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 RESPONDENT

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QUESTION PRESENTED

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

CORPORATE DISCLOSURE STATEMENT

Piccadilly Cafeterias, Inc. is now known as Capital City Cornichon Corporation. The ownership structure has not changed since Piccadilly's prior disclosure set forth in its Brief in Opposition to the petition for writ of certiorari.

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PRELIMINARY STATEMENT

This matter arises from the chapter 11 bankruptcy case of Piccadilly Cafeterias, Inc. ("Piccadilly"). Petitioner is the State of Florida, Department of Revenue ("Florida"). After Piccadilly filed for bankruptcy, Piccadilly reached an agreement with its creditors regarding the sale of substantially all of its assets and the distribution of the proceeds. This agreement formed the basis for Piccadilly's plan that the bankruptcy court later confirmed. Prior to the bankruptcy court's confirmation of the plan, Piccadilly sold substantially all of its assets to a third-party purchaser. Florida seeks to impose a stamp tax on the instruments effecting the transfer of certain of these assets.

Pursuant to section 1146(a) of the Bankruptcy Code, 11 U.S.C. § 1146(a), a State may not impose a stamp tax on an instrument of transfer "under a plan confirmed under section 1129 of this title." Florida reads this phrase to impose a temporal limitation: in order for the exemption to apply, the transfer must occur *after* the plan is confirmed. But the statute is not worded that way, and, in context, is ambiguous because the language can be read plausibly as imposing no such temporal restriction. Under the Bankruptcy Code, a debtor commonly will sell assets during the bankruptcy proceedings in furtherance of its plan prior to confirmation of the plan, as happened in this case. In context, the better reading of the statute is that the exemption applies so long as the transfer is instrumental to a plan that is confirmed under section 1129, regardless of whether the transfer occurs before or after confirmation. The transfers qualify under this standard, and the Court should affirm the decision below.

STATEMENT

A. General Background

Founded in 1944, Piccadilly was once one of the largest cafeteria chains in the United States. Pet. App. ("PA") 12a; Joint App. ("JA") 69a. In 1999, Piccadilly operated 254 locations and generated net sales of approximately $496 million. JA 71a. Unfortunately, Piccadilly's fortunes declined and, by October 29, 2003, Piccadilly's operations had shrunk to 145 restaurants in fifteen states, and its annual net sales had declined to $320 million for the fiscal year ended July 1, 2003. JA 69a. At the same time, Piccadilly remained saddled with large debts. Although Piccadilly had closed many underperforming restaurants, it remained obligated to pay rent on many of the leases for these closed locations. In addition, Piccadilly faced pension plan liabilities and other debt burdens left over from when it was a much larger enterprise. JA 72a-73a. In short, with declining sales, Piccadilly faced all the economic stress of a rapidly down-sizing company.

By mid-2003, Piccadilly was unable to make a $5 million installment payment due to certain of its lenders. JA 73a. Piccadilly was also unable to make a scheduled contribution to its defined-benefit pension plan. *Id*. During this period of financial turmoil, Piccadilly hired a turnaround manager to assist in restructuring its operations, and Piccadilly analyzed its options. JA 73-74a. Ultimately, Piccadilly formed a plan: it concluded that the best way to maximize its value and pay creditors as much as possible was to market and sell the company aggressively. JA 74a.

B. Pre-Bankruptcy Events

It is axiomatic that the quick, forced-sale liquidation of an insolvent company's assets will generally realize less value than if the same assets are marketed and sold as part of a more strategic, negotiated transaction. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 539 (1994) ("property that *must* be sold [through a quick liquidation procedure] is simply *worth* less. No one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques."). For insolvent companies such as Piccadilly, however, negotiating the sale of their assets in a manner designed to maximize their value is often complicated -- and frequently impossible -- outside the bankruptcy process.

First, buyers typically will not pay anything for assets that are encumbered with liabilities that exceed their value. For example, if a company's assets are worth $100 million, but the assets are encumbered with $200 million in debt, no rational buyer would pay anything for the assets unless the buyer could purchase them free and clear of at least most of the debt.[1] Thus, in order to sell their assets other

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[1] That is the situation here. Although Piccadilly eventually sold its assets for $80 million, its debts exceeded $160 million. *See*

than through foreclosure, insolvent companies typically must find a way to do so free and clear of the claims and encumbrances of creditors. Outside of bankruptcy, however, insolvent companies such as Piccadilly -- with numerous assets and many creditors -- often find it impossible to sell their assets free and clear of claims and encumbrances.

Although in some circumstances some creditors might consent to release their claims outside of bankruptcy in exchange for stipulated recoveries, holdouts can thwart the process in order to extract disproportionate distributions. Further, if the debtor's creditors are large in number or sufficiently diverse (or both), it may be impractical to solicit their consent. Similarly, if the debtor cannot pay all claims in full, negotiations with creditors often break down over which creditors should bear the brunt of any loss. Bankruptcy law supplies a means to overcome these problems by permitting sales free and clear of the claims and encumbrances of creditors regardless of their consent, and by providing a mechanism for the fair apportionment of the proceeds among competing claimants. *See, e.g.,* 11 U.S.C. §§ 363(b) (providing for sales of assets out of the ordinary course of business), 363(f) (permitting sales free and clear of claims and interests); 507 (prescribing distribution priorities in bankruptcy).[2]

Ex. B to Amended Joint Disclosure Statement by Debtor, Piccadilly Cafeterias, Inc. (summarizing pre-petition claims).

[2] In bankruptcy parlance, a sale of all or substantially all of a debtors' assets is typically a sale "out of the ordinary course of

Second, for insolvent companies such as Piccadilly, negotiating a sale is often complicated because, after an insolvent company begins defaulting on its obligations, at least some creditors inevitably commence debt collection actions to recover what is owed them. In particular, a creditor who fears being left unpaid while others receive payment may move quickly to seize and liquidate the debtor's assets. This may have the unfortunate effect of destroying the debtor's business as a going concern before the business can be sold. Once again, bankruptcy law provides mechanisms to prevent this from occurring. *See* 11 U.S.C. § 362(a) (enjoining debt collection activity after the commencement of a bankruptcy case to facilitate, among other things, the orderly disposition of the debtor's property).

Of course, in order for the bankruptcy process effectively to facilitate a sale and subsequent distribution of the proceeds among creditors, it is necessary to locate a willing buyer for the debtor's assets. In

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business." *See Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986) (citing *Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063 (1983)); *see also In re Roth American, Inc.*, 975 F.2d 949, 953 (3d Cir. 1992) (inquiry into whether particular transaction is in the ordinary course of a debtor's business includes whether "the transaction is of the sort commonly undertaken by companies in that industry" and "the interested parties' reasonable expectations of what transactions the debtor in possession is likely to enter in the course of its business" (internal quotation marks and citation omitted)).

this case, Piccadilly began the process of finding a buyer *before* it commenced its chapter 11 case.

Piccadilly initially identified 223 potential purchasers of its business. JA 74a. Of these, 38 executed confidentiality agreements in order to receive in-depth, strategic information regarding the company and its operations. *Id*. Piccadilly then negotiated with these interested parties for the best terms and price. Ultimately, Piccadilly identified Piccadilly Acquisition Corporation ("PAC"), an affiliate of Tru-Foods Corporation, as the best prospect, and executed a purchase agreement with PAC for the sale of its assets for approximately $54 million. JA 75a. The agreement expressly contemplated that Piccadilly would commence a chapter 11 bankruptcy case, and that during the bankruptcy proceedings, PAC's offer would be subject to higher and better bids. *Id*. In other words, prior to filing for bankruptcy, Piccadilly managed to flesh out two of the most critical components of its plan: the sale of its assets for a significant sum, and a method for maximizing their value by making PAC's offer subject to higher bids in bankruptcy.

C. Piccadilly's Bankruptcy Filing

Armed with a $54 million offer for its assets, Piccadilly commenced its chapter 11 case on October 29, 2003 by filing a bankruptcy petition with the bankruptcy court. By operation of law, when a debtor such as Piccadilly files a bankruptcy case, an estate is created consisting of all the debtor's assets, wherever located. 11 U.S.C. § 541.

In chapter 11 cases, a trustee is not usually appointed, and the debtor typically continues to manage its business as the "debtor in possession" of the estate. 11 U.S.C. §§ 1101(a) (defining "debtor in possession" in a chapter 11 case), 1107 (prescribing duties of debtor in possession, including duties of trustee), 1108 (authorizing operation of business during chapter 11 proceeding). Accordingly, after it commenced its bankruptcy case, Piccadilly continued to operate its business as a "debtor in possession."

After a debtor commences a bankruptcy case, the provisions of the automatic stay apply, preventing creditors from taking action against estate property, or otherwise dismantling the estate. 11 U.S.C. § 362(a). Accordingly, after Piccadilly commenced its chapter 11 case, its creditors were generally enjoined from pursuing debt collection activity against it or its assets.

Under the Bankruptcy Code, a debtor's monetary obligations constitute "claims" against the debtor's estate. The Code provides that any "creditor" holding a "pre-petition" claim is entitled to file a "proof of claim" with the bankruptcy court. 11 U.S.C. §§ 101(10) (defining "creditor" as an entity holding a pre-petition claim), 501(a) (providing for the filing of proofs of claim), 502(b) (providing for the allowance or disallowance of claims); Fed. R. Bankr. P. 3001, 3003. As used herein, the term "pre-petition" refers to claims or events arising or occurring before the filing of a bankruptcy petition commencing a bankruptcy case. Conversely, the term "post-petition" refers to claims or events arising or occurring after the filing.

If a creditor holds a pre-petition claim, the creditor (including a state entity) generally must file a proof of claim in order to receive a distribution. Fed. R. Bankr. P. 3002(a); *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933).[3] If a creditor files a proof of claim, and no party in interest objects, the claim is deemed allowed against the estate, and may be paid from funds available to pay claims in accordance with the Bankruptcy Code's priority provisions. 11 U.S.C. § 502(a); *see generally* 11 U.S.C. § 507 (specifying general priorities in bankruptcy). If a party in interest objects to the claim, however, the bankruptcy court must allow the claim except to the extent that one of the grounds for disallowance set forth in section 502 applies. 11 U.S.C. § 502(b).

In general, the Bankruptcy Code prescribes different mechanisms for the determination and payment of expenses that the *estate* incurs *post-petition* during the course of the bankruptcy case. Specifically, section 503 provides generally that "[a]fter notice and a hearing, there shall be allowed, administrative expenses . . . including . . . the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). The administrative expense designation is significant because, under the Code's general priority provisions, administrative expenses are granted the second-highest general payment priority ahead of most pre-petition claims. 11 U.S.C. § 507(a)(2) (prescribing the second-highest general

[3] The term "creditor" specifically includes a "governmental unit." 11 U.S.C. §§ 101(15), 101(27).

priority for "administrative expenses allowed under section 503(b)"). In this case, Florida contends that its claim for Piccadilly's alleged stamp tax liability is entitled to priority treatment as an administrative expense. JA 48a (original claim of $2,000,000, later reduced to $39,200).

After the commencement of a bankruptcy case, the Office of the United States Trustee generally appoints a committee of unsecured creditors to take part in the administration of the case. 11 U.S.C. §§ 1102 (providing for the appointment of a creditors' committee), 1103 (prescribing the powers and duties of a creditor's committee); *see* 28 U.S.C. §§ 581, *et seq*. (governing the functions of the Office of the United States Trustee). Shortly after Piccadilly filed its bankruptcy petition, the U.S. Trustee appointed a creditors' committee consisting of seven of Piccadilly's largest unsecured creditors. JA 76a. In addition to the official creditors' committee, several of Piccadilly's secured creditors formed an unofficial "ad hoc committee" to represent the interests of the holders of certain of Piccadilly's outstanding senior secured notes. JA 61a.[4] Throughout the proceedings, Piccadilly negotiated with these committees regarding how it would dispose of its assets and distribute

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[4] Section 1102(a) provides for the appointment of an official committee of creditors holding "unsecured" claims -- meaning claims not backed by any particular lien or security interest in the debtor's property. *See* 11 U.S.C. § 506(a) (defining what constitutes a secured claim in bankruptcy). The Code generally contemplates that the holders of secured claims will represent themselves, or will form unofficial ad hoc committees.

the funds to pay the creditors' claims. In other words, as explained more fully below, Piccadilly actively negotiated the contours of its plan.

D. The Plan and Sale

The practical aim of chapter 11 is the successful confirmation of a negotiated plan that provides for the debtor's retention or sale of its assets, and the payment of claims. *See* 11 U.S.C. §§ 1123 (prescribing the contents of a chapter 11 plan), 1123(b)(4) (providing that a chapter 11 plan may "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds among holders of claims or interests"), 1129 (prescribing the rules governing confirmation of a plan); *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. P'ship*, 526 U.S. 434, 457 n.28 (1999) ("the Chapter 11 process relies on creditors and equity holders to engage in negotiations toward resolution of their interests") (quotation marks and citations omitted). As noted, Piccadilly began formulating its plan well before it commenced its bankruptcy case, and the signature feature of its plan was the sale of its assets as a going concern for the highest price possible. A going-concern sale is a form of reorganization, and Piccadilly sought to reorganize in this manner.

With respect to the timing of any sale, Piccadilly faced two choices: (1) sell its assets after confirmation of a plan, or (2) sell its assets as soon as practicable. Significantly, the Bankruptcy Code permits either.

To begin with, section 363(b) permits a debtor in possession, with bankruptcy-court approval, to sell its assets "out of the ordinary course of business" at any time during the bankruptcy case. 11 U.S.C. § 363(b).[5] Alternatively, the Code permits a debtor to sell its assets pursuant to the terms of a confirmed plan. 11 U.S.C. § 1123(a)(5)(B), 1123(b)(4). The Code provides this flexibility because the plan-confirmation process can take a considerable amount of time. In some cases, such as this one, the expeditious sale of the debtor's assets may realize more than a delayed sale (*e.g*., the value of the debtor's business may be deteriorating due to aggressive competition, declining sales, loss of employees, loss of customers, need for capital investment, etc.). In this case, the bankruptcy court determined that Piccadilly had "sound business reasons" for conducting a prompt sale of its assets, and that the expeditious sale was "in the best interests of creditors . . . and other parties in interest." JA 32a.

Accordingly, on October 29 and 30, 2003, Piccadilly filed motions seeking the bankruptcy court's approval of the sale of its assets on certain terms and conditions. JA 77a-78a. In particular, Piccadilly sought approval of the sale to PAC for $54 million, subject to higher and better bids. JA 78a. Piccadilly also sought approval of competitive bidding procedures and the scheduling of a hearing to approve a final sale to the highest bidder. *Id*. Finally, Picca-

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[5] *See supra* note 2 (discussing meaning of the phrase "out of the ordinary course of business").

dilly requested relief under section 1146(a) of the Bankruptcy Code from the imposition of stamp taxes on the transfer of its assets, stating that it intended "to use the proceeds of the Sale as the basis for its plan." PA 12a. On December 11, 2003, the bankruptcy court approved an amended set of bidding and sale procedures. JA 79a-80a; PA 35a.

After intense competitive bidding at an auction held on February 10, 2004, Piccadilly Investment, LLC ("PI") was the highest bidder with an offer of $80 million for Piccadilly's assets. JA 80a; PA 14a. On February 13, 2004, the bankruptcy court conducted a hearing to consider the approval of the sale of Piccadilly's assets to PI free and clear of all claims and interests (other than certain obligations that PI agreed to assume as part of the sale). JA 80a; *see also* JA 27a. On the same day, the bankruptcy court approved the sale free and clear, and, on March 16, 2004, Piccadilly closed the transaction with PI. JA 81a. The sale included the transfers of real estate located in Florida, and Florida contends that it is entitled to collect a stamp tax with respect to the deeds memorializing the transfers of this real estate. JA 115a-116a; PA 14a.

In approving the sale of Piccadilly's assets to PI, the bankruptcy court determined that having a sale free and clear of claims and encumbrances was a condition of the purchaser's willingness to buy the assets. JA 35a. Pursuant to section 363 of the Code, the court specifically ordered the sale of Piccadilly's assets "free and clear of all Liens, claims, interests and encumbrances" and specifically directed "all persons and entities, including, but not limited to, all . . .

governmental, tax and regulatory authorities . . . holding Liens, claims, interests or encumbrances of any kind or nature" against Piccadilly or the assets being sold, including any claim "arising under or out of, in connection with, or in any way related to . . . the transfer of [Piccadilly's assets to PI] shall be and hereby are forever barred, estopped and permanently enjoined from asserting, prosecuting or otherwise pursuing against [PI or its property] such persons' or entities' claims . . . ." JA 38a. The court ordered that all such claims were expressly transferred and channeled "to the proceeds of the sale . . . ." JA 39a.

Regarding Florida's stamp tax that might be imposed on any instrument of transfer, the bankruptcy court expressly found that "[t]he sale of [Piccadilly's assets to PI is] in contemplation of a plan and, accordingly, the transfer of the [assets to PI is] exempt, under section 1146(c) [recodified as section 1146(a)] of the Bankruptcy Code, from any transfer, stamp or similar tax." JA 46a.

E. The Plan and Global Settlement

Prior to selling its assets, Piccadilly engaged in extensive negotiations with its creditors regarding the disposition of the proceeds from the contemplated sale. On or about January 26, 2004, Piccadilly entered into an agreement with the creditors' committee and the ad hoc committee regarding disposition of the sale proceeds (the "Global Settlement"). JA 81a-82a. Under the terms of the Global Settlement, the creditors' committee and the ad hoc committee (1) agreed to support the sale of Piccadilly's assets, (2) agreed to a specified disposition of the proceeds of the sale, and (3) agreed to support confirmation of a plan based on the sale of Piccadilly's assets and the settled disposition of the proceeds under the terms of the Global Settlement. JA 82a-83a. On February 25, 2004 -- prior to the closing of the sale of Piccadilly's assets to PI -- the bankruptcy court entered an order approving the Global Settlement. JA 86a. As the district court subsequently concluded, the Global Settlement "resolved, among other things, the priority of distribution among [Piccadilly's] creditors and in many ways was analogous to a confirmed plan." PA 15a; *see also* PA 3a. On March 26, 2006 -- ten days after it closed the sale with PI -- Piccadilly filed its original chapter 11 plan with the bankruptcy court.[6]

Creditors are entitled to vote on a plan, and in order to ensure that the creditors' vote is properly informed, the debtor is required to prepare and distribute a disclosure statement explaining, among other things, the plan, the creditors' treatment under the plan, alternatives to the plan, and any relevant contingencies that may affect the creditors' treatment. 11 U.S.C. § 1125 (prescribing the contents of a disclosure statement). In this case, Piccadilly prepared a disclosure statement to accompany its plan. JA 50a. Thereafter, creditors voted on and approved the plan, and, on October 21, 2004, the court confirmed the plan. JA 122a, 127a. The plan provides

[6] Piccadilly began drafting the plan document on February 10, 2004, as indicated in the attorneys' time records filed subsequently with the bankruptcy court.

for distributions to creditors from the proceeds of the sale of Piccadilly's assets to PI as provided in the Global Settlement. JA 86a. Significantly, as explained in the disclosure statement, the plan is based on the Global Settlement and contains terms "substantially similar to the provisions set forth in the Global Settlement . . . ." JA 86a. Further, the Global Settlement plainly contemplated the sale of Piccadilly's assets, and it was pursuant to the Global Settlement that the various creditor groups agreed to support the sale. JA 83a (noting that the Global Settlement provided that "the Parties to the Global Settlement . . . shall not object to and shall support the Sale").

The sale was necessary for distributions under the plan. PA 40a. Reflecting this, the bankruptcy court's order confirming the plan provides: "Pursuant to section 1146(c) [now 1146(a)] of the Bankruptcy Code, the issuance, transfer or exchange of any security or the making or delivery of an instrument of transfer under this Plan may not be taxed under any law imposing a stamp tax or similar tax. Any sale of any Asset occurring before, after or upon the [effective date of the plan] (including the sale) shall be deemed to be in furtherance of this Plan." JA 129a.

F. Florida's Stamp Tax

Florida contends that it is entitled to collect a tax on the real property transfer deeds discussed above by virtue of Fla. Stat. § 201.02, which provides for the imposition of a "stamp tax" on the transfer of real estate in the amount of $.70 for every $100 of consideration for the transfer. A current Florida regulation implementing this statute mirrors the decision of the Eleventh Circuit in this case (as well as other decisions) and provides: "Transfer in Bankruptcy: Sale of real property by trustees, debtors or receivers in federal bankruptcy proceedings is subject to tax unless the transfer is made pursuant to a plan confirmed under § 1129 of the Bankruptcy Code, is a precondition or essential to the confirmation of the plan, or is necessary to consummate or implement a confirmed plan and the debtor is a party to the transfer." Fla. Admin. Code. Ann. R. 12B-4.014(15) (citing cases).

G. The Decisions Below

Florida objected unsuccessfully to the bankruptcy court's approval of the sale of Piccadilly's assets free and clear of all claims and encumbrances, and, specifically, the court's determination that the transfer of the assets would be exempt from any stamp tax. PA 36a. Florida likewise objected unsuccessfully to confirmation of the plan. PA 38a-39a. Pending resolution of Florida's claim that Piccadilly owes a stamp tax in connection with the transfer of certain of its assets to PI, the bankruptcy court required Piccadilly to escrow sufficient funds to pay Florida's claim. JA 115a. Thereafter, Florida filed a complaint with the bankruptcy court, asserting that Piccadilly was required to pay a stamp tax in the amount of $39,200. JA 113a; PA 40a.

On Piccadilly's motion for summary judgment, the bankruptcy court determined that Piccadilly was not liable for any stamp tax in connection with the sale of its assets. During oral argument, Piccadilly stated that "[t]here would be no plan in this case had there not been the sale of this property, had there not been the global settlement agreement that set up the sale of the property and that set up the framework of the plan." PA 17a. Florida itself stated that "the actual sale itself contemplated the liquidating plan." *Id.* The bankruptcy court found that Piccadilly's transfer of substantially all of its assets to PI was "'under' the Plan because such transfer was necessary to consummate the Plan." PA 40a. The court further reasoned that "[t]he sale of substantially all of the assets of [Piccadilly] contemplated the liquidating plan, which sale and plan were so interwoven that one could not proceed without the other." *Id.* The court likewise concluded that the sale of Piccadilly's assets "was necessary to the consummation of the confirmed Plan because the sale of [Piccadilly's] assets generated the proceeds required to fund the Plan." *Id.*

On appeal, the district court affirmed. The court acknowledged that the proper starting point in the analysis is to begin with the text of section 1146. PA 25a. The court found, however, that this inquiry is not particularly helpful because the text is capable of being read in several ways, and is therefore "ambiguous." *Id.* The court reasoned that it was required to look to other "tools of statutory interpretation for help." *Id.*

The court observed that the clear purpose of section 1146(a) is to provide tax relief to facilitate the chapter 11 process. PA 24a (quoting *City of New York v. Jacoby Bender, Inc. (In re Jacoby-Bender)*, 758 F.2d 840, 841 (2d Cir. 1985)). The court acknowledged further that "[t]here are times when it is more advantageous for the debtor to begin to sell as many assets as quickly as possible in order to insure that the assets do not lose value." PA 24a (quotation marks and citation omitted). The court found it improbable that Congress would have intended to grant tax relief for a sale that occurs just after confirmation of a plan and is essential to it, but deny the same relief to the same sale that occurs just before confirmation. "Neither party disputes that the vagaries of the market often dictate that time is of the essence and that waiting for a plan to be confirmed before making a sale will often be detrimental, or even fatal, to the ultimate confirmation of the plan." PA 28a. Finding a direct connection in this case between the sale of Piccadilly's assets and its plan, the court affirmed the bankruptcy court's decision. The district court declined, however, to articulate a particular standard for determining when a pre-confirmation transfer qualifies for the exemption, noting that it had been presented only with the "limited question" of whether section 1146(a) *may* apply to such transfers. PA 28a. The court observed, however, that, at a minimum "there must be some nexus between the pre-confirmation sale and the confirmation plan." PA 29a.

The court of appeals also affirmed. Like the district court, the Eleventh Circuit concluded that the text of section 1146 is ambiguous because "the statute can plausibly be read either as describing eligible transfers to include transfers 'under a plan confirmed' regardless of *when* the plan is confirmed *or* . .

. imposing a temporal restriction on when the confirmation of the plan must occur." PA 7a. In choosing between these two readings, the court noted that, when Congress intends to place a temporal restriction on particular relief under the Bankruptcy Code, it knows how to do so, and does so expressly. PA 7a-8a. That Congress placed no express temporal restriction in section 1146 demonstrates that Congress did not intend one to exist. PA 8a.

The court likewise observed that, although tax exemptions are to be construed narrowly, "it is equally true that 'we are not to abrogate the purpose of the exemption through too narrow an application.'" PA 8a (quoting *In re Hechinger Inv. Co. of Del., Inc.*, 335 F.3d 243, 259 (3d Cir. 2003) (Nygaard, J., dissenting)). The court found this to be especially so "in light of the principle that a remedial statute such as the Bankruptcy Code should be liberally construed." PA 8a. Further, the court observed that Florida's restrictive interpretation of section 1146 "ignores the practical realities of Chapter 11 reorganization cases." *Id*. The court reasoned that "it is just as probable that a debtor may need to close a sale as a condition precedent to the parties' willingness to proceed with confirmation of a plan as it is for the parties to agree on the terms of a plan, obtain confirmation, and then determine what the sale will bring." *Id*. The court concluded that sales that precede confirmation may qualify for the statutory exemption. PA 9a.

Like the district court, the court of appeals declined to articulate a precise standard for determining when a pre-confirmation transfer qualifies for the exemption under section 1146(a). The court observed that Florida had argued only that the exemption "*never*" applies to pre-confirmation transfers, not that the exemption applies to some pre-confirmation transfers but not others, and that the issue of the precise standard to distinguish pre-confirmation transfer that qualify for the exemption from those that do not had not been briefed. PA 9a & n.5. Thus, the court determined that the issue of a precise standard "is not properly before us." *Id*. The court observed, however, that, at a minimum, there must be "some nexus between the pre-confirmation sale and the confirmed plan." PA 8a-9a.

SUMMARY OF ARGUMENT

Section 1146(a) is ambiguous. Considered both in isolation and in context with other provisions of the Bankruptcy Code, the section may be read to apply to (1) transfers of property that are instrumental to a plan that is confirmed regardless of whether the transfer occurs before or after confirmation, or (2) transfers that are instrumental to a plan that follow confirmation. Although the contextual evidence favors the first reading, either is plausible. Accordingly, it is appropriate to consider other evidence of the section's meaning, including its purpose, structure, and history, as well as the purposes and structure of the Bankruptcy Code as a whole.

The purpose of section 1146(a) is to facilitate the chapter 11 process through tax relief. Likewise, the relevant purposes of the Bankruptcy Code are to preserve going concerns and maximize property available to satisfy the claims of creditors. The Eleventh

Circuit's conclusion that section 1146(a) applies to pre-confirmation transfers with an appropriate nexus to a plan facilitates these purposes; Florida's interpretation frustrates them. By imposing a stamp tax, Florida seeks to surcharge the transfer of Piccadilly's property, which can only serve to discourage transfers by raising their cost, and correspondingly diminish funds available to creditors.

Florida's reading also creates an unwarranted anomaly. Under Florida's interpretation, a transfer that is largely trivial to a plan that occurs just after confirmation is entitled to the exemption, whereas a transfer that occurs just before confirmation never is, no matter how critical the latter may be to the plan. It is not plausible that Congress would have intended such an anomaly.

The structure of the Bankruptcy Code further supports the Eleventh Circuit's reading that section 1146(a) applies to pre-confirmation transfers with an appropriate nexus to a plan that is confirmed. The Code permits sales prior to confirmation, including sales critical to the reorganization and confirmation processes. In this case, the prompt sale of Piccadilly's assets was critical to its plan. The Code endorses precisely the series of events that occurred in this case, and there is no reason to conclude that Congress intended to create an incentive to avoid pre-confirmation value-maximizing transactions by construing section 1146(a) as inapplicable to transfers critical to a plan that occur before confirmation.

The history behind section 1146(a) also supports the Eleventh Circuit's interpretation in this case.

Through numerous iterations over the years, Congress has continuously expanded the scope of the exemption. Likewise, in explaining the section, Congress did so in a manner that suggests that it applies to chapter 11 transfers generally, rather than simply to those occurring after confirmation.

Finally, various canons of construction support the Eleventh Circuit's reading. At bottom, Florida seeks to impose a temporal restriction on the text of section 1146(a) by limiting its application to post-confirmation transfers. But when Congress intends to place temporal restrictions on relief under the Code -- for example, to restrict certain relief to the pre- or post-confirmation period -- it does so expressly with language such as "after confirmation" or "before confirmation." The fact that Congress did not do so in section 1146(a) demonstrates that Congress did not intend such a restriction to apply to the section.

In addition, it must be kept in mind that Florida seeks to recover its stamp tax as a priority expense of administration ahead of the claims of most of Piccadilly's other creditors. In chapter 11 cases, a debtor may not confirm a plan unless the debtor pays all administrative expenses in full in cash. This obviously imposes a financial burden on debtors seeking confirmation, and correspondingly diminishes a debtor's prospects for success, which is obviously contrary to the purposes of section 1146(a) and the Code as a whole. Under the Court's precedents, Florida's attempt to transform a disfavored stamp tax liability into a priority claim is contrary to established interpretive principles. The better reading of the phrase a "transfer under a plan confirmed under section 1129" is a transfer instrumental to a plan that is confirmed under section 1129, regardless of whether the transfer occurs before or after confirmation. Because the transfers in this case fall within this standard, the Court should affirm the decision below.

ARGUMENT

A. Section 1146(a) Is Ambiguous.

Section 1146(a) provides: "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(a). Thus, section 1146(a) exempts from "any law imposing a stamp tax or similar tax" (1) "the making or delivery of an instrument of transfer" (2) "under a plan confirmed under section 1129." Florida's stamp tax plainly qualifies as a "stamp tax or similar tax." Likewise, the documentary deeds transferring property from Piccadilly to PI on which Florida seeks to impose its tax qualify as "the making or delivery of an instrument of transfer." Further, because the bankruptcy court confirmed Piccadilly's plan under section 1129 of the Bankruptcy Code, there is in this case "a plan confirmed under section 1129." The question is whether the relevant transfers occurred "*under* a plan confirmed under section 1129."

Florida asserts that only transfers that occur after a plan is confirmed are entitled to the statutory exemption. To reach this conclusion, Florida reads a temporal limitation into the text, arguing that "a reorganization plan . . . 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." Pet. Br. 12. The court below, of course, read the statute differently. It concluded that, although the text is ambiguous, the better reading is that the statute affords the exemption to transfers with an appropriate nexus to a plan regardless of whether the transfers occur before or after confirmation. PA 7a. Although the Eleventh Circuit's conclusion is correct, both readings are at least plausible. Accordingly, section 1146(a) is ambiguous, and the question becomes which reading best comports with the purpose, structure, and history of the provision, as well as the Bankruptcy Code of which it is a part.

In general, when the language of a statute admits of two plausible interpretations, it is facially ambiguous. *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson,* 545 U.S. 409, 419 n.2 (2005). Reference to the text of a provision in isolation, however, is not dispositive: statutory ambiguity "is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Thus, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Context is critical for two reasons. A statutory provision that seems clear in isolation may, in fact, be ambiguous when considered in the larger context of the statutory scheme of which it is a part. *See id.* (although the term "employees" as used in a particular statute appeared "at first blush" to mean current employees, "[t]his initial impression . . . does not withstand scrutiny in the context of" the statutory provision). Conversely, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme," for example "because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

Under the Court's standards, section 1146(a) is a textbook example of ambiguity. First, the language of the section in isolation readily admits of more than one plausible interpretation. Second, analysis of the section's text alongside the text of the Bankruptcy Code as a whole plainly supports more than one reading. Although exhaustive contextual review of section 1146(a) demonstrates that the Eleventh Circuit's interpretation has considerably more support than Florida's, the statute remains sufficiently ambiguous to require resort to other considerations to demonstrate its meaning.

1. The text of section 1146(a) itself is ambiguous.

In construing the phrase "under a plan confirmed," the Eleventh Circuit observed that section 1146(a) "can plausibly be read either . . . to include transfers 'under a plan confirmed' regardless of *when* the plan is confirmed *or* . . . imposing a temporal restriction on when the confirmation of the plan must occur." PA 7a. Although the court adopted the first reading, it acknowledged that the text "is ambiguous." *Id*.

In *In re Hechinger Investment Co. of Del., Inc.*, 335 F.3d 243 (3d Cir. 2003), the majority of the Third Circuit panel stopped short of labeling the statute "ambiguous." Nevertheless, the majority refused to read the text as embracing only one possible construction. In concluding that section 1146(a) applies solely to transfers that occur after confirmation of a plan, the majority interpreted the phrase "under a plan confirmed" to mean "authorized by a confirmed plan." *Id.* at 252-53. The majority acknowledged that "we do not go so far as to say that this is the only plausible interpretation of that term." *Id.* As the majority explained, "[t]he preposition 'under' is of course very common, and it can have many different meanings in different contexts." *Id*. at 252. For example, "an accepted definition of the preposition 'under' is 'in accordance with,' and 'accordance' may mean 'agreement.'" *Id*. at 253. Thus, "we cannot say that the language of section 1146(c) [now 1146(a)] rules out the possibility that 'under a plan confirmed' means 'in agreement with a plan confirmed.'" Rather, "on this reading," the statute may exempt from taxation transfers that occur prior to confirmation. *Id*.

In his dissent in *Hechinger*, Judge Nygaard analyzed the same text and concluded that it is ambiguous. *Id*. at 257. He reiterated that the term "under" has many potential meanings depending on the context in which it is used, and can be "a preposition, adverb, adjective, noun, or verb." *Id*. at 258. Given the term's highly variable definitional nature and exceptionally frequent usage, he doubted whether it was sound to give the provision a fixed or preferred meaning even when used more than once within the same sentence. *Id*. Judge Wilkinson similarly explained in his concurrence in *In re NVR, LP*, 189 F.3d 442, 458 (4th Cir. 1999), that "[i]t is not plain to me that section 1146(c) [now 1146(a)] contains a temporal element" or that "one must read the section to say anything about the relationship between plan confirmation and the timing of a transfer." As he elaborated, "[i]t is equally possible that the provision requires only that the transfer occur 'under' -- i.e., that it be inferior or subordinate to -- 'a plan' that is ultimately 'confirmed.'" *Id*.

The variability of the term "under" is well documented. The American Heritage Dictionary provides fifteen definitions, including "in view of," "because of," "by virtue of," as well as "[s]ubject to the restraint of." AMERICAN HERITAGE DICTIONARY 1395 (1976). Other definitions include "as designated, indicated, or represented by," "in accordance with," and "in the state or process of." http://dictionary.reference.com/browse/under. Black's Law Dictionary defines the term to include "inferior" or "subordinate." BLACK'S LAW DICTIONARY 1525 (6th ed. 1990). Moreover, this Court has recognized that "[t]he word 'under' has many dictionary definitions and must draw its meaning from its context." *Ardestani v. INS*, 502 U.S. 129, 135 (1991).

Given the imprecise manner in which section 1146(a) is drafted, coupled with the variable meaning of the term "under," section 1146(a) is facially susceptible to competing interpretations. Quite plausibly, the phrase "under a plan confirmed" can be read to mean "in accordance with a plan that is confirmed" without imposing any temporal requirement on *when* the plan must be confirmed in relation to the transfer. Alternatively, it can be read to mean "authorized by a confirmed plan," suggesting that the plan must be confirmed before the transfer. Accordingly, it is not possible to conclude by reference to the text of Section 1146(a) alone that the provision is susceptible to a single plausible reading, and the statute is thus facially ambiguous.

2. In context with the Bankruptcy Code, section 1146(a) is ambiguous.

The statute's ambiguity becomes even more pronounced with considered in context with other provisions of the Bankruptcy Code. To begin with, if Congress had intended section 1146(a) to apply only to transfers occurring *after* confirmation, it could easily have said so by placing an express temporal limitation in the statute like the express temporal limitations that appear elsewhere in the Code. For example, section 1127 governs modifications to a chapter 11 plan, and provides in section 1127(a) that the proponent of a plan may modify a plan "at any time before confirmation." 11 U.S.C. § 1127(a). Likewise, section 1127(b) provides that, subject to certain restrictions, the proponent of a plan may modify the plan "at any time after confirmation of such plan." 11 U.S.C § 1127(b); *see also* PA 7a (listing as additional examples 11 U.S.C. §§ 1104(a) ("At any time after the commencement of the case but before confirmation of the plan . . . ."); 1104(c) ("[T]hen at any time before the confirmation of a plan . . . ."); 1105 ("At any time before confirmation of a plan . . . ."); 1114(e)(2) ("Any payment for retiree benefits required to be made before a plan confirmed under [§ 1129] is effective . . . .")). With specific reference to section 1127(b), if Congress had intended to impose a temporal restriction on section 1146(a), it easily could have written the statute to read: "For transfers occurring after confirmation of a plan, . . . an instrument of transfer under a plan . . . may not be taxed."

That Congress did not impose a clear (and commonly available) temporal limitation in section 1146(a) suggests that Congress did not intend one to exist. *See F.C.C. v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 302 (2003) ("where Congress has intended to provide . . . exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly"); *Toibb v. Radloff*, 501 U.S. 157, 161 (1991) (refusing to infer limitation on section 109 of the Bankruptcy Code, stating "Congress knew how to restrict recourse to the avenues of bankruptcy relief"). As the Court has explained, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation marks and citations omitted); *see Dole Food Co. v. Patrickson*, 538 U.S. 468, 476

(2003); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 (1991) (where Congress placed express time limitations in other parts of act, but not in part under consideration, Court would not infer time limitation where Congress did not include it). This is especially warranted here given that in section 1146(b) -- the subsection immediately following section 1146(a) -- Congress imposed an express temporal limitation on requests for determinations of certain tax effects of the Bankruptcy Code. *See* 11 U.S.C. § 1146(b) (providing that a bankruptcy court may declare certain tax effects of the Code after the earlier of the date a government unit responds to a plan proponent's request for such a declaration or "270 days after such request"); *King*, 502 U.S. at 220-21 (comparing subsections of same statute).

Similarly, if Congress had intended section 1146(a) to apply only to transfers occurring after confirmation, it could easily have used the temporally limiting phrase "transfer of property dealt with under a confirmed plan" instead of the phrase "transfer under a plan confirmed under section 1129." Notably, Congress used precisely the first formulation in section 1142(b) applicable to "any instrument required to effect a transfer of property dealt with by a confirmed plan," which, in context, involves transfers that follow confirmation. The fact that Congress used one phrase for a particular temporal effect in section 1142(b) and a quite distinct phrase in section 1146(a) suggests that Congress intended a different effect in section 1146(a) -- in this case, a non-temporal one.

Other contextual evidence also suggests that the distinct phrase "plan confirmed under section 1129" used in section 1146(a) does not mean "confirmed plan" in the sense of a "plan that has already been confirmed." At first blush, the phrase "plan confirmed under section 1129" appears to be a cross-reference to section 1129 designed to limit the applicability of section 1146(a) to chapter 11 plans confirmed in chapter 11 cases. But the cross-reference is completely unnecessary for that purpose. Pursuant to section 103(g) of the Code, the provisions of subchapter III of chapter 11 (including section 1146) already apply *only* in chapter 11 cases. 11 U.S.C. § 103(g); *see also* 11 U.S.C. § 901 (excluding section 1146 from chapter 9 proceedings). Further, confirmation under section 1129 already is the *only* way in which a plan may be confirmed in chapter 11. 11 U.S.C. § 1129(a)(1) (providing that a plan may be confirmed "only if" the requirements of section 1129 are satisfied). Because section 1146(a) already applies in chapter 11 cases exclusively, and because chapter 11 plans already can only be confirmed under section 1129, the phrase "plan confirmed under section 1129" more likely means something else. *See Kawaauhua v. Geiger*, 523 U.S. 57, 62 (1998) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.") (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988)); *see also Dole*, 538 U.S. at 476-77 ("we should not construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous"); *United States v. Menasche*, 348 U.S.

528, 538 (1955). This is bolstered by the fact that Congress used the term "confirmed plan" in section 1142(b) to refer to a plan confirmed in a chapter 11 case under section 1129 without any explicit cross-reference to section 1129. The question becomes: what then is the meaning of the reference in section 1146(a) to "plan confirmed under section 1129" if not a superfluous cross-reference?

Avoiding a construction of section 1146(a) that renders any part of the Code superfluous, and ascribing meaning to Congress's deliberate decision to use language in section 1146(a) distinct from the text of section 1142(b), the phrase "plan confirmed under section 1129" in section 1146(a) plausibly means a plan that is confirmed at some point in time under the requirements of chapter 11. While perhaps not conclusive, this demonstrates that the meaning of the phrase "plan confirmed under section 1129" is reasonably susceptible to different interpretations.

The ambiguity of section 1146(a) is demonstrated even more dramatically by the contextual variability of the meaning of the term "under." As noted, courts have focused on the meaning of this term to discern the relationship between "transfer" and "plan" as used in section 1146(a). In *Hechinger*, the majority observed that one meaning of the term "under" is "authorized by," and if "authorized by" is substituted for "under," this suggests that the plan must precede the transfer. But as Judge Nygaard explained in his dissent in *Hechinger*, if Congress had intended the term "under" to mean the more limited "authorized by," Congress easily could have said so as it has elsewhere in the Code. *See* 335 F.3d at 258 (Nygaard, J., dissenting) (noting nineteen different instances in which Congress used the term "authorized" in the Code, and observing that Congress used the phrase "authorized under" at least four times). The fact that Congress used the term "under," rather than the more specific (and commonly available) "authorized by" or "authorized under," suggests that the term "under" has a different meaning, which could plausibly include one of the term's other numerous definitions.

It is certainly true, of course, that Congress uses the phrase "under" three times in section 1146(a). In *Hechinger*, the majority reasoned that the multiple use of the same term in the same sentence narrows the term's possible readings under the theory that it is preferable to construe a term to have the same meaning each time it is used in the same statute. 335 F.3d at 253-54 ("It is a 'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'") (quoting *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986)). The majority observed that the term "authorized by" fits as a substitute for "under" each time the term appears in section 1146(a) and, thus, helps resolve the statute's meaning. But this reasoning encounters at least three critical difficulties.

First, several of the recognized alternative definitions of "under" fit plausibly as substitutes for the term in each instance in which the term appears in section 1146(a). For example, as the majority in *Hechinger* itself stated, another recognized meaning of the term "under" is "in accordance with." As modified to substitute this alternative, section 1146(a) would read: "The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer *in accordance with* a plan confirmed *in accordance with* section 1129 of this title, may not be taxed *in accordance with* any law imposing a stamp tax or similar tax." This plausible substitution also provides no basis for concluding that section 1146(a) only applies to transfers occurring after confirmation.

Second, there is no reason why a term of such common usage and variable meaning as "under" must have the same meaning each time it is used, even in the same sentence. For example, the same word "under" obviously means different things in the following sentence: "if you walk *under* the bridge you will find that, *under* my interpretation of the law, you will be subject to penalties *under* the penal code" -- namely "if you walk *beneath* the bridge you will find that, *in accordance with* my interpretation of the law, you will be subject to penalties *by virtue of the* penal code." The Bankruptcy Code illustrates this. For example, section 302(a) provides that "[t]he commencement of a joint case *under* a chapter of this title constitutes an order for relief *under* such chapter." 11 U.S.C. § 302(a). In context, this means "[t]he commencement of a joint case *subject to the provisions of* a chapter of this title constitutes an order for relief *in* such chapter."

Third, as suggested above, Congress plainly does not use the term "under" throughout the Code exclusively to mean "authorized by." For example, in section 111, an agency that provides credit counseling to debtors is required to meet "the standards set forth *under* this section." 11 U.S.C. § 111(b)(4)(A) (emphasis supplied). In context, this means the agency is required to meet "the standards set forth *in* this section." It plainly does not mean "the standards set forth *authorized by* this section," because such a substitution would make "set forth" nonsensical. Similarly, section 303(a) provides that "an involuntary case may be commenced only *under* chapter 7 or 11 of this title." 11 U.S.C. § 303(a). In context, this means "an involuntary case may be commenced only *in* chapter 7 or 11 of this title." The term "under" as used in section 303(a) cannot mean "authorized by" -- *e.g.*, "an involuntary case may be commenced only *authorized by* chapter 7 or 11 of this title" -- because section 303(a) itself authorizes involuntary cases, and the provisions of chapter 7 or 11 do not. Likewise, section 343 provides that "[t]he debtor shall appear and submit to examination *under* oath at the meeting of creditors." 11 U.S.C. § 343 (emphasis supplied). In context, this means "[t]he debtor shall appear and submit to examination *subject to an* oath at the meeting of creditors." It does not mean ""[t]he debtor shall appear and submit to examination *authorized by an* oath at the meeting of creditors."

As the Court has explained, once it is demonstrated that the same term used in the same act has different meanings depending on the context in which it is used, "the term standing alone is necessarily ambiguous and each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute." *Robinson*, 519 U.S. at 343-44. Such is the case here.

Further, substituting "authorized by" for "under" in section 1146(a) simply does not answer the question whether the transfer must occur before or after a plan is confirmed. It is perfectly plausible that a transfer can be "authorized by" a plan that is not confirmed until *after* the transfer. In *Hechinger*, the majority thought that this was not possible because of the way in which it construed the concept of "authorization." The majority reasoned that a transfer prior to confirmation was not conducted under the "authority" of a plan, but, rather, under the "authority" of section 363 of the Bankruptcy Code. *See* 11 U.S.C. § 363(b). Therefore, the majority concluded, until confirmation of a plan occurred, the transfer could not be "under" the plan. The majority reasoned that, following confirmation, however, transfers may be conducted under the "authority" of the plan, and therefore are "authorized by" the plan. *Hechinger*, 335 F.3d at 252. This reasoning has at least three weaknesses.

First, as noted, the term "under" does not necessarily mean "authorized by." But even assuming that it does, the fact that section 363 permits sales of assets prior to confirmation does not mean that these sales are not also "authorized by" a plan. It simply means that they are not "authorized by" a plan that has been confirmed at the time of the sale. The Bankruptcy Code does not permit the sale of assets willy nilly during the chapter 11 proceedings prior to plan confirmation. *See Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d

1063, 1069, 1071 (2d Cir. 1983). Rather, there must be a good business reason behind the sale (hence the requirement of bankruptcy court approval in section 363(b)), *see id.* at 1071, and, frequently, the reason will be (as in this case) because the sale is a necessary component of a plan even though the plan has yet to be confirmed. In that sense, a sale prior to confirmation may be "authorized by" a plan in the sense of being "justified" by the plan, which is simply an alternative definition of "authorized." AMERICAN HERITAGE DICTIONARY 89 (1976) ("To be sufficient grounds for; justify").

Second, sales conducted pursuant to the terms of a confirmed plan are authorized *by statute* no less than sales conducted under section 363(b) that occur prior to confirmation. Section 1141 authorizes compliance with a confirmed plan, and, following confirmation, section 1142 directs the debtor or other party responsible for implementing the plan to "carry out the plan." 11 U.S.C. §§ 1141, 1142(a). Accordingly, in both instances (*i.e.*, sales pre- and post-confirmation), there may be a "plan" and, separately, a statute or statutes "authorizing" the sale. The only difference is that in one instance the plan has not yet been confirmed, and in the other it has. In both situations, the ultimate authority is statutory, and the fact that sales conducted prior to confirmation are "authorized" by a statute is therefore a distinction without a real difference.

Third, as suggested above, the majority interpretation in *Hechinger* of the term "under" turns, in fact, on a definitional gloss imposed on yet another definitional gloss. Specifically, even if the term "under" means "authorized by," this begs the question what the phrase "authorized by" means. Like the term "under," the term "authorized" has many meanings, including "to be sufficient grounds for," or "justify." AMERICAN HERITAGE DICTIONARY 89 (1976). As noted, a plan may "justify" a sale both before and after confirmation (*e.g.*, before confirmation by supplying a reason for it, and after confirmation by directing that it be done, which direction can be enforced under section 1142).

In *Hechinger*, the majority reasoned further that substituting the phrase "authorized by" for the term "under" would be consistent with the use of a similar phrase appearing in section 365(g)(1). 335 F.3d at 254. But this reference also does not dispel the ambiguity of section 1146(a) for two reasons.

First, section 365(g)(1) merely describes the effect of the rejection of an executory contract or unexpired lease in a bankruptcy case. *E.g., Eagle Ins. Co. v. BankVest Capital Corp. (In re Bankvest Capital Corp.)*, 360 F.3d 291, 295-96 (1st Cir. 2004); *see also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522 (1984) (explaining concepts of assumption and rejection). Section 365(g)(1) provides that rejection constitutes a "breach" of the contract or lease as though the breach had occurred immediately before the debtor commenced its bankruptcy case, *unless* the debtor assumed the contract during the course of the bankruptcy proceeding under section 365 or "under a plan confirmed under chapter . . . 11." 11 U.S.C. § 365(g)(1); *see also BankVest*, 360 F.3d at 295-96.

Read carefully and in context, the phrase "*under* a plan confirmed under chapter . . . 11" in section 365(g)(1) does not mean "*authorized by* a plan confirmed under chapter . . . 11." Critically, the authorization for the assumption of a lease under a plan is described in section 1123(b)(2), which, in turn, *circles back to section 365*. Specifically, section 1123(b)(2) provides that "a plan may . . . *subject to section 365 of this title*, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section." 11 U.S.C. § 1123(b)(2) (emphasis supplied). Thus, although a plan may "provide for" assumption of an executory contract or unexpired lease, the ultimate "authority" for assumption -- whether prior to confirmation without a plan or as part of confirmation under one -- remains the same: section 365. Read in context, the phrase "plan confirmed under chapter . . . 11" appearing in section 365(g)(1) merely serves to describe one of the *vehicles* for the assumption election (*e.g.*, designation that the contract or lease is assumed in a plan). This does not demonstrate a clear dichotomy of "authorizations" between assumptions under section 365 and those under a plan. On the contrary, it more plausibly supports the construction of "*under* a plan" appearing in section 365(g)(1) to mean "*in accordance with* a plan."

Second, unlike sales, which can occur either before or after plan confirmation, the assumption or rejection of an executory contract or unexpired lease must *always* occur before confirmation. The Bankruptcy Code does not permit post-confirmation assumptions or rejections. *Bildisco*, 465 U.S. at 529

("In a Chapter 11 reorganization, a debtor-in-possession has until a reorganization plan is confirmed to decide whether to accept or reject an executory contract, although a creditor may request the Bankruptcy Court to make such a determination within a particular time."). Thus, the phrase "*under* a plan confirmed under chapter . . . 11" appearing in section 365(g)(1) cannot refer to assumptions or rejections occurring after confirmation. Moreover, the reason why section 365(g)(1) distinguishes contracts and leases that are assumed "under a plan confirmed under chapter . . . 11" from those that are assumed under section 365 is simply in recognition that, in chapter 7 cases, there is no plan, and therefore no plan vehicle to elect assumption. *See* 11 U.S.C. § 103(a) (providing that the provisions of chapter 3 of the Bankruptcy Code, including section 365, apply in both chapter 7 and chapter 11 cases).

By analogy, if the phrase "under a plan confirmed under chapter . . . 11" appearing in section 365(a)(1) includes assumptions designated in a plan prior to confirmation, then the phrase "under a plan confirmed under section 1129" appearing in section 1146(a) also includes sales designated in a plan prior to confirmation. This, of course, supports the decision below.

Considered in context with other relevant terms and phrases used throughout the Bankruptcy Code, as well as the various meanings plausibly ascribed to similar terms and phrases employed in the Code's many provisions, section 1146(a) is ambiguous.

B. The Purpose of Section 1146(a) and the Purposes and Structure of the Bankruptcy Code Demonstrate that Section 1146(a) Applies to Pre-Confirmation Transfers.

In resolving statutory ambiguity, it is appropriate to consider the purpose of the relevant provision, as well as the purposes and structure of the larger enactment of which it is a part. *Robinson*, 519 U.S. at 346 (considering the statutory purpose of antiretaliation in resolving whether use of the term "employees" included former employees, as well as the broader context of Title VII in which the term is employed); *see also Dolan v. United States*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."); *Shapiro v. United States*, 335 U.S. 1, 31 (1948) ("we must heed the . . . well-settled doctrine . . . to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen"). In this case, reference to the purpose of section 1146(a), as well as the purposes and structure of the Code as a whole, refute Florida's interpretation. In order to fulfill the purpose of section 1146(a), as well as the purposes and structure of the Code as a whole, the Court should conclude that the phrase "transfer under a plan confirmed under section 1129" means a transfer instrumental to a plan that is confirmed under section 1129, regardless of whether the transfer occurs before or after confirmation.

1. The Purposes of Section 1146(a) and the Bankruptcy Code Support Affirmance.

Although the text of section 1146(a) is ambiguous, its purpose is not: Congress enacted the statute to facilitate the chapter 11 process "through giving tax relief." *Jacoby-Bender*, 758 F.2d at 841; *see also Hechinger*, 335 F.3d at 259 (Nygaard, J., dissenting) ("Section 1146(c) . . . was clearly intended to provide relief to debtors when they were compelled to sell assets under the plan. Our reading of the statute should comport with that intent."); *id.* at 259 n.2 ("We should read 1146(c) to facilitate reorganization, not impede reorganization.").

This is fully consistent with the purposes of the Bankruptcy Code as a whole. As the Court has explained, "two recognized policies underlying Chapter 11 [are] preserving going concerns and maximizing property available to satisfy creditors." *203 North LaSalle St. P'ship*, 526 U.S. at 453; *see also Toibb*, 501 U.S. at 163 ("Chapter 11 also embodies the general Code policy of maximizing the value of the bankruptcy estate"); *Bildisco*, 465 U.S. at 527 ("the policy of Chapter 11 is to permit successful rehabilitation of debtors").

The imposition of a stamp tax on a transfer from a bankruptcy estate is not a tax incident to the debtor's conduct of a business, such as a sales tax or an income tax. Rather, it is simply a tax on the bankruptcy process itself. Moreover, it is a tax that both makes the disposition of property more expensive and reduces the amount of funds available to satisfy the claims of creditors. Not surprisingly, Congress enacted section 1146(a) to unfetter the disposition of property in the chapter 11 context from the burden of a tax of this kind.

In light of this reality, Florida's argument that section 1146(a) prescribes a tax exemption exclusively for post-confirmation transfers not only contravenes the purpose of section 1146(a) and the broader purposes of the Code, it simply makes no sense. It is implausible that Congress would have intended the anomaly that a transfer essential to a plan that occurs two minutes before confirmation may be taxed, but the same transfer occurring two seconds after may not. Accordingly, the Court should reject Florida's interpretation. *See Panetti v. Quarterman*, 127 S. Ct. 2842, 2854 (2007) (stating that the "purposes [of a statute] and the practical effects of our holdings [] should be considered when interpreting" a statute) (citing *Castro v. United States*, 540 U.S. 375, 380 (2003) (describing Court's resistance to an "interpretation of the statute that would 'produce troublesome results' [and] 'create procedural anomalies.'")); *Nixon v. Missouri Mun. League*, 541 U.S. 125, 138 (2004).

Moreover, viewed in light of the purposes of both section 1146(a) and the Code as a whole, Florida's argument generates a result that may be described as "absurd." *In re Chapman*, 166 U.S. 661, 667 (1897) ("nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."); *see Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 511 (1989) (rejecting interpretation of rule that, because of anomaly that a literal reading would endorse, simply "can't mean what it says") (quotation marks and citation omitted).

Debtors frequently sell property during the course of their chapter 11 cases prior to confirmation of a plan, and they often do so in order to take advantage of the opportunity to obtain the best price for what may be an asset that is declining in value. Stamp taxes are significant. For example, the taxes that Florida sought to impose in *In re T.H. Orlando Ltd.*, 391 F.3d 1287, 1290 (11th Cir. 2004) amounted to $161,425. Here, Florida seeks to charge $39,200 for the sake of recording four simple deeds of transfer (for which a separate recording fee is also required, Fla. Stat. § 28.24). If Florida's interpretation of section 1146(a) were accepted, debtors would face the following choice: (1) forgo a value-maximizing sale that facilitates the chapter 11 process until after confirmation in order to take the tax exemption even though the delay may disadvantage the process, or (2) sell the property prior to confirmation and pay the tax. But there is no reason why Congress would have intended a tax exemption designed to *facilitate* the chapter 11 process to serve as an incentive to impair it. Accordingly, Florida's interpretation should be rejected and the Court should conclude that section 1146(a) applies to transfers instrumental to a plan both before and after confirmation.

2. The Structure of the Bankruptcy Code Supports Affirmance.

As noted, the goal of every chapter 11 case is the formulation and confirmation of a negotiated plan providing for the disposition of the debtor's property and the payment of claims. As the text of the Bankruptcy Code itself recognizes, a plan is not something that springs into existence at the point of confirmation. Rather, it is a work created over time that provides a framework for the disposition of the debtor's property and the payment of claims. Critically, the Code refers repeatedly to a "plan" long before the confirmation process even begins.

For example, section 1121(a) provides that a debtor may file a "plan" along with its petition in bankruptcy. 11 U.S.C. § 1121(a). Further, the Code provides that one of the powers of a creditors' committee is to "participate in the formulation of a plan." 11 U.S.C. § 1103(c)(3). The Code also provides that, once a plan has been filed, it may be modified at any time prior to confirmation. 11 U.S.C. § 1127(a). After confirmation, a plan may also be modified, provided that the plan has not been substantially consummated and the other statutory requirements of section 1127(b) are satisfied. 11 U.S.C. § 1127(b); *see also* 11 U.S.C. § 1101(2) (defining phrase "substantial consummation"). Thus, not only does the Code contemplate the concept of a plan as a work in progress, it also provides expressly that confirmation is not monolithic because even the terms of a confirmed plan may be altered under the statutory scheme.

In this case, Piccadilly and its creditors essentially completed negotiation of the critical features of the plan -- the sale of Piccadilly's assets and the distribution of the proceeds to creditors -- prior to the actual court-approved sale of the assets to PI on March 16, 2004. JA 81A; PA 37A. As the bankruptcy court determined, a sale of the assets free and clear was essential for a sale to occur -- *i.e.*, no buyer would be willing to purchase the assets if encumbered with Piccadilly's $160 million in debt. JA 35a. As is customary in bankruptcy, the court ordered all claims and interests to be channeled "to the proceeds of the sale." JA 39a. The parties resolved the difficulty of how to divide the proceeds through the Global Settlement. JA 81a-83a. Obviously, without the sale, there would be no proceeds to divide.

The bankruptcy court determined that Piccadilly had "sound business reasons" for conducting a prompt sale of its assets, and those reasons apply to many chapter 11 debtors suffering from acute financial distress. Once Piccadilly decided that its best option was to sell its assets expeditiously, it acted promptly to avoid the value-destroying consequences of further decline. It formed its plan, reached agreement with its creditors over its essential terms, sold its assets at the highest price it could obtain, and then confirmed its plan.

For purposes of interpreting section 1146(a), Florida's insistence that the statute applies only to transfers that occur after confirmation elevates an incomplete conception of the form of the process over its substance. As Florida itself stated below, "the actual sale itself contemplated the liquidating plan." PA

17a. As the bankruptcy court concluded, the sale and the plan "were so interwoven that one could not proceed without the other." PA 40a. Without a sale in this case, there could have been be no confirmed plan that maximized the value of Piccadilly's property and provided the best distribution to creditors. As the bankruptcy court also found, the sale "was necessary to the consummation of the confirmed Plan because the sale of [Piccadilly's] assets generated the proceeds required to fund the Plan." *Id*.

The court of appeals declined to define the precise standard governing when a "transfer" is sufficiently related to "a plan confirmed under section 1129" such that it constitutes a "transfer under a plan" within the meaning of section 1146(a). PA 8a-9a. In light of the analysis conducted above, however, Piccadilly submits that the better interpretation of the phrase "transfer under a plan confirmed under section 1129" is transfer instrumental to a plan that is confirmed under section 1129, regardless of whether the transfer occurs before or after confirmation. This interpretation recognizes an appropriate connection between the transfer and the confirmed plan, and is consistent with the structure of the chapter 11 process and its policy, as well as the purpose of section 1146(a) itself. In this case, the findings of the bankruptcy court -- which Florida has not challenged -- demonstrate that the sale was not only instrumental to the plan, it was necessary to the plan and interwoven with it. Accordingly, section 1146(a) applies.[7]

C. The History of Section 1146(a) Supports the Conclusion that the Section Applies to Pre-Confirmation Transfers.

The history behind section 1146(a) also supports affirmance. Section 1146(a) (formerly section 1146(c) renumbered in 2005), descends from section 77B(f) of the Bankruptcy Act of 1898. *995 Fifth Ave. Assocs., L.P. v. New York State Dep't of Taxation & Fin. (In re 995 Fifth Ave. Assocs., L.P.)*, 963 F.2d 503, 510 (2d Cir. 1992). Added in 1934, section 77B(f) prescribed an exemption only from certain enumerated provisions of federal tax law. *Id.* at 510.

In 1938, Congress overhauled the Act, adding Chapter X to replace the former corporation reorganization provisions of section 77B. Section 267, applicable in Chapter X cases, broadened the exemption to include state stamp taxes and provided: "The issuance, transfer, or exchange of securities, or the

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[7] It is also plausible to interpret the phrase "transfer under a plan confirmed under section 1129" to mean "transfer in accordance with a plan that is confirmed under section 1129," regardless of whether the transfer occurs before or after confirmation. This is a somewhat broader standard embracing the alternative reading discussed in *Hechinger*. The Court, however, need not choose between this standard and the one discussed above in order to affirm, as the Court below addressed only Florida's argument that pre-confirmation transfers *never* qualify under the statute. Further, given the bankruptcy court's finding that transfers at issue here were critical to the plan, they would qualify under either standard.

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 of any State." 11 U.S.C. § 667 (1938) (repealed in 1978). Congress enacted the provision over the objection of the Assistant General Counsel of the Treasury Department, who testified that stamp tax obligations are typically small and therefore no great burden on the bankruptcy process, and, if enacted, the exemption would impose an undue burden on governmental authorities obligated to determine whether the exemption applied to a particular transfer. *Revision of the National Bankruptcy Act: Hearings on H.R. 8046 Before the S. Comm. on the Judiciary*, 75th Cong. 139 (1938) (statement of Arthur H. Kent, Assistant General Counsel, Treasury Department). Congress presumably disagreed.

In any event, Florida can hardly complain that application of section 1146(a) to sales under a plan prior to confirmation is impracticable. As noted, a current Florida regulation mirrors the Eleventh Circuit's decision in this case (as well as that of other courts) and provides: "Transfer in Bankruptcy: Sale of real property by trustees, debtors or receivers in federal bankruptcy proceedings is subject to tax unless the transfer is made pursuant to a plan confirmed under § 1129 of the Bankruptcy Code, is a precondition or essential to the confirmation of the plan, or is necessary to consummate or implement a confirmed plan and the debtor is a party to the transfer." Fla. Admin. Code Ann. R. 12B-4.014(15) (citing cases). In addition, the practice in chapter 11 is for the debtor to ask the bankruptcy court to determine, on notice to the relevant taxing authority, that section 1146(b) exemption applies to a particular transfer, as happened in this case. PA 12a. This alleviates any interpretive burden on filing clerks.

In 1970, Congress appointed a commission to study and report on revisions to the nation's bankruptcy laws. In its 1973 report, the commission recommended the following text: "The issuance, transfer or exchange of securities, or the making or delivery of instruments of transfer under any plan confirmed under this chapter, shall not be taxable under any law of the United States, a state, or any subdivision thereof, imposing a stamp or similar tax." REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, 93d Cong., 1st Sess. pt. II, § 7-315, at 258 (1973). The report notes that the proposed text "is derived from § 267 of the present Act, but broadened to cover all taxes similar to stamp taxes." *Id*. at 260 n.2.

In a 1976 hearing on proposed amendments to the bankruptcy laws held before the Committee on the Judiciary, the Commissioner of the Internal Revenue Service stated that the stamp tax exemption was "of diminished importance insofar as federal revenues are concerned since the Excise Tax Reduction Act of 1965 repealed the stamp taxes on the issuance and transfer of stocks and bonds and the conveyance of realty." *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the H. Comm. on the Judiciary*, 94th Cong. 1974 (1976) (statement of Donald C. Alexander, Commissioner of Internal Revenue Service). The Commissioner reported that the IRS did not oppose the proposal. *Id.*[8]

Congress enacted section 1146(a) (originally codified as 1146(c)) as part of its enactment in 1978 of the current Bankruptcy Code. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 1146(c) (1978). The House Report accompanying the Code explains that "[s]ection 1146(c) [now 1146(a)] of title 11 is modeled after section 267 of the Bankruptcy Act which exempts any security or transfer instrument dealt with under a confirmed Chapter X plan from any state or federal stamp tax." H.R. Rep. No. 95-595, at 281 (1977), *reprinted in* 1978 U.S.C.C.A.N. 6238. Significantly, the report continues: "Section 1146(c) [now 1146(a)] *broadens* the exemption to any stamp tax or similar tax on a security or a *transfer instrument dealt with under the consolidated chapter 11*." *Id.* (emphasis supplied).

The report is significant because it reveals an intent to broaden the scope of the exemption. Further, although the report recites that section 267 exempted transfers from stamp taxes "under a confirmed Chapter X plan," it states that section 1146(a) exempts "a transfer instrument dealt with under the

[8] The reference to the Excise Tax Reduction Act of 1965, Pub. L. No. 89-44, 79 Stat. 136 (1965), helps explain Congress's purpose behind its retention of the stamp tax exemption in section 1146(a). The legislative materials to the 1965 Act reveal that Congress intended to eliminate most federal excise taxes, including stamp taxes, as archaic, regressive, counterproductive, and unduly burdensome. H.R. Rep. No. 89-433 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1645, 1655-56.

consolidated chapter 11" without mentioning plan confirmation at all, let alone as a precondition to application of the exemption to the transfer. If anything, this supports the view that transfers that occur prior to confirmation are included within the scope of the exemption as transfers dealt with as part of the "chapter 11" case.[9]

D. Relevant Canons of Construction Bolster the Conclusion that Section 1146(a) Applies to Pre-Confirmation Transfers.

Unlike other sections of the Bankruptcy Code that contain express temporal restrictions, section 1146(a) does not. Florida asks the Court to recognize one anyway. Florida's request is unsound. Courts do not have "carte blanche to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do." *United States v. Locke*, 471 U.S. 84, 95 (1985).

Critically, Florida's interpretation of section 1146(a) fails to recognize the distinct language of the section in sharp contrast with the text of other sections of the Code that plainly incorporate temporal distinctions. This difference is entitled to deference,

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[9] The reference to "consolidated" chapter 11 is apparently a reference to the fact that, in enacting chapter 11, Congress consolidated into chapter 11 the three prior reorganization chapters in existence under the Bankruptcy Act of 1898: Chapter X mentioned above, Chapter XI governing business arrangements, and Chapter XII governing real estate arrangements. *See Toibb*, 501 U.S. at 167 n.5 (Stevens, J., dissenting) (quoting S. Rep. No. 95-989, pp. 9-10 (1978), discussing replacement of Chapters X, XI, & XII with chapter 11).

Russello, 464 U.S. at 23, and there is no reason to disregard it.

As the Court has noted, temporal restrictions on relief, particularly time limitations, are inherently arbitrary. *Locke*, 471 U.S. at 94 ("[d]eadlines are inherently arbitrary") (quotation marks and citation omitted). That is all the more true when created artificially without clear statutory direction. In the bankruptcy context, this Court has refused time and again to imply limits on statutory bankruptcy relief where Congress has not prescribed an express limitation. *See, e.g., NextWave*, 537 U.S. at 302; *Toibb*, 501 U.S. at 161. There is no reason to depart from that practice in this case.

The Court's analysis in *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991), is particularly instructive. There, the Court interpreted 38 U.S.C. § 2024(d), which grants certain employees the right to obtain civilian reemployment following military service. The Court observed that, unlike other parts of the same statute that set forth express time limits on the duration of similar statutory protections, section 2024(d) prescribed none. Citing the principle that a "statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context," the Court declined to import a temporal restriction into section 2024(d). 502 U.S. at 220-21. As noted, Congress has placed express temporal restrictions in numerous sections of the Code. *E.g.*, 11 U.S.C § 1127(b) (permitting certain plan modifications "at any time after confirmation of such plan"). The fact that section 1146(a) contains no similar provision demonstrates that Congress did not intend one to exist there.

Moreover, as the Eleventh Circuit recognized, "a remedial statute such as the Bankruptcy Code should be liberally construed." PA 8a; *cf. Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782 (1952) (reform legislation in favor of seamen "is largely remedial and calls for liberal interpretation in favor of the seamen"). With this in mind, it is important not to lose sight of Florida's ultimate objective: to have its claim for stamp tax liability allowed and paid as a priority expense of administration ahead of the claims of almost every other creditor. As the Court has stated recently, the Code's priority provisions should be strictly construed. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 126 S Ct. 2105, 2116 (2006) ("provisions allowing preferences must be tightly construed"). That rule has all the more force where, as here, the governing statutory scheme plausibly excludes Florida's claim in its entirety from *any* distribution. As the Court explained in *Howard Delivery*, "[e]very claim granted priority status reduces the funds available to general unsecured creditors and may diminish the recovery of other claimants qualifying for equal or lesser priorities." *Id*. Thus, "[t]o give priority to a claimant not clearly entitled thereto is not only inconsistent with the policy of equality of distribution; it dilutes the value of the priority for those creditors Congress intended to prefer." *Id*. (quotation marks and citation omitted).

Further, in order to confirm a chapter 11 plan, a debtor must pay all administrative expenses in cash in full. 11 U.S.C. § 1129(a)(9)(A). Unquestionably, imposing a stamp tax liability as an expense of administration will make the chapter 11 process that much more difficult, which, as noted, is contrary to the purpose of section 1146(a).

Florida contends that several canons of statutory construction favor its interpretation. *See* Pet. Br. 26-29. In particular, it invokes the concept that statutes prescribing tax exemptions must be "strictly construed" against the exemption. Pet. Br. 27 (citing *Nat'l Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995)); *see also Hechinger*, 335 F.3d at 254 (citing cases).

But "[c]anons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction." *Circuit City Stores v. Adams*, 532 U.S. 105, 115 (2001). In this case, there are compelling reasons to disregard the canons that Florida invokes.

First, section 1146(a) clearly describes a tax exemption. Thus, it is already clear that Congress intends to disrupt state taxation schemes. Likewise, it is perfectly clear that chapter 11 debtors are entitled to the benefit of the exemption. The only issue is whether section 1146(a) contains a temporal limitation that debtors must adhere to in order to claim the exemption (i.e., whether debtors must wait to close transfers after confirmation rather than before). Employing the canons of strict construction that Florida invokes to imply a temporal limitation where none is expressly supplied overstates the office of these canons. While perhaps useful to illuminate meaning in appropriate cases, Florida employs them improperly to add restrictions to the text that do not already exist.

Second, canons are intended to discern legislative purpose, not thwart it. In this case, Florida seeks to invoke the canons of strict construction that it cites to perpetuate an anomalous result at odds with Congress's purpose of providing tax relief to facilitate the chapter 11 process. That is unwarranted. As Judge Nygaard observed in his dissent in *Hechinger*, even if tax exemptions are to be strictly construed, that does not mean a court should "abrogate the purpose of the exemption through too narrow an application." *Hechinger*, 335 F.3d at 259 (Nygaard, J., dissenting).

The Court's analogous decision in *Dolan v. United States*, 546 U.S. 481 (2006), is instructive. Invoking the canon that "a waiver of a Government's sovereign immunity will be strictly construed," the United States urged the Court to construe generously the exceptions to waiver of immunity set forth in section 2680 of the Federal Tort Claims Act ("FTCA"). Rejecting this argument, the Court concluded that the canon was "unhelpful" in construing the statute because "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute," which waived immunity "in sweeping language." *Id*. at 491-92 (quotation marks and citation omitted). The same reasoning applies here.

The central purpose of section 1146(a) is to prescribe a tax exemption, and the statute so provides. Again, the only issue is whether to graft a temporal restriction on the statute's text. Applying a canon of strict construction to accomplish this result in such a context would be contrary to the exemption's clear purpose. As in *Dolan*, the Court should conclude that "the proper objective of a court attempting to construe [the statute] is to identify those circumstances which are within the words and reason of the exception -- no less and no more." *Id.* (quotation marks and citation omitted).

Finally, the Court's decision in *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989), is not to the contrary. There the Court considered whether, as a constitutional matter, the administration of a bankruptcy estate is entitled to the shield of intergovernmental tax immunity. The Court concluded that "[a]bsolute tax immunity is appropriate only when the tax is on the United States itself, or an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities." *Id.* at 849 (quotation marks and citation omitted). Concluding that the administration of a bankruptcy estate does not fall within this definition, the Court held that the constitutional doctrine does not bar a State from taxing a debtor in possession in bankruptcy.

Turning to the question whether the bankruptcy laws exempted the debtor, the Court considered 28 U.S.C. § 960(a). By its terms, section 960(a) applies to "officers and agents conducting any business under authority of a United States Court," and specifically permits the imposition of state and local taxes "applicable to such business to the same extent as if it were conducted by an individual or corporation." *Id.* Recognizing that section 960 expressly authorizes taxation only on *operating* businesses, courts had construed the provision, by negative implication, as denying the ability to tax the non-operating liquidation of assets in bankruptcy. Stating that "[a] court must proceed carefully when asked to recognize an exemption," *id*. at 851-52, the Court found that such inferential reasoning did not constitute a sufficiently "clear expression of an exemption from state taxation" to warrant overriding a state's authority to tax, *id*. at 852. The instant controversy is entirely different.

In this case, section 1146(a) clearly proscribes the imposition of stamp taxes and demonstrates Congress's intent to exempt a category of state taxation. Moreover, section 960(b) itself provides that, although an operating bankruptcy estate must generally pay accrued taxes, there is an exception if "payment of the tax is excused under a specific provision of title 11." 28 U.S.C. § 960(b)(2). Section 1146(a) is precisely such a specific provision.

Unlike the situation in *Sierra Summit*, there is no call in this case to "recognize" an exemption that exists only vaguely or appears only through inferential reasoning -- section 1146(a) plainly establishes the exemption. The only issue is whether to graft onto that exemption the temporal restriction that Florida proposes. For all the reasons discussed above, the Court should reject Florida's invitation.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

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