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No. 07-312

In the Supreme Court of the United States

STATE OF FLORIDA DEPARTMENT OF REVENUE,

PETITIONER,

v.

PICCADILLY CAFETERIAS, INC.,

RESPONDENT.

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

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IOWA, KANSAS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OHIO, OKLAHOMA, PENNSYLVANIA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING, AND THE CITIES OF CHICAGO, NEW YORK, AND PHILADELPHIA, AND THE CITY & COUNTY OF SAN FRANCISCO AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether § 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?

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INTEREST OF THE *AMICI CURIAE*

At issue in this case is whether the tax exemption found in the Bankruptcy Code at 11 U.S.C. § 1146(c) applies to property sales undertaken before a chapter 11 plan is confirmed, or whether the exemption is limited to transfers made pursuant to a confirmed plan.[1] This is an issue of critical importance to state, county, and municipal taxing authorities. Section 1146(c) exempts principally the real estate transfer tax,[2] and thirty-seven States—at the state, county, and/or municipal level—impose such a tax on the recording of deeds, mortgages, and/or lease assignments.[3] While this tax is usually a small percentage of the consideration paid (typically 1% or less), it accounts for billions of dollars in revenue to

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[1] The Bankruptcy Abuse Prevention & Consumer Protection Act of 2005, Pub. L. No. 109-8, § 719(b)(3)(B), 119 Stat. 133, deleted former sub-sections (a) and (b) of § 1146, and former subsection (c) is now sub-section (a). Because this case pre-dates the change in the statute, *amici* will refer to the applicable section as § 1146(c), consistent with the convention adopted in petitioner's brief. Pet. Br. 2 n.1.

[2] Debtors' counsel regularly file motions seeking to extend the exemption to cover sales and use taxes, UCC filing fees, gains taxes, and other taxes and fees. See Karen Cordry, *The Incredible Expanding Section 1146(c)*, 21 Am. Bank. Inst. J. 10 (Dec.–Jan. 2003).

[3] A list of these States and the applicable tax rates is available at www.realtor.org/smart_growth.nsf/docfiles/TransferTaxRates(8-05).pdf.

state and local governments nationwide.[4] As a result, if this Court were to affirm the Eleventh Circuit's determination that pre-confirmation sales are entitled to the § 1146(c) exemption, state and local governments would face a substantial decrease in tax revenue, undermining their ability to provide valuable services.

Moreover, if the Court were to adopt the standard contemplated by the Eleventh Circuit—under which the availability of the exemption turns on whether the transaction at issue is determined retroactively to have been "necessary to the consummation of a confirmed plan of reorganization," Pet. App. 9a—courts, debtors, and state and local taxing authorities would be forced to take on substantial new burdens. Rather than merely determine whether a transaction is authorized by an existing, confirmed plan of reorganization—the interpretation adopted by the Third and Fourth Circuits, see *In re Hechinger Inv. Co.*, 335 F.3d 243, 257 (3d Cir. 2003); *In re NVR, LP*, 189 F.3d 442, 457-458 (4th Cir. 1999)—all parties would have to undertake a far more difficult and amorphous inquiry, on a case-by-case basis and without any guidance from

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[4] For example, transfer tax collections for fiscal year 2006 for the State of Washington were $1.010 billion (dor.wa.gov/docs/reports/2007/Tax_Reference_2007/50reet.pdf at p. 202), for the State of Florida were $4.105 billion (dor.myflorida.com/dor/tables/f2fy2006.xls), and for the City of New York were $1.352 billion in mortgage recording taxes and $1.305 billion in conveyance of real property taxes (www.comptroller.nyc.gov/bureaus/acc/cafr-pdf/cafr2006.pdf at p. 260).

the language of the statute, into whether the transaction is "necessary" to the debtor's ability to propose and confirm a plan. Moreover, given the subjective nature of this analysis, the decision either way on whether a transaction is exempt is likely to engender disputes, litigation, and appeals, exacerbating the burdens on state and local governments and increasing the costs and time expended by all parties to the proceeding.

STATEMENT

On October 28, 2003, Piccadilly Cafeterias, Inc. ("Piccadilly") entered into an asset purchase agreement with Piccadilly Acquisition Corporation ("PAC"), in which the latter agreed to acquire Piccadilly's assets (chiefly property) in exchange for $54 million. Pet. App. 2a. The next day, Piccadilly filed a chapter 11 bankruptcy petition and a motion under § 363(b) of the Bankruptcy Code for an order authorizing an auction of Piccadilly's assets, using PAC's offer as the opening, minimum bid. *Id.* at 2a, 13a & n.6.[5] Piccadilly's motion also asked the bankruptcy court to declare the resulting sale exempt from stamp taxes under § 1146(c). *Id.* at 2a.

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[5] Section 363(b) authorizes "the trustee, after notice and a hearing, [to] use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Although § 363(b) refers to "the trustee['s]" power to use, sell, or lease property, under chapter 11, a debtor-in-possession (like Piccadilly here) has most of the powers of a trustee, including the latter's § 363(b) authority. See *id.* §§ 1107(a), 1108.

The bankruptcy court entered an order on December 4, 2003, approving the bidding process and establishing an auction date. *Id.* at 2a-3a. The winner at auction was Piccadilly Investments, LLC (no relation to Piccadilly or PAC), with a bid of $80 million. *Id.* at 3a. On February 13, 2004, the bankruptcy court approved the sale and held, over the objection of the State of Florida ("Florida"), that the sale was exempt from stamp taxes under § 1146(c). *Id.* at 2a-3a. One month later, the bankruptcy court entered an amended order approving the sale and denying Florida's motion to reconsider the sale order, and the sale closed on March 16, 2004. *Id.* at 3a.

Piccadilly filed its initial proposed liquidation plan ten days later, and subsequently submitted an amended plan, to which Florida objected. *Ibid.* Florida also initiated an adversary proceeding seeking a declaration that § 1146(c) did not exempt the asset sale from stamp taxes. *Ibid.* On October 21, 2004, the bankruptcy court confirmed the amended liquidation plan, over Florida's renewed objection. *Ibid.*

In the adversary proceeding, both Florida and Piccadilly moved for summary judgment. *Ibid.* The bankruptcy court ruled that the § 1146(c) exemption applied—although the sale occurred well before the plan was proposed and at least seven months before it was confirmed—on the ground that the sale was necessary for the eventual consummation of the plan. *Ibid.*

The district court, and then the Eleventh Circuit, affirmed. *Id.* at 3a-4a, 9a. The court of appeals rejected the argument that § 1146(c) exempts only post-confirmation sales, holding that even pre-

confirmation transactions take place "under a plan confirmed" whenever they are "necessary to the consummation of a confirmed plan." *Id.* at 9a. This Court granted Florida's certiorari petition.

SUMMARY OF ARGUMENT

In extending the tax exemption found in § 1146(c) to pre-confirmation sales "necessary to the consummation of a confirmed plan of reorganization," Pet. App. 9a, the Eleventh Circuit relied on what it deemed the "practical realities" of chapter 11 reorganization, as well as certain ambiguities that it identified in the statute, *id.* at 7a-8a. Its analysis fails for several reasons.

First, although the Eleventh Circuit indicated that expansion of the § 1146(c) exemption to pre-confirmation sales would serve Congress' purported purpose of encouraging reorganization of financially distressed companies, Pet. App. 6a, 8a, it is impossible to divine any such congressional intent for this exemption, which applies equally to both liquidations and reorganizations that occur pursuant to a confirmed plan. Moreover, even if Congress did intend § 1146(c) to encourage reorganizations, the court of appeals was incorrect to conclude that expanding the tax exemption to pre-confirmation sales will further this goal. To the contrary, the "practical realities" of chapter 11 demonstrate that the current trend among debtors is to use chapter 11 to liquidate rather than to reorganize, and that the Eleventh Circuit's approach will only give them an added incentive to do so. And to the extent that debtors do use chapter 11 for reorganization, there is no reason to believe that financially beneficial transactions upon which

reorganizations depend will not occur absent expansion of the § 1146(c) exemption and the minimal benefit it provides to debtors (and their purchasers).

Second, the Eleventh Circuit's view that the § 1146(c) exemption applies to both pre- and post-confirmation transfers is belied by that provision's own language, the related statutes upon which § 1146(c) was modeled, and established canons of statutory construction. In particular, as Florida ably explains in its brief, § 1146(c) expressly limits its scope to transfers "under a plan confirmed," that is, it exempts only those transfers authorized by a confirmed plan. Pet. Br. 12-21. The use of the past tense in this phrase should not be overlooked, as the Eleventh Circuit did, and the word "confirmed" is unambiguous and means exactly what it says: the plan must already be "confirmed" at the time the instrument of transfer is made or delivered. Moreover, this language is virtually identical to that found in § 267 of the Bankruptcy Act and § 4382(b) of the Internal Revenue Code—both of which established tax exemptions that extended only to transactions occurring *after* plan confirmation. Because § 1146(c) uses the same language as these provisions, settled rules of statutory construction require that the three statutes be read consistently.

Rules of interpretation also require that Congress act clearly when it abrogates state or local taxing authority, and there is no clear indication here that Congress intended any such abrogation, much less that it meant to expand the § 1146(c) exemption to all sales "necessary" to plan consummation—an analytical factor that the Eleventh Circuit grafted onto the

statute's plain language. Moreover, as noted above, the practical difficulties with applying the Eleventh Circuit's expansive interpretation are strong evidence that the statute was never meant to be read as the court of appeals did. To the contrary, had Congress intended to extend the exemption to transfers necessary to plan confirmation, it easily could have worded the statute in a way that would have made its intentions clear—and that would answer many of the difficult questions of line-drawing that arise under the Eleventh Circuit's view.

ARGUMENT

I. Limiting The § 1146(c) Exemption To Post-Confirmation Transfers Will Not Frustrate Plan Confirmation Or Otherwise Impede Reorganization.

The Eleventh Circuit determined that § 1146(c) should be read to make Piccadilly's pre-confirmation asset sale tax exempt on the view that "'Congress's apparent purpose in enacting section 1146 was to facilitate reorganizations through giving tax relief.'" Pet. App. 6a (quoting *In re Jacoby-Bender, Inc.*, 758 F.2d 840, 841 (2d Cir. 1985)); see also *Hechinger*, 335 F.3d at 259 (Nygaard, J., dissenting) ("We should read 1146(c) to facilitate reorganization, not impede reorganization."). In so doing, the court of appeals relied on "the principle that a remedial statute such as the Bankruptcy Code should be liberally construed," Pet. App. 8a—even to the point of being extended to cover situations where there was *no* reorganization. The Eleventh Circuit's belief that an expansion of the § 1146(c) exemption is necessary to encourage reorganizations is misplaced.

Like many debtors who file under chapter 11, Piccadilly never intended to reorganize. On October 28, 2003, Piccadilly negotiated and executed an agreement for the sale of nearly all of its assets to PAC with the understanding that Piccadilly then would file for bankruptcy and propose an immediate sale through a court-approved process. Pet. App. 2a. As planned, Piccadilly filed for bankruptcy the next day and sought both authority under § 363(b) to sell its assets pursuant to a judicial auction, and a declaration that the sale would be exempt from transfer taxes under § 1146(c). *Ibid.* The auction proceeded apace, and the sale closed in March. *Id.* at 2a-3a. Only afterward did Piccadilly even file its proposed liquidation plan, and it was not until October 2004, seven months after the sale closed, that the court actually confirmed the plan. *Id.* at 3a. Thus, reorganization was never among Piccadilly's goals.

The circumstances giving rise to this case are emblematic of current trends in bankruptcy proceedings. Chapter 11, once a powerful tool by which corporations reorganized as going concerns, is now often used as a means to dispose of corporate assets. "Corporate reorganizations have all but disappeared. Giant corporations make headlines when they file for Chapter 11, but they are no longer using it to rescue a firm from imminent failure. Many use Chapter 11 merely to sell their assets and divide up the proceeds." Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 Stan. L. Rev. 751, 751 (2002); see also Hon. J. Vincent Aug, *et al.*, *The Plan of Reorganization: A Thing of the Past?*, 13 J. Bankr. L. & Prac. 4 Art. 1 (2004) ("restructuring the business as a going-concern is no longer the primary focus of chapter 11"); Douglas

G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 Stan. L. Rev. 673, 674 (2003) (in 84% of large chapter 11 cases filed in 2002, investors had a deal in hand when the case was filed, or used the case to sell assets).

In addition, and also well illustrated by this case, the modern practice is for corporations to rely, as Piccadilly did, on § 363(b)—rather than a confirmed plan—to sell their assets. Under the Bankruptcy Code, a chapter 11 debtor may sell or transfer the bankruptcy estate's assets outside of the ordinary course of business in either one of two ways. First, the debtor may act pursuant to § 363(b), which empowers "the trustee, after notice and a hearing, [to] use, sell, or lease * * * property of the estate." 11 U.S.C. § 363(b)(1).[6] This can be an expedient route. A motion to sell assets under § 363(b) requires only 20 days' notice to creditors and other interested parties, see Fed. R. Bankr. P. 2002(a)(2), and sale motions are generally approved if the court finds that the sale falls within the debtor's sound business judgment, see, *e.g.*, *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983).

Alternately, the debtor may sell or transfer estate assets pursuant to a confirmed plan. To obtain a confirmed plan, however, the debtor must undertake a number of steps. First, it must propose a plan that sets out its method of implementation, which may include the "sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution

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[6] As we explain, *supra* note 5, a debtor-in-possession has most of the powers of a trustee, including the trustee's authority under § 363(b).

of all or any part of the property of the estate among those having an interest in such property of the estate." 11 U.S.C. § 1123(a)(5)(D). Next, the debtor must prepare and circulate a court-approved disclosure statement that provides all interested parties with sufficient information to make an informed decision whether to accept or reject the plan, see *id.* § 1125, and solicit and obtain sufficient votes to sustain the plan, see *id.* § 1126. Finally, the debtor must establish that the plan meets all requirements for confirmation, including that it was proposed in good faith, is in the best interests of creditors, and meets the absolute priority rule. See *id.* § 1129.

Of these two options for disposing of estate assets, debtors generally prefer § 363(b) over plan confirmation. As the above description makes plain, the process for selling estate assets through a confirmed plan has more procedural steps and creditor protections than the § 363(b) sales process. Section § 363(b) also affords debtors greater flexibility: after the asset sale, the debtor still retains the power to propose a chapter 11 plan or convert the case to one under chapter 7. See *id.* § 1112(a).

Asset purchasers also often prefer § 363(b). The process is streamlined, but still provides them with many protections that they would not enjoy if they bought the assets outside of bankruptcy. For example, the purchaser in a § 363(b) sale may take title to an asset free and clear of all "interests" of other parties (which courts have interpreted to include liens, encumbrances, and successor liability claims), without waiting for plan confirmation. See 11 U.S.C. §363(f)

and (m); see also *In re Trans World Airlines, Inc.*, 322 F.3d 283, 288-293 (3d Cir. 2003).

Although § 363(b) sales were initially resisted by some courts and have been the subject of scholarly criticism,[7] the clear current trend among bankruptcy courts is to allow chapter 11 debtors to use § 363(b) to make sales, even bulk sales involving substantially all of the estate assets. See generally Elizabeth B. Rose, *Chocolate, Flowers & § 363(b): The Opportunity for Sweetheart Deals Without Chapter 11 Protections*, 23 Emory Bankr. Dev. J. 249, 269 (2006) ("Empirically, the number of § 363 preplan sale motions for all or

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[7] Courts and commentators have expressed concerns about the § 363(b) process because, while benefitting debtors and the buyers of their assets, it deprives creditors of many of the protections that the plan confirmation process provides, including the requirement of a judicial finding that the plan is proposed in good faith and is in the creditors' best interests. See generally 11 U.S.C. § 1129. Recognizing this potential to circumvent creditor protections, some courts initially disapproved of § 363(b) sales where the anticipated transaction was of such a size and nature as to have a major impact on the plan process. See, *e.g.*, *In re Continental Airlines, Inc.,* 780 F.2d 1223, 1227-1228 (5th Cir. 1986) ("[I]f the debtor were allowed to reorganize the estate in some fundamental fashion pursuant to § 363(b), creditor's rights * * * might become meaningless."). For the same reason, commentators, too, have criticized the use of § 363(b) to authorize bulk sales. See, *e.g.*, Elizabeth B. Rose, *Chocolate, Flowers, & § 363(b): The Opportunity for Sweetheart Deals Without Chapter 11 Protections*, 23 Emory Bankr. Dev. J. 249, 275-283 (2006) (discussing abuses inherent in § 363(b) sale process and arguing for more transparency and supervision).

substantially all of the debtor's assets dramatically increased in the 1990s and preplan sales enjoy even more use since 2000."); Harvey R. Miller & Shai Y. Waisman, *Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?*, 78 Am. Bankr. L.J. 153, 194-195 (Spring 2004) (listing 22 large corporate debtors that used § 363(b) to sell all or substantially all of their assets outside of a confirmed plan). Given the prevalence of § 363(b) sales, one scholar has even suggested that Congress amend the Bankruptcy Code to establish a formal process for the non-plan sale of substantially all of a debtor's assets, as a means of obtaining greater consistency and predictability in the process. See George W. Kuney, *Let's Make It Official: Adding an Explicit Preplan Sale Process as an Alternative Exit from Bankruptcy*, 40 Hous. L. Rev. 1265, 1287-1305 (2004).

In short, it has become the norm and not a rare exception for chapter 11 filings to result in liquidations through a quick bulk sale of estate assets under § 363(b). Accordingly, the Eleventh Circuit's view that an expansion of the § 1146(c) exemption to pre-confirmation transfers is necessary to encourage reorganizations is not well founded. Initially, for all of the reasons noted above that underlie the current trend toward using chapter 11 to dispose of assets under § 363(b), there are already powerful incentives to engage in these pre-plan transactions, even without a minor added tax advantage. More fundamentally, however, the fact that debtors use chapter 11 less and less as a means to reorganize undercuts the argument that pre-plan tax exemptions are needed to foster reorganization—or that they do so. As this case

illustrates, chapter 11 can be used to liquidate as well as to reorganize, and there is nothing in § 1146(c) that limits the tax exemption to *reorganization* plans. Under the Eleventh Circuit's view, a debtor like Piccadilly, which uses chapter 11 to dispose of assets before liquidating, rather than reorganizing, would receive all the benefits of a tax exemption that the court of appeals deemed necessary to encourage reorganization. And by allowing such benefits, this view could be said to encourage liquidations as much as, if not more than, reorganizations.

Nor is there reason to conclude, in those cases where chapter 11 is being used to reorganize, that reorganizations will not occur absent extension of the § 1146(c) exemption to pre-confirmation sales. Indeed, the experience has been to the contrary in the Fourth Circuit, where the court of appeals made clear years ago that the exemption extends only to post-confirmation transactions. See *NVR*, 189 F.3d at 458. In *Hechinger*, the Third Circuit, expressly rejecting the view that limiting § 1146(c) to post-confirmation sales "would frustrate reorganization," noted that the Fourth Circuit had adopted this limitation four years earlier in *NVR*, and there was no evidence that the rule had caused "dire effects" in that circuit. *Hechinger*, 335 F.3d at 254 n.5.

The Fourth Circuit's experience should come as no surprise. The reality is that § 1146(c)'s exemption will almost surely have little practical effect on a debtor's willingness and ability to reorganize. Real estate transfer taxes are quite small as a share of the sale price—in most cases less than 1% and often far lower. See www.realtor.org/smart_growth.nsf/docfiles/

TransferTaxRates(8-05).pdf.[8] As a result, parties are unlikely to forego financially beneficial transactions merely because the § 1146(c) exemption is unavailable. In fact, we know of no reported cases finding that but for the availability of the exemption, an asset sale would not have gone forward.

Nor are there any reported cases finding that a debtor was unable to confirm a plan because it had to pay the transfer tax on a pre-confirmation sale. Indeed, in both *NVR* and *Hechinger*, the taxes were either paid or escrowed pending confirmation and the sales consummated long before confirmation. That parties are willing to complete these transactions with no assurance that the taxes will be released from escrow or refunded to the debtor is strong evidence that the viability of the sales will not turn on whether a 1% tax must be paid. This is underscored by the fact that there is no exemption for those transactions from other types of taxes, such as sales or capital gains taxes, which are assessed at much higher percentages (as much as 15% for the federal capital gains tax, for instance).

Moreover, there are valid reasons to limit the exemption to post-confirmation transfers. If the purpose of § 1146(c) is to facilitate reorganization, it is logical to extend its exemption only to those who have succeeded in confirming a plan. While not all plans are for reorganizations, it is at least true that all reorganizations require a confirmed plan, and Congress

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[8] For example, Illinois's real estate transfer tax is 0.1% of the consideration paid for the property. See 35 ILCS 200/31-15 (2006).

was plainly aware that many chapter 11 debtors would fail to obtain confirmed plans. See *In re Jacoby-Bender, Inc.,* 34 B.R. 60, 62 (Bankr. E.D.N.Y. 1983). By limiting the exemption to transfers under a confirmed plan, Congress created an incentive for early confirmation, so that more transfers are made under the confirmed plan. Absent that incentive, the debtor can arrange an early sale of the assets with no particular motive to move promptly to confirmation.

With that understanding, it was sensible for Congress to balance the advantages of a tax break for debtors confirming plans against the injury to state and local taxing authorities from the loss of revenue. There is nothing illogical about Congress choosing to limit the extent to which it deprived States and localities of the transfer taxes upon which they heavily rely in order to benefit debtors. The balance that § 1146(c) strikes is a sensible one: tax benefits are available, but only after the debtor achieves a confirmed plan, with all of the substantive and procedural protections that the confirmation process ensures.

In the final analysis, therefore, the argument that a narrow construction of § 1146(c) would frustrate the purpose of the exemption must fail because there is no evidence that such a construction will impede reorganizations, much less that Congress intended to provide wide-ranging tax relief to any sale or transfer, regardless of when it took place, that might assist in the eventual confirmation of a chapter 11 plan.

II. Settled Rules Of Statutory Construction That § 1146(c)'s Exemption Is Reserved For Post-Confirmation Transfers.

The first rule of statutory construction is that language must be given its plain meaning. See, *e.g.*, *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6 (2000) ("when the statute's 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") (internal quotation marks and citation omitted). Courts presume that Congress "says in a statute what it means and means in a statute what it says there." *Ibid.* (internal quotation marks omitted). In its brief, Florida details why the proper construction of § 1146(c)—particularly its language limiting the tax exemption to transfers "under a plan confirmed"—is that it exempts only those transfers authorized by, and following confirmation of, a plan. Pet. Br. 12-21. *Amici* adopt these arguments.

But even if the Court were to conclude that § 1146(c) is ambiguous, the Eleventh Circuit's reading still fails for at least two reasons. First, related statutes reveal Congress's clear intent to limit § 1146(c) to post-confirmation sales. Second, it is impossible to reconcile the court of appeals' interpretation with the established canon that tax exemptions, particularly federal exemptions from state taxes, are construed narrowly. We consider these reasons in turn.

A. Section 1146(c) Must Be Construed In Harmony With Related Statutes.

The Eleventh Circuit's interpretation of § 1146(c) cannot be squared with congressional intent as manifest

in related federal laws. There has long been federal legislation exempting from taxation the issuance of securities or the making or delivery of instruments of transfer under a confirmed bankruptcy plan. The first such law was § 77B(f) of the Bankruptcy Act of 1934, which exempted from federal transfer taxes "[t]he 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." Pub. L. No. 296, 48 Stat. 911, 919 (1934). In 1938, Congress replaced § 77B(f) with § 267, and thereby extended the exemption to both state and federal taxes. See Pub. L. No. 75-696, 52 Stat. 840, 903-904 (1938) ("The issuance, transfer, or exchange of securities, or the making or delivery of instruments of transfer under any plan confirmed under this chapter, shall be exempt from any stamp taxes now or hereafter imposed under the laws of the United States or any State."); see generally 6A *Collier on Bankruptcy* ¶ 15.08, at 836-837 (14th ed. 1977). Meanwhile, the Internal Revenue Code of 1954 included a parallel exemption from federal documentary stamp taxes on the issuance, transfer, or exchange of securities or the making, delivery, or filing of conveyances in corporate and railroad reorganizations confirmed under the Bankruptcy Act or approved in equity receivership proceedings, so long as the transfers occurred within five years of the confirmation or approval. See 26 U.S.C. § 4382(b) (1972) (repealed).

As relevant here, when Congress enacted the Bankruptcy Reform Act of 1978, the stamp tax exemption provisions in § 1146(c) were "modeled after section 267 of the Bankruptcy Act * * *." H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 281 (1978), 1978

U.S.C.C.A.N. 5963, 6238. Indeed, § 1146(c) employs virtually the same language as § 267 in exempting from stamp taxes transfers "under a plan confirmed." Critically, § 4382(b) of the Internal Revenue Code also corresponded to § 267. See 6A *Collier on Bankruptcy* ¶ 15.08, at 837-840. And while there are no reported decisions construing either § 267 or § 4382(b), the leading contemporary bankruptcy treatise makes clear that they did "not extend any exemption to transactions (that is, transfers, issuance, etc.) *which occur prior to confirmation of the plan and which are merely preparatory steps*." 6A Collier on Bankruptcy ¶ 15.08, at 840 (emphasis added).

In fact, § 4382(b) made this plain on its face. Its language limits the exemption to transactions "only if the issuance, transfer, or exchange of securities, or the making, delivery, or filing of instruments of transfer or conveyances, occurs within 5 years from the date of such confirmation, approval, or change." 26 U.S.C. § 4382(b) (1972). The five-year period logically must refer solely to time elapsed since the confirmation date; if it were to include the five years before confirmation, it would sweep in transactions that occurred well before the debtor even filed for bankruptcy, which could not possibly have been intended. Moreover, because § 4382(b) and § 267 overlap, they must be—and have been—read harmoniously, to provide that their stamp tax exemptions are applicable only to post-confirmation transfers. Likewise, because Congress modeled § 1146(c) on § 267, and used virtually identical wording in both, they should be given the same construction. See *Erlenbaugh v. United States,* 409 U.S. 239, 243-244 (1972) (statutes in pari materia are to be read consistently).

B. If Congress Had Intended To Extend § 1146(c) To Pre-Confirmation Sales, Congress Would Have Done So Clearly.

Not only is the Eleventh Circuit's expansion of the § 1146(c) exemption inconsistent with the long-established interpretation of similar statutes, but that court's reading of § 1146(c) fails on another, independent ground—the court improperly ignored the requirement that it narrowly interpret federal exemptions from state taxation and, worse still, grafted onto § 1146(c) language not found in the statute.

Under the Eleventh Circuit's view, the § 1146(c) exemption applies to any transfer, regardless of when it occurs, if the transfer is "necessary to the consummation of a confirmed plan." Pet. App. 9a. This sweeping interpretation of the statutory language cannot be reconciled with prior decisions of this Court, which not only require tax exemptions generally to be narrowly construed, see, *e.g.*, *United States v. Centennial Savs. Bank FSB*, 499 U.S. 573, 583 (1991), but strictly read federal laws that interfere with a state's tax scheme, see, *e.g.*, *Nat'l Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995). This Court has long held in the bankruptcy context, specifically, that if Congress intended to exempt a debtor or trustee from applicable state or local taxes, "[t]he intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." *Swarts v. Hammer*, 194 U.S. 441, 442 (1904) (no exemption from state and local property taxes); see also *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 853-854 (1989) (no

exemption from sales and use taxes). Nothing on the face of § 1146(c) evinces a clear, congressional purpose to extend its exemption to pre-confirmation sales that are essential to a later plan. See *NVR*, 189 F.3d at 459 (Wilkinson, C.J., concurring in part and concurring in the judgment) (construing § 1146(c) to apply only to post-confirmation sales "[b]ecause concerns of federalism require the narrower interpretation").

If Congress had intended to extend § 1146(c) to pre-confirmation transfers that are arguably essential to a later plan, it would be expected to have said so expressly. In particular, under the Eleventh Circuit's view, the tax exemption, as applied to pre-confirmation sales, must be either retroactive or conditional—either the tax is due at the time of the sale with a rebate available to the debtor if, following confirmation, the sale is deemed "necessary" to the plan, or the tax is due conditionally but not payable until it becomes clear that there will be no confirmed plan or the sale will be "unnecessary" to plan confirmation. If Congress meant to create such a process, it readily could have made that clear.

For example, Congress might have exempted transactions "necessary to the confirmation of a plan that has been or is ultimately confirmed." Had it done so, it might also have included some definition of what made a transaction "necessary." Likewise, Congress might have provided that "[t]he amount of any tax conditionally exempted pending confirmation shall be escrowed until a plan is confirmed or the case is converted or dismissed," or, alternatively, that "[t]axes paid on pre-confirmation transfers necessary to plan confirmation shall be rebated upon confirmation of the

plan." The Eleventh Circuit fails even to acknowledge, much less resolve, these issues.

Not only did Congress make no mention of expanding the § 1146(c) exemption to sales "necessary to the consummation of a confirmed plan," it similarly failed to address the applicability of the exemption to § 363(b) sales. This silence is telling. Piccadilly engaged in a bulk sale of its assets pursuant to § 363(b), and thus avoided the time-consuming process of proceeding pursuant to a confirmed plan. Only later, after the sale closed, was a liquidating plan proposed and eventually confirmed. As we have explained, Piccadilly's approach is the prevalent one: chapter 11 is used far more often for liquidations than for reorganizations, and, moreover, the sale of assets in chapter 11 is more likely undertaken pursuant to § 363(b) than through the plan confirmation process.

Notably, however, although § 1146(c) expressly anticipates that its exemption will apply to sales associated with a confirmed plan, it says nothing about whether that exemption extends to § 363(b) sales. There can be no question that Congress was aware that § 363(b) provides chapter 11 debtors with an alternative means of selling assets. Under these circumstances and in combination with the mandate that courts interpret federal exemptions to state taxation narrowly, it cannot be assumed that Congress intended that the exemption apply where, as here, a debtor sells the majority of its assets pursuant to § 363(b).

In short, § 1146(c)'s plain language limits the tax exemption to post-confirmation sales. Even if the provision were ambiguous, however, related statutes and the long-established requirement that tax

exemptions be construed narrowly require reversal of the Eleventh Circuit's decision.

CONCLUSION

The decision of the Eleventh Circuit should be reversed.

Respectfully submitted.

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