No. 21-1270

In the Supreme Court of the United States

MOAC MALL HOLDINGS LLC, PETITIONER

v.

TRANSFORM HOLDCO LLC, ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether 11 U.S.C. 363(m) imposes a jurisdictional limitation on the appellate review of sale or lease orders issued by bankruptcy courts under 11 U.S.C. 363(b) or (c).

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INTEREST OF THE UNITED STATES

This case concerns whether 11 U.S.C. 363(m) imposes a jurisdictional limit on the appellate review of sale or lease orders issued by bankruptcy courts under 11 U.S.C. 363(b) or (c). The United States is the Nation's largest creditor, and in that capacity, it often raises objections to efforts to sell or lease assets under Sections 363(b) and (c). In addition, United States Trustees are charged with supervising the administration of bankruptcy cases, including those involving sale and lease orders under Sections 363(b) and (c). 28 U.S.C. 581-589a; see 11 U.S.C. 307 ("The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under [the Bankruptcy Code]."). The United States therefore has a substantial interest in the question presented.

STATEMENT

1. a. Title 11 of the United States Code contains the vast majority of statutory provisions governing bankruptcy proceedings, including the one at the center of this case, 11 U.S.C. 363. Section 363 governs the use, sale, and lease of the property of a bankruptcy estate. Sections 363(b) and (c) establish that estate property generally may be sold or leased outside the ordinary course of business only with the authorization of the bankruptcy court. See 11 U.S.C. 363(b)(1) and (c)(2)(B). Section 363(m) then limits the relief a party may obtain on appeal of such an authorization, unless the sale or lease has been stayed or the purchaser or lessee acted in bad faith. 11 U.S.C. 363(m). Specifically, Section 363(m) provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Ibid.

Another provision of the Bankruptcy Code, 11 U.S.C. 365, governs the treatment of a debtor's unexpired leases. Section 365 provides that the "trustee, subject to the court's approval, may assume" a debtor's unexpired lease, 11 U.S.C. 365(a), and assign the lease to another party, 11 U.S.C. 365(f). But Section 365 sets limits on such an assignment, including special restrictions for the assignment of a "lease of real property in a shopping center." 11 U.S.C. 365(b)(3); see 11 U.S.C. 365(f)(2)(B).

b. A different title of the United States Code, Title 28, houses the provisions granting federal courts jurisdiction over bankruptcy proceedings. Section 1334 confers bankruptcy jurisdiction on district courts, 28 U.S.C. 1334, and Section 157 permits Article I bankruptcy courts to "hear and determine all cases under title 11 and all core proceedings" when those cases or proceedings are referred to them by district courts, 28 U.S.C. 157(b)(1). Bankruptcy courts may also "enter appropriate orders and judgments" in core proceedings, *ibid.*, including "orders approving the use or lease of property," and "orders approving the sale" of most estate property, 28 U.S.C. 157(b)(2)(M) and (N). Those orders are "subject to review under section 158," 28 U.S.C. 157(b)(1), which provides that district courts "shall have jurisdiction to hear appeals" from the orders of bankruptcy courts "entered in cases and proceedings" under Section 157, 28 U.S.C. 158(a). Section 158 also grants the federal circuits jurisdiction to hear appeals from final judgments of district courts in bankruptcy cases. 28 U.S.C. 158(d)(1); see 28 U.S.C. 1291, 1292; *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992).

2. Petitioner MOAC Mall Holdings LLC leases spaces to tenants at the Mall of America in Bloomington, Minnesota. When it opened in 1992, the Mall of America was the largest mall in the Western Hemisphere,[1] and Sears, Roebuck and Co. was one of its three original anchor tenants, Pet. App. 51a-52a. To entice Sears, petitioner offered unusually favorable terms,

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[1] *The Mall of America in Bloomington, Minnesota Opens*, The Facts App, https://thefacts.app/facts/events/the-mall-of-america-in-bloomington-minnesota-opens-at-the-time-the-largest-shopping-mall-in-the-united-states (last visited Sept. 6, 2022).

including the right to lease a three-story space for up to 100 years for an annual rent of $10. *Id.* at 52a.

In October 2018, however, Sears filed for reorganization under Chapter 11 of the Bankruptcy Code. Pet. App. 15a. In February 2019, the bankruptcy court issued an order under 11 U.S.C. 363(b) authorizing the sale of the majority of Sears's assets to respondent Transform Holdco LLC, a company formed and headed by Sears's final CEO and several other former Sears executives.[2] Pet. App. 3a-4a, 16a, 50a. One of the assets included in the sale was the right to designate the companies, or "assignees," that would seek to take over hundreds of Sears's retail leases, including its Mall of America lease. *Id.* at 17a; see *id.* at 4a, 16a-18a, 50a.

The sale order contained some protections for landlords (including petitioner), reserving their rights to object to any lease assignments that failed to conform to the requirements of 11 U.S.C. 365. See J.A. 138. Under the terms of the sale order, "[a]ny party seeking to object to the assumption and assignment of" a lease could file a written objection to be resolved by the bankruptcy court. J.A. 140; see J.A. 140-142.

After the bankruptcy court issued its order authorizing the sale of Sears's assets under Section 363(b), the sale closed. Pet. App. 4a. Respondent then sought to have the Mall of America lease assigned to respondent's wholly owned subsidiary, Transform Leaseco LLC (Leaseco). *Id.* at 18a-19a.

3. a. Petitioner objected to the assignment of the Mall of America lease to Leaseco, contending that

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[2] The other respondent named in the petition for a writ of certiorari, Sears Holding Corporation, did not participate in the court of appeals and does not appear to be participating in this Court. See Pet. Br. ii; J.A. (cover); Br. in Opp. i, iv, 2.

Leaseco did not satisfy the requirements of Section 365(b)(3) because its financial condition and operating performance were not similar to those of Sears in 1991, and Leaseco's assumption of the lease would disrupt the mall's tenant mix or balance. Pet. App. 19a-20a, 59a-60a. Following a hearing, the bankruptcy court overruled petitioner's objections, concluding that, with additional concessions from Leaseco, the assignment met the statutory requirements. *Id.* at 20a. In September 2019, the bankruptcy court issued an order "authorizing the assumption and assignment of the Mall of America Lease to Leaseco." *Ibid.*

The next day, petitioner asked the bankruptcy court for a stay of the order pending appeal. J.A. 62. Petitioner asserted that, in the absence of a stay, governing circuit precedent suggested that the appeal might be "equitabl[y] moot[]" and also "legally moot" in light of Section 363(m). Br. in Opp. App. 3a-4a. The bankruptcy court explained that the concern would be understandable if petitioner were appealing the previous authorization of the sale of Sears's assets under Section 363(b), but the court did not believe that Section 363(m) would be applicable to the assignment order because petitioner was not "appealing the whole sale"; rather, it was appealing an assignment of one of "600 leases" involved in the sale, and the sale itself had "closed already." *Id.* at 5a.

Respondent (on behalf of itself and Leaseco) agreed that Section 363(m) would not apply, stating that "I think we couldn't rely on 363(m) for the purposes of arguing mootness because we have not closed on a transaction to assume and assign this [lease] to a subdebtor." Br. in Opp. App. 5a. When petitioner protested that circuit precedent might dictate otherwise,

the bankruptcy court again rejected the concern, observing that "this is a 365 order. It's an outgrowth of the sale. It's not a 363(m), and they're not going to rely on 363(m), which [respondent's counsel] just reiterated for the second time." *Id.* at 7a. When petitioner continued to protest, the court stated that respondent "would be judicially estopped" from relying on Section 363(m) because the bankruptcy court was relying on respondent's "representation" that Section 363(m) does not apply. *Ibid.* Finding no irreparable injury, the bankruptcy court denied the stay pending appeal. *Id.* at 8a-12a, 14a-15a.

b. Petitioner appealed to the district court, which vacated the order assigning the Mall of America lease because it found that the assignment was inconsistent with a requirement for shopping center leases established by Section 365(b)(3). Pet App. 51a, 94a-98a, 100a.

Respondent moved for reconsideration, arguing for the first time that Section 363(m) operated to deprive the district court of jurisdiction over petitioner's appeal. Pet. App. 13a-14a. Petitioner contended that respondent had waived that argument and was judicially estopped from raising it based on its representations to the bankruptcy court. *Id.* at 26a-27a. Petitioner further contended that Section 363(m) was inapplicable to the lease assignment order. *Id.* at 27a.

The district court stated that it was "appalled by [respondent]'s behavior," Pet. App. 28a, but concluded that circuit precedent dictated that Section 363(m) is jurisdictional, making waiver and judicial estoppel unavailable. *Id.* at 28a-34a. The court also found that Section 363(m) applied to petitioner's appeal, either because the lease assignment constituted a sale or because it was "inextricably intertwined" with the sale of Sears's as-

sets. *Id.* at 43a; see *id.* at 39a-43a. The court therefore vacated its prior decision invalidating the authorization of the lease assignment and dismissed petitioner's appeal for lack of jurisdiction. *Id.* at 48a.

Petitioner appealed the district court's order granting a jurisdictional dismissal under Section 363(m), and respondent conditionally cross-appealed the district court's initial decision about the merits of the lease assignment. Pet. App. 2a-3a.

3. The court of appeals affirmed the jurisdictional dismissal. Pet. App. 1a-11a. The court found that, although the lease assignment was authorized under Section 365 rather than Section 363, it fell within the scope of Section 363(m) because the assumption and assignment of Sears's leases was "integral to a sale authorized under [Section] 363(b)." *Id.* at 5a; see *id.* at 5a-8a. The court further found that respondent was not barred from relying on Section 363(m) because that provision is jurisdictional and not "subject to waiver and judicial estoppel." *Id.* at 8a.

The court of appeals rejected the contention that deeming Section 363(m) jurisdictional is inconsistent with *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500 (2006), in which this Court cautioned against conflating "jurisdictional and nonjurisdictional statutory limitations." Pet. App. 8a. The court of appeals explained that, after *Arbaugh*, it "held in no ambiguous terms that section 363(m) is a limit on our jurisdiction and that, absent an entry of a stay," an appellate court "only retain[s] authority to review challenges to the good faith aspect of the sale." *Ibid.* (quoting *In re WestPoint Stevens, Inc.*, 600 F.3d 231, 248 (2d Cir. 2010)) (some internal quotation marks omitted). The court further explained that treating Section 363(m) as jurisdictional is appropriate

because the district court in this case "was unable to grant effective relief without impacting the validity of the sale at issue, thus rendering the case moot by operation of a clear limit on [a court's] appellate review that is imposed by Congress." *Id.* at 9a; see *ibid.* ("[Section] 363(m) is jurisdictional because it creates a rule of statutory mootness.") (citation and internal quotation marks omitted).

SUMMARY OF ARGUMENT

I. A. Article III of the Constitution restricts "[t]he judicial Power" of the federal courts to cases in which a plaintiff asserts an injury in fact caused by the defendant and redressable by the courts. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 559-561 (1992) (quoting U.S. Const. Art. III, § 1). Statutes, by contrast, generally do not impose jurisdictional limitations on the courts' authority to grant relief. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

Congress may, of course, provide that a particular statutory requirement is jurisdictional. It has sometimes enacted statutes that limit a court's authority to decide a particular class of claims, *e.g.*, 28 U.S.C. 1332, or its power to issue a specific class of remedies, *e.g.*, 8 U.S.C. 1252(f)(1). And when Congress does so, the jurisdictional limitation "cannot be waived or forfeited, must be raised by courts *sua sponte*," and is not susceptible to "equitable exceptions." *Boechler, P.C.* v. *Commissioner*, 142 S. Ct. 1493, 1497 (2022). "[M]indful of th[ose] consequences," this Court will not pronounce a statutory limitation jurisdictional unless Congress "clearly states" that it is. *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 513, 515 (2006). While Congress need not "'incant magic words,'" the text, structure, and statutory context must demonstrate that the provision qualifies

as jurisdictional. *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 410 (2015) (citation omitted).

B. Under those principles, 11 U.S.C. 363(m) is not jurisdictional. The plain text of the provision demonstrates that it merely imposes a statutory restriction on the relief that a party may obtain when it appeals a bankruptcy court's order authorizing a sale or lease under 11 U.S.C. 363(b) or (c). The provision does not speak in jurisdictional terms, and the statutory provisions governing bankruptcy jurisdiction are located in a different title of the United States Code to which Section 363(m) establishes no link. Nor is there any other clear indication that Section 363(m) should be deemed jurisdictional. To the contrary, Section 363(m) is meaningfully distinct from another provision of the Bankruptcy Code that is unmistakably of a jurisdictional character, 11 U.S.C. 305(c), and from other statutory provisions that this Court has characterized as jurisdictional.

C. Courts that have nonetheless found Section 363(m) jurisdictional have primarily reasoned that it moots an appeal of a covered sale or lease authorization by preventing an appellant from obtaining the relief it seeks. But many appellants will seek relief that does not "affect the validity" of the underlying sale or lease. 11 U.S.C. 363(m). And even though some appellants will request relief the statute precludes, the courts' reasoning cannot be squared with *Steel Co.*, which recognizes the general rule that a statutory limitation on relief does not undermine the existence of Article III jurisdiction. 523 U.S. at 89-90, 96. Because Congress has not clearly indicated that Section 363(m) departs from that rule, the provision's restriction on the remedies available to bankruptcy appellants does not undermine a

court's jurisdiction across the board, even if a jurisdictional dismissal may occasionally be appropriate in individual cases in which the appellants' claims for relief are frivolous. *Ibid.*

Respondent asserts that Section 363(m) is jurisdictional under the reasoning of *Bowles* v. *Russell*, 551 U.S. 205 (2007), but that case relied on a line of Supreme Court decisions finding nearly identical statutory restrictions jurisdictional. There is no similar line of precedent here. Respondent attempts to fill the void by suggesting that a Bankruptcy Rule that preceded Section 363(m) had incorporated historical limitations on *in rem* jurisdiction. But that argument fails for multiple reasons. The earlier Bankruptcy Rule cannot have been jurisdictional because it was not enacted by Congress, which controls the jurisdiction of the federal courts. The text of Section 363(m) cannot be squared with the limits on *in rem* jurisdiction that respondent describes. And bankruptcy jurisdiction is, in any event, not purely *in rem*.

D. Accordingly, like most statutory limitations on relief, Section 363(m) is nonjurisdictional, and the doctrines of forfeiture, waiver, and judicial estoppel may be applied to prevent the application of the statute in appropriate cases. The court of appeals therefore erred in not addressing petitioner's arguments about waiver and estoppel.

II. Finally, to the extent that this Court considers petitioner's alternative argument that the court of appeals adopted an unduly broad understanding of the scope of Section 363(m), petitioner is correct that the lower court's interpretation departs from the plain text of the statute. If the Court reaches the issue, it should therefore remand to the court of appeals to consider

whether this case falls within an appropriately limited construction of Section 363(m).

ARGUMENT

I. SECTION 363(m) DOES NOT IMPOSE A JURISDICTIONAL LIMIT ON APPELLATE REVIEW OF SALE OR LEASE ORDERS

A. Statutory Limitations On Relief Are Not Jurisdictional Unless Congress Has Clearly Made Them So

1. Article III establishes fundamental limits on "'[t]he judicial Power'"—that is, the "jurisdiction of federal courts." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 559 (1992) (quoting U.S. Const. Art. III, § 1). By "limit[ing] the jurisdiction of federal courts to 'Cases' and 'Controversies,'" Article III prohibits courts from exercising jurisdiction unless the party invoking the court's power has suffered an injury in fact that was caused by the defendant and is likely to be "redressed by a favorable decision" from the court. *Id.* at 559, 561 (quoting U.S. Const. Art. III, § 1). Those requirements must be met at every stage of the litigation. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997). Where it becomes "impossible for a court to grant any effectual relief whatever to the prevailing party," the "action can no longer proceed and must be dismissed as moot." *Campbell-Ewald Co.* v. *Gomez*, 577 U.S. 153, 161 (2016) (citations omitted).

This Court has cautioned, however, against confusing the Constitution's jurisdictional mandates with nonjurisdictional requirements established by statute. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89-93 (1998). In *Steel Co.*, the Court clarified that statutory restrictions on the availability of a cause of action or a particular remedy generally do not "implicate [courts'] subject-matter jurisdiction," unless a plaintiff has no

more than a "frivolous or immaterial" argument that it is entitled to relief under the statute. *Id.* at 89; see *Bell* v. *Hood*, 327 U.S. 678, 682 (1946). The Court in *Steel Co.* rejected the view, advanced by Justice Stevens's concurrence, that the Court had the power to decide whether the plaintiff had stated a claim for relief under the statute without first establishing the existence of Article III standing. 523 U.S. at 89-93. The Court explained that the absence of a "valid (as opposed to arguable)" statutory cause of action generally "does not implicate subject-matter jurisdiction" even if it may ultimately prevent the plaintiff from obtaining the relief it seeks. *Id.* at 89-90.

The Court in *Steel Co.* also rejected Justice Stevens's assertion that a statutory impediment to relief necessarily prevents a plaintiff from satisfying Article III's redressability requirement. 523 U.S. at 96. Redressability may be absent where "the relief requested by the plaintiffs * * * would not * * * remed[y] their injury in fact." *Ibid.* (emphasis omitted). But the question whether a statute affords plaintiffs their requested "remedy" is generally "not of the jurisdictional sort which the Court raises on its own motion." *Ibid.* (citation and internal quotation marks omitted). Accordingly, a court's redressability analysis may rely on a statutory restriction on remedies "only to the extent" that the plaintiff's assertion that it is entitled to a particular remedy is "frivolous." *Id.* at 108 n.9.

2. "Of course, Congress c[an] make" a court's jurisdiction to hear a claim turn on the satisfaction of a particular statutory requirement if it so chooses. *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514 (2006); see *Kontrick* v. *Ryan*, 540 U.S. 443, 452 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdic-

tion."). Congress has, for example, "made an amount-in-controversy threshold an ingredient of subject-matter jurisdiction in delineating diversity-of-citizenship jurisdiction." *Arbaugh*, 546 U.S. at 514-515 (citing 28 U.S.C. 1332). And Congress may choose, more narrowly, to deny a court "jurisdiction or authority to grant a particular form of relief." *Biden* v. *Texas*, 142 S. Ct. 2528, 2539 (2022). Thus, the Court recently recognized (*ibid.*) that 8 U.S.C. 1252(f)(1) "deprives courts of the power to issue a specific category of remedies."

When Congress enacts a statute that "mark[s] the bounds of a 'court's adjudicatory authority,'" *Boechler, P.C.* v. *Commissioner*, 142 S. Ct. 1493, 1497 (2022) (citation omitted), the jurisdictional provision has a "unique" status "in our adversarial system," *Sebelius* v. *Auburn Regional Medical Center*, 568 U.S. 145, 153 (2013). "Jurisdictional requirements cannot be waived or forfeited, must be raised by courts *sua sponte*," and are not susceptible to "equitable exceptions." *Boechler*, 142 S. Ct. at 1497. As a result, true jurisdictional defects "can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction," often causing a "waste of adjudicatory resources" and "disturbingly disarm[ing] litigants." *Sebelius*, 568 U.S. at 153. Moreover, once a court discovers a jurisdictional impediment, it generally has no choice but to dismiss the affected claim or to withhold the affected remedy. See *Steel Co.*, 523 U.S. at 93.

"[M]indful of th[ose] consequences," this Court will not assume that Congress intends to depart from *Steel Co.*'s general rule under which the satisfaction of a statutory requirement presents a merits question unless Congress "clearly" establishes that a particular statute should be afforded jurisdictional status. *Arbaugh*, 546

U.S. at 513, 515. In order to provide a clear indication that a statute is jurisdictional, Congress need not "'incant magic words,'" but "traditional tools of statutory construction must plainly show that" the statute is jurisdictional. *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 409-410 (2015) (citation omitted). A statute may be deemed jurisdictional where its "text" and "structure" "clearly mandate [a] jurisdictional reading." *Boechler*, 142 S. Ct. at 1498. Alternatively, clarity may come from "statutory context." *Ibid.* For example, the Court has sometimes found sufficient clarity in a statute attaching jurisdictional consequences to conditions on a waiver of sovereign immunity, cf. *United States* v. *Navajo Nation*, 556 U.S. 287, 290 (2009), and a "long line of Supreme Court decisions left undisturbed by Congress" may similarly serve "as a clear indication that a requirement is jurisdictional," *Boechler*, 142 S. Ct. at 1500 (brackets omitted). But where the text, structure, and statutory context lack "any clear statement," the statute cannot be characterized as jurisdictional. *Id.* at 1498.

B. Congress Did Not Clearly Indicate That Section 363(m) Is Jurisdictional

Under the foregoing principles, Section 363(m) does not impose jurisdictional limits on appellate courts. By its terms, the provision merely provides that an appeal of a bankruptcy court's "authorization * * * of a sale or lease" under Section 363(b) or (c) cannot "affect the validity" of an unstayed sale or lease "to an entity that purchased or leased [the] property in good faith." 11 U.S.C. 363(m). The statute therefore limits the relief that a party may obtain on appeal when it challenges a covered sale or lease order. But, under *Steel Co.*, such statutory restrictions on relief generally do not qualify

as jurisdictional. 523 U.S. at 89-93. Nor has Congress given any clear indication that Section 363(m) represents a departure from the general rule; the text, structure, and statutory context are devoid of any "clear statement" that the statute "mark[s] the bounds" of judicial authority. *Boechler*, 142 S. Ct. at 1497-1498.

1. a. Section 363(m)'s text offers no clear indication that the provision deprives courts of jurisdiction to review covered sale and lease authorizations. Rather, three distinct aspects of the text establish that courts retain the power to review those orders. First, the provision applies when there has been a "reversal or modification on appeal" of an authorization; that phrasing assumes that courts will be able to hear an "appeal" of a covered authorization and "revers[e]" or "modif[y]" the authorization as appropriate. 11 U.S.C. 363(m). Second, the provision states that an appellate reversal or modification "does not affect the validity of a sale or lease," *ibid.*; that language limits the consequences of orders issued on appeal but does not restrict the "power of the court" to hear an appeal in the first place, *Reed Elsevier, Inc.* v. *Muchnik*, 559 U.S. 154, 161 (2010) (citation omitted). Third, the provision applies "whether or not" a bona fide purchaser "knew of the pendency of the appeal," 11 U.S.C. 363(m); thus, Section 363(m)'s applicability does not prevent an appeal from pending.

Section 363(m) therefore contrasts sharply with the text of provisions that have been found to deprive a court of jurisdiction to hear claims. In *Rockwell International Corp.* v. *United States*, 549 U.S. 457, 468 (2007), for example, the Court concluded that a provision of the False Claims Act, 31 U.S.C. 3729 *et seq.*, withdrew jurisdiction over certain claims where the provision specified that "[n]o court shall have jurisdic-

tion over an action" by a private plaintiff "based upon the public disclosure of allegations or transactions" in certain contexts "unless" the plaintiff "is an original source," 31 U.S.C. 3730(e)(4)(A) (2006). The Court held that "the jurisdictional nature of the original-source requirement is clear *ex visceribus verborum*." *Rockwell Int'l*, 549 U.S. at 468. And in *Patchak* v. *Zinke*, 138 S. Ct. 897, 904 (2018), a plurality of the Court concluded that a provision was jurisdictional because it stated that an "'action' relating to" certain property "'shall not be filed or maintained in a Federal court'" and "'shall be promptly dismissed.'" *Id.* at 905 (opinion of Thomas, J.) (citation omitted). Section 363(m), by contrast, contains no reference to courts' jurisdiction or authority to hear appeals from bankruptcy orders covered by the provision (beyond the implicit assumption that such orders *may* be reversed or modified). And Section 363(m) includes no mandate to dismiss such appeals.

b. Statutory context reinforces the conclusion that Section 363(m) does not limit federal courts' appellate jurisdiction in bankruptcy proceedings. The primary statutory provisions addressing bankruptcy jurisdiction are found in an entirely distinct title of the Code, Title 28. See *Kontrick*, 540 U.S. at 453 (contrasting a nonjurisdictional Bankruptcy Rule with jurisdictional limits found in Title 28). Specifically, 28 U.S.C. 1334 confers bankruptcy jurisdiction on district courts. And, when district courts refer cases to bankruptcy courts, Section 157 provides that those courts may issue orders in core proceedings "subject to review under" 28 U.S.C. 158, a provision that in turn grants district and circuit courts jurisdiction over bankruptcy appeals, 28 U.S.C. 158(a) and (d). The bankruptcy court orders that Section 157 describes as "subject to review under" Section

158 include "orders approving the use or lease of property" and "orders approving the sale of" most estate "property." 28 U.S.C. 157(b)(2)(M) and (N).

Section 363(m) does not cross-reference the provisions in Title 28 that confer appellate jurisdiction with respect to sale and lease orders, and it lacks any other "clear tie" to those jurisdictional grants. *Boechler*, 142 S. Ct. at 1499. This Court has repeatedly held that the fact that Congress addressed jurisdiction in "an entirely separate provision" suggests that the requirement at issue is not jurisdictional. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982); see *Arbaugh*, 546 U.S. at 515; *Wong*, 135 S. Ct. at 1633; *Reed Elsevier*, 559 U.S. at 164-165. That reasoning applies with particular force in this case, where multiple jurisdictional provisions are housed in a distinct title, to which Section 363(m) has no link.

Moreover, Section 363(m) is meaningfully distinct from another provision in Title 11 that clearly limits the jurisdictional grants in Title 28. See *Boechler*, 142 S. Ct. at 1498 (noting existence of other provisions enacted around the same time that "much more clearly link their jurisdictional grants to" the type of requirement at issue). In 11 U.S.C. 305(c), Congress provided that a court's determination to dismiss or suspend proceedings under certain circumstances "is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28." 11 U.S.C. 305(c). That provision speaks directly to the adjudicatory authority of the courts of appeals and of this Court with respect to the appeals of certain bankruptcy orders, and it does so while citing

the jurisdiction-granting provisions of Title 28. Section 363(m) does neither.

c. There is no additional evidence that would provide a clear indication that Section 363(m)'s limitation is truly jurisdictional. Congress did not, for example, enact Section 363(m) against a backdrop of cases from this Court deeming analogous statutes jurisdictional, see *Fort Bend County* v. *Davis*, 139 S. Ct. 1843, 1849 (2019); nor does Section 363(m) implicate federal sovereign immunity in any way, see *Navajo Nation*, 556 U.S. at 290. Section 363(m) therefore bears no resemblance to statutory provisions that this Court has found to limit subject-matter jurisdiction.

2. A statute that does not constrain a court's subject-matter jurisdiction may nonetheless qualify as jurisdictional if it limits a court's "jurisdiction to grant a particular remedy." *Biden* v. *Texas*, 142 S. Ct. at 2540; cf. *Town of Chester* v. *Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (recognizing that Article III may restrict a court's power to grant a particular "form of relief" even when the court has jurisdiction to decide the underlying claim). As this Court recently held, the immigration provision found at 8 U.S.C. 1252(f)(1) "does not deprive the lower courts of all subject matter jurisdiction over claims brought" under certain immigration provisions, *Biden* v. *Texas*, 142 S. Ct. at 2539, but it expressly "strips lower courts of '*jurisdiction or authority*' to 'enjoin or restrain the operation of' the relevant statutory provisions," *Garland* v. *Aleman Gonzalez*, 142 S. Ct. 2057, 2064 (2022) (quoting 8 U.S.C. 1252(f)(1)) (emphasis added). And because Section 1252(f)(1) governs the scope of remedial jurisdiction, it may be raised *sua sponte* at any stage of the litigation. See *id.* at 2062-2063 (explaining that this Court introduced the question

whether Section 1252(f)(1) deprived the lower courts of jurisdiction to award the injunctive relief in that case).

Section 363(m) restricts the effects of a specific kind of judicial remedy, but it offers no clear indication that its limitation is jurisdictional. Unlike Section 1252(f)(1), Section 363(m) does not expressly strip courts of "jurisdiction or authority" to issue certain kinds of relief. 8 U.S.C. 1252(f)(1). Nor does it do so implicitly. It does not purport to "cabin a court's power." *Wong*, 575 U.S. at 409. Instead, it provides only that a reversal or modification of a sale or lease order under Section 362(b) or (c) "does not affect the validity of" the underlying sale or lease unless certain requirements are met. 11 U.S.C. 363(m). The provision is therefore akin to the numerous statutes that limit the nature of the relief a party may obtain—and like the vast majority of those statutes, it is not jurisdictional. See *Steel Co.*, 523 U.S. at 96.

C. The Arguments To The Contrary Lack Merit

1. The courts of appeals have not offered a convincing rationale for deeming Section 363(m) jurisdictional

Among the courts of appeals that previously deemed Section 363(m) jurisdictional, a majority have revisited that determination and reversed their position in the wake of this Court's efforts to "'bring some discipline' to use of the jurisdictional label." *Boechler*, 142 S. Ct. at 1497 (citation omitted); see, *e.g.*, *In re Stanford*, 17 F.4th 116, 122 (11th Cir. 2021); *Trinity 83 Dev., LLC* v. *ColFin Midwest Funding, LLC*, 917 F.3d 599, 601-603 (7th Cir. 2019); *In re Spanish Peaks Holdings II, LLC*, 872 F.3d 892, 896-897 n.4 (9th Cir. 2017).

The circuits that have continued to find Section 363(m) jurisdictional have done so on the theory that the provision renders the appeal of a sale or lease authorization under Section 363(m) "moot" by making it impos-

sible for a court to "grant effective relief" in every case involving the unstayed sale or lease of property to a party acting in good faith. Pet. App. 9a; see *In re C Whale Corp.*, No. 21-20147, 2022 WL135125, at *3 (5th Cir. Jan. 13, 2022) (per curiam) ("In the absence of a stay, this court has interpreted Section 363 to moot an appeal, unless the purchaser did not act in good faith.") (citing *In re Bleaufontaine, Inc.*, 634 F.2d 1383, 1389-1390 (5th Cir. 1981)).

Those courts' reliance on a theory of "statutory mootness," Pet. App. 9a, cannot be squared with *Steel Co.*'s holding that Article III jurisdiction is not typically defeated by a statutory limitation on relief. 523 U.S. at 89-90, 96. In general, a court may not rely on a statutory provision restricting available remedies in performing an Article III mootness analysis unless the appellant has no more than a "frivolous" argument that relief is available. *Id.* at 89, 108 n.9. Because Section 363(m) contains no clear indication that Congress intended to depart from that general rule, its application renders an appeal moot only when the appellant's asserted entitlement to relief that is not barred by Section 363(m) is "frivolous." *Ibid.*

To be sure, in some appeals of sale or lease authorizations under 11 U.S.C. 363(b) or (c), the appellants will have only frivolous arguments that they are entitled to relief that will not "affect the validity" of an underlying sale or lease, 11 U.S.C. 363(m), and those appellants may have their appeals dismissed on jurisdictional grounds, *Steel Co.*, 523 U.S. at 108 n.9; see *Tenet* v. *Doe*, 544 U.S. 1, 12 (2005) (Scalia, J., concurring) (where "the absence of a cause of action is so clear that [the plaintiff's] claims are frivolous," dismissal is on a "*jurisdictional* ground"). But the possibility that Section 363(m)

will sometimes prompt dismissals of that sort cannot justify deeming the provision jurisdictional—and therefore immune from standard principles of waiver and forfeiture—because *any* statutory requirement may give rise to a jurisdictional dismissal when a plaintiff has only a "frivolous" argument that the requirement is satisfied. *Steel Co.*, 523 U.S. at 89. For example, in *Arbaugh*, this Court held that Title VII's requirement that an employer must have at least 15 employees in order to be susceptible to suit is "nonjurisdictional in character," 546 U.S. at 516, and therefore subject to principles of waiver and forfeiture, *id.* at 514. But *Arbaugh* recognized that the petitioner's claim could have been "dismissed for want of subject-matter jurisdiction" had petitioner's contention that she was entitled to relief under Title VII been "'wholly insubstantial and frivolous.'" *Id.* at 513 n.10 (quoting *Steel Co.*, 523 U.S. at 89).

b. Courts of appeals have sometimes sought to bolster the theory of "statutory mootness" through an impermissible reliance on the policies underlying Section 363(m). The Sixth Circuit, for instance, has observed that Section 363(m) reflects the "particular need to encourage participation in bankruptcy asset sales and increase the value of the property of the estate by protecting good faith purchasers from modification by an appeals court of the bargain struck with the debtor." *Weingarten Nostat, Inc.* v. *Service Merch. Co.*, 396 F.3d 737, 741 (2005). It has therefore reasoned that "[e]ven if [an] appeal is not moot as a constitutional matter because a court could provide a remedy, the policy favoring finality * * * requires that certain appeals nonetheless be treated as moot absent a stay." *Id.* at 742.[3] This

[3] The Sixth Circuit has subsequently indicated that it does not understand that doctrine to operate as a *per se* rule automatically

Court, however, has already held that a statute "does not become jurisdictional whenever it 'promotes important congressional objectives.'" *Fort Bend*, 139 S. Ct. at 1851 (quoting *Reed Elsevier*, 559 U.S. at 169 n.9).

Further, applying Section 363(m) according to its plain, nonjurisdictional terms is unlikely to undermine the interests in finality that the statute serves because parties generally have "good reason promptly to raise an objection that may rid them of the" appeal from a bankruptcy order authorizing a sale or lease. *Fort Bend*, 139 S. Ct. at 1851. Respondent initially eschewed invocation of Section 363(m) in this case, assuring the bankruptcy court that it would not rely on the provision and avoiding a stay of the assignment partly on that basis. See pp. 5-6, *supra*. But absent such unusual circumstances, waiver and forfeiture are likely to be rare. Respondent itself states (Br. in Opp. 18) that it was unable to locate any "reported decision of any other court of appeals in the 40 years since § 363(m) was enacted [that] * * * turned on waiver" before this case.

2. Respondent's arguments also fail

a. Respondent has sought (Br. in Opp. 29) to establish that Section 363(m) is jurisdictional, claiming that Section 363(m) is a "close analogue" of the statutory provision the Court deemed jurisdictional in *Bowles* v. *Russell*, 551 U.S. 205 (2007). While Section 363(m) and the statute at issue in *Bowles* both involve appeals, the similarities end there. The provision in *Bowles*, 28 U.S.C. 2107(c), established a 14-day time limit for the

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mooting appeals from unstayed sale orders; instead, it requires a party asserting mootness under Section 363(m) to establish that "the reviewing court is unable to grant effective relief without affecting the validity of the sale." *In re Brown*, 851 F.3d 619, 622-623, cert. denied, 138 S. Ct. 328 (2017).

appeal of a district court's denial of habeas relief, and the Court's holding was based primarily on a "century's worth of precedent and practice in American courts" finding nearly identical time limits jurisdictional. *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 436 (2011) (citing *Bowles*, 551 U.S. at 209-211). There is no comparable "'line of Supreme Court decisions left undisturbed by Congress' attach[ing] a jurisdictional label" to statutes like Section 363(m). *Fort Bend*, 139 S. Ct. at 1849 (brackets and citations omitted).

b. Respondent attempts to fill that void by observing that Section 363(m)'s predecessor was Bankruptcy Rule 805, and then contending that Rule 805 was "understood as merely declaratory of [a] long-standing principle of *in rem* jurisdiction," under which "the court's *in rem* jurisdiction of estate property terminates once the property is transferred out of the court's custody." Br. in Opp. 32 & n.9. That contention fails for multiple reasons.

First, while respondent is correct that Section 363(m)'s text tracks aspects of former Bankruptcy Rule 805, respondent cites only a single 1976 court of appeals decision purportedly establishing that Rule 805 was intended to reflect historical limits on the scope of *in rem* jurisdiction. Br. in Opp. 32 (citing *In re Abingdon Realty Corp.*, 530 F.2d 588, 590 (4th Cir.)). But that case says nothing about *in rem* jurisdiction, nor does it hold that Bankruptcy Rule 805 was somehow jurisdictional. See *In re Abingdon Realty*, 530 F.2d at 589-590 (holding that an appeal of a sale authorization does not automatically stay the underlying sale, and then finding the suit moot under the particular "circumstances" of that case). In any event, this Court recently declined to rely on "lower court cases" interpreting ostensibly "analogous"

language in a provision that was not before the Court. *Boechler*, 142 S. Ct. at 1500.

Second, lower-court precedents concerning Bankruptcy Rule 805 are a particularly poor candidate for establishing the jurisdictional nature of Section 363(m) because "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." *Kontrick*, 540 U.S. at 452. Rule 805 was—as the current Bankruptcy Rules have been—"prescribed by this Court" and not by Congress; it therefore could not be jurisdictional. *Id.* at 453; see *id.* at 454 (recognizing that "filing deadlines prescribed in Bankruptcy Rules * * * do not delineate what cases bankruptcy courts are competent to adjudicate"); 28 U.S.C. 2075 (1970).

Third, respondent's *in rem* theory cannot be squared with the plain terms of the statute. Respondent contends (Br. in Opp. 32) that "once [estate] property is transferred out of the court's custody," *in rem* jurisdiction terminates along with "an appellate court's jurisdiction to fashion relief inconsistent with the transfer." The terms of Section 363(m), however, expressly contemplate that a court may continue to issue relief that invalidates some transfers of property outside the estate (*i.e.*, those where the property was not "purchased or leased * * * in good faith," 11 U.S.C. 363(m)). And Section 363(m) does not apply at all where property is transferred outside the estate other than under the provisions of Sections 363(b) and (c), nor does it prevent *bankruptcy* courts from continuing to fashion relief pertaining to property that has been transferred outside the estate. Respondent does not, for example, suggest that the bankruptcy court was powerless to authorize the Mall of America lease assignment, even though respondent had acquired the right to assign the lease (un-

less rejected by the bankruptcy court) in an asset sale that closed months before the bankruptcy court addressed the assignment.

Fourth, respondent's assumption (Br. in Opp. 31-32) that Section 363(m) incorporates tenets of *in rem* jurisdiction disregards the fact that bankruptcy jurisdiction is not solely *in rem*. This Court has explained that, while bankruptcy jurisdiction is *in rem* "at its core" and "the principal focus of the bankruptcy proceedings is and was always the res, some exercises of bankruptcy courts' powers * * * unquestionably involve[] more than mere adjudication of rights in a res." *Central Virginia Cmty. Coll.* v. *Katz*, 546 U.S. 356, 362, 378 (2006). Indeed, the Court has specifically recognized that bankruptcy courts may "mandat[e] turnover of * * * property" that has been wrongfully transferred outside the estate, and that the issuance of such orders may "itself involve *in personam* process." *Id.* at 371-372. Because bankruptcy jurisdiction is not purely *in rem*, the limitations on jurisdiction in bankruptcy proceedings need not track those that apply to purely *in rem* actions.[4]

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[4] Courts' ability to exercise some *in personam* jurisdiction in bankruptcy proceedings also renders inapposite the cases respondent invokes from other *in rem* contexts. See Br. in Opp. 32 n.8 (citing *Lozman* v. *City of Riviera Beach*, 568 U.S. 115, 120 (2013) (admiralty); *Republic Nat'l Bank* v. *United States*, 506 U.S. 80, 96 (1992) (civil forfeiture)). And even if those cases were applicable in the bankruptcy context, they do not support respondent's assertion that *in rem* jurisdiction necessarily terminates when a court loses custody of the res. *Republic National Bank*, for instance, observes that control of the res is "a prerequisite to the *initiation* of an *in rem* civil forfeiture proceeding," but the subsequent release of the property does not terminate jurisdiction unless it renders any potential judgment "'useless.'" 506 U.S. at 84-85 (citation omitted). The court of appeals in this case did not address whether any relief

D. Because Section 363(m) Is Not Jurisdictional, The Court Of Appeals Erroneously Failed To Consider Petitioner's Waiver And Judicial-Estoppel Arguments

The court of appeals in this case concluded that Section 363(m) is not "subject to waiver and judicial estoppel" because it is jurisdictional. Pet. App. 8a. Stripped of its jurisdictional premise, the court's analysis was incomplete and should be reversed.

Nonjurisdictional statutes do not enjoy the "unique" treatment afforded to jurisdictional requirements. *Sebelius*, 568 U.S. at 153. A failure to satisfy a nonjurisdictional requirement leads to a dismissal on the "merits." *Steel Co.*, 523 U.S. at 93. Courts are also "under no *obligation* to raise" a nonjurisdictional issue *sua sponte*, although they may do so in certain circumstances. *Day* v. *McDonough*, 547 U.S. 198, 205 (2006); cf. *Arbaugh*, 546 U.S. at 514. And, as most relevant here, nonjurisdictional limits "can be waived or forfeited by an opposing party." *Nutraceutical Corp.* v. *Lambert*, 139 S. Ct. 710, 714 (2019); see *Fort Bend*, 139 S. Ct. at 1849; *Kontrick*, 540 U.S. at 456.

Because Section 363(m) is nonjurisdictional, respondent's belated attempt to invoke that statute's limits in a motion to reconsider the district court's merits decision should have been subject to the usual rules for preserving claims in litigation. By failing to raise Section 363(m) at the outset of the district court litigation, respondent forfeited its right to rely on the provision. See *Hamer* v. *Neighborhood Hous. Servs.*, 138 S. Ct. 13, 17 n.1 (2017) ("Forfeiture is the failure to make the timely assertion of a right[.]") (brackets and citation omitted). In fact, by affirmatively disclaiming any in-

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would be available to petitioner if Section 363(m) is not jurisdictional. See pp. 30-32, *infra*.

tention to rely on Section 363(m) when successfully opposing petitioner's effort to obtain a stay of the assignment order from the bankruptcy court, respondent appears to have waived its right to invoke the provision. *Ibid.* ("waiver is the 'intentional relinquishment or abandonment of a known right'") (citation omitted). Furthermore, the district court observed that "[a]ll the conditions for application of judicial estoppel would seem to be met here" because the bankruptcy court indicated that it was relying on respondent's statements that Section 363(m) did not apply when the court refused to grant petitioner a stay pending appeal. Pet. App. 32a; see Br. in Opp. App. 7a.

In the court of appeals, respondent denied that it was estopped from raising Section 363(m), but respondent did not dispute that it had waived any reliance on the statute by raising it only in a motion to reconsider. Compare Resp. C.A. Opening Br. 51-54 (asserting that estoppel did not bar reliance on Section 363(m) because the provision is jurisdictional *and* because the standards for estoppel were not met), with *id.* at 49-50 (arguing that waiver did not apply, but only because the statute is jurisdictional).

The court of appeals, however, never addressed petitioner's arguments about waiver and estoppel. Accordingly, this Court should reverse the decision of the court of appeals.[5]

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[5] This Court has recognized that a nonjurisdictional statutory "exhaustion requirement" that uses "'mandatory language'" prevents a court from "excus[ing] a failure to exhaust." *United States* v. *Palomar-Santiago*, 141 S. Ct. 1615, 1621 (2021) (quoting *Ross* v. *Blake*, 578 U.S. 632, 639 (2016)). But respondent has not raised any analogous argument that, even if Section 363(m) is nonjurisdictional, it is nevertheless invulnerable to arguments based on forfeiture, waiver, and judicial estoppel.

II. THE COURT OF APPEALS APPLIED THE WRONG STANDARD IN ASSESSING WHETHER THE APPELLATE RELIEF PETITIONER SOUGHT IS BARRED BY SECTION 363(m)

Petitioner also advances (Br. 42) an alternative argument that, even if Section 363(m) is "not subject to waiver, estoppel, and forfeiture," the statute "would not bar the relief sought by" petitioner. If this Court holds that Section 363(m) is nonjurisdictional—and therefore subject to those three doctrines—this Court might not reach the alternative argument. But if it chooses to address the issue, the Court should conclude that the court of appeals' determination that Section 363(m) bars petitioner's appeal was based on an unduly expansive understanding of the statute's scope.

1. In cases, like this one, in which an appellant has not obtained a stay pending appeal and the "entity that purchased or leased" an asset did so "in good faith," the plain text of Section 363(m) establishes two additional conditions that must be met before a court may refuse to grant relief to an appellant who would otherwise prevail on the merits. 11 U.S.C. 363(m).

First, because the statute limits the consequences of an appeal only when it results in the "reversal or modification * * * of an authorization" of a sale or lease "under [Section 363](b) or (c)," a court may not refuse to grant an appellant relief under Section 363(m) unless the appellant is seeking review of an "authorization under [Section 363](b) or (c)." 11 U.S.C. 363(m). This Court has long recognized that courts have the ability to "revers[e] or modif[y]" orders only when they are under review. *Ibid.*; see *Freshman* v. *Atkins*, 269 U.S. 121, 124 (1925) (recognizing that a court may not correct an error in an order that is "not before" it). Accordingly,

unless a party appeals an order that was issued under Section 363(b) or (c), Section 363(m) does not apply.[6]

Second, as respondent concedes, Section 363(m) will not deprive an appellant of a remedy unless the relief sought will "affect the validity" of a sale or lease authorized under Section 363(b) or (c). Br. in Opp. 5 ("By its terms, § 363(m) does not apply if a remedy *could* be fashioned that does not affect the validity of a sale."). Section 363(m) will therefore apply where an appeal challenging a sale or lease authorization under Section 363(b) or (c) is premised on an element of the sale or lease that is necessary to preserve the transaction's validity.

In many cases, however, a court will be able to afford relief that does not undermine the validity of the sale or lease. For example, a party might challenge the way a sale authorization distributes the profits from the sale. Reversing or modifying a court's authorization of a sale by altering the distribution will not "affect the validity" of the sale itself. 11 U.S.C. 363(m); see, *e.g.*, *In re BCD Corp.*, 119 F.3d 852, 857 (10th Cir. 1997) (holding that

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[6] Some courts have found this requirement satisfied even though the order on appeal did not expressly authorize a sale or lease under Section 363(b) or (c) because the order concerned the satisfaction of conditions that "were made part of the judge's opinion approving the sale," *In re Stadium Management Corp.*, 895 F.2d 845, 848 (1st Cir. 1990), or because it was "clear" that the bankruptcy court "intended" the order on review to "operate in conjunction with" an order authorizing a sale under Section 363, *Cinicola* v. *Scharffenberger*, 248 F.3d 110, 126 (3d Cir. 2001). Because the court of appeals overlooked this requirement entirely, this Court need not decide precisely when an order qualifies as an "authorization" of a sale or lease "under [Section 363](b) or (c)," 11 U.S.C. 363(m), and may instead leave it for the court of appeals to address on remand. See pp. 30-32, *infra*.

Section 363(m) did not prevent relief because appellant was seeking a "recovery from the sale proceeds"). Alternatively, a party may challenge the authorization of a particular term of a sale in circumstances where it is clear that the sale or lease would go forward whether or not the challenged term is included. See, *e.g.*, *In re Energytec, Inc.*, 739 F.3d 215, 220 (5th Cir. 2013) ("[Buyer] did agree to consummate the sale despite that the validity of [appellant's] claims remained to be decided, suggesting that 'free and clear' was not integral to the sale.") (emphasis omitted). Section 363(m) will not bar such appellate relief.

In short, and as some courts of appeals have correctly recognized, Section 363(m) "by its terms forbids only those appeals" for which relief would "'affect the validity of a sale,' not all those that call into question any aspect of such a sale." *In re Energy Future Holdings Corp.*, 949 F.3d 806, 820-821 (3d Cir. 2020); see, *e.g.*, *In re ICL Holding Co.*, 802 F.3d 547, 554 (3d Cir. 2015) ("The provision stamps out only those challenges that would claw back the sale."); *In re C.W. Mining Co.*, 641 F.3d 1235, 1239 (10th Cir. 2011) (finding that Section 363(m) did not require dismissal "[b]ecause the trustee ha[d] not affirmatively foreclosed the possibility that [the appellant] might be entitled to alternative relief that would not affect the validity of the sale").

2. In the decision below, however, the court of appeals strayed from the statutory text. Rather than ask whether the appeal concerned an order authorizing a sale or lease under Section 363(b) or (c) *and* whether a reversal or modification of the order on appeal would necessarily invalidate the underlying sale or lease, the court focused its analysis on a single question: whether the challenged lease assignment was "integral" to the

sale of Sears's assets to respondent. See, *e.g.*, Pet. App. 5a (citing circuit precedent establishing that Section 363(m) "limits appellate review of any transaction that is integral to a sale authorized under [Section] 363(b)"); *id.* at 6a ("We agree that the assignment of the lease to Leaseco was integral to the sale of Sears's assets to [respondent.]"); *id.* at 6a-7a (determining that the sale order's language "supports the conclusion that the successful assignment of the leases * * * was integral to the Sale Order").

The word "integral" does not appear in Section 363(m), and asking whether an appeal challenges an integral element of a sale or lease authorized under Section 363(b) or (c) will not always produce the same result as the two-step analysis that the statute requires. An appellant may, for example, challenge an "integral" element of a sale in the context of an appeal of an order issued under a provision other than Section 363; or the appellant may challenge an integral term of a sale in an appeal of an authorization under Section 363(b); but the court may still be able to fashion relief that modifies the relevant term without invalidating it or the sale as a whole. See *In re ICL Holding Co.*, 802 F.3d at 554 (observing that Section 363(m) does not require a court to leave "*every*" term in a sale agreement undisturbed, even if each term "is technically 'integral to that transaction'") (citation omitted).

Accordingly, if this Court reaches the question whether the court of appeals appropriately applied Section 363(m), it should conclude that the court of appeals' unduly broad inquiry went beyond the statutory text.

3. Petitioner contends (Br. 42-49) that this case presents one of the circumstances in which the court of appeals' mistaken interpretation of Section 363(m) led it

to apply the statute to an appeal that the provision does not cover. Petitioner contends (Br. 6) both that the order under review was "entered under Section 365, not Section 363," and that the relief sought would not invalidate "the earlier asset sale" under Section 363.

Because the court of appeals "grounded its decision" about the applicability of Section 363(m) on an erroneous understanding of the statute, this Court "lack[s] the benefit of [the court of appeals'] judgment on how" the correct interpretation of the statute applies to the facts of this case. *Bank of Am. Corp.* v. *City of Miami*, 137 S. Ct. 1296, 1306 (2017). In similar circumstances, this Court often remands for application of the correct standard by the court of appeals "in the first instance." *Ibid.* If the Court reaches petitioner's alternative argument about Section 363(m)'s scope, that result would be warranted here.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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