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 IN SUPPORT OF RESPONDENT FOR *AMICI CURIAE* PROFESSORS RICHARD AARON, JAGDEEP BHANDARI, SUSAN BLOCK-LIEB, INGRID HILLINGER, LOIS R. LUPICA, C. SCOTT PRYOR, AND KEITH SHARFMAN

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## INTEREST OF *AMICI CURIAE*[1]

The *Amici Curiae* are law professors who devote their careers to the study and teaching of bankruptcy law.[2] They are deeply interested in this case because the issue posed, which has divided the courts of appeals, arises in many of the thousands of cases for bankruptcy reorganization filed each year under chapter 11 of the Bankruptcy Code.

This brief is filed by the *Amici* to offer to the Court what assistance they can for interpreting the meaning and scope of the Bankruptcy Code's exemption for chapter 11 debtor estates from taxes imposed by States on sales of property of the estate made before the bankruptcy court has confirmed the debtor's plan of reorganization under § 1129 of the Bankruptcy Code.

The *Amici* file this brief in support of the decision of the Eleventh Circuit Court of Appeals

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[1] Pursuant to Rule 37 of the Rules of this Court, the *Amici* file this brief with the written consent of all parties, which has been filed with the Clerk of this Court. No counsel for a party has authored this brief in whole or in part. No person or entity including the *Amici* or their counsel made a monetary contribution for the preparation or submission of this brief; it has been prepared *pro bono*.

[2] The *Amici* are Richard Aaron, Professor of Law, S. J. Quinney College of Law, University of Utah; Jagdeep S. Bhandari, Professor of Law, Florida Coastal School of Law; Susan Block-Lieb, Professor of Law, Fordham Law School; Ingrid Hillinger, Professor of Law, Boston College School of Law; Lois R.Lupica, Professor of Law, University of Maine School of Law; C. Scott Pryor, Professor of Law, Regent University School of Law; and Keith Sharfman, Professor of Law, Marquette University Law School.

holding that such sales may be exempt from transfer taxes under some circumstances, but suggest a different basis for interpreting the exemption under § 1146(a) of the Bankruptcy Code than the one formulated by the Circuit Court.

## SUMMARY OF ARGUMENT

The Court of Appeals for the Eleventh Circuit ruled that § 1146(a) of the Bankruptcy Code should be interpreted to exempt from State transfer taxes some pre-confirmation sales of property made by a chapter 11 debtor during the course of its reorganization under the Bankruptcy Code. Under the Eleventh Circuit's test, a pre-confirmation sale will be exempt if it is found that the transfer was "necessary for the consummation of a confirmed plan of reorganization." The Circuit Court declined to follow the interpretation of those courts which read § 1146(a) as granting exemption only if the sale was provided for by a provision of the plan of reorganization confirmed by the bankruptcy court under § 1129 of the Bankruptcy Code.

The *Amici* take a somewhat different approach to the interpretation of the phrase, "plan confirmed," in § 1146(a). They agree with the Eleventh Circuit's holding that § 1146(a) contains no temporal requirement that the plan of reorganization be confirmed before a sale may be made. However, the *Amici* believe that a pre-confirmation sale should be within the exemption if it is a material element of a business plan formulated by the chapter 11 debtor for its reorganization,

provided that the basis of the plan ultimately confirmed by the bankruptcy court under § 1129 is substantially the same as that of the earlier business plan. Because of the substantial identity between the pre-confirmation business plan and the plan confirmed, the two plans should be viewed as having been merged together upon confirmation under § 1129, making the sale under the business plan a sale under the "plan confirmed" within the meaning of § 1146(a). Such interpretation of § 1146(a) is consistent with Congress' purpose and the needs of a modern system for bankruptcy reorganization.

In formulating their suggested test, the *Amici* rely on several approaches to statutory interpretation that have been used by this Court to interpret provisions of the Bankruptcy Code. Among other interpretive factors, this brief examines the context in which the exemption from State transfer taxes was first enacted, and its place in the current context of bankruptcy reorganization. Pre-confirmation sales are commonplace in today's chapter 11 cases, but were permissible under early law only if there was an emergency or another compelling reason justifying such a sale. The *Amici* suggest that if the current practice of making pre-confirmation sales part of a debtor's program for reorganization had been the practice decades ago when Congress brought the exemption into bankruptcy reorganization law, it would have intended such sales to be exempt if the basis for the reorganization under the plan confirmed is substantially the same as provided by the debtor's program for reorganization under its earlier business plan.

The *Amici* urge that § 1146(a) be read as written, without adding a temporal requirement to its language. Under an important established interpretive principle, the Court should not write a temporal requirement into that provision because, unlike so many other Bankruptcy Code provisions, Congress did not itself do so in § 1146(a).

## ARGUMENT

## I.

## A PRE-CONFIRMATION SALE IS EXEMPT FROM TRANSFER TAX UNDER BANKRUPTCY CODE § 1146(a) IF THE SALE IS A MATERIAL ELEMENT OF THE DEBTOR'S BUSINESS PLAN, AND THE BUSINESS PLAN CONSTITUTES THE BASIS OF THE DEBTOR'S PLAN OF REORGANIZATION LATER CONFIRMED BY THE BANKRUPTCY COURT UNDER § 1129

### A. If the Debtor's Business Plan Has Substantially the Same Terms As Those Implemented By the Debtor's Confirmed Plan, they Merge, and the Pre-Confirmation Sale Is a Sale Under The "Plan Confirmed" Within the Meaning of § 1146 (a)

In many cases under chapter 11 of the Bankruptcy Code, the debtor's road to rehabilitation begins with a written business plan to chart the way in which the debtor will reorganize its business operations and finances. Indeed,

planning for a chapter 11 reorganization often occurs even before the chapter 11 case has been filed, through negotiation of a pre-packaged plan of reorganization which is confirmed under § 1129 in a subsequently filed chapter 11 case. See, e.g., *In re Trans World Airlines, Inc.*, 2001 WL 1820326, at *2 (Bankr. D. Del. 2001)*; see also* Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69, 75-76 (2004). In restructuring their operations, most chapter 11 debtors plan pre-confirmation sales of at least some of their assets. Their business plans provide for the pre-confirmation sale of those assets which are not necessary to future operations, or where a sale is necessary to generate cash for operations or ultimate distribution to creditors. Pre-confirmation sales are often important steps in a debtor's program for reorganization.

Where a debtor's pre-confirmation sale of assets constitutes a material part of its business plan for its reorganization, and the plan of reorganization later confirmed carries out the terms of the business plan, the *Amici* suggest that such a sale be viewed as having occurred under the "plan confirmed" within the meaning of § 1146(a). Because the business plan merges with the "plan confirmed" in such circumstances, it follows that a sale under such a business plan constitutes a transfer under the "plan confirmed." As stated in *Western Auto Supply Co. v. Savage Arms, Inc.* (*In re Savage Industries, Inc.*), 43 F.3d 714, 720 n. 9 (1st Cir. 1994), ". . . the order approving the proposed sale . . . [was] for present purposes, the *functional equivalent* of an order confirming a conventional chapter 11 reorganization plan." (Italics added). The *Amici* thus urge that

§ 1146(a) be interpreted to exempt pre-confirmation sales that are a material element of the debtor's business plan, provided that the plan ultimately confirmed is structured on the basis of the debtor's business plan.

A meaningful reorganization requires the debtor to formulate a business plan that provides direction for the debtor's reorganization. Under § 1123(a)(5) of the Bankruptcy Code, a debtor's reorganization may be accomplished by an internal reorganization,[3] a transfer of property to other entities,[4] a merger or consolidation of the debtor with another entity,[5] or a sale of property.[6] Regardless of the form a debtor's business plan takes, a sale of property may be a material element of the business plan that provides the basis for the debtor's plan of reorganization, which is later confirmed by the bankruptcy court under § 1129. Where a pre-confirmation sale is such a material element, § 1146(a) should be interpreted to exempt it from a transfer tax.

A pre-confirmation sale of assets outside the ordinary course of business thus may be an important part of the program charted by the debtor for its reorganization in its chapter 11 case. Such a sale may be approved by a bankruptcy court only after notice to all creditors and an opportunity for a hearing has been given,[7] and

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[3] Bankruptcy Code § 1123(a)(5)(A).

[4] Bankruptcy Code § 1123(a)(5)(B).

[5] Bankruptcy Code § 1123(a)(5)(C).

[6] Bankruptcy Code § 1123(a)(5)(D).

[7] Bankruptcy Code § 363(b).

only if there is a good business reason for the sale. *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983). It has been held that a good business reason for a pre-confirmation sale exists if the transfer is necessary to the debtor's program for reorganization. In that connection, in *In re Chateaugay Corp.*, 973 F.2d 141, 143 and 144 (2d Cir. 1992), the court noted the finding below that the sale of a wholly owned subsidiary of the debtor was "a necessary step toward the confirmation of one [or] more Plans and [the debtors'] emergence from bankruptcy."

Another court likewise authorized the sale of a major asset because it would bring the debtor closer to reorganization. Thus, in *Matter of Baldwin United Corp.*, 43 B.R. 888, 906 (Bankr. S. D. Ohio 1984), the court observed that ". . . the removal of this asset and its attendant problems should have the effect of clearing away substantial obstacles to reorganization." Similarly, in *In re Trans World Airlines, Inc.*, 2001 WL 1820326, at *2-3 and *14 (Bankr. D. Del. Apr. 2, 2001), the court recognized that a sale of substantially all of an airline debtor's assets was an essential step in its business plan to merge with another airline, as the only means for its feasible reorganization, stating that the "Sale Order implements the public interest that favors an organized rehabilitation (albeit here as only a part of a larger viable enterprise) of a financially distressed corporation which lies at the core of chapter 11." A pre-confirmation sale of assets may thus be a material element of the debtor's business plan, which charts the way for its reorganization and ultimate confirmation by the bankruptcy court under

§ 1129 of the Bankruptcy Code. Section 1146(a) should be interpreted to exempt a sale that is a material element of the debtor's business plan that merges with the confirmed plan.

### B. Historical Overview Of § 363(b)'s Authorization of Pre-Confirmation Sales

The standard for allowing pre-confirmation sales other than in the ordinary course of business has evolved over time. Initially, courts limited pre-confirmation sales to emergencies and other compelling circumstances. *In re Lionel Corp.*, 722 F.2d at 1070-1071. After the Bankruptcy Code was enacted in 1978, that restrictive standard for sales was replaced by the "business purpose" test, which became the test for authorizing non-ordinary course sales under § 363(b) of the Bankruptcy Code. *Id.*

In administering the Bankruptcy Code, courts recognize the need for some flexibility in the interpretation of its provisions in order to accomplish its objectives. "[I]f a bankruptcy judge is to supervise a business reorganization case successfully under the Code, then . . . some play for the operation of both § 363(b) and Chapter 11 must be allowed for." *Id.* at 1071, paraphrasing Justice Holmes' statement in *Missouri, Kansas, and Texas Ry. Co. v. May*, 194 U.S. 267, 270 (1904) ("some play must be allowed for the joints of the machine. . . ."). This does not mean that a bankruptcy court has *carte blanche* to order § 363(b) sales. Under § 363(b), such a proposed sale must be to accomplish a good business rea-

son if it is to be authorized by the bankruptcy court. As the *Lionel* court stated,

> Resolving the apparent conflict between Chapter 11 and § 363(b) does not require an all or nothing approach. Every sale under § 363(b) does not automatically short-circuit or side-step Chapter 11; nor are these statutory provisions to be read as mutually exclusive.

722 F.2d at 1071. When the Bankruptcy Code's sale and reorganization provisions are read together, a sale that is an integral part of a chapter 11 debtor's program for reorganization is within §1146(a)'s exemption.

A debtor should not have to wait until the plan confirmation process has commenced for its reorganization to progress. Indeed, the terms for a debtor's reorganization should be formulated long before confirmation of its plan, and are generally structured in its business plan written much earlier in its chapter 11 case, if not before it has been filed. Nothing in the text of § 1146(a) or its legislative history indicates that Congress intended that debtors were to be required to wait until confirmation of a plan of reorganization to sell assets in order for a sale to be exempt from transfer tax.

### C. Section 1146(a)'s Text Does Not Contain a Temporal Requirement, and Congress Did Not Intend One

The legislative history of § 1146(a) indicates that it was modeled upon § 267 of the 1938 Bankruptcy Act. *See* H.R. Rep. No. 595, 95th

Cong., 1st Sess. 421 (1977). Former § 267 exempted from stamp taxes "the making or delivery of instruments of transfer under any plan confirmed." In turn, § 267 was derived from its direct predecessor, the Bankruptcy Act of 1934, which, in § 77(B)(f), used the language,"to make effective any plan," as the basis for such exemption. Where the basis for the debtor's reorganization is substantially the same under its business plan and confirmed plan, a sale under the business plan is one of the elements that makes the confirmed plan effective. Section 1146(a) should thus be interpreted to exempt such a sale.

Analogous case law supports interpreting § 1146(a) to exempt pre-confirmation sales that satisfy the test suggested by the *Amici*. This Court, in *Martin v. Hadix*, 527 U.S. 343 (1999), declined to infer a temporal provision where Congress had not expressly mandated one. *Id.* at 354. There, this Court did not allow fee awards to be capped retroactively on claims pending at the time of the enactment of the statute at issue. It explained that if Congress had desired such a result, "it could have used language more obviously targeted to addressing the temporal reach of that section." *Id. United States v. Wright*, 48 F.3d 254 (7th Cir. 1995), likewise held that a temporal element should not be injected into a statute if Congress has not written one into the provision. In that case, the Seventh Circuit explicitly stated that if Congress wanted to create a temporal restriction in the law, it would have done so in express terms. *Id.* at 255 and 256. Other Circuit Courts have similarly ruled that a temporal element should not be read into

a statute. *United States v. Sullivan*, 219 Fed. Appx. 414, 417 (6th Cir. 2007); *United States v. Presley,* 52 F.3d 64, 69-70 (4th Cir.), *cert denied*, 516 U.S. 891 (1995).

Had Congress intended there to be a temporal requirement in § 1146(a), it could have added one to § 1146(a) in the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act, when it revisited many of the business-related provisions of the Bankruptcy Code enacted in 1978. Pub. L. No. 109-8, 119 Stat. 23 (2005). Indeed, Congress did focus on the previously enacted provisions of § 1146 when writing those 2005 amendments, and in fact amended the provisions of § 1146 then in force, but without injecting a temporal requirement into the exemption.

Unlike several other provisions of the Bankruptcy Code that expressly contain a temporal requirement, § 1146(a) does not so provide. As stated by this Court in *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, reh'g denied, 512 U.S. 1247 (1994), in regard to another provision of the Bankruptcy Code: "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." At the same Term, this Court likewise used that basis for statutory construction in *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (*quoting Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). *See also, Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("Congress 'says in a statute what it means and means in a statute what it says there.' ") (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)); *Nat'l Fed'n of*

*Fed. Employees, Local 1309 v. Department of Interio*r, 526 U.S. 86, 104 (1999).

Unlike many other provisions of the Bankruptcy Code that turn on a temporal requirement, none was written into § 1146(a). Moreover, if Congress had intended a temporal requirement it could be expected that it would have at least been mentioned in the legislative history. *Dewsnup v. Timm*, 502 U.S. 410, 419-420 (1992).

As noted above, other sections of the Bankruptcy Code do contain temporal provisions, such as the 120 day plan-filing exclusivity period in § 1121(d) and the lease rejection provisions in § 365(d)(4). When Congress intends that a statute have a temporal requirement, it makes its intention clear by including explicit language in the provision. For example, it did so in § 502's provision for determining claims in bankruptcy, which states that the amount of every claim must be determined "as of the date of the filing of the petition." The connection between time and claims does not end there. Claims are divided by the Bankruptcy Code into two categories, depending on whether they arise before or after the commencement of the bankruptcy case. If a claim arises after commencement of a case, then it will be afforded administrative priority of distribution if it benefited the estate, whereas it will not have priority if it arose pre-petition. Bankruptcy Code §§ 503(b) and 507. Likewise, a temporal requirement is explicitly set forth in the automatic stay provisions of § 362(a)'s clauses (1), (2), (5), (6), and (8).

If Congress intended to include a temporal requirement in § 1146(a), "it clearly knew how to

draft language to that effect." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 302 (2002). Absent such language, § 1146(a) should not be interpreted as having a temporal requirement.

### D. Analogous Contract and Tax Law Support the *Amici's* Proposed Test

Generally, under state contract law, multiple agreements may be read as one if the parties so intended. *Arciniaga v. General Motors Corp.*, 460 F.3d 231, 237 (2d Cir.), *cert. denied 127 S. Ct. 838 (2006)*; *Jackson v. Cintas Corp.*, 425 F.3d 1313, 1317 (11th Cir. 2005) (whether contract is entire or severable is determined by parties' intent, which may be expressed directly, through severability clause, or indirectly). The issue typically is whether agreements belong to one contract or two different contracts.[8] Two contracts are treated as one when the terms, nature, and purpose are common to each other or they are otherwise interdependent.[9] By analogy, in the context of a chapter 11 reorganization, pre-confirmation sales may be a material element of the debtor's plan for reorganization, and such plan may be the basis of the formal plan of reorgani-

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[8] "A divisible contract is one where the performance by each party is divided into two or more parts, and the performance of each part by one party is the agreed exchange for a corresponding part by the other party." RESTATEMENT (SECOND) OF CONTRACTS § 240 (1981). An indivisible or entire contract is one contract when the parties intend that the terms, nature, purpose, and consideration are common to each other and interdependent. Joseph D. Calamari & Joseph M. Perillo, THE LAW OF CONTRACTS § 478, n. 76 (3d ed. 1987).

[9] *Id.*

zation that is later confirmed. Section 1146(a) should be interpreted to exempt a pre-confirmation sale that is a material element of the debtor's reorganization program set forth in its business plan that is effectuated by its confirmed plan, because both plans merge, in the same way that two agreements merge into one contract.

Moreover, where the debtor's business plan under which it makes a sale is part of the basis of its confirmed plan, both plans should be viewed as parts of one unit, just as the tax law treats separate steps taken toward a single goal as part of a single overall transaction. In tax law, this "step transaction" doctrine treats a series of interrelated transactions as one single transaction, instead of separate steps, regardless of the resulting tax consequences. *Comm'r v. Clark,* 489 U.S. 726, 738 (1989). The purpose of the "step transaction" doctrine is to assure that the tax consequences of a transaction turn on the substance of that transaction and not its form. *Greene v. U.S.,* 13 F.3d 577, 581 (2d Cir. 1994), citing *Comm'r v. Court Holding Co.*, 324 US 331 (1945); see also, *King Enterprises, Inc. v. U.S.*, 418 F.2d 511, 517 (Ct. Cl. 1969) (The "central purpose of the step transaction doctrine [is] to assure that tax consequences turn on the substance of a transaction rather than on its form.").

Under this doctrine, supposed separate transactions will be treated as merged into a single transaction when it is apparent that the separate transactions were entered into in order to accomplish the result of a single plan. *Associated Wholesale Grocers, Inc. v. U.S.*, 927 F.2d 1517, 1523 (10th Cir. 1991); *Security Indus. Ins. Co. v.*

*U.S.*, 702 F.2d 1234, 1246 (5th Cir. 1983); *King Enterprises, Inc. v. U.S.*, 418 F.2d 511, 517 (1969). Further, courts commonly apply the "end results" test to determine whether the "step transaction" doctrine applies in a given case. *Associated Wholesale Grocers*, 927 F.2d at 1522-23. Under this test, seemingly separate transactions will be viewed as a single transaction when it appears that they were steps of a single transaction designed to achieve a particular ultimate result. *Id.*

In the chapter 11 context, the "business plan" and the "plan confirmed" may be inextricably inter-related pieces of a single plan for achieving the debtor's reorganization. Where that is so, a pre-confirmation sale that is material under the business plan should be exempt from transfer tax imposed by § 1146(a) because it is essentially an integral step in the program designed to achieve the debtor's reorganization under the "plan confirmed." The substance of the transaction should not be ignored in the absence of clear language in § 1146(a) requiring such a result.

## II.

## ESTABLISHED MEANS FOR STATUTORY INTERPRETATION CALL FOR INTERPRETING § 1146(a) AS EXEMPTING TRANSFERS UNDER THE AMICI'S PROPOSED TEST

### A. Section 1146(a) Should Be Construed In the Context of Present Chapter 11 Practice

In recent years, pre-confirmation sales have become increasingly more prevalent in chapter 11 cases. See Harvey R. Miller and Shai Y. Waisman, *Is Chapter 11 Bankrupt?*, 47 Boston College L. Rev. 129, 156 (2005) (citing several cases which involved asset sales). Today, courts routinely allow § 363(b) to be used to effect pre-confirmation sales of many, if not substantially all, of the debtor's assets in chapter 11 cases. *Id*. A pre-confirmation sale may have a significant role in accomplishing the debtor's reorganization under chapter 11. Where that is so, § 1146(a) should be interpreted to exempt it from transfer tax.

The ubiquity of § 363(b) sales is an immense change in circumstances that was not anticipated by Congress at the time it brought a transfer tax exemption provision into bankruptcy reorganization law 74 years ago when it enacted the Bankruptcy Act of 1934. In those earlier times, pre-confirmation sales were limited to circumstances involving a compelling need for a debtor to make a sale before confirmation, such as the

wasting nature of an asset.[10] In the very recent context of chapter 11 cases, however, pre-confirmation sales under § 363(b) are no longer restricted to such limited circumstances and are made in many chapter 11 cases as a matter of good business judgment.

If pre-confirmation sales had been commonly made when Congress brought such exemption into the bankruptcy reorganization law, it would have intended, by the provision it enacted, to exempt such sales because they were in furtherance of its original theory to exempt those sales that "make effective any plan." Bankruptcy Act of 1934. See discussion in Section I.C *supra*.

The current prevalent use of pre-confirmation sales of assets as an important reorganizational tool is the context in which § 1146(a) should be interpreted. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991); *United States v. Sanchez*, 511 U.S. 350, 357 (1994); *Ali v. Federal Bureau of Prisons,* __ U.S. __ 2008 WL 169359 at *11 (2008) (dissenting opinion, per Kennedy, J.). Section 1146(a) should be interpreted in this current context, especially in light of chapter 11's flexibility.[11] When there have been dramatic changes

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[10] See generally *In re Lionel Corp.*, 722 F.2d at 1066-1069; *In re V. Loewer's Gambrinus Brewery Co.*, 141 F.2d 747, 748-749 (2d Cir. 1944) (Court approved sale of debtor's brewery as it was a rapidly wasting asset and perishable, stating: "[T]he disposition of the property could not be longer delayed without peril to all interests.").

[11] James H.M. Sprayregen, P.C., Jonathan Friedland and Roger J. Higgins, *Chapter 11: Not Perfect, But Better Than the Alternatives*, 14 J. BANKR. L. & PRAC. 6 ART. 1, 11 (2005) ("Chapter 11's inherent flexibility has fostered new means of

and a statute is ambiguous, courts should look beyond the statute's original context and view it in its current circumstances. "In cases of changed circumstances, statutory construction appears informed by an effort to ensure integrity and coherence in the law by 'updating' obsolete statutes—or, to put it less contentiously and probably more accurately, by interpreting them in a way that takes account of changing conditions." Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 493 (1989).

Moreover, this Court has observed that construction of Bankruptcy Code provisions is a holistic endeavor. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme. . . ."). Accord: *Dodd v. United States*, 545 U.S. 353, 370 n.10 (2005) ("Our cases make clear that when interpreting a particular section of a statute, we look to the entire statutory scheme rather than simply examining the text at issue."); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.,* 484 U.S. at 371.

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preserving going-concern value in complex corporate transactions."); Harvey R. Miller and Shai Y. Waisman, *Is Chapter 11 Bankrupt?*, 47 Boston College L. Rev. 129, 146 (2005) ("From the outset, the Bankruptcy Code was understood to be a flexible document, with its provisions to be shaped and interpreted to meet the needs of the Congressional policy of furthering rehabilitation. Early case law illustrates the manner in which policy considerations behind the 1978 Act encouraged a pragmatic view and application of the Bankruptcy Code.").

Section 1146(a)'s context is important because it illuminates its meaning. Section 1146(a) contains a phrase, "plan confirmed," which is rendered ambiguous because current chapter 11 cases regularly involve pre-confirmation sales, many of which are integral to the debtor's ultimate reorganization. In the interpretation of a statute, when circumstances have significantly changed, its meaning should not be confined to a literal reading that Congress would not have wanted had the new circumstances existed when the provision was written. *Perry v. Commerce Loan Co.*, 383 U.S. 392, 397-400, reh'g denied, 384 U.S. 934 (1966) (reviewing Chapter XIII of the Bankruptcy Act of 1938).

The increase in the usage of pre-confirmation sales in chapter 11 cases, along with the transformation in the bankruptcy process as a whole, is a change in circumstances upon which Congress could not have focused when originally drafting the transfer tax exemption decades ago. Had such circumstances existed when Congress was considering whether to bring the exemption from transfer taxes into the law, it surely would have intended such pre-confirmation sales to be exempt.

### B. Interpreting § 1146(a) In Light Of The Pre-Confirmation Sale Process

Debtors favor pre-confirmation sales rather than waiting for confirmation, because early sales are often an important means to advance its business plan for reorganization, whereas its reorganization efforts could be beset by uncertainty and greater costs if it were to await the plan confirmation process before selling assets. Such delay would create uncertainty as to the

ultimate selling price of assets to be sold, and also risk the loss of potential purchasers and the best price.

Section 1146(a) should thus be interpreted broadly to exempt pre-confirmation sales that are part of a debtor's business plan, as a means of maximizing the value of the estate for its creditors as part of a modern, efficient and effective system for bankruptcy reorganization.

## CONCLUSION

For the foregoing reasons, the order appealed from should be affirmed.

Respectfully Submitted,

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