

SUPREME COURT OF THE UNITED STATES

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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Place: Washington, D.C.
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9
10 Washington, D.C.
11 Monday, December 5, 2022

12
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:
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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 ex -- 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 con -- jurisdictional character. None of the
5 cases Transform cites are from this Court, and
6 none actually designated the rule
7 jurisdictional. Because the requirement of a
8 stay is not jurisdictional, it was subject to
9 waiver, forfeiture, and estoppel, each of which
10 applies 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 -- 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 -- the -- that the assignee did
20 not 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 -- it's very
2 protective of mall owners. Congress was very
3 solicitous of them. And it provided that both
4 in order to assume and to assign a shopping
5 center lease, the -- the debtor and the assignee
6 would have to show that there would be adequate
7 assurance of future performance, and that
8 required specifically showing that the assignee
9 had the 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 the district
15 court had ruled on the merits, and it was
16 affirmatively waived in the bankruptcy court as
17 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 -- a

1 sale of property of the estate under 363(b)
2 because that had already happened. The sale had
3 closed. The money had been paid to Sears, and
4 there was no -- it was not subject to adjustment
5 if the designated leases were later held not to
6 be 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 a -- 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
4 are hereby authorized, in accordance with
5 Sections 105(a) and 365 [...] to assume and
6 assign the Designated Lease." Assumption and
7 assignment occurs under 365. There's no
8 reference there to 363. We're challenging the
9 assumption and 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 Mall of
6 America, and that's because, under 365(d)(4),
7 the -- the statutory time to assume a lease
8 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 -- a
21 litigation trust, and I assume an argument could
22 be made that it would become property of the
23 litigation 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 -- I -- I
24 think --

25 JUSTICE ALITO: But you -- no, go

1 ahead.

2 JUSTICE GORSUCH: You sure?

3 JUSTICE ALITO: Yeah.

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

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

18 MR. HALLWARD-DRIEMEIER: Yeah.

19 JUSTICE GORSUCH: You are.

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

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

25 MR. HALLWARD-DRIEMEIER: 363(m)

1 protects the good faith purchaser's interests.

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

5 MR. HALLWARD-DRIEMEIER: But --
6 exactly. Here --

7 JUSTICE GORSUCH: So, 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 -- of an asset
14 that -- that -- that a good faith purchaser has
15 taken on?

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

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

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

24 JUSTICE GORSUCH: Yes, but your
25 argument doesn't turn on that fact. Your

1 argument turns on the meaning of the statute.

2 So that doesn't help me.

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

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

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

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

13 MR. HALLWARD-DRIEMEIER: So --

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

20 MR. HALLWARD-DRIEMEIER: I -- I -- I
21 think, absent it's in a sense agreement to do
22 so, as it has here be -- by waiving the
23 protections of the statute, I don't think that's
24 --

25 JUSTICE GORSUCH: Well, the good faith

1 purchaser is not the one who waives it or not.

2 It's --

3 MR. HALLWARD-DRIEMEIER: Oh. Well,

4 here --

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

6 MR. HALLWARD-DRIEMEIER: -- here, it

7 is, Your Honor.

8 JUSTICE GORSUCH: I understand here it

9 is, but that's not always going to be true.

10 MR. HALLWARD-DRIEMEIER: No, and --

11 and, in fact, that's -- the cases that we cite

12 -- and the reply brief on page 18 make that

13 distinction -- they hold that where the

14 transferee is outside of the -- the -- the

15 proceedings and -- and not subject to the

16 court's jurisdiction order, that the -- that it

17 can't be ordered back. But, they say, where the

18 transferee is a party to the proceeding, where

19 the order can in effect be undone through an

20 order to the parties to the proceeding, then

21 there is jurisdiction to give that relief, as

22 here.

23 JUSTICE GORSUCH: So you would be okay

24 with a rule that says it's not jurisdictional,

25 but in no circumstances may a court order a good

1 faith purchaser outside of the bankruptcy
2 proceedings to revert an asset?

3 MR. HALLWARD-DRIEMEIER: Well, that --
4 that issue is not presented in this case, and I
5 would urge the Court not to reach out to decide
6 it because I don't think it's been briefed in
7 this case.

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

12 This is about statutory mootness. It
13 was a statutory protection that was waived by
14 Transform specifically twice in the bankruptcy
15 court. And the bankruptcy court ended its
16 comment about that -- and this is at page 7(a)
17 of the brief in opposition appendix -- saying
18 they're not going to rely on 363(m).

19 Mr. Chesley just reiterated that for a second
20 time. If that were an inaccurate
21 characterization of Transform's position, and,
22 indeed, they had twice disavowed 363(m) already
23 at that time, it was -- it was incumbent upon
24 Transform to clarify.

25 The district court recognized that if

1 ever there was a case for judicial estoppel,
2 this is it. But we don't need to rely on either
3 of these doctrines because we also have
4 forfeiture.

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

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

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

23 They say the only remedy is Section
24 549. But Section 549 here is a two-year period
25 of repose. It's also the debtor's cause of

1 action subject to waiver. They assert that
2 Sears has already waived any claim under 549,
3 and, of course, the two-year period is gone.

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

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

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

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

24 JUSTICE GORSUCH: I got that. I
25 really do.

1 MR. HALLWARD-DRIEMEIER: -- and the --
2 the -- the -- so the -- I would point the Court
3 to both this Court's decision Republic Bank of
4 Miami, which is not a bankruptcy case, granted,
5 but where the Court seemed to understand that
6 because the United States was a party before it
7 and had, indeed, brought the action, then a
8 court order to undo the -- the transfer would be
9 honored by the United States. I mean, there
10 were complications because the United States
11 needs an appropriations, but the court found it.

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

22 JUSTICE GORSUCH: Thank you, counsel.

23 CHIEF JUSTICE ROBERTS: Thank you.

24 Following up on Chafin, if I'm remembering
25 correctly, the Court went on a little bit about

1 how narrow the issues that would be available in
2 the proceeding would be.

3 MR. HALLWARD-DRIEMEIER: Well, the
4 Court actually does not resolve the question.
5 They said that on remand there was a question
6 whether the -- the -- that the agreement, the --
7 the international convention would itself
8 provide for an order of re-return or if
9 principles of equity would allow.

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

20 At the moment, there are two pieces of
21 paper. There's a -- a lease that was given to
22 Sears, and there's a second piece of paper that
23 says, pursuant to authority under Section 365 of
24 the bankruptcy court -- code, the -- the --
25 Sears' lease has been assigned to Transform, but

1 when on remand that order is taken away, then
2 Transform has nothing to -- to assert in terms
3 of its right to the -- to the leasehold in -- at
4 Mall of America.

5 CHIEF JUSTICE ROBERTS: Thank you.

6 JUSTICE JACKSON: Isn't part of --

7 CHIEF JUSTICE ROBERTS: Justice -- I'm
8 sorry.

9 Justice Thomas?

10 JUSTICE THOMAS: Nothing.

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

13 JUSTICE KAGAN: No, we are.

14 CHIEF JUSTICE ROBERTS: No, we are.
15 Yeah.

16 Justice Thomas?

17 Justice Alito?

18 I thought we were.

19 Justice Sotomayor?

20 Justice Kagan?

21 JUSTICE KAGAN: Can -- can I ask you
22 to make an assumption you don't want to make?
23 But would you assume, sort of along the lines
24 that Justice Gorsuch was -- was saying, that, in
25 fact, at this late date, the Court is not going

1 to be able to undo the assignment? Does that
2 make this constitutionally moot, or is there
3 some other form of relief that the Court could
4 provide to resolve this dispute?

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

12 JUSTICE KAGAN: But, I -- I -- I -- I
13 want to --

14 MR. HALLWARD-DRIEMEIER: The parties
15 have stipulated --

16 JUSTICE KAGAN: Just -- just stick
17 with my question.

18 MR. HALLWARD-DRIEMEIER: Okay.

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

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

1 Your Honor, the -- the rule -- the statute only
2 precludes an -- an invalidation of the -- of the
3 sale. Of course, we think this is an
4 assignment, not a sale, so it doesn't apply.
5 But, if that is unavailable, then the court has
6 to consider whether there can be any other
7 relief. Here, we think other relief might be,
8 for example, further protection to ensure us
9 that -- that Transform actually does comply with
10 all of its requirements or perhaps money out of
11 the estate to compensate Mall of America for
12 what it has lost.

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

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 Justice Kavanaugh?

1 Justice Barrett?

2 Justice Jackson?

3 JUSTICE JACKSON: I just wanted to ask
4 whether in part -- partly in response to Justice
5 Gorsuch's question, is it your view that the
6 statute itself, (m), assuming that it applies,
7 does contemplate circumstances in which you
8 might have to unravel it because it's -- it --
9 it only talks about the validity of a sale that
10 has been made in good faith?

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

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Ms. Sinzduk.

25

1 ORAL ARGUMENT OF COLLEEN R. SINZDAK
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONER

4 MS. SINZDAK: Mr. Chief Justice, and
5 may it please the Court:

6 Section 363(m) is not jurisdictional
7 because nothing in its text suggests that it is,
8 and there is no other evidence that satisfies
9 the clear statement rule described in Arbaugh.

10 Respondent is incorrect in asserting
11 that Section 363(m) is nonetheless
12 jurisdictional because it reflects a
13 longstanding limit on in rem jurisdiction.
14 Among other things, this Court's decision in
15 Republic National Bank rejected the existence of
16 the very limit on in rem jurisdiction that
17 Respondent now asserts.

18 Nor should Respondent prevail based on
19 its new argument that Section 549 and 550
20 provide the exclusive means to unwind the
21 disputed lease assignment. This new argument
22 about whether Petitioner is entitled to relief
23 under the bankruptcy statutes is not
24 jurisdictional, and even if it were, there is no
25 reason that this Court would have to address it

1 before the question of subject matter
2 jurisdiction on which this Court granted cert.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: I know there's a
5 resistance to projecting what would happen when
6 this case -- if this case goes back, but what do
7 you think will happen?

8 MS. SINZDAK: We are not taking a
9 position on that. The United States does not
10 have --

11 JUSTICE THOMAS: Nobody is.

12 MS. SINZDAK: Nobody is.

13 (Laughter.)

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

23 It is our -- it is our -- our sense
24 that in general this -- this idea that there
25 would need to be further process it -- it -- it

1 doesn't have a lot of precedent. We have
2 looked, for example, at what happens when
3 there's a good faith purchaser, and in the cases
4 that we found, there hasn't been additional
5 process that the good faith -- purchaser has had
6 to go through. At least looking at the
7 bankruptcy court dockets, we haven't been able
8 to see that. But -- but we aren't taking a -- a
9 position on that because that wasn't a question
10 on which this Court granted cert.

11 JUSTICE GORSUCH: Counsel, I -- I hear
12 everything you say, okay? So take it as read,
13 okay? But, normally -- I mean, my bankruptcy
14 experience is limited, so -- and yours is much,
15 much more -- you -- you have access to people
16 with great more expertise, and so I'm -- I'm --
17 I'm really pleading for that, okay?

18 Normally, I think of good faith
19 purchasers -- put aside bad faith purchasers,
20 okay -- as once they purchase an asset in
21 bankruptcy, we're done and it's all about
22 finality and resolution and moving on and
23 quickly resolving these cases. And that's
24 really pretty essential to the greater purposes
25 of the bankruptcy laws, certainty and allowing

1 people an opportunity for a new start, okay?

2 What happens to good faith purchasers
3 in these circumstances who, through no fault of
4 their own but because of the monkey business of
5 the parties, have major assets, you know,
6 potentially with -- withdrawn from them years
7 later? I mean, we're going to -- we're talking
8 years later. That just seems to me contrary to
9 what I know instinctively about the bankruptcy
10 laws.

11 Now perhaps there's some other
12 limitation that we can make up, we can find.
13 Yes, yes, you're -- you're -- you're shaking
14 your head to the right question and nodding it
15 to the right question. Help me. What -- what
16 is it?

17 MS. SINZDAK: Sure. So, if the
18 purchaser, the good faith purchaser, was not a
19 party to the appeal, which -- which we think is
20 not the situation we have here --

21 JUSTICE GORSUCH: Got you.

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

24 JUSTICE GORSUCH: Yes.

25 MS. SINZDAK: -- and suddenly someone

1 is showing up at their door and saying you need
2 to give us the property, then we think they
3 could assert Section 363(m). They wouldn't have
4 had an opportunity to assert it before, so they
5 would not have waived. They would not have
6 forfeited.

7 JUSTICE GORSUCH: Interesting.

8 MS. SINZDAK: There would be no
9 concerns with respect to judicial estoppel.

10 JUSTICE GORSUCH: That's helpful.
11 Thank you.

12 MS. SINZDAK: If I could just address
13 the three -- a -- a -- a few quick points about
14 jurisdiction because we do think this is a
15 straightforward question, and we do -- no, we
16 know that with respect to the Court's
17 precedents, but we think there are three issues
18 where things can get a little bit confused in
19 terms of what governs subject matter
20 jurisdiction.

21 And so the first one is a statutory
22 restriction on relief does not normally govern
23 subject matter jurisdiction. And I think that
24 there can be some concern because of the
25 redressability prong under Article III, the

1 Article III analysis, that relief should play
2 into that. We think that Steel Co. squarely
3 addresses this at page 96, where the Court
4 explained that a statutory restriction on
5 relief, the question doesn't usually affect
6 jurisdiction because the question under the
7 redressability analysis is not whether a party
8 is entitled to the relief that it's seeking but,
9 rather, whether, if they are able to obtain that
10 relief, it will truly redress their -- their
11 injury. Now --

12 JUSTICE JACKSON: Counsel, I'm sorry
13 to interrupt you, but can you just make sure to
14 address an issue that I think you didn't have a
15 chance to address, which is the mootness
16 question sort of directly? What -- what is --
17 what is the most straightforward reason this
18 case remains live given what has been argued on
19 the other side?

20 MS. SINZDAK: Okay. Again, I just
21 want to say at the threshold that I -- we don't
22 think the Court has to -- to deal with the new
23 question because this is itself a question of
24 subject matter jurisdiction. So we're not in a
25 world where you have to worry about your --

1 your -- your -- your weighing in on the merits
2 when there is a --

3 JUSTICE JACKSON: So we can pick
4 either one for jurisdiction?

5 MS. SINZDAK: That's right. But I --
6 I also want to say we do not think that the new
7 question presented -- the -- sorry, pardon me,
8 the new argument is actually jurisdictional, and
9 that's because it's essentially an assertion
10 about whether the -- the Petitioner is going to
11 be able to get the relief it seeks on remand.

12 And we do think that Chafin versus
13 Chafin, the 2013 opinion that I believe
14 Petitioner's counsel were -- was referring to,
15 that directly said that questions about whether
16 a statutory scheme -- or, in that instance, it
17 was actually a statute and a convention.

18 Questions about whether that statutory
19 scheme permit the relief that a part -- the
20 appellant is seeking on remand, those questions
21 go to the merits, not mootness. And it's --
22 it's -- it's very clear. So I think Chafin
23 versus Chafin at page 174 is the direct answer
24 to the mootness question, and that actually
25 anticipated one of the three jurisdictional

1 points I wanted to make.

2 The last one is just about in rem
3 jurisdiction, and I think there are points in
4 Respondents' brief where it treats in rem
5 jurisdiction as synonymous with subject matter
6 jurisdiction.

7 And we think that's not right because
8 subject -- in rem jurisdiction is really an
9 alternative to in personam jurisdiction, so I
10 think every law student learns pretty early on
11 that in order for a court to hear a case, it
12 needs to assure itself that it has both subject
13 matter jurisdiction, that is, the power to hear
14 the class of cases into which the controversy
15 falls. And either person -- in -- in -- in
16 personam jurisdiction, personal jurisdiction, or
17 in rem jurisdiction.

18 And the reason that's important is
19 that we know that limits on personal
20 jurisdiction can be waived. And we think the
21 same is -- is true of limits on in rem
22 jurisdiction such that even if Respondent was
23 correct that there is some principle of in rem
24 jurisdiction that's floating around here, it
25 just doesn't matter because it could be waived.

1 And if the Court has no further
2 questions?

3 CHIEF JUSTICE ROBERTS: No one?
4 Okay. Thank you.

5 MS. SINZDAK: Thank you.

6 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.
7 Brunstad.

8 MR. BRUNSTAD: Not quite yet for
9 rebuttal, Your Honor.

10 CHIEF JUSTICE ROBERTS: Ah, ah, yes.
11 (Laughter.)

12 CHIEF JUSTICE ROBERTS: It's a tough
13 day. Sorry. Your opening points.

14 ORAL ARGUMENT OF G. ERIC BRUNSTAD, JR.,
15 ON BEHALF OF THE RESPONDENTS

16 MR. BRUNSTAD: Mr. Chief Justice, and
17 may it please the court:

18 Justice Thomas, I am going to take a
19 position on your question.

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

22 Justice Kagan, there is no additional
23 relief that can be granted.

24 Justice Jackson, this case is moot.
25 There is no case or controversy.

1 But, first, it's important to set
2 forth the actual facts because my -- my friend
3 got a few things wrong.

4 In 1991, Sears and MOAC entered into a
5 100-year freely assignable essentially rent-free
6 ground lease. Sears built the building, not
7 MOAC. Decades later, in 2018, when Sears filed
8 for bankruptcy, the building that Sears built
9 with this ground lease became property of the
10 bankruptcy estate of Sears' bankruptcy estate.

11 Sears moved for authority to sell by
12 private contract this property to Transform.
13 After the necessary approvals from the
14 bankruptcy court were obtained, that sale
15 transaction closed on October 4, 2019, three
16 years ago, and it was a sale, as the district
17 court determined. It was a transfer of
18 ownership of property for a price.

19 There was additional consideration
20 that was paid for this specific asset, this
21 building and this lease, millions of dollars in
22 additional consideration that's elaborated on
23 pages 13 to 14 of the red brief.

24 Okay. There is no remedy that can be
25 granted to them at this point. What is the

1 relief, the sole relief that they identify?
2 It's on page 10 of their reply brief.

3 JUSTICE JACKSON: Before you get into
4 that, though, can -- I'm interested in the fact
5 that your recitation of the facts did not
6 include the waiver that they continue to point
7 to.

8 MR. BRUNSTAD: Yes.

9 JUSTICE JACKSON: Isn't there a point
10 in the procedural history of this in which your
11 client, Transform, said we're not going to rely
12 on 363(m) and what do we do about that?

13 MR. BRUNSTAD: Justice Jackson, there
14 is that point that goes to Section 363(m). My
15 argument initially is wholly apart from Section
16 363(m). Put that statute aside, put the
17 question of waiver aside because it only
18 pertains to Section 363(m).

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

1 That remedy does not exist as a matter
2 of law. The statutory remedy, the exclusive
3 remedy is the avoidance powers. That's not
4 available here. The bankruptcy court on remand
5 has no subject matter jurisdiction over this
6 property. Its property is -- its jurisdiction
7 is limited to property of the estate.

8 This is not property of the estate.
9 If this were remanded back to the bankruptcy
10 judge, the judge would say, I don't have
11 jurisdiction here. I have jurisdiction over
12 property of the estate, not Transform's
13 property. If you want me to have jurisdiction,
14 you have to invoke the avoidance powers to bring
15 it back into the estate. That's not available.

16 But, Justice Gorsuch, your question
17 about what is the -- what is the answer, it is
18 in this Court's seminal decisions, so for
19 commercial law geeks like me, these decisions,
20 although not widely known, they are seminal in
21 my field, and they are this -- this -- this
22 Court's triumvirate of decisions in Gray versus
23 Brignardello, in Voorhees versus Bank of the
24 United States, and in Grignon's Lessee versus
25 Astor, and there the Court unequivocally

1 explained, if you reverse a sale order on
2 appeal, it does nothing to affect the sale. The
3 sale cannot be overturned.

4 This Court's language explanation in
5 Gray is -- is -- is -- is -- is straightforward.
6 Although the judgment or decree may be reversed,
7 yet all rights acquired at a judicial sale while
8 the decree or judgment were in full force and
9 which they authorized will be protected.

10 With the errors of the Court, the
11 purchaser has no concern and the Court said this
12 is so well established, you know, we don't -- we
13 shouldn't even have to reiterate it. The Court
14 was even more unequivocal in Voorhees versus
15 Bank of the United States.

16 JUSTICE SOTOMAYOR: If I go to the
17 sale order itself, I thought the sale order
18 which was selling Sears' right to assign the
19 lease to Transform, the sales order said that
20 that right reserved the landlord's right to
21 object to any lease assignment that failed to
22 conform to the requirements of 365.

23 So the sale order itself reserved the
24 right of objection. That's what you bought. At
25 the assignment or at the step of the assignment,

1 the landlord objected. And the Court said no,
2 I'm going to overrule it. But then you came in
3 and said -- you, Transform, came in and said,
4 I'm not going to rely on 365(m). I'm here
5 before the Court. I'm going to subject myself
6 to this procedure, which you did. And it got --
7 you got overruled. And then you wanted to
8 appeal that. I don't understand.

9 MR. BRUNSTAD: First off --

10 JUSTICE SOTOMAYOR: You took -- you're
11 before the Court.

12 MR. BRUNSTAD: Yes.

13 JUSTICE SOTOMAYOR: So you're in
14 personam.

15 MR. BRUNSTAD: Ah.

16 JUSTICE SOTOMAYOR: You're defending
17 your own rights and -- to the assignment, and
18 now you've lost, or you -- you're invoking
19 365(m). So I don't understand how the Court has
20 lost jurisdiction.

21 MR. BRUNSTAD: A proceeding --

22 JUSTICE SOTOMAYOR: And I'm not even
23 sure how you're a good faith purchaser because
24 you purchase subject to the landlord's
25 objection.

1 MR. BRUNSTAD: The -- the bankruptcy
2 court found we were a good faith purchaser, and
3 as the court of appeals explained, that
4 designation was not challenged. We are a
5 quintessential good faith --

6 JUSTICE SOTOMAYOR: Yes, but --

7 MR. BRUNSTAD: -- purchaser.

8 JUSTICE SOTOMAYOR: -- subject to a
9 condition.

10 MR. BRUNSTAD: Well, well -- two --
11 several things, Justice Sotomayor. First of
12 all, it was a two step-process for the sale.
13 The sale was under Section 363 of the assets,
14 which required further approval of the Court for
15 the transfer of the lease, which is also part of
16 the sale, for which additional consideration was
17 paid in addition to the 1.4 billion that was
18 paid for the bulk sale. So this was all a
19 package together.

20 What happened, though, was, at that
21 point, right, and -- and this is -- this is --
22 this is important, the bankruptcy court does not
23 exercise in personam jurisdiction over property
24 of the estate. There's no summons and complaint
25 against the purchaser. There's no ordinary in

1 personam process. It's all in rem.

2 This Court said so in Stratton versus
3 New -- and as the Seventh Circuit explained, a
4 proceeding under Section 363, that's the sale
5 statute, is an in rem proceeding. One does not
6 convert an in rem proceeding into in personam as
7 a buyer by -- by showing up.

8 If that were true, this Court's
9 decision in Hood would be wrong. If -- if --
10 Your Honor may recall in Hood --

11 JUSTICE SOTOMAYOR: I'm sorry, I'm --
12 I'm totally confused now by you.

13 MR. BRUNSTAD: Certainly, Your Honor.

14 JUSTICE SOTOMAYOR: Only for the
15 certain --

16 MR. BRUNSTAD: Let me explain.

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

19 MR. BRUNSTAD: We are the --

20 JUSTICE SOTOMAYOR: -- buyer.

21 MR. BRUNSTAD: -- buyer, Your Honor,
22 yes.

23 JUSTICE SOTOMAYOR: You bought subject
24 to the objection.

25 MR. BRUNSTAD: No, Your Honor.

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

3 MR. BRUNSTAD: That's the -- that's
4 this Court's point in Gray versus Brignardello.
5 Whatever may have been the merits of the
6 objection is not the buyer's concern. This
7 Court was emphatic about that -- emphatic about
8 that.

9 JUSTICE SOTOMAYOR: I see what you're
10 saying.

11 MR. BRUNSTAD: When you show up at a
12 sale, all -- the Court said -- and this is just
13 repeating its language from prior decisions.
14 This has been the settled commercial law rule
15 for 200 years. The purchaser is not concerned
16 with any errors the trial court might make in
17 authorizing the sale. As long as the sale was
18 authorized, the purchaser takes free. If it's
19 reversed on appeal, it does not matter --

20 JUSTICE SOTOMAYOR: I now have --

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

23 JUSTICE GORSUCH: Okay. So they say
24 there might be some other relief.

25 MR. BRUNSTAD: Not so, Justice

1 Gorsuch.

2 JUSTICE GORSUCH: All right. Help me

3 --

4 MR. BRUNSTAD: Here's why. Here's
5 why. This is bankruptcy.

6 JUSTICE GORSUCH: Yeah.

7 MR. BRUNSTAD: And, in bankruptcy, if
8 you have a claim, you must file a proof of
9 claim. They did. They filed a proof of claim
10 for the unpaid rent. Transform paid that as
11 additional consideration, which was then paid to
12 them. The opportunity to file a claim for
13 additional damages has long since gone. There
14 is no possibility. That is foreclosed.

15 JUSTICE GORSUCH: Counsel --

16 MR. BRUNSTAD: They're out of
17 bankruptcy.

18 JUSTICE GORSUCH: -- the one --

19 MR. BRUNSTAD: There is another
20 reason, Justice Gorsuch.

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

24 MR. BRUNSTAD: The other reason is
25 there's no such thing as a cause of action for

1 breach --

2 JUSTICE GORSUCH: Right.

3 MR. BRUNSTAD: -- of Section 365 of
4 the Bankruptcy Code. There is no such thing.
5 It would be an implied cause of action that does
6 not exist. So they are foreclosed procedurally
7 and substantively from making any claim for
8 damages which they've never heretofore even
9 suggested. It is not possible. Especially
10 since now Sears's bank -- Sears's bankruptcy is
11 over. The case is gone. The funds have been
12 distributed. There is nothing left. So they do
13 not -- Justice Kagan, there is no opportunity
14 for any additional relief whatsoever. The sole
15 statutory mechanism --

16 JUSTICE GORSUCH: All right. So,
17 counsel, I'm sorry to interrupt you there, but
18 --

19 MR. BRUNSTAD: Certainly, Justice
20 Gorsuch.

21 JUSTICE GORSUCH: -- boy, you've been
22 so persuasive, you -- you -- you -- you got me
23 into thinking I should dig this case --

24 MR. BRUNSTAD: I --

25 JUSTICE GORSUCH: -- which you --

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

2 JUSTICE GORSUCH: But you don't want
3 that, do you?

4 MR. BRUNSTAD: I do want you to
5 dismiss the petition as improvidently granted.

6 (Laughter.)

7 MR. BRUNSTAD: I absolutely do, but I
8 do think the statute's also jurisdictional, and
9 I would like to explain why, and this -- this
10 ties into the fact that, right, this is in rem
11 subject matter jurisdiction.

12 JUSTICE GORSUCH: Yeah.

13 MR. BRUNSTAD: Subject matter
14 jurisdiction in the bankruptcy court is property
15 of the estate. What is the proceeding here? It
16 is the sale of estate property. That is
17 fundamentally in rem.

18 It cannot be in personam, right? If
19 that were -- if it were in personam, this
20 Court's decision in Hood would be wrong. There,
21 the state showed up. You can't do in personam
22 action against the state. You can only do in
23 rem, the Court said. By the state showing up,
24 which it did, it doesn't convert in rem into in
25 personam. It stays in rem. This is in rem from

1 the beginning. Just like in admiralty, the ship
2 has sailed.

3 JUSTICE JACKSON: But, counsel --

4 JUSTICE SOTOMAYOR: Mr. --

5 JUSTICE JACKSON: -- you suggest that
6 in rem is like a very, very narrow set of
7 powers. And I had understood the bankruptcy
8 court could exercise certain additional powers
9 in its review of the rem. Is that not so?

10 MR. BRUNSTAD: As this Court explained
11 in Ahlers, whatever equitable powers remain in
12 the bankruptcy court must and can only be
13 exercised within the confines of the Bankruptcy
14 Code. The Bankruptcy Code has a very specific
15 remedy for upsetting these sales. It's called
16 the avoidance powers. They essentially concede
17 those are not available here. They apply not
18 only to good faith purchasers -- that's Section
19 549 and Section 550 -- but also bad faith
20 purchasers. There is a specific provision of
21 Section 363 that allows for overturning a sale
22 to bad faith purchasers, 363(n). That remedial
23 scheme would make no sense if there was also
24 some vague general equitable power of the
25 bankruptcy court to simply do an end run around

1 the avoidance powers and simply bring property
2 back into the estate.

3 JUSTICE BARRETT: Mr. -- Mr. Brunstad,
4 I feel like you're taking us far afield of the
5 question that we granted cert on. I mean, why
6 does any of this matter? Why can't we just
7 answer the jurisdictional question that we
8 granted cert on and then send it away and you
9 can make your arguments below?

10 MR. BRUNSTAD: Justice Barrett,
11 because there is no case or controversy. As
12 this Court explained --

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

15 MR. BRUNSTAD: Yes, yes, under --

16 JUSTICE BARRETT: If we decided a
17 jurisdictional question, you know, as counsel
18 said, we can decide on either ground.

19 MR. BRUNSTAD: No, Justice Barrett.
20 Here's why. In this Court's decision in
21 Official English for Arizonans, the Court said
22 we consider not only our ability to decide the
23 question but the lower court's ability to
24 proceed. Here, if you -- if you were to reverse
25 and send it back, what could the lower court do?

1 Absolutely nothing.

2 JUSTICE KAGAN: No, they can decide
3 their own jurisdiction to decide jurisdiction.
4 So we have a bunch of different jurisdictional
5 questions. As Justice Barrett said, one we took
6 cert on, and they're split on it, and there's
7 usefulness to our deciding that. And then, as
8 to anything else, send it back and they can
9 decide on their own jurisdiction with respect to
10 the rest --

11 MR. BRUNSTAD: No, Justice Kagan.

12 JUSTICE KAGAN: -- and you'll make
13 your arguments there.

14 MR. BRUNSTAD: Jurisdiction is not
15 relief. There must be some tangible remedy that
16 they must be able to get. They cannot. Wholly
17 apart from Section 363 --

18 JUSTICE KAGAN: Well, that's just
19 assuming the conclusion. I mean, that's exactly
20 what we would be asking -- you know, we would be
21 saying there are a bunch of other issues in this
22 case, and one of them is whether there's any
23 possibility of relief remaining, and, you guys,
24 the lower courts, go decide that.

25 MR. BRUNSTAD: But, Justice Kagan, in

1 the Tempnology decision that Your Honor
2 authored, you -- at the very beginning of that
3 decision, Your Honor said, well, is there a
4 contractual breach remedy here? And you thought
5 there was enough evidence that there was to then
6 reach the question of whether Section 365 breach
7 equals rescission. And Your Honor said it
8 doesn't. Very similar here, similar to the one
9 that Your Honor rejected in that decision.

10 But the threshold question under case
11 or controversy jurisprudence is, is there some
12 sort of tangible relief, something they can get
13 out of actually prevailing? And, here, the
14 answer is no. The sole relief they want is to
15 take away the property. And they also want a
16 forfeiture. They've said so themselves. It
17 just simply goes back to them.

18 That's not permissible under
19 bankruptcy law for a whole host of complicated
20 reasons. But the fundamental threshold thing
21 they want they cannot get.

22 CHIEF JUSTICE ROBERTS: Well, counsel,
23 the --

24 MR. BRUNSTAD: This Court's precedents
25 establishes that.

1 CHIEF JUSTICE ROBERTS: -- the Chafin
2 case makes very clear that in terms of looking
3 at what relief is available, they go -- they
4 stretch it pretty far, I think, in -- in -- in
5 analyzing it. You know, maybe this will happen,
6 and it's not inconceivable that this will
7 happen. Not their words, but the type of relief
8 they were talking about under the convention
9 seemed to me to be sort of any possible argument
10 you've got is enough to get it to the district
11 court to at least consider its jurisdiction.

12 MR. BRUNSTAD: Well, Your Honor, on
13 page 10, there's a reason why there is --

14 CHIEF JUSTICE ROBERTS: Page 10 of
15 what?

16 MR. BRUNSTAD: -- their -- their
17 statement of a remedy is citation-free. They
18 cite not --

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

21 MR. BRUNSTAD: Page 10 of the yellow
22 brief, Your Honor.

23 CHIEF JUSTICE ROBERTS: Oh, okay.

24 MR. BRUNSTAD: Where they actually
25 articulate their remedy. They cite not a single

1 case in support of the remedy they claim that
2 they have, and the reason why is because all of
3 this Court's precedents is to the contrary. The
4 cases that I articulated at the beginning are
5 very clear. You cannot -- when -- when the
6 order of a sale is reversed, you cannot disturb
7 the sale. That is blackletter, bench --
8 benchmark commercial law and practice in this
9 country for two centuries. If you want to get
10 around it, you have to, in bankruptcy, use the
11 statutory mechanism, which is the avoidance
12 powers. As we explain in our brief, that is
13 just not available.

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

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

18 JUSTICE BARRETT: Well, I'm saying, so
19 why can't -- you know, as Justice Kagan and I
20 were talking about, we answer the question in
21 which we get it -- granted cert, and you should
22 feel good then if you're right about your
23 chances below.

24 MR. BRUNSTAD: Because there's no case
25 or controversy if there is no effective relief

1 that can be granted.

2 JUSTICE BARRETT: We're not saying
3 there's a case or controversy, right? Let's
4 imagine you lose and we say it's not
5 jurisdictional. All we're saying is that this
6 isn't a jurisdictional bar.

7 MR. BRUNSTAD: Yes.

8 JUSTICE BARRETT: Any other arguments
9 you have, you can take them up below.

10 MR. BRUNSTAD: Because the case or
11 controversy requirement of Article III
12 constrains this Court's jurisdiction as well,
13 not simply the lower courts' jurisdiction. That
14 -- that's -- that's -- that's the fundamental
15 point.

16 But there's a second point, and that
17 is the bankruptcy court has no subject matter
18 jurisdiction over this property. Its subject
19 matter jurisdiction is limited in rem to
20 property of the estate.

21 This is also why Section 364 is
22 jurisdictional. It is a blunt abrogation of
23 subject matter jurisdiction. It says,
24 regardless of whether you reverse or you modify
25 a decision on appeal, it does not affect the

1 validity of the sale. If you can't affect the
2 validity of the sale, the property cannot be
3 brought back into the estate.

4 If the property can't be brought back
5 into the estate, there's no subject matter
6 jurisdiction in federal court. The ship has
7 sailed, and the statute says you cannot possibly
8 get it back into port. It is just like in
9 admiralty jurisdiction.

10 It's also jurisdictional because
11 Section 363(m) codifies an historic practice.
12 It codifies Rule 805, which was declaratory of
13 existing case law which was uniform.

14 JUSTICE JACKSON: Of course, if that's
15 true, why did you waive it so many times in this
16 case? I mean, that's the -- the only reason why
17 we're here looking at this and trying to decide,
18 per the question presented, whether it's
19 jurisdictional is because you brought it up
20 late. And the court had already ruled against
21 you, and you apparently waived, you know, the
22 363(m) question. And so, when you brought it
23 back again, you said, but wait, wait, wait, that
24 question is jurisdictional, so you still have to
25 decide it.

1 MR. BRUNSTAD: Counsel made a mistake
2 in articulating what Section 3-6 --

3 JUSTICE JACKSON: Your counsel?
4 Counsel for Transform?

5 MR. BRUNSTAD: Counsel for Transform.
6 It's the same mistake the bankruptcy judge made
7 about Section 363. But Transform knew this was
8 a jurisdictional question. They cited in their
9 papers in the bankruptcy court the very
10 jurisdictional precedents from the Second
11 Circuit that say it's jurisdictional. One also
12 cannot by consent or waiver or misstatement of
13 the law create subject matter jurisdiction that
14 does not exist.

15 Here, there is no subject matter
16 jurisdiction because the statute bluntly says,
17 no matter what you do on appeal, you cannot
18 bring the asset back into the estate. If you
19 cannot bring the asset back into the estate,
20 it's not property of the estate. There cannot
21 be federal subject matter jurisdiction in
22 bankruptcy, which is limited in rem to assets of
23 the estate. Okay. So it is a blunt
24 jurisdictional abrogation.

25 That is by design. That was

1 specifically what Congress intended by codifying
2 verbatim in this oddly worded statute a former
3 rule of procedure, Rule 805, which was
4 declaratory of existing law.

5 The two seminal cases were Fink and
6 Taylor. Taylor involved a situation where there
7 were assets in bankruptcy that were sold, and
8 then the Committee of Creditors appealed and the
9 court of appeals said we don't have jurisdiction
10 to decide this controversy. We have no
11 authority to hear.

12 The same thing in Fink, which used
13 jurisdiction three times in its decision, the
14 Fourth Circuit's decision. Jurisdiction,
15 jurisdiction, jurisdiction. We cannot bring the
16 property back. We cannot order it to come back.
17 Again, one does not --

18 CHIEF JUSTICE ROBERTS: Well, they --
19 they may have used -- they may have used it
20 three times, but the statute doesn't use it at
21 all.

22 MR. BRUNSTAD: Correct, but -- but --
23 and the question is why. And in Boechler, this
24 Court said we look at the traditional tools of
25 statutory interpretation. We look at the text,

1 the context, and the history.

2 Well, here, there is an established
3 historical practice that Congress intended to
4 codify. It wasn't just that the courts limited
5 remedial relief. They said we have no authority
6 to even hear the appeal where you're challenging
7 the validity of the sale.

8 And authority to hear is subject
9 matter jurisdictional. We can't even hear it.
10 We're not going to even hear the merits. In
11 case after case after case, the appellate courts
12 dismissed these bankruptcy appeals over and over
13 again without hearing the merits. That's the
14 practice that Rule 805 captured.

15 The courts construing Rule 805
16 interpreted it in exactly that way. All the --
17 and some of them involved parties that were
18 before the court. The purchaser was there or
19 not. It did not matter. What mattered was that
20 the courts of appeals would not hear those
21 appeals where the litigant was challenging the
22 validity of the sale.

23 Congress chose to codify that
24 practice, but they did so in a specific context,
25 and that is bankruptcy jurisdiction is

1 fundamentally in rem. This Court has said so
2 since the early 1800s. It reiterated that in
3 Katz. It reiterated that in Hood. It
4 established that asset sales in bankruptcy are
5 in rem, not in personam in Stratton versus New.

6 All the lower courts have said the
7 same thing. And they have also concluded as
8 follows: Once property leaves the estate, the
9 jurisdiction of the bankruptcy court lapses. It
10 ends. Why? Because it's in rem and it is
11 limited to property of the estate. Once the
12 property leaves the estate, as happened here
13 when the sale was consummated on October 4,
14 2019, it was not property of the estate.

15 JUSTICE JACKSON: But what do we do
16 with the good faith language in the statute? I
17 mean, that suggests that some court is going to
18 litigate at least -- at least that issue.

19 MR. BRUNSTAD: Correct. That limits
20 the subject matter of the litigation to whether
21 the purchaser was in good faith or not. If the
22 purchaser was in bad faith --

23 JUSTICE JACKSON: Well, you said he
24 had no jurisdiction. You said, once it's gone,
25 so the sale happens, the property is gone, and

1 then we have 3 -- 363(m), which at least seems
2 to preserve as a litigatable topic --

3 MR. BRUNSTAD: Yes.

4 JUSTICE JACKSON: -- the question of
5 whether the sale happened in good faith. Your
6 argument suggests that, too bad, so sad, there's
7 nothing we can do. The -- the -- the property
8 is gone.

9 MR. BRUNSTAD: No, Justice Jackson,
10 because -- because all that it does is it
11 abrogates subject matter jurisdiction in a
12 narrow category of cases. It's as though, in --
13 in -- in the exercise of its authority to enact
14 basically federal subject matter jurisdiction,
15 the court said you have federal subject matter
16 jurisdiction in the district courts but not with
17 respect to this particular federal question.
18 That would be an abrogation of subject matter
19 jurisdiction.

20 This statute works in exactly the same
21 way. If what you're challenging is the validity
22 of a sale to a good faith purchaser, we do not
23 have subject matter jurisdiction to hear it. As
24 a subject matter constraint, we have no
25 authority to hear it.

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

6 You can't be circular. It seems to me
7 that you've got to have jurisdiction to decide
8 the good faith question.

9 MR. BRUNSTAD: That's correct, Your
10 Honor. They have jurisdiction to decide whether
11 it's good faith or not.

12 CHIEF JUSTICE ROBERTS: Yeah.

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

17 JUSTICE BARRETT: But the property
18 left. But the property left. I mean, in these
19 hypotheticals, I mean, I think what Justice
20 Jackson is saying and what the Chief is
21 following up on is you told us before that once
22 the property was gone, poof --

23 MR. BRUNSTAD: Yes.

24 JUSTICE BARRETT: -- jurisdiction --
25 jurisdiction went away.

1 MR. BRUNSTAD: Correct.

2 JUSTICE BARRETT: The property is
3 gone, but somehow the Court by virtue of the
4 statute still has to decide this good faith
5 question --

6 MR. BRUNSTAD: And -- and --

7 JUSTICE BARRETT: -- and have subject
8 matter jurisdiction to do it.

9 MR. BRUNSTAD: Yes, Justice Barrett,
10 and there is a remedy. As this Court explained
11 in Katz, the avoidance powers are ancillary to
12 the court's in rem jurisdiction. If, in fact,
13 the sale were overturned because it was a bad
14 faith purchaser, then there are ways, statutory
15 means of undoing the sale and bringing the
16 property back into the estate so the court can
17 exercise in rem jurisdiction over it.

18 But the statutory scheme is holistic.
19 Section 363(m) suspends all of that if it's to a
20 good faith purchaser by bluntly stating nothing
21 that you can do can bring the asset back.
22 Overturning it, reversing it, modifying it does
23 not affect the validity of the sale. The
24 transfer of ownership must remain in the
25 purchaser. All of those ancillary processes to

1 bring the race back into the estate, into the
2 custody of the bankruptcy court so it can order
3 an alternative disposition, are suspended.
4 That's the -- that was the intended effect of
5 Section 363(m).

6 CHIEF JUSTICE ROBERTS: Well, I don't
7 know. Maybe they are and maybe they're not in
8 particular instances. But you do -- have
9 acknowledged that under 363(m) there is
10 jurisdiction in the court. Now you want to say
11 it's simply to adjudicate good faith, but then
12 all sorts of consequences flow from that
13 decision.

14 MR. BRUNSTAD: But that's the subject
15 matter, Your Honor. That's the point. The
16 subject matter of good faith is preserved. The
17 subject matter of the validity of the sale is
18 not.

19 Now this is -- this is an unusual
20 statute. This is not like any other statute we
21 were able to find that the court had to construe
22 whether it was jurisdictional or not. It's
23 unique. But that's because bankruptcy
24 jurisdiction is unique. The remedial scheme is
25 unique. Its impact on -- it's very surgical.

1 It is a key into the system as a whole, but it
2 is supposed to be a subject matter block. It
3 says as so bluntly and directly: Reversal or
4 modification on appeal does not affect the
5 validity of the sale.

6 CHIEF JUSTICE ROBERTS: If the --

7 MR. BRUNSTAD: That means what it
8 says.

9 CHIEF JUSTICE ROBERTS: -- purchase
10 was in good faith.

11 MR. BRUNSTAD: Correct. So the only
12 subject matter you can hear is good faith or
13 not. If the purchaser was in bad faith, all of
14 the remedial provisions under the code are
15 preserved.

16 JUSTICE JACKSON: Does the rem need to
17 be back in order to adjudicate the good faith
18 question?

19 MR. BRUNSTAD: It does, Your Honor.
20 This is the opposite of --

21 JUSTICE JACKSON: It does? So -- so,
22 before the court could --

23 MR. BRUNSTAD: No, no, no, no, Your
24 Honor, no, no.

25 JUSTICE JACKSON: -- evaluate good

1 faith, we've got to get the rem back?

2 MR. BRUNSTAD: I -- I misspoke, Your
3 Honor.

4 JUSTICE JACKSON: It does not?

5 MR. BRUNSTAD: No. The good --

6 JUSTICE JACKSON: All right. So how
7 does it have subject matter jurisdiction to
8 address the question with the rem being gone if
9 you're right about the impact of the rem being
10 gone?

11 MR. BRUNSTAD: Because that is a
12 precursor to being able to invoke the ancillary
13 processes of avoidance, and those processes turn
14 on whether you have a good faith purchaser or
15 not. If it's a bad faith purchaser, 363(n)
16 applies, and 363(n) says, if you have a
17 collusive bidder, the trustee can avoid the sale
18 or collect damages. It gives an option, which
19 is why it can't be automatically void.

20 So the determination of good faith or
21 bad faith is a precursor to be invoking one of
22 the ancillary processes, as this Court explained
23 to them in Katz, to bring the asset back into
24 the estate so the court can order a different
25 disposition.

1 363(m), when it's a good faith
2 purchaser, blocks all of that. The subject
3 matter is -- cannot be touched because you
4 cannot affect the validity of the sale. The
5 statute says so bluntly. If you cannot affect
6 the validity of the sale, the asset cannot
7 conceivably possibly come back into the estate.
8 There is no avoidance mechanism. So there
9 cannot be any additional exercise of
10 jurisdiction over the race, and -- and an
11 appellate court cannot order a lower court to
12 exercise jurisdiction it does not possess.

13 JUSTICE KAGAN: But, Mr. --

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

17 JUSTICE KAGAN: Mr. Brunstad, do you
18 have anything to say about the question
19 presented?

20 (Laughter.)

21 MR. BRUNSTAD: I do, Your Honor. I
22 do, Your Honor. Section 363(m) is
23 jurisdictional, Your Honor, for three reasons:
24 text, context, and history, the traditional
25 methods of statutory interpretation that we look

1 to to determine whether a statute was intended
2 by Congress to be jurisdictional.

3 The text has -- it -- the text has
4 this blunt subject matter restriction, as I've
5 articulated it. But the context is really
6 critical.

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

11 MR. BRUNSTAD: The clear statement is
12 does not affect the validity of a sale. It's a
13 subject matter constraint, not a procedural
14 rule. The other statutes involve things like
15 file your notice of appeal in 14 days or a time
16 limit. This is not a procedural limitation.

17 JUSTICE KAGAN: I think -- I think
18 what we've always meant when we say a clear
19 statement about jurisdiction is something that
20 says something like the court has no
21 jurisdiction.

22 (Laughter.)

23 MR. BRUNSTAD: That -- and, in fact,
24 that would be wonderful if it were here. It's
25 not. But the intent was exactly that. You

1 cannot bring the ship back into port. The ship
2 has sailed.

3 CHIEF JUSTICE ROBERTS: And we've --
4 and we've also looked at any kind of wiggle room
5 into -- you know, through the door. You know,
6 if you've got jurisdiction for something, we
7 don't think that that statute is jurisdictional.
8 I mean, you may pick and choose and, when you
9 get into the court, you may be denied relief.
10 You may be denied a big chunk of relief.

11 But, if there's going to be
12 jurisdiction for a little bit, we sort of let
13 them sort out how -- what relief is available
14 once they're in court.

15 MR. BRUNSTAD: There is no relief
16 available here. Put that -- putting that aside,
17 it's a unique --

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

20 MR. BRUNSTAD: But -- but that -- that
21 was -- they did not appeal that determination.
22 It was a factual determination below. The court
23 of appeals remarked they didn't raise that, they
24 didn't timely raise that. That is a settled
25 question of fact, not subject to being reopened.

1 Okay. But --

2 CHIEF JUSTICE ROBERTS: Settled
3 questions of fact can also be appealed, right?

4 MR. BRUNSTAD: They did not. That's
5 the problem. They did not challenge that on
6 appeal, so that isn't established. Plus,
7 there's no basis for it.

8 But, to Your Honor's point, this is a
9 uniquely worded statute for a reason. It
10 codifies an historic practice, and the historic
11 practice informs what this statute is. Congress
12 codified the rule, and the rule reflected a
13 uniform body of case law that refused to even
14 hear these appeals if there wasn't a stay where
15 you're challenging the validity of the sale.
16 That was what Congress intended to do.

17 So I think it's important to sort of
18 take a look at that. I understand the clear
19 statement rule, but, again, I would qualify
20 that. That makes sense and is easily applied
21 when you have a procedural requirement, is that
22 jurisdictional or not. Again, here, we have a
23 uniquely worded statute with intended
24 jurisdictional consequences. If you have a sale
25 to a good faith --

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

3 MR. BRUNSTAD: Yes, Justice Gorsuch.

4 JUSTICE GORSUCH: Just so I -- just so
5 I understand it because there's --

6 MR. BRUNSTAD: Perhaps you can do a
7 better job than I could.

8 JUSTICE GORSUCH: No, no. I'm --
9 (Laughter.)

10 JUSTICE GORSUCH: One thing I'm
11 confident about is -- is -- is that I -- I am --
12 I am deeply confused by this case. But I just
13 want to make sure my confusion is at least what
14 I think it is. How about that? That you would
15 say that, right, we normally require magic words
16 like "no jurisdiction"? That those are
17 typically in personam actions in an in rem
18 world?

19 MR. BRUNSTAD: Yes.

20 JUSTICE GORSUCH: What, say, no
21 jurisdiction might look like would be you can't
22 touch the property.

23 MR. BRUNSTAD: Correct, Your Honor.

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

1 MR. BRUNSTAD: Correct, Your Honor,
2 and that is --

3 JUSTICE GORSUCH: All right. At least
4 I understand the argument. Okay. Thank you.

5 MR. BRUNSTAD: So --

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

8 MR. BRUNSTAD: Correct. Correct. And
9 that's what we have here. There was a finding
10 by the --

11 JUSTICE JACKSON: Right, but the
12 question of whether it was made in good faith,
13 who -- who handles that, is Congress intending
14 for this Court to address that or no?

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

18 JUSTICE JACKSON: No, I understand,
19 but, as you read the statute --

20 MR. BRUNSTAD: Yes.

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

23 MR. BRUNSTAD: Correct.

24 JUSTICE JACKSON: -- a part of the
25 analysis, and so, if the rem is gone, who

1 addresses that?

2 MR. BRUNSTAD: Had they appealed it,
3 the district court would have addressed it in
4 the first instance. They did not. They did not
5 object to good faith in the bankruptcy court.
6 They did not raise it on appeal. They did not
7 argue it in their appellate briefs. They did
8 not raise it in the court of appeals. They did
9 not raise it anywhere. Okay. But had they
10 addressed that determination, then that could
11 have been addressed by the court of appeals.
12 That's fine. But what --

13 JUSTICE JACKSON: Because somehow
14 there's jurisdiction for that?

15 MR. BRUNSTAD: Well, there's
16 jurisdiction for that because the statute only
17 abrogates subject matter jurisdiction if you've
18 got a good faith purchaser. It goes to defining
19 -- it's -- it's like saying suppose the federal
20 question statute said you have federal subject
21 matter jurisdiction over federal questions
22 except for X. Well, you would have to determine
23 as a factual matter, is this about X? If it's
24 about X, we don't have jurisdiction. If it's
25 not about X, we do.

1 That's exactly the same thing that's
2 going on here under Section 363(m). Is it a
3 good faith purchaser? That's a factual
4 question. If it's a good faith purchaser, the
5 abrogation of jurisdiction applies. If it's not
6 a good faith purchaser, it doesn't. And if it's
7 not a good faith purchaser, we have a whole
8 remedial scheme under the Bankruptcy Code that
9 can get invoked. But, if it is a good faith
10 purchaser, you cannot touch the sale. It cannot
11 be undone.

12 That was by design. That was
13 Congress's intent to do that in codifying this
14 historic practice. And when codify -- when
15 Congress codifies an historic rule, especially
16 in bankruptcy, this Court has said over and over
17 again --

18 JUSTICE SOTOMAYOR: I -- I'm sorry,
19 did we have a common law rule on good -- it
20 being the good faith buyer could still challenge
21 the sale?

22 MR. BRUNSTAD: The -- there was a -- a
23 -- a -- a -- a common law rule on that that
24 wasn't particularly developed. It has become --

25 JUSTICE SOTOMAYOR: So what we know --

1 MR. BRUNSTAD: -- more developed over
2 the Bankruptcy Code.

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

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

7 JUSTICE SOTOMAYOR: It was because it
8 was adding an exception, the good faith buyer
9 exception, that didn't exist. And it seems to
10 me that I don't see anything in the words of the
11 statute that suggests it wasn't imputing other
12 equitable doctrines as well, like, yeah, if you
13 know of the appeal and there's no sale order,
14 you take -- you're still a good faith
15 purchaser --

16 MR. BRUNSTAD: Justice Sotomayor --

17 JUSTICE SOTOMAYOR: -- but if you --
18 if you --

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

20 JUSTICE SOTOMAYOR: -- if you've
21 waived this --

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

1 JUSTICE SOTOMAYOR: But --

2 MR. BRUNSTAD: So it was part of the
3 common law. It wasn't as developed as it is
4 under the Bankruptcy Code. It was part of the
5 rule that Congress codified. And as this Court
6 has said over and over again, when Congress
7 codifies an historic practice in bankruptcy, we
8 will not construe the code to intend a change
9 unless Congress clearly intended a change.
10 Here, it's clear that they --

11 JUSTICE SOTOMAYOR: By the way --

12 MR. BRUNSTAD: -- intended to codify
13 the practice, which, again, was uniform. The
14 courts of appeals refused to hear --

15 JUSTICE SOTOMAYOR: -- do -- do --

16 MR. BRUNSTAD: -- these cases on the
17 merits.

18 JUSTICE SOTOMAYOR: I just have a
19 practical question.

20 MR. BRUNSTAD: Yes, Your Honor.

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

23 MR. BRUNSTAD: Yes, Your Honor.

24 JUSTICE SOTOMAYOR: -- does that mean
25 the bankruptcy estate couldn't have been wound

1 up subject to that pending case?

2 MR. BRUNSTAD: So perhaps, Your Honor,
3 but if a stay had been granted, the property
4 would not have left. It would be -- have
5 remained within the estate. The bankruptcy
6 could have -- court would have remained -- would
7 have had in rem jurisdiction over the asset.

8 JUSTICE SOTOMAYOR: I see.

9 MR. BRUNSTAD: It's because a stay was
10 not granted that the transaction closed under
11 private contract on October 4, 2019, and
12 Transform has been -- has owned and maintained
13 the building and occupied it for the last three
14 years, has paid the taxes, has paid the
15 utilities, has paid the rent, is fixing the
16 roof.

17 Here's another reason why we can't do
18 an end run around the statutory mechanisms.
19 Under the statutory mechanisms, all of those
20 reliance interests of the purchaser are
21 preserved if the -- if the transfer is avoided
22 under Section 550. Under their theory, their
23 nonexistent, in my opinion, common law theory,
24 there's no protection.

25 So the millions of dollars in

1 additional money that Transform paid to acquire
2 this specific asset, in addition to the \$1.4
3 billion it paid for the bulk -- bulk -- the bulk
4 sale, the additional money it's expended to
5 maintain the property, pay the taxes, is simply
6 forfeited. Under the statutory scheme, it's
7 not. You're given a lien for that on the
8 property under the statutory avoidance scheme.

9 That's another reason why we can't do
10 an end run around Congress's carefully crafted
11 protections for avoiding sales. There's
12 protections for purchasers there. There's none
13 in the common law theory.

14 But, again, going back to -- and if I
15 could just briefly cite these cases -- it's Gray
16 versus Brignardello, 68 U.S. at 634; Voorhees
17 versus Bank of U.S., 35 U.S. at 475 to 476;
18 Grignon's Lessee versus Astor, 43 U.S. at 343.
19 The Court is unequivocal in explaining -- this
20 applies -- it applies in rem, it applies to
21 sales, you cannot take the property away from
22 the purchaser just because the trial court made
23 an error that was reversed on appeal.

24 CHIEF JUSTICE ROBERTS: Thank you.

25 Justice Thomas?

1 JUSTICE THOMAS: Nothing.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 Justice Sotomayor?

4 Justice Jackson?

5 Okay. Thank you, counsel.

6 MR. BRUNSTAD: Thank you, Your Honor.

7 CHIEF JUSTICE ROBERTS: Mr.

8 Hallward-Driemeier, rebuttal?

9 REBUTTAL ARGUMENT OF DOUGLAS H. HALLWARD-DRIEMEIER

10 ON BEHALF OF THE PETITIONER

11 MR. HALLWARD-DRIEMEIER: Thank you,

12 Your Honor.

13 With respect to the general
14 proposition that the ship has sailed, this Court
15 explicitly rejected that proposition in Republic
16 National Bank. It said we hold, in an in rem
17 forfeiture action, the court of appeals is not
18 divested of jurisdiction by the prevailing
19 party's transfer of the res out of the court.
20 This Court rejected precisely the rule they have
21 cited. So perhaps they are suggesting there is
22 a bankruptcy-specific rule to the same effect.

23 We cite at page 18 of the reply brief
24 several cases in the courts of appeals that
25 concern this issue, and they say that if the

1 transferee is not a party to the proceeding,
2 then the court cannot order it back. But, if
3 the transferee is a party to the proceeding,
4 then the court of appeals can undo the
5 transaction. That is the rule we are relying
6 on. It is the rule applied by Fink and other
7 cases cited.

8 Now, mind you, Gray, Voorhees, et
9 cetera, were never cited in the briefs, and I
10 don't know what they say. I'm sorry. But, to
11 the extent that they purport to establish a rule
12 similar to their characterization of The Ann or
13 The Little Charles, again, this Court
14 specifically rejected that in Republic National
15 Bank.

16 Now 363(m), as Your Honors' questions
17 suggested -- as Your Honors' questions suggest,
18 presupposes that there is authority in the
19 courts to get that property back if, for
20 example, it's a bad page -- bad faith purchaser.
21 But it does not say that it has to be done via
22 Section 549. And, in fact, Transform's argument
23 explains why that can't be the case, because 549
24 is a cause of action owned by the debtor. It
25 says, hey, too late, sorry, Sears waived any 549

1 cause of action, and also, guess what, two years
2 have passed, so you can't do that either.

3 Congress would not have subjected a
4 party who prevails on appeal in establishing
5 that the transfer is to a party in bad faith
6 would have no viable cause of action or
7 opportunity to recover it.

8 It's inherent in the authority of the
9 Court. That's what the cases we cite on page 18
10 provide. At the end of the day, all of these
11 are merits issues that do not preclude this
12 Court from deciding the issue on which it
13 granted certiorari.

14 I want to point out that with -- on
15 that issue, first of all, that the good faith
16 finding of fact was in the sale order. Of
17 course, it could not have made a good faith
18 finding of fact with respect to the assignment
19 because the assignment didn't happen until six
20 months later.

21 And MOAC is challenging their good
22 faith. We challenged it in the form of making
23 an argument of judicial estoppel because they
24 were the ones that were responsible for there
25 being no stay because they told the bankruptcy

1 court multiple times that they would not invoke
2 363(m). This -- this bankruptcy court referred
3 to that in its analysis of every one of the
4 factors.

5 And then, finally, with respect to
6 Rule 805, it predated Section 363(m) by two
7 years. There was no established practice of the
8 type they suggest, and, of course, the cases we
9 cite are to the contrary.

10 Thank you, Your Honor.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel. The case is submitted.

13 (Whereupon, at 1:40 p.m., the case was
14 submitted.)

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