

**SUPREME COURT  
OF THE UNITED STATES**

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IN THE SUPREME COURT OF THE UNITED STATES

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MOAC MALL HOLDINGS LLC,	)
Petitioner,	)
v.	) No. 21-1270
TRANSFORM HOLDCO LLC, ET AL.,	)
Respondents.	)

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Pages: 1 through 78  
Place: Washington, D.C.  
Date: December 5, 2022

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4                                 Petitioner,                                 )  
5                                 v.   ) No. 21-1270  
6   TRANSFORM HOLDCO LLC, ET AL.,                                 )  
7                                 Respondents.                                 )

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10                                 Washington, D.C.  
11                                 Monday, December 5, 2022

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13                                 The above-entitled matter came on for  
14                                 oral argument before the Supreme Court of the  
15                                 United States at 12:28 p.m.

16  
17                                 APPEARANCES:  
18                                 DOUGLAS H. HALLWARD-DRIEMEIER, ESQUIRE, Washington,  
19                                 D.C.; on behalf of the Petitioner.  
20                                 COLLEEN R. SINZDAK, Assistant to the Solicitor  
21                                 General, Department of Justice, Washington, D.C.;  
22                                 for the United States, as amicus curiae,  
23                                 supporting the Petitioner.  
24                                 G. ERIC BRUNSTAD, JR., ESQUIRE, New Haven,  
25                                 Connecticut; on behalf of the Respondents.

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P R O C E E D I N G S

(12:28 p.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in 21-1270, MOAC Mall Holdings versus Transform Holdco LLC.

Mr. Hallward-Driemeier.

ORAL ARGUMENT OF DOUGLAS H. HALLWARD-DRIEMEIER

ON BEHALF OF THE PETITIONER

MR. HALLWARD-DRIEMEIER: Mr. Chief Justice, and may it please the Court:

Because of the harsh consequences of designating a procedural prerequisite jurisdictional, this Court requires a clear indication from Congress before it will treat a limit as such.

Nothing in the text, structure, or context of Section 363(m) suggests, much less clearly reflects, that Congress intended the absence of a stay to deprive the appellate courts of jurisdiction. To the contrary, the text explicitly presupposes the exercise of appellate jurisdiction, including to reverse or modify a sale order. The provision merely limits the remedial consequences of such a ruling and then only if there was no stay.

1            Transform's few appellate decisions  
2            concerning an earlier rule of bankruptcy  
3            procedure do not provide a clear indication of  
4            jurisdictional character. None of the cases  
5            Transform cites are from this Court, and none  
6            actually designated the rule jurisdictional.  
7            Because the requirement of a stay is not  
8            jurisdictional, it was subject to waiver,  
9            forfeiture, and estoppel, each of which applies  
10          here.

11            Transform assured the bankruptcy court  
12            that it would not invoke Section 363(b) to  
13            defeat MOAC's appeal because Transform did not  
14            believe Section 363(m) applied. And Transform  
15            was right. The order under review did not  
16            authorize a sale under 363(b). The asset sale  
17            had already closed. Rather, the order  
18            authorized assumption and assignment of a lease  
19            under Section 365, with no additional payment to  
20            the debtor.

21            It does not defeat any congressional  
22            limit on the Court's power to hold Transform to  
23            the position it took in the bankruptcy court.

24            Finally, Transform's alternative  
25            argument that the lease's transfer deprived the

1 appellate courts of jurisdiction to review the  
2 assignment order is confused on multiple levels.  
3 It wrongly assumes that bankruptcy courts'  
4 jurisdiction is solely in rem, which this Court  
5 has rejected, but even if it were, this Court  
6 has made clear that the transfer of the res does  
7 not deprive the appellate courts of jurisdiction  
8 where, as here, the transferee is a party to the  
9 proceedings.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: In your -- I  
12 understand you'd like to get to the  
13 jurisdiction/non-jurisdiction question, but I  
14 think I've almost had my fill of that. The --  
15 could you just take a second to explain what  
16 provision you rely on to -- as the -- to  
17 challenge the lease assignment?

18 MR. HALLWARD-DRIEMEIER: We argue that  
19 the -- the less -- that the assignee did not  
20 satisfy adequate assurance of future  
21 performance. And that's in --

22 JUSTICE THOMAS: Yeah, I understand  
23 that.

24 MR. HALLWARD-DRIEMEIER: --  
25 365(b)(1)(C) and also 365(b)(3)(A). So the

1 Bankruptcy Code requires -- it's very protective  
2 of mall owners. Congress was very solicitous of  
3 them. And it provided that both in order to  
4 assume and to assign a shopping center lease,  
5 the -- the debtor and the assignee would have to  
6 show that there would be adequate assurance of  
7 future performance, and that required  
8 specifically showing that the assignee had the  
9 same financial wherewithal and operation  
10 experience as the -- the original lessee, here,  
11 Sears in 1991. And the district court held that  
12 that was not met here.

13 JUSTICE THOMAS: As a practical  
14 matter, what -- what would the difference be?

15 MR. HALLWARD-DRIEMEIER: Well, on --  
16 on remand, we believe that MOAC would be  
17 entitled to recover the property because the --  
18 the time to -- to designate and assume and  
19 assign the lease has now expired. But, even if  
20 we were not right on that, at the very least,  
21 MOAC would be entitled to an assignee that  
22 satisfied that statutory requirement, which  
23 would also protect the mall's interest.

24 Of course, whether we're entitled to  
25 either of those reliefs is a merits question.

1 It does not go to this Court's jurisdiction.

2 CHIEF JUSTICE ROBERTS: Does your  
3 argument depend upon there being issues that  
4 could be raised that do not go to the  
5 authorization of the sale or lease? In other  
6 words, I understand the argument that this  
7 doesn't bar jurisdiction across the waterfront,  
8 but it does seem to bar any further inquiry into  
9 the validity of the sale or lease. No?

10 MR. HALLWARD-DRIEMEIER: Where --  
11 where the statute is properly invoked, that  
12 would be true. But, here, its protections were  
13 both waived and forfeited. It was not raised in  
14 the district court until after -- after the  
15 district court had ruled on the merits, and it  
16 was affirmatively waived in the bankruptcy court  
17 as part of Transform's objection to a stay --

18 CHIEF JUSTICE ROBERTS: So --

19 MR. HALLWARD-DRIEMEIER: -- pending  
20 appeal.

21 CHIEF JUSTICE ROBERTS: -- so what  
22 would you have left apart from the issues of  
23 waiver?

24 MR. HALLWARD-DRIEMEIER: Well, we  
25 would also argue that this was not a -- a sale



1 of property of the estate under 363(b) because  
2 that had already happened. The sale had closed.  
3 The money had been paid to Sears, and there was  
4 no -- it was not subject to adjustment if the  
5 designated leases were later held not to be  
6 eligible for assignment.

7 In fact, the A -- the -- the APA, the  
8 purchase agreement, explicitly contemplated that  
9 the bankruptcy court would have to consider and  
10 decide whether there had been adequate assurance  
11 of future performance and that if it was not  
12 found, then the debtor would have no obligation  
13 to assume or assign the lease.

14 So the sale closes while that  
15 possibility of an individual designated lease  
16 not being assignable was still outstanding. So  
17 there is -- there's no way in which the sale is  
18 invalidated by a ruling in our favor. That's  
19 why I say Transform was right initially to say  
20 that this is not an order that -- to which  
21 363(m) applies even on its terms because it  
22 specifically contemplates the purchase or sale.  
23 The words "sale" and "purchaser" appear several  
24 times in the provision, and it is an  
25 authorization under 363(b).

1           The authorization that is relevant  
2 here appears at Petition Appendix 114a. It's  
3 paragraph 11 of the APA, and it says debtors are  
4 hereby authorized, in accordance with Sections  
5 105(a) and 365, to assume and assign the  
6 designated lease. Assumption and assignment  
7 occurs under 365. There's no reference there to  
8 363. We're challenging the assumption and  
9 assignment, not the earlier sale.

10           What was sold was designation rights.  
11 The sale of the designation rights is done and  
12 gone. It's been completed and not going to be  
13 undone with this. But the sale of the  
14 designation rights contemplated that a  
15 designated lease might never be successfully  
16 assigned because the assignee could not satisfy  
17 their statutory requirement of adequate  
18 protection, and that's what happened here.

19           So Transform is simply being held to  
20 the terms of its bargain.

21           JUSTICE ALITO: Suppose we agree with  
22 you on the jurisdictional question. What would  
23 happen on remand? Can the district court simply  
24 vacate the assignment order?

25           MR. HALLWARD-DRIEMEIER: Yes, Your

1 Honor. And --

2 JUSTICE ALITO: Okay. What -- what if  
3 that happens? To whom would the lease revert?

4 MR. HALLWARD-DRIEMEIER: So we believe  
5 that the lease would revert to the -- to the  
6 Mall of America, and that's because, under  
7 365(d)(4), the -- the statutory time to assume a  
8 lease expires after 210 days, unless extended by  
9 consent. Here, there was extension by consent  
10 until the end of August --

11 JUSTICE ALITO: But why wouldn't it  
12 revert --

13 MR. HALLWARD-DRIEMEIER: -- but no  
14 further.

15 JUSTICE ALITO: -- either to the Sears  
16 bankruptcy estate, if there is still such a  
17 thing, or to the reconstituted Sears?

18 MR. HALLWARD-DRIEMEIER: Well, it --  
19 it -- in a sense, it would revert to the estate,  
20 but because, under the language of 365(d)(4),  
21 once the 210-day period to assume has passed,  
22 the lease is deemed rejected, and since we're  
23 past that time, it would, under the terms of the  
24 statute, immediately revert to the lessor.

25 But there's another reason why the

1 same thing holds, and that's because Transform  
2 only had designation rights during the  
3 designation period, and that expired on May 3,  
4 2019. So we think it's too late two times over  
5 for them to -- to try to -- to redesignate a new  
6 assignee and go through that process.

7 But that's my merits argument. If I'm  
8 wrong on that, then, at the very least, assuming  
9 that Sears or its -- its successor has an  
10 ability to designate a new assignee, at the very  
11 least, we would be entitled to only being  
12 assigned to someone who can satisfy the  
13 protections afforded by the statute.

14 JUSTICE ALITO: But there are news  
15 reports that Sears exited bankruptcy in  
16 November, is -- is that correct? So is there  
17 still an estate?

18 MR. HALLWARD-DRIEMEIER: Your -- Your  
19 -- Your Honor, we would take the position again  
20 that it's too late. There is a -- a litigation  
21 trust, and I assume an argument could be made  
22 that it will become property of the litigation  
23 trust. We would dispute that.

24 But, again, those are merits issues  
25 for the courts to determine on remand. They

1 don't go to this Court's jurisdiction because  
2 there's an Article III case or controversy.

3 JUSTICE ALITO: No, I -- I understand  
4 that. I'm just trying to figure out what the  
5 practical implications of a ruling in your favor  
6 are.

7 MR. HALLWARD-DRIEMEIER: But, again,  
8 our -- our position is -- is that twice over the  
9 time to designate and to assume and assign this  
10 lease have passed, but that's because both under  
11 the terms of the APA and under the terms of the  
12 statute Congress created, basically, Sears had  
13 one shot to -- to identify an assignee that  
14 would satisfy the requirement.

15 And had they designated an assignee,  
16 it could have been any -- it could have been  
17 Target, it could have been Bloomingdale's that  
18 had the similar financial situation and -- and  
19 operating experience as Sears in 1991. That  
20 would have been fine and good. Instead, they  
21 designated a holding company that had never had  
22 any such experience.

23 JUSTICE GORSUCH: Counsel, I think --

24 JUSTICE ALITO: But you -- no, go  
25 ahead.

1 JUSTICE GORSUCH: You sure?

2 JUSTICE ALITO: Yeah.

3 JUSTICE GORSUCH: All right. I think  
4 what I'm struggling with and I'm -- I sense my  
5 colleagues are too is that it's a little unusual  
6 to say a good faith purchaser of a bankruptcy  
7 asset might have to disgorge it, you know, some  
8 years later after perhaps the bankruptcy estate  
9 has been eliminated and the bankruptcy's  
10 discharged.

11 So, you know, what do we do about  
12 that? Does every good faith purchaser now take  
13 an asset subject to the possibility that it will  
14 be reverted to and a bankruptcy estate might  
15 have to re-emerge? I mean, I -- I'm just -- I'm  
16 just unfamiliar with -- I'm not a bankruptcy  
17 expert.

18 MR. HALLWARD-DRIEMEIER: Yeah.

19 JUSTICE GORSUCH: You are.

20 MR. HALLWARD-DRIEMEIER: So -- so 360  
21 --

22 JUSTICE GORSUCH: Let me -- is there  
23 any other analogue to this that you're aware of  
24 in the --

25 MR. HALLWARD-DRIEMEIER: 363(m)

1 protects the good faith purchaser's interests.

2 JUSTICE GORSUCH: Yes, as if there's a  
3 stay, but, you know, then you waive and then  
4 here we are.

5 MR. HALLWARD-DRIEMEIER: Exactly.  
6 Here --

7 JUSTICE GORSUCH: And I guess I'm  
8 asking is there any other instance in the  
9 bankruptcy laws -- maybe that's the way to get  
10 at it --

11 MR. HALLWARD-DRIEMEIER: Well --

12 JUSTICE GORSUCH: -- where there's  
13 this kind of reversion of -- of an asset that --  
14 that a good faith purchaser has taken on?

15 MR. HALLWARD-DRIEMEIER: So, in -- in  
16 -- in the first instance, I want to reiterate  
17 that we don't think that Transform is a  
18 purchaser with respect to the asset assignment.

19 JUSTICE GORSUCH: I understand, yes,  
20 yes, yes, yes, yes.

21 MR. HALLWARD-DRIEMEIER: Right?  
22 Because this was a separate --

23 JUSTICE GORSUCH: Yes, but your  
24 argument doesn't turn on that fact. Your  
25 argument turns on the meaning of the statute.

1 So that doesn't help me.

2 MR. HALLWARD-DRIEMEIER: So, again, I  
3 think that the statute -- this Court has  
4 recognized that even important principles, even  
5 emphatic, you know --

6 JUSTICE GORSUCH: Yes, yes. I spot  
7 you --

8 MR. HALLWARD-DRIEMEIER: -- rules  
9 written emphatically --

10 JUSTICE GORSUCH: -- counsel, I spot  
11 you all of that, but you are dancing, my friend.

12 MR. HALLWARD-DRIEMEIER: So --

13 JUSTICE GORSUCH: So let's get to the  
14 -- let's get to the center stage, you know, is  
15 there another example that you can think of  
16 where a good faith purchaser in the  
17 bankruptcy laws -- just a straightforward  
18 question -- would have to disgorge an asset?

19 MR. HALLWARD-DRIEMEIER: I think,  
20 absent its in a sense agreement to do so, as it  
21 has here by waiving the protections of the  
22 statute, I don't think that's --

23 JUSTICE GORSUCH: Well, the good faith  
24 purchaser is not the one who waives it or not.  
25 It's --



1 MR. HALLWARD-DRIEMEIER: Oh. Well,  
2 here --

3 JUSTICE GORSUCH: -- it's the debtor.

4 MR. HALLWARD-DRIEMEIER: -- here, it  
5 is, Your Honor.

6 JUSTICE GORSUCH: I understand here it  
7 is, but that's not always going to be true.

8 MR. HALLWARD-DRIEMEIER: No, and --  
9 and, in fact, that's -- the cases that we cite  
10 -- and the reply brief on page 18 make that  
11 distinction -- they hold that where the  
12 transferee is outside of the -- the proceedings  
13 and not subject to the court's jurisdiction  
14 order, that the -- that it can't be ordered  
15 back. But, they say, where the transferee is a  
16 party to the proceeding, where the order can in  
17 effect be undone through an order to the parties  
18 to the proceeding, then there is jurisdiction to  
19 give that relief, as here.

20 JUSTICE GORSUCH: So you would be okay  
21 with a rule that says it's not jurisdictional,  
22 but in no circumstances may a court order a good  
23 faith purchaser outside of the bankruptcy  
24 proceedings to revert an asset?

25 MR. HALLWARD-DRIEMEIER: Well, that --

1 that issue is not presented in this case, and I  
2 would urge the Court not to reach out to decide  
3 it because I don't think it's been briefed in  
4 this case.

5 Their -- the -- the principles of what  
6 are called equitable mootness have, you know,  
7 been legion, and I know that there have been a  
8 number of petitions about that to the Court.

9 This is about statutory mootness. It  
10 was a statutory protection that was waived by  
11 Transform specifically twice in the bankruptcy  
12 court. And the bankruptcy court ended its  
13 comment about that -- and this is at page 7(a)  
14 of the brief in opposition appendix -- saying  
15 they're not going to rely on 363(m).  
16 Mr. Chesley just reiterated that for a second  
17 time. If that were an inaccurate  
18 characterization of Transform's position, and,  
19 indeed, they had twice disavowed 363(m) already  
20 at that time, it was -- it was incumbent upon  
21 Transform to clarify.

22 The district court recognized that if  
23 ever there was a case for judicial estoppel,  
24 this is it. But we don't need to rely on either  
25 of these doctrines because we also have

1 forfeiture.

2 Transform went through the entire  
3 merits litigation in the district court without  
4 asserting that 363(m) had any application to the  
5 court's jurisdiction to hear this decision,  
6 jurisdiction in the statutory sense,  
7 jurisdiction in the Article III sense, said  
8 nothing about that until after it had lost.

9 And that's precisely the -- the unfair  
10 harsh consequences of misdesignating a rule  
11 jurisdictional. Here, there is no indication  
12 that Congress intended that effect.

13 And I would ask -- give the example,  
14 Your -- Your Honor, Justice Gorsuch, you asked  
15 about the good faith purchaser, but Transform's  
16 argument is so broad that it would mean that  
17 there is no authority to recover the property  
18 even from a bad faith purchaser, one who did not  
19 purchase in good faith.

20 They say the only remedy is Section  
21 549. But Section 549 here is a two-year period  
22 of repose. It's also the debtor's cause of  
23 action subject to waiver. They assert that  
24 Sears has already waived any claim under 549,  
25 and, of course, the two-year period is gone.

1 JUSTICE GORSUCH: Counsel, I hear all  
2 of that, okay? I guess my concern -- and I'm  
3 just -- put aside this case, I know it's really  
4 hard, okay, and -- and I -- I -- I'll put my  
5 cards on the table. I have a hard time seeing  
6 this as jurisdictional, okay?

7 But I just -- I just can't think that  
8 there are many circumstances in the bankruptcy  
9 laws, if there are any, where good faith  
10 purchasers might have to relinquish an asset.  
11 Okay. Forget about bad faith purchasers.  
12 Forget about those.

13 And so we're going to be scrambling to  
14 come up with some sort of rule to deal with that  
15 fact, okay, and -- and I just want to know where  
16 on earth that would come from, and you haven't  
17 seemed to have given me much help so far.

18 MR. HALLWARD-DRIEMEIER: Well, again,  
19 the -- it's a merits question, and --

20 JUSTICE GORSUCH: I got that. I  
21 really do.

22 MR. HALLWARD-DRIEMEIER: -- and the --  
23 the -- so the -- I would point the Court to both  
24 this Court's decision in Republic Bank of Miami,  
25 which is not a bankruptcy case, granted, but

1 where the Court seemed to understand that  
2 because the United States was a party before it  
3 and had, indeed, brought the action, then a  
4 court order to undo the -- the transfer would be  
5 honored by the United States. I mean, there  
6 were complications because the United States  
7 needs an appropriations, but the court found it.

8 Chafin v. Chafin, which is referred to  
9 in the law professors' amicus brief, is another  
10 one to the same effect. There, the Court  
11 characterized it as simply asking for the  
12 routine relief on appeal that the decision of  
13 the district court be reversed and its order  
14 undone. There, the question involved a child's  
15 custody. The child had during litigation  
16 because there was no stay pending appeal been  
17 removed to Scotland.

18 JUSTICE GORSUCH: Thank you, counsel.

19 CHIEF JUSTICE ROBERTS: Thank you.

20 Following up on Chafin, if I'm remembering  
21 correctly, the Court went on a little bit about  
22 how narrow the issues that would be available in  
23 the proceeding would be.

24 MR. HALLWARD-DRIEMEIER: Well, the  
25 Court actually does not resolve the question.

1 They said that on remand there was a question  
2 whether the -- the -- that the agreement, the --  
3 the international convention would itself  
4 provide for an order of re-return or if  
5 principles of equity would allow.

6 And I think what the cases that we're  
7 citing on page 18 of the reply reflect is that  
8 the bankruptcy court is a court of equity. A  
9 party like Transform comes to the court, asks  
10 for an order. It's subject to the court's  
11 personal jurisdiction because that was a term of  
12 the APA, consent to the personal jurisdiction of  
13 the bankruptcy court, that if the court undoes  
14 it, then Transform will have to honor that  
15 order.

16 At the moment, there are two pieces of  
17 paper. There's a lease that was given to Sears,  
18 and there's a second piece of paper that says,  
19 pursuant to authority under Section 365 of the  
20 bankruptcy court -- code, the -- the -- Sears'  
21 lease has been assigned to Transform, but when  
22 on remand that order is taken away, then  
23 Transform has nothing to -- to assert in terms  
24 of its right to the -- to the leasehold in -- at  
25 Mall of America.

1 CHIEF JUSTICE ROBERTS: Thank you.

2 JUSTICE JACKSON: Isn't part of --

3 CHIEF JUSTICE ROBERTS: Justice -- I'm  
4 sorry.

5 Justice Thomas?

6 JUSTICE THOMAS: Nothing.

7 CHIEF JUSTICE ROBERTS: Oh, I'm sorry,  
8 we're not there yet.

9 JUSTICE KAGAN: No, we are.

10 CHIEF JUSTICE ROBERTS: No, we are.  
11 Yeah.

12 Justice Thomas?

13 Justice Alito?

14 I thought we were.

15 Justice Sotomayor?

16 Justice Kagan?

17 JUSTICE KAGAN: Can I ask you to make  
18 an assumption you don't want to make? But would  
19 you assume, sort of along the lines that Justice  
20 Gorsuch was -- was saying, that, in fact, at  
21 this late date, the court is not going to be  
22 able to undo the assignment? Does that make  
23 this constitutionally moot, or is there some  
24 other form of relief that the court could  
25 provide to resolve this dispute?

1                   MR. HALLWARD-DRIEMEIER: Well, Your --  
2                   Your Honor, I think there might be additional  
3                   relief that could be provided to -- to Mall of  
4                   America in terms of out of the compensation from  
5                   the sale. That's not been explored yet. I do  
6                   want to make one point in terms of whether this  
7                   assignment can be undone.

8                   JUSTICE KAGAN: Well, I -- I want  
9                   to --

10                  MR. HALLWARD-DRIEMEIER: The parties  
11                  have stipulated --

12                  JUSTICE KAGAN: Just -- just stick  
13                  with my question.

14                  MR. HALLWARD-DRIEMEIER: Okay.

15                  JUSTICE KAGAN: You gave one -- flesh  
16                  out, like, what do you think a court might do,  
17                  even assuming -- and I know you dispute this,  
18                  and I'm not suggesting that you're wrong --  
19                  but -- but, if there is no unwinding to be done,  
20                  what is left?

21                  MR. HALLWARD-DRIEMEIER: Well, Your --  
22                  Your Honor, the -- the rule -- the statute only  
23                  precludes an -- an invalidation of the -- of the  
24                  sale. Of course, we think this is an  
25                  assignment, not a sale, so it doesn't apply.



1 But, if that is unavailable, then the court has  
2 to consider whether there can be any other  
3 relief. Here, we think other relief might be,  
4 for example, further protection to ensure us  
5 that -- that Transform actually does comply with  
6 all of its requirements or perhaps money out of  
7 the estate to compensate Mall of America for  
8 what it has lost.

9 But, again, that's not necessary to  
10 reach here because, here, the parties entered  
11 into a stipulation that Transform would not do  
12 anything further that would moot the appeal. As  
13 a consequence, this property remains dark. It  
14 has never been developed. There's no -- nobody  
15 operating it right now. So, if ever there's a  
16 situation in which an assignment of a lease  
17 could be undone, it's this one because the  
18 parties agreed to a -- a stipulated --

19 CHIEF JUSTICE ROBERTS: Justice  
20 Gorsuch?

21 Justice Kavanaugh?

22 Justice Barrett?

23 Justice Jackson?

24 JUSTICE JACKSON: I just wanted to ask  
25 whether in part -- partly in response to Justice

1 Gorsuch's question, is it your view that the  
2 statute itself, (m), assuming that it applies,  
3 does contemplate circumstances in which you  
4 might have to unravel it because it's -- it --  
5 it only talks about the validity of a sale that  
6 has been made in good faith?

7 MR. HALLWARD-DRIEMEIER: Yes, Your  
8 Honor, it -- it explicitly contemplates that if  
9 the transfer was not made in good faith, then  
10 there would be an unwinding. So the -- Congress  
11 specifically contemplated an exercise of this  
12 jurisdiction, even that the -- the sale would  
13 have to be unwound in certain circumstances.  
14 And Transform has waived whatever protection the  
15 statute might otherwise have afforded it.

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Ms. Sinzduk.

20 ORAL ARGUMENT OF COLLEEN R. SINZDAK  
21 FOR THE UNITED STATES, AS AMICUS CURIAE,  
22 SUPPORTING THE PETITIONER

23 MS. SINZDAK: Mr. Chief Justice, and  
24 may it please the Court:

25 Section 363(m) is not jurisdictional

1 because nothing in its text suggests that it is,  
2 and there is no other evidence that satisfies  
3 the clear statement rule described in Arbaugh.

4 Respondent is incorrect in asserting  
5 that Section 363(m) is nonetheless  
6 jurisdictional because it reflects a  
7 longstanding limit on in rem jurisdiction.  
8 Among other things, this Court's decision in  
9 Republic National Bank rejected the existence of  
10 the very limit on in rem jurisdiction that  
11 Respondent now asserts.

12 Nor should Respondent prevail based on  
13 its new argument that Section 549 and 550  
14 provide the exclusive means to unwind the  
15 disputed lease assignment. This new argument  
16 about whether Petitioner is entitled to relief  
17 under the bankruptcy statutes is not  
18 jurisdictional, and even if it were, there is no  
19 reason that this Court would have to address it  
20 before the question of subject matter  
21 jurisdiction on which this Court granted cert.

22 I welcome the Court's questions.

23 JUSTICE THOMAS: I know there's a  
24 resistance to projecting what would happen when  
25 this case -- if this case goes back, but what do

1 you think will happen?

2 MS. SINZDAK: We are not taking a  
3 position on that. The United States does not  
4 have --

5 JUSTICE THOMAS: Nobody is.

6 MS. SINZDAK: Nobody is.

7 (Laughter.)

8 MS. SINZDAK: Nobody is. It does not  
9 affect this Court's subject matter jurisdiction  
10 to decide this question, so we do not need to.  
11 We would say that we are not aware of cases in  
12 which courts have insisted that there be  
13 additional process in order to unwind a -- a  
14 lease assignment once the court has reversed the  
15 lease assignment on appeal. There aren't cases  
16 as far as we can tell either way.

17 It is our -- it is our -- our sense  
18 that in general this -- this idea that there  
19 would need to be further process doesn't have a  
20 lot of precedent. We have looked, for example,  
21 at what happens when there's a good faith  
22 purchaser, and in the cases that we found, there  
23 hasn't been additional process that the good  
24 faith purchaser has had to go through. At least  
25 looking at the bankruptcy court dockets, we

1 haven't been able to see it. But we aren't  
2 taking a position on that because that wasn't a  
3 question on which this Court granted cert.

4 JUSTICE GORSUCH: Counsel, I hear  
5 everything you say, okay? So take it as read,  
6 okay? But, normally -- I mean, my bankruptcy  
7 experience is limited, so -- and yours is much,  
8 much more -- you -- you have access to people  
9 with great more expertise, and so I'm -- I'm --  
10 I'm really pleading for that, okay?

11 Normally, I think of good faith  
12 purchasers -- put aside bad faith purchasers,  
13 okay -- as once they purchase an asset in  
14 bankruptcy, we're done and it's all about  
15 finality and resolution and moving on and  
16 quickly resolving these cases. And that's  
17 really pretty essential to the greater purposes  
18 of the bankruptcy laws, certainty and allowing  
19 people an opportunity for a new start, okay?

20 What happens to good faith purchasers  
21 in these circumstances who, through no fault of  
22 their own but because of the monkey business of  
23 the parties, have major assets, you know,  
24 potentially withdrawn from them years later? I  
25 mean, we're going to -- we're talking years

1 later. That just seems to me contrary to what I  
2 know instinctively about the bankruptcy laws.

3 Now perhaps there's some other  
4 limitation that we can make up, we can find.  
5 Yes, yes, you're -- you're shaking your head to  
6 the right question and nodding it to the right  
7 question. Help me. What -- what is it?

8 MS. SINZDAK: Sure. So, if the  
9 purchaser, the good faith purchaser, was not a  
10 party to the appeal, which -- which we think is  
11 not the situation we have here --

12 JUSTICE GORSUCH: Got you.

13 MS. SINZDAK: -- if, instead, they --  
14 they're sort of -- it's three years later --

15 JUSTICE GORSUCH: Yes.

16 MS. SINZDAK: -- and suddenly someone  
17 is showing up at their door and saying you need  
18 to give us the property, then we think they  
19 could assert Section 363(m). They wouldn't have  
20 had an opportunity to assert it before, so they  
21 would not have waived. They would not have  
22 forfeited.

23 JUSTICE GORSUCH: Interesting.

24 MS. SINZDAK: There would be no  
25 concerns with respect to judicial estoppel.

1 JUSTICE GORSUCH: That's helpful.

2 Thank you.

3 MS. SINZDAK: If I could just address  
4 three -- a few quick points about jurisdiction  
5 because we do think this is a straightforward  
6 question, and we do -- we know with respect to  
7 the Court's precedents, but we think there are  
8 three issues where things can get a little bit  
9 confused in terms of what governs subject matter  
10 jurisdiction.

11 And so the first one is a statutory  
12 restriction on relief does not normally govern  
13 subject matter jurisdiction. And I think that  
14 there can be some concern because of the  
15 redressability prong under Article III, the  
16 Article III analysis, that relief should play  
17 into that. We think that Steel Co. squarely  
18 addresses this at page 96, where the Court  
19 explained that a statutory restriction on  
20 relief, the question doesn't usually affect  
21 jurisdiction because the question under the  
22 redressability analysis is not whether a party  
23 is entitled to the relief that it's seeking but,  
24 rather, whether, if they are able to obtain that  
25 relief, it will truly redress their -- their

1 injury. Now --

2 JUSTICE JACKSON: Counsel, I'm sorry  
3 to interrupt you, but can you just make sure to  
4 address an issue that I think you didn't have a  
5 chance to address, which is the mootness  
6 question sort of directly? What -- what is --  
7 what is the most straightforward reason this  
8 case remains live given what has been argued on  
9 the other side?

10 MS. SINZDAK: Okay. Again, I just  
11 want to say at the threshold that we don't think  
12 the Court has to -- to deal with the new  
13 question because this is itself a question of  
14 subject matter jurisdiction. So we're not in a  
15 world where you have to worry about your --  
16 your -- your -- your weighing in on the merits  
17 when there is a --

18 JUSTICE JACKSON: So we can pick  
19 either one for jurisdiction?

20 MS. SINZDAK: That's right. But I --  
21 I also want to say we do not think that the new  
22 question presented -- the -- sorry, pardon me,  
23 the new argument is actually jurisdictional, and  
24 that's because it's essentially an assertion  
25 about whether the -- the Petitioner is going to



1 be able to get the relief it seeks on remand.

2           And we do think that Chafin versus  
3 Chafin, the 2013 opinion that I believe  
4 Petitioner's counsel were -- was referring to,  
5 that directly said that questions about whether  
6 a statutory scheme -- or, in that instance, it  
7 was actually a statute and a convention.

8           Questions about whether that statutory  
9 scheme permit the relief that the appellant is  
10 seeking on remand, those questions go to the  
11 merits, not mootness. And it's -- it's -- it's  
12 very clear. So I think Chafin versus Chafin at  
13 page 174 is the direct answer to the mootness  
14 question, and that actually anticipated one of  
15 the three jurisdictional points I wanted to  
16 make.

17           The last one is just about in rem  
18 jurisdiction, and I think there are points in  
19 Respondents' brief where it treats in rem  
20 jurisdiction as synonymous with subject matter  
21 jurisdiction.

22           And we think that's not right because  
23 subject -- in rem jurisdiction is really an  
24 alternative to in personam jurisdiction, so I  
25 think every law student learns pretty early on

1 that in order for a court to hear a case, it  
2 needs to assure itself that it has both subject  
3 matter jurisdiction, that is, the power to hear  
4 the class of cases into which the controversy  
5 falls, and either person -- in -- in personam  
6 jurisdiction, personal jurisdiction, or in rem  
7 jurisdiction.

8 And the reason that's important is  
9 that we know that limits on personal  
10 jurisdiction can be waived. And we think the  
11 same is -- is true of limits on in rem  
12 jurisdiction such that even if Respondent was  
13 correct that there is some principle of in rem  
14 jurisdiction that's floating around here, it  
15 just doesn't matter because it could be waived.

16 And if the Court has no further  
17 questions?

18 CHIEF JUSTICE ROBERTS: No one?

19 Okay. Thank you.

20 MS. SINZDAK: Thank you.

21 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.  
22 Brunstad.

23 MR. BRUNSTAD: Not quite yet for  
24 rebuttal, Your Honor.

25 CHIEF JUSTICE ROBERTS: Yeah, yeah,

1       yeah.

2                       (Laughter.)

3                       CHIEF JUSTICE ROBERTS:  It's a tough  
4       day.  Sorry.  Your opening points.

5                       ORAL ARGUMENT OF G. ERIC BRUNSTAD, JR.,  
6                       ON BEHALF OF THE RESPONDENTS

7                       MR. BRUNSTAD:  Mr. Chief Justice, and  
8       may it please the court:

9                       Justice Thomas, I am going to take a  
10      position on your question.

11                      Justice Gorsuch, I have a better  
12      answer to the question that's actually correct.

13                      Justice Kagan, there is no additional  
14      relief that can be granted.

15                      Justice Jackson, this case is moot.  
16      There is no case or controversy.

17                      But, first, it's important to set  
18      forth the actual facts because my -- my friend  
19      got a few things wrong.

20                      In 1991, Sears and MOAC entered into a  
21      100-year freely assignable essentially rent-free  
22      ground lease.  Sears built the building, not  
23      MOAC.  Decades later, in 2018, when Sears filed  
24      for bankruptcy, the building that Sears built  
25      with this ground lease became property of the

1 bankruptcy estate of Sears' bankruptcy estate.

2 Sears moved for authority to sell by  
3 private contract this property to Transform.  
4 After the necessary approvals from the  
5 bankruptcy court were obtained, that sale  
6 transaction closed on October 4, 2019, three  
7 years ago, and it was a sale, as the district  
8 court determined. It was a transfer of  
9 ownership of property for a price.

10 There was additional consideration  
11 that was paid for this specific asset, this  
12 building and this lease, millions of dollars in  
13 additional consideration that's elaborated on  
14 pages 13 to 14 of the red brief.

15 Okay. There is no remedy that can be  
16 granted to them at this point. What is the  
17 relief, the sole relief that they identify?  
18 It's on page 10 of their reply brief.

19 JUSTICE JACKSON: Before you get into  
20 that, though, can -- I'm interested in the fact  
21 that your recitation of the facts did not  
22 include the waiver that they continue to point  
23 to.

24 MR. BRUNSTAD: Yes.

25 JUSTICE JACKSON: Isn't there a point

1 in the procedural history of this in which your  
2 client, Transform, said we're not going to rely  
3 on 363(m) and what do we do about that?

4 MR. BRUNSTAD: Justice Jackson, there  
5 is that point that goes to 363(m). My argument  
6 initially is wholly apart from Section 363(m).  
7 Put that statute aside, put the question of  
8 waiver aside because it only pertains to Section  
9 363(m).

10 There is no case or controversy.  
11 There is no way to undo the sale in this  
12 instance. And here is why, three reasons: The  
13 remedy they seek, which is specified on page 10  
14 of their brief, the courts can simply enter an  
15 order voiding transfer of MOAC's lease. You can  
16 just simply take the property from them.

17 That remedy does not exist as a matter  
18 of law. The statutory remedy, the exclusive  
19 remedy is the avoidance powers. That's not  
20 available here. The bankruptcy court on remand  
21 has no subject matter jurisdiction over this  
22 property. Its property is -- its jurisdiction  
23 is limited to property of the estate.

24 This is not property of the estate.  
25 If this were remanded back to the bankruptcy

1 judge, the judge would say, I don't have  
2 jurisdiction here. I have jurisdiction over  
3 property of the estate, not Transform's  
4 property. If you want me to have jurisdiction,  
5 you have to invoke the avoidance powers to bring  
6 it back into the estate. That's not available.

7 But, Justice Gorsuch, your question  
8 about what is the -- what is the answer, it is  
9 in this Court's seminal decisions, so for  
10 commercial law geeks like me, these decisions,  
11 although not widely known, they are seminal in  
12 my field, and they are this -- this -- this  
13 Court's triumvirate of decisions in Gray versus  
14 Brignardello, in Voorhees versus Bank of the  
15 United States, and in Grignon's Lessee versus  
16 Astor, and there the Court unequivocally  
17 explained, if you reverse a sale order on  
18 appeal, it does nothing to affect the sale. The  
19 sale cannot be overturned.

20 This Court's language explanation in  
21 Gray is -- is -- is -- is -- is straightforward.  
22 Although the judgment or decree may be reversed,  
23 yet all rights acquired at a judicial sale while  
24 the decree or judgment were in full force and  
25 which they authorized will be protected.

1                   With the errors of the Court, the  
2 purchaser has no concern and the Court said this  
3 is so well established, you know, we don't -- we  
4 shouldn't even have to reiterate it. The Court  
5 was even more unequivocal in Voorhees versus  
6 Bank of the United States.

7                   JUSTICE SOTOMAYOR: If I go to the  
8 sale order itself, I thought the sale order  
9 which was selling Sears' right to assign the  
10 lease to Transform, the sales order said that  
11 that right reserved the landlord's right to  
12 object to any lease assignment that failed to  
13 conform to the requirements of 365.

14                   So the sale order itself reserved the  
15 right of objection. That's what you bought. At  
16 the assignment or at the step of the assignment,  
17 the landlord objected. And the Court said no,  
18 I'm going to overrule it. But then you came in  
19 and said -- you, Transform, came in and said,  
20 I'm not going to rely on 365(m). I'm here  
21 before the Court. I'm going to subject myself  
22 to this procedure, which you did. And it got --  
23 you got overruled. And then you wanted to  
24 appeal that. I don't understand.

25                   MR. BRUNSTAD: First off --

1 JUSTICE SOTOMAYOR: You took -- you're  
2 before the Court.

3 MR. BRUNSTAD: Yes.

4 JUSTICE SOTOMAYOR: So you're in  
5 personam.

6 MR. BRUNSTAD: Ah.

7 JUSTICE SOTOMAYOR: You're defending  
8 your own rights and -- to the assignment, and  
9 now you've lost, or you -- you're invoking  
10 365(m). So I don't understand how the Court has  
11 lost jurisdiction.

12 MR. BRUNSTAD: A proceeding --

13 JUSTICE SOTOMAYOR: And I'm not even  
14 sure how you're a good faith purchaser because  
15 you purchase subject to the landlord's  
16 objection.

17 MR. BRUNSTAD: The -- the bankruptcy  
18 court found we were a good faith purchaser, and  
19 as the court of appeals explained, that  
20 designation was not challenged. We are a  
21 quintessential good faith --

22 JUSTICE SOTOMAYOR: Yes, but --

23 MR. BRUNSTAD: -- purchaser.

24 JUSTICE SOTOMAYOR: -- subject to a  
25 condition.



1           MR. BRUNSTAD: Well, two -- several  
2 things, Justice Sotomayor. First of all, it was  
3 a two step-process for the sale. The sale was  
4 under Section 363 of the assets, which required  
5 further approval of the Court for the transfer  
6 of the lease, which is also part of the sale,  
7 for which additional consideration was paid in  
8 addition to the 1.4 billion that was paid for  
9 the bulk sale. So this was all a package  
10 together.

11           What happened, though, was, at that  
12 point, right, and -- and this is -- this is --  
13 this is important, the bankruptcy court does not  
14 exercise in personam jurisdiction over property  
15 of the estate. There's no summons and complaint  
16 against the purchaser. There's no ordinary in  
17 personam process. It's all in rem.

18           This Court said so in Stratton versus  
19 New, and as the Seventh Circuit explained, a  
20 proceeding under Section 363, that's the sale  
21 statute, is an in rem proceeding. One does not  
22 convert an in rem proceeding into in personam as  
23 a buyer by -- by showing up.

24           If that were true, this Court's  
25 decision in Hood would be wrong. If -- if --

1 Your Honor may recall in Hood --

2 JUSTICE SOTOMAYOR: I'm sorry, I'm --  
3 I'm totally confused now by you.

4 MR. BRUNSTAD: Certainly, Your Honor.

5 JUSTICE SOTOMAYOR: Only for the  
6 certain --

7 MR. BRUNSTAD: Let me explain.

8 JUSTICE SOTOMAYOR: You are the party  
9 who bought. You're a good faith --

10 MR. BRUNSTAD: We are the --

11 JUSTICE SOTOMAYOR: -- buyer.

12 MR. BRUNSTAD: -- buyer, Your Honor,  
13 yes.

14 JUSTICE SOTOMAYOR: You bought subject  
15 to the objection.

16 MR. BRUNSTAD: No, Your Honor.

17 JUSTICE SOTOMAYOR: You're before the  
18 Court --

19 MR. BRUNSTAD: That's the -- that's  
20 this Court's point in Gray versus Brignardello.  
21 Whatever may have been the merits of the  
22 objection is not the buyer's concern. This  
23 Court was emphatic about that -- emphatic about  
24 that.

25 JUSTICE SOTOMAYOR: I see what you're

1 saying.

2 MR. BRUNSTAD: When you show up at a  
3 sale, all -- the Court said -- and this is just  
4 repeating its language from prior decisions.  
5 This has been the settled commercial law rule  
6 for 200 years. The purchaser is not concerned  
7 with any errors the trial court might make in  
8 authorizing the sale. As long as the sale was  
9 authorized, the purchaser takes free. If it's  
10 reversed on appeal, it does not matter --

11 JUSTICE SOTOMAYOR: I now have --

12 MR. BRUNSTAD: -- which is why there's  
13 no common law rule that you can undo it.

14 JUSTICE GORSUCH: Okay. So they say  
15 there might be some other relief.

16 MR. BRUNSTAD: Not so, Justice  
17 Gorsuch.

18 JUSTICE GORSUCH: All right. Tell me  
19 why.

20 MR. BRUNSTAD: Here's why. Here's  
21 why. This is bankruptcy.

22 JUSTICE GORSUCH: Yeah.

23 MR. BRUNSTAD: And, in bankruptcy, if  
24 you have a claim, you must file a proof of  
25 claim. They did. They filed a proof of claim

1 for the unpaid rent. Transform paid that as  
2 additional consideration, which was then paid to  
3 them. The opportunity to file a claim for  
4 additional damages has long since gone. There  
5 is no possibility. That is foreclosed.

6 JUSTICE GORSUCH: Counsel --

7 MR. BRUNSTAD: They're out of  
8 bankruptcy.

9 JUSTICE GORSUCH: -- the one --

10 MR. BRUNSTAD: There is another  
11 reason, Justice Gorsuch.

12 JUSTICE GORSUCH: The one thing you're  
13 -- well, give me your other reason. Then I --  
14 then I've got a -- another question.

15 MR. BRUNSTAD: The other reason is  
16 there's no such thing as a cause of action for  
17 breach --

18 JUSTICE GORSUCH: Right.

19 MR. BRUNSTAD: -- of Section 365 of  
20 the Bankruptcy Code. There is no such thing.  
21 It would be an implied cause of action that does  
22 not exist. So they are foreclosed procedurally  
23 and substantively from making any claim for  
24 damages which they've never heretofore even  
25 suggested. It is not possible. Especially

1 since now Sears's bank -- Sears's bankruptcy is  
2 over. The case is gone. The funds have been  
3 distributed. There is nothing left. So they do  
4 not -- Justice Kagan, there is no opportunity  
5 for any additional relief whatsoever. The sole  
6 statutory mechanism --

7 JUSTICE GORSUCH: All right. So,  
8 counsel, I'm sorry to interrupt you there, but  
9 --

10 MR. BRUNSTAD: Certainly, Justice  
11 Gorsuch.

12 JUSTICE GORSUCH: -- boy, you've been  
13 so persuasive, you -- you -- you -- you got me  
14 into thinking I should DIG this case --

15 MR. BRUNSTAD: I --

16 JUSTICE GORSUCH: -- which you --

17 MR. BRUNSTAD: Yes, Your Honor. Yes.

18 JUSTICE GORSUCH: But you don't want  
19 that, do you?

20 MR. BRUNSTAD: I do want you to  
21 dismiss the petition as improvidently granted.

22 (Laughter.)

23 MR. BRUNSTAD: I absolutely do, but I  
24 do think the statute's also jurisdictional, and  
25 I would like to explain why, and this -- this

1 ties into the fact that, right, this is in rem  
2 subject matter jurisdiction.

3 JUSTICE GORSUCH: Yeah.

4 MR. BRUNSTAD: Subject matter  
5 jurisdiction in the bankruptcy court is property  
6 of the estate. What is the proceeding here? It  
7 is the sale of estate property. That is  
8 fundamentally in rem.

9 It cannot be in personam, right? If  
10 that were -- if it were in personam, this  
11 Court's decision in Hood would be wrong. There,  
12 the state showed up. You can't do in personam  
13 action against the state. You can only do in  
14 rem, the Court said. By the state showing up,  
15 which it did, it doesn't convert in rem into in  
16 personam. It stays in rem. This is in rem from  
17 the beginning. Just like in admiralty, the ship  
18 has sailed.

19 JUSTICE JACKSON: But, counsel --

20 JUSTICE BARRETT: Mr. --

21 JUSTICE JACKSON: -- you suggest that  
22 in rem is like a very, very narrow set of  
23 powers. And I had understood the bankruptcy  
24 court could exercise certain additional powers  
25 in its review of the rem. Is that not so?

1           MR. BRUNSTAD: As this Court explained  
2 in Ahlers, whatever equitable powers remain in  
3 the bankruptcy court must and can only be  
4 exercised within the confines of the Bankruptcy  
5 Code. The Bankruptcy Code has a very specific  
6 remedy for upsetting these sales. It's called  
7 the avoidance powers. They essentially concede  
8 those are not available here. They apply not  
9 only to good faith purchasers -- that's Section  
10 549 and Section 550 -- but also bad faith  
11 purchasers. There is a specific provision of  
12 Section 363 that allows for overturning a sale  
13 to bad faith purchasers, 363(n). That remedial  
14 scheme would make no sense if there was also  
15 some vague general equitable power of the  
16 bankruptcy court to simply do an end run around  
17 the avoidance powers and simply bring property  
18 back into the estate.

19           JUSTICE BARRETT: Mr. -- Mr. Brunstad,  
20 I fee like you're taking us far afield of the  
21 question that we granted cert on. I mean, why  
22 does any of this matter? Why can't we just  
23 answer the jurisdictional question that we  
24 granted cert on and then send it away and you  
25 can make your arguments below?

1                   MR. BRUNSTAD: Justice Barrett,  
2 because there is no case or controversy. As  
3 this Court explained --

4                   JUSTICE BARRETT: But we don't have to  
5 -- we don't have to get into that, right?

6                   MR. BRUNSTAD: Yes, under --

7                   JUSTICE BARRETT: If we decided a  
8 jurisdictional question, you know, as counsel  
9 said, we can decide on either ground.

10                  MR. BRUNSTAD: No, Justice Barrett.  
11 Here's why. In this Court's decision in  
12 Official English for Arizonans, the Court said  
13 we consider not only our ability to decide the  
14 question but the lower court's ability to  
15 proceed. Here, if you -- if you were to reverse  
16 and send it back, what could the lower court do?  
17 Absolutely nothing.

18                  JUSTICE KAGAN: No, they can decide  
19 their own jurisdiction to decide jurisdiction.  
20 So we have a bunch of different jurisdictional  
21 questions. As Justice Barrett said, one we took  
22 cert on, and they're split on it, and there's  
23 usefulness to our deciding that. And then, as  
24 to anything else, send it back and they can  
25 decide on their own jurisdiction with respect to



1 the rest --

2 MR. BRUNSTAD: No, Justice Kagan.

3 JUSTICE KAGAN: -- and you'll make  
4 your arguments there.

5 MR. BRUNSTAD: Jurisdiction is not  
6 relief. There must be some tangible remedy that  
7 they must be able to get. They cannot. Wholly  
8 apart from Section 363 --

9 JUSTICE KAGAN: Well, that's just  
10 assuming the conclusion. I mean, that's exactly  
11 what we would be asking -- you know, we would be  
12 saying there are a bunch of other issues in this  
13 case, and one of them is whether there's any  
14 possibility of relief remaining, and, you guys,  
15 the lower courts, go decide that.

16 MR. BRUNSTAD: But, Justice Kagan, in  
17 the Tempnology decision that Your Honor  
18 authored, you -- at the very beginning of that  
19 decision, Your Honor said, well, is there a  
20 contractual breach remedy here? And you thought  
21 there was enough evidence that there was to then  
22 reach the question of whether Section 365 breach  
23 equals rescission. And Your Honor said it  
24 doesn't. Very similar here, similar to the one  
25 that Your Honor rejected in that decision.

1                   But the threshold question under case  
2 or controversy jurisprudence is, is there some  
3 sort of tangible relief, something they can get  
4 out of actually prevailing? And, here, the  
5 answer is no. The sole relief they want is to  
6 take away the property. And they also want a  
7 forfeiture. They've said so themselves. It  
8 just simply goes back to them.

9                   That's not permissible under  
10 bankruptcy law for a whole host of complicated  
11 reasons. But the fundamental threshold thing  
12 they want they cannot get.

13                   CHIEF JUSTICE ROBERTS: Well, counsel,  
14 the --

15                   MR. BRUNSTAD: This Court's precedents  
16 establishes that.

17                   CHIEF JUSTICE ROBERTS: -- the Chafin  
18 case makes very clear that in terms of looking  
19 at what relief is available, they go -- they  
20 stretch it pretty far, I think, in -- in  
21 analyzing it. You know, maybe this will happen,  
22 and it's not inconceivable that this will  
23 happen. Not their words, but the type of relief  
24 they were talking about under the convention  
25 seemed to me to be sort of any possible argument

1 you've got is enough to get it to the district  
2 court to at least consider its jurisdiction.

3 MR. BRUNSTAD: Well, Your Honor, on  
4 page 10, there's a reason why their --

5 CHIEF JUSTICE ROBERTS: Page 10 of  
6 what?

7 MR. BRUNSTAD: -- their statement of a  
8 remedy is citation-free. They cite not --

9 CHIEF JUSTICE ROBERTS: I'm sorry,  
10 page 10 of what?

11 MR. BRUNSTAD: Page 10 of the yellow  
12 brief, Your Honor.

13 CHIEF JUSTICE ROBERTS: Oh, okay.

14 MR. BRUNSTAD: Where they actually  
15 articulate their remedy. They cite not a single  
16 case in support of the remedy they claim that  
17 they have, and the reason why is because all of  
18 this Court's precedents is to the contrary. The  
19 cases that I articulated at the beginning are  
20 very clear. You cannot -- when the order of a  
21 sale is reversed, you cannot disturb the sale.  
22 That is blackletter, bench -- benchmark  
23 commercial law and practice in this country for  
24 two centuries. If you want to get around it,  
25 you have to, in bankruptcy, use the statutory

1 mechanism, which is the avoidance powers. As we  
2 explain in our brief, that is just not  
3 available.

4 JUSTICE BARRETT: Well, if it's that  
5 clear, you'll win below, right?

6 MR. BRUNSTAD: It's clear we'll win  
7 below because there is no --

8 JUSTICE BARRETT: Well, I'm saying, so  
9 why can't -- you know, as Justice Kagan and I  
10 were talking about, we answer the question in  
11 which we granted cert, and you should feel good  
12 then if you're right about your chances below.

13 MR. BRUNSTAD: Because there's no case  
14 or controversy if there is no effective relief  
15 that can be granted.

16 JUSTICE BARRETT: We're not saying  
17 there's a case or controversy, right? Let's  
18 imagine you lose and we say it's not  
19 jurisdictional. All we're saying is that this  
20 isn't a jurisdictional bar.

21 MR. BRUNSTAD: Yes.

22 JUSTICE BARRETT: Any other arguments  
23 you have, you can take them up below.

24 MR. BRUNSTAD: Because the case or  
25 controversy requirement of Article III

1 constrains this Court's jurisdiction as well,  
2 not simply the lower courts' jurisdiction. That  
3 -- that's -- that's -- that's the fundamental  
4 point.

5           But there's a second point, and that  
6 is the bankruptcy court has no subject matter  
7 jurisdiction over this property. Its subject  
8 matter jurisdiction is limited in rem to  
9 property of the estate.

10           This is also why Section 364 is  
11 jurisdictional. It is a blunt abrogation of  
12 subject matter jurisdiction. It says,  
13 regardless of whether you reverse or you modify  
14 a decision on appeal, it does not affect the  
15 validity of the sale. If you can't affect the  
16 validity of the sale, the property cannot be  
17 brought back into the estate.

18           If the property can't be brought back  
19 into the estate, there's no subject matter  
20 jurisdiction in federal court. The ship has  
21 sailed, and the statute says you cannot possibly  
22 get it back into port. It is just like in  
23 admiralty jurisdiction.

24           It's also jurisdictional because  
25 Section 363(m) codifies an historic practice.

1 It codifies Rule 805, which was declaratory of  
2 existing case law which was uniform.

3 JUSTICE JACKSON: Of course, if that's  
4 true, why did you waive it so many times in this  
5 case? I mean, that's the -- the only reason why  
6 we're here looking at this and trying to decide,  
7 per the question presented, whether it's  
8 jurisdictional is because you brought it up  
9 late. And the court had already ruled against  
10 you, and you apparently waived, you know, the  
11 363(m) question. And so, when you brought it  
12 back again, you said, but wait, wait, wait, that  
13 question is jurisdictional, so you still have to  
14 decide it.

15 MR. BRUNSTAD: Counsel made a mistake  
16 in articulating what Section 3-6 --

17 JUSTICE JACKSON: Your counsel?  
18 Counsel for Transform?

19 MR. BRUNSTAD: Counsel for Transform.  
20 It's the same mistake the bankruptcy judge made  
21 about Section 363. But Transform knew this was  
22 a jurisdictional question. They cited in their  
23 papers in the bankruptcy court the very  
24 jurisdictional precedents from the Second  
25 Circuit that say it's jurisdictional. One also

1 cannot by consent or waiver or misstatement of  
2 the law create subject matter jurisdiction that  
3 does not exist.

4 Here, there is no subject matter  
5 jurisdiction because the statute bluntly says,  
6 no matter what you do on appeal, you cannot  
7 bring the asset back into the estate. If you  
8 cannot bring the asset back into the estate,  
9 it's not property of the estate. There cannot  
10 be federal subject matter jurisdiction in  
11 bankruptcy, which is limited in rem to assets of  
12 the estate. Okay. So it is a blunt  
13 jurisdictional abrogation.

14 That is by design. That was  
15 specifically what Congress intended by codifying  
16 verbatim in this oddly worded statute a former  
17 rule of procedure, Rule 805, which was  
18 declaratory of existing law.

19 The two seminal cases were Fink and  
20 Taylor. Taylor involved a situation where there  
21 were assets in bankruptcy that were sold, and  
22 then the Committee of Creditors appealed and the  
23 court of appeals said we don't have jurisdiction  
24 to decide this controversy. We have no  
25 authority to hear.

1           The same thing in Fink, which used  
2           jurisdiction three times in its decision, the  
3           Fourth Circuit's decision. Jurisdiction,  
4           jurisdiction, jurisdiction. We cannot bring the  
5           property back. We cannot order it to come back.  
6           Again, one does not --

7           CHIEF JUSTICE ROBERTS: Well, they --  
8           they may have used -- they may have used it  
9           three times, but the statute doesn't use it at  
10          all.

11          MR. BRUNSTAD: Correct, but -- and the  
12          question is why. And in Boechler, this Court  
13          said we look at the traditional tools of  
14          statutory interpretation. We look at the text,  
15          the context, and the history.

16          Well, here, there is an established  
17          historical practice that Congress intended to  
18          codify. It wasn't just that the courts limited  
19          remedial relief. They said we have no authority  
20          to even hear the appeal where you're challenging  
21          the validity of the sale.

22          And authority to hear is subject  
23          matter jurisdictional. We can't even hear it.  
24          We're not going to even hear the merits. In  
25          case after case after case, the appellate courts



1 dismissed these bankruptcy appeals over and over  
2 again without hearing the merits. That's the  
3 practice that Rule 805 captured.

4 The courts construing Rule 805  
5 interpreted it in exactly that way. All the --  
6 and some of them involved parties that were  
7 before the court. The purchaser was there or  
8 not. It did not matter. What mattered was that  
9 the courts of appeals would not hear those  
10 appeals where the litigant was challenging the  
11 validity of the sale.

12 Congress chose to codify that  
13 practice, but they did so in a specific context,  
14 and that is bankruptcy jurisdiction is  
15 fundamentally in rem. This Court has said so  
16 since the early 1800s. It reiterated that in  
17 Katz. It reiterated that in Hood. It  
18 established that asset sales in bankruptcy are  
19 in rem, not in personam in Stratton versus New.

20 All the lower courts have said the  
21 same thing. And they have also concluded as  
22 follows: Once property leaves the estate, the  
23 jurisdiction of the bankruptcy court lapses. It  
24 ends. Why? Because it's in rem and it is  
25 limited to property of the estate. Once the

1 property leaves the estate, as happened here  
2 when the sale was consummated on October 4,  
3 2019, it was not property of the estate.

4 JUSTICE JACKSON: But what do we do  
5 with the good faith language in the statute? I  
6 mean, that suggests that some court is going to  
7 litigate at least -- at least that issue.

8 MR. BRUNSTAD: Correct. That limits  
9 the subject matter of the litigation to whether  
10 the purchaser was in good faith or not. If the  
11 purchaser was in bad faith --

12 JUSTICE JACKSON: Well, you said he  
13 had no jurisdiction. You said, once it's gone,  
14 so the sale happens, the property is gone, and  
15 then we have 363(m), which at least seems to  
16 preserve as a litigatable topic --

17 MR. BRUNSTAD: Yes.

18 JUSTICE JACKSON: -- the question of  
19 whether the sale happened in good faith. Your  
20 argument suggests that, too bad, so sad, there's  
21 nothing we can do. The -- the -- the property  
22 is gone.

23 MR. BRUNSTAD: No, Justice Jackson,  
24 because -- because all that it does is it  
25 abrogates subject matter jurisdiction in a

1 narrow category of cases. It's as though, in --  
2 in -- in the exercise of its authority to enact  
3 basically federal subject matter jurisdiction,  
4 the court said you have federal subject matter  
5 jurisdiction in the district courts but not with  
6 respect to this particular federal question.  
7 That would be an abrogation of subject matter  
8 jurisdiction.

9 This statute works in exactly the same  
10 way. If what you're challenging is the validity  
11 of a sale to a good faith purchaser, we do not  
12 have subject matter jurisdiction to hear it. As  
13 a subject matter constraint, we have no  
14 authority to hear it.

15 CHIEF JUSTICE ROBERTS: Well, how can  
16 that be? I mean, it says that the provision on  
17 which you're relying saying you don't have  
18 authority to hear it depends upon the fact that  
19 the property was purchased in good faith.

20 You can't be circular. It seems to me  
21 that you've got to have jurisdiction to decide  
22 the good faith question.

23 MR. BRUNSTAD: That's correct, Your  
24 Honor. They have jurisdiction to decide whether  
25 it's good faith or not.

1 CHIEF JUSTICE ROBERTS: Yeah.

2 MR. BRUNSTAD: But, if it is to a good  
3 faith purchaser, as in this case, there is no  
4 subject matter authority to take the property  
5 away, to hear an appeal challenging --

6 JUSTICE BARRETT: But the property  
7 left. But the property left. I mean, in these  
8 hypotheticals, I mean, I think what Justice  
9 Jackson is saying and what the Chief is  
10 following up on is you told us before that once  
11 the property was gone, poof --

12 MR. BRUNSTAD: Yes.

13 JUSTICE BARRETT: -- jurisdiction --  
14 jurisdiction went away.

15 MR. BRUNSTAD: Correct.

16 JUSTICE BARRETT: The property is  
17 gone, but somehow the Court by virtue of the  
18 statute still has to decide this good faith  
19 question --

20 MR. BRUNSTAD: And -- and --

21 JUSTICE BARRETT: -- and have subject  
22 matter jurisdiction to do it.

23 MR. BRUNSTAD: Yes, Justice Barrett,  
24 and there is a remedy. As this Court explained  
25 in Katz, the avoidance powers are ancillary to

1 the court's in rem jurisdiction. If, in fact,  
2 the sale were overturned because it was a bad  
3 faith purchaser, then there are ways, statutory  
4 means of undoing the sale and bringing the  
5 property back into the estate so the court can  
6 exercise in rem jurisdiction over it.

7 But the statutory scheme is holistic.  
8 Section 363(m) suspends all of that if it's to a  
9 good faith purchaser by bluntly stating nothing  
10 that you can do can bring the asset back.  
11 Overturning it, reversing it, modifying it does  
12 not affect the validity of the sale. The  
13 transfer of ownership must remain in the  
14 purchaser. All of those ancillary processes to  
15 bring the race back into the estate, into the  
16 custody of the bankruptcy court so it can order  
17 an alternative disposition, are suspended.  
18 That's the -- that was the intended effect of  
19 Section 363(m).

20 CHIEF JUSTICE ROBERTS: Well, I don't  
21 know. Maybe they are and maybe they're not in  
22 particular instances. But you do -- have  
23 acknowledged that under 363(m) there is  
24 jurisdiction in the court. Now you want to say  
25 it's simply to adjudicate good faith, but then

1 all sorts of consequences flow from that  
2 decision.

3 MR. BRUNSTAD: But that's the subject  
4 matter, Your Honor. That's the point. The  
5 subject matter of good faith is preserved. The  
6 subject matter of the validity of the sale is  
7 not.

8 Now this is -- this is an unusual  
9 statute. This is not like any other statute we  
10 were able to find that the court had to construe  
11 whether it was jurisdictional or not. It's  
12 unique. But that's because bankruptcy  
13 jurisdiction is unique. The remedial scheme is  
14 unique. Its impact on -- it's very surgical.  
15 It is a key into the system as a whole, but it  
16 is supposed to be a subject matter block. It  
17 says as so bluntly and directly: Reversal or  
18 modification on appeal does not affect the  
19 validity of the sale.

20 CHIEF JUSTICE ROBERTS: If the --

21 MR. BRUNSTAD: That means what it  
22 says.

23 CHIEF JUSTICE ROBERTS: -- purchase  
24 was in good faith.

25 MR. BRUNSTAD: Correct. So the only

1 subject matter you can hear is good faith or  
2 not. If the purchaser was in bad faith, all of  
3 the remedial provisions under the code are  
4 preserved.

5 JUSTICE JACKSON: Does the rem need to  
6 be back in order to adjudicate the good faith  
7 question?

8 MR. BRUNSTAD: It does, Your Honor.  
9 This is the opposite --

10 JUSTICE JACKSON: It does? So -- so,  
11 before the court could --

12 MR. BRUNSTAD: No, no, no, no, Your  
13 Honor, no.

14 JUSTICE JACKSON: -- evaluate good  
15 faith, we've got to get the rem back?

16 MR. BRUNSTAD: I -- I misspoke, Your  
17 Honor.

18 JUSTICE JACKSON: It does not?

19 MR. BRUNSTAD: No. The good --

20 JUSTICE JACKSON: All right. So how  
21 does it have subject matter jurisdiction to  
22 address the question with the rem being gone if  
23 you're right about the impact of the rem being  
24 gone?

25 MR. BRUNSTAD: Because that is a

1 precursor to being able to invoke the ancillary  
2 processes of avoidance, and those processes turn  
3 on whether you have a good faith purchaser or  
4 not. If it's a bad faith purchaser, 363(n)  
5 applies, and 363(n) says, if you have a  
6 collusive bidder, the trustee can avoid the sale  
7 or collect damages. It gives an option, which  
8 is why it can't be automatically void.

9           So the determination of good faith or  
10 bad faith is a precursor to be invoking one of  
11 the ancillary processes, as this Court explained  
12 to them in Katz, to bring the asset back into  
13 the estate so the court can order a different  
14 disposition.

15           363(m), when it's a good faith  
16 purchaser, blocks all of that. The subject  
17 matter is -- cannot be touched because you  
18 cannot affect the validity of the sale. The  
19 statute says so bluntly. If you cannot affect  
20 the validity of the sale, the asset cannot  
21 conceivably possibly come back into the estate.  
22 There is no avoidance mechanism. So there  
23 cannot be any additional exercise of  
24 jurisdiction over the race, and -- and an  
25 appellate court cannot order a lower court to



1 exercise jurisdiction it does not possess.

2 JUSTICE KAGAN: But, Mr. --

3 MR. BRUNSTAD: And once again, just  
4 because the purchaser showed up does not convert  
5 an in rem proceeding into an in personam action.

6 JUSTICE KAGAN: Mr. Brunstad, do you  
7 have anything to say about the question  
8 presented?

9 (Laughter.)

10 MR. BRUNSTAD: I do, Your Honor. I  
11 do, Your Honor. Section 363(m) is  
12 jurisdictional, Your Honor, for three reasons:  
13 text, context, and history, the traditional  
14 methods of statutory interpretation that we look  
15 to to determine whether a statute was intended  
16 by Congress to be jurisdictional.

17 The text has -- the text has this  
18 blunt subject matter restriction, as I've  
19 articulated it. But the context is really  
20 critical.

21 JUSTICE KAGAN: Well, to context, boy  
22 -- jumping to context in a place where we've  
23 always said you need a clear statement in the  
24 text, where is your clear statement in 363(m)?

25 MR. BRUNSTAD: The clear statement is

1 does not affect the validity of a sale. It's a  
2 subject matter constraint, not a procedural  
3 rule. The other statutes involve things like  
4 file your notice of appeal in 14 days or a time  
5 limit. This is not a procedural limitation.

6 JUSTICE KAGAN: But I think what we've  
7 always meant when we say a clear statement about  
8 jurisdiction is something that says something  
9 like the court has no jurisdiction.

10 (Laughter.)

11 MR. BRUNSTAD: That -- and, in fact,  
12 that would be wonderful if it were here. It's  
13 not. But the intent was exactly that. You  
14 cannot bring the ship back into port. The ship  
15 has sailed.

16 CHIEF JUSTICE ROBERTS: And we've --  
17 and we've also looked at any kind of wiggle room  
18 into -- you know, through the door. You know,  
19 if you've got jurisdiction for something, we  
20 don't think that that statute is jurisdictional.  
21 I mean, you may pick and choose and, when you  
22 get into the court, you may be denied relief.  
23 You may be denied a big chunk of relief.

24 But, if there's going to be  
25 jurisdiction for a little bit, we sort of let

1       them sort out what relief is available once  
2       they're in court.

3                   MR. BRUNSTAD:  There is no relief  
4       available here.  Put that -- putting that aside,  
5       it's a unique --

6                   CHIEF JUSTICE ROBERTS:  Well, of  
7       course, there is if it's in bad faith.

8                   MR. BRUNSTAD:  But -- but that -- that  
9       was -- they did not appeal that determination.  
10      It was a factual determination below.  The court  
11      of appeals remarked they didn't raise that, they  
12      didn't timely raise that.  That is a settled  
13      question of fact, not subject to being reopened.

14                   Okay.  But --

15                   CHIEF JUSTICE ROBERTS:  Settled  
16      questions of fact can also be appealed, right?

17                   MR. BRUNSTAD:  They did not.  That's  
18      the problem.  They did not challenge that on  
19      appeal, so that isn't established.  Plus,  
20      there's no basis for it.

21                   But, to Your Honor's point, this is a  
22      uniquely worded statute for a reason.  It  
23      codifies an historic practice, and the historic  
24      practice informs what this statute is.  Congress  
25      codified the rule, and the rule reflected a

1 uniform body of case law that refused to even  
2 hear these appeals if there wasn't a stay where  
3 you're challenging the validity of the sale.  
4 That was what Congress intended to do.

5 So I think it's important to sort of  
6 take a look at that. I understand the clear  
7 statement rule, but, again, I would qualify  
8 that. That makes sense and is easily applied  
9 when you have a procedural requirement, is that  
10 jurisdictional or not. Again, here, we have a  
11 uniquely worded statute with intended  
12 jurisdictional consequences. If you have a sale  
13 to a good faith --

14 JUSTICE GORSUCH: Counsel, let me see  
15 if I could put it in my own words.

16 MR. BRUNSTAD: Yes, Justice Gorsuch.

17 JUSTICE GORSUCH: Just so I -- just so  
18 I understand it because there's --

19 MR. BRUNSTAD: Perhaps you can do a  
20 better job than I could.

21 JUSTICE GORSUCH: No, no. I'm --  
22 (Laughter.)

23 JUSTICE GORSUCH: One thing I'm  
24 confident about is that I -- I am -- I am deeply  
25 confused by this case. But I just want to make

1 sure my confusion is at least what I think it  
2 is. How about that? That you would say that,  
3 right, we normally require magic words like "no  
4 jurisdiction"? That those are typically in  
5 personam actions in an in rem world?

6 MR. BRUNSTAD: Yes.

7 JUSTICE GORSUCH: What, say, no  
8 jurisdiction might look like would be you can't  
9 touch the property.

10 MR. BRUNSTAD: Correct, Your Honor.

11 JUSTICE GORSUCH: And -- and this  
12 statute says you can't touch the sale.

13 MR. BRUNSTAD: Correct, Your Honor,  
14 and that is --

15 JUSTICE GORSUCH: All right. At least  
16 I understand the argument. Okay. Thank you.

17 MR. BRUNSTAD: So --

18 JUSTICE JACKSON: Can't touch the sale  
19 if it was made in good faith?

20 MR. BRUNSTAD: Correct. Correct. And  
21 that's what we have here. There was a finding  
22 by the --

23 JUSTICE JACKSON: Right, but the  
24 question of whether it was made in good faith,  
25 who -- who handles that, is Congress intending

1 for this Court to address that or no?

2 MR. BRUNSTAD: No, and I don't think  
3 the Court needs to reach that in this case  
4 because that's not an issue in this case.

5 JUSTICE JACKSON: No, I understand,  
6 but, as you read the statute --

7 MR. BRUNSTAD: Yes.

8 JUSTICE JACKSON: -- clearly, the good  
9 faith part is still in there. It's --

10 MR. BRUNSTAD: Correct.

11 JUSTICE JACKSON: -- a part of the  
12 analysis, and so, if the rem is gone, who  
13 addresses that?

14 MR. BRUNSTAD: Had they appealed it,  
15 the district court would have addressed it in  
16 the first instance. They did not. They did not  
17 object to good faith in the bankruptcy court.  
18 They did not raise it on appeal. They did not  
19 argue it in their appellate briefs. They did  
20 not raise it in the court of appeals. They did  
21 not raise it anywhere. Okay. But had they  
22 addressed that determination, then that could  
23 have been addressed by the court of appeals.  
24 That's fine. But what --

25 JUSTICE JACKSON: Because somehow

1 there's jurisdiction for that?

2 MR. BRUNSTAD: Well, there's  
3 jurisdiction for that because the statute only  
4 abrogates subject matter jurisdiction if you've  
5 got a good faith purchaser. It goes to defining  
6 -- it's like saying suppose the federal question  
7 statute said you have federal subject matter  
8 jurisdiction over federal questions except for  
9 X. Well, you would have to determine as a  
10 factual matter, is this about X? If it's about  
11 X, we don't have jurisdiction. If it's not  
12 about X, we do.

13 That's exactly the same thing that's  
14 going on here under Section 363(m). Is it a  
15 good faith purchaser? That's a factual  
16 question. If it's a good faith purchaser, the  
17 abrogation of jurisdiction applies. If it's not  
18 a good faith purchaser, it doesn't. And if it's  
19 not a good faith purchaser, we have a whole  
20 remedial scheme under the Bankruptcy Code that  
21 can get invoked. But, if it is a good faith  
22 purchaser, you cannot touch the sale. It cannot  
23 be undone.

24 That was by design. That was  
25 Congress's intent to do that in codifying this

1 historic practice. And when codify -- when  
2 Congress codifies an historic rule, especially  
3 in bankruptcy, this Court has said over and over  
4 again --

5 JUSTICE SOTOMAYOR: I -- I'm sorry,  
6 did we have a common law rule on good -- it  
7 being the good faith buyer could still challenge  
8 the sale?

9 MR. BRUNSTAD: The -- there was a -- a  
10 common law rule on that that wasn't particularly  
11 developed. It has become --

12 JUSTICE SOTOMAYOR: So what we know --

13 MR. BRUNSTAD: -- more developed over  
14 the Bankruptcy Code.

15 JUSTICE SOTOMAYOR: -- so what we know  
16 now is whatever Congress wrote, it was doing  
17 away with the common law rule?

18 MR. BRUNSTAD: No, Your Honor. No.

19 JUSTICE SOTOMAYOR: It was because it  
20 was adding an exception, the good faith buyer  
21 exception, that didn't exist. And it seems to  
22 me that I don't see anything in the words of the  
23 statute that suggests it wasn't imputing other  
24 equitable doctrines as well, like, yeah, if you  
25 know of the appeal and there's no sale order,



1 you take -- you're still a good faith  
2 purchaser --

3 MR. BRUNSTAD: Justice Sotomayor --

4 JUSTICE SOTOMAYOR: -- but if you --  
5 if you --

6 MR. BRUNSTAD: -- I was not clear.

7 JUSTICE SOTOMAYOR: -- if you've  
8 waived this --

9 MR. BRUNSTAD: Yeah. On page 10a of  
10 the red brief, we reproduce Bankruptcy Rule 805,  
11 and it does, in fact, also have a good faith  
12 element to it.

13 JUSTICE SOTOMAYOR: But --

14 MR. BRUNSTAD: So it was part of the  
15 common law. It wasn't as developed as it is  
16 under the Bankruptcy Code. It was part of the  
17 rule that Congress codified. And as this Court  
18 has said over and over again, when Congress  
19 codifies an historic practice in bankruptcy, we  
20 will not construe the code to intend a change  
21 unless Congress clearly intended a change.  
22 Here, it's clear that they --

23 JUSTICE SOTOMAYOR: By the way --

24 MR. BRUNSTAD: -- intended to codify  
25 the practice, which, again, was uniform. The

1 courts of appeals refused to hear --

2 JUSTICE SOTOMAYOR: -- do -- do --

3 MR. BRUNSTAD: -- these cases on the  
4 merits.

5 JUSTICE SOTOMAYOR: I just have a  
6 practical question.

7 MR. BRUNSTAD: Yes, Your Honor.

8 JUSTICE SOTOMAYOR: At the end of the  
9 case -- or assume a stay had been granted --

10 MR. BRUNSTAD: Yes, Your Honor.

11 JUSTICE SOTOMAYOR: -- does that mean  
12 the bankruptcy estate couldn't have been wound  
13 up subject to that pending case?

14 MR. BRUNSTAD: So perhaps, Your Honor,  
15 but if a stay had been granted, the property  
16 would not have left. It would be -- have  
17 remained within the estate. The bankruptcy  
18 could have -- court would have remained -- would  
19 have had in rem jurisdiction over the asset.

20 JUSTICE SOTOMAYOR: I see.

21 MR. BRUNSTAD: It's because a stay was  
22 not granted that the transaction closed under  
23 private contract on October 4, 2019, and  
24 Transform has been -- has owned and maintained  
25 the building and occupied it for the last three

1 years, has paid the taxes, has paid the  
2 utilities, has paid the rent, is fixing the  
3 roof.

4 Here's another reason why we can't do  
5 an end run around the statutory mechanisms.  
6 Under the statutory mechanisms, all of those  
7 reliance interests of the purchaser are  
8 preserved if the -- if the transfer is avoided  
9 under Section 550. Under their theory, their  
10 nonexistent, in my opinion, common law theory,  
11 there's no protection.

12 So the millions of dollars in  
13 additional money that Transform paid to acquire  
14 this specific asset, in addition to the \$1.4  
15 billion it paid for the bulk -- bulk -- the bulk  
16 sale, the additional money it's expended to  
17 maintain the property, pay the taxes, is simply  
18 forfeited. Under the statutory scheme, it's  
19 not. You're given a lien for that on the  
20 property under the statutory avoidance scheme.

21 That's another reason why we can't do  
22 an end run around Congress's carefully crafted  
23 protections for avoiding sales. There's  
24 protections for purchasers there. There's none  
25 in the common law theory.

1           But, again, going back to -- and if I  
2           could just briefly cite these cases -- it's Gray  
3           versus Brignardello, 68 U.S. at 634; Voorhees  
4           versus Bank of U.S., 35 U.S. at 475 to 476;  
5           Grignon's Lessee versus Astor, 43 U.S. at 343.  
6           The Court is unequivocal in explaining this  
7           applies -- it applies in rem, it applies to  
8           sales, you cannot take the property away from  
9           the purchaser just because the trial court made  
10          an error that was reversed on appeal.

11           CHIEF JUSTICE ROBERTS: Thank you.

12           Justice Thomas?

13           JUSTICE THOMAS: Nothing.

14           CHIEF JUSTICE ROBERTS: Justice Alito?

15           Justice Sotomayor?

16           Justice Jackson?

17           Okay. Thank you, counsel.

18           MR. BRUNSTAD: Thank you, Your Honor.

19           CHIEF JUSTICE ROBERTS: Mr.

20          Hallward-Driemeier, rebuttal?

21           REBUTTAL ARGUMENT OF DOUGLAS H. HALLWARD-DRIEMEIER

22           ON BEHALF OF THE PETITIONER

23           MR. HALLWARD-DRIEMEIER: Thank you,

24          Your Honor.

25           With respect to the general

1 proposition that the ship has sailed, this Court  
2 explicitly rejected that proposition in Republic  
3 National Bank. It said we hold, in an in rem  
4 forfeiture action, the court of appeals is not  
5 divested of jurisdiction by the prevailing  
6 party's transfer of the res out of the court.  
7 This Court rejected precisely the rule they have  
8 cited. So perhaps they are suggesting there is  
9 a bankruptcy-specific rule to the same effect.

10 We cite at page 18 of the reply brief  
11 several cases in the courts of appeals that  
12 concern this issue, and they say that if the  
13 transferee is not a party to the proceeding,  
14 then the court cannot order it back. But, if  
15 the transferee is a party to the proceeding,  
16 then the court of appeals can undo the  
17 transaction. That is the rule we are relying  
18 on. It is the rule applied by Fink and other  
19 cases cited.

20 Now, mind you, Gray, Voorhees, et  
21 cetera, were never cited in the briefs, and I  
22 don't know what they say. I'm sorry. But, to  
23 the extent that they purport to establish a rule  
24 similar to their characterization of The Ann or  
25 The Little Charles, again, this Court

1 specifically rejected that in Republic National  
2 Bank.

3           Now 363(m), as Your Honors' questions  
4 suggested -- as Your Honors' questions suggest,  
5 presupposes that there is authority in the  
6 courts to get that property back if, for  
7 example, it's a bad page -- bad faith purchaser.  
8 But it does not say that it has to be done via  
9 Section 549. And, in fact, Transform's argument  
10 explains why that can't be the case, because 549  
11 is a cause of action owned by the debtor. It  
12 says, hey, too late, sorry, Sears waived any 549  
13 cause of action, and also, guess what, two years  
14 have passed, so you can't do that either.

15           Congress would not have subjected a  
16 party who prevails on appeal in establishing  
17 that the transfer is to a party in bad faith  
18 would have no viable cause of action or  
19 opportunity to recover it.

20           It's inherent in the authority of the  
21 Court. That's what the cases we cite on page 18  
22 provide. At the end of the day, all of these  
23 are merits issues that do not preclude this  
24 Court from deciding the issue on which it  
25 granted certiorari.

1           I want to point out that with -- on  
2           that issue, first of all, that the good faith  
3           finding of fact was in the sale order. Of  
4           course, it could not have made a good faith  
5           finding of fact with respect to the assignment  
6           because the assignment didn't happen until six  
7           months later.

8           And MOAC is challenging their good  
9           faith. We challenged it in the form of making  
10          an argument of judicial estoppel because they  
11          were the ones that were responsible for there  
12          being no stay because they told the bankruptcy  
13          court multiple times that they would not invoke  
14          363(m). The bankruptcy court referred to that  
15          in its analysis of every one of the factors.

16          And then, finally, with respect to  
17          Rule 805, it predated Section 363(m) by two  
18          years. There was no established practice of the  
19          type they suggest, and, of course, the cases we  
20          cite are to the contrary.

21          Thank you, Your Honor.

22          CHIEF JUSTICE ROBERTS: Thank you,  
23          counsel. The case is submitted.

24          (Whereupon, at 1:40 p.m., the case was  
25          submitted.)

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