No. 20-1385

In the
Supreme Court of the United States

TAREK OBAID,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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Does the Due Process Clause require that all exercises of civil jurisdiction—*in personam*, *in rem* and *quasi in rem*—satisfy the "minimum contacts" test? In *Shaffer v. Heitner*, 433 U.S. 186 (1977), this Court answered "yes." *Id.* at 207, 212. Contradicting *Shaffer*, a split panel of the Ninth Circuit held that *Shaffer* is limited to *quasi in rem* cases and thus, minimum contacts is irrelevant to *in rem* cases. No other court of appeals has embraced this view.

The Ninth Circuit understood, however, that, if the property *owner's* contacts are irrelevant to *in rem* cases, there must nonetheless be *some test* by which to confirm that due process is satisfied. It consequently held that "traditional *in rem* principles" govern and the constitutionality of *in rem* jurisdiction is "anchor[ed]…to the presence of the *res*." Pet.App.15-16. In this case, however, it is *undisputed* that the *res* is *not present* anywhere in the United States. To uphold jurisdiction, therefore, the Ninth Circuit invented a novel and erroneous construction of the civil forfeiture venue statute, 28 U.S.C. § 1355(b)(1), holding that it creates a "legal fiction" that property is *legally sited* wherever any of the acts or omissions giving rise to the forfeiture occurred. Pet.App.17. Pursuant to this construction, the Ninth Circuit deemed the *res* "present."

The Ninth Circuit's erroneous construction of both Section 1355(b) and *Shaffer* renders compelling the need to grant this Petition.

I. PETITIONER HAS NOT WAIVED HIS ARGUMENT THAT *IN REM* JURISDICTION IS LACKING BECAUSE THE *RES* IS ABSENT

A. Petitioner Raised the Absence of the *Res* in His Motion to Dismiss

Realizing the problem and seeking to avoid this Court's review, the Government has assiduously elided the question Petitioner has repeatedly raised for four years: Does the Due Process Clause permit a court to adjudicate *in rem* if the *res* is *not present* and its owner otherwise lacks minimum contacts? The Government absurdly claims that Petitioner has "waive[d]" this argument, asserting that it was "not made in [Petitioner's] initial motion and [was] raised only in 'passing' in his initial reply brief." BIO.6. This argument is demonstrably false.

Petitioner has repeatedly asserted that the *res* is absent and consequently, jurisdiction cannot be established based upon on its presence. The Government's only response, from day one, has been evasion. For example, the Complaint alleged that venue lies under 28 U.S.C. § 1395(b), because "the DEFENDANT ASSETS are located in the Central District of California," Compl. ¶ 18, Dist. Ct. ECF No. 1. During an initial meet-and-confer, when Petitioner's counsel challenged the Government to "provide[] its good faith basis for this 'boilerplate' pleading concerning the location of the defendant property," the Government of-

fered no basis at all, which Petitioner noted in his motion to dismiss ("MTD"). MTD 8 n.4, Dist. Ct. ECF No. 45.

Petitioner's MTD highlighted that the absence of the *res* was consequential to both personal jurisdiction and venue. MTD 1-2; *id.* at 9-10. Supporting these arguments, Petitioner's MTD included a Declaration by William Garcia attesting that the stock certificate was in Switzerland. Garcia Decl., Dist. Ct. ECF No. 45-1. Indeed, the *very first sentence* of Petitioner's MTD personal jurisdiction argument highlighted the importance of the absence of the *res*: "The government asks the court to exercise *in rem* jurisdiction over intangible property (stock) *located outside the forum*, owned by a foreign national with no significant contacts with California or the United States. The court cannot adjudicate the government's claim without personal jurisdiction over the property owner, Mr. Obaid, and that exercise, based on such tenuous forum contacts, would violate constitutional due process." MTD 2 (italics added). The MTD thus asked the court to consider how, consistent with due process, it could "exercise *in rem* jurisdiction over intangible property (stock)" when the *res* is "located outside the forum" and the owner himself has "no significant contacts with California or the United States." *Id*. Petitioner's MTD observed that, unlike the typical *in rem* case in which minimum contacts is established by the presence of the *res*, no presence-based jurisdiction could lie here, stating, "Significantly, unlike in *Shaffer,* in this case the *property at issue is not present*

in this forum. The legal situs of the Palantir Shares is where the certificate issued to Claimant is located—Switzerland." *Id*. at 3. (italics added). Thus, because the *res was indisputably absent*, the only conceivable, constitutional basis upon which to exercise *in rem* jurisdiction was if Petitioner *himself* otherwise had minimum contacts. *Id*. at 14-18.

The Government was perfectly aware of Petitioner's arguments emphasizing the absence of the *res*. Indeed, it *never contested* that the *res* is absent.[1] *See* MTD Reply Br. 5 n.2, Dist. Ct. ECF No. 73. Instead, the Government chose to stick its head in the sand, evading altogether the issue of the *effect* the *res*'s absence had on jurisdiction and venue. It argued that it need not establish jurisdiction over *Petitioner* because the "defendant" is the *res* and alternatively, that buying stock in a corporation whose principal place of business was California is sufficient to establish Petitioner's minimum contacts with California.[2] MTD Opp'n 1-2, Dist. Ct. ECF No. 72. The Government's MTD opposition did, however, tellingly and quietly abandon its claim of venue under § 1395(b)

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[1] In its Ninth Circuit answering brief, the Government untimely and frivolously asserted that the *res* is sited in Delaware. Gov't Answering Br. 26 n.6, CA9 Dkt. No. 28 (Mar. 19, 2019). Petitioner's appellate reply explained why both the plain language of Delaware's stock situs statute and choice-of-law principles render this argument frivolous. Appellant's Reply Br. 17-19, CA9 Dkt. No. 41 (Apr. 19, 2019). The Government thereafter abandoned this argument.

[2] The Government has since abandoned the argument that Petitioner has minimum contacts with the forum.

(where the property is "found"), addressing instead only 28 U.S.C. § 1355(b), which lays venue in any district where "any of the acts or omissions giving rise to the forfeiture occurred…." MTD Opp'n 11-16, Dist. Ct. ECF No. 72.

Petitioner's MTD reply then highlighted again the absence of the *res*, stating, "Claimant's position is that this court has jurisdiction over *neither the* res *nor the Claimant*." Reply Br. 1, Dist. Ct. ECF No. 73 (italics added). It noted that "courts routinely uphold *in rem* jurisdiction when the property is in the forum… When the *res* is located outside the forum, however, minimum contacts must be established—if at all—by *other contacts* with the forum[,]" such as commission of a crime therein. *Id*. at 4-5. Petitioner argued, "Here, by contrast, there is no criminal prosecution that could potentially establish minimum contacts despite absence of the *res*. *The Government does not contest that the* res *in this case is outside the forum*, or that California law deems the legal situs of certificated stock to be where the share certificate is located." *Id*. at 5 (internal citations omitted, italics added). Accordingly, Petitioner argued, "*The overseas location of the* res *means that the Government cannot base* in rem *jurisdiction on the presence of the* res…." *Id*. (italics added). Indeed, the next subsection, titled, "The Government Has Not Alleged Sufficient Facts to Establish Prima Facie Jurisdiction Over Either the *Res* or Claimant," concluded, "The absence of the *res* in this case means that the *res itself lacks minimum contacts with this forum*, and Claimant's own limited contacts

with California are far less extensive than the stockholders in *Shaffer*. *Whether one applies the minimum contacts test to the* res *or to Claimant, the test is not satisfied*." *Id.* at 5, 7 (italics added).

It is thus clear that Petitioner sought 12(b)(2) dismissal based on the *absence of the res or any other minimum contacts by the owner of the* res. The Government pretends that only the latter—the owner's other contacts—is at issue. It is not. This Court should reject such gamesmanship and tackle the issue Petitioner has consistently raised: Whether *in rem* jurisdiction can be exercised when neither the *res* is present, nor the owner otherwise has minimum contacts.

B. The Ninth Circuit Held that the *Res* is Present by Operation of 28 U.S.C. § 1355(b)

The Government falsely claims that the "court of appeals likewise did not address [Petitioner's] objection" to jurisdiction based on the absence of the *res*. It contends that Petitioner "relies on a misreading of a single sentence of the decision below" and that the Court of Appeals merely drew an "analogy between [28 U.S.C.] Section 1355(b) and federal bankruptcy law," but did not construe Section 1355(b) as a federal property situs law. BIO.16-17. This is patently false.

The Ninth Circuit held that "*Shaffer* is limited to *quasi in rem* proceedings," Pet.App.14, and that jurisdiction here could be exercised based on "traditional *in rem* principles," Pet.App.16—namely, the presence of the *res*. This presence-based doctrine, said the court, derives from *Tennessee Student Assistance*

Corp. v. Hood, 541 U.S. 440 (2004), and occupies a separate doctrinal "sphere" from *Shaffer*'s minimum-contacts test. Pet.App.18 ("[E]ach survives in its respective sphere: *Shaffer* in the realm of *quasi in rem* jurisdiction and *Hood* in the realm of *in rem* jurisdiction.").

Specifically, the panel majority held that under *Hood*, "*in rem* bankruptcy jurisdiction essentially creates a fiction that the property—regardless of actual location—is *legally* located within the jurisdictional boundaries of the district in which the court sits." Pet.App.17 (quotation marks omitted). It then declared: "*The jurisdictional statute here creates a similar legal fiction*, providing that a 'forfeiture action or proceeding may be brought in the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred,' even if the property is located in a foreign country." *Id*. (italics added) (quoting 28 U.S.C. § 1355(b)). Thus, it concluded, Section 1355(b), creates a "legal fiction" that property subject to civil forfeiture is *legally sited*, for purposes of civil forfeiture, in any district "in which any of the acts or omissions giving rise to the forfeiture occurred." 28 U.S.C. § 1355(b).

The Government claims that "the straightforward point was that, for purposes of establishing *in rem* jurisdiction, both forfeiture and bankruptcy focus on the property itself, not its owner or others who might have claims." BIO.17. It argues that the panel majority did not "depend[] on the premise that the defini-

tion of property was physically within the judicial district." *Id.* at 17-18. This sentence makes no legal sense. If Section 1355(b) creates a "legal fiction" that the *res* is located in any district where any act/omission giving rise to the forfeiture occurs, by definition it establishes the property's *legal situs* for purposes of civil forfeiture.

Tellingly, the Government concedes that Section 1355 addresses venue and *subject-matter* jurisdiction, not personal jurisdiction. *See* Pet.24-33. It states that under Section 1355(a)'s "grant of subject-matter jurisdiction, there is no need for a district court to have the property within its district; the forfeiture action alone provides the basis for jurisdiction." BIO.17. Indeed, as a *subject-matter* jurisdiction and venue statute, Section 1355 does not require presence of the property.[3] But this says nothing about the present question: What does *due process* require to exercise *in rem* jurisdiction? Must the *res* be present or, alternatively, the owner have other minimum contacts? The Government repeatedly claims the *owner* need not have minimum contacts but it remains conveniently silent regarding how due process can be satisfied when the *res* is undisputedly absent.

[3] The Government remarkably implies that a subject-matter jurisdiction statute *per se* establishes personal jurisdiction. This is constitutionally untenable, as these doctrines derive from different constitutional provisions (Article III, section 2 versus the Due Process Clauses) and serve distinct purposes.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS

A. Conflict with *Shaffer* and *Hood*

Shaffer stated that it "use[d] the term '*in rem*' in place of '*in rem* and *quasi in rem*'," 433 U.S. at 199 n.17, and held that the Due Process Clause establishes a "single standard"—minimum contacts—to assess the constitutionality of civil jurisdiction. *Id.* at 209. It explained that a single standard ensures that an individual, whose property is at risk in both *in rem* and *quasi in rem* cases, is provided due process: "[T]he phrase, 'judicial jurisdiction over a thing', is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing" and thus, "in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising jurisdiction over the interests of *persons* in a thing." *Id.* at 207 (citations omitted, emphasis added).[4]

Hood did not modify or overrule *Shaffer sub silentio*. Yet the Government claims "[t]he entire premise of the Eleventh Amendment claim asserted by the state entity there [in *Hood*] was that the bankruptcy court could not exercise personal jurisdiction over it

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[4] *Shaffer* recognized that requiring minimum contacts of the property's owner would not alter the outcome in most *in rem* cases, since such cases are almost always filed where the property is located. *See Shaffer*, 433 U.S. at 207-08 ("[I]t would be unusual for the State where the property is located not to have jurisdiction.").

because of state sovereign immunity." BIO.12. It relied on a single sentence from *Hood* which states: "Nor is there any dispute that, if the Bankruptcy Court *had to exercise personal jurisdiction over TSAC*, such an adjudication *would implicate* the Eleventh Amendment." *Id*. (quoting *Hood*, 541 U.S. at 452-53) (italics added). But this proves Petitioner's point: *If* the Bankruptcy Court *had to* exercise *personal jurisdiction* over TSAC—e.g., because TSAC's *own property* was at risk—then the State's Eleventh Amendment immunity would be implicated. But the *State's property was not at risk in Hood* because, as the Court made clear, bankruptcy proceedings are against the *debtor-property owner's* estate, not against *creditors* such as TSAC. *Hood*, 541 U.S. at 447 ("[T]he court's jurisdiction is premised on the debtor and his estate and not on the creditors."). Because the bankruptcy "court's [*in rem*] jurisdiction is premised on the *res*"—which was voluntarily placed before the court by its owner—it could adjudicate the rights of all *creditors*, even State creditors and creditors absent from the proceedings. *Id*. at 448.[5]

Here, unlike *Hood*, the *res* owner has not voluntarily placed his *res* before the court. *See* Pet.19-20. The Government initiated forfeiture against Petitioner's property, placing it at risk of deprivation, and triggering his right to due process. As *Shaffer* stated, "The fiction that an assertion of jurisdiction over property

[5] Moreover, States do not have due process rights, *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1964), and thus *Hood* cannot be construed to contain any due process holding.

is anything but an assertion of jurisdiction over the owner of the property is an ancient form without substantial modern justification." 433 U.S. at 212. While the presence of the *res* will normally justify the court's disposition thereof, *id*. at 207, 211-12, its undisputed *absence* renders adjudication constitutionally infirm absent other minimum contacts by its owner.

B. The Government's Policy Arguments Do Not Trump Due Process

The Government's weak policy arguments are grounded in its own convenience and conflict with the constitutional rights of property owners. It claims that requiring minimum contacts "would wreak havoc on the forfeiture system" because it is "often not clear who owns the property." BIO.13. Yet the Government easily can avoid jurisdictional issues by bringing forfeiture actions where the *property is located*. The property's presence, under *Shaffer* and *Hood*, will generally establish minimum contacts.

The Government's boogeyman—multiple owner-claimants where it is "not clear who owns the property"—is not present here and would rarely be an issue. The overwhelming majority of federal forfeitures are "administrative" forfeitures in which the property is automatically forfeited because no one files a timely claim. Indeed, in over *90 percent* of federal civil forfeitures, the Government automatically wins via administrative forfeiture without litigation. Lisa Knepper *et al*., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, INST. FOR JUSTICE 23-24 (3d ed. 2020).

Moreover, the specter of multiple claimants is not unique to civil forfeiture and easily addressed by courts. Multiple claimants are common in other *in rem* actions such as interpleader and quiet title. There, owner-claimants are free to consent to or challenge jurisdiction.[6] If their challenge succeeds, the Government must re-file where the *res* is located or the owner(s) otherwise have minimum contacts. While this may be *inconvenient* for the Government, it would not "wreak havoc" on the forfeiture system; it would merely require that civil forfeiture comport with due process.

The Government laments that complying with due process "would also create an easy way for criminals to defeat forfeiture: transfer the relevant assets to a person who lacks sufficient contacts with the forum." BIO.14. But Petitioner is the undisputed owner of the *res* and there is no allegation of any fraudulent transfer. And, even in cases involving fraudulent transfer, courts can exercise jurisdiction over fraudulent transferees under the "effects test" of *Calder v. Jones*, 465 U.S. 783 (1984). *See, e.g.*, *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 401-02 (5th Cir. 2009); *Gambone v. Lite Rock Drywall*, 288 Fed. App'x 9, 13-14 (3d Cir. 2008); *Sugartown Worldwide LLC v. Shanks*, No. 14-5063, 2015 WL 1312572, at *7 (E.D. Pa. Mar. 24,

[6] If a claimant-owner does not appear in the action (assuming constitutionally adequate notice has been provided), a default judgment will be entered that is immune from collateral attack. *See Mullane v. Cent. Hanover Bank & Tr.*, 339 U.S. 306, 312-13 (1950).

2015); *Racher v. Lusk*, No. CIV-13-665, 2013 WL 6037122, at *3 (W.D. Okla. Nov. 14, 2013); *Sourcing Mgmt., Inc. v. Simclar, Inc.*, 118 F. Supp. 3d 899, 911 (N.D. Tex. 2015). The Government can raise this well-established basis for jurisdiction in an appropriate case.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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