No. 21-1270

In The
Supreme Court of the United States

MOAC MALL HOLDINGS LLC,

Petitioner,

v.

TRANSFORM HOLDCO LLC, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF THE HON. JUDITH FITZGERALD (BANKRUPTCY JUDGE, RET.), AND LAW PROFESSORS PAMELA FOOHEY, GEORGE KUNEY, ROBERT LAWLESS, JONATHAN LIPSON, BRUCE A. MARKELL, NANCY RAPOPORT, RICHARD SQUIRE, RAY WARNER AND JACK WILLIAMS, IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICI CURIAE*

Your *amici curiae* are the Honorable Judith Fitzgerald (Bankruptcy Judge, Western District of Pennsylvania, ret.), and law Professors Pamela Foohey (Cardozo School of Law), George Kuney (University of Tennessee College of Law), Robert Lawless (University of Illinois College of Law), Jonathan Lipson (Temple University), Bruce A. Markell (Northwestern Pritzker School of Law, and Bankruptcy Judge, District of Nevada, ret.), Nancy B. Rapoport (William S. Boyd School of Law, University of Nevada, Las Vegas), Richard Squire (Fordham Law School), Ray Warner (St. John's University School of Law), and Jack Williams (Georgia State University).[1]

Your *amici* have taught courses on bankruptcy and commercial law, conducted research, and have been frequent speakers and lecturers at seminars and conferences throughout the United States. Each is highly regarded in this field, and each has made substantial contributions to bankruptcy scholarship and jurisprudence.

The question presented to this Court is as follows: "Whether Bankruptcy Code Section 363(m) limits the appellate court's jurisdiction over any sale order *or order deemed integral* to a sale order. . . ." (emphasis

[1] Pursuant to this Court's Rule 37.3(a), the Petitioner and Respondents have consented to the filing of *amicus* briefs. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel contributed any money to fund its preparation or submission.

added).[2] Pet. i. The answer is that § 363(m) does not limit appellate review of the transaction involved in this case—the assignment of a commercial lease to a new tenant by a bankruptcy debtor. The assignment of commercial leases is governed exclusively by 11 U.S.C. § 365.

The appeal in this case was from an order concerning the assignment of a retail lease in the Mall of America (the "Assignment Order").[3] The Assignment Order was entered pursuant to Code § 365 which is the exclusive Code section that governs the assumption and assignment of commercial leases. It is a standalone provision with its own specific requirements, and it operates independently of anything in § 363. Section 365(b) contains no mootness provision,[4] and appellate review of orders under § 365(b) is not limited by § 363(m).[5]

Section 365(b) mandates that if a debtor-tenant in a commercial shopping center assigns its lease as part of a bankruptcy transaction, the landlord (such as a

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[2] References to the "Code" are 11 U.S.C. § 101 *et seq.* Section 363(m) is located at App. 128a.

[3] App. 2a. Order dated September 5, 2019.

[4] The term "mootness provision" in this brief is used for convenience only and does not signify any agreement that § 363(m) is actually a "mootness" section. *In re Energy Future Holdings Corp.*, 949 F.3d 806 (3d Cir. 2020) describing this phrase as a "misnomer."

[5] The text of § 365 is set forth in Pet. App. G, 135a-149a. All references to "App." refer to Petitioner's Appendix filed with its Petition for Certiorari.

mall owner) *must* receive what the Bankruptcy Code calls "adequate assurance of future performance." This statutory protection was deemed critical to mall owners when Congress adopted the Shopping Center Amendments in 1984.[6] These statutory provisions have been recognized as vital in protecting mall owners from serious harm when retail tenants within a shopping center file for bankruptcy.[7]

In this case, the District Court made detailed findings laying out why the proposed assignment of a lease by Sears Holding Corp. ("Sears") to Transform Leaseco LLC ("Leaseco") (a subsidiary of Transform Holdings LLC) failed to satisfy the statutory standard of adequate assurances of future performance to MOAC Mall

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[6] The "Shopping Center Amendments" to the Bankruptcy Code were enacted in 1984 as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984. Pub. L. No. 98-353, 98 Stat. 333 (1984). "Shopping center landlords, even more than other non-debtor parties to executory contracts and unexpired leases, receive 'extraordinary protection' under the Code . . . Section 365(b)(3) however, imposes a heightened standard for 'adequate assurance of future performance' in shopping center leases." *In re Rickel Home Centers, Inc.*, 209 F.3d 291 (3d Cir. 2000).

[7] Lease assignments can result in defaults under an owner's mortgage loan, as well as among other occupancy tenants who have lease provisions guarantying certain tenant mixes. *See generally Omnibus Bankruptcy Improvements Act of 1983, Report from the Committee on the Judiciary*, S. Rep. No. 98-65 at 33-35 (1983) (quoting hearings on S. 2297 before the Subcommittee on Courts of the Senate Judiciary Committee, 97th Cong. 2d Sess. (1982) (Testimony by Nathan B. Feinstein).

Holdings LLC ("MOAC")—the owner of the Mall of America.

Two key issues surfaced: whether the assignment would impair the "tenant mix" at the mall, and whether the proposed assignee could satisfy the test that its financial condition be similar to that of the original tenant when it first signed its lease. *See* § 365(b)(3)(A). Both tenant mix and the tenants' creditworthiness are critical underwriting standards that lenders evaluate when providing financing for mall owners.[8] This is because a mall's value and economic viability depend heavily on tenant mix and tenant creditworthiness. Congress addressed both issues when it amended § 365(b) by passing the Shopping Center Amendments.[9]

However, on rehearing, the District Court dismissed the appeal as moot. It did so by appending to § 365(b) a mootness provision found in § 363(m), which deals with sales of estate property. However, it cited no authority for the view that Congress intended to

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[8] For example, tenant mix and tenant credit quality are key factors that Moody's Investors Service evaluates in its rating methodology for commercial real estate property when evaluating collateral for commercial mortgage-backed securities. *See Moody's Sustainable Net Cash Flow and Value for CMBS and CRE CLO's Methodology*, November 19, 2021, available at https://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_1302944.

[9] Congress recognized that a mall is like an ecosystem, with a high degree of interdependence among the tenants. *See* John T. Brooks, *Shopping Center Tenants in Bankruptcy: The Effect of the 1984 Code Amendments*, 1988 U. Ill. L. Rev. 725.

permit courts to append a mootness provision from § 363 to the highly specific requirements found in § 365(b). Instead of looking to the text of § 365(b), it created a judge-made rule that appended mootness when a lease assignment was somehow "integral" or "intertwined" with a prior sale. The court's reasoning rests on federal common-lawmaking that did not survive *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

In addition, our interest in filing this brief is to address the serious harm the ruling by the Second Circuit will cause, as it will substantially impair the rights of mall owners which Congress has carefully detailed in § 365(b). This case well illustrates the harm: the District Court held that the errant ruling by the Bankruptcy Court effectively "rewrote" the Bankruptcy Code, and yet found itself powerless to correct the harm. Unrestricted assignment of leases in a shopping center can cause a host of financial issues, including cross-defaults in mortgage loans and tenant leases, and downgrading of securities that are collateralized by mall properties.[10]

We write to address a larger issue as well. Because similar outcomes have become all too common, both scholars and courts now urge restraint on theories that enlarge and "weaponize" mootness arguments. There is substantial concern over the abuse of theories of mootness—be it statutory or equitable. Justice Alito, then sitting on the Third Circuit, noted that equitable mootness unduly restricts appellate review and "places too

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[10] *See, e.g.*, *Moody's Sustainable Net Cash Flow, supra.*

much power in the hands of bankruptcy judges."[11] The same problem is evident here—where a purported statutory mootness provision is engrafted onto a Code section which has no such provision, and then is interpreted broadly as jurisdictional. The harm is evident: an erroneous ruling by a non-article III court is then asserted to be immune from appellate review. This problem is exacerbated by the similar extension of finding many transactions to be either § 363 "transfers" or somehow "integral" to a § 363 transfer—all in the name of invoking appellate immunity.

We urge this Court not to permit an unwarranted expansion of the concept of mootness, be it statutory or otherwise.

INTRODUCTORY STATEMENT

The assignment of the lease between MOAC and Sears involved a series of separate and discrete steps. Sears initially entered into an Asset Purchase Agreement (the "APA") on January 17, 2019, in which it agreed to sell substantially all its assets to Transform—an entity consisting of former Sears' executives.

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[11] *See, e.g.*, *Nordhoff Investments v. Zenith Electronics*, 258 F.3d 180, 192 (3d Cir 2001) (Alito, J., concurring) (noting that "equitable mootness doctrines can easily be used as a weapon to prevent any appellate review of Bankruptcy Court order confirming reorganization plans."). *See also In re Continental Airlines*, 91 F.3d 553, 567-83 (3d Cir. 1996) (Alito, J., dissenting).

App. 103a. The APA was approved in a Sale Order.[12] One of the assets was the right to designate, at a future time, and in a separate legal proceeding, the assignees of Sears' leases (the "Designation Rights"). Neither the APA nor the Sale Order made any mention of any specific lease assignment.

Months later, pursuant to its Designation Rights, Transform proposed to assign the Sears' lease to Leaseco.[13] MOAC objected because the proposed assignment failed to meet the statutory requirements for "adequate assurance of future performance." One concern was that the proposed assignment did not identify the actual proposed occupant.[14] This put the tenant mix at risk—an issue noted during congressional testimony as being one of the most critical issues affecting

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[12] "By order dated February 8, 2019 (the "Sale Order") the Bankruptcy Court authorized a sale under 11 U.S.C. § 363(b). Through the Sale Order, Transform . . . purchased from Sears the right to designate which assignee would assume Sears's leases." App. 3a-4a.

[13] The District Court referred to Respondent Transform Holdco LLC as "Holdco," and Transform Leaseco LLC, a wholly owned subsidiary of Holdco, as "Leaseco," stating it was Leaseco which was the designated assignee of the Sears' lease. App. 12a.

[14] "Holdco had no intention of operating a Sears's store at the Mall of America, but rather intended to sublease the premises to a third-party at a profit to Transform. . . . This was MOAC's major motivation for fighting the assignment—it did not want to see Sears' anchor tenant space divided or occupied by whoever would pay Transform the highest price. MOAC wanted another big box retailer to take over the space . . . both to preserve the character of the Mall of America and to ward off the possibility that MOAC might find itself in default on co-tenancy provisions in the leases of other Mall tenants." App. 19a.

the viability of shopping centers when a tenant files for bankruptcy.[15]

On September 5, 2019, the Bankruptcy Court entered the "Assignment Order" which authorized Transform to assign the lease to Leaseco. App. 101a-125a. The Assignment Order specifically recited that the assignment was governed by § 365.[16] Indeed, an assignment of a lease in a shopping center *cannot* be authorized by § 363, nor is § 363 a necessary component of a lease assignment.

The District Court initially reversed the Bankruptcy Court and held that Transform had failed to satisfy the statutory requirements found in § 365(b)(3)(A). App. 89a *et seq*. It was not a close call. The Code requires that the proposed assignee must prove that its financial condition is similar to that of the debtor/tenant "at the time the debtor became the lessee under the lease." § 365(b)(3)(A). App. 90a. "The statutory language requires similarity of financial condition and operating performance; the Bankruptcy Court found no such similarity; game over." App. 91a. The District Court held

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[15] Pamela S. Holleman and Magdalena Ellis, *Reexamining the Protections Afforded to Solvent Shopping Center Tenants Under 365 in Light of Trak Auto Corp., Part II*, ABI Journal, 6-7 (Feb. 2005) (citing *Bankruptcy: the Shopping Center Protection Improvement Act of 1982: Hearing before the Subcommittee on Courts of the Committee on the Judiciary of the U.S. Senate*, S. 2297 at 27-28 (1982).

[16] "The Debtors are hereby authorized in accordance with sections 105(a) and 365 of the Bankruptcy Code to assume and assign the Designated Lease to the Buyer or the Buyer's assignee. . . ." App. 114a.

that the Bankruptcy Court had, in essence, rewritten the Code.[17] That is, MOAC was not being provided with adequate assurance of future performance.

On rehearing, the District Court dismissed the appeal. The District Court did not alter its finding that the assignment violated § 365(b). The statutory defect with the proposed assignment was never corrected. The District Court acknowledged that in general, lease assignments are *not* governed by § 363(m). ("That said, not every assignment under § 365 is *per se* a § 363(m) sale.") App. 41a.

However, the District Court held that because the assignment was "integral" to the Sale Order then the mootness provision of § 363(m) attached to § 365(b), thus denying appellate review of an otherwise invalid and harmful lease assignment.

Notably, the District Court stated, "this court is appalled by Transform's behavior" (App. 28a) because Transform had repeatedly told the Bankruptcy Court that § 363(m) did not apply. App. 22a. Nor did the Bankruptcy Court believe § 363(m) applied. App. 22a. But because the District Court felt constrained by the notion that § 363(m) was "jurisdictional," it stated that the principles of waiver and estoppel could not be

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[17] "Instead, the court adopted an alternative standard for determining the adequacy of assurance after concluding that the statutory standard was not met. Put otherwise, the Bankruptcy Court, stretching *In re Ames* past its breaking point, effectively rewriting it and overriding the express wishes of the legislature." App. 95a (citation omitted).

considered. App. 27a, announcing the reversal with "deep regret." App. 48a.

The Second Circuit affirmed and incorrectly held that "in the absence of a stay, § 363 limits appellate review of a final sale to "challenges to the 'good faith' aspects of the sale, without regard *to the merits of the appeal*." App. 5a (emphasis added; citations omitted). The core determination, and the "game changer" was that "section 363(m) is jurisdictional because it 'creates a rule of statutory mootness.'" App. 9a. This ruling that § 363(m) is jurisdictional improperly precluded the Second Circuit from considering any possible effective relief, including the waiver and estoppel by Transform for first informing the Bankruptcy Court it would not assert that § 363(m) applied, and then changing its position—which led the District Court to conclude it was "appalled" at the reversal of position by Transform.

The effect of this ruling is that the owners of commercial real property may have valuable leases assigned to new tenants in violation of the requirements set by Congress in § 365(b) and yet will be unable to obtain appellate review by an Article III court. Further, the ruling adds an unwelcome contribution to the growing concern over the misuse and abuse of theories of mootness, both in connection with plans of reorganization (equitable mootness) and in sales (statutory mootness) both of which have led leading commentators and courts to conclude that the absence of appellate review has led to a "lawless" Chapter 11 process,

and one lacking in effective appellate review of the Bankruptcy Courts.[18]

SUMMARY OF ARGUMENT

The decision of the Second Circuit should be reversed for the following reasons, in addition to those urged by Petitioner.

First, the Second Circuit erred by ruling that the mootness provision found in § 363(m) barred appellate review. The core ruling was that § 363(m) should be appended to § 365(b), thereby importing a mootness provision into the statutory scheme for adequate assurances of future performance. Section 365(b) contains a detailed and precise scheme for assignment of leases, with the principal obligation being that the debtor and assignee must provide adequate assurance of future performance to the lessor. Section 365 is the exclusive provision that governs. The Second Circuit's reasoning rests on federal common-lawmaking that did not survive *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

The ruling by the Second Circuit will be harmful in virtually all major retail bankruptcy cases involving shopping centers, Appending a limit of appellate review to § 365(b) will severely diminish the intended statutory protections afforded to mall owners. The

[18] Lynn LoPucki, *Chapter 11's Descent into Lawlessness*, 96 Amer. Bankr. L. J. 247 (2022).

outcome will be that rather than restricting harmful lease assignments, the decision will permit assignments that are contrary to the law by blocking effective appellate review.

Second, even if § 363(m) somehow applies, the courts have held that the purported limit on appellate review is not jurisdictional but rather is only a limit on the kind of relief that may be available. "[S]o long as we can 'grant effective relief' § 363(m) doesn't bar appellate relief." *ICL Holding Co. Inc.*, 802 F.3d 547 (3d Cir. 2015). Numerous cases support the view that "partial relief" may be granted. The decisions holding that some "effective relief" may be considered cannot be reconciled with the notion that § 363(m) should be viewed as jurisdictional or as a per se rule precluding any consideration of any defense.

The Second Circuit disregarded any consideration on whether effective relief was available and held instead that the § 363(m) contains a per se rule that precludes judicial review in the absence of a stay and on any issue other than the good faith of the purchaser.[19] Yet, because § 363(m) should *not* be considered "jurisdictional," the District Court, at a minimum should have determined whether the defenses of waiver and estoppel precluded Transform's argument of mootness. ("All the conditions for application of judicial estoppel

[19] Petitioner is not asking this Court to make a "fact bound" determination on whether waiver or estoppel was established as a factual matter, but only that it constituted reversible error for its failure to consider whether waiver and estoppel survived if § 363(m) is viewed as non-jurisdictional.

would seem to be met here.") App. 32a. The Second Circuit acknowledged that the ruling on jurisdiction precluded consideration of the waiver and estoppel issue. App. 9a.

Third, enlarging the reach of statutory mootness carries with it the same harms that many courts have now noted with equitable mootness. "By excising appellate review, equitable mootness tends to insulate errors by bankruptcy judges or district courts, but also stunts the development of uniformity in the law of bankruptcy." *In re One2One Communications, LLC*, 805 F.3d 428, 447 (2015) (Krause, J., concurring).[20]

In a similar vein, Justice Alito, then sitting on the Third Circuit, noted that mootness unduly restricts appellate review and "places too much power in the hands of bankruptcy judges."[21] As a result of this, Chapter 11 suffers from what Professor Adam Levitin refers to as "illusory appellate review."[22] "[T]he limited nature of appellate review in bankruptcy "reduces

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[20] *See also id*. at 448, n. 16 (citing *Brief of Bankruptcy Law Professors* filed in *Law Debenture Trust Co. of N.Y. v. Charter Commc'ns Inc.*, 133 S. Ct. 2021 (2013)).

[21] *See, e.g.*, *Nordhoff Investments v. Zenith Electronics*, 258 F.3d 180, 192 (3d Cir 2001) (Alito, J., concurring). *See also Continental*, 91 F.3d 567-83 (Alito, J., dissenting).

[22] Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 Tex. L. Rev. 1079 (2022).

public oversight in Chapter 11 and intensifies the authority of Bankruptcy Courts."[23]

LEGAL ARGUMENT

I. Section 365 is the exclusive statutory section that governs the assumption and assignment of commercial leases; § 365 contains no statutory mootness provision.

A. The Second Circuit improperly appended the mootness provisions of § 363(m) to § 365.

The overarching error of the Second Circuit was its legal conclusion that the mootness provisions found in § 363(m) can somehow be appended to § 365(b), despite the absence of any textual support in § 365 that would support such a conclusion. Section 365 is the exclusive section that governs the assumption and assignment of commercial leases. No other Code section can authorize such a transaction, and no other Code section is a necessary predicate for consummating such a transaction.

That the mootness provision of § 363(m) cannot be properly appended to § 365 was addressed in *In re Joshua Slocum, Ltd.*, 922 F.3d 1081, 1085 (3d Cir. 1990). "We decline to interpret the mootness principles

[23] Levitin, *Poison Pill* at 1122 (citing Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. Pa. L. Rev. 1715, 1733 (2018)).

in such a way that would, in effect create a third situation where parties are required to seek a stay, i.e., the assignment of leases under § 365. While § 363(m) contains a provision requiring a stay, the section that applies in this case, § 365 does not." Then Judge Alito, in dissenting, cited *Slocum* with apparent approval for this very proposition that there should not be a "third situation," and arguing against the extension of equitable mootness. *In re Continental*, 91 F.3d 553, 572, n. 7.

Circuit Judge Sloviter, in his dissent in *Slocum* acknowledged that § 363(m) should not be "stretch[ed] . . . so far" as to embrace § 365. 922 F.3d at 1093. Likewise, the District Court acknowledged that § 363(m) does not apply to 365(b) in the general case of an assignment only. "That said, not every assignment under § 365 is *per se* a § 363(m) sale." App. 41a.

The recognition that not every assignment is governed by § 363(m) reveals a fatal flaw with the ruling by the Second Circuit. This statement correctly reflects that had Sears assigned the lease to Transform as a one-off matter, and if the assignment were legally defective, as in this case, then an appeal would not be moot. Merely because Sears first "sold" or assigned the right to Transform to step into its shoes as assignor of the lease, does not mean that the assignee had *greater* rights than Sears would have had as assignor. If a single assignment by Sears was subject to appellate review, then so too was the same assignment when triggered under the Designation Rights. Transform did not gain appellate immunity because of the

intervening step of buying designation rights. Or restated, the procedural mechanism of using "designation rights" should not alter the substantive requirements of § 365(b) nor diminish their effect by precluding Article III review.

The same error is evident in the often-repeated notion that § 363(m) is controlling because it was "integral" or "intertwined" with the earlier Sale Order. App. 41a-43a. That the assignment was preceded by the creation of a sale of designation rights should change nothing in terms of the obligation to comply with § 365(b)'s requirements, and the ability to appeal from erroneous decisions. The entire notion that an "integral" assignment has a different outcome from an assignment done without a prior designation is an improper overreach by the Bankruptcy Courts and an improper exercise of federal common law making, all of which is precluded under *Erie v. Tompkins. See also In re PW, LLC*, 391 B.R. 25, 36-37 (B.A.P. 9th Cir. 2008). "DB cannot mask an improper condition of the transfer—avoiding appellate review—by cloaking it as an essential and inseparable part of a sale."

B. Congress enacted detailed and specific protections for the owners of shopping centers in § 365(b); adding a judge-made limit on appellate review of invalid assignments would substantially dilute these protections.

Section 365(b) is the exclusive section that governs lease assignments. It operates independently of § 363(m) and contains no jurisdictional limit on appellate review—because Congress did not intend for the protections to be immune to judicial review. Engrafting a mootness provision through judicial fiat would cause substantial harm to the express goals of Congress.

In 1984 Congress amended the Bankruptcy Code adding the Shopping Center Amendments to the Code to address a perceived problem with the harm caused by a bankrupt tenant in a large shopping center. To correct the various problems, Congress created a specialized treatment for leases of commercial shopping centers that distinguish such leases from the generic lease referred in § 363(b). The key protections were designed to give landlords of shopping centers greater protection when debtor-tenants sought to assign a lease to third parties.

> However, BAPCPA amended § 365(f)(1) and the courts now seem inclined to prohibit assignments that do not strictly comply with the lease. . . . This provision was added because Congress recognized that unlike the usual situation where a lease assignment affects only the lessor, an assignment of a shopping center

> lease to an outside party can have a significant detrimental impact on others, in particular the center's other tenants."[24]

Congress focused on tenant mix—the risk that a bankrupt tenant would seek to assign its lease to an occupant that would destroy the carefully balanced mix of tenants and thus imperil the financial viability of owner and other tenants. The legislative history leading to the enactment of the 1984 Amendments described the "serious economic harm" or risk of business failure to the other tenants, caused when a tenant files for bankruptcy:

> [T]hese provisions . . . have not functioned as originally intended by Congress. Under the Bankruptcy Code, the shopping center and its solvent tenants may suffer serious economic harm or even business failure if the bankrupt tenant closes its store for an extended period of time or assigns its lease to a business which does not conform to the lease's use clause thus disrupting the shopping center's tenant mix.[25]

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[24] DAVID KUNEY, RETAIL AND OFFICE BANKRUPTCY 73 (ABI, 2018) (citing *In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1086 (3d Cir. 1991)).

[25] Pamela S. Holleman and Magdalena Ellis, *Reexamining the Protections Afforded to Solvent Shopping Center Tenants Under 365 in Light of Trak Auto Corp., Part II* ABI Journal, Feb. 2005 at 7 (citing *Omnibus Bankruptcy Improvements Act of 1983, Report from the Committee of the Judiciary*, S. Rep. No. 98-65 at 33-35 (1983)).

"Congress has determined that shopping center landlords and non-debtor tenants are entitled to special protections."[26] One of the most critical protections is that of tenant mix—which was one of two key objections in this case (the other being financial condition).[27] "The Code does not allow for the disruption of the existing tenant mix and balance in a shopping center or the violation of tenant exclusives that would follow a proposed lease assignment."[28]

Testimony taken in connection with the Shopping Center Amendments focused on the importance of preserving tenant mix:

> Tenants locate in shopping centers based on the complimentary ability of the various stores in the shopping center to draw customers. . . . These *multifarious symbiotic relationships* in the shopping center are in peril whenever any tenant suffers financial hardship or fails. . . . The continued vitality of those relationships and the businesses in the center depends on the system our bankruptcy policies create to swiftly fill vacancies and *fairly acknowledge the interest of remaining solvent tenants*.[29]

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[26] Holleman, *Protections for Shopping Centers*, 1.

[27] Holleman, *Protections for Shopping Centers*, 3 (discussing how a shopping center is "akin to a small town" and that a change in tenant mix is highly disruptive).

[28] *Id*. at 4.

[29] *Id*. at 6, citing *Omnibus Bankruptcy Improvements Act of 1983, Report from the Committee on the Judiciary*, S. Rep. No. 98-65 at 33-35 (1983) (quoting hearings on S. 2297 before the

Another key witness during the senate hearings, testified that "the success of a shopping center, and thus all of its tenants, is based in large part on its tenant mix."[30] "[T]he use of any tenant space for purposes other than those contemplated by the shopping center and its other tenants and provided for in a master lease or other agreement . . . [could cause] a shopping center's operations to be seriously impaired."[31]

The decision by the Second Circuit that errant assignments cannot be redressed by appellate review is entirely contrary to the intent of Congress. These detailed protections would be of little value if owners had no ability to appeal from an erroneous determination by a Bankruptcy Court. Congress provided for special protections for owners of shopping centers; engrafting a mootness provision into this scheme distorts the intent of Congress and too readily permits an outcome as occurred here—where a plain violation of § 365(b) was immunized from any appellate review.

Subcommittee on Courts of the Senate Judiciary Committee, 97th Cong. 2d Sess. (1982) (Testimony by Nathan B. Feinstein)).

[30] *Id*. at 7.

[31] *Bankruptcy: the Shopping Center Protection Improvement Act of 1982: Hearing before the Subcommittee on Courts of the Committee on the Judiciary of the U.S. Senate*, S. 2297, at 27-28 (1982) (Statement of Wallace R. Woodbury).

C. The specific provisions of § 365 control over any conflicting provisions in § 363(m).

The detailed and specific provisions of § 365(b) govern over the generalized provision of § 363(m). This Court's decision in *RadLAX Gateway Hotel v. Amalgamated Bank*, 566 U.S. 639 (2012) well illustrates why the specific protections found in § 365(b) should not be diluted by imposing a generic rule of mootness from § 363(m).

In *RadLAX* the debtors proposed a plan of reorganization which involved the sale of the Radison Hotel. The Code requires that if a plan of reorganization involves a sale of property subject to a mortgage, then the lender is entitled to "credit bid" its outstanding loan balance. *See* § 1129(b)(2)(A)(ii). Nevertheless, the debtor's plan proposed to sell the hotel without permitting the mortgage lender to credit bid, in the hopes that it could raise cash.

The debtor argued that one of the permitted alternatives to § 1129(b)(2)(A)(iii) was a plan that provided for the "realization by such holder of the indubitable equivalent of its claims." The debtor argued that despite the precise requirement that credit bidding was permitted, it could eliminate that right by relying on the more generalized "indubitable equivalent" provision.

This Court in *RadLAX* held that the specific provision which permitted credit bidding governed: that is, the specific statutory section prevails over the

general especially when, as here, Congress has a comprehensive statutory scheme targeted to a specific problem:

> A well established canon of statutory interpretation succinctly captures the problem: "[I]t is a commonplace of statutory construction that the specific governs the general." That is particularly true where, as in § 1129(b)(2)(A), "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions."

RadLAX, 566 U.S. 639, 645 (citations omitted).

A similar problem arose in construing the relationship between § 365(f) and § 365(b)(3)(C). *Trak Auto Corp. v. West Town Center LLC (In re Trak Auto Corp.)*, 367 F.3d 237 (4th Cir. 2004). In *Trak Auto* the question arose over the facial conflict between § 365(f)(1) which is a general provision that permits lease assignments notwithstanding an anti-assignment clause, and § 365(b)(3)(C) which is a more specific provision that requires the assignee of a shopping center to honor a clause restricting the use of the premises. The Fourth Circuit held that the specific clause governed over the general for reasons that pertain here as well.

> When two provisions in a statute are in conflict "a specific [provision] closely applicable to the substance of the controversy at hand controls over a more generalized provision. . . . Under this canon, § 365(b)(3)(C) controls because it speaks more directly to the issue, that is, whether a debtor-tenant assigning a

> shopping center lease must honor a straightforward use restriction.

Trak Auto, 367 F.3d 237, at 243-44.

The concern here is similar to *RadLAX* and *Trak Auto*. Section 363(b) refers to a "sale or lease" of estate property. This is a generic provision that covers a multitude of leases—including personal property. However, Congress carved out special and exclusive requirements for both leases of "non-residential real property" and leases of "shopping centers." The focus of Congress led to the enactment of specific protections for landlords, and without any limit on appellate review. The specific and detailed provisions of § 365 should prevail over the general notion that some sales or leases might, in other circumstances, be subject to the limits found in § 363(m).

II. Even if § 363(m) somehow applies, it is not a "jurisdictional" barrier to granting effective or partial relief.

A. Section 363(m) only limits the remedies a court may impose but is not "jurisdictional."

The Second Circuit's core ruling was that § 363(m) is "jurisdictional" because it supposedly contains a "per se" rule of mootness, which precludes appellate review regardless of the merits of the appeal and regardless of whether effective relief of some kind can be fashioned. "We have held in no ambiguous terms that § 363(m) is a limit on our jurisdiction and that, absent

an entry of a stay of the Sale Order, we only retain authority to review challenges to the 'good faith' aspect of the sale." App. 8a. As noted, this rule pertains "without regard to the merits of the appeal." App. 5a.

The Second Circuit's ruling was incorrect. It deviated both from the plain text of § 363(m) and was inconsistent with the long-standing principles of mootness that holds that a court must consider whether there is any "effective relief," and that partial relief should be considered. These principles cannot be reconciled with the Second Circuit view that § 363(m) is an ironclad per se rule that closes the door on the consideration of any issue.

The test for mootness varies with the nature of the mootness assertion. The Eleventh Circuit in *Reynolds v. Serisfirst Bank (In re Stanford)*, 17 F.4th 116, 122 (11th Cir. 2021) distinguished three different concepts of mootness: constitutional, equitable and statutory. Constitutional mootness is based on the requirement of a "case or controversy" in Article III and is "jurisdictional." *Id*. No one has argued that this appeal was constitutionally moot. Equitable mootness is based on reliance or complexity. ("Constitutional mootness is characterized by an "*inability* to alter the outcome. By contrast, equitable mootness involves an "*unwillingness* to alter the outcome.")[32] Statutory mootness is distinct and is not jurisdictional. "Statutory mootness

[32] George W. Kuney, *Understanding and Taming the Doctrine of Equitable Mootness*, Norton Annual Survey of Bankruptcy Law, 2018 edition, at 7.

under 363(m), however, is not jurisdictional. . . ." *Stanford*, 17 F.4th at 122.

The underlying rationale for mootness, including statutory, is whether there is a possibility of "effectual relief whatever." That is, can partial relief be meaningful. This has been the law since *Mills v. Green*, 159 U.S. 651, 653 (1895).

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.

As Justice Roberts wrote for a unanimous Court in *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) "a case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. . . . As long as the parties have a concrete interest, however small, in the outcome of the litigation, the

case is not moot." (Citing *Mills v. Green*, 159 U.S. 651, 653.)[33]

These principles of mootness are reflected in the statutory mootness provisions in the Bankruptcy Code. Prior to the enactment of the 1978 Code, the bankruptcy mootness provision was found in former Rule 805 of the Federal Rules of Bankruptcy Procedure (abrogated by the Bankruptcy Reform Act of 1978). Bankruptcy Rule 805, was the "precursor to Section 363(m)."[34] Like § 363(m), Rule 805 does not reflect a jurisdictional limit but speaks of a possible reversal or modification on appeal:

> Former Bankruptcy Rule 805 provided in pertinent part: "Unless an order approving a sale of property . . . is stayed pending appeal, the sale to a good faith purchaser . . . shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser . . . knows of the pendency of the appeal." This provision was dropped with the adoption of Rule 8005 (Rule 805's replacement) in 1983, but the doctrine continues both as a creature of common law and in the provisions of sections 363(m) and 364(e) of the Bankruptcy Code.

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[33] "While a court may not be able to return the parties to the status quo ante—a court can fashion some form of meaningful relief in circumstances such as these." *Church of Scientology of California v. United States*, 506 U.S. 9, 12-13 (1992).

[34] George Kuney, *Mootness*, at 11, n. 34 (citing COLLIER ON BANKRUPTCY, 30 ¶ 1129.09(2)(a)).

Edith H. Jones, *Bankruptcy Appeals*, 16 T. Marshall L. Rev. 245, 266 (1991).[35]

Section 363(m) varies slightly but significantly from former Rule 805. It now states that the "reversal or modification" "does not affect the validity of the sale or lease under such authorization." Thus, the change was from "shall not be affected" to "does not affect the validity of the sale." If anything, this change gave greater latitude to an appeal since the issue is not whether the appeal "affects" the sale but more narrowly whether it affects the "validity of the sale."

Accordingly, the District Court and Second Circuit were obligated to consider whether some effective relief was available—including consideration of whether waiver and estoppel precluded any assertion of mootness, or whether the challenge to the lease assignment had any material effect on the Sale Order—which made no mention of any specific assignment.

B. Section 363(m) does not preclude appellate review of whether partial relief is available.

Petitioner correctly argues that several of the circuit courts have rejected the argument that § 363(m) is a jurisdictional bar to appellate review. Cert. Pet. 17 (citing cases). For example, in *In re Energy Future Holdings Corp.*, 949 F.3d 806 (3d Cir. 2020) the Third

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[35] *See also* G. Kuney, *Mootness*, at 10 (discussing Rule 805 as the origin of § 363(m)).

Circuit held that "mootness" is "a bit of a misnomer because we have construed § 363(m) as a constraint not on our jurisdiction but on our capacity to afford relief." 949 F.3d at 820. It held that the "ultimate test is whether the grant of relief would in effect 'claw back the sale.'" 949 F.3d at 821 (citing *ICL Holding*, 802 F.3d at 554).

Courts have permitted appellate relief where there could be effective relief even if remedy was only partial. "Furthermore, appellate courts have not hesitated to find Bankruptcy Court orders only partially moot."[36] *See also In re Edwards*, 962 F.2d 641 (7th Cir. 1992) (concluding that § 363(m) does not, however, forbid all forms of collateral attack).

This recognition that partial relief can be granted undercuts the notion that § 363(m) is jurisdictional. In other words, the part of the order that can be dealt with effectively will not be found moot.[37] Examples of

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[36] Tabb, *Lender Preferences*, at 126. *See also* G. Kuney, *Mootness*, at 5. "The mere inability to restore the parties to the state in which they were before (i.e., the status quo ante) is not grounds for rendering an appeal constitutionally moot. Rather, the test for mootness is whether any meaningful relief can be granted, 'even if it only partially redresses the grievances of the prevailing party.'" (Citing *United Artists Theatre Co. v. Walton*, 315 F.3d 217, 226 (3d Cir. 2003)).

[37] "[T[he failure to obtain a stay pending appeal leads to mootness only if it is impossible for the appellate court to give meaningful, effective relief because of changed circumstances." Charles J. Tabb, *Lender Preference Claims and the Destruction of Appealability and Finality: Resolving a Chapter 11 Dilemma*, 50 Ohio St. J. 109. 126. Tabb cites examples of partial mootness as including *In re AOV Indus.,* 792 F.2d 1140, 1148-50 (D.C. Cir.

partial appellate relief included confirmed plans of reorganization that have been partially performed or payment of money, such as attorney fees.[38] These cases of partial relief confirm that § 363(m) is not jurisdictional; that the appellate court may still seek to fashion some relief.

The Second Circuit, however, expressly declined to consider the availability of partial relief. It cited *Contrarian Funds LLC v. Artex LLC* (*In re WestPoint Stevens, Inc.*), 600 F.3d 231, 247 (2d Cir. 2010) for the proposition that § 363(m) "moots a broader range of cases than are barred under traditional doctrines of mootness. Even if the appeal is not moot as a constitutional matter because a court could provide a remedy . . . § 363(m) requires that certain appeals nonetheless be treated as moot absent a stay." 600 F.3d at 247 (citations omitted).

The Second Circuit's statement that it could not consider partial relief was a greater barrier to appellate review than the standard for constitutional mootness. This extreme view would mean that Congress intended to preclude appellate relief on a larger scale than traditional principles of mootness, and yet failed to use language plainly signifying such a critical aspect of the Code.

1986); *In re King Resources Co.*, 651 F.2d 1349, 1352 (10th Cir. 1981); *In re Combined Metals Reduction Co.*, 557 F.2d 179, 194-95 (9th Cir. 1977).

[38] Tabb, *Lender Preference*, 126.

Effective relief may well have been available. For example, a finding that § 363(m) was not jurisdictional would have permitted the District Court to consider the valid arguments of waiver and estoppel. Transform had repeatedly advised the Bankruptcy Court it was not relying on § 363(m) and based on that, Judge Drain denied a request for a stay based on these representations. App. 32a. The District Court was "appalled" at this conduct. App. 28a. but felt its hands were tied.

Also, reversing the designation of Leaseco as a lease assignee would not have altered one word of the APA or the Sale Order—neither of which were based on an assignment to Leaseco. Thus, reversal of the assignment would not have "clawed back" the core consideration of the Sale Order.[39]

C. Section 363(m) did not preclude appellate review of whether the assignment of Sears' lease was "authorized."

Section 363(m) only pertains if there has been an "authorization under subsection (b) or (c) of this section of a sale or lease of property. . . ." Thus, a threshold test for the triggering of mootness is whether the sale was one "authorized" under § 363(b) or § 363(c). Some courts have interpreted this to mean that if the sale order is violative of the Bankruptcy Code, then it

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[39] The "ultimate test is whether the grant of relief would in effect 'claw back the sale.'" 949 F.3d at 821 (citing *ICL Holding*, 802 F.3d at 554).

cannot be found to constitute a valid "authorization." Other courts disagree.[40]

The leading case is *Matter of Saybrook Mfg. Co., Inc.*, 963 F.2d 1490, 1496 (11th Cir. 1992). The Eleventh Circuit held that an appeal from a financing order which permitted cross-collateralization was not moot because cross-collateralization violated the Code. "Cross-collateralization is not authorized by section 364. Section 364(e), therefore, is not applicable and this appeal is not moot."

The principles underlying *Saybrook* pertain here, as acknowledged in the concurring opinion of Circuit Judge Joran in *In re Stanford*, 17 F.4th 116 (11th Cir. 2021). Judge Jordan doubted whether "any sale which is authorized by a Bankruptcy Court, regardless of whether the underlying transaction violates the Bankruptcy Code, triggers statutory mootness." *Id*. at 126. He stated that under *Saybrook* § 364(m) "does not bar an appeal of a Bankruptcy Court's authorization of a financing order if the claim is that the Bankruptcy Code does not permit the type of financing that has been authorized. We expressly rejected the 'cart before the horse' approach embraced by other courts which, absent a stay, mooted all claims irrespective of whether

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[40] *But cf. Reynolds v. Servisfirst Ban (In re Stanford)*, 17 F.4th 116, 122-23 stating that " 'authorizations' are covered, not just those that may be *proper* under the Code." This view effectively negates the meaning of "authorization" and thus renders the word "authorized" as without any useful content.

or not the Code prohibited the underlying financing mechanism." 17 F.4th at 127.

In the case below, the District Court had already determined that the lease assignment violated § 365(b). The Assignment Order did not, and could not, deviate from the Code and permit assignments that violated a key Code provision. The Assignment Order cannot be fairly read as "authorizing" transfers in contravention of § 365. Thus, because the assignment was not an "authorized" transaction, the mootness provision of § 363(m) was not triggered.

III. The mootness provision of § 363(m) should not be expanded to embrace lease assignments under § 365.

Mootness has become an endemic issue in bankruptcy practice. As Justice Alito noted, mootness has been "weaponized" to preclude effective appellate review of plans of reorganization (equitable mootness) and has, to the same effect, been asserted to avoid appellate review of "sales" under § 363(m). What ties these two problems together is the equally well noted problem that bankruptcy practice has migrated from a "plan oriented" practice to one dominated by a "sales" process—in which virtually all dispositions are deemed sales, with the attendant assertion of "mootness." The net result in both cases is the same—bankruptcy law is developing with a notable lack of uniformity and without any Article III review despite the evident need for such.

One of the leading scholars on modern bankruptcy practice, Professor Lynn M. LoPucki has written extensively on the "lawlessness" in modern Chapter 11 cases—a change which he argues has occurred in part because of the misuse of § 363 and the absence of effective appellate review of the Bankruptcy Courts. Lynn M. LoPucki, *Chapter 11's Descent into Lawlessness*, 96 Amer. Bankr. L. J. 247 (2022).

The harm from the overuse of § 363 has led to the absence of effective appellate review. Professor Adam Levitin has analyzed the problem of "illusory appellate review" in Chapter 11 cases.

> Appellate rights, however, are often illusory in bankruptcy. As Professor Melissa Jacoby has noted, the limited nature of appellate review in bankruptcy "reduces public oversight in Chapter 11 and intensifies the authority of Bankruptcy Courts.[41]

Professor Levitin concludes that in general "bankruptcy suffers from a lack of effective appellate review for a variety of reasons because no part of the system is designed to be conducive to appellate review."[42] The lack of appellate review ultimately empowers Bankruptcy Courts to disregard the law, which in turn encourages debtors to engage in judge and venue shopping: "lack of appellate review becomes a

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[41] Levitin, *Poison Pill*, 1121 (citing Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. Pa. L. Rev. 1715, 1733 (2018)).

[42] Levitin, *Poison Pill*, 1128.

decidedly pro-debtor feature upsetting bankruptcy law's careful calibration of debtor and creditor rights."[43]

The proper ruling on the narrow scope of § 363(m) relates to the broader issue underlying this appeal—namely, the need for adequate appellate review of Bankruptcy Courts decisions, and the related need to limit rulings that immunize Bankruptcy Courts from appellate review. Here, The Second Circuit's decision will continue the erosion of effective appellate review and may thus contribute to what academic scholars now see as lawlessness in Chapter 11.

CONCLUSION

Your *amici* respectfully submit that the Second Circuit decision should be reversed.

Respectfully submitted,

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[43] Levitin, *Poison Pill*, 1128.