No. 21-1270

In the Supreme Court of the United States

MOAC MALL HOLDINGS LLC, PETITIONER

v.

TRANSFORM HOLDCO LLC AND SEARS HOLDINGS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

GREGG M. GALARDI
ANDREW G. DEVORE
DANIEL G. EGAN
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10036

GREGORY S. OTSUKA
LARKIN HOFFMAN DALY & LINDGREN, LTD
8300 Norman Center Drive
Suite 1000
Minneapolis, MN 55437

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
ROPES & GRAY LLP
2099 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 508-4776
Douglas.Hallward-Driemeier@ropesgray.com

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Transform's opposition goes to great lengths to obscure the central question presented by the petition: whether, as the court of appeals held, Bankruptcy Code Section 363(m) "is a limit on [appellate] jurisdiction." Pet. App. 8a, Pet. i. That holding is contrary to a majority of circuit courts and disregards this Court's admonition in *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500 (2006), against construing a statute as jurisdictional when Congress did not clearly so indicate. Correcting that error would be sufficient grounds to reverse the court of appeals' holding. If Section 363(m) is not jurisdictional, then it would not apply *at all* to MOAC's appeal, because, as the district court observed, the doctrines of waiver and judicial estoppel would otherwise bar Transform's invocation of Section 363(m). See Pet. App. 27a-33a; *id.* at 32a ("All the conditions for application of judicial estoppel would seem to be met here."). Indeed, holding Section 363(m) not jurisdictional would

be outcome-determinative because the district court had already agreed with MOAC on the merits. *Id.* at 89a-100a.

Trying to distract from the Second Circuit's erroneous holding that Section 363(m) is jurisdiction-stripping, Transform goes so far as to omit the word "jurisdictional" from any of its three reformulated questions and buries the question whether Section 363(m) can "be waived" third, when that question is logically prior to the others Transform poses. If Section 363(m) is non-jurisdictional (and thus waivable), then any further analysis regarding Section 363(m)'s application to these facts would be unnecessary.

The Second Circuit's holding that Section 363(m) is jurisdictional conflicts with this Court's settled precedent and the majority of circuits to consider the question. The recurring split will persist absent this Court's intervention. And the court of appeals' erroneous rule was outcome dispositive. MOAC had initially succeeded on its appeal before the district court vacated that ruling based on a ground Transform had affirmatively waived and would have been estopped from asserting but for the court's mistaken view that Section 363(m) is jurisdictional. Nothing in Transform's opposition detracts from the foregoing or provides any other basis to deny review.

I. The Circuits Are Intractably Divided As To Whether Section 363(m) Is Jurisdictional

1. Transform cannot dispute the clear circuit split on whether Section 363(m) is jurisdictional. Transform instead tries to recast the issue in this case as one narrowly about waiver, as to which there is no conflict.

BIO 18. Transform has it backwards: the jurisdictional question must be addressed first. Here, the Second Circuit refused to consider MOAC's argument "that Transform has waived its ability to rely on § 363(m), or is estopped from doing so," because, in the court of appeals' view, "that argument [was] foreclosed by our binding precedent * * * under which § 363(m) deprived the District Court of appellate jurisdiction." Pet. App. 8a. The Second Circuit had no occasion to address Transform's waiver because once the court of appeals held it lacked jurisdiction to hear the appeal, it could go no further. No amount of misdirection can disguise the Second Circuit's clear, outcome-dispositive holding that Section 363(m) is jurisdictional—a holding contrary to the majority of circuits that have addressed the issue.

Transform's back-up argument—that the Second and Fifth Circuits actually "adopt[] the same approach" to Section 363(m) as the other circuits, notwithstanding the Second Circuit's characterization of Section 363(m) as jurisdictional, BIO 23—similarly misses the mark. To begin, Transform's contention is refuted by the courts of appeals themselves, which readily acknowledge the circuit split. See, *e.g.*, *Brown* v. *Ellmann* (*In re Brown)*, 851 F.3d 619, 622-623 (6th Cir. 2017) (discussing the divergent majority and minority circuit approaches as to whether Section 363(m) is jurisdictional); *Schepis* v. *Burtch (In re Pursuit Cap. Mgmt., LLC)*, 874 F.3d 124, 135 n.17 (3d Cir. 2017) (same).

The courts of appeals have made clear that the divergence is not simply semantic. For example, the Sixth Circuit has observed that courts such as the Second Circuit "construe § 363(m) as creating a *per se* rule

automatically mooting appeals for failure to obtain a stay," in contrast to the "alternative two part approach" adopted by other circuits, requiring courts to assess whether they can "grant effective relief without impacting the validity of the sale." *Parker* v. *Goodman (In re Parker)*, 499 F.3d 616, 621 (2007).

This Court has recognized the significant differences that stem from characterizing a limitation as jurisdictional or otherwise. "The distinction matters. Jurisdictional requirements cannot be waived or forfeited, must be raised by courts *sua sponte*, and, as relevant to this case, do not allow for equitable exceptions." *Boechler, P.C.* v. *Comm'r*, 142 S. Ct. 1493, 1497 (2022). Just so in this case. The district court and Second Circuit believed themselves foreclosed from considering waiver or judicial estoppel, notwithstanding that each doctrine otherwise applied, and the district court had to address Transform's jurisdictional argument notwithstanding it was raised for the first time only *after* the court had resolved MOAC's appeal on the merits favorably to MOAC. None of that would have happened in any of the circuits that, consistent with this Court's precedent, refuse to treat Section 363(m) as a jurisdictional bar.

Nor are instances of waiver or estoppel the only cases in which the courts of appeals' different approaches matter. The different analyses employed by circuits on each respective side of the split materially impact the outcomes and the litigants' rights. The Second Circuit has held that once it finds a transaction to be "integral to the Sale Order such that § 363(m) applies," a reviewing court only has "appellate jurisdiction over * * * the narrower issue of whether the sale

was entered in good faith." Pet. App. 7a. Whether a separate order is "integral" to a sale order does not even appear in the statute, yet once that determination is made in the Second Circuit no further inquiry is permitted, including whether the court might fashion relief that would not "revers[e] or modif[y]" or otherwise "affect the validity of a sale." 11 U.S.C. 363(m).

By contrast, courts on the other side of the split not only consider waiver and estoppel (to the extent applicable), but also assess whether they can fashion relief without invalidating the sale. In *In re Energy Future Holdings Corp.*, for example, the Third Circuit rejected labeling Section 363(m) as jurisdictional and instead found it to be "a constraint not on our jurisdiction, but on our capacity to fashion relief." 949 F.3d 806, 820 (2020). The Third Circuit was thus able to consider the next step mandated by Section 363(m): "whether a remedy can be fashioned that will not affect the validity of the sale." *Id.* at 821 (citation omitted). Similarly, the Seventh Circuit held that Section 363(m) "does not defeat jurisdiction" and thus proceeded to evaluate on the merits whether the relief sought by appellants would invalidate the sale. *Trinity 83 Dev., LLC* v. *ColFin Midwest Funding, LLC*, 917 F.3d 599, 602 (2019).

Not only does the "non-jurisdictional" label matter to *whether* effective relief can be granted, it also determines *who* has the burden of showing whether effective relief without invalidating the sale is possible. For example, after concluding that Section 363(m) merely limits remedies, the Sixth Circuit held that it is the party *opposing* relief on appeal who must "prove that the reviewing court is unable to grant effective relief without affecting the validity of the sale." *Brown*, 851 F.3d

at 623. By contrast, if a statute is jurisdictional, showing an available remedy would be the burden of the party asserting jurisdiction. See *Spenlinhauer* v. *O'Donnell*, 261 F.3d 113, 118 (1st Cir. 2001) (party "asserting appellate jurisdiction * * * bears the burden" to establish circumstances supporting jurisdiction).

2. Transform tries to confuse the issue by arguing that the Second Circuit's jurisdictional finding was based on its belief that, in light of Section 363(m), it could not fashion effective relief, and thus its holding was simply an application of traditional mootness doctrine. BIO 18. But that is not what the Second Circuit held. The Second Circuit based its ruling on circuit precedent reading Section 363(m) as a blanket jurisdictional bar. Pet. App. 5a. The Second Circuit never addressed whether it could fashion relief without invalidating Sears' Section 363 sale, because its inquiry ended after finding Section 363(m) jurisdictional and concluding the MOAC lease assignment was "integral" to the previously completed asset sale. *Id.* at 6a. More critically, the Second Circuit believed that the jurisdictional nature of Section 363(m) left it without power to consider Transform's waiver and estoppel.

Transform contends that the fact that the Petition further challenges the court of appeals' determination that Section 363(m) would apply even if not waived makes the Petition "fact-bound." BIO 21. Not so. As the Petition noted, this additional error by the court of appeals could provide the Court an *additional* ground for reversal. Pet. 33. The error of treating Section 363(m) as jurisdictional and precluding consideration of Transform's waiver and estoppel is an independent and

sufficient ground on which to grant certiorari and reverse the court of appeals' judgment.

In any event, the Second Circuit's finding that assignment of the MOAC lease was "integral" to the debtor's asset sale, such that reversing the assignment might in some way "invalidate" the earlier sale, is not a "fact-bound" question—indeed, there were no findings of fact on this issue below—but one of law. The undisputed facts are that MOAC is "not appealing the whole sale," which "would've closed already," as Transform's counsel conceded below, BIO App. 4a-5a, and the asset sale and its price were not contingent on the assignment of any particular lease, Pet. 11. Each lease was subject to a further proceeding at which the lessor could object that the conditions for assignment were not met, *Ibid.*, as the district court initially held, Pet. App. 97a. This second legal error by the court of appeals could provide an additional ground for reversal, but is irrelevant if the Court agrees that Section 363(m) is jurisdictional and thus subject to waiver.

The clear conflict among the circuits will not abate without this Court's intervention. Both circuits in the minority doubled down in the past year on their stance that Section 363(m) is jurisdictional, without any discussion of *Arbaugh* or its clear statement test. *In re Pursuit Holdings (NY), LLC*, 845 F. Appx. 60, 62 (2d Cir. 2021); *Morimoto* v. *C Whale Corp. (In re C Whale Corp.)*, No. 21-20147, 2022 WL 135125, at *4 (5th Cir. Jan. 13, 2022). The time is ripe for this Court to resolve this persistent circuit split.

II. THE SECOND CIRCUIT'S RULING IS INCONSISTENT WITH THIS COURT'S PRECEDENT

In 2006, to curb lower courts' overuse of the term "jurisdictional," this Court established a "readily administrable bright line" test precluding finding a statute jurisdictional *unless* Congress "clearly state[d]." *Arbaugh*, 546 U.S. at 515-516. Section 363(m) has no such clear statement.

The courts should have analyzed Section 363(m)'s plain text to see whether Congress had "clearly stated" the statute was jurisdictional, but did not. Instead, the Second Circuit simply fell back on its pre-*Arbaugh* precedent in *In re Gucci*, 105 F.3d 837 (1997), and on post-*Arbaugh* decisions citing *Gucci* but without analyzing *Arbaugh* or the statutory text. See Pet. App. 8a-10a (citing *Pursuit Holdings*, 845 F. Appx. 60 (2d Cir. 2021); *Contrarian Funds LLC* v. *Aretex LLC (In re WestPoint Stevens, Inc.)*, 600 F3d 231 (2d Cir. 2010)).

Remarkably, Transform argues that Section 363(m) is jurisdictional on its face simply because it limits the relief that can be afforded on appeal. BIO 31. But, to the extent Transform's speculation accurately describes the Second Circuit's reasoning, that merely underscores the magnitude of the court of appeals' error and the circuit split. Other circuits recognize the fallacy of that reasoning: "[J]urisdiction means a court's power to 'proceed *at all* in any cause,' not its power to award a particular remedy." *United States* v. *Hart*, 983 F.3d 638, 642 (3d Cir. 2020) ("[I]f a rule limits only a remedy, we will not treat it as jurisdictional without extremely clear evidence."). Moreover, Transform ignores the introductory language of Section 363(m) that expressly contemplates an appellate court's "reversal

or modification on appeal of any authorization under [Section 363(b) or (c)]," 11 U.S.C. 363(m), which could only occur if the appellate court *had*, and exercised, appellate jurisdiction. The only limitation in Section 363(m) goes to the relief available—a reversal or modification "does not affect the validity of a sale or lease." *Ibid.* The "clear statement" test therefore precludes concluding that Section 363(m) is jurisdictional.

Transform also argues that *Arbaugh* is distinguishable because it involved a "definitional" provision, whereas Section 363(m) is remedy-limiting. BIO 18, 30. This is a distinction without a difference. *Arbaugh* and its progeny are clear that the "clear statement" test applies broadly across federal statutes—not just definitional provisions. See, *e.g.*, *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 168 (2010) (applying the *Arbaugh* test to a statutory copyright registration requirement).

Transform's attempt to liken Section 363(m) to the statute in *Bowles* v. *Russell*, 551 U.S. 205 (2007) is also unavailing. In *Bowles*, this Court found a statutory time limit for invoking the appellate court's jurisdiction to be jurisdictional in light of the Court's "longstanding treatment of statutory time limits for taking an appeal as jurisdictional." 551 U.S. at 210. This Court has since cautioned against over-reading *Bowles*. See *Reed Elsevier*, 559 U.S. at 168 (rejecting argument that 17 U.S.C. 411 is jurisdictional under *Bowles*). Unlike *Bowles*, there is no history of treating provisions like Section 363(m) as jurisdictional.

3. The broader statutory context governing bankruptcy-related appellate jurisdiction also confirms Congress's lack of a clear statement. The scope of district

courts' appellate jurisdiction over bankruptcy matters is contained in 28 U.S.C. 158(a). Section 158(a)(1) provides that district courts "shall have" jurisdiction to hear all appeals "from final judgments, orders, and decrees * * * of bankruptcy judges." 28 U.S.C. 158(a)(1). Section 158(a)(1) uses mandatory language ("shall have") to grant jurisdiction over all final orders in bankruptcy, and there is no dispute that the Assignment Order is final for appeal purposes. The remaining subsections of Section 158(a) *expand* district courts' appellate jurisdiction for certain interlocutory orders. Congress made no statutory carve-out in Section 158 for Section 363 sales, and there is no carve-out in Section 363(m) either.

III. This Case Is An Ideal Vehicle To Resolve The Circuit Split

Transform's express waiver of any argument under Section 363(m) presents the jurisdictional question in a clean fashion that makes this an ideal vehicle to resolve the circuit split. Respondent contends that the fact that this case involves waiver makes it "unique," but that is precisely why this case presents the issue so cleanly. Transform unquestionably waived any rights and arguments under Section 363(m), and the lower courts' ability to enforce that waiver turns solely on whether the statute is jurisdictional.

1. This case exemplifies the dangers this Court has warned of in trying to reign in overuse of the term "jurisdictional." See *Arbaugh*, 546 U.S. at 502 (a court's mischaracterization of a statute as jurisdictional can lead to "unfairness and waste of judicial resources"); *Puckett* v. *United States*, 556 U.S. 129, 134 (2009) (jurisdictional labels can lead parties to engage in "sand-

bagging," *i.e.*, "raising the error only if the case does not conclude in [their] favor").

The district court was "appalled" by Transform's tactics and observed that "[a]ll the conditions for application of judicial estoppel would seem to be met here." Pet. App. 28a, 32a. But it felt constrained by Second Circuit precedent to dismiss for want of jurisdiction.

Transform attempts to distance itself from its tactics by characterizing its counsel as merely "acquiesc[ing] in the [bankruptcy] court's view." BIO 3. But counsel went far beyond mere acquiescence: they affirmatively asserted "we couldn't rely on 363(m) for the purposes of arguing mootness"; they made no objection when the bankruptcy court noted that "they're not going to rely on 363(m), which [Transform's counsel] just reiterated for the second time," BIO App. 7a; and they "include[d] the representations made on the record of the hearing" in the proposed order prepared by Transform's counsel, *id.* at 12a, 15a. Only after losing on the merits in district court did Transform reverse course and argue Section 363(m) applied and barred appeal.

The Court's ruling in this case would eliminate the persistent conflict among lower courts regarding Section 363(m)'s impact and definitively reject the gamesmanship exhibited by Transform.

2. Respondent's remaining arguments for opposing review are similarly misplaced. Transform's suggestion that MOAC "lacks a legitimate interest in the outcome sufficient to give it standing" is meritless. BIO 34. MOAC argued—and the district court agreed—that Transform was an improper lease assignee because it could not show "financial and operating similarity" to the original lessee. Pet. App. 97a. A reversal of the

Assignment Order thus would free MOAC from being tethered to an improper assignee for the remaining 70-year lease term. This interest alone more than satisfies MOAC's standing.

Transform's reliance on Section 549 to suggest that MOAC would have the burden to bring a derivative action on behalf of the estate to undo the lease, and that it is time barred from doing so, BIO 33, is similarly baseless. Section 549 creates a bankruptcy estate cause of action that enables trustees to avoid extrajudicial transfers that were made by a debtor without court approval. See 11 U.S.C. 549(a). Here, the assignment was made pursuant to a court order, which was timely appealed and would be vacated under the district court's original ruling. Transform cites not a single case for its illogical assertion that MOAC must seek derivative standing to file a post-petition avoidance action for the estate in order to preserve its remedy on appeal.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

DOUGLAS HALLWARD-DRIEMEIER
GREGG M. GALARDI
ANDREW G. DEVORE
DANIEL G. EGAN
ROPES & GRAY LLP

GREGORY S. OTSUKA
LARKIN HOFFMAN DALY &
LINDGREN, LTD

Counsel for Petitioner

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