No. 07-312

IN THE
Supreme Court of the United States

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Petitioner,

v.

PICCADILLY CAFETERIAS, INC.,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether 11 U.S.C. § 1146(c) of the Bankruptcy Code, which exempts from stamp or similar taxes any asset transfer "under a plan confirmed under section 1129 of the Code," applies to transfers of assets occurring prior to the actual confirmation of such a plan?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 24.1, petitioner states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

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The opinion of the Eleventh Circuit is reported at *In re Piccadilly Cafeterias, Inc.*, 484 F.3d 1299 (11th Cir. 2007), and is reproduced in the Petition Appendix ("Pet. App.") at 1a-9a. The final summary judgment and opinion of the bankruptcy court granting summary judgment in favor of respondent Piccadilly are unreported and are reproduced at Pet. App. 31a-41a. The opinion of the district court affirming the bankruptcy court is unreported and is reproduced at Pet. App. 10a-30a.

JURISDICTION

The judgment of the Eleventh Circuit was entered on April 18, 2007. Pet. App. 1a. This Court granted the petition for writ of certiorari on December 7, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

11 U.S.C. § 1146(a) (previously 1146(c)) of the Bankruptcy Code, entitled "Special Tax Provisions" and which is reproduced in the petition appendix, states:

> (a) The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

See Pet. App. 42a.

STATEMENT OF THE CASE

Section 1146(c) (now 1146(a))[1] of the Bankruptcy Code allows debtors in bankruptcy to avoid the imposition of "stamp" or other "similar" taxes on transfers of their property if done "under a plan confirmed" pursuant to Chapter 11 of the Code, which relates to reorganizations. This statutory authority provides a means of avoiding the imposition of such taxes, provided the asset transfers are "under a plan confirmed" by a bankruptcy court.

In this case, no dispute exists that the State of Florida's taxes under Chapter 201, Florida Statutes, are "stamp" or "similar" taxes and that such taxes are applicable to the transfer of property at issue. Nor does any dispute exist that the transfer was not sought under section 1129, which sets forth the requirements for confirmation of a plan under Chapter 11, whose proceedings are designed to allow debtors and creditors to work together to from a plan of reorganization that is mutually beneficial. Instead, it is undisputed that the approval for the transfer of the property was sought under section 363(b)(1) of the Bankruptcy Code, which provides for the sale of assets outside of the ordinary course of business. Moreover, no dispute exists that no plan of confirmation under Chapter 11 had even been proposed at the time of the transfers and that a

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[1] Newly renumbered section 1146(a) is referred to herein as section 1146(c), the section number that was in effect during the litigation of this case. No changes were made in the language of the section when it was renumbered in 2005. Pet. App. 42a.

confirmed plan did not exist until over eight months later.

Under these facts, the tax exemption authorized under section 1146(c) is not available because these types of pre-confirmation transfers cannot be said to be "under a plan confirmed" within the plain meaning of section 1146(c). The Third and Fourth Circuits have applied the plain meaning of this phrase, finding that it sets a clear, objective, and easily-applied chronological bright line that precludes tax exemptions for transfers made prior to confirmation of a plan under Chapter 11. *In re Hechinger Inv. Co. of Delaware, Inc.*, 335 F.3d 243, 246-47 (3d Cir. 2003); *In re NVR, LP,* 189 F.3d 442, 447 (4th Cir. 1999).

In this case the Eleventh Circuit, however, takes a much broader view, holding that section 1146(c)'s tax exemption is available to transfers occurring prior to a plan even being proposed, let alone confirmed, so long as they are later determined after-the-fact to be "necessary" in some statutorily undefined way to the ultimate "consummation" of a confirmed plan. *Piccadilly Cafeterias,* 484 F.3d at 1304-05. That broad reading conflicts with the natural meaning of 1146(c), encourages debtors to sell their property pre-confirmation under section 363 of the Bankruptcy Code and then liquidate their assets under Chapter 11 (rather than Chapter 7) in order to gain the tax exemption. It also creates needless additional litigation over what transfers are deemed "necessary." Section 1146(c), properly read, exempts from stamp taxes only those transfers made under the authority of a confirmed plan as discussed herein.

A. History of Section 1146(c).

Section 1146(c)'s origin is traced to section 77(B)(f) of the Bankruptcy Act amendments of 1934, which modified the Bankruptcy Act of 1898. Section 77(B)(f) exempted "the issuance, transfers, or exchanges of securities or making or delivery of conveyances to make effective any plan of reorganization confirmed under the provisions of this section" from federal stamp taxes. *See* 11 U.S.C. § 267(f) (repealed 1938). Four years later, Congress amended the Act by expanding the exemption to *state* and federal taxes on securities or transfers under a confirmed chapter X plan. *See* 11 U.S.C. § 667 (1938, repealed 1978)*; see also In re New York, N.H. & H.R. Co.*, 95 F.2d 483 (2d Cir. 1938). The exemption was again expanded in 1978 to embrace "any law imposing a stamp tax *or similar tax.*" (emphasis added). *See* H.R. Rep. No. 595, 95th Cong, 1st Sess. 281 (1977).

The statute provides that the "issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." 11 U.S.C. § 1146(c). Other than altering the statutory references to the confirmation provisions, this language has not been materially altered since 1938. Congress has made major revisions to the Bankruptcy Code in 1938, 1978, 1984, and 2005. Despite having the opportunity to amend the language of section 1146(c) in 2005, Congress readopted section 1146(c) and renumbered it as section 1146(a).

B. Florida's Documentary Stamp Tax

Florida, like most States, imposes a tax on "deeds, instruments, or writings whereby any lands, tenements, or other real property, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to, or vested in" a purchaser or other transferee. Fla. Stat. § 201.02(1) (2007). The amount of the tax is 70 cents "on each $100 of the consideration" for the property, and the tax is required to be paid "prior to recordation" of the instrument. *Id.*; Fla. Stat. § 201.01(1). The Bankruptcy Code does not define the term "stamp tax or similar tax" as used in section 1146(c), though courts have set forth standards.[2] Respondent "does not dispute that in the absence of the section 1146 exemption, [Petitioner] would be entitled to the disputed taxes." District Court's Order of June 23, 2006 n.11, Pet. App. 14a.

C. Piccadilly's Bankruptcy Proceedings.

On October 28, 2003, Respondent Piccadilly Cafeterias, Inc. ("Piccadilly") executed an asset purchase agreement with Piccadilly Acquisition Corporation ("PAC"). PAC agreed to purchase all of

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[2] The Second Circuit in *995 Fifth Ave. Assocs., L.P. v. New York State Department of Taxation & Finance*, 963 F.2d 503, 512 (2d Cir. 1992), held that the "essential characteristics" of a "stamp tax or similar tax" are: (i) the tax is imposed only at the time of transfer; (ii) the tax is determined by the fair market or par value of the item transferred; (iii) the tax rate is "a relatively small percentage" of that value, "typically about one percent or less"; (iv) the tax is imposed regardless of any gain or loss realized by the transferor; and (v) "in the case of state documentary transfer taxes, the tax must be paid as a prerequisite to recording."

Piccadilly's assets for $54 million. One day later, on October 29, 2003, Piccadilly filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code.

At the same time, Piccadilly also filed a motion pursuant to 11 U.S.C. § 363(b)(1), requesting authorization to sell substantially all of its assets outside of the ordinary course of business. Piccadilly also requested an exemption from stamp taxes on the asset sale pursuant to 11 U.S.C. § 1146(c). The Florida Department of Revenue ("Department") objected to both of Piccadilly's requests.

On December 4, 2003, upon request by Piccadilly, the bankruptcy court approved an auction through which the highest bidder would be entitled to purchase Piccadilly's assets. The winning bid of $80 million was from Piccadilly Investments, Inc., which had no relationship to PAC. On January 26, 2004, Piccadilly and a committee of senior secured note holders, along with a committee of unsecured creditors, entered into a global settlement, setting the priority of distribution among Piccadilly's creditors.

On February 13, 2004, the bankruptcy court approved the sale of Piccadilly's assets to Piccadilly Investments and approved the global settlement. The court further held that the $80 million sale to Piccadilly Investments was exempt from stamp taxes under 11 U.S.C. § 1146(c), even though the sale was made: (i) prior to the global settlement or its approval, (ii) prior to the proposal of any plan, and (iii) pursuant to the court's authority to approve sales of estate assets under section 363 (versus its authority under section 1129 to confirm a plan). The Department moved to reconsider, vacate and/or amend the sale order. The motion was denied by the bankruptcy

court. The sale of Piccadilly's assets closed on March 16, 2004.

Piccadilly did not file a plan of liquidation in Chapter 11 until March 26, 2004. More than four months later, on July 31, 2004, it filed an amended plan. Those plans did not provide for any form of reorganization of Piccadilly or the continuation of Piccadilly's business, but merely provided for distribution of Piccadilly's assets in accordance with the terms of the global settlement. The Department then commenced an adversary proceeding, and filed an objection to the plan along with a complaint against Piccadilly seeking a declaration that its pre-confirmation stamp taxes in the amount of $32,200 were not exempt under 11 U.S.C. § 1146(c). The bankruptcy court confirmed the amended plan on October 21, 2004. The court denied the Department's motion to reconsider the confirmation order. The Department then amended its complaint against Piccadilly, and both parties filed motions for summary judgment on the issue of stamp taxes and the application of section 1146(c).

D. Proceedings Below.

1. *The Bankruptcy and District Courts.* The bankruptcy court, and the district court on appeal, both held that section 1146(c) should be read to allow a tax exemption for pre-confirmation transfers. The bankruptcy court held a hearing and ruled in favor of Piccadilly on summary judgment, holding that the pre-confirmation asset sale was exempt from stamp taxes pursuant to 11 U.S.C. § 1146(c). According to the bankruptcy court, even though the transfer was completed before a plan was even proposed, much less confirmed, the sale of substantially all of Piccadilly's

assets was nonetheless a transfer "under a plan confirmed under section 1129." Pet. App. 40a. The bankruptcy court determined that "the sale was necessary to consummate the Plan." Pet. App. 40a-41a. The district court affirmed the bankruptcy court's conclusion that the exemption can apply even when a transfer is completed and subject to tax at a time when no plan has been proposed or confirmed.[3] Pet. App. 28a-29a.

2. *The Eleventh Circuit.* The court of appeals affirmed, agreeing with the district court that pre-confirmation transfers may constitute transfers "under a plan confirmed" pursuant to 11 U.S.C. § 1146(c). *Piccadilly Cafeterias,* 484 F.3d at 1304.

After acknowledging that the precise issue was one of first impression in the Eleventh Circuit, the court expressly disagreed with the decisions of the Third and Fourth Circuits in *Hechinger* and *NVR*, respectively, both of which held that the exemption in section 1146(c) may *not* apply to pre-confirmation transfers of assets, such as the one in this case. Instead, the court sided with the statutory interpretation found in a "somewhat similar" Eleventh Circuit case, as well as the reasoning of the Second Circuit in an "analogous" case involving section 1146(c), both of which held that the language "under a plan" refers to any transfers that are deemed

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[3] The district court focused solely on whether pre-confirmation transfers are eligible for tax exemptions under section 1146(c); it did not decide the issue of whether the specific pre-confirmation sale of Piccadilly's assets was necessary to consummate the plan ultimately confirmed. Pet. App.28a-29a.

"necessary to the consummation of a confirmed Chapter 11 plan."[4] *Id.*

In this case, the Eleventh Circuit went even further. It held that the language "under a plan confirmed" is not bound by any temporal limitation. Instead, section 1146(c)'s tax exemption may apply to *all* "pre-confirmation transfers that are necessary to the consummation" of an ultimately confirmed plan of reorganization. *Id.* In other words, as long as a Chapter 11 plan is confirmed at some point in the future, and the pre-confirmation transfer later is deemed "necessary to the consummation" of that eventually confirmed plan, the Eleventh Circuit held that it does not matter that the plan *did not even exist* at the time of the transfer. As long as the pre-confirmation transfer is deemed necessary after-the-fact, it may be considered as occurring "under" the later confirmed plan for purposes of the statute's stamp tax exemption.[5]

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[4] The two cases the Eleventh Circuit relied on, *In re T.H. Orlando Ltd.*, 391 F.3d 1287 (11th Cir. 2004), and *In re Jacoby-Bender*, 758 F.2d 840 (2d Cir. 1985), are distinguishable from those of the Third and Fourth Circuits (and this case) because they involved post-confirmation transfers.

[5] Like the district court, the Eleventh Circuit addressed only the general issue of whether pre-confirmation transfers are ever eligible for the tax exemption in section 1146(c). 484 F.3d at 1304-05 n.5. It was not presented with the issue of whether, assuming pre-confirmation transfers are eligible, the specific pre-confirmation transfer at issue was "necessary for consummation" of the confirmed plan. *Id.*

SUMMARY OF ARGUMENT

The Eleventh Circuit erred in its broad interpretation of section 1146(c) of the Bankruptcy Code. By its plain language, section 1146(c) only exempts from stamp or similar taxes any asset transfer "under a plan confirmed under section 1129" of the Code. Transfers that occur prior to plan confirmation are ineligible for this favorable tax treatment.

Under its plain meaning and basic principles of statutory construction, section 1146(c) only permits tax exemptions for transfers made under the authority of a confirmed plan. The statute's plain meaning precludes a bankruptcy court from retroactively approving tax exemptions for asset transfers that occurred months or years before a plan's actual confirmation. The Eleventh Circuit went beyond section 1146(c)'s proper scope, concluding that the statute's tax exemption applies to transfers occurring before a plan is even proposed.

By removing any requirement that a plan actually be confirmed or even proposed at the time of the transfer, the Eleventh Circuit expanded the tax exemption in such a boundless way that it can apply to virtually any transaction in a bankruptcy proceeding, regardless of when it occurred. This holding is justified by neither the statute's language nor this Court's principles of statutory construction, which require a narrow and limiting construction of tax statutes. The statutory requirement that there be "a plan confirmed" becomes of little consequence, so long as a bankruptcy court eventually confirms a plan and determines after-the-fact that pre-confirmation transfers are "necessary" for the plan's

"consummation" – a concept the Eleventh Circuit simply engrafted into the statute.

In addition, the Eleventh Circuit essentially disregarded the principle that tax statutes must be construed narrowly but, instead, allowed general principles of flexibility to trump the plain language of section 1146(c). Its ruling ensures that the issue of whether a pre-confirmation transfer is ultimately determined after-the-fact to be "necessary" to a confirmed plan's "consummation" will be subject to substantial litigation and uncertainty. Its ruling also places undue burdens on the administration of state and local tax systems, which are deprived of tax revenues and forced to unravel tax exemptions granted liberally under the Eleventh Circuit's misconstruction of section 1146(c).

Notably, Congress has had the opportunity to alter or expand the clear language of section 1146(c), but has opted not to do so. Congress revised the Bankruptcy Code in 2005, *after* the Third and Fourth Circuits had issued their decisions narrowly interpreting section 1146(c). Congress only renumbered section 1146(c) as 1146(a), leaving the statute's language unchanged thereby supporting the interpretations of the only two appellate courts to have addressed the precise issue presented.

Neither the plain language of section 1146(c) nor any principles of statutory construction or policy support the Eleventh Circuit's decision, which is impractical in operation and impedes the sound functioning of the bankruptcy and tax systems. This Court should therefore reverse the Eleventh Circuit and hold that the tax exemption in section 1146(c) does not apply to pre-confirmation transfers.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 1146(c) REQUIRES THAT FEDERAL COURTS LIMIT EXEMPTIONS FROM STATE AND LOCAL STAMP OR SIMILAR TAXES TO ONLY THOSE POST-CONFIRMATION TRANSFERS MADE UNDER THE AUTHORITY OF A CONFIRMED PLAN.

The Eleventh Circuit's broad interpretation of section 1146(c) is at odds with the plain language of that provision, which is naturally read to require that a reorganization plan under Chapter 11 must first be proposed and confirmed, and that only those transfers that flow from and occur after the plan's confirmation are entitled to tax exemptions from state and local stamp and similar taxes. That is the plain and ordinary reading of the language as a whole in section 1146(c), which this Court should adopt for the reasons that follow.

A. Section 1146(c)'s Plain Meaning Provides for Tax Exemptions Only for Transfers Authorized by Confirmed Plans.

The statutory text forms the "starting point" for determining what Congress intended in section 1146(c). *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Indeed, this Court has long held that the paramount principle of statutory construction is a statute's plain language, which bears a strong presumption of congressional intent. *See Ardestani v.*

I.N.S., 502 U.S. 129, 135-36 (1991).[6] Indeed, the strong presumption that a statute's plain language expresses congressional intent "is rebutted only in 'rare and exceptional circumstances, … when a contrary legislative intent is clearly expressed." *Id.* at 135-36 (citation omitted).

Plain language principles have primacy in the bankruptcy context, where this Court with some frequency reviews statutes whose language is challenged as ambiguous or inconsistent with the general principle that bankruptcy laws should be given flexibility to achieve their remedial purpose. *See, e.g., Lamie*, 540 U.S. at 536 ("We should prefer the plain meaning since that approach respects the words of Congress."). Yet, it has been noted time and again that a party seeking to defeat the plain and ordinary meaning of a portion of the Bankruptcy Code bears an "exceptionally heavy burden" in doing so. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 9 (2000) (burden on party is "exceptionally heavy" to overcome the most natural reading of bankruptcy code provision) (citing *Patterson v. Shumate,* 504 U.S. 753, 760 (1992)); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 552 (1994)) (same); *see also Rubin v. United States*, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.'") (citations

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[6] *See also Thompson v. United States*, 246 U.S. 547, 551 (1918) ("The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture."); *Caminetti v. United States,* 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed…").

omitted). Where the meaning of statutory language is plain, the "sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Hartford Underwriters*, 530 U.S. at 6 (quoting *Caminetti*, 242 U.S. at 485) (internal quotes removed). Judicial analysis starts "with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'" *Id.* (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

Under its plain language, the stamp tax exemption set forth in section 1146(c) flows from an orderly sequence of events, which are reflected in the verb tenses and the ordinary meaning of the words used in that section: a confirmed reorganization plan must first exist from which authorized property transfers are then made to which the statutory tax exemption then becomes applicable. This temporal sequence of events flows naturally and logically from the plain, ordinary, and natural reading of section 1146(c) as a whole. To be made, the transfers must be authorized under a plan that has been confirmed.

This temporal dimension inherent in section 1146(c) is reflected in a number of ways, including the wording of the statute and the tenses used. *See United States v. Wilson*, 503 U.S. 329 (1992) ("Congress' use of a verb tense is significant in construing statutes."). In section 1146(c), the word "confirmed" modifies the word "plan" and is a past participle, meaning "a verb form indicating past or completed action or time that is used as a verbal adjective in phrases such as *baked beans* and *finished work[.]*" *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) *available* at http://www.bartleby.com/61/47/P0104700.html (last

visited January 22, 2008) (emphasis in original); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1653 (1981) ("a participle that typically expresses completed action …"). Where a past participle is placed after the noun it modifies, e.g., "beans baked in the oven," or "work finished after midnight," the past participle still indicates past or completed action. Here, the phrase "plan confirmed" connotes a "confirmed plan" meaning one that has already been confirmed in the past.

Given that section 1146(c) speaks in terms of a past confirmed plan, the use of the word "under" in the phrase "under a plan confirmed" must be read in its ordinary sense and in context. *See Ardestani*, 502 U.S. at 135 ("The word "under" has many dictionary definitions and must draw its meaning from its context."). The most natural and plain reading of "under" in this context comports with its standard dictionary definition, which is "with the authorization of" or to be "inferior or subordinate" to its referent, here the confirmed plan. *See Hechinger*, 335 F.3d at 252-54 (citing Random House Dictionary for "under" as "authorized" by);[7] *NVR*, 189 F.3d at 457 (citing

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[7] The Third Circuit concluded that the "most natural reading" of "under a plan confirmed" is "authorized" by such a plan, stating:

> When an action is said to be taken "under" a provision of law or a document having legal effect, what is generally meant is that the action is "authorized" by the provision of law or legal document. Thus, if a claim is asserted "under" 42 U.S.C. § 1983, Section 1983 provides the authority for the claim. If a motion is made "under" Fed.R.Civ.P. 12(b)(6), that rule provides the authority for the motion. If benefits are paid "under" a pension or welfare plan, the payments are authorized by the plan.

335 F.3d at 252.

Black's Legal Dictionary for "under" as "inferior" or "subordinate" and Webster's II New Riverside University Dictionary as "with the authorization of");[8] *see also* THE NEW SHORTER OXFORD ENGLISH DICTIONARY, 3469 (1993) ("Subject to the authority, control, direction, or guidance of"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2487 (1981) ("required by: in accordance with: bound by").

As this Court recognized in *Ardestani*, a range of dictionary meanings exist for the word "under" and, while creative and potentially plausible alternative readings may exist, its core meaning when referring to something being "under" a statute includes "subject to" or "governed by" as well as "by reason of the authority of." 502 U.S. at 135 (citing *St. Louis Fuel and Supply Co., Inc. v. F.E.R.C.*, 890 F.2d 446, 450 (D.C. Cir. 1989)). Given the context of section 1146(c), which requires that its tax exemption be "under" laws imposing a stamp or similar tax and that transfers must be "under" a confirmed plan "under" Chapter 11, the plain and ordinary meaning of "under" (i.e., "under the authority of") makes good sense. All three references to "under" in section 1146(c) should be read consistent with one another under the "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning[.]" *C.I.R. v. Keystone Consol. Industries., Inc.*, 508 U.S. 152, 159 (1993); (citing *Sorenson v. Sec. of Treasury*, 475 U.S. 851, 860 (1986)). This canon has even greater weight given

[8] The Fourth Circuit stated: "Logically reading these definitions in the context of § 1146(c), we cannot say that a transfer made prior to the date of plan confirmation could be subordinate to, or authorized by, something that did not exist at the date of transfer-a plan confirmed by the court." 189 F.3d at 457.

that section 1126(c) uses the word "under" three times in the same sentence. *Hechinger*, 335 F.3d at 253. Moreover, this interpretation of "under a plan confirmed" gives it the same meaning as the identical phrase used in section 365(g) of the Bankruptcy Code, which regards executory contracts and unexpired leases "under a plan confirmed under chapter 9, 11, 12, or 13 of this title." 11 U.S.C. § 365(g). *See Hechinger*, 335 F.3d at 254 ("It seems clear that this language means a plan that is confirmed pursuant to the authority conferred by those chapters.").[9]

Read in this light,[10] section 1146(c) provides that the "transfer" at issue must be "*under the authority of* a plan confirmed *under the authority of* section 1129 of this title" and that such transfers "may not be taxed *under the authority of* any law imposing a stamp tax or similar tax."[11] Plainly and

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[9] *See also* 11 U.S.C. § 524 (relating to "willful failure of a creditor to credit payments received under a plan confirmed under this title…") & 11 U.S.C. § 1231 (identical to section 1146(c) in Chapter 12 context). These are the only other references to "under a plan confirmed" in the Code.

[10] Notably, neither the Eleventh Circuit nor the dissent in *Hechinger* reach a conclusion of what definition of "under" to accept. The Eleventh Circuit found section 1146(c) ambiguous and refused to read it to preclude pre-confirmation transfers. *Piccadilly Cafeterias*, 484 F.3d at 1304. The dissent in *Hechinger* decides what "under" "does *not* mean[,]" 335 F.3d at 258, but does not decide what it does mean, though inferring that "in accordance with" might be acceptable. *Id.*

[11] Congress obviously may simply use the word "under" to convey this meaning, and need not insert the phrase "the authority of" into the Code in a cumbersome way. As noted in *Hechinger*, "[i]n some contexts, the mere word 'under' may be sufficient to convey this meaning, whereas in others an explicit reference to the concept of legal authority may be necessary." 335 F.3d at 253 n.3.

symmetrically reading "under" in this way, a transfer must be under the authority of a plan that has been confirmed under the authority of a plan that meets section 1129's requirements. *Keystone Consol. Industries, Inc.*, 508 U.S. at 159 ("the Code must be given 'as great an internal symmetry and consistency as its words permit.'") (citation omitted).

It cannot be fairly said that a transfer made prior to the date of plan confirmation (or prior to a plan even being proposed, as is the case here) can be under the authority of, or governed or subject to, a plan that did not even exist at the time of the transfer.[12] To do so creates a fiction that unnecessarily injects uncertainty and burdens into the administration of state and local stamp taxes (as discussed below).

In contrast, section 1146(c)'s plain language results in the most reasonable interpretation, which creates a bright and common sense line that makes the tax exemption self-executing: eligible transfers must be authorized under and thereby flow from a confirmed plan. Under its plain language, section 1146(c) entitles debtors to relief from stamp and similar taxes imposed *at the time of transfer* to facilitate the implementation of an already confirmed reorganization plan thereby preventing federal interference with state taxation system before a debtor reaches the point of plan confirmation. As the Fourth Circuit concluded:

> Congress, by its plain language, intended to provide exemptions only to those

[12] Nor can it be said to be "subordinate" or "inferior" to a nonexistent plan. *See NVR*, 189 F.3d at 457.

> transfers reviewed and confirmed by the court. Congress struck a most reasonable balance. If a debtor is able to develop a Chapter 11 reorganization and obtain confirmation, then the debtor is to be afforded relief from certain taxation to facilitate the implementation of the reorganization plan. Before a debtor reaches this point, however, the state and local tax systems may not be subjected to federal interference.

NVR, 189 F.3d at 458. The contrary view would allow debtors an unlimited ability to obtain the exemption for months or years before a plan is proposed or confirmed, and unduly burden and complicate the administration of state and local stamp tax system. It would also read the necessity of a confirmed plan out of the statute because the tax exemption could be obtained without a debtor having even proposed a plan.

Moreover, the plain meaning of "under" and the grammatical tense of the word "confirmed" lead to the natural reading of a temporal restriction in section 1146(c) without the need for Congress to have expressly done so. The plain and natural reading of section 1146(c), that transfers must be made on the authority of a confirmed plan, forecloses the need for an explicit limitation. *See Hechinger*, 335 F.3d at 256. Transfers made under the authority of a confirmed plan will necessarily come chronologically after such a plan is confirmed thereby making the addition of further temporal language unnecessary or redundant.

Further, this temporal restriction is reinforced by a plain reading of the phrase that a transfer under

a confirmed plan "*may not be taxed* under any law imposing a stamp tax or similar tax." (Emphasis added). Under the Code, the phrase "may not" is defined as "*prohibitive*, and not permissive." 11 U.S.C. § 102(4) (emphasis added). Thus, the phrase "may not be taxed" in section 1146(c) must be read to mean "shall not be taxed" or "must not be taxed." This "prohibitive" use of "may not" buttresses the plain meaning of section 1146(c). *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'") (citations omitted). This prohibitive language, in effect, creates a tax exemption *at the time of the transfer*, not at some later time when a federal court may determine that a pre-confirmation transfer is somehow deemed to be "necessary" to the "consummation" of a plan already confirmed.

Pre-confirmation transfers do not fit this definition because they were taxable events at the time of transfer. Stamp and other transfer taxes generally become due and payable at the time of transfer or its recordation, such that any exemption must exist and be implemented at that point in time in order to meet the literal requirements of section 1146(c). *See, e.g.,* Fla. Stat. § 201.01(1). The view that pre-confirmation transfers are not taxable events subject to stamp or similar taxes, but are merely subject to a possible tax exemption under a plan that has been neither proposed nor confirmed, turns section 1146(c)'s otherwise plain meaning, and the concept of its prohibitive tax exemption, on their collective heads.

Moreover, the language of section 1146(c) provides no support for the notion that Congress intended to grant tax exemptions for any and all

property transfers that happen to occur during the course of a bankruptcy proceeding. Had it intended to do so, it would have used different language that made clear that any property transferred, whether pre-confirmation or post-confirmation, was entitled to a tax exemption. For instance, Congress could have enacted a statute stating that any property transfer under section 363 of the Code (such as the transfer at issue) shall not be taxed under stamp and similar transaction taxes. But Congress chose prohibitively to limit tax exemptions to only those property transfers that flow from a confirmed plan under section 1129, a reading of section 1146(c)'s plain language that also happens to make common sense.

B. The Eleventh Circuit Ignored Section 1146(c)'s Plain Meaning, Rewriting the Statute to Say It Applies to Any Transfers Later Determined to be Necessary for the Consummation of a Confirmed Plan.

The Eleventh Circuit, in concluding that section 1146(c) applies to pre-confirmation transfers, was required to essentially rewrite the statute. This point is evident in its conclusion that courts applying the Eleventh Circuit's holding are now required to determine after-the-fact whether a pre-confirmation transfer was "necessary to the consummation of a confirmed plan of reorganization, which, at the very least, requires that there be some nexus between the pre-confirmation transfer and the confirmed plan." *Piccadilly Cafeterias*, 484 F.3d at 1304. This reading of section 1146(c) is an expansive one, extending its language beyond transfers authorized under *confirmed* plans to *any* transfers that are later deemed "necessary to the *consummation* of a

confirmed plan" – a far broader concept than the plain language of the statute supports.

Had Congress intended this expansive and manipulable interpretation of the scope of the stamp tax exemption it could have written section 1146(c) to say: "Any ~~The~~ issuance, transfer, or exchange of a security, or the making or delivery of ~~an~~ any instrument of transfer made prior to a plan's confirmation and later deemed necessary to the consummation of ~~under~~ a plan confirmed under section 1129 of this title, may be exempt ~~may not be taxed~~ under any law imposing a stamp tax or similar tax, provided some nexus exists between the pre-confirmation transfer and the confirmed plan." It did not, and the Eleventh Circuit's judicial gloss on the plain language of the statute drastically transforms its meaning. *See Lamie*, 540 U.S. at 538 (rejecting an interpretation that reads "an absent word" into a statute and enlarges its application).

Section 1146(c) speaks only in terms of tax exemptions that are allowed for transfers that flow from "confirmed" plans. Once a confirmed plan exists, a question may naturally arise (particularly if the plan has not been written clearly or in a detailed way) whether a particular proposed transfer to be accomplished is "necessary" for "consummation" of that confirmed plan and thereby "may not be taxed." That is precisely what occurred in *In re Jacoby-Bender*, 758 F.2d 840 (2d Cir. 1985), upon which the Eleventh Circuit erroneously relied.

In *Jacoby-Bender*, the Second Circuit addressed whether a transfer made *after* confirmation of a plan, but not specifically referred to in the approved plan, could still be considered "under a plan confirmed" as

required by section 1146(c). *See id.* at 841. The only issue was what degree of specificity was needed in the confirmed plan itself to conclude that a particular transfer was made under its authority. Under this distinguishable fact pattern, the Second Circuit concluded that a specific transfer of assets takes place "under a plan confirmed" as long as the transfer "is necessary to the *consummation* of a plan." *Id.* at 842 (emphasis added).[13]

The Eleventh Circuit's misreading of section 1146(c) erroneously injects the concept of "consummation" and equates it with "confirmation" thereby leading to much mischief. Confirmation and consummation are two distinct concepts. What is "necessary" for "confirmation" of a proposed Chapter 11 plan is set forth in section 1129; what is necessary for "consummation" of a confirmed plan is a far different question and focuses on the legitimate scope of transfers flowing from the confirmed plan itself.

In rejecting the contention that *Jacoby-Bender*'s "necessary for consummation" principle applied to pre-confirmation transfers, the Fourth Circuit in *NVR* stated:

> Depending on the type and size of debtor at issue and the complexity of the reorganization, a reorganization plan

[13] Nothing in the Second Circuit's opinion addresses or even suggests that a transfer *prior to confirmation* would have been covered. In fact, the bankruptcy court previously *denied* the debtor's effort to obtain an earlier ruling on the application of section 1146(c) to the potential sale when the plan had not yet been confirmed. *See In re Jacoby-Bender, Inc.*, 34 B.R. 60, 62 (Bankr. S.D.N.Y. 1983).

> might well be worded either in specific terms identifying each and every transfer or in much broader language that generally outlines the activities that must occur to consummate the plan. We do not take issue with the Second Circuit's logic as it was applied in *Jacoby-Bender* because it was employed to interpret a *plan* – i.e., to *identify which transfers* were necessary to, and thus contemplated by, "a plan confirmed."

189 F.3d at 456 (emphasis in original). The court noted, however, that lower courts[14] began to extend *Jacoby-Bender*'s language and alter its holding, "changing the test from 'necessary to the consummation of a plan,' to 'necessary to the confirmation of a plan.'" *Id.* This approach is severely flawed because the "fundamental difference between the consummation of a plan is the timing of the events within the bankruptcy process. Consummation or execution of a reorganization plan cannot take place until the bankruptcy court first confirms a plan." *Id.*; *see also Hechinger*, 335 F.3d at 255 (*Jacoby-Bender* "resolved the issue of whether the sale was authorized by the terms of the *previously confirmed plan*, not whether the sale was necessary to achieving the plan's confirmation.") (emphasis added).

For these reasons, the Eleventh Circuit's engrafting of new language into section 1146(c) is erroneous and unsupported by that section's text. *See*

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[14] *See, e.g., In re Lopez Dev., Inc.*, 154 B.R. 607, 609 (Bankr. S.D. Fla. 1993); *In re Permar Provisions, Inc.*, 79 B.R. 530, 534 (Bankr. E.D.N.Y. 1987); *In re Smoss Enter. Corp.*, 54 B.R. 950, 951 (Bankr. E.D.N.Y. 1985).

Lamie, 540 U.S. at 538 (no need to go beyond "a plain, nonabsurd meaning" of statute).

C. Other Principles of Statutory Interpretation Support Reading Section 1146(c) as Providing Tax Exemptions Only for Transfers Authorized by Confirmed Plans.

The plain language approach as applied to section 1146(c) is further supported by fundamental principles of statutory interpretation used in the bankruptcy and taxation contexts.

First, the relevant language of section 1146(c) related to "under a plan confirmed" has not changed since 1978. Since that time, Congress has had the opportunity to amend the language when it enacted revisions to the Bankruptcy Code in 1984 and 2005. Regarding the latter, Congress in 2005 enacted the Bankruptcy Abuse Prevention and Consumer Protection Act. In doing so, it simply readopted section 1146(c) verbatim and renumbered it as section 1146(a).

This 2005 revision of the Code occurred *after* both the Fourth Circuit's 1999 decision in *NVR* and the Third Circuit's 2003 decision in *Hechinger*, each holding that section 1146(c)'s tax exemption does not apply to pre-confirmation transfers. Rather than legislatively overruling the decisions of the Fourth and Third Circuits, which were the only circuits that directly addressed pre-confirmation transfers,[15]

[15] At that time, it appeared that the Eleventh Circuit in *T.H. Orlando* had adopted the interpretation of section 1146(c) set forth in *NVR* and *Hechinger*, thereby reflecting unanimity (Continued …)

Congress merely readopted and renumbered section 1146(c) as section 1146(a). This lack of change to section 1146(c)'s statutory language is evidence of the correctness of these decisions. In *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978), this Court stated that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (citations omitted).[16]

Second, this Court has held that courts should "proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed." *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851-52 (1989) (citation and quotation marks omitted). As such, tax exemptions are to be "unambiguously proved" by the party seeking the exemption. *See United States v. Centennial Savings Bank FSB,* 499 U.S. 573, 583 (1991); *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988); *C.I.R. v. Jacobson*, 336 U.S. 28, 49 (1949).

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among three circuit courts. *See In re T.H. Orlando Ltd.*, 391 F.3d 1287, 1291(11th Cir. 2004) (agreeing with "our sister circuits' interpretation of § 1146(c)."") The Eleventh Circuit below, however, held that its discussion on this issue in *T.H. Orlando* "does not square" with the "strict temporal interpretation" of those cases and did not reach a conclusion on whether section 1146(c) may apply to pre-confirmation transfers. *Piccadilly Cafeterias*, 484 F.3d at 1303 n.2.

[16] *See also Thompson*, 246 U.S. at 551 (it is presumed that Congress, when it enacts a statute, had full knowledge of judicial decisions germane to the statute's subject matter); *Caminetti*, 242 U.S. at 487-88 (reasoning that Congress was presumed to know previous meaning given to a statutory term when enacting a new law using that term).

Given this admonition, section 1146(c)'s language must be construed strictly and narrowly in favor of the states to prevent unwarranted displacement of state tax laws. *See Nat'l Private Truck Council v. Oklahoma Tax Comm'n,* 515 U.S. 582, 590 (1995) (discussing principles of comity in taxation and the "federal reluctance to interfere with state taxation" given the "strong background presumption against interference."). Congress must use "plain words" if it intends to prevent state taxation; courts will not conclude an exemption is intended based on "dubious inferences." *Oklahoma Tax Comm'n v. U.S.*, 319 U.S. 598, 607 (1943). Such exemptions are not to be implied when not explicitly granted. *See Wells Fargo Bank*, 485 U.S. at 354.

Here, no federal interest exists in construing section 1146(c)'s limited tax exemption beyond the narrow context of the statute's plain language. Its scope is limited to only stamp or similar taxes imposed on certain transfers that arise under the authority of a confirmed plan under Chapter 11. Its scope does not extend to transfers authorized under other portions of the Bankruptcy Code, such as section 363, which formed the basis for the transfer below. Nor does it extend to transfers other than those arising in the Chapter 11 context (such as Chapter 7 liquidations). Instead, the limited scope of section 1146(c) merely relieves a debtor who has obtained a confirmed plan under section 1129 from paying such taxes on those limited transfers authorized under the plan. No federal interest exists in implying any broader tax relief, which would conscript tax revenues from the states for no apparent purpose.

A similar presumption exists against federal interference with the administration of a state's taxation scheme. *See, e.g., Nat'l Private Truck Council,* 515 U.S. at 586 & 590 ("We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration."). For this reason, tax statutes must be narrowly construed in favor of the state to avoid this interference. *See id.; see also Wells Fargo*, 485 U.S. at 354. The effect of the Eleventh Circuit's ruling is to directly interfere with the administration of Florida's documentary stamp tax structure, which imposes the tax on the transfer and requires that the tax be paid "prior to recordation" of the instrument of transfer. By extending the tax exemption to transfers that occurred months or years earlier at a time when no confirmed plan existed (or was even proposed), states are placed in the position of having to "unravel" or "undo" the taxes imposed in each of these situations. This additional administrative burden may require rebates from the state treasury for taxes paid, the escrowing of tax funds to be held contingent upon the possible future proposal or confirmation of a plan, or any number of other possible methods of implementing after-the-fact tax exemptions.

The plain meaning of section 1146(c) respects and gives force to these important principles of statutory construction by avoiding the potential morass that flows from a broad versus strict construction of the statute. The Eleventh Circuit all but ignored these principles in expanding section 1146(c)'s application. By broadening the statute's application to include pre-confirmation transfers that occurred without the authority of a confirmed (or proposed) plan, the Eleventh Circuit displaces and

disrupts the state's taxation system to a greater extent than the language of section 1146(c) supports thereby providing another reason for rejection of the Eleventh Circuit's approach.

Finally, the title of the subchapter in which section 1146(c) is placed is "POST-CONFIRMATION MATTERS." This placement has at least some meaning, and cannot be dismissed as entirely irrelevant. Indeed, the general principle is that, while not dispositive, the placement of a provision in a particular subchapter provides general support for its terms being interpreted consistent with that subchapter. *See, e.g., Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). While it might be argued that some provisions in the subchapter have been misplaced, the more persuasive position is that Congress intended to grant tax exemptions to *post-confirmation* transfers flowing from a confirmed plan.

D. Review of Section 1146(c)'s Legislative History Is Unnecessary and Sheds Little Light.

Given the plain meaning of section 1146(c), it is unnecessary to review its legislative history. *See Lamie,* 540 U.S. at 539. In any event, its legislative history is exceptionally sparse and sheds little light such that this Court should "rest [its] holding on the statutory text." *Id.* at 542.

The 1934 legislation, section 77B(f) of the Bankruptcy Act, exempted the debtor from payment

of federal stamp taxes on new securities issued pursuant to a plan of reorganization that required the debtor to modify the terms of outstanding securities for which the federal stamp tax had already been paid. *See* S. Rep. No. 482, 73d Cong. 2d Sess. 4 (1934). The 1934 exemption applied only to specified federal stamp taxes, which were themselves repealed by the Excise Tax Reduction Act of 1965, Pub. L. 89-44, § 401(b), 79 Stat. 148 (1965), effective January 1, 1968. The 1938 legislation enacted as section 267 of the Chandler Act of 1938, expanded the exemption to "any stamp taxes now or hereafter imposed." *See* Chandler Act of 1938, ch. 575, § 267, 52 Stat. 840, 902-903 (1938) (repealed in 1979).

None of the available legislative history explains the legislative purpose for the extension of the exemption from federal to federal and state stamp taxes in 1938 or from stamp taxes to stamp "and similar" taxes in 1978. At best, Congress merely intended to broaden the scope of these taxes.[17] None of the legislative history addresses the issue presented in this case. Thus, any inference that Congress intended to create tax exemptions for property transfers occurring after a bankruptcy case is commenced but before a plan is confirmed or even proposed, must be divined from the statutory language itself. As this Court has noted, the lack of

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[17] *See, e.g., 995 Fifth Ave. Assocs.,* 963 F.2d at 510 n.2 (holding that New York "gains tax" of 10% on profit from sale of real estate was not "stamp tax or similar tax" exempted under § 1146(c); expansion of exemption in 1978 to "similar taxes" should not "be read broadly to accord greater tax relief for debtors" as stated by district court; legislative history of 1978 amendment is "a simple declaration that the new provision, § 1146(c), enlarges the former exemption under § 267 to include taxes similar to stamp taxes").

"*any* conclusive statement in the legislative history" supporting a meaning of the word "under" lends support for concluding that its ordinary meaning must prevail. *Ardestani*, 502 U.S. at 136-37 (emphasis in original). Given the absence of any legislative history on the issue presented, this Court must rely on the plain language of section 1146(c) as supported by established principles of statutory construction.

II. THE ELEVENTH CIRCUIT'S DECISION IS IMPRACTICAL AND CREATES MISCHIEF IN THE ADMINISTRATION OF EXEMPTIONS FROM STATE AND LOCAL STAMP TAXES.

The Eleventh Circuit's interpretation is impractical for a number of reasons. It creates an unwieldy judicial test, increases the potential for "creative" and unjustified tax exemptions, unduly burdens state and local tax officials who must now guard against or "unravel" newfound and unwarranted exemptions, and provides a windfall where Chapter 11 is used for liquidation rather than reorganization. In contrast to the elegance and simplicity of section 1146(c)'s plain meaning, the Eleventh Circuit's interpretation "would itself lead to results that seem undesirable as a matter of policy." *Hartford Underwriters*, 530 U.S. at 12.

First, the Eleventh Circuit's interpretation of section 1146(c) creates a new test unmoored from the statute's plain language. By engrafting a "necessary" for the "consummation" of a plan requirement, the court strains the statutory language and injects a new judicial inquiry: whether pre-confirmation transfers are now in hindsight deemed "necessary" for the "consummation" of the plan ultimately confirmed and

whether "some nexus between the pre-confirmation transfer and the confirmed plan" now exists. *Piccadilly Cafeterias*, 484 F.3d at 1304. The Eleventh Circuit's interpretive test puts the collection of such taxes in a litigation limbo that may not be resolved for months or years after deeds are recorded and tax exemptions later unraveled or undone. Allowing a pre-confirmation transfer to qualify for a tax exemption at the time of transfer, premised on the transfer possibly being later deemed "necessary" to the "consummation" of an as yet un-confirmed plan and having no defined "nexus" to a proposed plan, thwarts the administration of state tax systems. It creates the type of burdensome, contentious and unnecessary inquiries that too often plague bankruptcy court proceedings.

Second, it bears noting that actual confirmed plans result in only a small percentage of the Chapter 11 cases filed.[18] For this reason, granting tax exemptions at the beginning of a case – with an expectation that a plan will be proposed and ultimately approved down the road – is putting the cart before the horse. *See, e.g., In re 310 Associates, L.P.*, 282 B.R. 295 (S.D.N.Y. 2002) ("Any debtor could claim that a transfer will be important to a future plan of reorganization, without knowing anything about the substance of that plan."). Granting tax exemptions at the outset of a case, even though it is speculative that a plan will ever be confirmed, finds no support in the Code and creates additional difficulties and complexities that will proliferate under the Eleventh Circuit's decision. Moreover, if no

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[18] *See* Karen Cordry, *The Incredible Expanding Section 1146(c),* 21 AM. BANK. INST. J. 10, 10 (Dec-Jan. 2003) ("vast majority of cases do not confirm a plan").

plan is ever confirmed (as is likely) or the case is converted or dismissed, state and local tax officials must attempt to "unravel" or "undo" these unwarranted section 1146(c) exemptions thereby creating an unnecessary and burdensome strain on the administration of the tax systems.[19]

These types of unnecessary and unwarranted burdens are the natural result of the Eleventh Circuit's overly broad construction of section 1146(a). Bankruptcy courts in the Eleventh Circuit will logically see increased attempts to get approval of tax exemptions immediately upon the filing of a bankruptcy petition and long before any plan is proposed, let alone confirmed. Real estate recording taxes, like Florida's, are invariably collected when the deed is recorded or when some other instrument of transfer is delivered. As a result, it has become increasingly necessary for the Florida Department of Revenue to not only oppose efforts to obtain premature tax exemptions, but to attempt to require that any tax revenues be placed in escrow until a plan is actually proposed and confirmed thereby defensively protecting tax revenues and, in effect, transforming section 1146(c) into a tax rebate statute. In addition, the proliferation of tax exemptions for pre-confirmation transfers creates the potential for "stealth orders" that may go unnoticed by state and local taxing authorities, further burdening tax administration.[20]

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[19] Cordry, *supra* note 18, at 10.

[20] *Id.*

Third, the Eleventh Circuit's expansive, non-textual approach will likely fuel the "creative" approaches of debtors to further expand the exemption's reach. Even before its decision in *Piccadilly Cafeterias*, the Eleventh Circuit's decision in *T.H. Orlando* was criticized because it "invites all manner of creative tinkering with Chapter 11 plans" such that asset transfers can be structured "in such a way that they can be characterized, rightly or wrongly, as 'necessary to the consummation' of a plan of reorganization."[21] In *T.H. Orlando*, the Eleventh Circuit allowed a transfer of *non-debtor* property between two *non-debtors* to be exempted from the tax. Because the underlying transfer of non-debtor property between two third-party non-debtors was arguably necessary for the debtor to receive its loan, the court held that it could grant an exemption from taxes on such third-party transactions. These types of "machinations will only make life harder for bankruptcy judges called upon to adjudicate the confirmability of a Chapter 11 plan."[22]

The potential for abuse in such situations is precisely what occurred in *NVR*, where a homebuilder in financial distress made 5,571 transfers of real property in an 18-month period following its filing under Chapter 11, paying over $8 million in state and local transfer and recording taxes before ultimately emerging from bankruptcy. 189 F.3d at 448. The bankruptcy court held that these pre-confirmation

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[21] Paul D. Leake & Mark G. Douglas, *Testing the Limits of the Chapter 11 Transfer Tax Exemption: In Search of the Meaning of "Under a Plan Confirmed"*, 1 N.Y.U. J. L. & BUS. 839, 855 (Summer 2005).

[22] *Id.*

transfers, which were made in the ordinary course of the debtor's business operations, were subject to the tax exemption under section 1146(c). *Id.* The debtor sought refunds, but the Fourth Circuit held tax exemptions are unavailable for these types of pre-confirmation transfers.

The situation in *NVR* is not unlike what Florida and other states may expect in coming years as real estate ventures invoke the bankruptcy laws and seek to avoid transfer taxes on past and proposed transfers. Debtors will routinely insert section 1146(c) exemption clauses in section 363 sale orders, which are likely to be routinely approved by bankruptcy courts because, after all, a plan may ultimately be confirmed. As in *NVR*, many real estate ventures will undoubtedly claim the section 1146(c) exemption for pre-confirmation transfers with or without a section 363 sale order. The Eleventh Circuit's approach will only fuel the insupportable expansion of the limited tax exemption set forth in section 1146(c).

Finally, the broad nature of the Eleventh Circuit's interpretive holding has made it more common for companies "to enter bankruptcy with a plan for sale to be effected almost immediately after the bankruptcy case is filed with a planned distribution scheme blessed by the court, a practice which arguably gives little more than lip service" to applicable bankruptcy principles.[23] Indeed, the

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[23] *See* Honorable Nancy C. Dreher, *Eleventh Circuit parts with the Third and Fourth Circuits and holds that the § 1146(c) exemption from state stamp taxes applies to preconfirmation sales*, BANKRUPTCY SERVICE CURRENT AWARENESS ALERT (June 2007).

Eleventh Circuit's decision "only makes it easier for the process to go forward" and "[c]reditors who get the wrong end of these swift sales are increasingly unhappy; abuses will inevitably bring negative reactions from the bankruptcy courts."[24] Moreover, section 1129(d) explicitly provides that a plan may not be confirmed if "the principal purpose of the plan is the avoidance of taxes." 11 U.S.C. § 1129(d). Where, as is increasingly common, most or all of the debtor's assets are liquidated through pre-confirmation sales, and the plan merely distributes those assets in a way only slightly different from a traditional Chapter 7 liquidation, it is difficult to view these plans as being confirmed for any purpose other than avoiding taxes, producing a windfall to debtors.

In contrast to the simplicity of a plain language approach to section 1146(c), the Eleventh Circuit's construction has a substantially greater potential for mischief, unnecessary collateral litigation, and unnecessary expenditures of resources and time. The "plain meaning approach" supports the "sound functioning of the bankruptcy system" and thereby is the most workable. *See Lamie*, 540 U.S. at 537 (reasoning that "[i]f we add to all this the apparent sound functioning of the bankruptcy system under the plain meaning approach," any expansion of the system beyond the plain meaning is inappropriate). Nothing in the record suggests that the plain meaning given to section 1146(c) by the Third and Fourth Circuits has caused disruption. *Id.* (noting that "[s]eeming order has attended" application of challenged rule). For all these reasons, this Court should reject the Eleventh Circuit's broad and

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[24] *Id.*

limitless application of section 1146(c) to prevent misuse of its limited exemption.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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