No. 07-312

In the Supreme Court of the United States

STATE OF FLORIDA DEPARTMENT OF REVENUE,

PETITIONER,

v.

PICCADILLY CAFETERIAS, INC.,

RESPONDENT.

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

BRIEF FOR THE STATES OF ILLINOIS, ARKANSAS, COLORADO, HAWAII, IOWA, KANSAS, MAINE, MASSACHUSETTS, MICHIGAN, NEVADA, NEW HAMPSHIRE, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, VERMONT, WASHINGTON, WISCONSIN, WYOMING, THE COMMONWEALTH OF PUERTO RICO, THE CITY OF CHICAGO, THE CITY & COUNTY OF DENVER, AND THE CITY & COUNTY OF SAN FRANCISCO, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Constitutional Provisions:

Statutes:

Miscellaneous:

INTEREST OF THE *AMICI CURIAE*

At issue in this case is whether the tax exemption found in the Bankruptcy Code at 11 U.S.C. § 1146(c)[1] applies to property sales undertaken before a plan of reorganization is confirmed, or whether the exemption is limited to transfers made pursuant to a confirmed plan. This is an issue of critical importance to state, county and municipal taxing authorities. Section 1146(c) exempts principally the real estate transfer tax,[2] and thirty seven states—at the state, county and/or municipal level—impose such a tax on the recording of deeds, mortgages and/or lease assignments.[3] While this tax is usually a small percentage of the consideration paid, it accounts for billions of dollars in revenue to state and local governments nationwide.[4]

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[1] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 719(b)(3)(B), 119 Stat. 23, deleted former sub-sections (a) and (b) of § 1146, and former subsection (c) is now sub-section (a). Because this bankruptcy case pre-dates the change in the statute, *amici* will refer to the applicable section as § 1146(c).

[2] Debtors' counsel regularly file sale motions seeking to extend the exemption to cover sales and use taxes, UCC filing fees, gains taxes and other taxes and fees. *See* Karen Cordry, *The Incredible Expanding Section 1146(c)*, 21 Am. Bank. Inst. J. 10 (Dec.-Jan. 2003). To date, there are no reported decisions extending the exemption in this manner.

[3] A list of these states is available at www.realtor.org/smart_growth.nsf/docfiles/TransferTaxRates(8-05).pdf.

[4] For example, transfer tax collections for fiscal year 2006 for the State of Washington were $1.010 billion (see dor.wa.gov/docs/reports/2007/Tax_Reference_2007/50reet.pdf at p. 202), for the State of Florida were $4.105 billion (see

Prior to the Eleventh Circuit's decision in this case, only the Third and Fourth Circuits had addressed whether § 1146(c) exempts taxes on pre-confirmation transfers, and both of these courts rejected the idea. *See In re Hechinger Inv. Co. of Delaware, Inc.*, 335 F.3d 243, 257 (3d Cir. 2003); *In re NVR, LP,* 189 F.3d 442, 456-58 (4th Cir. 1999). Elsewhere, the lower courts have split. Compare *In re Beulah Church of God in Jesus Christ, Inc.*, 316 B.R. 41 (Bankr. S.D.N.Y. 2004), *In re Linc Capital, Inc.*, 280 B.R. 640 (Bankr. N.D. Ill. 2002), *In re Permar Provisions, Inc.*, 79 B.R. 530 (Bankr. E.D.N.Y. 1987), and *In re Smoss Enters. Corp.*, 54 B.R. 950 (E.D.N.Y. 1985) (all declaring some pre-confirmation sales to be tax exempt), with *States of Illinois & Washington v. Nat'l Steel Corp.*, 2003 WL 22089881, 50 Collier Bankr. Cas.2d 1409 (N.D. Ill. Sept. 9, 2003) (limiting exemption to sales made pursuant to a confirmed plan). The circuit split that the Eleventh Circuit has created, and the divide among lower courts, result in the uneven application of the Bankruptcy Code and state and local tax laws. This case provides an ideal vehicle for resolving this split in authority on a question of national importance.

STATEMENT

Factual Background and Proceedings Below

On October 28, 2003, Piccadilly Cafeterias, Inc. ("Piccadilly") entered into an asset purchase agreement with

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dor.myflorida.com/dor/tables/f2fy2006.xls), for the State of New York were $938.144 million (see www.tax.state.ny.us/pdf/taxnews/2006_ann_rep.pdf at p. 22), and for the City of New York general fund were $1.352 billion in mortgage recording taxes and $1.305 billion in conveyance of real property taxes (see www.comptroller.nyc.gov/bureaus/acc/cafr-pdf/cafr2006.pdf at p. 260).

Piccadilly Acquisition Corporation, in which the latter agreed to acquire Piccadilly's assets (chiefly property) in exchange for $54 million. Pet. App. 2a. The next day, Piccadilly filed a Chapter 11 bankruptcy petition and a motion under § 363 of the Bankruptcy Code for an order authorizing an auction of Piccadilly's assets, using the offer of Piccadilly Acquisition Corporation as the opening minimum bid. *Id.* at 2a, 13a. Piccadilly's motion also asked the bankruptcy court to declare the resulting sale exempt from stamp taxes under § 1146(c). *Id.*

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

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

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

The district court, and then the Eleventh Circuit, affirmed. *Id.* at 3a-4a, 9a. The court of appeals rejected the argument that § 1146(c) exempts only post-confirmation sales, holding that even pre-confirmation transactions take place "under a plan confirmed" whenever they are "necessary to the consummation of a confirmed plan." *Id*. at 9a.

Statutory Background

There has long been federal legislation exempting from taxation the issuance of securities or the making or delivery of instruments of transfer under a confirmed bankruptcy plan. The first such law was the Bankruptcy Act of 1934, which exempted from federal transfer taxes "[t]he issuance, transfers, or exchanges of securities or making or delivery of conveyances to make effective any plan of reorganization confirmed under the provisions of this section." 48 Stat. 911, 919 (1934). In 1938, the Chandler Act replaced this provision with one that extended the exemption to both state and federal taxes. See 52 Stat. 840, 903-04 (1938) ("The issuance, transfer, or exchange of securities, or the making or delivery of instruments of transfer under a plan confirmed under this chapter, shall be exempt from any stamp taxes now or hereafter imposed under the laws of the United States or any State."). Meanwhile, the Internal Revenue Code of 1954 included a parallel exemption from federal documentary stamp taxes on the exchange of securities or the making, delivery or filing of conveyances in corporate and railroad reorganizations confirmed under the Bankruptcy Act or approved in equity receivership proceedings, so long as the transfers occurred within five years of the confirmation or approval. 26 U.S.C. § 4382(b) (1972) (repealed).

While there are no reported decisions construing these exemptions in the Chandler Act and the Internal Revenue Code, the leading bankruptcy treatise proclaimed that they "do not extend any exemption to transactions (that is, transfers,

issuance, etc.) *which occur prior to confirmation of the plan and which are mere preparatory steps*." 6A Collier on Bankruptcy ¶ 15.08, at 840 (14th ed. 1977) (emphasis added).

When Congress enacted the Bankruptcy Reform Act of 1978, the stamp tax exemption provisions were included in § 1146(c), which was modeled after the exemption in the Bankruptcy Act. *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 421 (1977). Section 1146(c) now 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(c). It is the language limiting the tax exemption to transfers "under a plan confirmed" that forms the basis of the instant dispute and is the subject of a developed split among the federal courts.

REASONS FOR GRANTING THE WRIT

The question that this case presents—at the intersection of bankruptcy and tax law—is of paramount importance to States and other taxing authorities. Florida's certiorari petition thoroughly describes the circuit and lower court split implicated by the Eleventh Circuit's holding that sales consummated before plan confirmation may be sales made "under a plan" for purposes of § 1146(c)'s tax exemption. The uneven application of bankruptcy law, with its profound implications for state and local taxing bodies, counsels powerfully for Supreme Court review. But the need for uniformity is particularly acute here, for the Bankruptcy Code affords debtors substantial latitude in selecting a venue for bankruptcy filing, and the conflict deepened by the Eleventh Circuit's decision opens the door wide to strategic forum shopping.

Beyond this, the question over which the federal courts are divided—a question implicated squarely by the Eleventh Circuit's decision here—is of significant practical importance,

as parties increasingly use pre-plan Chapter 11 proceedings as a forum for asset sales. The rule adopted by the Eleventh Circuit in this case facilitates abuse by entities who wish to use the Bankruptcy Code to avoid tax liability on asset sales.

Finally, the court of appeals' holding in this case cannot be reconciled with § 1146(c)'s literal meaning and statutory context, misapplies the Second Circuit's seminal decision in *In re Jacoby-Bender, Inc.,* 758 F.2d 840 (2d Cir. 1985), and runs afoul of this Court's repeated admonition that tax exemptions generally, and federal exemptions from state taxes specifically, must be construed narrowly. For all of these reasons, this Court should grant the petition for certiorari and reverse the judgment of the Eleventh Circuit.

I. THE ELEVENTH CIRCUIT'S DECISION ENCOURAGES FORUM SHOPPING.

In its petition, Florida thoroughly discusses the circuit split created by the Eleventh Circuit's decision. If this split is not resolved, it can be expected to encourage forum shopping in those cases where parties anticipate the sale of significant amounts of real estate. Indeed, the risk of forum shopping—present whenever the federal courts are divided, as they are here—is particularly acute in the bankruptcy context. Under the venue provisions of the Bankruptcy Code, a debtor may file its case in any of several districts—the district of its domicile, of its residence, of its principal place of business, or of its principal assets. In addition, a debtor may file in any district in which an affiliate, general partner or partnership files for bankruptcy. See 28 U.S.C. § 1408. Beyond these options, § 1408(2) also allows affiliated entities to file in any jurisdiction where any one of them is in bankruptcy proceedings. This permits a forum shopper to incorporate an affiliate in a jurisdiction where the former ultimately wants to file, put the affiliate in bankruptcy, and then file itself in the hand-picked jurisdiction.

With the decision in this case, a debtor planning to sell real estate has an incentive to file for bankruptcy in the Eleventh Circuit, where it may qualify for the exemption at the very inception of the case, prior even to filing a plan. In the Eleventh Circuit, the pre-plan sale will enjoy the more liberal tax exemption, even if the property involved is located elsewhere in the country. Indeed, that would be so even if the property were located in the Third or Fourth Circuits, where the courts of appeals have refused to extend the § 1146(c) exemption to pre-confirmation sales.

This case presents an ideal vehicle for resolving the circuit and lower court split on this critical question of bankruptcy and tax law, to ensure nationwide uniformity of bankruptcy rules (as the Constitution demands, U.S. Const. art. I, § 8, cl. 4), and to eliminate what is now a powerful incentive to forum shop.

II. THE QUESTION PRESENTED IS OF SIGNIFICANT PRACTICAL IMPORTANCE, AS MORE AND MORE COMPANIES SEEK TO USE CHAPTER 11 TO SELL ASSETS BEFORE PLAN CONFIRMATION.

Recent trends in the use of Chapter 11 make the tax status of pre-confirmation sales of critical and growing importance. While Chapter 11 is the reorganization chapter of the Bankruptcy Code, it increasingly serves as a platform for selling assets in bulk, after which the debtor may seek to confirm a liquidation plan, or the case may be dismissed or converted to a proceeding under Chapter 7. Indeed, "[c]orporate reorganizations have all but disappeared. Giant corporations make headlines when they file for Chapter 11, but they are no longer using it to rescue a firm from imminent failure. Many use Chapter 11 merely to sell their assets and divide up the proceeds." Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 Stan. L. Rev. 751, 751 (2002); see also Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 Stan. L. Rev. 673, 674 (2003) (stating that in 84%

of Chapter 11 cases filed in 2002, the investors had a deal in hand when the case was filed or used the case to sell assets).

Experts have acknowledged this trend and have concluded that:

> if restructuring the business as a going-concern is no longer the primary focus of a chapter 11, then, instead of determining how to restructure and reorganize the business, one must focus on the process by which assets are sold and liquidated through a chapter 11 to maximize their value to creditors. Thus, the primary focus must be on Sections 363 [use, sale and lease of property] and 365 [executory contracts and unexpired leases] of the Bankruptcy Code.

Hon. J. Vincent Aug *et al.*, *The Plan of Reorganization: A Thing of the Past?*, 13 J. Bankr. L. & Prac. 4 Art. 1 (2004).

This case illustrates the trend. Piccadilly negotiated and executed an agreement for the sale of nearly all of its assets to Piccadilly Acquisition Corporation with the understanding that Piccadilly would file for bankruptcy and the sale would take place through a court-approved process. The next day, Piccadilly filed for bankruptcy and sought both authority under § 363 to sell its assets outside the ordinary course of business pursuant to a court-approved auction process, and a declaration that the sale would be tax exempt under § 1146(c). The auction proceeded, and the sale closed in March. Only later did Piccadilly even file its proposed liquidation plan, and it was not until October 2004, seven months later, that the court actually confirmed the plan.

The practice of using Chapter 11 for the bulk sale of assets outside of a confirmed plan has become commonplace. By conducting the asset sale in the context of a bankruptcy, debtors receive the benefit of the automatic stay, and they are able to

sell their assets using a court-approved auction process. Moreover, by selling their assets pursuant to § 363, rather than a confirmed liquidation plan, debtors avoid (or at least forestall) the need to make certain disclosures necessary for the approval of a disclosure statement, to submit the plan to a creditor vote, or to satisfy plan confirmation criteria under § 1129. Indeed, a debtor may obtain court permission to sell assets under § 363 merely by showing that the sale is within the debtor's sound business judgment. See *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2nd Cir. 1983).

The process also allows purchasers to obtain assets free and clear of liens, claims and encumbrances, including successor liability claims, and to obtain other protections without having to await plan confirmation. See 11 U.S.C. § 363(f) and (m); *In re Trans World Airlines, Inc.*, 322 F.3d 283, 293 (3d Cir. 2003).[5] In addition, if the sale order grants the § 1146(c) exemption, both the debtor and the non-debtor purchaser are exempt, even where state or local law imposes the tax on the purchaser rather than the debtor. See *Matter of CCA Partnership*, 70 B.R. 696 (Bankr. Del.), aff'd, 72 B.R. 765 (D. Del.), aff'd, 833 F.2d 303 (3d Cir. 1987) (table).[6]

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[5] A checklist of suggested provisions for use in a judicial sale order, intended to provide the purchaser with the maximum possible protections, appears as an exhibit to *The Plan of Reorganization: A Thing of the Past*, *supra*. Included is a recommended provision declaring the sale exempt from taxes under § 1146(c).

[6] Guided by the same broad construction of § 1146(c), the Eleventh Circuit has also applied the exemption to non-debtor property, where a lender would not provide financing for the debtor without entering into a deal with the non-debtor, as well. See *In re T.H. Orlando Ltd.*, 391 F.3d 1287, 1289-90, 1295 (11th Cir. 2004).

In short, the trend is to use Chapter 11 to sell assets under § 363. Accordingly, the tax treatment of pre-confirmation sales has become of substantial and growing importance to state and local tax authorities nationwide.

III. THE ELEVENTH CIRCUIT'S DECISION CANNOT BE SQUARED WITH THE PLAIN MEANING OF § 1146(C) OR DECISIONS OF THIS COURT.

Finally, the Eleventh Circuit's decision fails on its merits. The court determined that § 1146(c) is ambiguous and that transfers are made "under a plan confirmed," regardless of when the transfers took place, so long as the transfer is deemed "necessary to the consummation of a confirmed plan." Pet. App. 9a. In its petition, Florida ably explains why the plain meaning analyses of the Third Circuit in *Hechinger* and the Fourth Circuit in *NVR* are better reasoned and should be followed. A few additional points bear mention.

First, the Eleventh Circuit determined that, because other Bankruptcy Code provisions include language specifically limiting their application to certain stages of the bankruptcy process, Congress must not have intended to place any temporal limits on transfers eligible for the § 1146(c) exemption. *Id.* But the court overlooked a critical fact. Section 1146 falls within Subchapter III of Chapter 11 (covering §§ 1141-1146), and that subchapter is entitled "Postconfirmation Matters," a clear indication of Congress' intent to limit the exemption to post-confirmation transfers.

Second, while acknowledging the rule that tax exemptions must be narrowly construed, the Eleventh Circuit nevertheless concluded that a narrow construction here would interfere with § 1146(c)'s objectives and with the remedial goal of the Bankruptcy Code as a whole. Pet. App. 8a. This analysis is flawed. The Eleventh Circuit, and other courts that have found that a narrow construction of § 1146(c) would defeat the

purpose of the exemption, rely on language from the Second Circuit's decision in *Jacoby-Bender*. See *id.* at 6a-7a; see also *In re Beulah Church of God in Jesus Christ, Inc.*, 316 B.R. at 48; *In re Webster Classic Auctions, Inc.*, 318 B.R. 216, 218 (Bankr. M.D. Fla. 2004). But *Jacoby-Bender* involved a property sale pursuant to an already confirmed Chapter 11 plan, which contemplated that the sale would fund payments to creditors. Moreover, the passage in that decision describing § 1146(c)'s "apparent purpose"—"to facilitate reorganizations through giving tax relief," 758 F.2d at 841—is entirely consistent with the Third and Fourth Circuit's more limited, plain language interpretation. Congress could (and did) balance the advantages of a tax break for debtor reorganization with the injury to state and local taxing authorities from the loss of revenue. The balance that § 1146(c) strikes is a sensible one: tax benefits are available, but only after the debtor achieves a confirmed plan, with all of the substantive and procedural protections that the confirmation process ensures for creditors.[7]

Third, in place of a plain reading of § 1146(c), which limits the exemption to post-plan transactions, the Eleventh Circuit's standard lacks any textual support. In an effort to assign some meaning to the statutory phrase "under a plan confirmed," the Eleventh Circuit requires a transfer to be "necessary" or "essential" to plan confirmation to receive the tax exemption. But this is a distinction—between necessary or essential, on the one hand, and unnecessary or nonessential, on the other—without any mooring in the Code. And this rule not only confers a tax benefit in cases where § 1146(c)'s plain language would not (as it did in this case), but it likely withholds benefits from some who would receive it under the

[7] Sections 1121-1129 of the Bankruptcy Code set out the requirements for proposing a plan, making adequate disclosures, soliciting votes, and ultimately confirming a plan.

statute's literal terms. The statute exempts transfers conducted "under a plan confirmed," regardless of their importance to the plan as a whole, while the Eleventh Circuit would seem to exclude incidental or less important sales, whether they occur before or after confirmation.

Finally, the Eleventh Circuit's liberal construction of the § 1146(c) exemption is difficult to reconcile with prior decisions of this Court, which not only require tax exemptions generally to be narrowly construed, see *United States v. Centennial Savs. Bank FSB*, 499 U.S. 573, 583 (1991), but strictly read federal laws that interfere with a state's tax scheme, specifically. See *Nat'l Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995). Furthermore, this Court has long held in the bankruptcy context that if Congress intended to exempt a debtor or trustee from applicable state or local taxes, "[t]he intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." *Swartz v. Hammer*, 194 U.S. 441, 442 (1904) (no exemption from state and local property taxes), see also *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 853-54 (1989) (no exemption from sales and use taxes). Nothing on the face of § 1146(c) evinces such a clear, congressional purpose. If Congress intended to extend § 1146(c) to pre-confirmation sales that are essential to a later plan, it would be expected to have said so expressly.

For these reasons, and those set forth in the certiorari petition, the Eleventh Circuit's decision not only deepens a split within the federal courts over an issue of critical importance, but the decision is fundamentally flawed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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