often entertained massive class actions in courts that do not have general jurisdiction over the defendant. *Mussat*, 953 F.3d at 445; *see*, *e.g. Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (brought in California but domiciled in Arkansas and Delaware); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (brought in Kansas but domiciled in Oklahoma and Delaware). In fact, the presumption that specific jurisdiction only applies to the claims of the named parties is so strong, that the defendant in *Phillips Petroleum* attempted to severe the out-of-state claims not by arguing that the court lacked specific jurisdiction to bind the defendant with a judgment, but rather that the court was not able to bind the out-of-state class members. *Phillips Petroleum*, 472 U.S. at 806. Thus, specific jurisdiction has been a non-issue since the beginning of class-action suits. *See*, *e.g.*, *Al Haj v. Pfizer, Inc.*, 338 F. Supp. 3d 815, 818–19 (N.D. Ill. 2018) (noting that the defendant could not point to any decisions preceding *Bristol-Myers* which held that specific jurisdiction must be evaluated over the unnamed class members).

The decision of *Bristol-Myers* was not meant to alter this application. In *Bristol-Myers*, this Court held that in mass actions based on state law, specific jurisdiction must be evaluated over the claims of every plaintiff. 137 S. Ct. at 1781. But *Bristol-Myers* was meant to be a very narrow holding, applying only in the mass action context and as a response to an abuse of forum-shopping. First, mass actions and class actions are entirely different. Mass actions are a construction of California law, of which there is no federal equivalent, and all the plaintiffs are named parties to the litigation. *Mussat*, 953 F.3d at 446. Second, the holding of *Bristol-Myers* relied heavily on the fact that the plaintiffs were abusing the concept known as "forum-shopping," where a plaintiff chooses a state solely based on how the state's law will affect the outcome. *Riviera Trading Corp. v. Oakley, Inc.*, 944 F. Supp. 1150, 1158 (S.D.N.Y. 1996). While strategically picking forums base on state law is common, this case was particularly egregious because of how little contacts any of the named plaintiffs had with the state. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1031 (2021). This Court was entirely concerned with the policy implications of forum shopping and dealt entirely in the realm of named plaintiffs—there was no intent for this mass action case to bleed over into the realm of class actions and unnamed class members.

The vast majority of federal courts have understood this. The only two circuit courts to have answered this issue have sided with the historical understanding of specific jurisdiction in class action suits—specifically holding that *Bristol-Myers* does not apply to class action suits, and that only named parties in class action suits must

demonstrate specific jurisdiction. *Lyngaas*, 992 F.3d; *Mussat*, 953 F.3d. Further only a handful of district courts from only three circuits have applied *Bristol-Myers* to class actions. *Carpenter v. PetSmart, Inc.*, 441 F. Supp. 3d 1028, 1035 (S.D. Cal. 2020); *Chizniak v. CertainTeed Corp.*, No. 117CV1075FJSATB, 2020 WL 495129, at *5 (N.D.N.Y. Jan. 30, 2020); *Chavez v. Church & Dwight Co.*, No. 17 C 1948, 2018 WL 2238191, at *11 (N.D. Ill. May 16, 2018); *Wenokur v. AXA Equitable Life Ins. Co.*, No. CV-17-00165-PHX-DLR, 2017 WL 4357916, at *4 n.4 (D. Ariz. Oct. 2, 2017). Even the circuits that have not specifically answered this question have hinted at what an eventual decision will entail. *See Molock v. Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 295–96 (D.C. Cir. 2020) (while not explicitly answering whether *Bristol-Myers* applies to class actions, carefully implying that unnamed members not be included in a specific jurisdiction analysis).

D. Affirming the Thirteenth Circuit Substantially Limits the Ability to Promote Efficient Litigation, Allow Injured Parties to Seek Justice, and Hold Defendants Accountable for Mass Violations of Law.

It is quite obvious as to why this Court did not intend the holding of *Bristol-Myers* to be applicable to class action suits. If this Court were to hold that unnamed class members must be included in the courts' specific jurisdiction analysis, it would not merely create issues of fairness and reasonableness in the case at hand but also handicap the entirety of Rule 23. But that is exactly what the Thirteenth Circuit asks of this Court—to simply forget the principles of efficiency and economy and eliminate a valuable tool that allows many harmed parties the ability to seek justice when they

otherwise could not. This Court has been unwilling to encumber Rule 23 in the past and it should remain unwilling today.

The primary purpose of Rule 23 is to unburden the judiciary by saving precious time and resources. *See China Agritech*, 138 S. Ct. at 1811; *Am. Pipe*, 414 U.S. at 551, 553. This follows a portion of the Congressional logic in allowing this Court to create Federal Rules of Civil Procedure: efficiency. *See Burlington N. R.*, 480 U.S. at 5. In *Devlin*, this Court explains that it is unwilling to consider unnamed class members as parties for determining diversity jurisdiction over the suit, not only because it would destroy the "[e]ase of Administration" of class action suits, the entire purpose of Rule 23, but also because doing so would almost completely destroy the ability of a federal court to hear a nationwide class action suit. *See Devlin*, 536 U.S. at 10.[3] The same results would occur in the case at hand if this Court were to affirm the Thirteenth Circuit.

First and foremost—nationwide class actions would almost cease to exist. It is true that they may still be brought in states where corporations have general jurisdiction, but this still severely and unjustly restricts plaintiffs' suits. For example, when determining when to transfer a suit, the plaintiff's forum is given great

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[3] While this Court did not specify "nationwide" class action when explaining its unwillingness to treat unnamed members as parties for purposes of diversity, "nationwide" can be inferred from the fact that the only time diversity would be in issue is where a suit would involve class members from multiple states, if not every state, thus decreasing the likelihood the class would be able to find a diverse forum from the defendant(s).

deference because, as the injured party, the plaintiff is allowed to pick a forum most convenient for them to reduce the burden of seeking redress. *See Hefferan v. Ethicon Endo-Surgery Inc.*, 828 F.3d 488, 493 (6th Cir. 2016). ("The deference normally accorded an American plaintiff's forum choice is based on the premise that holds in some, but not all, cases that the decision to bring suit in one's home forum is a matter of convenience."). If nationwide class actions could only be held in states with general jurisdiction over defendants, then plaintiffs with the ability to start a class action will have the additional burden of having to find a state of general jurisdiction, instead of merely filing in their home state.

Second, the class actions that do get filed will be exponentially hindered by the necessity of the Court to properly analyze jurisdiction over every unnamed class member. This alone raised several questions that have yet to be addressed. Namely, how would federal courts consider the connections of every member to a state? Would new rules for notice be required to inform unnamed class members to provide proof of connection to the state before a class is certified? How would those unnamed members provide proof—would they have to hire counsel to draft a statement of jurisdiction or would the class representatives' counsel be responsible for that as well? *See* Brief of Amicus Curiae American Association for Justice In Support of Plaintiff-Appellant and Reversal at 20–21, *Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020), (No. 17-cv-8841), 2019 WL 1422419. In class actions, where the number of potential class members can easily reach the millions, how is a court feasibly supposed to undertake this task? *See In re M3 Power Razor Sys. Mktg. & Sales Prac. Litig.*, 270

F.R.D. 45, 56 (D. Mass. 2010) ("In this case, involving millions of potential plaintiffs with small individual claims."). A court simply cannot. Moreover, all of these issues would arise in a single suit—but what Mr. Todd asks would require multiple suits, up to one in every state in the nation, to be litigated. Thus, in order to promote efficiency and economy, and, quite simply, the mere ability to handle class action suits, this Court cannot require a specific jurisdiction analysis for every unnamed class member.

In addition to the two outcomes this Court sought to avoid in *Devlin*, injured parties would be substantially harmed, not merely in the context of picking a forum, but potentially from bringing a suit altogether. For example, class action suits allow for the sharing of legal fees, allowing injured parties to seek relief where they might not have been able to afford to before or where simply the cost of the legal fees would far surpass the damages they incurred. *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744 (7th Cir. 2008) ("Moreover, it allows a vehicle to justice for members of a class otherwise unable to meet the financial burdens of bringing such claims alone."). The outcome of limiting class actions to states which have general jurisdiction is not ensuring fairness and reasonableness in the treatment of the defendant because it is already fair to have a defendant answer for all claims arising out of the same violation in a single state. The only consequence is dissuading potential harmed parties from filing suits by instilling additional and unreasonable burdens, allowing wrongdoers to circumvent accountability and justice.

If this Court were to uphold the Thirteenth Circuit, it would result in the same outcome that this Court was unwilling to allow less than two decades ago—nationwide class actions would be wiped from existence and the administration of remaining class actions would be overwhelmed by the need to perform jurisdictional analysis for every unnamed class member. It would also substantially limit the ability of harmed parties to seek justice. Therefore, the holding of the Thirteenth Circuit should be reversed and remanded.

II. PURSUANT TO FEDERAL CHOICE-OF-LAW RULES, PERSONAL JURISDICTION BASED ON AN ALTER EGO THEORY IS DETERMINED UNDER THE FEDERAL COMMON LAW TEST TO PROMOTE UNIFORMITY AND FAIRNESS.

A finding of personal jurisdiction in this class action solely with respect to the claims of the named plaintiffs is dispositive in this case. However, such a finding is not the only route to proper assertion of personal jurisdiction over Mr. Todd. Personal jurisdiction based on an alter ego theory also establishes, and both parties agree, that "general personal jurisdiction could be exercised over Mr. Todd if he were the alter ego of Spicy Cold, an entity that is subject to general jurisdiction in New Tejas" Pet. App. 12a. A finding of general personal jurisdiction based on an alter ego theory is compatible with due process. *Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 433 (4th Cir. 2011) (explaining that it "is compatible with due process for a court to exercise personal jurisdiction over an individual . . . when the individual or corporation is an alter ego or successor of a corporation that would be subject to personal jurisdiction in that court"). The complex choice-of-law issue in this case is a result of both Mr. Todd and the unnamed out of state class members residing outside of New Tejas.

To exercise personal jurisdiction over Mr. Todd based on alter ego theory, this Court must apply federal law. *Enter. Group Planning, Inc. v. Falba*, 73 F.3d 361 (6th Cir. 1995). As a general matter it is undisputed that "[a] district court exercising federal-question jurisdiction must apply federal choice-of-law rules to determine the applicable substantive law." Pet. App. 14a. In other words, claims brought under federal law must be resolved through application of federal law. U.S. Const. art. VI, cl. 2 (establishing that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land"). Here, the class action brought by Mrs. Cole asserts a claim arising under federal law, namely the TCPA. 47 U.S.C. § 227; Pet. App. 3a. Federal law must be applied to resolve the choice-of-law issue for the proper exercise of alter ego personal jurisdiction over Mr. Todd.

Recognition that federal choice-of-law rules apply in this case leads to a narrowing of the question before the court: what is the proper federal choice-of-law rule? The answer is the federal common law test. Two principles guide the application of the federal common law test in this case as opposed to the Thirteenth Circuit's improper use of the Restatement. First, based on the federal interest of personal jurisdiction to adjudicate a federal claim, the federal common law test for alter ego jurisdiction applies, allowing exercise of personal jurisdiction over Mr. Todd as the alter ego of Spicy Cold. Second, public policy favors recognition of Mr. Todd as the alter ego of Spicy Cold based on Mr. Todd's disregard of the corporate form and the anomalous alter ego law of New Tejas.

A. The Federal Interest in Adjudicating a Federal Claim Requires Application of the Federal Common Law Test for Alter Ego Corporate Veil Piercing.

This Court's decision in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) carves out an exception to the *Erie* doctrine and allows for the existence of federal common law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79-80 (1938). Federal common law amounts to "'law of independent federal judicial decision,' outside the constitutional realm, untouched by the *Erie* decision." *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 308 (1947). While the *Erie* doctrine rid the courts of federal common law in diversity jurisdiction cases generally, the *Clearfield* doctrine recognized the need for a federal common law specifically for the purpose of "fashioning federal rules applicable to . . . federal questions." *Clearfield*, 318 U.S. at 367. When an inquiry involves "uniquely federal interests," federal common law should apply. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (explaining there are areas of law "so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced"). In this case a federal question is before the Court based on Mrs. Cole's federal TCPA claim, which necessitates the application of the federal common law test. 47 U.S.C. § 227; Pet. App 3a.

1. The Federal Common Law Test Provides Uniformity in the Resolution of Federal Claims Where a Federal Interest is Involved.

One purpose of utilizing federal common law when a claim arises from a federal question is to provide uniformity in the application of federal statutes. *Clearfield*, 318 U.S. at 367. If state law is allowed to control the application of federal statutes, it

"would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states." *Id.* When a federal rule is at issue, the "desirability of a uniform rule is plain." *Id.*

For example, this Court affirmed the need for uniformity where federal interests exist, such as with federal programs. In its 1979 decision of *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979), the Court explained that "[u]ndoubtedly, federal programs that by their nature are and must be uniform in character throughout the Nation necessitate formulation of controlling federal rules." *Id.* at 728 (citing *United States v. Yazell*, 382 U.S. 341, 354 (1966)) (internal quotations omitted).

The Court took a similar approach in *Standard Oil* when it held that "state law should not be selected as the federal rule for governing the matter in issue." 332 U.S. at 309–10. By declining to apply state law, the Court explained that the outcome of cases where the government-soldier relationship is involved should not "vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies across state lines." *Id.* Similarly, the use of an "automatic telephone dialing system" to access consumers across state lines, as Mr. Todd did in this case, does not predicate the use of state law to resolve claims where a corporation has harmed its consumers. In fact, the opposite is true. Federal law was put in place in the form of the TCPA to outlaw the exact harm present in Mr. Todd's use of an automatic dialer. The law was enacted due to inconsistent responses

when state law was the only response to automatic dialing systems. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2344 (2020).

The policy of applying the federal common law test to resolve the alter ego jurisdiction question centers on the "convenience, certainty, and definiteness in having one set of rules . . . as contrasted to multiple rules." *Bank of Am. Nat. Tr. & Sav. Ass'n v. Parnell*, 352 U.S. 29, 34 (1956). Application of the federal common law test in this case would ensure that the TCPA is administered fairly and consistently across state lines. An affirmative holding that the federal common law test applies would not only lead to uniformity in the administration of the TCPA but would also serve as a guide for corporations in evaluating their business practices.

2. The TCPA Represents a Significant Federal Interest in Consumer Protection that Warrants Application of Federal Common Law.

In this case, there is a unique federal interest in adjudicating a federal claim based on the significance of the TCPA. 47 U.S.C. § 227. To put the TCPA in perspective, this Court recognized a simple truth: "Americans passionately disagree about many things. But they are largely united in their disdain for robocalls." *Barr*, 140 S. Ct. at 2343 (2020). In 1991, Congress passed the TCPA in response to "a torrent of vociferous consumer complaints about intrusive robocalls." *Id.* at 2344. Robocalls have become such a daily nuisance that the Federal Government received "a staggering number of complaints about robocalls—3.7 million complaints in 2019 alone." *Id.* at 2343 (commenting that "[t]he States likewise field a constant barrage of complaints").

This Court also took pause to note that the incredible number of complaints experienced in 2019 occurred with the TCPA in place. *Id.* (noting "[f]or nearly 30 years, the people's representatives in Congress have been fighting back" against robocalls). As explained by a Senate sponsor of the TCPA, "robocalls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall." 137 Cong. Rec. 30, 821-22 (1991). On these grounds, Congress found that robocalls were an invasion of privacy. 47 U.S.C. § 227 (Congressional Findings). By utilizing an "automatic dialing system" to call consumers across the United States with a prerecorded voice message advertising Spicy Cold products, Mr. Todd engaged in unlawful robocalling. Pet. App. 3a.

At the time of the TCPA's enactment, the need for federal legislation to address this matter of public importance was clear: "telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 370–71 (2012). Because state laws alone provided a loophole for corporations, Congress enacted federal legislation to set forth a uniform response to invasive robocalls. In so doing, Congress established a "[f]ederal interest in regulating telemarketing" which is "evident from the regulatory role Congress assigned to the FCC." *Id.* at 383. For example, the Act "directs the FCC to prescribe regulations to protect the privacy of residential telephone subscribers." *Id.* at 373–74.

The TCPA "principally outlaws four practices," two of which have been violated by Mr. Todd and Spicy Cold in this case. *Id.* at 373; 47 U.S.C. § 227. First, the TCPA

prohibits calls made "using any automatic telephone dialing system or an artificial prerecorded voice" to a cellular telephone, and second, TCPA prohibits the same to any "residential telephone line . . . without prior express consent of the called party." 47 U.S.C. § 227. Mrs. Cole received unwanted, unsolicited robocalls on her cellular phone and residential phone line in violation of the TCPA. 47 U.S.C. § 227; Pet. App. 3a. Mr. Todd and Spicy Cold violated two practices outlawed by the TCPA. Mr. Todd now attempts to not only hide behind Spicy Cold, but also to use state law as a shield to evade alter ego personal jurisdiction and ultimately avoid accountability for his actions.

Resolution of a claim involving the TCPA under state law would frustrate Congressional purpose of enacting the TCPA. This Court recognized that "Congress' design would be less well served if consumers had to rely on the laws or rules of court of a State, or the accident of diversity jurisdiction, to gain redress for TCPA violations." *Mims*, 565 U.S. at 383. This impact is felt more strongly with specific regard to the choice-of-law issue before the Court in this case. Application of state law to determine alter ego personal jurisdiction would preclude Mrs. Cole's claim from being brought to court based on the unusual law of New Tejas. The majority categorized this law as an "outlier among the States." Pet. App. 6a. The decision before the Court today must consider the significance of these public policy concerns that are at the heart of the federal interest.

3. The Appearance of a Circuit Split Between the Use of the Federal Common Law Test and the Restatement is Distinguishable Based on the Presence of a Federal Interest.

The Thirteenth Circuit was correct in their determination that federal law applies to Mrs. Cole's alter ego theory of personal jurisdiction. Pet. App. 14a. However, they reach the wrong result in concluding that federal common law always directs courts to follow the Restatement when resolving choice-of-law issues. The "Gordian knot" referred to by the Thirteenth Circuit indicates that this is simply not true. Courts are not consistently applying the Restatement to resolve choice-of-law issues. If they were, this case would not need judicial intervention. Instead, federal district courts are undertaking a fact-specific inquiry, which comports with the requirement that the personal jurisdiction analysis be fact specific to ensure fundamental justice and fairness. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781 (explaining that "[t]he Supreme Court has made clear that personal jurisdiction over a defendant must be evaluated on a claim-by-claim, plaintiff-by-plaintiff basis").

First, courts begin by determining which laws are competing for application. Courts will ask whether the choice-of-law question is "vertical—i.e., should federal or state law apply?" or "horizontal—i.e., which state's law should apply?" *TAC-Critical Sys., Inc. v. Integrated Facility Sys., Inc.*, 808 F. Supp. 2d 60, 64 (D.D.C. 2011). In this case the issue is vertical, and the Thirteenth Circuit properly determined federal law should apply. From there courts will look to the applicable federal or state law and determine whether application of either would lead to a difference in outcome.

For example, as recognized by Circuit Judge Arroford when dissenting to the Thirteenth Circuit's decision below, courts will often "decline to conduct a choice-of-

law analysis" where the outcome would be unchanged. Pet. App. 20a (citing *Invesco High Yield Fund v. Jecklin*, No. 19-15931, 2021 WL 2911739, at *1 (9th Cir. July 12, 2021); *Volvo Const. Equip. Rents, Inc. v. NRL Rentals, LLC*, 614 F. App'x 876, 879 (9th Cir. 2015); *Fillmore E. BS Fin. Subsidiary LLC v. Capmark Bank*, 552 F. App'x 13, 15 (2d Cir. 2014); *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1161 (5th Cir. 1983)). Where the resulting application of different laws would produce the same result, the choice-of-law analysis becomes unnecessary to the individual case at bar.

The first case cited by the Thirteenth Circuit, *Sys. Div., Inc. v. Teknek Elecs., Ltd.*, demonstrates this point. 253 F. App'x 31, 34–35 (Fed. Cir. 2007). There, the court properly explained that "[a]lter ego is a doctrinal basis for disregarding the corporate entity and is invoked where recognition of the corporate form would work an injustice to a third party." *Id.* at 34. As to the test for alter ego, the court enumerates "two general requirements for disregarding the corporate entity: there must be 'such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist,' and it must be demonstrated that 'if the acts are treated as those of the corporation alone, an inequitable result will follow.'" *Id.* at 34–35 (citing *Automotriz De California v. Resnick*, 47 Cal.2d 792, 796, (1957) (internal quotations omitted). This two-part test is the same as the federal common law test. *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1073 (9th Cir. 2015). The same is also true of *Estate of Thomson ex rel. Estate of Rakestraw v. Toyota Motor Corp.Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008), cited by the Thirteenth Circuit. There, the court applied Ohio law, which utilizes the same seven factors as the federal

common law test. *Id.*; see *Anwar v. Dow Chem. Co.*, 876 F.3d 841, 849 (6th Cir. 2017) (explaining the federal common law test consists of two elements and seven factors). The result of the choice-of-law inquiry is unchanged.

While it is true that courts have used the Restatement to apply state law to the alter ego determination, those instances are distinguishable from the case at bar. Where federal interests supersede those of an individual state, courts should apply the federal common law test in the alter ego context. *U.S. Through Small Bus. Admin. v. Pena*, 731 F.2d 8, 12 (D.C. Cir. 1984) (explaining that "[t]he question whether a corporate veil ought to be pierced for purposes of applying some federal statute is distinct from whether a corporate veil ought to be pierced for purposes of allocating state tort or contract liabilities"). Ultimately, this Court should make clear what is implicit practice among courts and affirmatively hold that "courts should 'use the federal common law of veil-piercing when a federal interest is implicated by the decision of whether to pierce the corporate veil.'" *Anwar*, 876 F.3d at 848.

By affirming the holding of the district court, the Thirteenth Circuit not only undermines the purpose of class actions but also acts directly against the furtherance of uniformity and consistent application of federal statutes that federal common law seeks to maintain. Pet. App. 17a. In determining that federal law follows the Restatement, the Thirteenth circuit would have courts look to federal law regarding alter ego personal jurisdiction only to be directed to apply state law. Restatement (Second) of Conflict of Laws § 6 (Am. L. Inst. 1971).

Where a federal interest requires the application of federal common law to maintain uniformity in the application of a federal statute, it does not follow that the federal law would then direct courts to apply state law. This is the most fundamental problem with the Restatement: it does not include the option of applying federal common law where this Court has demonstrated a specific need for federal common law because a federal interest is involved.

B. As a Matter of Public Policy, the Federal Common Law Test Must Apply to Determine the Alter-ego Analysis.

Application of the federal common law test for alter ego would pierce the corporate veil by recognizing that Mr. Todd is the alter ego of Spicy Cold. Though the issue is one of jurisdiction and not liability, this decision would hold Mr. Todd accountable for his business practices which violated the TCPA.

The purpose of a corporate veil is to provide liability incentives to businesses by shielding shareholders from liability for the actions of their corporations. *Labadie Coal Co. v. Black*, 672 F.2d 92, 96 (D.C. Cir. 1982). However, "when the incentive value of limited liability is outweighed by the competing value of basic fairness to parties dealing with the corporation—courts may look past a corporation's formal existence to hold . . . controlling individuals liable" for corporate wrongs. *Id.* at 96. A determination that Spicy Cold is the alter ego of Mr. Todd would in effect pierce the corporate veil and shift liability for Spicy Cold's wrongdoing onto Mr. Todd as the sole operator of Spicy Cold. Pet. App. 5a. This determination is appropriate based both on the purposes underlying the federal common law test for corporate veil piercing and the federal interest in litigating claims arising under the TCPA.

The federal common law test for alter ego determinations consists of a two-prong test and, when necessary, consideration of seven non-exclusive factors. The two-prong test asks: "(1) is there such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist?; and (2) if the acts are treated as those of the corporation alone, will an inequitable result follow?" *Id.* at 96. In this case it is undisputed that "under a federal common law test, Mr. Todd is the alter ego of Spicy Cold and thus subject to general jurisdiction in New Tejas." Pet. App. 22a. However, the policy underlying the application of this test cannot be ignored.

As the Sixth Circuit explained, "[t]he crux of the alter-ego theory of personal jurisdiction therefore is that courts are to look for two entities acting as one." *Anwar*, 876 F.3d at 848. As recognized by both the district court and the Thirteenth Circuit, "Mr. Todd owned all of the stock of Spicy Cold Foods, Inc . . . and operated the company without a formal board of directors." Pet. App. 5a. Although sole ownership of a corporation does not automatically implicate the alter ego theory, the concept of a corporate veil "is, however, designed to serve normal, inoffensive uses of the corporate device, and is not to be stretched beyond its reason and policy." *Quinn v. Butz*, 510 F.2d 743, 757–59 (D.C. Cir. 1975). Here, the line between Spicy Cold and Mr. Todd was blurred and blended even further in that "Spicy Cold's bank account was often used to pay Mr. Todd's personal expenses." Pet. App. 5a. Under these circumstances, "when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as

an association of persons" to meet the needs of justice. *Quinn*, 510 F.2d at 758; *see also United States v. Bestfoods*, 524 U.S. 51, 62 (1998) (explaining the "fundamental principle . . . that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf").

In this case, the only distinction between Mr. Todd and Spicy Cold Foods Inc. is the difference in their names. Pet. App. 5a. To that end, courts have held that disregarding "the corporate form is appropriate when a corporation is merely the alter ego of its owners, such that the corporation no longer has a 'separate personality' apart from its owners." *Flynn v. Greg Anthony Constr. Co.*, 95 F. App'x 726, 733–34 (6th Cir. 2003) (citing *Quinn*, 510 F.2d at 758). Put differently, "[t]he fiction of the corporate entity cannot stand athwart sound regulatory procedure." *Cap. Tel. Co. v. F.C.C.*, 498 F.2d 734, 738 n.11 (D.C. Cir. 1974); *see also Chicago, M. & St. P. Ry. Co. v. Minneapolis Civic & Com. Ass'n*, 247 U.S. 490, 501 (1918) (declaring "courts will not permit themselves to be blinded or deceived by mere forms or law but . . . will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require"). Mr. Todd has demonstrated complete disregard for the corporate form. Allowing Mr. Todd to violate a federal law and hide behind his corporation to avoid liability would certainly violate public policy and promote misuse of corporations.

CONCLUSION

Mr. Todd must be held accountable for his actions. Personal jurisdiction can be properly asserted over Mr. Todd with respect to the named parties in this class action and through application of the federal common law test for alter ego personal jurisdiction. Mr. Todd must not be permitted to either subvert the purpose of personal jurisdiction under class actions or improperly use state law as a loophole to avoid accountability for his actions. Instead, the decision of the Thirteenth Circuit must be reversed, and this case be remanded for trial.

Dated November 13, 2021

Respectfully Submitted,
By: /s/_____
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APPENDIX

U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, § 1:

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.

Fed. R. Civ. P. 4:

(k) Territorial Limits of Effective Service.

(1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

Fed. R. Civ. P. 23:

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

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

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

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

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

28 U.S.C. § 2072:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

47 U.S.C. § 227:

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

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

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

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

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, 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);

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

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

(ii) the sender obtained the number of the telephone facsimile machine through—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution, except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D), except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.