No. 21-1270

In the Supreme Court of the United States

MOAC MALL HOLDINGS LLC,

***Petitioner*,**

v.

TRANSFORM HOLDCO LLC, ET AL.,

***Respondent*.**

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

This matter involves an appeal from a bankruptcy court's order approving a Chapter 11 debtor's sale and assignment of a leasehold interest. Petitioner seeks to overturn the order. The sale occurred on October 4, 2019, and Respondent thereafter assumed ownership of the property, paying the property's expenses since that time. The lower courts held that Petitioner has no effective remedy available that would not affect the validity of the sale, and therefore dismissed Petitioner's appeal under 11 U.S.C. § 363(m).

The questions presented are:

1. Wholly apart from § 363(m), whether Petitioner would have an effective remedy if the order approving the sale were overturned.

2. Whether the order authorizing the sale and assignment of the leasehold interest is subject to § 363(m), and, if so, whether an appellate court has the jurisdictional authority to disturb Respondent's ownership of the purchased asset.

PARTIES TO THE PROCEEDING

Sears Holdings Corporation is an additional party to the proceedings below, but was not named as an appellee in the Court of Appeals and is not participating in the proceedings in this Court.

RULE 29.6 STATEMENT

Respondent Transform Holdco LLC is a limited liability company organized and existing under the laws of Delaware. Transform Holdco LLC's parent corporation is Hoffman Topco LLC. No publicly held corporation owns any membership interest in Hoffman Topco LLC.

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Other Cited Authorities:

PRELIMINARY STATEMENT

This matter involves the transfer of a *res*—a leasehold interest that belonged to the bankruptcy estate of Sears, Roebuck and Co. ("Sears"). Exercising *in rem* jurisdiction, the Bankruptcy Court entered an order (the "Transfer Order") authorizing Sears to sell the *res* to Respondent ("Transform"), a good-faith purchaser. In the absence of a stay, Sears consummated the transfer on October 4, 2019. Accordingly, as of that date, the leasehold interest became Transform's property.

Notwithstanding the consummation of the sale, Petitioner ("MOAC") seeks to overturn the order authorizing it, Pet. Br. 19, ostensibly to divest Transform of its ownership rights. But wholly apart from § 363(m), setting aside the order is insufficient to strip Transform of its property. First, the Bankruptcy Court no longer has jurisdiction over the *res*; its jurisdiction ended when the property was transferred out of Sears' estate. *E.g.*, *Matter of Chi., Rock Island & Pac. R.R. Co.*, 794 F.2d 1182, 1186 (7th Cir. 1986) (following the sale of estate property, "[t]he court's jurisdiction lapses with its control of the property.").

Second, the reversal of an order authorizing a sale in bankruptcy *does not automatically set aside the transfer*. Other provisions of the Code—the avoidance provisions—must be properly invoked to divest the transferee of its ownership. Wholly apart from § 363(m), the Bankruptcy Code carefully regulates not only how the bankruptcy court may authorize a conveyance of estate property, 11 U.S.C. § 363(b), but

also how, if erroneous, the conveyance may be avoided and the asset returned to the estate, *id.* §§ 549(a), 550. *See Mission Prods. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 372 (2006) (the avoidance powers are "ancillary to and in furtherance of the court's *in rem* jurisdiction.").

In this case, however, the avoidance mechanism is unavailable owing to Sears' release of any claim under these provisions, the expiration of the relevant period of repose, and MOAC's lack of standing to invoke the relevant provisions. Nor does MOAC have any other conceivable remedy. Because overturning the Transfer Order would provide MOAC with no meaningful benefit, there is no case or controversy under Article III, and the Court should dismiss the petition as moot.

Alternatively, the Court should affirm the judgment below on the merits. First, §§ 363(b) and (m) plainly apply to sales of leasehold interests. Second, § 363(m) is a jurisdictional bar in cases to which it applies—disputes, such as this one, in which an appellant seeks to overturn a consummated sale to a good-faith purchaser. In such instances, § 363(m) is jurisdictional because, absent a stay, the statute makes clear that the bankruptcy court cannot exercise adjudicatory authority over the transferred property, *and* the statute withdraws the appellate court's subject matter authority to hear the appeal.

A bankruptcy court's jurisdiction over estate property is *in rem*, not *in personam*. 28 U.S.C. §§ 1334(e), 157; *Tenn. Student Assistance Corp. v.*

Hood, 541 U.S. 440, 447-48 (2004). By statute, *in rem* bankruptcy jurisdiction requires control over some asset of the estate and does not reach other people's property. 28 U.S.C. § 1334(e). Once a sale of estate property has been consummated to a good-faith purchaser pursuant to an unstayed order, § 363(m) forbids interference with the buyer's ownership by directing that any order reversing or modifying the authorization "does not affect the validity of a sale." The phrase "does not affect the validity of a sale" means just that: the "sale" (*i.e.*, the transfer of ownership, including the right to possess and control the asset) may not be disturbed. Hence, the bankruptcy court cannot wrest ownership or control from the buyer. As a result, the property cannot be returned to the estate—a necessary predicate for the court's exercise of *in rem* jurisdiction to order a different disposition of the *res*.

More important, § 363(m) restricts the appellate court's *subject matter* jurisdiction in appeals challenging the validity of a sale to a good-faith purchaser by limiting it to those in which a stay has been granted. For unstayed sales to a good-faith purchaser, the outcome is immutable: the reversal or modification of an order authorizing the sale "does not affect the validity of a sale." There is nothing the court may do to affect the sale, and the court cannot hear the appeal.

The statute's history confirms that this was Congress' intention. Section 363(m) codifies former Rule 805 of the Federal Rules of Bankruptcy Procedure, which was declaratory of existing case law. That case law established two principles: a lack of

adjudicative *power* to disturb consummated sales, and a corresponding restriction on an appellate court's subject matter authority to hear the dispute.

Section 363(m) is nothing like the definitional provison at issue in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). Nor is the relevant jurisdictional analysis as formulaic or simplistic as MOAC contends. *See* Pet. Br. 2. As this Court has explained, consideration of whether Congress has imbued a statute "with jurisdictional consequences" is informed by thoughtful application of the "traditional tools of statutory construction," including evaluation of the text, the manner in which the statute operates, and its history. *Boechler, P.C. v. Comm'n of Internal Revenue*, 142 S. Ct. 1493, 1497 (2022) (citations and quotation marks omitted). This includes consideration of any relevant historical practices the statute incorporates. *E.g.*, *Bowles v. Russell*, 551 U.S. 205, 209-10 (2007) (relying on historic understanding of the role of a notice of appeal in concluding that statutory provision requiring a timely notice was jurisdictional).

Concededly, § 363(m) is uniquely constructed. But that is because it is the almost verbatim codification of former Rule 805, which captured an established appellate practice of dismissing appeals challenging the propriety of unstayed sale orders without reaching the merits. Congress' codification of this practice demonstrates its intention that appeals within the statute's purview, such as this one, simply cannot be heard; it is no response (as MOAC and the United States offer) that appeals of matters ancillary to a sale are unaffected. Accordingly, if the Court does

not dismiss the Petition for lack of a case or controversy, it should nonetheless affirm the judgment below.

STATEMENT

I. STATUTORY AND JURISDICTIONAL BACKGROUND

When a debtor commences a bankruptcy case, a bankruptcy estate is created consisting of all of the debtor's property, including the debtor's leasehold interests. *See* 11 U.S.C. § 541(a); S. Rep. No. 95-989, 95th Cong., 2d Sess. 82 (1978) (the estate "includes" a "leasehold interest"); *Tempnology*, 139 S. Ct. at 1658 (discussing the creation of the estate).

Property of the estate is constituted *in custodia legis*—in the custody of the bankruptcy court, which exercises exclusive *in rem* jurisdiction over the estate's assets. *See* 28 U.S.C. § 1334(e) (vesting the district courts with "exclusive jurisdiction" over property of the estate); *id.* § 157(a) (delegating bankruptcy jurisdiction to the bankruptcy courts); *Hood,* 541 U.S. at 447-48; *Straton v. New*, 283 U.S. 318, 321 (1931) (the jurisdiction of the bankruptcy court "is so far in rem that the estate is regarded as in custodia legis from the filing of the petition"); *Gross v. Irving Tr. Co.*, 289 U.S. 342, 344-45 (1933); *U.S. Fid. & Guar. Co. v. Bray*, 225 U.S. 205, 217 (1912); *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300, 306-07 (1911); *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 192 (1902); *Shawhan v. Wherritt*, 48 U.S. (7 How.) 627, 643 (1849).

As this Court has long recognized, the exclusive jurisdiction of the bankruptcy court over property of the estate extends to the supervision of sales of the estate's assets. *See, e.g.*, *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734, 737 (1931) (because "the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate," the court "may order a sale"); *Robertson v. Howard*, 229 U.S. 254, 261 (1913); *Ex Parte Christy*, 44 U.S. (3 How.) 292, 321 (1845). The bankruptcy court's comprehensive authority to authorize the sale of estate property is currently codified in § 363 of the Bankruptcy Code.

Day-to-day management of the estate is vested in a trustee (or, in most Chapter 11 cases, a debtor-in-possession exercising the duties of a trustee), rather than the court. *See* 11 U.S.C. §§ 704, 1101, 1106, 1107, 1108; *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985). And under § 363(c)(1), the trustee may continue to sell property of the estate without leave of court if such sales are in the ordinary course of the debtor's business, such as a retailer selling goods, or an airline selling tickets. In contrast, under § 363(b)(1), the trustee must obtain court authorization to conduct sales of estate property that are not in the ordinary course, such as sales of substantial assets, after notice and a hearing. However, the authorization process and the sale itself are distinct; once authorization is obtained, the trustee may then proceed with the sale, typically (as in this case) by private contract.

In addition to § 363, other provisions of the Code supply further rules governing certain kinds of asset

sales. *See, e.g.*, 11 U.S.C. § 1110 (prescribing special regulations for how aircraft equipment may be sold). As is relevant here, § 365 imposes additional requirements regarding the disposition of leasehold interests.

Under § 365(a), the trustee may "assume" or "reject" an unexpired lease, with court approval. *Tempnology*, 139 S. Ct. at 1658. In turn, § 365(f) permits the trustee to "assign" an assumed lease to a third-party purchaser. *See* 11 U.S.C. §§ 365(f)(2), 365(b)(3).

Critically, § 365 works in tandem with, not independently of, § 363 in matters involving the sale of a leasehold interest—as § 363 itself makes plain, and as every court of appeals to have addressed the issue has held. *See* 11 U.S.C. § 363(l) ("*Subject to the provisions of section 365*, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title[.]") (emphasis added); *e.g.*, *In re Rickel Home Ctrs., Inc.*, 209 F.3d 291, 300-03 (3d Cir. 2000) (elaborating how the sale of a leasehold interest is subject to § 363 and to further regulation under § 365 regarding "'the particular mechanics of conveyance'") (quoting *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 498 (3d Cir. 1998)).

In addition to § 363(l), other subsections of § 363 are necessary to effectuate sales of a debtor's leasehold interests. Most critically, § 363(f) allows assets to be cleansed of liens and other encumbrances that render them effectively unsaleable. 11 U.S.C.

§ 363(f).[1] Section 365 also does not specify the requirements of notice and a hearing for approval of sales outside of the ordinary course; these are in § 363. *Compare* 11 U.S.C. §§ 365(f) (providing *simpliciter* that a trustee may assign a leasehold interest without specifying whether court approval or notice and a hearing are required), *with* 363(b)(1) (requiring notice and a hearing for all sales of property of the estate out of the ordinary course).

A transfer of property out of the estate pursuant to court order has jurisdictional consequences. Once such a transfer is made, the bankruptcy court's *in rem* jurisdiction over the property terminates. *See, e.g.*, *Matter of FedPak Sys., Inc.*, 80 F.3d 207, 214 (7th Cir. 1996) ("'[bankruptcy court] jurisdiction does not follow . . . property [that is sold]'; rather, that jurisdiction 'lapses when property leaves the estate.'") (alterations in original) (quoting *Matter of Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987)). Because the bankruptcy court lacks jurisdiction over property transferred out of the estate, some other mechanism is necessary to bring the asset back into the estate if the transfer is erroneous. That mechanism is to be found among the Code's avoidance provisions.

First, erroneous sales are treated as "transfers." 11 U.S.C. § 101(54). Second, erroneous transfers are subject to avoidance under § 549 as unauthorized conveyances (either because they were made without

[1] For example, a tenant's interest in a lease is often encumbered by a mortgage (known as a "leasehold mortgage"); to authorize transfer of the leasehold interest free and clear of that mortgage, the court must look to § 363(f), rather than § 365.

necessary court approval or because approval is overturned). Critically, the Code does not treat unauthorized transfers as void, but rather as *avoidable*. *In re Jim L. Shetakis Distrib. Co.*, 401 F. App'x 249 (9th Cir. 2010) (the unauthorized transfer of a lease was not void under § 363, but rather "voidable by the trustee under § 549"); *Matter of Lemco Gypsum, Inc.*, 910 F.2d 784, 788-89 (11th Cir. 1990). If a transfer is avoided under § 549, the trustee may, under § 550, recover the property "for the benefit of the estate." Formally, the avoidance powers are processes "ancillary to and in furtherance of the court's *in rem* jurisdiction." *Katz*, 546 U.S. at 372.

If a sale of property to a good-faith purchaser is authorized and no stay is obtained, however, § 363(m) precludes any recovery of that property, and bars an appellate court from hearing an appeal challenging the validity of the sale. Section 363(m) directs: "[t]he reversal or modification on appeal of an authorization . . . of a sale or lease of property does not affect the validity of a sale or lease [to a good-faith purchaser] unless such authorization and such sale or lease were stayed pending appeal."

II. FACTUAL BACKGROUND AND PRIOR PROCEEDINGS

A. The Lease

On May 30, 1991, Sears entered into an agreement to construct and operate a retail store at the Mall of America (the "MOAC Lease" or "REA" in prior opinions below). Pet. App. 120a-21a. The terms of the MOAC Lease were "unusual" and "highly favorable to

Sears." Pet. App. 51a, 53a. Sears' rent was a mere $10 a year for a term of 100 years. Pet. App. 52a. Sears was required to operate its retail department store for only the "first 15 years of the lease." D. Ct. App. APX2092. After that, the lease was freely assignable. *Id*. at APX2125. Sears could, without MOAC's approval, "vacate all or any part of the building," "lease or sublease all or any portion of the building," or "assign the REA." Pet. App. 53a.

B. Proceedings in the Bankruptcy Court

Sears commenced its Chapter 11 case on October 15, 2018. Following a hearing, the Bankruptcy Court on February 8, 2019 entered an order under § 363(b)(1) (the "Sale Order") authorizing the sale of substantially all of Sears' assets to Transform in accordance with the parties' asset purchase agreement (the "APA"). *See* Pet. App. 3a-4a; JA 166. As a significant portion of Sears' assets were long-term leases of real property where its stores were located, much of the value that Transform purchased was its right to designate leases for Sears to assume and assign to it. *See* Pet. App. 15a-16a. The purchase price that Transform paid in connection with the APA included approximately $1.4 billion in cash and other consideration. JA 274.

Because Sears was in dire financial straits, the sale of Sears' assets to Transform had to be approved and closed quickly; otherwise hundreds of Sears' stores would have been forced to shut down and thousands of Sears' employees terminated. *See* Pet.

App. 16a; JA 75.[2] Because the need to close quickly meant Transform could not fully evaluate the economics of hundreds of store locations, Transform agreed, and the Sale Order and APA provided, that Transform would have the right to designate any of Sears' approximately 600 leases for later assumption and assignment (subject to court approval). Pet. App. 16a, 57a; JA 288-92. Transform designated the MOAC Lease under this procedure. *See* Pet. App. 4a.

The leases to be assigned to Transform under the designation process were expressly included as purchased assets under the APA. The APA provided that "Sellers [Sears] shall sell, transfer, assign, convey and deliver . . . to Buyer . . . and Buyer . . . shall purchase . . . the 'Acquired Assets.'" JA 240. The term "Acquired Assets" included "All Acquired Lease Rights." JA 240. "Acquired Lease Rights" included all rights in each "Acquired Lease," meaning "each Lease that is assumed by Seller [Sears] and assigned to Buyer [Transform] pursuant to the terms of this Agreement," including the MOAC Lease. JA 177. This provision effectuated the intent of the parties that the sale under the APA include all assets that would ultimately be transferred to Transform, thereby providing Transform with all the protections it bargained for under the APA. JA 175.

In entering the Sale Order approving the APA, the Bankruptcy Court found that Transform was a good-

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[2] Contrary to MOAC's contentions, *e.g.*, Pet. 10 ("Transform has never operated as a retailer"); Pet. Br. 9 (labelling Transform a "non-retail entity"), Transform continued Sears' retail operations after the sale for a substantial amount of time, Pet. App. 16a.

faith purchaser. *See* Pet. App. 16a; JA 98-99, 147.[3] Contrary to MOAC's assertion, Pet. Br. 44, the sale of the "Acquired Assets" (including the MOAC Lease) was authorized "[p]ursuant to sections 105(a), 363(b), 363(f) and 365 of the Bankruptcy Code," JA 111. The order likewise determined that Transform "is entitled to, and is hereby granted, the full rights, benefits, privileges, and protections of section 363(m) of the Bankruptcy Code." JA 147. Elaborating this point, the order directed that "the reversal or modification on appeal of the authorization provided herein of the Sale Transaction shall neither affect the validity of the Sale Transaction *nor the transfer of the Acquired Assets [including the MOAC Lease] owned by the Debtors [Sears] to the Buyer [Transform]* . . . unless such authorization is duly stayed before the Closing of the Sale Transaction pending such appeal." JA 147 (emphasis added).[4] The Sale Order also directed that neither the APA nor the "Sale Transaction" is "avoidable under section 363(n) or chapter 5 of the Bankruptcy Code[.]" JA 148; *see also* JA 70-71 (defining "Sale Transaction" to include the sale of the Acquired Assets). MOAC did not object to (or appeal) these provisions.

In April 2019, the Bankruptcy Court entered a further order establishing procedures for the designation of leases by Transform, and shortly thereafter, Transform filed a notice designating leases

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[3] As the Court of Appeals observed, MOAC did not timely challenge Transform's designation as a good-faith purchaser. *See* Pet. App. 10a.

[4] The Sale Order adopts the definition of Acquired Assets used in the APA. JA 69 n.2.

for assumption and assignment, including the MOAC Lease. Pet. App. 18a-19a. MOAC objected, claiming that Transform did not meet the qualifications for assignment under § 365(b)(3) of the Bankruptcy Code. Pet. App. 19a. After an evidentiary hearing, the Bankruptcy Court overruled MOAC's objection. Pet. App. 20a. The Bankruptcy Court then issued the Transfer Order authorizing Sears' assumption of the MOAC Lease and its transfer to Transform. Pet. App. 20a, 111a-12a, 114a.

Consistent with the APA (and contrary to MOAC's contention, Pet. Br. 6-7), the Transfer Order was entered under *both* §§ 363 and 365, specifically directing that "[p]ursuant to sections 105(a), 363(b), . . . and 365 of the Bankruptcy Code, the Debtors [Sears] are authorized to transfer the Designated Lease in accordance with the terms of the Asset Purchase Agreement and the Sale Order." Pet. App. 111a-12a. Further, the order directed that the transfer would "vest the Buyer [Transform] . . . with all right, title, and interest of the Debtors in the Designated Lease" and "be free and clear of all Claims . . . in accordance with section 363(f) of the Bankruptcy Code." Pet. App. 112a. The Bankruptcy Court determined that "[t]he assumption and assignment of the Designated Lease is integral to the Asset Purchase Agreement," Pet. App. 109a, and that the "Designated Lease constitutes an Acquired Asset"—an asset that Transform purchased under the APA, Pet. App. 111a.

In exchange for its purchase of the MOAC Lease, Transform was required to provide significant new consideration *in addition to* the purchase price under

the APA. Specifically, the Transfer Order required Transform to guaranty that it would sublease the property within two years (absent interference from MOAC) even though the lease itself contained no such requirement; escrow $1.1 million to cover one years' charges on the property, Pet. App. 20a; and pay additional amounts to cure Sears' defaults, JA 291. The order also required Transform to assume Sears' liabilities under the lease, including utilities, taxes, insurance, and common area or other maintenance charges, Pet. App. 118-19a, and Sears was discharged of any further obligations with respect to all such liabilities, 11 U.S.C. § 365(k); Pet. App. 118a.

Ignoring the facts (as well as the relevant orders and determinations of the District and Bankruptcy Courts), MOAC contends repeatedly that the sale of the MOAC Lease to Transform had nothing to do with the APA or the purchase price that Transform paid, and thus does not involve the "validity" of any sale. Pet. Br. 7-8, 47-49. MOAC offers this counterfactual assertion as though the $1.4 billion Transform paid under the APA was unrelated to its right to designate any of the leases for transfer, and likewise that the *additional* consideration Transform paid under the Transfer Order uniquely for the MOAC Lease had nothing to do with the sale of this interest. In particular, MOAC cites to a provision in the APA stating that the closing of the APA by itself did not "effectuate" a sale of any particular lease. *Id.* at 8. But that is only because, at the time the APA was approved, leases had not yet been designated or their assignment authorized by the Bankruptcy Court. As the lower courts held, upon satisfaction of the APA's contractual requirements, the MOAC Lease became

part of the package of assets Transform purchased under, and with the protections of, the APA. Pet. App. 7a, 43a-46a.

MOAC moved for a stay of the Transfer Order pending appeal, arguing that a stay was necessary to ensure that appellate relief would not be foreclosed by § 363(m). Pet. App. 21a; Resp. App. 5a-8a. MOAC's stay papers and oral argument reveal that MOAC understood that its appellate rights were in peril if it did not obtain a stay, citing in its stay motion the very cases upon which the Court of Appeals ultimately rested its decision that § 363(m) is jurisdictional. In addition, as noted, the Sale Order specifically warned MOAC that, in the absence of a stay, the transfer would be final and unavoidable. JA 147.

At the stay hearing, the Bankruptcy Court engaged in extended colloquy with MOAC's counsel. In response to MOAC's argument that a stay was necessary to protect its appellate rights, the court stated: "I can't imagine 363(m) as far as the sale is concerned applying here." Resp. App. 5a. The court also stated that, before it would issue a stay, it would require MOAC to post "a bond equal to the sale consideration price." Resp. App. 5a, 9a ("the bond here would be enormous").

The court also directed a number of questions to counsel for Transform. The first was: "Are you going to rely on 363(m)? I mean, if you were, I would think the sale would've closed already." Resp. App. 5a. Counsel responded: "Correct, Your Honor." Resp. App. 5a. The court inquired again: "So you're not relying on – you wouldn't – you're not going to go to

the district [court] and say 363(m) applies here." Resp. App. 5a. Counsel responded: "Well, we – in effect, because we do not have a transaction, I think we couldn't rely on 363(m) for the puposes of arguing mootness because we have not closed on a transaction to assume and assign this to a sub-[lessee]." Resp. App. 5a.[5]

The court then evaluated the factors for granting a stay and concluded that MOAC had not shown irreparable harm, a likelihood of success on the merits, or that a stay would be in the public interest. Resp. App. 8a, 9a, 11a-12a. ("I don't think you've made the . . . the necessary very strong showing [on the merits], *so really none of the factors are met here*.") (emphasis added), 13a-15a.[6] Following the hearing, the Bankruptcy Court entered an order denying a stay. Resp. App. 13a. The transfer of the lease

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[5] MOAC's accusations of "gamesmanship," "reneg[ing] on its promise," and "duplicity," *e.g.*, Pet. Br. 12, 18, protest too much. It is true that, during the colloquy, counsel for Transform acquiesced in the court's view that § 363(m) would not apply, reasoning that a further transaction had not yet closed between Transform and a new sublessee. Resp. App. 5a. But counsel was mistaken in his view that Transform's subleasing arrangements with subtenants had any bearing on the operation of § 363(m) in connection with Sears' sale of the leasehold interest to Transform—nothing in that sale was contingent on Transform's consummation of a subleasing arrangement.

[6] MOAC's assertion that "[t]he bankruptcy court denied MOAC's stay precisely because Transform promised it would not raise Section 363(m) as a defense," Pet. Br. 18, mischaracterizes the record. The Bankruptcy Court itself believed that § 363(m) was inapplicable. More important, the Bankruptcy Court found that "none of the factors [supporting a stay] are met here." Resp. App. 11a-12a.

pursuant to the APA occurred five days later. Pet. App. 23a.

MOAC did not seek a stay from the District Court. Rather, aware that the cost of an appellate bond would be "enormous," MOAC chose instead to rely on a mistake of law by both the Bankruptcy Court and Transform's counsel.

C. Proceedings in the District Court

On appeal to the District Court, MOAC argued that the Transfer Order should be reversed because, even though the terms of the lease made it freely assignable by Sears, § 365(b)(3) precluded Sears' assignment of the lease to Transform. Although the District Court rejected most of MOAC's arguments, it agreed (after acknowledging going back and forth on the matter, *see* Pet. App. 99a) with one of them: that Transform was not sufficiently like the Sears of 1991 to qualify as an assignee under the statute. Pet. App. 95a.

Transform then moved for rehearing, asserting that the District Court lacked appellate jurisdiction to reverse the Transfer Order under § 363(m), relying on the principle that questions of jurisdiction are non-waivable. In response, MOAC argued that § 363(m) was inapplicable because the lease transfer had been authorized under § 365. Pet. App. 45a-46a. Rejecting MOAC's argument, the District Court found that the lease transfer was itself a sale, Pet. App. 42a ("a transfer of an interest in property for consideration"), and likewise was "inextricably intertwined" with the larger asset sale, thus doubly implicating the

provisions of § 363(m), Pet. App. 43a (citation omitted). Because the sole relief that MOAC sought—setting aside the lease transfer—would plainly affect the validity of a sale under § 363, MOAC's remedy was barred by § 363(m). Pet. App. 48a. The District Court found that, although Transform had not previously invoked § 363(m), the issue was jurisdictional and could not be waived, and that judicial estoppel did not apply to a change of position on an issue of law. Pet. App. 29a-34a. The court therefore dismissed MOAC's appeal. Pet. App. 48a. MOAC moved for rehearing, asserting that Transform was not a good-faith purchaser; that motion was denied. *See* Pet. App. 10a.

D. Proceedings in the Court of Appeals

MOAC appealed to the Second Circuit, arguing that the Transfer Order was not integral to the Sale Order such that appellate relief would be subject to § 363(m). Pet. App. 7a-8a. MOAC also contended that Transform had waived any argument under § 363(m), or, in the alternative, was judicially estopped from asserting it. Pet. App. 7a-8a. MOAC further argued that § 363(m) is not jurisdictional. Pet. App. 9a. Transform cross-appealed the District Court's original decision with respect to § 365(b)(3)(A).

Rejecting MOAC's arguments, the Court of Appeals affirmed for three reasons. First, it agreed that the lease transfer was "integral to the sale of Sears's assets to Transform." Pet. App. 6a. Second, the court reasoned that relief affecting the validity of the asset sale, including setting aside the lease transfer, would negate Transform and Sears'

agreement under the APA, and was therefore foreclosed under § 363(m). Pet. App. 7a-8a. Third, the court determined that § 363(m) is not waivable because it implicates the court's jurisdiction. Pet. App. 8a-9a.

E. Proceedings in this Court

MOAC filed its Petition for a writ of certiorari on March 17, 2022. In opposing the Petition, Transform explained, *inter alia*, that even if MOAC were successful in overturning the Transfer Order, MOAC would lack an effective remedy. BIO 32-34. MOAC's response was to assume (without explanation) that "[a] reversal of the Assignment Order . . . would free MOAC from being tethered to an improper assignee for the remaining 70-year lease term." Pet. Cert. Rpl. 11-12. The Court granted the Petition on June 27, 2022.

SUMMARY OF THE ARGUMENT

The Petition should be dismissed. MOAC seeks reversal of the Transfer Order, Pet. Br. 19, but setting aside the order is insufficient to divest Transform of its property. In the absence of any prospect for effective relief of benefit to MOAC, no live case or controversy exists under Article III.

First, wholly apart from § 363(m), the Bankruptcy Court lacks jurisdiction over the leasehold interest. In order for a bankruptcy court to direct a different disposition of transferred property, it must first be reconstituted as property of the estate. Second, the exclusive means under the Bankruptcy Code for

recovering transferred property and reconstituting it as property of the estate is through the avoidance powers. The reversal of an order authorizing a sale in bankruptcy *does not automatically set aside a transfer*. Other provisions of the Code—the avoidance provisions—must be properly invoked to divest the transferee of its property, and these provisions are unavailable here.

The relevant avoidance power for undoing transfers of estate property, including transfers that turn out to be erroneous, is § 549. Sears, however, waived all avoidance claims as set forth in the Sale Order. JA 147-48. In any event, relief under § 549 is unavailable because the provision's two-year statute of repose has expired. Further, the avoidance power may only be invoked by Sears on behalf of the estate. And even if relief under § 549 were available, the effect of avoidance would be to return the property to Sears' estate, not transfer it to MOAC. 11 U.S.C. § 550. In sum, there is no mechanism for MOAC to achieve the windfall it seeks by recapturing the valuable rights it granted to Sears in 1991—a 100-year, essentially rent-free, lease, together with the building that *Sears* constructed thereon, which Transform purchased and paid for. As MOAC has no plausible claim to an effective remedy, the Court should dismiss the Petition.

If the Court does not dismiss the Petition for lack of a live case or controversy, it should affirm the judgment below holding that § 363(m) is jurisdictional. To begin with, § 363(m) applies to the transfer of Sears' leasehold interest. In addition, § 363(m) is jurisdictional in cases, such as this, in

which the validity of the sale itself is challenged but a stay was not obtained.

First, the statute makes clear that the bankruptcy court cannot exercise *in rem* adjudicatory authority over the transferred property. Second, the statute withdraws the appellate court's subject matter authority to hear appeals challenging the validity of a sale to a good-faith purchaser. As this Court has observed, "[b]ecause Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Bowles*, 551 U.S. at 212-13; *see also United States v. Curry*, 47 U.S. (6 How.) 106, 112-13 (1848). Section 363(m) codifies such a Congressional determination. This is confirmed not only by the text of the provision, but also by reference to the context in which it operates and its relevant history—the "traditional" references for determining whether Congress has imbued a statute "with jurisdictional consequences." *Boechler*, 142 S. Ct. at 1497 (citations and quotation marks omitted).

Section 363(m) is the codification of former Rule 805 of the Federal Rules of Bankruptcy Procedure. Rule 805 was, in turn, declaratory of existing case-law in which, in the absence of a stay, court after court dismissed appeals of sale orders for lack of authority to hear and decide the subject matter. In codifying the Rule, Congress codified along with it the established practice the Rule incorporated.

Section 363(m) is wholly unlike the definitional provison at issue in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). Nor is the relevant jurisdictional analysis

as rigid as MOAC asserts. *See* Pet. Br. 2. Particularly salient is the historical practice that § 363(m) codified. *E.g.*, *Bowles*, 551 U.S. at 209-10. As this history reveals, § 363(m) is a subject-matter constraint.

MOAC cannot avoid this conclusion by pointing out the obvious: that in cases in which the requested relief is *not* to undo the transfer to a good-faith purchaser (*i.e.*, in which § 363(m) does *not* apply), appellate jurisdiction is fully preserved. Section 363(m) sensibly recognizes that an order authorizing a sale may cover issues that have nothing to do with the propriety of the sale. For example, in addition to authorizing the sale to a good-faith purchaser, the order may direct a disposition of the proceeds. An appeal that concerns only the disposition of the proceeds does not implicate § 363(m). The relevant point is that appeals that challenge the transfer of property to a good-faith purchaser *do* implicate § 363(m), in which case appellate review is foreclosed. This is such a case, and § 363(m) is jurisdictional.

ARGUMENT

I. THE PETITION SHOULD BE DISMISSED BECAUSE NO EFFECTIVE RELIEF CAN BE GRANTED.

Article III, § 2, of the Constitution limits the jurisdiction of the federal courts to the adjudication of actual "Cases" and "Controversies." *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). Under this requirement, a federal court has no authority "to declare principles or rules of law which cannot affect

the matter at issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653 (1895); *see Lewis*, 494 U.S. at 477.

The "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Id.* at 477-78; *see also Already*, 568 U.S. at 90-91; *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71-72 (2013); *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 67 (1997). Thus, if while an appeal is pending "an event occurs which renders it impossible for" an appeals court to grant "any effectual relief whatever" to a prevailing party, the appeal must be dismissed. *Mills*, 159 U.S. at 653; *see also Lewis*, 494 U.S. at 477-78. Likewise, "[a] case becomes moot . . . 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Already*, 568 U.S. at 91 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)).

This matter must be dismissed for lack of an actual case or controversy because MOAC cannot be afforded any effective relief. *See Arizonans for Off. Eng.*, 520 U.S. at 73 (the Court must "inquire not only into this Court's authority to decide the questions petitioners present, but to consider, also, the authority of the lower courts to proceed."); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

The remedy MOAC seeks is to reverse the Transfer Order. Pet. Br. 19. But setting aside the order will not divest Transform of its property, and under the Bankruptcy Code, Transform's rights cannot be stripped away. On October 4, 2019, pursuant to the Sale Order, the Transfer Order, and the APA,

Transform was "vest[ed] . . . with all right, title, and interest of the Debtors in the Designated Lease . . . free and clear of all Claims . . . in accordance with section 363(f) of the Bankruptcy Code." Pet. App. 112a. Thus, on that date, the leasehold interest ceased to be property of the bankruptcy estate and became Transform's property. Transform paid for its purchase and has paid millions more as the property's owner for the past three years. MOAC has identified no means of reversing these events, and none exists. Under the Bankruptcy Code, the reversal of an order authorizing such a consummated transfer does not automatically set aside the transfer, and the Code's means for setting aside the transfer are unavailable to MOAC.

A. The Bankruptcy Court Lacks *In Rem* Jurisdiction To Order a Different Disposition of the *Res*.

After Sears transferred the leasehold interest from its estate to Transform as provided in the Transfer Order, the Bankruptcy Court's *in rem* jurisdiction over the asset came to an end. *See, e.g.*, *In re Skuna River Lumber,* 564 F.3d 353, 355 (5th Cir. 2009); *Matter of FedPak Sys.*, 80 F.3d at 214; *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir. 1990); *Matter of Lemco Gypsum*, 910 F.2d at 788-89; *In re Hall's Motor Transit Co.*, 889 F.2d 520, 523 (3d Cir. 1989); *Matter of Chi., Rock Island & Pac. R.R. Co.*, 794 F.2d at 1186. This result reflects the application of traditional principles of *in rem* jurisdiction, which require the court to have custody and control of the *res* in question. When that custody is relinquished by court order, *in rem* jurisdiction ceases. *E.g.*, *United States*

v. Mack, 295 U.S. 480, 484 (1935); *The Ann*, 13 U.S. (9 Cranch.) 289, 291 (1815).

When Congress vested the bankruptcy courts with *in rem* jurisdictional authority, *see* 28 U.S.C. § 1334(e), Congress presumably did so subject to the established understanding of how *in rem* jurisdiction functions. *E.g.*, *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) ("[W]hen a statutory term is obviously transplanted from another legal source, it brings the old soil with it" and "as part of the old soil they bring with them, the bankruptcy statutes incorporate the traditional standards") (citations and quotation marks omitted); *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986). Thus, once property leaves the estate as authorized by court order, the bankruptcy court's *in rem* jurisdiction over the asset terminates.

In addition to conforming to the mandate of § 1334(e) confining the bankruptcy court's *in rem* jurisdiction to property of the estate, this rule makes practical sense. The Bankruptcy Code authorizes a trustee to sell property in the ordinary course of its business without court order. 11 U.S.C. § 363(c)(1). But the bankruptcy court does not thereby retain jurisdiction over the property of every customer who buys goods from a bankrupt department store, or tickets from a bankruptcy airline. The court's *in rem* authority is limited to property of the estate.

Because the Bankruptcy Court's *in rem* jurisdiction over the leasehold interest ended once it left the estate, some other mechanism is required if the property is to be disposed of in some other way.

Wholly apart from § 363(m), however, that possibility is now foreclosed in this instance.

B. Reversal of the Transfer Order Would Not By Itself Divest Transform of its Ownership of the Leasehold Interest.

Just as the bankruptcy courts do not enjoy free-standing jurisdiction over property that, by court order, has left their custody, they likewise do not possess free-ranging authority to recover property transferred out of the estate. Rather, this authority is carefully circumscribed by the Bankruptcy Code. Under the Code's provisions, an appellate decision reversing the Transfer Order would not automatically undo the transfer. Rather, reversing the Transfer Order would simply render the transfer *unauthorized* by setting aside the basis for the transfer's approval; the transfer would be *avoidable*, not void.

To illustrate, § 363(n) directs that, if an order approving a sale is overturned because the purchaser engaged in collusive bid-rigging (the paradigmatic form of bad-faith conduct), the sale itself is not treated as void, but avoidable. That is necessarily so because the statute gives the trustee an election: avoid the sale *or* allow the sale to stand and recover damages—an election that would be foreclosed if the sale were automatically void. It is only if the trustee elects to avoid a sale that the property returns to the estate. That is confirmed by § 541, which directs that property of the estate includes "any interest in property that the trustee recovers under section 363(n)." Again, this section would make no sense if

the sale were automatically void and the property treated automatically as property of the estate. Rather, § 363(n) makes clear that a statutory mechanism is required to recapture property, even in the hands of a bad-faith, collusive bidder.

In *Tempnology*, this Court likewise rejected the concept of the automatic avoidance of transferred property under the Bankruptcy Code. The case concerned the effect of a debtor's election, with court approval, to stop performing an ongoing contract; specifically whether the debtor's election had the effect of automatically stripping away a property right the contract had transferred. The Court rejected this approach, stating that it "would circumvent the Code's stringent limits on 'avoidance' actions." 139 S. Ct. at 1663.

The same is true here: reversal of the Transfer Order would not automatically void the transfer of Sears' leasehold interest to Transform. Rather, specific provisions of the Bankruptcy Code—§§ 549 and 550—direct the relevant avoidance mechanism. The problem for MOAC is that, under the facts of this case, avoidance of the transfer under these provisions is unavailable.

C. The Transfer Is Not Avoidable.

The Transfer Order authorized the sale of Sears' leasehold interest. Setting aside the Transfer order would render the transfer *un*authorized—the exact

purview of § 549.[7] And under § 549, if a sale is unauthorized, the transfer is avoidable, not void. Among other reasons for concluding that the transfer is avoidable, the trustee is given an election: avoid and recapture the property *or* allow the transfer to stand and recover its value (*i.e.*, damages). 11 U.S.C. § 550(a). Because the trustee is limited to a single recovery, *id.* § 550(d), it *cannot* be both. In turn, § 550(a) provides that the avoidance of a transfer under § 549 permits the relevant property (or its monetary substitute) to be reconstituted as property of the estate. *See also id.* § 541(a)(3) (directing that property recovered under § 550 becomes property of the estate).

Although § 549 would be the vehicle for attempting to undo the transfer here, it is unavailable because Sears waived all avoidance claims in the Sale Order. JA 147-48 (directing that neither the APA nor the "Sale Transaction" is "avoidable under section 363(n) or chapter 5 of the Bankruptcy Code[.]").[8] Section 549 is also unavailable because it is now time-barred.

Section 549(d) establishes a two-year period of repose that runs from the date of the transfer. 11

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[7] Section 363(m) confirms this understanding: "[t]he reversal or modification on appeal of an authorization under subsection (b)" necessarily renders the transfer "*un*authorized." 11 U.S.C. § 363(m) (emphasis added).

[8] Because avoidance claims belong to the estate, Sears was the proper party to do so. *See In re Smart World Tech., LLC*, 423 F.3d 166, 174-75 (2d Cir. 2005) ("[I]t is the debtor-in-possession, as legal representative of the estate, who is vested with the power to settle the estate's claims.").

U.S.C. § 549(d) ("An action or proceeding under this section may not be commenced after the earlier of . . . (1) two years after the date of the transfer sought to be avoided; or (2) the time the case is closed or dismissed.").[9] In this instance, the transfer occurred on October 4, 2019. Pet. App. 23a. The relevant period of repose has thus long since expired. *See In re Jim L. Shetakis Distrib. Co.*, 401 F. App'x at 251; *Matter of Lemco Gypsum*, 910 F.2d at 788-89.

MOAC cannot effectuate an end-run around Congress' carefully tailored avoidance provisions with some alternative argument for setting aside the transfer. *E.g.*, *Tempnology*, 139 S. Ct. at 1663 (the avoidance powers "can be invoked in only narrow circumstances," which is necessary "to keep avoidance cabined"). Importantly, the statutory scheme is carefully tailored to protect the interests of good-faith transferees such as Transform. Whereas § 549 permits the avoidance of a transfer, it is § 550(a) that permits the recovery of the property from the transferee. S. Rep. No. 95-989, 95th Cong., 2d Sess. 90 (1978) ("Section 550 . . . enunciates the separation between the concepts of avoiding a transfer and recovering from the transferee."). Critically, § 550(e) imposes a lien on the recovered property in favor of the transferee for improvements and other reliance

[9] Where, as here, the time runs from the date of an act or event, rather than upon the "accrual of the claim," and admits of no exceptions, that "is close to a dispositive indication that the statute is one of repose." *Cal. Pub. Emps Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017).

costs the transferee has made or incurred, including the payment of taxes.[10]

Where, as here, the statutory scheme prescribes (and limits) the remedy with carefully crafted restrictions and protections, there is no occasion to create some unlimited, common-law alternative. *See, e.g., Shriver v. Woodbine Sav. Bank*, 285 U.S. 467, 478 (1932) ("[W]here a statute creates a liability and provides a remedy by suit specially adapted to its enforcement, other less appropriate common-law remedies are impliedly excluded."); *Kaukauna Water-Power Co. v. Green Bay & Miss. Canal Co.*, 142 U.S. 254, 280 (1891); *see also Matter of Pointer*, 952 F.2d 82, 88 (5th Cir. 1992); *accord City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981).[11]

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[10] For example, Transform has continued to pay rent and taxes, and MOAC has demanded that Transform make repairs to the property. Section 550(e) would permit Transform to be made whole on these expenses; automatic return would leave Transform empty-handed in contravention of the Code's protections.

[11] Likewise unavailing is Rule 60(b). Fed. R. Civ. P. 60(b); *see* Fed. R. Bankr. P. 9024 (rendering Rule 60(b) applicable in contested bankruptcy matters, with modifications). Rule 60(b) simply permits a court to set aside a judgment for the reasons enumerated in the Rule; it does not provide for the avoidance of a court-authorized transfer of property. In addition, the grounds for voiding a judgment under the Rule are not satisfied here—"'A judgment is not void . . . simply because it is or may have been erroneous'"; it is void "only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270, 271 (2010) (citations

The United States observes that, in situations in which § 363(m) does not apply (*i.e.*, "where the property was not 'purchased or leased . . . in good faith"), "a court may continue to issue relief that invalidates some transfers of property outside the estate[.]" U.S. Br. 24. Like MOAC, however, the Government offers no explanation as to how or under what authority such relief may be effectuated. In the case of a bad-faith transfer, an appellate court would be free to grant relief affecting the validity of the sale such as by reversing the sale order. Thereafter, the trustee could avoid the transfer under § 549, and either recover the property itself *or* its value under § 550. And because the transfer had been made in bad faith, the transferee would not be protected under § 550(e), which is limited to good-faith transferees. This is entirely consistent with Transform's analysis.

D. MOAC Lacks Standing To Set Aside the Transfer.

MOAC also lacks standing to pursue any avoidance action. Section 549 permits a "trustee" to avoid an unauthorized transfer of estate property, and where the Bankruptcy Code specifically authorizes a

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omitted). Bankruptcy courts do not otherwise have unlimited residual authority to reconsider their own orders once rights have vested in reliance thereon. *See Wayne United Gas Co. v. Owens-Ill. Glass Co.*, 300 U.S. 131, 137 (1937) ("we think the court has the power, for good reason, to revise its judgments upon seasonable application *and before rights have vested on the faith of its action*"; "the rule which governs the case is that the bankruptcy court, in the exercise of its sound discretion, *if no intervening rights will be prejudiced by its action*, may grant rehearing upon application diligently made") (emphasis added).

trustee to take action, others may not. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000); *see also Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 486 (1985); *Matter of Pointer*, 952 F.2d at 88 ("the plain language of § 549 restricts its use to trustees or debtors-in-possession" and a creditor "therefore lacks standing" to bring an action under § 549).

MOAC would also lack constitutional standing because any avoidance of the transfer must be "for the benefit of" Sears' bankruptcy estate, not MOAC. 11 U.S.C. § 550(a). To establish standing under Article III, a party must demonstrate, *inter alia*, that it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). In addition, "a litigant must assert his or her own legal rights and interests," not those of others. *Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)); *see Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). MOAC cannot meet this burden.

Prior to the sale, Sears' leasehold interest constituted property of Sears' bankruptcy estate. Pet. App. 107a-08a. As a prerequisite to the assignment to Transform, Sears sought, and the Transfer Order approved, Sears' *assumption* of the lease under § 365. 11 U.S.C. § 365(f)(2)(A); Pet. App. 111a, 114a-15a. Because Sears assumed the lease prior to its transfer, reversing the assignment would merely cause the

leasehold interest to revert to the estate.[12] Thus, in pursuing the avoidance of the transfer, MOAC would be attempting to obtain property that would belong to the estate. This MOAC may not do. *See Kowalski*, 543 U.S. at 129.

Because MOAC cannot obtain effective relief, its Petition should be dismissed.

II. SECTION 363(m) IS JURISDICTIONAL.

A. Section 363 Applies.

The argument that § 365 *alone* governs the assignment of leasehold interests is wrong. By its terms, § 363 applies to all sales of "property of the estate." 11 U.S.C. §§ 363(b)(1), (c)(1).

It is settled that a debtor's leasehold interest is an interest of the debtor in property, and therefore property of the estate subject to sale authorized under § 363(b). *See* S. Rep. No. 95-989, 95th Cong., 2d Sess. 82-3 (1978); *Weingarten Nostat, Inc. v. Serv. Merch. Co.*, 396 F.3d 737, 743 (6th Cir. 2005); ("[A] lease is property of the estate, and the assignment of a lease for consideration is a sale under § 363[.]"); *Rickel*

[12] Although MOAC objected to the assignment of the lease to Transform, it did not object to the assumption of the lease. On appeal, MOAC argued, and the District Court agreed, that *Transform* could not take assignment of the lease under the requirement in § 365(b)(3)(A) that, "in the case of an assignment," the assignee have certain characteristics similar to the debtor. 11 U.S.C. § 365(b)(3)(A); Pet. App. 95a. That restriction does not apply when the estate is assuming the lease.

Home Ctrs., 209 F.3d at 300; *In re Stadium Mgmt. Corp.*, 895 F.2d 845, 849 (1st Cir. 1990).

In addition to being subject to the provisions of § 363(b), the sale of a leasehold interest is also subject to the provisions of § 365 regarding "the particular mechanics of conveyance." *Rickel Home Ctrs.*, 209 F.3d at 302-03 (citation and quotation marks omitted). Section 365(a) requires the trustee to elect whether to "assume" or "reject" a lease, with the trustee's election to "assume" being a prerequisite to "assignment" to a third party under § 365(f)(2)(A). As this Court explained over a century ago, "[a] reasonable time [i]s allowed the [trustees] to ascertain the value of the lease before they ma[k]e their election; for which purpose they might have it valued, *or put up for sale*[.]" *Quincy Mo. & Pac. R.R. Co. v. Humphreys*, 145 U.S. 82, 99 (1892) (emphasis added).

As noted, the assignment of a lease for consideration is a sale. *Weingarten,* 396 F.3d at 743. And sales of leasehold interests are necessarily subject to the provisions of both §§ 363 and 365. This is apparent from § 363(l)'s express reference to § 365, which would be pointless if § 363 did not also apply to sales of leasehold interests. In particular, § 363(l) generally nullifies "*ipso facto* clauses"—clauses in contracts and leases that effect a forfeiture of the debtor's rights if the debtor becomes insolvent, files for bankruptcy, or a trustee is appointed. Section 363(l) begins with the proviso "[s]ubject to section 365" because §§ 365(b)(2) and 365(f) contain more specific restrictions on *ipso facto* clauses applicable to leases. *See id.* §§ 365(b)(2), (f).

There would be no need for the proviso in § 363(l) if § 363 did not also apply to the sale of a lease. Conversely, the proviso illustrates Congress' intent that *both* provisions work together in the context of the sale of a leasehold interest, with the general provisions of § 363(l) sensibly giving way to the more tailored provisions of §§ 365(b)(2) and 365(f) in the context of sales of leasehold interests.

Further, the Code's provisions for removing encumbrances on leasehold interests (*e.g.*, leasehold mortgages) so these assets may be sold free and clear of liens are to be found only in § 363. 11 U.S.C. § 363(f). Without the ability to invoke § 363(f), leasehold interests could not be cleansed of liens and other encumbrances, rendering them unsaleable. In addition, certain procedural rules necessary for the conduct of the sale of a leasehold interest are to be found *only* in § 363. *Compare* 11 U.S.C. § 365(f) (providing *simpliciter* that a trustee may assign a leasehold interest without specifying whether court approval or notice and a hearing are required), *with* § 363(b)(1) (requiring notice and a hearing for all sales of property of the estate out of the ordinary course).

In arguing that § 363 does not apply to the sale of a leasehold interest, MOAC's amicus cites a single appellate case, *In re Joshua Slocum Ltd.*, 922 F.2d 1081 (3d Cir. 1990), but this decision has been repudiated in subsequent decisions of the Third Circuit, which have held (consistent with every other appellate court to have addressed the issue) that the sale of a leasehold interest is subject to both §§ 363 and 365. *See Rickel Home Ctrs.*, 209 F.3d at 302; *Krebs Chrysler-Plymouth*, 141 F.3d at 498 (departing

from *Joshua Slocum* and holding that franchises are "property of the estate under section 541" and therefore are "covered by section 363 [and subject to § 363(m)], although the procedure for their transfer is delineated by section 365"); *In re Glob. Home Prods. LLC*, 369 B.R. 770, 772 (D. Del. 2007) (observing that *Krebs* "departs from *Slocum*").

Because § 363(b) applies to the sale of a leasehold interest, so, too, does § 363(m)—by its plain terms, § 363(m) *explicitly* applies to sale authorizations under § 363(b). *See, e.g.*, *Weingarten*, 396 F.3d at 743; *Rickel Home Ctrs.*, 209 F.3d at 300; *see also In re Adamson Co.*, 159 F.3d 896, 898 (4th Cir. 1998). Accordingly, the courts below were correct in concluding that Sears' sale of its leasehold interest to Transform is subject to § 363(m).

MOAC's contention that the Transfer Order was somehow divorced from the parties' sale transaction, Pet. Br. 44-45, is simply without merit. The District Court and the Court of Appeals both concluded correctly that Sears' sale of its leasehold interest to Transform was part of the overall sale under the APA, and for this reason also subject to the provisions of § 363, including § 363(m). Pet. App. 6a, 43a. Both courts likewise carefully analyzed the terms of the APA, and determined that, following entry of the Transfer Order, the MOAC Lease became an Acquired Asset sold to Transform under the APA. As a result, the lower courts concluded correctly that unwinding the Transfer Order would rewrite the APA and affect the validity of the sale. Further, in accordance with the APA, Transform paid new and unique consideration for the MOAC Lease (in addition to

what it had already paid previously), and, as the District Court held, that alone qualifies the Transfer Order as an order authorizing a sale under § 363(b). Pet. App. 42a.

B. Section 363(m) Is a Jurisdictional Limitation.

"Jurisdiction" refers to "a court's adjudicatory authority." *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). In turn, "'[s]ubject matter jurisdiction defines the court's authority to hear a given type of case,'" *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984)), and "represents 'the extent to which a court can rule on the conduct of persons or the status of things.'" *Id.* (quoting Black's Law Dictionary 870 (8th ed. 2004)); *see Bowles*, 551 U.S. at 213; *Curry*, 47 U.S. at 112-13. In order to imbue a statute "with jurisdictional consequences," Congress need not "incant magic words." *Boechler,* 142 S. Ct. at 1497 (citations and quotation marks omitted). Rather, the requisite intent may be discerned by reference to "traditional tools of statutory construction," such as consideration of the text, the manner in which the statute operates, and its history. *Id.*

Section 363(m) is properly jurisdictional under this standard. If an appeal concerns the propriety of the sale to a good-faith purchaser, the statute directs that any reversal or modification of the lower court's sale order "does not affect the validity of the sale" *unless* a stay has been obtained. In other words, a stay is required for the court to hear and decide a challenge regarding the validity of a good-faith sale.

The observation of the United States that § 363(m) is not jurisdictional because it contemplates that appeals will be heard, U.S. Br. 15, is simply question-begging. Section 363(m) recognizes that a bankruptcy court's order authorizing a sale may also address ancillary matters that have nothing to do with the propriety of the sale itself. If, for example, an appeal involves the disposition of proceeds, § 363(m) is not implicated. In contrast, if the appeal involves the propriety of the sale to a good-faith purchaser and no stay has been granted, § 363(m) applies and deprives the court of the ability to hear and decide the challenge, regardless of the merits. That is a subject-matter constraint. *See Carlsbad Tech.*, 556 U.S. at 639 ("Subject matter jurisdiction defines the court's authority to hear a given type of case[.]") (quoting *Morton*, 467 U.S. at 828).

That Congress intended the statute to be jurisdictional in the manner described is confirmed by two considerations. First, § 363(m) confirms the lack of *in rem* bankruptcy jurisdiction over an asset transferred to a good-faith purchaser. Second, the operation of the section and its relevant history demonstrate that Congress intended the statute to restrain an appellate court's subject matter authority (*i.e.*, its ability *to hear* the matter in the first place). Although the statute is uniquely phrased, that simply reflects that it codifies almost word-for-word former Rule 805, which captured an established appellate practice of dismissing appeals challenging the propriety of unstayed sale orders without reaching the merits. Congress' codification of this practice demonstrates its intention that appeals within the statute's purview cannot be heard.

1. Section 363(m) confirms the lack of *in rem* jurisdiction over the transferred *res*.

As traditionally understood, in order for a court to exercise jurisdiction *in rem*, it must have control over the property in question (or at least be able to reach it). *See, e.g.*, *The Ann*, 13 U.S. at 291 ("In [o]rder to institute and perfect proceedings *in rem*, it is necessary that the thing should be actually or constructively within the reach of the Court"); *see also United States v. Mack*, 295 U.S. 480, 484 (1935) ("One of the essentials of jurisdiction in rem is that the thing shall be 'actually or constructively within the reach of the Court.'") (quoting *The Ann*, 13 U.S. at 291); *The Resolute*, 168 U.S. 437, 439 (1897); *United States v. The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (Marshall, C.J.). In bankruptcy, this jurisdictional predicate is satisfied by the commencement of the bankruptcy case, which, by operation of law, vests the bankruptcy court with custody and control of all property of the estate. 28 U.S.C. § 1334(e); *see, e.g.*, *Hood,* 541 U.S. at 447-48; *Straton*, 283 U.S. at 321.

As explained in Part I.A., however, once property has been sold and transferred pursuant to court order, it is no longer property of the estate and the court's *in rem* jurisdiction over the asset ceases—the ship, so to speak, has sailed. And if § 363(m) means anything, it means that the "sale" (*i.e.*, the transfer of ownership and control) of the asset to the good-faith purchaser cannot be disturbed. This ineluctably confirms that the bankruptcy court cannot reach

the *res*, and thus has no basis for the exercise of *in rem* jurisdiction over it.

The Court's decision in *Republic National Bank of Miami v. United States*, 506 U.S. 80 (1992), supports this jurisdictional analysis. In *Republic*, the United States initiated an *in rem* forfeiture action against a residence in which a bank claimed a lien. *Id*. at 82. With court approval, the residence was sold, and the marshal retained the proceeds. *Id*. After the court denied the bank's claim, the assets were transferred to a fund in the U.S. Treasury. *Id*. at 83. The United States argued on appeal that the movement of the funds caused the appellate court to lose jurisdiction on the theory that any order requiring payment of the funds would be useless once the funds had been transferred out of the court's reach. *Id*. at 84-85. The controlling opinion of Chief Justice Rehnquist held that a judgment requiring payment of the funds to the bank would not be useless because a statute provided that, if the bank prevailed, the "property shall be returned forthwith to the claimant." *Id*. at 90 (quoting 28 U.S.C. § 2465).

Of course, § 363(m) directs exactly the opposite in the context of unstayed, good-faith bankruptcy sales—the property *cannot* be retaken. Moreover, in contrast to *Republic*, MOAC is not asserting a claim to the proceeds of sale (if that were its only claim, § 363(m) would be inapplicable on its face). Rather, MOAC seeks the relief that could *not* be ordered in *Republic*—the unwinding of the sale of the residence itself. In *Republic*, no one suggested that the residence could be taken back from the purchaser. And the courts of appeals following *Republic* have

held that the original *res* cannot be reached; further, if there is no substitute *res* available to the appellant, the "useless judgment exception" applies and compels dismissal of the appeal. *See Newpark Shipbuilding & Repair, Inc. v. M/V Trinton Brute*, 2 F.3d 572, 573 (5th Cir. 1993) (describing, unlike *Republic*, that "the vessel is no longer the res; a marshal's sale discharges all liens against the ship and grants the purchaser title free and clear of liens[.]") (appeal dismissed for lack of a substitute *res*); *Eurasia Int'l, Ltd. v. Holman Shipping, Inc.*, 411 F.3d 578, 584 (5th Cir. 2005); *United States v. One Parcel of Real Estate at 3262 SW 141 Ave.*, 33 F.3d 1299, 1303 (11th Cir. 1994).[13]

Nothing in *Republic* overrides the jurisdictional rule in bankruptcy that, once property is transferred by court order out of the estate, the bankruptcy court's *in rem* jurisdiction over that asset ceases. To the extent there is a substitute *res*, that is within the power of the court to administer. But an appellate court's jurisdiction to direct a different disposition of the original *res* also ends—an appellate court cannot direct a bankruptcy court to exercise jurisdiction the bankruptcy court does not possess.

The government's contention that bankruptcy jurisdiction is not exclusively *in rem* because certain of the Code's remedial provisions may involve "*in*

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[13] Admiralty cases following *Republic* have also explicitly declined to convert *in rem* to *in personam* proceedings for the purpose of permitting an appellant to proceed with their appeal. *See Newpark*, 2 F.3d at 573 ("For [the vessel's owner] to be able to recover . . . we would effectively have to convert the judgment from one in rem to a judgment in personam. We decline to so extend the holding in *Republic*.").

personam process," U.S. Br. 25 (citing *Katz*, 546 U.S. 356), is inapposite. A bankruptcy court does not exercise *in personam* jurisdiction in authorizing bankruptcy sales; its jurisdiction is *in rem*. It is true that, in avoiding a transfer of property from the estate, *in personam process* may be used, but as the Court explained in *Hood*, the type of *process* used does not defeat the *in rem* nature of the proceeding. *Hood*, 541 U.S. at 453 ("Our precedent has drawn a distinction between *in rem* and *in personam* jurisdiction, even when the underlying proceedings are, for the most part, identical. Thus, whether an *in rem* adjudication in a bankruptcy court is similar to civil litigation in a district court is irrelevant."). As the Court further explained in *Katz*, a court order directing the recovery of property following an avoidance of a transfer "might itself involve *in personam* process," but this is "ancillary to and in furtherance of the court's *in rem* jurisdiction." 546 U.S. at 372. There is no reason to doubt the *in rem* nature of the proceedings here.

2. Section 363(m) constrains an appellate court's subject matter jurisdiction.

In addition to denying a basis for the exercise of *in rem* jurisdiction over the *res*, § 363(m) also withdraws, in the absence of a stay, an appellate court's subject matter authority over an appeal challenging the validity of a sale to a good-faith purchaser. That is because, as the statute directs, any ruling of the appellate court reversing or modifying the sale order simply "does not affect the validity of a sale" *unless* a stay has been obtained. In ordinary parlance, a stay

is the ticket to the dance; without it, admission is denied.

The condition of a stay operates in essentially the same manner as the statutory requirement of a timely notice of appeal addressed in *Bowles*, and the statutory requirement of a citation of the opposing party in *Curry*. *Bowles*, 551 U.S. at 213; *Curry*, 47 U.S. at 112-13. Both conditions properly constrained the appellate court's subject matter jurisdiction because, if the stated conditions were not satisfied, the appellate court could not proceed. Likewise, under § 363(m), in order for an appellate court to proceed to hear an appeal challenging the validity of the sale to a good-faith purchaser, a stay is required.

This was the historic practice under former Rule 805 that § 363(m) codified: absent a stay, an appellate court would not proceed with an appeal challenging the validity of a consummated sale. In case after case, appellate courts applying Rule 805 dismissed such appeals without considering the merits. Although the courts' rationales differed, the lack of a stay was treated as a constraint on the appellate court's subject matter authority—its power to *hear* a class of matters. *E.g.*, *In re Combined Metals Reduction Co.*, 557 F.2d 179, 188 & n.5 (9th Cir. 1977) (explaining that the "recently-adopted" Rule 805 was "[i]n accord" with the prior case law holding that the consummation of a court-ordered sale of property of a debtor in bankruptcy left the appellate court with "no matter before it which it had authority to decide").

When Congress codified this historic rule in § 363(m), it converted the practice into a statutory

command. It is of no moment that the rule originated in judicial practice—the same can be said of the jurisdictional nature of the statutory requirement of a timely notice of appeal addressed in *Bowles*. Congress *codified* the practice, and along with it, its historic contours. *E.g.*, *Taggart*, 139 S. Ct. at 1801 ("[A]s part of the 'old soil' they bring with them, the bankruptcy statutes incorporate the traditional standards[.]"); *Bowles*, 551 U.S. at 209-10; *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998) ("We . . . 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'") (citation omitted); *Midlantic Nat'l Bank*, 474 U.S. at 501.[14]

Rule 805 did not arise in a vacuum. Rather, as the Advisory Committee Note stated, the rule was "declaratory of existing case law." *See* 13 Collier on Bankruptcy ¶ 805.01 (14th ed. 1976) (republishing Advisory Committee note). Contemporaneous rulings of the courts of appeals at the time of the adoption of Rule 805 uniformly agreed. *See Matter of Abingdon Realty Corp.*, 530 F.2d 588, 590 (4th Cir. 1976); *In re Nat'l Homeowners Sales Serv. Corp.*, 554 F.2d 636, 637 (4th Cir. 1977); *Combined Metals*, 557 F.2d at 188-89, 188 n.5; *Country Fairways, Inc. v. Mottaz*, 539 F.2d 637, 641 (7th Cir. 1976). Importantly, these cases all understood Rule 805 to reflect not a limitation on remedies, but a fundamental limitation on the power of a court to hear a dispute over the

[14] As *Midlantic* illustrates, the relevant historic practice may be established by reference to the decisions of the lower federal courts. *See* 474 U.S. at 500-01. MOAC concedes that the history is relevant, Pet. Br. 38, it simply ignores it.

proper disposition of a *res* sold by court order. *See, e.g.*, *Combined Metals*, 557 F.2d at 188-89.

The cases also reflected a consensus regarding the decisions of which Rule 805 was "declaratory." *See Abingdon Realty*, 530 F.2d at 589-90 (citing *Fink v. Cont'l Foundry & Mach. Co.,* 240 F.2d 369 (7th Cir. 1957); *Sobel v. Whittier Corp.*, 195 F.2d 361, 363 (6th Cir. 1952); *Taylor v. Austrian*, 154 F.2d 107, 108 (4th Cir. 1946); *Sterling v. Blackwelder*, 405 F.2d 884, 884 (4th Cir. 1969)); *see also Combined Metals*, 557 F.2d at 187-88 (citing *Fink*, 240 F.2d at 374, *Taylor*, 154 F.2d at 108); *Nat'l Homeowners Sales*, 554 F.2d at 637 (citing *Fink*, 240 F.2d 369); *Country Fairways,* 539 F.2d at 641 (same). The most often cited case, *Fink*, addressed not only the appellate court's lack of authority to address the merits, but also the jurisdictional limits of a court over property transferred to a good-faith purchaser pursuant to an unstayed order. In *Fink*, the trial court authorized a corporation to sell its assets. 240 F.2d at 371. The plaintiffs appealed, but did not seek a stay. *Id.* Accordingly, while the appeal was pending, the transaction was consummated. The court observed that, when the purchaser "thus received title and possession on that day[,] the assets passed from the jurisdiction of the court and beyond the reach of its equitable powers." *Id.* at 374. In the absence of a stay, the court dismissed the appeal, declining to address the merits. *Id.* at 375.

Likewise, in *Taylor*, a committee of stockholders of a debtor in reorganization appealed from an order authorizing the trustee to sell property of the estate. 154 F.2d at 108. Although the committee appealed, it

did not seek a stay and the transaction closed. *Id.* The court therefore dismissed the appeal, explaining that all of the committee's objections "relate to the sale of the securities or to the future conduct and administration of the reorganization proceedings in the District Court," and therefore "[n]one of the suggestions tend to show that there is any matter now pending in this court which it has the authority to decide." *Id.*; *see also Sterling*, 405 F.2d at 884 (dismissing appeal without reaching the merits).

Consistent with this line of cases, appellate courts thereafter applied Rule 805 to dismiss appeals challenging bankruptcy sales in the absence of a stay. *See Abingdon Realty*, 530 F.2d at 590; *Nat'l Homeowners Sales*, 554 F.2d at 637; *Combined Metals*, 557 F.2d at 188-89; *Country Fairways,* 539 F.2d at 641. It is this practice that Congress codified when it enacted § 363(m).

The United States' assertion that "[t]he earlier Bankruptcy Rule [805] cannot have been jurisdictional because it was not enacted by Congress, which controls the jurisdiction of the federal courts," U.S. Br. 10, is of no moment. The rule did not purport to impose new limits on a jurisdictional grant. Rather, Rule 805 was "declaratory of existing case law," which recognized that the court lacked the authority to hear an appeal regarding property that had already been transferred in the absence of a stay. Although a rule cannot "extend or limit" jurisdiction, it may *reflect* existing limits as articulated by the courts. *See* 28 U.S.C. § 2075; Fed. R. Bankr. P. 9030. In any event, Congress codified the Rule.

MOAC insists that § 363(m) cannot be jurisdictional because there are appeals that may "arise in connection with sale or related transactions for which there are available remedies on appeal that will not invalidate the sale itself." Pet. Br. 37; *see also* U.S. Br. 9 In the same vein, MOAC identifies two kinds of matters it says appellate courts should be empowered to consider: "determinations on the allocation of sale proceeds as between creditors or the estates of different debtors" and "the validity of liens on sale proceeds," as well as "the propriety of third party releases that may be included in a sale order or related order," Pet. Br. 37, but have nothing to do with the sale. These contentions are curiously off point. To observe (as MOAC and the United States do) that there are matters that § 363(m) does *not* apply to hardly demonstrates that § 363(m) has no jurisdictional effect with respect to the class of disputes that it *does* apply to.[15]

The Government's admonitions about *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), are likewise unavailing. U.S. Br. 11-12. *Steel Co.* addressed whether a particular statute, 42 U.S.C. § 11046(a), permitted a cause of action for historic reporting violations, and whether the question itself was "jurisdictional" in nature. 523 U.S. at 88-89. The Court concluded that, where the answer depended on

[15] Lower court cases that MOAC cites likewise involve challenges to ancillary matters. *See, e.g., In re Brown*, 851 F.3d 619, 623 (6th Cir. 2017) (altering distribution of proceeds does not affect validity of sale); *Trinity 38 Dev., LLC v. ColFin Midwest Funding, LLC*, 917 F.3d 599, 603 (7th Cir. 2019) (same). These cases hardly demonstrate that § 363(m) has no jurisdictional effect in matters to which the statute *does* apply.

whether the averments in the complaint satisfied the relevant statutory criteria for stating a valid claim, the question was not jurisdictional, but simply one of satisfying the criteria. *Id.* at 90.

This case, and the operation of § 363(m), are entirely different. Here, MOAC claims that the transfer should be set aside because it does not comply with § 365. Under § 363(m), whether MOAC is right or wrong is immaterial. Regardless of the merits of MOAC's averments, a court cannot do anything that affects the validity of the transfer. Absent a stay, the relevant subject matter—the propriety of the transfer—is removed from the courts' adjudicatory purview.

Finally, the Court's decision in *Arbaugh v. Y&H Corp.,* 546 U.S. 500 (2006), does not compel the conclusion that § 363(m) is not a jurisdictional limitation. *Arbaugh* involved a definitional provision, 42 U.S.C. § 2000e(b), that defined the term "employer" under Title VII as a business with fifteen or more employees. 546 U.S. at 503. After a jury awarded petitioner damages on her Title VII claim, respondent raised for the first time that it was not an employer within the meaning of Title VII because it had fewer than fifteen workers. *Id*. at 508. Rejecting respondent's argument that the fifteen-employee requirement was jurisdictional, the Court concluded that it was simply "an element of plaintiff's claim for relief." *Id.* at 516.

The definition of the term "employer" at issue in *Arbaugh* was simply one element of the claim. As such, there was no basis to conclude that the courts

lack the power to rule on such claims if the plaintiff fails to prevail on every element. Unlike the statutory provision at issue in *Arbaugh*, § 363(m) *is* properly jurisdictional because it does something distinctly different: it withdraws, in the absence of a stay, an appellate court's subject matter authority over an appeal challenging the validity of a sale to a good-faith purchaser. And as a constraint on the subject matter of the appellate courts, it is not waivable. Accordingly, the decision of the court below should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Petition or, alternatively, affirm the judgment of the Second Circuit.

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APPENDIX

APPENDIX OF STATUTORY PROVISIONS

11 U.S.C. § 363

…

(b)

(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate….

…

(c)

(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1183, 1184, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

…

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate….

…

(l) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b)

or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) 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.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

…

11 U.S.C. § 365

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)

(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease….

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by

performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

…

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and

its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

…

(f)

(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

…

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

…

11 U.S.C. § 541

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
>
> …
>
> (3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.
>
> (4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

….

11 U.S.C. § 549

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate—

> (1) that occurs after the commencement of the case; and

(2)

(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

…

(d) An action or proceeding under this section may not be commenced after the earlier of—

(1) two years after the date of the transfer sought to be avoided; or

(2) the time the case is closed or dismissed.

…

11 U.S.C. § 550

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section [1] (a)(2) of this section from—

> (1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or
>
> (2) any immediate or mediate good faith transferee of such transferee.

…

(e)

> (1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of—
>
> > (A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and
> >
> > (B) any increase in the value of such property as a result of such improvement, of the property transferred.

28 U.S.C. § 1334

…

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—

> (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

….

Fed. R. Bankr. P. 805 (1976)

. . . Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal.