No. 21-1270

In the Supreme Court of the United States

MOAC MALL HOLDINGS LLC, PETITIONER

v.

TRANSFORM HOLDCO LLC AND SEARS HOLDINGS CORPORATION

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

In *Arbaugh* v. *Y & H Corp.*, this Court clarified that limitations on judicial relief should not be treated as jurisdictional absent a clear statement by Congress. Section 363(m) of Title 11 of the United States Code provides that "reversal or modification on appeal of an authorization under" Section 363(b) and (c) (governing sale of property of the bankruptcy estate) "does not affect the validity of a sale" to a good faith purchaser. The statute does not restrict any other remedy that an appellate court might fashion that does *not* "affect the validity of [the] sale."

The Second Circuit held that Section 363(m) deprived the appellate courts of jurisdiction over an appeal from a lease assignment order entered under 11 U.S.C. 365. The sale order was not contingent on the lease assignment; the sale had already closed, and the sale price was fixed without regard to whether the lease could be assigned. Respondent had also expressly waived (in successfully opposing a stay) any argument that Section 363(m) would bar appellate review of the lease assignment. The Second Circuit nevertheless found the lease assignment "integral" to the sale order and held that the court therefore lacked appellate jurisdiction, which was not subject to waiver or estoppel.

The question presented is:

Whether Bankruptcy Code Section 363(m) limits the appellate courts' jurisdiction over any sale order or other order deemed "integral" to a sale order, such that it is not subject to waiver, estoppel or forfeiture, including when a remedy could be fashioned that does not affect the validity of the sale.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Petitioner is MOAC Mall Holdings LLC. MOAC Mall Holdings LLC is a wholly owned subsidiary of Mall of America Company LLC. No publicly held corporation owns 10% or more of the stock of either MOAC Mall Holdings LLC or Mall of America Company LLC.

Respondent is Transform Holdco LLC.

Respondent Sears Holdings Corporation was named as an appellee in the court of appeals but did not participate in the proceedings and has not participated in the proceedings to date in this Court.

RELATED CASES

- *MOAC Mall Holdings LLC* v. *Transform Holdco LLC (In re Sears Holdings Corp.)*, No. 20-1846(L), U.S. Court of Appeals for the Second Circuit. Judgment entered December 17, 2021.
- *MOAC Mall Holdings LLC* v. *Transform Holdco LLC (In re Sears Holdings Corp.)*, No. 19-CIV-09140 (CM), U.S. District Court for the Southern District of New York. Judgment entered May 11, 2020.
- *In re Sears Holdings Corp.*, No. 18-23538 (RDD), U.S. Bankruptcy Court for the Southern District of New York. Order entered September 5, 2019.
- *In re Sears Holdings Corp.*, No. 18-23538 (RDD), U.S. Bankruptcy Court for the Southern District of New York. Order entered February 8, 2019.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a) is not reported in the national reporter, but is available at 2021 WL 5986997. The opinion of the United States District Court for the Southern District of New York (Pet. App. 12a) is reported at 616 B.R. 615. The earlier, vacated opinion of the United States District Court for the Southern District of New York upholding petitioner's appeal on the merits (Pet. App. 49a) is reported at 613 B.R. 51. The order of the United States Bankruptcy Court for the Southern District of New York is unreported but is reproduced at Pet. App. 101a.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2021. Pet. App. 1a. On January 24, 2022, the court of appeals entered a stay of its mandate to allow petitioner to file a petition for a writ of certiorari. Pet. App. 126a. The petition for a writ of certiorari was filed on March 17, 2022, and was granted on June 27, 2022. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 363 and 365 of Title 11 of the United States Code and Section 158 of Title 28 of the United States Code were reproduced in full in the appendix filed with petitioner's petition for a writ of certiorari.

INTRODUCTION

This case concerns whether Section 363(m) of the Bankruptcy Code deprives district and circuit courts of jurisdiction to review on appeal (i) unstayed orders entered by bankruptcy judges authorizing a debtor to sell assets and (ii) unstayed orders entered by bankruptcy judges considered "integral" to a debtor's sale of assets. This Court established a bright-line test in *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500 (2006), requiring lower courts to find a statute jurisdictional *only* if Congress has "clearly state[d]" that it is jurisdictional. Absent a clear Congressional statement, courts are instructed to treat a statute as nonjurisdictional. Application of this test proves that Section 363(m) is not jurisdictional.

Section 363(m) provides as follows:

> 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.

11 U.S.C. 363(m).

By its terms, Section 363(m) does not speak to the jurisdiction of district or circuit courts sitting in an appellate capacity. Rather, it eliminates one remedy these courts might order *after exercising* their appellate jurisdiction; if the court reverses or modifies the appealed order, the underlying sale itself will not be invalidated. This is a remedial limitation, and this Court has said time and again that statutory limitations on remedies do not deprive courts of jurisdiction.

In proceedings below, the bankruptcy court entered an order on February 8, 2019 under Section 363(b) of the Bankruptcy Code authorizing Sears to sell a substantial portion of its assets to respondent Transform. The asset sale closed three days later and the purchased assets were conveyed by Sears to Transform. At the time, Sears was a lessee from MOAC of a three-floor space within the Mall of America shopping center in Minnesota. Sears' interest in the lease was not an acquired asset conveyed to Transform in connection with the sale closing. Instead, the asset purchase agreement contemplated that Sears and Transform could, at a later date, following separate notice and a hearing, seek bankruptcy court authorization to assign to Transform one or more leases (including Sears' lease with MOAC). But no aspect of the sale order or asset purchase agreement was contingent on the successful

subsequent assignment of any lease. Rather, the purchase agreement expressly provided that Sears had no obligation to assign any lease if the bankruptcy court denied the proposed assignment, and leases could subsequently be rejected by Sears.

Months after the sale closed, Sears sought and obtained, over petitioner's objection, bankruptcy court approval to assign the Mall of America shopping center lease to Transform under Section 365 of the Bankruptcy Code (which, unlike Section 363, governs a debtor's ability to assume and assign leases and other executory contracts in bankruptcy). Petitioner appealed. Petitioner sought a stay of that lease assignment order pending appeal out of concern that Transform might argue on appeal that Section 363(m) precluded appellate review of the order. At the hearing on petitioner's stay request, Transform (i) told the bankruptcy court that Section 363(m) did not apply to the order or appeal (because the lease assignment was not a proceeding under Section 363(b) or (c)) and (ii) agreed that Transform would not raise any Section 363(m) argument in the district court appeal. The bankruptcy court relied on these statements in denying MOAC's request for a stay.

After full briefing on the merits in the appeal, the district court ruled in MOAC's favor because the lease assignment did not satisfy the requirements of Bankruptcy Code Section 365. It concluded that Transform did not satisfy the statutory requirement that the lease assignee provide "adequate assurance of future performance" to the lessor. Transform then reversed course, arguing for the first time in a petition for rehearing that Section 363(m) *did* apply, that it was a jurisdictional statute not subject to waiver, and that it

deprived the district court of any ability to consider the appeal in the first place. The district court stated that it was "appalled" by Transform's conduct, but reluctantly agreed, based on Second Circuit precedent, that Section 363(m) deprived it of jurisdiction. The court of appeals affirmed, similarly finding that it was bound by circuit precedent.

As petitioner explained in its petition for a writ of certiorari, the Second Circuit is in the minority, as most circuit courts considering the issue have determined that Section 363(m) is not jurisdictional. Labeling a statutory prerequisite or limit on relief as "jurisdictional" carries immense practical consequences, as illustrated by the case at hand. Jurisdictional issues are not subject to waiver, estoppel or forfeiture, and can therefore prejudice parties and cause a waste of time and judicial resources. Moreover, the Second Circuit's overbroad view of Section 363(m)'s reach prevented the appellate courts from considering—as the plain language of Section 363(m) requires—whether there were remedies available on appeal that would not affect the validity of the sale, which is the sole remedial limitation that Congress included in the text of Section 363(m).

Section 363(m) does nothing more than cabin the effect of an appellate court's ruling on the validity of an asset sale. A limitation on remedies, however, is not jurisdictional. Section 363(m) is therefore subject to waiver, estoppel and forfeiture, each of which occurred here by Transform expressly disavowing any Section 363(m) argument, successfully defeating a stay on that basis, and then taking a "wait-and-see" approach in the district court appeal, raising the issue only after losing on the merits. Because Transform waived, forfeited, and is estopped from asserting Section 363(m) on ap-

peal, that is a sufficient basis to reverse the court of appeals' judgment below.

Even if Section 363(m) were jurisdictional, it would not extend to this case or to preclude the relief petitioner sought on appeal. The order here was entered under Section 365, not Section 363. And granting petitioner its relief of vacating the lease assignment would not affect—much less invalidate—the earlier asset sale. The already completed asset sale was not contingent in any way on subsequent lease assignments and expressly contemplated that the bankruptcy court might deny a requested assignment. That the judicial denial might come in the form of an appellate ruling no more "invalidates" the earlier sale order than an initial denial by the bankruptcy court would have.

STATEMENT OF THE CASE

1. The Parties

Sears Holdings Corporation was the parent entity for Sears, Roebuck and Co. (Sears), a one-time leading retailer of general merchandise, appliances, tools, consumer electronics, and other goods. On October 15, 2018, after years of declining revenue, Sears filed for chapter 11 bankruptcy. Pet. App. 57a.

MOAC Mall Holdings LLC (MOAC) d/b/a Mall of America in Bloomington, Minnesota is the nation's largest shopping and entertainment center. In 1991, MOAC entered into a lease agreement with Sears (the MOAC Lease) for Sears to serve as an anchor tenant and occupy a three-floor space within Mall of America. Given the strength of the Sears brand at the time, MOAC offered the MOAC Lease to Sears on favorable terms—a mere $10 per year in rent, with Sears sepa-

rately responsible for taxes, utilities, insurance, and common area maintenance. Pet. App. 52a.

Transform Holdco LLC (Transform) is an entity formed by Eddie Lampert, Sears' former Chief Executive Officer and founder of hedge fund ESL Investments. Mr. Lampert formed Transform after Sears filed for bankruptcy for the purpose of acquiring substantially all of Sears' assets. Pet. App. 50a.

2. The Asset Sale Under 11 U.S.C. 363

On February 8, 2019, the bankruptcy court entered an order (the Sale Order) approving a purchase agreement and sale of a substantial portion of Sears' assets to Transform under 11 U.S.C. 363(b), which is the Bankruptcy Code provision allowing debtors, after notice and a hearing and satisfaction of other statutory requirements, to sell property outside of the ordinary course of business. Pet. App. 3a-4a. The sale to Transform closed on February 11, 2019. The assets sold to Transform included Sears' real property, inventory, equipment, receivables, intellectual property, and certain other items. J.A. 239.

The MOAC Lease was not among the assets conveyed to Transform on the sale closing date. Transform did, however, acquire a "designation right" with respect to the MOAC Lease and approximately 600 other leases. J.A. 240. This meant that, at a later date after the asset sale closed, Sears and Transform could select the MOAC Lease and *seek* to have it assumed by Sears and assigned to Transform. Any such proposed lease assignment would be subject to the requirements of 11 U.S.C. 365—which, unlike the sale provision of Section 363, governs a debtor's ability to assume and assign leases in bankruptcy. Under Section 365 and the asset

purchase agreement, Sears and Transform needed to provide separate notice and a hearing on the proposed lease assignment, an opportunity for landlords and other parties to object, and, if the assignment was approved, a separate bankruptcy court order. 11 U.S.C. 365; J.A. 288-291.

To clarify that the MOAC Lease and other leases were not being sold to Transform as part of the Sale Order, the asset purchase agreement stated:

> For the avoidance of doubt, the sale, transfer, assignment and conveyance of the Designation Rights provided for herein on the Closing Date *shall not effectuate a sale, transfer, assignment or conveyance of any Designatable Lease to Buyer or any other Assignee.*

J.A. 259 (emphasis added).

The asset sale under the purchase agreement was not contingent on the successful assignment to Transform of the MOAC Lease or any other designated lease. Nor was the purchase price paid as consideration under the Sale Order subject to adjustment or contingent in any way on the subsequent successful or unsuccessful assumption and assignment of any lease. The parties specifically contemplated in the purchase agreement that some or all of the designated leases could ultimately be rejected by Sears and never assumed or assigned to Transform. J.A. 259-260, 292. The parties also specifically agreed in the purchase agreement that Sears had no obligation to assume or assign to Transform any lease with respect to which Transform was not able to satisfy the requirements of 11 U.S.C. 365, including if Transform was unable to provide "adequate assurance

of future performance" as required by that section. J.A. 264.

3. The Lease Assignment Under 11 U.S.C. 365

More than two months after the sale closed, Sears filed a notice with the bankruptcy court designating the MOAC Lease for proposed assumption and assignment to Transform. MOAC objected on the grounds that the requirements of 11 U.S.C. 365(b)(3), which establishes heightened requirements for debtors seeking to assume and assign shopping center leases, were not satisfied. Specifically, MOAC argued that Transform, a non-retail entity that did not propose to occupy the leased premises and instead intended to sublease the space to future subtenants, did not satisfy the requirements of Section 365(b)(3) to serve as an acceptable lease assignee. At no point did Transform assert that bankruptcy court denial of the lease assignment would affect the validity of the already closed asset sale. On September 5, 2019, following a hearing, the bankruptcy court overruled MOAC's objection and entered an order approving the lease assignment (the Assignment Order). Pet. App. 101a-125a.

MOAC appealed the Assignment Order to the district court and, out of an abundance of caution, also moved the bankruptcy court for a stay pending appeal. MOAC sought the stay because it was concerned that, in the absence of a stay, Transform might argue in district court that Section 363(m) barred MOAC's appeal.

At the hearing on MOAC's stay motion, the bankruptcy court stated that Section 363(m) did not apply because "this is a 365 order" and "not a 363[]" sale order. BIO App. 7a. Transform agreed. Transform first confirmed as "correct" the bankruptcy court's state-

ment "I can't imagine 363(m) as far as the sale is concerned applying here" because the appeal would concern "just one of the roughly 600 [leases]" and not "the whole sale, which is already closed." BIO App. 5a. And, when asked to confirm that Transform was not "going to go into the district court and say 363(m) applies here," Transform's counsel agreed that "we couldn't rely on 363(m) for the purposes of arguing mootness." *Ibid.* The bankruptcy court then specifically summarized the colloquy, noting that Transform is "not going to rely on 363(m), which [Transform's counsel] just reiterated for the second time." BIO App. 7a. When MOAC persisted, the bankruptcy court stated that Transform "would be judicially estopped" from arguing on appeal that Section 363(m) applied. *Ibid.* Because all parties, including Transform, agreed and confirmed that Section 363(m) could not be used to bar appellate review, the bankruptcy court found there was no irreparable harm necessitating a stay pending appeal, and denied the requested stay. BIO App. 7a-9a.

The court directed Transform's counsel to prepare an order, which should "refer to * * * the representations made on the record in the hearing." BIO App. 12a. The order stated that, in light of "representations made at the hearing," MOAC had not carried its burden to obtain a stay. BIO App. 15a.[1]

[1] Transform has not sublet the premises. Although Transform entered into a tentative agreement with a sublessee, that agreement had a litigation contingency concerning MOAC's appeal. See Bankr. Ct. Doc. 10194, at 8.

4. The District Court Ruling on the Merits

The critical issue on appeal was whether the proposed lease assignment to Transform satisfied the strict prerequisite in Section 365(b)(3) that Transform provide MOAC with "adequate assurance of future performance." To satisfy the "adequate assurance of future performance" requirement, Transform needed to demonstrate, among other things, that the financial condition and operating performance of Transform was similar to the financial condition and operating performance of Sears as of the time Sears became the lessee under the lease. 11 U.S.C. 365(b)(3)(A).

Section 365(b)(3) was added to the Bankruptcy Code for the benefit of shopping center landlords and other tenants as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984. Pub. L. No. 98-353, 98 Stat. 333 (1984). The protections under that provision were intended to "remedy serious problems caused shopping centers and their solvent tenants by the administration of the bankruptcy code" and, in the event a bankrupt shopping center lessee proposed to assign its lease, "insure that the assignee itself will not soon go into bankruptcy and will provide operating and advertising benefits to the other tenants similar to those provided by the original tenant when its lease was executed." H.R. Conf. Rep. 882, 98th Cong., 2d Sess. 598-600 (1984).

On appeal, following full briefing on the merits, the district court vacated the Assignment Order, ruling that the proposed assignment of the MOAC Lease to Transform violated Section 365. The district court stated that Transform, a newly formed entity that never intended to occupy or operate a retail establishment

at the Mall of America premises, was not similar to the "'financial condition and operating performance' of Sears" at the time of the lease "under any standard of similarity." Pet. App. 89a-100a. Thus, the district court found that the bankruptcy court, in approving the lease assignment, "read § 365(b)(3)(A) out of the statute, effectively rewriting it and overriding the express wishes of the legislature." *Id.* at 95a. In this case, "the congressionally-mandated requirement [of adequate assurance of future performance] was not satisfied." *Id.* at 97a.

In reversing the Assignment Order, the district court did not vacate, reverse, or disturb the Sale Order or the asset sale, which had been fully consummated more than a year prior, any more than a denial of the assignment by the bankruptcy court would have done in the first place. The purchase agreement specifically contemplated that possibility, providing that Sears "shall not be obligated to assume and assign any Lease" with respect to which Transform "fails to satisfy the Bankruptcy Court as to adequate assurance of future performance." J.A. 264.

5. The District Court Decision on Rehearing

After losing on the merits in the district court appeal, Transform reversed course and reneged on its promise to the bankruptcy court not to invoke Section 363(m). Transform filed a motion for rehearing with the district court, arguing for the first time that Section 363(m) applied to the Assignment Order and that it deprived the district court of jurisdiction over the appeal.

After briefing, the district court vacated its initial order and dismissed the appeal. The district court recognized that Transform's argument would typically be

precluded by waiver and estoppel because Transform disavowed any reliance on Section 363(m), and "flatly stated to the bankruptcy judge that § 363(m) had no applicability to the assignment of the Mall of America Lease to [Transform], *and that Transform did not intend to argue otherwise*, in order to induce him to deny MOAC's motion for a stay." Pet. App. 14a. The district court also recognized that the bankruptcy court "plainly relied on Transform's representation that § 363(m) would not moot the appeal in the absence of a stay." *Id.* at 22a-23a.

While stating that it was "appalled by Transform's behavior," the district court ruled, "with deep regret," that, based on Second Circuit precedent, Section 363(m) applied to the Assignment Order and that it is a jurisdictional statute depriving the district court of jurisdiction over the appeal. Pet. App. 28a, 48a. Specifically, the district court stated that:

> The Second Circuit has quite clearly interpreted § 363(m) as a jurisdiction-depriving statute—that is, a statute that removes the appellate court's power to decide any issue except the issue of bad faith. I sit as a district court in the Second Circuit, so I am constrained by the words used by my Court of Appeals to describe my power.

Id. at 31a.

Based on its ruling that Section 363(m) was jurisdictional, the district court determined that the Section 363(m) argument could not be waived by Transform and was not subject to judicial estoppel, despite the fact that "[a]ll the conditions for application of judicial es-

toppel would seem to be met here." Pet. App. 32a. The district court dismissed petitioner's appeal. *Id.* at 48a.

6. The Second Circuit Appeal

MOAC appealed, and the court of appeals affirmed. The court of appeals first rejected MOAC's argument that Section 363(m) did not apply to the Assignment Order because the lease assignment was not a sale under Section 363. The court noted that it has previously found Section 363(m)'s protections can extend to orders that are not made pursuant to Subsections (b) or (c) of Section 363, as referenced in Section 363(m), if the order is nonetheless "integral" to a Section 363 sale. Pet. App. 5a-6a. Specifically, the court found that Section 363(m) "also limits appellate review of any transaction that is integral to a sale authorized under § 363(b)—for example, where removing the transaction from the sale would prevent the sale from occurring or otherwise affect its validity." *Ibid.* The court found the Assignment Order to be "integral" to the sale based on stock language in the Sale Order that "[t]he assumption and assignment of the Assigned Agreements [defined to include 'Designatable Leases' like the MOAC Lease] are integral to the Asset Purchase Agreement" and nearly identical language in the Assignment Order. *Id.* at 6a-7a.

In so ruling, the court did not independently examine the substance of the respective sale and lease assignment transactions to determine their level of interrelatedness or whether reversing the lease assignment "would prevent the sale from occurring." Nor did the court explain how a reversal of the lease assignment order could otherwise affect the validity of an already-consummated sale, where (i) the Sale Order expressly

contemplated that the bankruptcy court could deny a proposed assignment, and (ii) the sale price was not dependent on whether the court approved a subsequent request to assign a lease. The court of appeals acknowledged that the purchase agreement contemplated that the MOAC Lease (or any other lease) would not be assigned if the bankruptcy court determined that the Section 365 prerequisites were not met. Pet. App. 7a. The court of appeals did not explain why such a determination by the appellate court would "negate the parties' [sale] agreement" if such a determination by the bankruptcy court would not have done so, but simply stated that it would. *Ibid.*

The court of appeals then addressed whether Section 363(m) is jurisdictional and thus not subject to waiver or judicial estoppel. Relying on *Contrarian Funds LLC* v. *Aretex LLC (In re WestPoint Stevens, Inc.)*, 600 F.3d 231 (2d Cir. 2010), and *Licensing by Paolo, Inc.* v. *Sinatra (In re Gucci)*, 105 F.3d 837 (2d Cir.), denying cert. to 193 B.R. 411 (S.D.N.Y. 1996), aff'd, 126 F.3d 380 (2d. Cir. 1997), and a recent unpublished decision in *In re Pursuit Holdings (NY), LLC*, 845 F. App'x 60, 62 (2d Cir. 2021) (non-precedential), the court of appeals held that "§ 363 is jurisdictional because it 'creates a rule of statutory mootness'" and, therefore, "§ 363(m) deprived the District Court of appellate jurisdiction." Pet. App. 8a-9a.

The court of appeals noted that "binding precedent" within the Second Circuit read the provision to "bar[] appellate review of any sale authorized by 11 U.S.C. § 363(b) . . . so long as the sale was made to a good-faith purchaser and was not stayed pending appeal." Pet. App. 5a (quoting *WestPoint Stevens*, 600 F.3d at 247). The court further held that, as a jurisdic-

tional limit, Section 363(m) was not subject to waiver or estoppel. *Id.* at 9a.

Noting the circuit conflict regarding whether Section 363(m) is jurisdictional, petitioner moved to stay the mandate in order to maintain the status quo for purposes of seeking review in this Court. The court of appeals granted the stay on January 24, 2022, pending the conclusion of proceedings before this Court. Pet. App. 126a.

SUMMARY OF ARGUMENT

This case presents the question whether 11 U.S.C. 363(m) is a jurisdiction-depriving statute that precludes appellate review of all unstayed sale orders in bankruptcy, such that it is not subject to waiver, estoppel or forfeiture. It also presents the question whether that bar, even if jurisdictional, extends to orders subsequent to the sale when the subsequent order can affect neither the sale nor its consideration, and where the sale agreement contemplated the later relief might be judicially denied. Each of those questions should be answered in the negative.

I. Under this Court's precedents, a statute is not to be considered jurisdictional unless Congress clearly says otherwise. Section 363(m) contains no such clear statement. Rather, the plain text of the statute, the statutory scheme governing bankruptcy and bankruptcy appeals, and relevant legislative history all demonstrate that Section 363(m) is not jurisdictional.

The text of Section 363(m) does not use the word "jurisdiction," does not (with the exception of one type of relief) deprive appellate courts of their ability to issue rulings on appeal of a matter under Section 363(b) or (c), and includes no express or implied limit on the

broad jurisdictional grant given to district and circuit courts over bankruptcy appeals under 28 U.S.C. 158. To the contrary, the text expressly contemplates the district and circuit courts exercising jurisdiction over an appeal, and specifically presumes that the appellate court may order "reversal or modification on appeal of any authorization * * * of a sale." The statute further provides that such reversal or modification "does not affect the validity of a sale" unless the sale order is stayed, but, again, that language presupposes that the appellate court may order relief that does not have that effect.

Interpreting Section 363(m) as jurisdictional would functionally eliminate the entire introductory language of the section, which expressly contemplates "[t]he reversal or modification on appeal of any authorization under subsection (b) or (c) of this section of a sale or lease of property." 11 U.S.C. 363(m). Congress would have no reason to address a potential ruling on appeal, and then place a limit on the effects of that ruling, if it had intended for appellate courts to lack the power or authority to hear the appeal and issue a ruling in the first place. The only natural reading of Section 363(m) is that it is a remedy-limiting statute. Under settled law, a statutory limitation on a remedy or its effect is not jurisdictional. And even if some remedy-stripping provisions might be deemed "jurisdictional," there is no clear statement in Section 363(m) that it has that effect.

As a nonjurisdictional statute, any defenses and arguments Transform might have had based on Section 363(m) were subject to waiver, estoppel and forfeiture. Transform did each here—first, by affirmatively repudiating any Section 363(m) argument on the record in bankruptcy court in order to defeat MOAC's stay re-

quest, and second, by failing to raise any Section 363(m) argument in the appeal until after the district court ruled on the merits in MOAC's favor. The court of appeals did not reach these issues though, finding such arguments "foreclosed" by Second Circuit precedent construing Section 363(m) as jurisdictional and, thus, not subject to waiver, estoppel or forfeiture.

One of the reasons that *Arbaugh* adopted its clear-statement rule was precisely because of the high costs to the judicial system of labeling a limitation jurisdictional, including the potential for gamesmanship. That concern is especially evident here. Section 363(m) *only* applies where the order under review was not stayed. The bankruptcy court denied MOAC's stay motion precisely because Transform promised it would not raise Section 363(m) as a defense. Here, therefore, the purported jurisdictional bar is not of Congress's making, but of Transform's making through its duplicity. A statute that was intended by Congress to prevent prejudice to good faith purchasers should not be turned into a sword that Transform can use to inflict an inequitable result.

II. Even if Section 363(m) affects the appellate courts' jurisdiction in *some* respect, it would not preclude the courts from granting relief to MOAC here. By its terms, Section 363(m) only limits the appellate courts' ability to affect the validity of an asset sale under Section 363(b) or (c). As this Court recently recognized in *Biden* v. *Texas*, even if a statute precludes a court from awarding a particular remedy, that limitation does not deprive the court of jurisdiction altogether and does not preclude other forms of relief. The Assignment Order involved a lease assignment under Bankruptcy Code Section 365, not an asset sale under

Section 363(b) or (c). The asset sale to Transform was fully consummated months prior, and reversing the Assignment Order would still leave the sale transaction entirely intact and unaffected. Indeed, the Sale Order contemplated that lease assignments might be denied by the bankruptcy court in the first place.

Reversal of the assignment would, as a technical matter, come in an order directing the bankruptcy court to enter a new order denying the lease assignment. As noted, the asset purchase agreement expressly contemplated such an order, so entry of that order (at the direction of an appellate court) could not "affect the validity of the sale."

The court of appeals' contrary ruling simply accepted the stock language drafted by Sears and Transform that the assignment was "integral," thus allowing the respondents to deprive petitioner of its right to appellate review. Nothing in Section 363(m) suggests Congress intended to give the debtor and purchaser the unilateral authority to deprive other parties of their appellate rights. The Court should correct the court of appeals' error and reverse the judgment below.

ARGUMENT

I. SECTION 363(m) OF THE BANKRUPTCY CODE IS NOT JURISDICTIONAL AND WAS THUS SUBJECT TO TRANSFORM'S WAIVER, ESTOPPEL AND FORFEITURE

A. Only a Clear Statement From Congress Can Make a Statutory Requirement or Limitation Jurisdictional

Congress alone has the power to establish and fix the bounds of a federal court's jurisdiction. U.S. Const. Art. III, § 1; *Kontrick* v. *Ryan*, 540 U.S. 443, 452 (2004) ("Only Congress may determine" a federal court's jurisdiction.). Federal courts, in turn, have a "virtually unflagging obligation * * * to exercise the jurisdiction given them [by Congress]." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976); see also *Sprint Commc'ns., Inc.* v. *Jacobs*, 571 U.S. 69, 72 (2013) ("[C]ourts are obliged to decide cases within the scope of federal jurisdiction" assigned to them.); *Cohens* v. *Virginia*, 19 U.S. 264, 404 (1821) (Federal courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

"Jurisdiction" refers to "a court's adjudicatory authority." *Kontrick*, 540 U.S. at 455. True jurisdictional statutes thus "speak to the power of the court" and the types of cases and persons enveloped within a court's adjudicatory authority. *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 160-161 (2010). As this Court has observed, however, lower courts are often imprecise with their use of the term "jurisdictional," and frequently mislabel statutes as jurisdictional based on "unrefined" analyses. See *id.* at 161; *Arbaugh* v. *Y & H*

Corp., 546 U.S. 500, 511 (2006); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (cautioning that jurisdiction "is a word of many, too many, meanings") (citation omitted).

Over the past two decades, this Court has taken aim "to ward off profligate use of the term 'jurisdiction.'" *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013); *Reed Elsevier*, 559 U.S. at 161 ("[W]e have encouraged federal courts and litigants to 'facilitat[e]' clarity by using the term 'jurisdictional' only when it is apposite.") (quoting *Kontrick*, 540 U.S. at 455.). In 2006, this Court devised a "readily administrable bright line" test for courts to administer in determining whether a particular statutory requirement or limitation is truly jurisdictional:

> If the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue * * * . But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Arbaugh, 546 U.S. at 515-516 (emphasis added); *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 420 (2015) (Congress can make a statute jurisdictional, but that "requires [a] plain statement.").

A provision is not jurisdictional if its language "provides no clear indication that Congress wanted that provision to be treated as having jurisdictional attributes." *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 439 (2011). If Congress has not spoken clearly, courts must presume that a limitation is not "given

the jurisdictional brand." *Id.* at 435; *Auburn Reg'l*, 568 U.S. at 153 ("[A]bsent such a clear statement, we have cautioned, 'courts should treat the restriction as nonjurisdictional in character.' ") (quoting *Arbaugh*, 546 U.S. at 516).

Requiring Congress to clearly state that a statute is jurisdictional makes sense given the severe consequences that attach to jurisdictional statutes. Misbranding a rule as jurisdictional "alters the normal operation of our adversarial system." *Henderson*, 562 U.S. at 434. Our justice system ordinarily "relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication." *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 356 (2006).

Failure to raise an issue for adjudication at the proper time generally results in waiver or forfeiture. *Sanchez-Llamas*, 548 U.S. at 356-357. "[O]ur legal system is replete with [waiver and forfeiture] rules" that promote "efficiency and fairness" to litigants and the courts by "requiring that certain matters be raised at particular times." *Henderson*, 562 U.S. at 434; see *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 487 n.6 (2008) ("[W]aiver and forfeiture rules * * * ensure that parties can determine when an issue is out of the case, and that litigation remains, to the extent possible, an orderly progression.").

Statutory requirements or limitations that are jurisdictional, however, upend the operation of these rules. Jurisdiction cannot be waived or forfeited by parties, and may therefore be raised "at any time," including months or years into litigation. *Henderson*, 562 U.S. at 434. Indeed, "[j]urisdictional requirements * * *

must be raised by courts *sua sponte*." *Boechler, P.C.* v. *Commissioner*, 142 S. Ct. 1493, 1497 (2022).

Parties can engage in "sandbagging," *i.e.*, "remaining silent about [an] objection and belatedly raising the error only if the case does not conclude in [their] favor." *Puckett* v. *United States*, 556 U.S. 129, 134 (2009); *Henderson*, 562 U.S. at 434-435 ("[A] party, after losing at trial, may move to dismiss the case because the trial court lacked subject-matter jurisdiction."). Jurisdictional issues may be raised even after a party expressly disclaims reliance on an argument before a lower court and purports to affirmatively waive the argument to induce a favorable ruling.

Such gamesmanship is unfair to litigants and can tax judicial resources by requiring courts to expend time and energy on the merits of a case, only to have to consider and act on belated arguments raised by a party months or years into the dispute—and even after the court issues a ruling on the merits—that the court lacked jurisdiction from the outset to even consider the case or proceeding. Misapplication of the jurisdictional label can therefore result in the courtroom door being slammed shut on a party's otherwise meritorious case, leading to "unfairness and waste of judicial resources." *Arbaugh*, 546 U.S. at 502); see *Henderson*, 562 U.S. at 434 (calling a requirement jurisdictional "is not merely semantic but [a question] of considerable practical importance for judges and litigants").

The case at hand exemplifies the "drastic" consequences "that attach to the jurisdictional label." *Henderson*, 562 U.S. at 435. Indeed, the purported Section 363(m) jurisdictional bar in this case was the result of Transform's own conduct. By its terms, Section 363(m)

does not apply if the applicable order is "stayed pending appeal." 11 U.S.C. 363(m). Here, the appealed order was not stayed because Transform affirmatively disavowed any Section 363(m) argument, telling the bankruptcy court at oral argument that the section was inapplicable to MOAC's appeal of the Assignment Order and that Transform would not raise any Section 363(m) argument on appeal. BIO App. 5a-7a. The bankruptcy court expressly relied on Transform's representation that it "couldn't rely on [Section] 363(m)" in denying MOAC's stay request, noting that without any threat of Section 363(m) barring the appeal, MOAC had no irreparable harm. BIO App. 5a, 8a.

Transform not only waived any reliance on Section 363(m) before the bankruptcy court, it also forfeited that argument by not raising it in a timely fashion before the district court. Transform and MOAC fully briefed the Assignment Order appeal on the merits in district court without Transform ever mentioning a Section 363(m) argument. Only after the district court ruled in MOAC's favor on the merits did Transform change its tune. It then contended, for the first time, that the district court lacked appellate jurisdiction under Section 363(m) because, due to Transform's own representations, the bankruptcy court had denied MOAC's request for a stay.

The prejudice to MOAC and to the district court is clear. The district court sharply criticized Transform's tactics in its ruling on rehearing, lamenting that "[t]he parties filed lengthy briefs discussing the complicated issue raised by the appeal; they held an oral argument at which the court questioned them closely on contested points of law [and] [i]t took several weeks of concentrated work to write the forty-three page decision dis-

posing of the appeal." Pet. App. 13a. Yet, "[a]t no point in this entire process" did Transform ever suggest that the district court lacked jurisdiction. *Ibid.*

More fundamentally, by declaring Section 363(m) jurisdictional, the district and circuit courts deprived MOAC of its right to appeal and its statutory rights under Section 365. In Section 365, Congress protected shopping mall owners from having retail leases assigned in bankruptcy to parties that are not able to fulfill the original tenant's role, to the detriment of the mall owner and other tenants. See H.R. Conf. Rep. 882, 98th Cong., 2d Sess. 598-600 (1984). Congress has also provided, by statute, that a party aggrieved by a bankruptcy court's ruling, including in applying Section 365, can seek appellate review. See 28 U.S.C. 158. By declaring Section 363(m) jurisdictional, the court of appeals denied MOAC of both its substantive and appellate rights, in contravention of the courts' "virtually unflagging obligation * * * to exercise the jurisdiction given them [by Congress]." *Colorado River Water Conservation Dist.*, 424 U.S. at 817. For precisely this reason, *Arbaugh's* clear-statement rule was established to ensure that any limitation on that authority is adopted by Congress, not the courts. See *Arbaugh*, 546 U.S. at 515-516 (the clear-statement test is meant to "leave the ball in Congress' court" to ward off overuse of the jurisdictional label); *Henderson*, 562 U.S. at 436 (the clear-statement test is "suited to capture Congress' likely intent").

B. Congress Has Not Clearly Stated That Section 363(m) is Jurisdictional

1. The Statutory Text Demonstrates That Section 363(m) is Not Jurisdictional

Section 363(m) does not satisfy *Arbaugh's* clear statement rule. 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.

11 U.S.C. 363(m).

At the outset, Section 363(m) does not use the word "jurisdiction" and "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982). Conspicuously absent from the text of Section 363(m) is any language restraining an appellate court's ability to hear an appeal of an order authorizing relief under Section 363(b) or (c). Instead, the language in Section 363(m) expressly recognizes appellate jurisdiction over such orders and contemplates appellate courts exercising jurisdiction to reverse or modify the bankruptcy court order.

To simplify, Section 363(m) can be broken down into three parts. Part one describes a potential ruling an appellate court may issue in a pending appeal involving an authorization under Section 363(b) or (c)—the appel-

late court may order a "reversal or modification on appeal" of such an authorization. Part two then limits one potential impact of a reversal or modification—such a ruling on appeal will not "affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith," regardless of whether the purchaser knew of the pending appeal. No other potential impact is mentioned or restricted. Finally, part three creates an exception to the foregoing limitation—a reversal or modification on appeal may affect the sale's validity if "such authorization and such sale or lease were stayed pending appeal."

Nothing about the foregoing language suggests that Congress intended Section 363(m) to deprive appellate courts of jurisdiction. Instead, in the single sentence comprising Section 363(m), Congress *twice* refers to an appellate court's *exercise* of jurisdiction to hear and rule on appeals of Section 363(b) or (c) authorizations, even if unstayed. The statute first speaks to the effect on a sale in the event there is a "reversal or modification on appeal of an authorization under [Section 363(b) or (c)] of a sale or lease of property," which presupposes jurisdiction over such an appeal. Second, the statute references whether an asset purchaser "knew of the pendency of the appeal," which again presupposes an appeal is pending. This language would be incongruous if Congress had intended Section 363(m) to preclude appellate courts from ever having jurisdiction in the first place to hear the appeal. By interpreting Section 363(m) as a jurisdictional bar to appellate review, the Second Circuit effectively rewrote the statutory text and ignored its actual language. See *Dodd* v. *United States*, 545 U.S. 353, 359 (2005) (courts "are not free to rewrite the statute that Congress has enacted");

Williams v. *Taylor*, 529 U.S. 362, 404 (2000) (courts must "give effect, if possible, to every clause and word of [the] statute.") (citation omitted); Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* § 26 (2012) ("If possible, every word and every provision is to be given effect[.] * * * None should be ignored.").

As discussed *supra*, the only textual limitation in Section 363(m) goes to the *effect* a district or circuit court's "reversal or modification on appeal" may have: such an order "does not affect the validity of a sale or lease" if the purchaser bought or leased the property from the debtor in good faith. 11 U.S.C. 363(m). That is a remedial limitation, however, which does not affect the court's jurisdiction. As this Court has observed, "[t]he nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy." *Avco Corp.* v. *Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557, 561 (1968). "A court does not lose jurisdiction over a claim merely because it lacks authority" to provide a particular form of relief. *Plains Com. Bank* v. *Long Fam. Land & Cattle Co.*, 554 U.S. 316, 352 (2008); *Steel Co.*, 523 U.S. at 90 (statute "merely specifying the remedial *powers* of the court" is not jurisdictional). "*[J]urisdiction* is a question of whether a federal court has the power * * * to hear a case"; "*relief* is a question of the various remedies a federal court may make available." *Davis* v. *Passman*, 442 U.S. 228, 239, n.18 (1979).

This Court most recently recognized the distinction in *Biden* v. *Texas*, finding that a statutory limitation on remedies does not deprive an appellate court of juris-

diction over an appeal. See 142 S. Ct. 2528, 2539 (2022) ("Section 1252(f)(1) deprives courts of the power to issue a specific category of remedies: those that 'enjoin or restrain the operation of' the relevant sections of the statute. A limitation on subject matter jurisdiction, by contrast, restricts a court's 'power to adjudicate a case.' ") (citation omitted); see also *Sioux Honey Ass'n* v. *Hartford Fire Ins.*, 672 F.3d 1041, 1052 (Fed. Cir. 2012) ("[A] court's power to grant relief is not synonymous with its ability to exercise jurisdiction, as these two concepts are separate and distinct. Power does not necessarily envelop the concept of jurisdiction."). If the court determines that Congress has barred the requested relief, a ruling to that effect is the *exercise* of jurisdiction, not its absence. See *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) (the question of whether the relief sought is statutorily available is not jurisdictional; rather, federal courts should "exercise federal jurisdiction for purposes of adjudicating" that issue); see also *Avco Corp.*, 390 U.S. at 561 (statutory limitation on relief is not jurisdictional as "the breadth or narrowness of the relief which may be granted * * * is a distinct question from whether the court has jurisdiction").

By the express terms of Section 363(m), a district court is free to fashion any relief not invalidating a Section 363 asset sale. The bankruptcy court observed that the lease assignment was "a 365 order" and "not a 363[]" sale order, BIO App. 7a, and the Second Circuit did not find otherwise. The district court's initial ruling on the merits—in which it reversed the Assignment Order—did not disturb any aspect of the Sale Order or the already-consummated Section 363 asset sale. The sale would remain valid in the event of a reversal on appeal to the same extent it would have remained valid

had the bankruptcy court correctly denied the assignment in the first place, as the purchase agreement expressly contemplated. See J.A. 264. As discussed further below, see Argument II, *infra*, simply reversing the Assignment Order is thus permissible under the plain language of the statute.

Eschewing the *Arbaugh* test and the plain reading of Section 363(m), the court of appeals instead blindly followed pre-*Arbaugh* precedent within the Second Circuit, finding the question whether Section 363(m) is jurisdictional "foreclosed by our binding precedent in *In re WestPoint Stevens, Inc.*, under which § 363(m) deprived the District Court of appellate jurisdiction." Pet. App. 8a (citing *Contrarian Funds LLC* v. *Aretex LLC (In re WestPoint Stevens, Inc.)*, 600 F.3d 231 (2d Cir. 2010)).

The court of appeals in *WestPoint Stevens*, however, never refers to *Arbaugh* or the clear-statement test it established. Instead, the court in *WestPoint Stevens* based its ruling on a prior Second Circuit decision in *Licensing by Paolo, Inc.* v. *Sinatra (In re Gucci)*, 105 F.3d 837 (2d Cir.), denying cert. to 193 B.R. 411 (S.D.N.Y. 1996), aff'd, 126 F.3d 380 (2d. Cir. 1997), that predated *Arbaugh* by nine years. *WestPoint Stevens*, 600 F.3d at 248 ("We adhere to our holding in *Gucci I* that, under section 363(m), we lack jurisdiction to review the entire Sale Order—not just the actual sale transaction."). *Gucci*, in turn, never applied a clear-statement test, and even acknowledged that Section 363(m) could "be read to imply that an appeal from an unstayed order may proceed for purposes other than affecting validity of the sale." 105 F.3d at 839. Notwithstanding this admission, the court in *Gucci* deferred to other circuits' (pre-*Arbaugh)* decisions finding

that Section 363(m) was jurisdictional. *Id.* at 839-840 (citing *Ewell* v. *Diebert (In re Ewell)*, 958 F.2d 276, 280 (9th Cir. 1992); *AnheuserBusch, Inc.* v. *Miller (In re Stadium Mgmt. Corp.)*, 895 F.2d 845, 847 (1st Cir. 1990); and *Cargill, Inc.* v. *Charter Int'l Oil Co. (In re Charter Co.)*, 829 F.2d 1054, 1056 (11th Cir. 1987)).

In the wake of *Arbaugh*, several other circuit courts overturned prior decisions that improperly labeled statutes, including Section 363(m), as jurisdictional. See *Trinity 83 Dev., LLC* v. *ColFin Midwest Funding, LLC*, 917 F.3d 599, 603 (7th Cir. 2019) ("*River West* is overruled [and] [a]ny other decision in this circuit that treats § 363(m) as making a controversy moot, rather than giving the purchaser or lessee a defense to a request to upset the sale or lease, is disapproved."); see also *United States* v. *Marshall*, 954 F.3d 823, 828 (6th Cir. 2020) (Many "pre-*Arbaugh* references to 'jurisdiction' * * * look just like many other 'drive-by jurisdictional' rulings that the Court has warned us not to follow. Consistent with that warning, we have lots of cases in which we recharacterized earlier decisions based on the *Arbaugh* line of cases.") (citation omitted); *Winnett* v. *Caterpillar, Inc.*, 553 F.3d 1000, 1005 (6th Cir. 2009) (listing past decisions interpreting the jurisdictional nature of a statute and holding that they "do not survive *Arbaugh's* effort to bring clarity to this area").

The Second Circuit declined to do the same, instead clinging to pre-*Arbaugh*, circuit-level decisions to justify its interpretation of Section 363(m). The Second Circuit's ruling is indefensible in light of the Section 363(m)'s plain language and the clear-statement test mandated by *Arbaugh*.

2. The Statutory Scheme Governing Bankruptcy Appeals Supports That Section 363(m) is Not Jurisdictional

The statutory scheme governing substantive bankruptcy law and bankruptcy appeals further supports the conclusion that Section 363(m) is not jurisdictional. Similar to the statutes at issue in *Reed Elsevier* and *Arbaugh*, which this Court found to be nonjurisdictional, Section 363(m) "is located in a provision 'separate' " from the relevant statutory provisions fixing the bounds of the district and circuit courts' jurisdiction. *Reed Elsevier*, 559 U.S. at 164; *Arbaugh*, 546 U.S. at 514-515 (the relevant statutory threshold limitation at issue "appears in a separate provision [from the jurisdictional portion of Title VII] that 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts' ") (quoting *Zipes*, 455 U.S. at 394). Treating Section 363(m) as jurisdictional "would thus disregard the structural divide built into the statute[s]." *Kwai Fun Wong*, 575 U.S. at 412.

Section 363(m) is contained in Title 11 of the U.S. Code, which governs substantive bankruptcy law. See S. Rep. 989, 95th Cong., 2d Sess. 1 (Senate Report) (1978) (Title 11 "will embody the substantive law of bankruptcy."). Congress established the appellate jurisdiction of district and circuit courts over bankruptcy matters in an entirely separate title of the U.S. Code when it enacted 28 U.S.C. 157 and 158 as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984.

Section 157(b) of Title 28 establishes the basic principle that orders entered by an Article I bankruptcy judge are subject to review by Article III district and

circuit courts on appeal. Specifically, 28 U.S.C. 157(b) provides that:

> Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, *subject to review under section 158 of this title*.

28 U.S.C. 157(b) (emphasis added).

Congress thus built a presumption of appellate review by Article III courts into the statutory scheme governing bankruptcy cases, which is reinforced by 28 U.S.C. 158's especially broad grant to district and circuit courts of jurisdiction to decide appeals of bankruptcy court orders.

Section 158(a)(1) provides that district courts "shall have jurisdiction" over all appeals "from final judgments, orders, and decrees * * * of bankruptcy judges entered in cases and proceedings" under the Bankruptcy Code. 28 U.S.C. 158(a). Subsections (a)(2) and (3) further expand the district courts' appellate jurisdiction to include (i) chapter 11 exclusivity orders, which are interlocutory but still within district courts' appellate jurisdiction without the need for leave to appeal, and (ii) other interlocutory orders if the courts grant leave to appeal. 28 U.S.C. 158(a)(2) (district courts "shall have jurisdiction to hear appeals * * * from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title"); 28 U.S.C. 158(a)(3) (district courts "shall have jurisdiction to hear appeals * * * with leave of the court, from other inter-

locutory orders and decrees"). Finally, Section 158(d) provides that courts of appeals "shall have jurisdiction" over appeals "from all final decisions, judgments, orders, and decrees * * * of bankruptcy judges entered in cases and proceedings entered under subsections (a) and (b) of [28 U.S.C. 158]" by district courts or bankruptcy appellate panels. 28 U.S.C. 158(d).

Notably absent from Section 158(a) is any exception to the district and circuit courts' appellate jurisdiction for appeals relating to sales under 11 U.S.C. 363 or lease assignments under 11 U.S.C. 365. This is in contrast to other provisions in Title 28, which expressly limit appellate jurisdiction over certain orders. This omission should be presumed to be intentional, as Congress knows how to create specific exceptions to appellate courts' jurisdiction when it wants. See *Department of Homeland Sec.* v. *MacLean*, 574 U.S. 383, 391 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.") (citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

Subsection (d) of 28 U.S.C. 1447, for instance, which addresses orders remanding cases removed to federal courts back to state courts, provides that "[a]n order remanding a case to the State court from which it was removed *is not reviewable on appeal* or otherwise." 28 U.S.C. 1447(d) (emphasis added). Similarly, subsection (b) of 28 U.S.C. 1452, which addresses the removal to bankruptcy court of claims and causes of action pending in other courts and the remand of claims on equitable grounds, states that "[a]n order entered under this subsection remanding a claim or cause of action, or a decision to not remand, *is not reviewable by appeal* or otherwise by the court of appeals under section 158(d),

1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title." 28 U.S.C. 1452(b) (emphasis added); see also 28 U.S.C. 1334(d) ("Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) *is not reviewable by appeal* or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title") (emphasis added); 28 U.S.C. 1441(e)(4) ("Any decision under this subsection concerning remand for the determination of damages *shall not be reviewable by appeal* or otherwise.") (emphasis added).

That Congress would speak so unambiguously in these other statutes when establishing jurisdictional limits over appeals in specific bankruptcy matters underscores that there is no clear statement making Section 363(m) jurisdictional. Congress could have easily said in Section 363(m)—as it did in the provisions referenced above when it truly intended to create a jurisdictional limitation—that an authorization under Section 363(b) or (c) "is not reviewable on appeal" or that district and circuit courts "are without jurisdiction" to review an authorization under Section 363(b) or (c). But Congress did not. See *Henderson*, 562 U.S. at 438-439 (noting that if Congress had wanted a provision "to be treated as jurisdictional, it could have cast that provision" in language like other statutes that "clearly signal[] an intent" to impose jurisdictional restrictions). Instead, it crafted a carefully worded provision reinforcing an appellate court's jurisdiction to hear, and issue a ruling in, an appeal of a Section 363(b) or (c) authorization ("[t]he reversal or modification on appeal of

an authorization under subsection (b) or (c) of this section") while limiting one discrete impact of the relief the district or circuit court may order (a reversal or modification on appeal "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").

The statute must therefore be interpreted as written—Section 363(m) does not deprive the district or circuit courts of jurisdiction on appeal, and instead expressly contemplates such jurisdiction.

What is more, the statutory grant of jurisdiction in 28 U.S.C. 158 is mandatory—Congress purposely used the phrase "shall have jurisdiction" in Section 158(a) and (d). Federal courts, in turn, cannot then simply renounce their jurisdiction to hear a case, as courts have a "virtually unflagging obligation * * * to exercise the jurisdiction given them [by Congress]." *Colorado River Water Conservation Dist.*, 424 U.S. at 817. The district court and circuit court thus possessed, and were required to exercise, jurisdiction over the Assignment Order appeal.

3. Legislative History Reinforces the Conclusion That Congress Did Not "Clearly" Intend Section 363(m) to be Jurisdictional

The legislative history behind Section 363(m) also reinforces that it is not a jurisdiction-depriving provision. The relevant Senate and House reports provide that:

> Subsection (l) [enacted as (m)] protects good faith purchasers of property sold under this section from a reversal on appeal of the sale authorization, unless the authorization for the sale and the sale itself were stayed pending appeal. The

> purchaser's knowledge of the appeal is irrelevant to the issue of good faith.

Senate Report 57; H.R. Rep. 595, 95th Cong., 1st Sess. 346 (1978).

Congress therefore intended to protect good faith purchasers from a single effect of any remedy that a district or circuit court may order on appeal. If an appellate court reverses or modifies a bankruptcy court order authorizing a Section 363 sale—which is permissible under the statute's plain text—the underlying sale transaction will not be invalidated if the sale order was not stayed and if the buyer is a "good faith" purchaser. No other remedial effect is proscribed. The legislative history behind Section 363(m) is simply devoid of any clear statement that it was meant to be treated as jurisdictional. The legislative history reflects Congress's desire to protect good faith purchasers from prejudice. It did not suggest that a purchaser could defeat a stay by disavowing Section 363(m) and then use the absence of a stay to defeat appellate review.

Appealable issues routinely arise in connection with sale or related transactions for which there are available remedies on appeal that will not invalidate the sale itself. For example, available remedies can include determinations on the allocation of sale proceeds as between creditors or the estates of different debtors, the validity of liens on sale proceeds, the propriety of third-party releases that may be included in a sale order or related order, and (as here) the post-sale assignment of a contract or lease. See, *e.g.*, *Trinity 83 Dev., LLC* v. *ColFin Midwest Funding, LLC*, 917 F.3d 599, 603 (7th Cir. 2019); *Brown* v. *Ellmann (In re Brown)*, 851 F.3d 619, 623 (6th Cir. 2017). Section 363(m) simply does not

limit an appellate court's ability to award any of these remedies on appeal.

In short, there is no textual, contextual, or historical basis for finding a "clear indication that Congress wanted that provision to be treated as having jurisdictional attributes." *Henderson*, 562 U.S. at 439. Accordingly, this Court should treat Section 363(m) as nonjurisdictional. See *Auburn Reg'l*, 568 U.S. at 153 (absent a clear statement, "courts should treat the restriction as nonjurisdictional in character") (citation omitted); *Arbaugh*, 546 U.S. at 516 (same).

C. As a Nonjurisdictional Statute, Section 363(m) is Subject to Waiver, Forfeiture and Estoppel, and Transform Did Each, Rendering Section 363(m) Inapplicable

The court of appeals' misapplication of the jurisdictional analysis to Section 363(m) prevented it from ever reaching waiver, forfeiture and estoppel issues. Relying on its prior decisions in *Gucci* and *WestPoint Stevens*, the court of appeals determined that the remedial limitation in Section 363(m) "creates a rule of statutory mootness" that renders Section 363(m) jurisdictional. But the remedial limitation in that section is merely a defense that is subject to waiver and forfeiture. See *Trinity 83*, 917 F.3d at 602 (Section 363(m) may provide a defense, but "[a] defense, even an ironclad defense, does not defeat jurisdiction"). Indeed, "absent some affirmative indication of Congress' intent to preclude waiver," federal "statutory provisions are subject to waiver by voluntary agreement of the parties." *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995); see also *Holland* v. *Florida*, 560 U.S. 631, 645 (2010) (nonjurisdictional statutory defenses are "subject to waiver and

forfeiture"); *Day* v. *McDonough*, 547 U.S. 198, 213 (2006) (same); *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159 (1873) ("A party may waive any provision * * * of a statute[] intended for his benefit.").

As a non-jurisdictional remedial limitation, any rights and protections under Section 363(m) were subject to judicial estoppel and could be waived or forfeited by Transform—which it did here by: (i) affirmatively repudiating any potential rights under Section 363(m); (ii) inducing a favorable bankruptcy court ruling (denial of a stay) on that basis; and (iii) waiting until after full briefing and a ruling on the merits in district court before ever raising any argument that Section 363(m) applied.[2]

1. Transform unquestionably waived any rights and arguments under Section 363(m) through its affirmative representations in bankruptcy court. Transform confirmed on the record at the bankruptcy court hearing on MOAC's request for a stay that it (i) agreed with the bankruptcy court that Section 363(m) was inapplicable and (ii) would not attempt to argue otherwise on appeal.

At that hearing, the bankruptcy court stated: "I can't imagine 363(m) as far as the sale is concerned ap-

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[2] The terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are similar but not synonymous. "[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). Under these circumstances, both doctrines apply to preclude any Section 363(m) argument by Transform.

plying here" given that the underlying asset sale already closed and the Assignment Order involved a lease assignment under Section 365 of the Bankruptcy Code and not a sale under Section 363. BIO App. 5a. Transform's counsel agreed. *Ibid.* ("Correct, Your Honor."). The court then directly addressed Transform's counsel: "So you're not relying on—you wouldn't—you're not going to go to the district and say 363(m) applies here. This is over." *Ibid.* Transform's counsel agreed, conceding that "I think we couldn't rely on 363(m) for the purposes of arguing mootness." *Ibid.* When MOAC's counsel sought further assurance on the issue, the bankruptcy court responded that:

> This is not—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 [Transform's counsel] just reiterated for the second time.

BIO App. 7a.

After so clarifying, the bankruptcy court denied MOAC's motion for a stay due to the lack of irreparable harm, BIO App. 8a, and directed that Transform draft an order referencing the "representations" made on the record, which the order did, BIO App. 12a, 15a.

As the district court found, "counsel for Transform represented to the Bankruptcy Court that § 363(m) did not apply to MOAC's challenge to the Assignment Order" and the bankruptcy court "plainly relied" on Transform's disavowal of any Section 363(m) argument on appeal. Pet. App. 22a-23a, 32a. Transform thus waived any ability to rely on Section 363(m) on appeal. See *American Atheists, Inc.* v. *Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 233 n.3 (2d Cir. 2014) ("[C]ircumstances manifest waiver" when party disa-

vows, but later attempts to revive, argument); *D.A.N. Joint Venture* v. *Cacioli (In re Cacioli)*, 463 F.3d 229, 235 (2d Cir. 2006) (finding waiver based on statements at oral argument that party's appeal was focused on one particular issue, without reference to another issue that party subsequently raised).

2. Transform also forfeited any Section 363(m) argument by not raising the issue before the district court until after the district court issued its decision reversing the Assignment Order on the merits. See *Kontrick*, 540 U.S. at 458 (defendant forfeited argument "by failing to raise the issue until after [the] complaint was adjudicated on the merits"); *Eberhart* v. *United States*, 546 U.S. 12, 19 (2005) (where party "failed to raise a defense of untimeliness until after the District Court had reached the merits, it forfeited that defense").

3. The doctrine of judicial estoppel also applies to preclude Transform from reversing its position as to the applicability and impact of Section 363(m). Judicial estoppel applies if (i) a party's later position is "clearly inconsistent" with its earlier position, (ii) another court accepted that party's earlier position, and (iii) the party seeking to assert an inconsistent position would "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire* v. *Maine*, 532 U.S. 742, 750-751 (2001).

The district court observed that "[a]ll the conditions for application of judicial estoppel would seem to be met here." Pet. App. 32a. Indeed, (i) Transform expressly disavowed any Section 363(m) argument in order to defeat MOAC's stay motion, (ii) the bankruptcy court denied the stay specifically because Transform's

waiver meant there would be no irreparable harm to MOAC (as required for a stay), and (iii) Transform later made an about-face attempt to invoke the absence of a stay (which Transform had procured) to defeat appellate jurisdiction. That is a quintessential instance of "deriv[ing] an unfair advantage or impos[ing] an unfair detriment" through inconsistent positions. *New Hampshire*, 532 U.S. at 750-751.

The court of appeals declined to consider these arguments, however, because it believed such arguments were "foreclosed by our binding precedent * * * under which § 363(m) deprived the District Court of appellate jurisdiction." Pet. App. 8a. Properly labeling Section 363(m) as nonjurisdictional will remove the only roadblock that prevented the courts below from finding that Transform is estopped from relying on, and waived and forfeited any potential argument under, Section 363(m). Because Transform is precluded from relying on Section 363(m), that alone is a sufficient basis for vacating the court of appeals' decision. There is no need for this Court (or the courts on remand) to consider whether reversing the Assignment Order would otherwise implicate Section 363(m) if Transform were not barred from raising it due to waiver, forfeiture, and estoppel.

II. THE RELIEF REQUESTED ON APPEAL BY MOAC WAS NOT BARRED BY SECTION 363(M) EVEN IF THAT PROVISION APPLIED

Even if Section 363(m) were jurisdictional in some sense, and thus not subject to waiver, estoppel and forfeiture, it would not bar the relief sought by MOAC. Under the plain language of the statute, it applies only when granting relief would "affect the validity" of the

sale authorized under Section 363(b) or (c). That is not true here, because MOAC appeals only from an Assignment Order entered under Section 365, and the separate, earlier Sale Order was not in any way contingent on the assignment being approved.

The court of appeals erred first by expanding Section 363(m) beyond its text to include any order deemed "integral" to a Section 363 sale and, second, by holding that that test was satisfied by a rote recitation in the Sale Order and Assignment Order, while in substance the sale did not depend in any respect on the subsequent Assignment Order.

A. The Court of Appeals Expanded the Reach of Section 363(m) Beyond What the Statute Provides

Congress granted appellate jurisdiction to the district and circuit courts in 28 U.S.C. 157 and 158, and any limitation on that jurisdiction should be construed narrowly. In light of the presumption in favor of appellate review, this Court has noted "the basic principle that we 'read limitations on our jurisdiction to review narrowly.'" *Castro* v. *United States*, 540 U.S. 375, 381 (2003) (quoting *Utah* v. *Evans*, 536 U.S. 452, 463 (2002)). The court of appeals turned that principle of construction on its head, and instead read Section 363(m) far more broadly than its text requires.

Section 363(m) addresses only the reversal or modification of a bankruptcy court's "authorization under [Section 363(b) or (c)] of a sale or lease of property," which is not the case here. The Section 363(b) sale involving Sears' assets was approved and consummated approximately seven months before the Assignment Order was entered. Moreover, the purchase agreement

between Sears and Transform specifies that any lease assignment would occur separately "pursuant to section 365 of the Bankruptcy Code," without reference to Section 363(b) or (c). J.A. 263. And the Assignment Order specifically addresses the assumption and assignment of a shopping center lease, which is a procedure governed by Section 365(a) and (b). The bankruptcy court expressly noted that the Assignment Order was "a 365 order" and "not a 363[]" sale order, BIO App. 7a, thus raising a threshold question whether Section 363(m) is implicated at all.

The Court need not decide, however, whether Section 363(m) could ever apply to appellate review of an order not entered under Section 363(b) or (c) because, even if so, it would not apply in this case. Section 363(m) only prevents an appellate court from entering an order that "affect[s] the validity" of the Section 363 sale. While the court of appeals recited a general standard—that Section 363(m) may apply when "removing the transaction from the sale would prevent the sale from occurring or otherwise affect its validity," Pet. App. 5a—it in fact applied an atextual test of whether the later order was "integral" to the earlier Sale Order.

In assessing whether the Section 365 Assignment Order was subject to Section 363(m), the Second Circuit simply noted stock language in the Sale Order, which was prepared by Sears and Transform, said that the lease assignment was "integral." Specifically, the court of appeals observed that the Sale Order recited that "[t]he assumption and assignment of the Assigned Agreements [defined to include 'Designatable Leases' such as the MOAC Lease] are integral to the Asset Purchase Agreement" and that nearly identical lan-

guage appeared in the Assignment Order (which was also prepared by Sears and Transform). Pet. App. 6a. Rote recitation by the parties that the later order is "integral" to the earlier one does not suffice to establish that reversal of the Assignment Order would "affect the validity" of the separate Sale Order, as Section 363(m) requires. And while the bankruptcy court entered the order prepared by Sears and Transform that included the "integral" recitation, the bankruptcy court itself acknowledged that it "can't imagine 363(m)" applying given that the underlying asset sale already closed, and the lease assignment was "a 365 order" and "not a 363[]" sale order. BIO App. 5a, 7a.

The Second Circuit never proceeded to analyze independently whether, on the facts of this case, reversing the Assignment Order "would prevent the sale from occurring or otherwise affect [the sale's] validity." Pet. App. 5a. Its application of the "integral" test thus improperly delegated to one side of a dispute the authority to resolve a question of statutory application by simply saying the statute applies. A seller "cannot mask an improper condition of the transfer—avoiding appellate review—by cloaking it as an essential and inseparable part of a sale," when it is not in fact so as a matter of substance. *Clear Channel Outdoor, Inc.* v. *Knupfer (In re PW, LLC)*, 391 B.R. 25, 36-37 (B.A.P. 9th Cir. 2008). It is an appellate court's responsibility to determine that, as a matter of substance, the statutory standard is satisfied.

While the "integral" test may have a useful role, it cannot supplant the standard Congress adopted. The term "integral" is not used or defined in the Bankruptcy Code. To the extent that term has any relevance, it is as a shorthand for the statutory standard that the

requested relief (here reversal of a Section 365 assignment) must "affect the validity" of the Section 363 sale.

Other circuits, unlike the court of appeals in this case, have not applied an "integral" standard as an independent jurisdictional test, but instead use it, if at all, to help assess whether the statutory limitation of "affect[ing] the validity" of a sale is satisfied. For example, the Eighth Circuit analyzes whether the order or transaction "is so closely linked to the agreement governing the sale that modifying or reversing the provision would adversely alter the parties' bargained-for exchange." *Official Comm. of Unsecured Creditors* v. *Trism, Inc. (In re Trism, Inc.)*, 328 F.3d 1003, 1007 (2003). The First Circuit similarly found that a sublease of the stadium in Foxborough, Massachusetts to the New England Patriots was "integral" to the sale of the stadium because the sublease was "one of the most valuable elements of the sale" and "removing it from the sale would have adversely affected the terms of the sale" which "was expressly conditioned on" the assignment of the sublease. *Anheuser-Busch, Inc.*, 895 F.2d at 848-849.

Focusing on the statutory language (rather than an atextual "integral" test) leads the majority of circuits to independently analyze whether any relief can be granted without invalidating the sale. The Third Circuit, for example, has recognized that "the provision by its terms forbids only those appeals that '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 (2020). The court thus determined that "Section 363(m) thus poses no bar to our review" on appeal of due process issues relating to claim procedures for asbestos claimants incorporated in a

chapter 11 plan confirmation order. *Id.* at 822. The Sixth Circuit has similarly recognized that Section 363(m) "does not prevent a reviewing court from" granting relief such as "redistributing the proceeds from such a sale," which does not directly affect the sale's validity. *In re Brown*, 851 F.3d at 623; see also *Trinity 83*, 917 F.3d at 602 ("Section 363(m) does not say one word about the disposition of the proceeds of a sale," and thus does not preclude such relief.).

By contrast, under the Second Circuit's approach, once the district court had concluded that the Assignment Order was "integral" to the Sale Order, then "§ 363(m)'s threshold was satisfied" and the district court was without jurisdiction to proceed. The court of appeals' "integral" test thus both expands the scope of the Section 363(m) bar and gives the parties to a sale agreement the power to deprive the appellate courts of jurisdiction simply by designating another order "integral" to the sale, even if it is not so as a matter of substance. Because limits on appellate jurisdiction should be read narrowly, *Castro*, 540 U.S. at 381, the court of appeals' approach must be rejected.

B. As a Substantive Matter, Reversing the Assignment Order Would Not Affect the Validity of the Prior Sale

Had the court of appeals analyzed the substance of the respective sale and lease assignment transactions, it would have readily determined based on the undisputed facts that reversal of the Assignment Order would not have "affect[ed] the validity of," the previously closed February 2019 asset sale. The terms of the purchase agreement make clear that setting aside the Assignment Order would not affect the validity of the

sale in any way. Neither the Sale Order nor the sale price was contingent on or affected by the assignment of the MOAC Lease (or any other particular Designatable Lease). To the contrary, Sears and Transform specifically contemplated in the purchase agreement that certain leases may not be assignable for the very reason the district court identified—Transform being unable to satisfy the "adequate assurance of future performance" requirement in Section 365(b). J.A. 264. The purchase agreement specifically provided that "Sellers and Buyer acknowledge that Buyer (or any applicable Assignee) must provide adequate assurance of future performance" under any contract or lease proposed to be assigned. J.A. 327. Moreover, in the event Transform was unable to provide adequate assurance of future performance (as the district court found to be the case regarding the MOAC Lease), the parties agreed the lease simply would not be assigned to Transform without any impact on the sale or its price. See J.A. 264.

Given that Sears and Transform contractually agreed that the bankruptcy court's denial of their request to assume and assign a lease would not affect the validity of the sale, then an appellate court's reversal of the Assignment Order on appeal cannot, as a matter of logic, affect the validity of the sale either. The order of the appellate court merely vacates the bankruptcy court's initial order authorizing the assignment and directs it to enter an order denying the assignment. If the bankruptcy court could, consistent with the purchase agreement, have entered an order denying assignment in the first place, then doing so later, pursuant to an appellate court's order, is equally consistent with the purchase agreement.

When consummating the Section 363 asset sale in February 2019, Transform had yet to decide which "Designated Leases" it planned on subsequently seeking to have assigned to it. Yet it closed the sale and paid the full purchase price to Sears (without any mechanism for future adjustment), accepting all risk that Transform would not be able to receive an assignment of some or all of the Designatable Leases. See *Newco Energy* v. *Energytec, Inc. (In re Energytec, Inc.)*, 739 F.3d 215, 220 (5th Cir. 2013) (decision on whether a sale was free and clear of a particular interest in a sold pipeline was not "integral" to the sale because the buyer "went forward with the sale" over a year prior "accepting the risk that Newco's interests would survive"). The asset sale to Transform is complete, and the outcome of this dispute will not affect the validity of that sale or any aspect thereof.

Because reversal of the Assignment Order would not affect the validity of the Sale Order entered under Section 363, the only limitation on relief specified in Section 363(m) is inapposite in this case, even if Transform were not precluded from invoking that section. This is a second, independent basis on which to reverse the court of appeals' judgment.

CONCLUSION

For the forgoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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