(ORDER LIST: 595 U.S.)

MONDAY, OCTOBER 4, 2021

CERTIORARI GRANTED

20-1434 COLE, GANSEVOORT, ET AL. V. TODD, LANCELOT

The petition for writ of certiorari is granted limited to the following questions: 1) Whether, in a class action, personal jurisdiction over a defendant is evaluated only with respect to the claims of named class members or also with respect to the claims of unnamed members? 2) Whether, with respect to a claim arising under federal law, personal jurisdiction based on an alter ego theory is determined under state law or federal law?

Appendix to
Petition for Writ of Certiorari

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

No. 19-5309

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

v.

LANCELOT TODD,
Defendant–Appellee.

Filed: May 10, 2020

Appeal from the United States District Court
for the District of New Tejas
(D.C. No. 18-cv-1292)

Before SINCLAIR, ARROFORD, and THAYER, Circuit Judges.

OPINION

SINCLAIR, Circuit Judge.

This appeal concerns two important questions regarding the exercise of personal jurisdiction. Plaintiff–Appellant Gansevoort Cole seeks to maintain a nationwide class action against Defendant–Appellee Lancelot Todd, a resident of West Dakota.

There is no dispute that personal jurisdiction exists with respect to the claims of New Tejas residents. This

appeal concerns personal jurisdiction over Mr. Todd with respect to the claims of out-of-state class members. Mrs. Cole contends that the district court could exercise personal jurisdiction on two grounds: (1) in a class action, jurisdiction is determined solely with respect to the claims of the named plaintiffs; and (2) in the alternative, general jurisdiction can be exercised over Mr. Todd because he is the alter ego of Spicy Cold Foods, Inc., a corporation organized under the laws of the state of New Tejas.

We conclude that the district court correctly held that it lacked personal jurisdiction over Mr. Todd with respect to the claims of out-of-state class members. We therefore AFFIRM the granting of the motion to strike class allegations.

Background

This matter concerns the latest entrepreneurial venture of Lancelot Todd, well-known promoter of the Vettura automobile and the Khaki Khomfort Trench Bench. In early 2015, Mr. Todd acquired the rights to "spicy cold" flavoring for potato chips, a flavoring that, as the result of a chemical reaction, (reportedly) causes one's tongue and mouth to go numb from cold upon consumption of the chip. Although some members of the public—including Mr. Todd—apparently find this sensation to be pleasant, the vast majority do not.

To commercialize "spicy cold" products, Mr. Todd incorporated "Spicy Cold Foods, Inc." ("Spicy Cold") under the laws of New Tejas in late 2015. As noted below, these laws are unusually deferential to the corporate form. Mr. Todd, who resides in West Dakota, personally owns all of the shares of Spicy Cold.

Spicy Cold's principal—and only—place of business is located in West Dakota. Spicy Cold originally attempted to sell its products wholesale to restaurants and grocery stores. When these sales efforts failed, the district court found, Mr. Todd determined that the problem was a lack of advertising.

According to the allegations in the Complaint, acting on behalf of Spicy Cold, Mr. Todd acquired an "automatic telephone dialing system" in 2017. On behalf of Spicy Cold, Mr. Todd began calling consumers across the country—including both cellular phones and residential phone lines—to deliver a prerecorded voice message:

> Sure, you can handle the heat, but can you handle the cold? Face the challenge of spicy cold chips—the coolest chips ever made. Available online now. Ask for them at your local grocery store. Frost-bite into the excitement!

Plaintiff Gansevoort Cole, a resident of New Tejas, alleges that she received at least ten of these calls, five on her cellular phone and five on her residential phone line. Mrs. Cole denies having any established business relationship with Spicy Cold or Mr. Todd and denies having consented to receive these phone calls. (Although perhaps not relevant to her claims, Mrs. Cole also denies that these calls made her any more likely to purchase or sample spicy cold chips.)

In 2018, Mrs. Cole filed suit in the district of New Tejas against Spicy Cold Foods, Inc. and Mr. Todd individually, alleging that these phone calls violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. She sued on behalf of herself and a class of all persons in the country who received similar calls.

Jurisdictional discovery confirmed Mrs. Cole's rationale for suing Mr. Todd personally: Mr. Todd has considerable personal wealth, but Spicy Cold has essentially no assets. Any profits that Spicy Cold earned were swiftly distributed to Mr. Todd as a dividend, and it leases its premises from Mr. Todd. Spicy Cold is, in effect, "judgment proof."

There is no question that the district court could exercise general jurisdiction over Spicy Cold Foods, Inc. because it is incorporated in New Tejas. *See, e.g.*, *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021) (noting that a corporation's "place of domicile" is its "place of incorporation and principal place of business") (citing *Daimler AG v. Bauman*, 571 U.S. 117, 139 n.19 (2014)).

Mr. Todd, however, moved to strike the nationwide class allegations against him for lack of personal jurisdiction. He contends that he is subject to general jurisdiction only in West Dakota, his place of domicile. And although he acknowledges that the New Tejas court could exercise jurisdiction over him with respect to the claims of New Tejas residents, he contends that no personal jurisdiction exists with respect to the claims of out-of-state class members.

Following jurisdictional discovery, Mrs. Cole articulated two theories of personal jurisdiction over Mr. Todd.

First, Mrs. Cole contends that in a class action, unnamed class members need not demonstrate personal jurisdiction over the defendant. Because it is undisputed that there is personal jurisdiction over the claim of the named plaintiff (i.e., her claim), she contends that the

district court could properly entertain a nationwide class action.

Second, in the alternative, she contends that the district court could properly exercise general jurisdiction over Mr. Todd because, under a federal common law test, Mr. Todd is the alter ego of Spicy Cold.

Mrs. Cole contended—and the district court found—that Mr. Todd was as successful in respecting the corporate form as he was in persuading consumers of the benefits of his spicy cold flavoring. That is to say, not at all. Mr. Todd owned all of the stock of Spicy Cold Foods, Inc. He operated the company without a formal board of directors. Spicy Cold's bank account was often used to pay Mr. Todd's personal expenses, and the entity was left severely undercapitalized for the enterprise it undertook. Further, enforcing the corporate form would inflict significant injustice on Mrs. Cole and others injured by Spicy Food's conduct. As the district court found, under the test for alter ego applied in most states (and found in the Restatement), a court would readily pierce the corporate veil and hold Spicy Cold to be the alter ego of Mr. Todd.[1]

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[1] The federal common law test applied by some courts requires "(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice." *Anwar v. Dow Chem. Co.*, 876 F.3d 841, 849 (6th Cir. 2017) (quoting *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1073 (9th Cir. 2015)). The relevant factors include: "(1) sharing the same employees and corporate officers; (2) engaging in the same business enterprise; (3) having

In response, Mr. Todd did not deny that under a federal common law test, he would be the alter ego of Spicy Cold and subject to general jurisdiction.[2] He instead argued that alter ego should be determined under the law of New Tejas (the forum state and Spicy Cold's state of incorporation) and that under that unusual law—admittedly an outlier among the States—he cannot be considered Spicy Cold's alter ego.

In the frontier days of New Tejas, when the territory was often characterized as a wretched hive of scum and villainy, the territorial legislature determined that to attract business, New Tejas would adopt laws that were extremely friendly to the corporate form. Among these laws—which have continued in effect through New Tejas's statehood and to the present day—is an extremely stringent standard for piercing the corporate veil and treating a corporation as an alter ego of its subsidiaries. As the New Tejas Supreme Court (and this Court) have repeatedly recognized, this standard requires that the company have been incorporated for the specific purpose of defrauding a specific individual. Mrs. Cole acknowledges that she cannot satisfy this standard and that if the law of New Tejas applies, Spicy Cold is not the alter ego of Mr. Todd.

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the same address and phone lines; (4) using the same assets; (5) completing the same jobs; (6) not maintaining separate books, tax returns and financial statements; and (7) exerting control over the daily affairs of another corporation." *Id.*

[2] Mr. Todd makes this same concession on appeal to this Court.

Following jurisdictional discovery, the district court rejected both of Mrs. Cole's arguments and granted Mr. Todd's motion to strike the nationwide class allegations based on the lack of personal jurisdiction.

Treating the order as the equivalent of an order denying class certification, a motions panel of this Court granted Mrs. Cole's petition for interlocutory appeal under Rule 23(f). *Cf. Microsoft v. Baker*, 137 S. Ct. 1702, 1711 n.7 (2017) (noting that "[a]n order striking class allegations is functionally equivalent to an order denying class certification and therefore appealable under Rule 23(f)"). We therefore have jurisdiction under 28 U.S.C. § 1292(e).

Discussion

We begin, briefly, by noting what is not in dispute: the district court's exercise of jurisdiction over the claims[3] of non-residents against Mr. Todd would not offend the Constitution. The Constitution limits the personal jurisdiction of the federal courts—at least when adjudicating claims based on federal law—only by the

[3] The language of specific personal jurisdiction is somewhat unwieldly. Personal jurisdiction concerns a court's power over a defendant, but specific jurisdiction limits that power to particular claims. A court may well have the power to adjudicate some claims against a defendant but not other claims against the same defendant. *E.g.*, *Bristol-Myers Squibb Co. v. Superior Court of Cal., S.F. Cnty.*, 137 S. Ct. 1773, 1781 (2017). To avoid repeating the awkward phrase "specific jurisdiction over a defendant with respect to a claim," this Court will follow the lead of the Supreme Court and refer to "specific jurisdiction over a claim," *id.*, despite its imprecision.

Due Process Clause of the Fifth Amendment, an inquiry that concerns contacts with the United States as a whole. *Cf. Canaday v. Anthem Companies, Inc.*, 9 F.4th 392 (6th Cir. 2021) (discussing the issue). Because there is no question that Mr. Todd has sufficient contacts with the United States as a whole, there is no question that Congress could, by statute, permit any federal court in the country to exercise jurisdiction over any claim against him.

The difficulty, of course, is that Congress has not done so. Rather than extending to the outer bounds of the Fifth Amendment, the personal jurisdiction of districts courts is governed by the Federal Rules of Civil Procedure, specifically Rule 4(k).

Under Rule 4(k)(1), apart from various exceptions not relevant to this appeal, personal jurisdiction exists only if a defendant "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). This rule, in effect, incorporates the limits on state court jurisdiction (including the limits of the Fourteenth Amendment) into the limits of the jurisdiction of district courts.

Because the New Tejas long-arm statute extends to the outer bounds permitted by the Constitution, the jurisdictional inquiry thus reduces to the question whether the exercise of jurisdiction would be consistent with the Due Process Clause of the Fourteenth Amendment.

With this framework in mind, we turn to the two jurisdictional arguments raised by Mrs. Cole.

I. The Class Action Device Does Not Permit Evasion of the Ordinary Rules of Personal Jurisdiction.

Mrs. Cole first contends that to adjudicate this case as a class action, there is no need to consider personal jurisdiction over the claims of unnamed class members. Personal jurisdiction, she contends, should be considered only with respect to the claims of the named plaintiff, and the district court indisputably has personal jurisdiction over her claims (and those of other New Tejas residents).

We disagree. As an initial matter, the class action device found in Rule 23 is a purely procedural rule. The Rules Enabling Act, 28 U.S.C. § 2072(b), provides that federal procedural rules "shall not abridge, enlarge or modify any substantive right."

Thus, although it is yet unclear "whether every class member must demonstrate standing *before* a court certifies a class," the Supreme Court has plainly held that "[e]very class member must have Article III standing in order to recover individual damages." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021); *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C. J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."). In other words, the use of the class action device does not empower a court to adjudicate disputes (and award relief) that it would otherwise be unable to adjudicate.

We have little difficulty in extending this principle to the requirement of personal jurisdiction. Under Rule 4(k)(1)(A), the personal jurisdiction of the district court is limited "to the jurisdiction of a court of general jurisdiction in [New Tejas]." And the Due Process Clause

of the Fourteenth Amendment limits the authority of state courts to adjudicate claims. State procedural rules (like class actions) cannot empower state courts to adjudicate claims that would otherwise be outside the bounds of the Fourteenth Amendment. Rule 4(k)(1)(A) applies these same limits to federal courts.

The dissent's contention that unnamed class members are "parties for some purposes but not others" may be true enough in the abstract, but unnamed class members are undeniably "parties" in the sense that they seek to have an enforceable judgment entered in their favor on their individual claims. And the power to enter an enforceable judgment on claims (i.e., to adjudicate them) is limited by the requirement of personal jurisdiction. If unnamed class members are to be "parties" enough to receive a judgment, they must also be "parties" over which there is personal jurisdiction. *But see Lyngaas v. Ag*, 992 F.3d 412, 437 (6th Cir. 2021) (relying on the conclusion that unnamed class members are "parties for some purposes and not for others" in rejecting these arguments).

The dissent's contention that subject-matter jurisdiction is evaluated only with respect to the claims of named class members, *see Mussat v. IQVIA, Inc.*, 953 F.3d 441, 443 (7th Cir. 2020), overstates the rule and is belied by *TransUnion v. Ramirez*. Although diversity of citizenship (and thus jurisdiction over the case as a whole) is determined only with respect to named class members, Article III standing is also part of subject-matter jurisdiction, and Article III standing must be evaluated with respect to "[e]very class member." *TransUnion*, 141 S. Ct. at 2208. We conclude that personal jurisdiction—which must be evaluated with

respect to individual claims—resembles the latter far more than the former.

We acknowledge that Rule 4 is merely one of the Rules of Civil Procedure. Congress could, of course, extend the jurisdiction of the federal courts by statute to their constitutional bounds. *E.g.*, Fed. R. Civ. P. 4(k)(1)(C) (noting broader jurisdiction "when authorized by a federal statute"). But Congress has not done so with respect to the TCPA, so Rule 4(k)(1)(A)'s limits govern.

Nor do we identify any conflict between Rule 4(k) and Rule 23, which is silent as to personal jurisdiction. Nothing in the text of Rule 23 indicates any intention to override the ordinary rules of personal jurisdiction.

The Supreme Court has made clear that personal jurisdiction over a defendant must be evaluated on a claim-by-claim, plaintiff-by-plaintiff basis. Mere similarity between an out-of-state plaintiff's claim and an in-state plaintiff's claim cannot give rise to personal jurisdiction over the former: "The mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix 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." *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781.

The same analysis applies to Rule 23. Commonality with the claims of the named plaintiffs cannot give rise to personal jurisdiction over the claims of unnamed class members.

For these reasons, we agree with the district court that for a case to proceed as a class action, there must be personal jurisdiction over the claims of unnamed class members.

II. Under Federal Choice-of-Law Rules, Alter Ego Is Evaluated Under the Law of an Entity's State of Incorporation.

As Mrs. Cole acknowledges, personal jurisdiction over Mr. Todd with respect to the claims of out-of-state class members could exist only if Mr. Todd were subject to general jurisdiction in New Tejas. Ordinarily, Mr. Todd would be subject to general jurisdiction only in West Dakota, his domicile.

But "federal courts have consistently acknowledged that it is compatible with due process for a court to exercise personal jurisdiction over an individual that would not ordinarily be subject to personal jurisdiction in that court when the individual or corporation is an alter ego or successor of a corporation that would be subject to personal jurisdiction in that court." *Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 433 (4th Cir. 2011). Thus, the parties agree, 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.

As set forth above, the parties agree that the validity of this theory essentially reduces to a choice-of-law inquiry: Under the ordinary test of alter ego applied in most states (and, on occasion, in the federal courts), Mr. Todd is the alter ego of Spicy Cold. Under the peculiar alter ego test of New Tejas (the forum state and the state of Spicy Cold's incorporation), Mr. Todd is not.

This is a novel question in this circuit, and it is a question on which our sister circuits provide little guidance. For example, the Fourth Circuit (with no explanation), has applied Virginia law of alter ego to a

case arising out of Virginia. *See Newport News Holdings Corp.*, 650 F.3d at 434 ("Under Virginia law, . . .").

The Sixth and Ninth Circuits, with similarly little explanation, appear to have applied a federal common law test for alter ego when federal claims are involved. *See Anwar*, 876 F.3d at 849; *Ranza*, 793 F.3d at 1071.[4]

The D.C. Circuit appears to suggest that federal law of alter ego (at least for liability purposes) should apply in "situations in which some federal interest was implicated by the decision whether to pierce the corporate veil." *U.S. Through Small Bus. Admin. v. Pena*, 731 F.2d 8, 12 (D.C. Cir. 1984).

Several other decisions—including from the Federal and Ninth Circuits—have applied state alter ego law in federal-question cases. *See Sys. Div., Inc. v. Teknek Elecs., Ltd.*, 253 F. App'x 31, 35 (Fed. Cir. 2007) (relying on the California law of alter ego); *Iconlab, Inc. v. Bausch Health Cos.*, No. 19-55683, 2020 WL 5640599, at *1 (9th Cir. Sept. 22, 2020) (stating in a case involving federal-question jurisdiction and an alter ego theory of personal jurisdiction: "We apply state law to questions of jurisdiction."); *see also BASF Corp. v. Willowood, LLC*, 359 F. Supp. 3d 1018, 1025 (D. Colo. 2019) (applying the Colorado law of alter ego in a patent infringement suit under federal law).

A bankruptcy court has noted the difficulty of the analysis: "Caselaw on whether a choice-of-law analysis is

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[4] *See also Estate of Thomson ex rel. Estate of Rakestraw v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008) ("In applying the alter-ego theory of personal jurisdiction in this diversity action, we must look to Ohio law.").

required in this context is unsettled, with some courts finding that for a jurisdictional analysis, courts should instead apply either the law governing the interpretation of the applicable jurisdictional statute (here, federal law) or federal due process jurisprudence, or both." *In re Lyondell Chem. Co.*, 543 B.R. 127, 139 (Bankr. S.D.N.Y. 2016); *see also id.* n.38 ("Some federal courts have engaged in a choice of law analysis to decide which law to apply to an alter ego theory of jurisdiction, usually finding that the law of the corporation's state of incorporation governs. Other courts have disagreed, distinguishing the analysis for 'alter ego' liability and for 'alter ego' jurisdiction, and finding that because 'alter ego' jurisdiction is either a construction of the statute providing jurisdiction or is part of due process (or both), for a jurisdictional veil piercing analysis, courts should apply either the law governing the interpretation of the jurisdictional statute or federal due process jurisprudence, or both." (collecting cases)).

And one district appears to suggest that there is a "relaxed" (federal common law?) standard for proving alter ego for jurisdictional purposes compared to liability purposes. *In re Platinum & Palladium Antitrust Litig.*, No. 1:14-CV-9391-GHW, 2017 WL 1169626, at *47 (S.D.N.Y. Mar. 28, 2017) (collecting cases).

We now endeavor to cut through this Gordian knot. A district court exercising federal-question jurisdiction must apply federal choice-of-law rules to determine the applicable substantive law. *Enter. Group Planning, Inc. v. Falba*, 73 F.3d 361 (6th Cir. 1995). Federal common law looks to the Restatement (Second) of Conflict of Laws to resolve choice-of-law issues. *See Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006) ("Federal common law follows the approach outlined in

the Restatement (Second) of Conflict of Laws."). The question thus becomes, under the principles of the Restatement (Second) of Conflict of Laws, what law would apply when considering alter ego for purposes of personal jurisdiction: (1) federal common law; (2) the law of the forum state; or (3) the law of the state of incorporation.

Under the Restatement (Second) of Conflict of Laws, arguments about alter ego are governed by the law of the state of incorporation. Restatement (Second) of Conflicts of Laws § 302 (1971) ("Conflict of Laws"); *see also In re Melo*, No. 17-43644-BDL, 2019 WL 2588287, at *5 (Bankr. W.D. Wash. June 21, 2019) ("As to the alter ego claim to pierce the corporate veil, Restatement (Second) Conflicts of Law Section 307 directs that claims to impose corporate liability on shareholder should be determined by the law of the state of incorporation of the relevant corporate entity."); *Tomlinson v. Combined Underwriters Life Ins. Co.*, No. 08-CV-259-TCK-FHM, 2009 WL 2601940, at *2 (N.D. Okla. Aug. 21, 2009) ("Many jurisdictions have cited § 307 [of the Restatement (Second)] as indicating that the law of the state of incorporation governs veil piercing claims.").

Comments to the Restatement confirm that "[t]he local law of the state of incorporation will be applied to determine the liability to which a person subjects himself by purchasing, or subscribing to, shares of a corporation." Conflict of Laws § 307, cmt. a. This law "is the law which the shareholders, to the extent that they thought about the question, would usually expect to have applied to determine their liability," and "this state will usually have the dominant interest in the determination of this issue." *Id.*

Corporations, the Supreme Court has explained, "are creatures of state law," and "it is state law which is the font" of a corporate entity's power. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98–99 (1991) (citing *Burks v. Lasker*, 441 U.S. 471, 478 (1979)). It is hardly surprising that state law would govern the jurisdictional effects of the relationship between the corporation and its owners (for example, the "corporate formalities" are necessarily a question of state law).

Spicy Cold Foods, Inc. is a creature of New Tejas law, and the law of New Tejas is the law under which Mr. Todd, had he thought about the question, would have expected his personal liability to be determined.

The era of general federal common law has long since passed. Federal choice of law principles, as reflected in the Restatement, direct us to apply the New Tejas law of alter ego, and under that test, it is undisputed that Mr. Todd is not the alter ego of Spicy Cold and thus not subject to general jurisdiction in New Tejas.

Conclusion

For these reasons, we conclude that the district court correctly determined that it lacked personal jurisdiction over Mr. Todd with respect to the claims of out-of-state class members and properly struck the class allegations.

AFFIRMED.

ARROFORD, Circuit Judge, dissenting.

My colleagues in the majority erroneously limit the personal jurisdiction of district courts in two important respects, with consequences that will be surely felt far outside of this case.

The decision regarding class actions effectively sounds the death knell for nationwide class actions, at least within the bounds of this Circuit. In effect, my colleagues hold, a nationwide class action can be maintained only where a defendant is subject to general jurisdiction, a result inconsistent with history and with Rule 33.

The decision to allow federal personal jurisdiction in a federal claim to rest on state law of incorporation invites a race-to-the-bottom among the states, particularly in light of New Tejas's idiosyncratic rule of alter ego. There is no reason that the jurisdiction of a federal court adjudicating a federal claim should be determined by state law.

Both holdings threaten significant harm in future cases, and I would urge the Supreme Court to grant review and harmonize our decisions with those of other circuits.

I. In a Class Action, Personal Jurisdiction Must Exist Only with Respect to the Claims of the Named Parties.

The majority's holding regarding class-action personal jurisdiction creates conflict between our court and the Sixth and Seventh Circuits, the only other courts of appeals to have addressed the issue. *Lyngaas v. Ag*, 992 F.3d 412 (6th Cir. 2021); *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 443 (7th Cir. 2020).

I agree with the holdings of our sister circuits, which Mrs. Cole has championed. There is no argument that the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California,* 137 S. Ct. 1773 (2017), controls. *Bristol-Myers* involved a "mass action" under the California Civil Procedure Code. *Mussat,* 953 F.3d at 446. A "mass action" merely involved consolidation of individual cases—all of the individual plaintiffs remain plaintiffs in the traditional sense. *Id.*

Bristol-Myers says nothing about how the rules of personal jurisdiction apply to unnamed members of a class action. *See* 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting) ("The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.").

And as the Supreme Court has repeatedly cautioned, unnamed class members are not "parties" for all purposes: "Nonnamed class members, however, may be parties for some purposes and not for others." *Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2002). For example, that "nonnamed class members cannot defeat complete diversity is likewise justified by the goals of class action litigation." *Id.* at 10. "Ease of administration of class actions would be compromised by having to consider the citizenship of all class members, many of whom may even be unknown, in determining jurisdiction." *Id.* "Perhaps more importantly, considering all class members for these purposes would destroy diversity in almost all class actions." *Id.*

The Supreme Court analysis in *Devlin* is far more analogous than its analysis in *Bristol-Myers*. A ruling that unnamed class members cannot defeat personal

jurisdiction is "justified by the goals of class action litigation." A requirement of personal jurisdiction with respect to the claims of unnamed class members would make administration more difficult and would prevent nationwide classes in almost all class actions. Looking to "purpose," as the Supreme Court did in *Devlin*, confirms that a personal jurisdiction inquiry over unnamed class members is unnecessary.

Like the Seventh Circuit, I "see no reason why personal jurisdiction should be treated any differently from subject-matter jurisdiction and venue: the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so." *Mussat*, 953 F.3d at 447.

II. In Determining Personal Jurisdiction With Respect to a Federal Claim, Alter Ego Should be Evaluated Under Federal Common Law.

The majority commits an equally egregious error when it holds that whether Mr. Todd is the alter ego of Spicy Cold—for purposes of personal jurisdiction—is governed by state rather than federal law.

As an initial observation, note the tension in the majority's analysis. In discussing class actions, the majority takes pains to root its analysis in the Constitution and due process. But in discussing alter ego, the majority departs from these federal constitution concerns and is content to leave the issue to state law. This inconsistency is a strong indication that the majority's analysis is incorrect.

Moreover, the majority's description of chaos and inconsistency in the caselaw is an exaggeration. When discussing substantive liability under an alter ego theory,

courts routinely decline to conduct a choice-of-law analysis because of the similarity in state law.[5] The "Gordian knot" discussed by the majority (and the failure of cases to conduct a rigorous choice-of-law analysis according to the majority's preferences) may simply reflect the general consensus regarding the law of alter ego. Any imprecision should be easily forgiven when the choice of law being applied is irrelevant to the result.

I agree, however, that in this case, a choice-of-law analysis is necessary because of New Tejas's unusual law of alter ego, which (the parties agree) is determinative. Where I part ways, however, is in the majority's framing of the choice-of-law inquiry, which glosses over the potential for the application of a federal common law rule.

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[5] *See, e.g.*, *Invesco High Yield Fund v. Jecklin*, No. 19-15931, 2021 WL 2911739, at *1 (9th Cir. July 12, 2021) ("The parties dispute whether Nevada or Delaware's alter ego law applies, but we need not decide this choice-of-law question because the result is the same under either state's law[.]"); *Volvo Const. Equip. Rents, Inc. v. NRL Rentals, LLC*, 614 F. App'x 876, 879 (9th Cir. 2015) ("The parties and the district court proceeded under the assumption . . . that there were no substantive differences between Nevada and Texas law concerning alter ego liability."); *Fillmore E. BS Fin. Subsidiary LLC v. Capmark Bank*, 552 F. App'x 13, 15 (2d Cir. 2014) ("[T]he same result would obtain under either California or New York standards for pleading an alter ego claim."); *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1161 (5th Cir. 1983) ("We too decline to answer the choice of law question, since our examination of Pennsylvania and Texas law also reveals an identity of result concerning the alter ego issue.").

The majority frames the question as *which* state law should apply, a question necessarily answered by "New Tejas." I frame the question as *whether* state law should apply, a question that I answer "no."

Recall that alter ego is relevant to this appeal only as part of determining whether the federal district court can adjudicate federal claims against Mr. Todd. And this issue, as the majority explains, is controlled by the Federal Rules of Civil Procedure and the Due Process Clause of the Fourteenth Amendment. I see no reason why state law would play any role whatsoever in this determination.

Whether Mr. Todd is subject to personal jurisdiction with respect to the TCPA claims of unnamed, out-of-state class members is an issue of federal law, not state law. This proposition should remain true regardless of whether the theory of personal jurisdiction is Mr. Todd's personal contacts with New Tejas or the theory that Mr. Todd is the alter ego of Spicy Cold.

And the result reached by the majority confirms the incorrectness of its analysis. The unusual alter ego law of New Tejas is being allowed to undermine federal interests by preventing a federal district court from adjudicating claims against Mr. Todd. This is why—as the Sixth Circuit and the D.C. Circuit have explained—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 v. Dow Chem. Co.*, 876 F.3d 841, 848 (6th Cir. 2017) (discussing *Flynn v. Greg Anthony Constr. Co.*, 95 F. App'x 726, 732 (6th Cir. 2003)); *see also U.S. Through Small Bus. Admin. v. Pena*, 731 F.2d 8, 12 (D.C. Cir. 1984).

Here, a federal interest—personal jurisdiction to adjudicate a federal claim—is implicated by the decision whether to pierce the corporate veil of Spicy Cold and treat Mr. Todd as its alter ego. Put another way, the law of alter ego for purposes of personal jurisdiction (at least with respect to federal claims in federal courts) is an area in which there are "uniquely federal interests" that "are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced . . . by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'" *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988).

For these reasons, I readily conclude that federal choice-of-law rules direct us to consider alter ego under federal common law and not under the law of New Tejas. Neither party disputes 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.

Even if it were necessary for the district court to have personal jurisdiction over Mr. Todd with respect to the unnamed class members, such jurisdiction exists.

The district court erred in striking the nationwide class allegations, and the decision below should be reversed. Respectfully, I dissent.

APPENDIX B

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

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

Federal Rule of Civil Procedure 4 provides in pertinent part:

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