No. 18-1067

IN THE

Supreme Court of the United States

In the Matter of

HARBORVIEW MORTGAGE LOAN TRUST 2005-10

AMBAC ASSURANCE CORPORATION,

Petitioner,

—v.—

U.S. BANK NATIONAL ASSOCIATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MINNESOTA

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR THE PETITIONER[1]

This case turns on a single question of federal constitutional law: can a state court exercise *in rem* jurisdiction over the property interests of a party who lacks any contacts—"minimum" or otherwise—with that state? Over 40 years ago, this Court said no. *See Shaffer v. Heitner*, 433 U.S. 186, 207 (1977). But here, the Minnesota courts said yes, at least where decisions central to the administration of corporate trusts are involved. They reasoned that a trustee's unilateral, undisclosed decision to oversee a trust from Minnesota somehow vests the state courts with power to render rulings concerning trust property located anywhere on earth, even if the trust's beneficial owners have never directed the slightest attention toward the North Star State.

Try as it might, Respondent cannot muster a serious defense of this logic. That is not surprising. To vest themselves with unbounded jurisdiction, the state courts committed two key errors. First, they focused exclusively on Respondent's contacts with Minnesota—disregarding Ambac's lack of contact with the state, even though this case will determine Ambac's rights. *Contra Walden v. Fiore*, 571 U.S. 277, 284 (2014). Second, they exercised power over Ambac's interests in the Trust by asserting that the relevant intangible property interests are located in Minnesota—despite this Court's holding that the

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[1] Terms not defined herein have the meanings set forth in the Petition for a Writ of Certiorari ("Petition").

situs of intangible property interests is too frail a contact to singlehandedly anchor *in rem* jurisdiction. *See Rush v. Savchuk*, 444 U.S. 320, 329 (1980). Together, these errors created a form of universal jurisdiction, eliminating purposeful availment as a requirement when intangible interests are at stake.

By any measure, that is an important holding. It flouts binding precedent, defies this Court's effort to corral the scope of worldwide jurisdiction, upsets the expectations of trust beneficiaries, and invites other states to grant their courts equally expansive power over trust property. It also allows Respondent, the most powerful player in the multi-trillion-dollar corporate trust market, to unilaterally centralize control over trust property worldwide in a friendly forum. Indeed, the theory articulated below is readily applicable to all manner of *in rem* proceedings. To exercise universal jurisdiction, a court need only identify some intangible property right and locate it with a plaintiff who has availed itself of the forum (or has offices nationwide).

Respondent understandably downplays that point, insisting that this case is unworthy of review. But circuit splits are not the sole measure of certiorari, and the vehicle issues that Respondent raises are illusory. While this appeal is interlocutory, it is final on the relevant question: whether the state may exercise jurisdiction over Ambac's interests in the Trust. Further, Minnesota courts regularly decide important questions in unpublished opinions and should not be allowed to evade review on that basis. The petition should be granted.

ARGUMENT

I. The Decision Below Is Wrong

In *Rush*, the Court held that an intangible property interest located in Minnesota did not support *in rem* jurisdiction over a party lacking any other contacts with the state. *See* 444 U.S. at 322. As though it anticipated this very case, the Court warned that the intangible property interest—there, an insurer's contractual duty to indemnify the defendant—had "no jurisdictional significance" as a "contact" with Minnesota. *Id.* at 330.

As we have already explained, that holding fits like a glove. *See* Pet. 14-18. Respondent's only answer is that the intangible property interest here "is at the heart of this case," whereas the interest in *Rush* was unrelated to the litigation. BIO 20. But that distinction is immaterial. Here, as there, the party being haled into court played no part in causing the property interest to be located in Minnesota. And here, as there, that party otherwise had no contacts with Minnesota. In both cases, the Minnesota courts erred by exercising *in rem* jurisdiction over the interests of a party based solely on someone else's contacts, while ignoring that party's total lack of contacts with the forum state.

This error connects to the central lesson of the Court's modern personal-jurisdiction jurisprudence. Since *International Shoe*, the Court has repeatedly made clear that the *plaintiff's* unilateral connections with the forum are irrelevant to whether jurisdiction may be exercised over the *defendant*. Applying that holding, *Rush* reasoned that the "fictitious presence"

of intangible property in Minnesota "does not, without more, provide a basis for concluding that there is *any* contact in the *International Shoe* sense," at least when it reflects nothing more than the conduct of the party invoking the court's jurisdiction. 444 U.S. at 328-30. *Cf. Walden*, 571 U.S. at 285 ("[T]he plaintiff cannot be the only link between the defendant and the forum."). The same is true in this case. Indeed, Ambac and the certificateholders have only a single contact "in the *International Shoe* sense": their contact with Massachusetts, where the Trust is supposed to be administered by Respondent pursuant to the Pooling Agreement governing the Trust. Pet. 7-8.

Respondent briefly refers to the claim below that "trust beneficiaries had every reason to expect that litigation might occur in Minnesota." BIO 20. But whether that finding rests on *Respondent's* "readily apparent presence in Minnesota," Pet. App. 40a, or *Respondent's* unilateral (and undisclosed) decision to administer the Trust from Minnesota, *id.* 17a-18a, it merely reflects *Respondent's* Minnesota contacts and is irrelevant. *See Walden*, 571 U.S. at 289 (holding that "petitioner's knowledge of respondents' 'strong forum connections'" is irrelevant to the jurisdictional analysis).

The bottom line is that Minnesota's courts defied this Court's personal-jurisdiction precedents in order to aggrandize that state's judicial power. Under the theory propounded below, the purposeful-availment limitation on *in rem* jurisdiction simply does not apply to intangible property fictitiously

located in the state. That cannot be the law. The decision below is not just wrong, but egregiously so.[2]

II. The Petition Is Certworthy

A. This Case Presents a Question of National Importance

The decision below constitutes an unbridled exercise of *in rem* jurisdiction by Minnesota courts over hundreds of millions of dollars of trust assets located elsewhere—undertaken at the urging of the nation's largest corporate trustee and justified on a theory that this Court squarely repudiated in *Rush*. It is important not only in its own right, but also because it sounds a painfully off-key note in the law of jurisdiction and will create economic uncertainty.

Respondent's assertion otherwise is mistaken. For starters, Respondent offers a cursory and tepid defense on the merits, focusing heavily on separate state law issues irrelevant to this petition. *See* BIO 16-18. On the issue actually presented, Respondent's inability to distinguish *Rush* only confirms that the

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[2] Respondent likewise fails to distinguish *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951), the sole case cited below to locate the Trust's intangible property in Minnesota and justify the exercise of jurisdiction. To be sure, the Court of Appeals stated that "the *parties* in the relationships created by the trust documents are within the jurisdiction of the district court." BIO 21 (citing Pet. App. 13a). But the court plainly did not mean that Ambac and the certificateholders are "within the jurisdiction of the district court"—no one has ever claimed they are. And *Standard Oil* does not allow a court to adjudicate the rights of persons in and to intangible property if they are not *already* subject to the jurisdiction of the court.

Minnesota courts paid little heed to the due process requirements established by the Constitution.

The adventurous view of *in rem* jurisdiction articulated below is especially unnerving in light of this Court's recent efforts to discipline and narrow theories of universal jurisdiction. *See, e.g. Daimler AG v. Bauman*, 571 U.S. 117, 132–33 (2014) (noting that the Court "has increasingly trained on the relationship among the defendant, the forum, and the litigation" (citing *Shaffer*, 422 U.S. at 204)); *see also BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017); *Walden*, 571 U.S. at 284; *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013). The Minnesota courts apparently believe that they can decide the rights of everyone, everywhere with respect to corporate trusts—even if no trust beneficiary had any contact with Minnesota—so long as a single entity with a plausible connection to the state seeks to exercise the trust's intangible rights there. That conception of state court jurisdictional power has never been correct and is doubly incorrect today.

Respondent seeks to diminish the significance of the Minnesota courts' error by claiming that the decision involves an idiosyncratic procedure created by an outlier law. *See* BIO 10-14. But Respondent is far too modest. Even if the sweep of Minnesota's rule could be limited to trusts overseen by Respondent, Respondent is the largest corporate trustee in the nation and, in the RMBS trust context alone, serves as the trustee "for thousands of securitization transactions involving many millions of mortgages." U.S. Bank Global Corp. Trust Services,

https://bit.ly/2Xc5k5M. Indeed, based upon our non-exhaustive review, Respondent has relied on Minnesota courts' *in rem* jurisdiction to bring dozens of TIPs concerning MBS trusts holding many billions of dollars in mortgage loans.[3] The application of this decision to Respondent will itself disturb settled market expectations.

In any event, Minnesota's decision may easily metastasize. The Uniform Trust Code (UTC), by its terms, is *non-exclusive* and "does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust." UTC § 202(c) (cited in BIO 10). Thus, *in rem* jurisdiction may still be available in other states as a matter of common law or statute, whether or not the UTC applies. *See, e.g.*, Ariz. Rev. Stat. § 14-1301(2); Nev. Rev. Stat. § 164.010; Restatement (Second) of Trusts § 199 cmt. f (trust proceedings "may be *quasi in rem* to affect interests in the trust property" (citation omitted)). Those state courts will

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[3] *See, e.g.*, *In re MLMI 2006-RM4 and MLMI 2006-RM5*, 62-TR-CV-18-43 (Minn. Dist. Ct.), Petition ¶ 1 (seeking approval of settlement of litigation over MLMI 2006-RM4 and MLMI 2006-RM5 trusts); *Merrill Lynch Mortgage Investors Trust, Series 2006-RM4, et al. v. Merrill Lynch Mortgage Lending, Inc. et al.*, Index No. 654403/2012 (N.Y. Sup. Ct.), Complaint ¶ 2 (original principal balance of MLMI 2006-RM4 and 2006-RM5 over $1.1 billion); *In the matter of GSAMP 2007-HE2*, 62-TR-CV-19-16 (Minn. Dist. Ct.), Petition ¶ 1 (seeking instruction in connection with litigation over GSAMP 2007-HE2 trust); *U.S. Bank National Association, as Trustee for GSAMP Trust 2007-HE2 v. Goldman Sachs Mortgage Co., et al.*, 651097/2019 (N.Y. Sup. Ct.), Summons ¶ 5 (original principal balance of GSAMP 2007-HE2 approximately $1 billion).

feel pressure to adopt an equally overbroad view of their jurisdiction, lest Minnesota outcompete them in the trust industry by offering a universal forum.

Nor can the constitutional reasoning below be cabined to TIP proceedings. *Contra* BIO 11-12. It would also apply whenever a state court attempts to exercise *in rem* jurisdiction by virtue of the fictional presence of intangible property within its borders. For instance, *Hanson v. Denckla*, 357 U.S. 235 (1958), one of this Court's seminal jurisdictional cases, addressed the exercise of *in rem* jurisdiction over trust assets in *probate* proceedings.[4]

Regardless, even if the Petition had no broader relevance, the Court often uses outlier laws to make important points about constitutional law. *E.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). Given the ubiquity of litigation concerning trust assets, and given this Court's demonstrated recognition that trust jurisdiction is an important issue, *see, e.g.*, *North Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*, 18-457, it is more vital than ever to ensure that state courts color inside the lines while seeking to control assets scattered across the globe. Here, that means reminding the Minnesota courts that this Court's precedent means what it says—and that the Due

[4] Respondent's related attempt to limit the scope of the Minnesota Trust Code based on Ambac's statutory construction arguments below, BIO 14, ignores that the Minnesota courts *rejected* Ambac's reading and broadly construed the Code to apply so long as the trustee has a business presence in the State, *see* Pet. App. 10a.

Process Clause of the U.S. Constitution imposes important limitations on universal jurisdiction.

B. This Case Is an Ideal Vehicle

Respondent offers an assortment of vehicle arguments, none of which withstand scrutiny.

Respondent first notes that the decision is non-precedential and from an intermediate court. But this Court has repeatedly granted certiorari to consider such decisions that raise important issues, including those of the Minnesota Court of Appeals. *See, e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Garza v. Minnesota*, No. 15-7987, 2016 U.S. LEXIS 4303 (June 28, 2016); *Hexom v. Minnesota*, No. 15-1052, 2016 U.S. LEXIS 4309 (June 28, 2016). "[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in [this Court's] decision to review the case." *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam).

Nor should it. The Minnesota Court of Appeals rarely decides cases by published decision; only 11% of its opinions are published. *See* 2017 Annual Report of the Minnesota Judicial Branch 53, https://bit.ly/2JPrAQ7. Minnesota courts should not be permitted to evade this Court's review by refusing to publish substantive decisions that address important federal constitutional questions. *See, e.g.*, *Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from denial of certiorari)

(courts should not be allowed to escape review by "avoid[ing] creating binding law").[5]

Respondent also claims that the Petition is "factbound" because the decision below turned on "undisputed" factual findings about the location of the intangible property and Respondent's structure. BIO 12-13. This is a puzzling argument: the absence of disputed facts supports, rather than weakens, the case for certiorari. And while Respondent proceeds to speculate that other TIP proceedings may involve different property or differently structured trustees, that is irrelevant to this Court's review of the legal error below—an error of much broader application.

Next up is Respondent's largely unexplained assertion that this case is a flawed vehicle because Ambac is an insurer, not a certificateholder. That fact has no bearing on the merits of this petition: Ambac is a "beneficiary" of the Trust—both as an express third-party beneficiary under the Pooling Agreement and as a subrogee of the certificateholders—and it will be bound, like any certificateholder, by an *in rem* order of the Minnesota courts. *See* Minn. Stat. § 501C.0204(1). Moreover, Respondent is wrong to suggest that the purposeful-availment analysis focuses solely on the conduct of *certificateholders*, as opposed to Trust beneficiaries. BIO 16. Jurisdiction must be established with respect to "each [party] over whom

[5] In fact, the Minnesota Court of Appeals often relies on its own unpublished decisions. *See, e.g.*, *State v. Zais*, 790 N.W.2d 853, 861 (Minn. Ct. App. 2010).

a state court exercises jurisdiction." *Rush*, 444 U.S. at 332. Here, that includes Ambac.[6]

Finally, Respondent opposes review on the ground that the decision below is "interlocutory." BIO 9. Respondent elaborates that "Minnesota courts have not yet had an occasion to opine on the *substance* of U.S. Bank's TIP petition." BIO 9 (emphasis added). That is both true and irrelevant. Whatever the Minnesota courts may say about the merits of the case, they have definitively decided that they may exercise jurisdiction consistent with due process. There is nothing interlocutory about that conclusion, and so immediate review is warranted. At the risk of stating the obvious, a party should not be required to defend on the merits in a forum that does not have power over it in the first place. *See, e.g.*, *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017); *Shaffer*, 433 U.S. at 195 n.12.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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[6] Relatedly, Respondent suggests review is inappropriate because no certificateholder has appeared in the proceeding below. Even if that were relevant—and it is not because Ambac is a beneficiary of the Trust who will be bound by an order *in rem* like any other—certificateholder Bonitas, LLC has appeared and objected to Respondent's acceptance of the settlement. Pet. ii. Nor, as a practical matter, is it surprising that certificateholders would not appear when, for holders of insured certificates, payments are guaranteed by Ambac regardless of the outcome of this proceeding.

June 5, 2019

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