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 IN OPPOSITION

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QUESTION PRESENTED

Whether a State may apply a stamp or similar tax to a transfer of property ordered by a federal court from a federal bankruptcy estate.

CORPORATE DISCLOSURE STATEMENT

Piccadilly Cafeterias, Inc. is now known as Capital City Cornichon Corporation. Capital City Cornichon Corporation is wholly owned by an individual, Soneet Kapila as Plan Administrator.

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PRELIMINARY STATEMENT

This case arises from the chapter 11 bankruptcy case of Respondent Piccadilly Cafeterias, Inc. ("Piccadilly"). Petitioner is the State of Florida, Department of Revenue ("Florida"). The issue is whether Florida may tax a court-ordered transfer of property from Piccadilly's chapter 11 bankruptcy estate to a third-party purchaser of Picadilly's assets.

Piccadilly filed its chapter 11 bankruptcy petition on October 29, 2003. By operation of law, when Piccadilly commenced its bankruptcy proceeding, all of its property became vested in its bankruptcy estate, and the presiding bankruptcy judge became vested with exclusive jurisdiction over the estate. 11 U.S.C. § 541; 28 U.S.C. § 1134. At the time it filed its bankruptcy case, Piccadilly had already concluded that it should sell its assets quickly in order to maximize the amount that it could obtain for them. Thereafter, Piccadilly obtained the bankruptcy court's authorization to sell its assets to the highest bidder at auction. At the conclusion of the auction, Piccadilly Investments, LLC ("PI") was the highest bidder.

On February 13, 2004, Piccadilly closed the sale of its assets to PI. On October 21, 2004, the bankruptcy court approved Piccadilly's chapter 11 plan, which provided for, among other things, distributions to Piccadilly's creditors from the proceeds from the sale of its assets. Florida contends that it is entitled to impose a tax in the amount of $32,200 on the transfer of certain assets from Piccadilly's bankruptcy estate to PI.

Citing section 1146(c) of the Bankruptcy Code, 11 U.S.C. § 1146(c),[1] the bankruptcy court ruled that Florida is not entitled to tax the transfer of assets from Piccadilly's bankruptcy estate to PI. Section 1146(c) provides that "[t]he 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). The bankruptcy court reasoned that, even though Piccadilly transferred its assets prior to actually confirming its plan, the transfer was part of a sale of Piccadilly's assets that was necessary in order to consummate the plan and make distributions to creditors from the proceeds. On appeal, the district court affirmed, as did the Eleventh Circuit.

The decision of the Court of Appeals in this case provides no occasion for certiorari review. To the extent that some aspects of the Eleventh Circuit's decision are inconsistent with aspects of the decisions of other courts of appeals, this case neither requires nor presents the appropriate vehicle for the Court's intervention.

First, whatever disagreement exists among the courts of appeals on the question presented is spread merely between three decisions, one each of the

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[1] Section 1146(c) has subsequently been recodified as 11 U.S.C. § 1146(a) pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The substance of the provision has not changed, and for ease of reference, the provision is referred to herein as section 1146(c). *See* Pet. App. 11a n.3.

Eleventh, Third, and Fourth Circuits. Further development of the relevant issues in the courts of appeals is warranted and may, in fact, resolve any controversy that exists currently. Among other things, Florida's petition for writ of certiorari suggests that the decision of the Eleventh Circuit in this case conflicts with a prior decision of the same circuit, *In re T.H. Orlando Ltd.*, 391 F.3d 1287 (11th Cir. 2004). Pet. 16. It is more than conceivable that the alleged conflict between the two decisions within the Eleventh Circuit may be resolved ultimately in a manner that eliminates any dispute among the Courts of Appeals.

Second, the decision of the Eleventh Circuit in this case purposefully declined to set forth a framework for determining the factual circumstances under which a State may or may not tax a transfer of property from a bankruptcy estate prior to confirmation of a chapter 11 plan. Specifically, the court stated that, because the parties had not briefed the issue of whether the bankruptcy court applied the correct analysis to the facts presented, "we leave for another day an attempt to set forth a framework for determining the circumstances under which § 1146(c)'s tax exemption may apply to pre-confirmation transfers." Pet. App. 9a. Thus, although the Third and Fourth Circuits have concluded that a State may tax a transfer of property from a bankruptcy estate that occurs prior to confirmation of a debtor's plan, the Eleventh Circuit, in concluding that a State may not do so, has left open the contours of the analysis that it has embraced.

Third, the decision below should be affirmed on an alternative ground that no other court of appeals has ruled upon. The precedents of this Court establish that a State cannot impose a tax on property that is held *in custodia legis* -- in the custody of the court. All property of a bankruptcy estate is held *in custodia legis*, and transfers of property from the estate -- as happened in this case -- are immune from state taxation. Among other reasons, States cannot tax transactions out of a bankruptcy estate because, if they could do so, a State could through the imposition of a tax effectively create a priority for itself in violation of the carefully articulated priority provisions of the federal Bankruptcy Code.

Fourth, the decision below construed correctly the ambiguous language of section 1146(c) in light of appropriate canons of interpretation, Congress's purpose in enacting the section, the legislative history, and the practical realities of chapter 11 reorganization cases. Further, as the dearth of appellate decisions on the issue indicates, Florida's petition presents no issue of extraordinary public importance warranting this Court's intervention.

Finally, the Court should deny Florida's petition because Florida failed to take an appeal of the order approving the sale of Piccadilly's assets to PI, and Florida likewise failed to seek or obtain a stay of the sale pending its appeal. Pursuant to section 363(m) of the Bankruptcy Code, 11 U.S.C. § 363(m), Florida cannot upset the sale and its appeal may be held to be moot. In sum, the petition presents no issue worthy of certiorari review and should be denied.

STATEMENT OF THE CASE

Prior to commencing its chapter 11 bankruptcy case, Piccadilly was one of the largest cafeteria chains in the United States. Pet. App. 12a. After determining that an asset sale would best serve its goal of maximizing its enterprise value, Piccadilly considered several offers from entities seeking to purchase its assets. *Id.* On October 28, 2003, Piccadilly executed an asset purchase agreement with Piccadilly Acquisition Corporation ("PAC") that provided that PAC would purchase substantially all of Piccadilly's assets for $54 million. *Id.* The next day, October 29, 2003, Piccadilly filed its chapter 11 bankruptcy petition, together with a motion seeking leave to sell substantially all of its assets outside of the ordinary course of business under 11 U.S.C. § 363(b)(1). *Id.* The motion sought exemption from the imposition of any stamp or similar tax on the basis that the proposed asset sale was "under a plan" within the meaning of 11 U.S.C. § 1146(c). *Id.* The motion stated that "[t]he Debtor intends to use the proceeds of the Sale as the basis for its plan under a liquidating Chapter 11 process. . . . Consummation of the Sale to Purchase is necessary to the consummation of any plan." *Id.* at 12a-13a.

Piccadilly sought and obtained leave of the bankruptcy court to conduct an auction that would award the right to purchase Piccadilly's assets to the highest bidder. Pet. App. 13a. PI made the winning bid of $80 million. On January 26, 2004, Piccadilly, together with a committee of senior secured noteholders and a committee of unsecured creditors, entered into a global settlement agreement ("Global Settlement"), which resolved consensually the priority of distribution among Piccadilly's creditors. *Id.* at 3a. On February 13, 2004, the bankruptcy court approved the sale to PI, and the asset sale closed on March 16, 2004. *Id.* at 14a. According to Florida, it is this transfer that entitles the State to collect the relevant tax. *Id.* The bankruptcy court approved the Global Settlement on February 25, 2004. *Id.* at 15a.

Piccadilly filed its initial chapter 11 plan of reorganization and disclosure statement on March 25, 2004, and its amended joint chapter 11 plan of liquidation (the "Plan") and disclosure statement on March 26, 2004, which the bankruptcy court confirmed on October 21, 2004. *Id.* Throughout the proceedings, Florida maintained that it was entitled to collect a tax and took many steps to protect its interest. *Id.* at 15a-17a. These efforts culminated in the adversary proceeding it filed on October 20, 2004 which gave rise to the Petition now before the Court. *Id.* at 17a. Both Piccadilly and Florida filed cross-motions for summary judgment in the adversary proceeding, and at oral argument, Piccadilly argued 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." *Id.* Even Florida conceded at that argument that "the actual sale itself contemplated the liquidating plan." *Id.*

In the end, the bankruptcy court granted Piccadilly's motion for summary judgment and denied Florida's motion, holding that "[t]he transfer of substantially all of the assets of the Debtor, including the Florida properties, were transfers 'under' the Plan because such transfer was necessary to consummate the Plan. The sale of substantially all of the assets of the Debtor contemplated the liquidating plan, which sale and plan were so interwoven that one could not proceed without the other." *Id.* at 40a. The bankruptcy court added that "[s]uch transfer was necessary to the consummation of the confirmed Plan because the sale of the Debtor's assets generated the proceeds required to fund the Plan." *Id.*

Florida appealed to the district court on the following issue: "Whether 11 U.S.C. § 1146(c), which exempts certain transfers made pursuant to a confirmed plan of reorganization from the imposition of stamp or similar tax, applies where a transfer is made pre-confirmation, pursuant to an order under 11 U.S.C. § 363, notwithstanding the limiting language of 1146(c)." Pet. App. 11a. The district court noted that "the Third and Fourth Circuits *are the only circuit courts to squarely address the issue.*" *Id.* at 19a. The district court stated that a "plain meaning" analysis "did not yield any clear answer to the question," *id.* at 25a, and that "under" was used frequently in the Bankruptcy Code and that the term was not subject to a single definition, *id.* at 26a. Citing a prior Eleventh Circuit case, *In re T.H. Orlando, Ltd.*, 391 F.3d 1287 (11th Cir. 2004), the court stated that "in the absence of any language imposing a temporal requirement, the undersigned does not believe it to be the duty, or prerogative, of the Court to impose one." Pet. App. 27a. Focusing on Congress's purpose in enacting section 1146, which was "to facilitate reorganizations through giving tax relief," *id.*, the district court also commented on the practical realities of chapter 11 reorganizations:

> [T]he instant case presents a perfect example of the perils of imposing an arbitrary temporal requirement. As noted, Debtor initially received a $54 million offer for its assets; only a few months later, Debtor sold its assets for $80 million. 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. The undersigned declines to adopt an interpretation that will effectively remove most transactions in furtherance of confirmation plans from the reach of the exemption.

Id. at 28a.

In affirming the bankruptcy court's decision, the district court "emphasize[d] that [the Court] ha[d] been presented with the limited question of '[w]hether 11 U.S.C. § 1146(c) . . . applies where a transfer is made pre-confirmation.'" Pet. App. 28a. Thus, the court's opinion "only addresse[d] whether section 1146's tax exemption *may be* applied, as a general proposition, to pre-confirmation transfers." *Id.*. The district court declined to reach the question whether the bankruptcy court appropriately applied the exemption to the specific pre-confirmation asset transfer at issue because it had not been addressed by the parties. *Id.* Specifically, the district court declined to reach "whether a confirmation plan need be filed with the bankruptcy court and/or contemplated by the parties in order for the 1146(a) exemption to apply." *Id.* at 29a.

Florida appealed and the Eleventh Circuit affirmed the district court's decision, holding in a *per curiam* decision that the section 1146(c) tax exemption "may apply to those pre-confirmation transfers that are necessary to the consummation of a confirmed plan of reorganization, which, at the very least, requires that there be some nexus between the pre-confirmation transfer and the confirmed plan." *Id.* at 8a-9a. The Eleventh Circuit declined to follow the "restrictive interpretation adopted by the Third and Fourth Circuits" for a number of reasons. *Id.* at 8a. It concluded that the "better reasoned approach" is one that "looks not to the timing of the transfers, but to the necessity of the transfers to the consummation of a confirmed plan of reorganization." *Id.* at 7a. Like the district court, the Eleventh Circuit found the plain language of section 1146(c) to be ambiguous, "as 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*, as the DOR argues, imposing a temporal restriction on when the confirmation of the plan must occur." *Id.*

The court reasoned that when Congress wants to "place a temporal restriction in the Bankruptcy Code it [does] so expressly," *Id.* at 7a (citing examples); and that although tax exemptions might be narrowly construed, courts are "not to abrogate the purpose of the exemption through too narrow an application," *id.* at 8a (citation and internal quotation marks omitted). With respect to practicalities, the court noted 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.*

Like the district court, the Eleventh Circuit "emphasize[d] that the issue of whether the bankruptcy court properly applied the § 1146(c) tax exemption to the asset sale in this case has not been briefed by the parties and is not properly before us. Hence, we do not decide this issue." *Id.* at 9a. The court concluded that because the parties' arguments "focus[ed] on whether, as a general proposition, the § 1146(c) tax exemption *may* apply to pre-confirmation transfers," it would "leave for another day an attempt to set forth a framework for determining the circumstances under which § 1146(c)'s tax exemption may apply to pre-confirmation transfers." *Id.*

REASONS FOR DENYING THE PETITION

Florida's petition challenges the Eleventh Circuit's holding that the stamp-tax exemption pursuant to 11 U.S.C. § 1146(c) may apply to preconfirmation transfers that are necessary to the consummation of a confirmed chapter 11 plan of reorganization. The Petition provides no basis for certiorari review and should be denied.

First, the decision below does not present a proper vehicle for review. Although there is some disagreement among the courts of appeals, only three decisions are involved: one each from the Third, Fourth, and Eleventh Circuits. Further, the Third and Fourth Circuits reached the same conclusion for different reasons, and none of the other circuits (apart from the Eleventh) have addressed the issue presented. Further, Florida suggests that the decision below conflicts with a prior decision by the same court, *In re T.H. Orlando, Ltd.*, 391 F.3d 1287 (11th Cir. 2004), Pet. 16, and the Eleventh Circuit itself ultimately may resolve this purported conflict in a way in that eliminates any conflict among the courts of appeals altogether.

Second, the Eleventh Circuit itself has not fully articulated its position on the question presented, expressly declining to set forth a framework for determining the circumstances under which section 1146(c) would apply to pre-confirmation transfers. In such circumstances, it would be better to allow the issue to develop further among the lower courts.

Third, the decision of the Eleventh Circuit should be affirmed on an alternative ground that none of the other courts of appeals have addressed. Specifically, this Court's precedents establish that a state may not tax property that is *in custodia legis*, that is, in the custody of a federal court. Although not raised by the parties or the courts below, the relevant legal principles demonstrate that the Eleventh Circuit's decision was correct. At the moment a debtor files its chapter 11 petition, the exclusive *in rem* jurisdiction of the bankruptcy court attaches to a debtor's property and the debtor's bankruptcy estate. Because Piccadilly's property was in the bankruptcy court's custody, Florida has no right to tax the estate or transfer from it. Because bankruptcy law demands uniform administration with respect to all creditors of a collective proceeding, the bankruptcy law binds the States no less than private parties. Individual creditors, including a State, may not "opt out" of the process and assert their own priorities contrary to the Bankruptcy Code's priority scheme, including tax priorities. This Court's precedents make clear that if the State were allowed to "pull out chunks of an estate" from the bankruptcy court in the form of taxes and tax liens, for example, it would seriously impair the ability of the bankruptcy court to perform its critical functions of administering the estate and promulgating a reorganization plan. *Gardner v. New Jersey*, 329 U.S. 565, 576 (1947); *see also New York v. Irving Trust Co.*, 288 U.S. 329, 332 (1933); *Van Huffel v. Harkelrode*, 284 U.S. 225, 228 (1931).

Fourth, the decision of the Eleventh Circuit correctly construed the statutory language "under a plan confirmed" contained in 11 U.S.C. § 1146(c). The text is ambiguous, as it can be read to include transfers "under a plan confirmed" regardless of when the plan is confirmed at the time of the transfer, or as imposing a temporal restriction on when confirmation must occur. Thus, the plain language of the statute, standing alone, cannot resolve the question whether the fact or the timing of plan confirmation is the critical issue. The Bankruptcy Code does not define the term "under" or the phrase "under a plan confirmed." Dictionary definitions of "under" are too numerous to be helpful, supporting both readings, and the presence of the word in nearly two hundred sections of the Bankruptcy Code does not assist the inquiry. The Eleventh Circuit correctly reasoned that the liberal construction due a remedial statute such as the Bankruptcy Code and the fact that Congress's purpose in enacting section 1146 was to facilitate reorganization by giving tax relief outweigh the general canon of statutory construction, used by the Third and Fourth Circuits, that tax exemptions are to be narrowly construed. The legislative history and language of the predecessor statutes to section 1146 support the Eleventh Circuit's position, as do the practical realities of chapter 11 reorganization cases.

Finally, the Court should deny Florida's petition because, although Florida received notice of the sale of Piccadilly's assets to PI, Florida failed to appeal the bankruptcy court's order approving the sale or obtain a stay of that order pending appeal. Under section 363(m) of the Bankruptcy Code, Florida cannot now upset the sale and its appeal may be deemed to be moot. Indeed, the majority of courts follow a per se rule, deeming appeals from a sale order moot unless a stay is sought and obtained. Because Florida failed to take these steps, it may lack the ability to pursue its appeal.

A. This Case Does Not Present a Proper Vehicle for Certiorari Review.

Florida's Petition relies heavily on a circuit split. But the split is shallow, involving only three circuits: the Third and Fourth Circuits on one side, and the Eleventh Circuit on the other. Pet. App. 1a; *compare In re Hechinger Inv. Co. of Delaware, Inc.*, 335 F.3d 243, 252-54 (3d Cir. 2003); *In re NVR, LP*, 189 F.3d

442, 456-58 (4th Cir. 1999) *with In re Piccadilly Cafeterias, Inc.*, 484 F.3d 1299 (11th Cir. 2007). Moreover, the differences among the three circuits in their construction of section 1146(c) are not well defined. Accordingly, the Court should deny certiorari review and allow the issue presented to develop further among the circuits. This is especially true because Florida suggests that the decision below is inconsistent with a prior decision by the same court, *In re T.H. Orlando, Ltd.*, 391 F.3d 1287 (11th Cir. 2004). It is more than conceivable that any disagreement among the courts of appeals ultimately may be resolved if the suggested conflict is resolved within the Eleventh Circuit.

The Third and Fourth Circuits reached their conclusion that the section 1146(c) exemption applies only to asset transfers authorized by the terms of a previously confirmed chapter 11 plan in very different ways. In the Fourth Circuit's decision in *NVR*, the majority employed a textual approach, relying on dictionary definitions of the word "under" to conclude that pre-confirmation transfers could not be "subordinate to, or authorized by, something that did not exist at the date of transfer—a plan confirmed by the court." 189 F.3d at 456-57 ("the language of § 1146(c) is plain and requires no great manipulation to interpret its terms"). In contrast, the Third Circuit's decision in *Hechinger* recognizes that the word "under" can have many different meanings in different contexts. 335 F.3d at 252. Admitting that its reading of "under" is not "the only plausible interpretation" of the term, the court stated that "we cannot say that the language of Section 1146(c) rules out the possibility that 'under a plan confirmed' means 'in agreement with a plan confirmed.'" *Id.* at 253. Accordingly, the Third Circuit analyzed other parts of the Bankruptcy Code and two canons of construction to reach its conclusion. *Id.* at 253-54. No court of appeals has since issued a decision agreeing with the Third and Fourth Circuits, and because the two analyses differ so much it is evident that the purported disagreement among the circuits is not mature.

Moreover, in reaching a conclusion contrary to that of the Third and Fourth Circuits, the Eleventh Circuit "emphasized" that it decided only the "general proposition [] that the § 1146(c) tax exemption *may* apply to pre-confirmation transfers." Pet. App. 9a. Because the question whether the bankruptcy court properly applied the tax exemption in this particular case was not briefed by the parties, the Eleventh Circuit "le[ft] for another day an attempt to set forth a framework for determining the circumstances under which § 1146(c)'s tax exemption may apply to pre-confirmation transfers." *Id.* Thus, the court below has not yet had the opportunity to fully articulate its approach, and no other circuit has taken any position on the question.

Members of this Court have recognized that when evolving or "frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 25 n.1 (1995) (Ginsburg, J., dissenting) (citing *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writ of certiorari) ("In my judgment it is a sound exercise of discretion for the Court to allow the various [lower courts] to serve as laboratories in which the issue receives further study before it is addressed by this Court.")). Allowing an issue to develop in the circuits permits "independent evaluation of a legal issue by different courts [and] a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule." Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 716 (1984).

The disagreement among the three courts of appeals on the issue presented is very recent and is sketched out only in broad terms, resulting in a shallow circuit split. This is just the sort of "evolving problem this Court need not, and . . . should not, resolve too hastily." *Arizona*, 514 U.S. at 25 (Ginsburg, J., dissenting). In these circumstances, when further development among the circuits is likely and likely beneficial, certiorari review should be denied.

B. The Decision Below Comports with this Court's Precedents Holding that the State Cannot Tax Property Held *in Custodia Legis.*

Certiorari review should be denied for the additional reason that the decision below comports with longstanding precedents of this Court holding that the State cannot tax property held by a court *in custodia legis.*

It is axiomatic that "[b]ankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the [bankruptcy] estate." *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004) (citing 28 U.S.C. § 1334(e)). That exclusive jurisdiction attaches at the moment a chapter 11 petition is filed. *Straton v. New*, 283 U.S. 318, 320-21 (1931); *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300, 306-07 (1911); *see also Thinking Machines Corp. v. Mellon Fin. Servs. Corp. #1 (In re Thinking Machines Corp.)*, 67 F.3d 1021, 1025 (1st Cir. 1995) ("From the moment that a debtor's petition is filed in the bankruptcy court, the debtor's property is in *custodia legis*.").

The doctrine of *in custodia legis* "bars any attachment of funds in a court's registry that would prevent the court from disposing of the funds in accordance with the purpose for which they were deposited." *Landau v. Vallen*, 895 F.2d 888, 893-94 (2d Cir. 1990). Frequently invoked when "the order of one court interferes with the authority of another to dispose of a *res* within its custody," courts most often apply it in the bankruptcy context to "bar the efforts of creditors to obtain preferential status." *Id.* at 894 (citing cases).

The doctrine has long protected property in the hands of the bankruptcy court. *Ex parte Christy*, 44 U.S. (3 How.) 292, 11 L.Ed. 603 (1845) (Story, J.). Indeed, "[i]t is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction." *Petrusch v. Teamsters Local 317 (In re*

Petrusch), 667 F.2d 297, 300 (2d Cir. 1981) (quoting *Mueller v. Nugent*, 184 U.S. 1, 14 (1902)).

Against this doctrinal backdrop, Florida's asserted entitlement to taxes cannot stand. Because the bankruptcy court must be able to perform its critical functions of marshalling the debtor's assets and adjusting and paying claims against those assets, *Straton*, 283 U.S. at 320-21; *Young v. Higbee Co.*, 324 U.S. 204, 210 (1945), no individual creditors, including the States and their subdivisions, may "opt out" of the process.

It is for this reason that this Court held that "[n]o good reason is suggested why liens for state taxes should be deemed to have been excluded from the scope of this general power [of the bankruptcy court] to sell free from incumbrances." *Irving Trust*, 288 U.S. at 333 (citation omitted). And further, that "[r]ealization upon the lien created by the state law must yield to the requirements of bankruptcy administration." *Id.* (citat ion omitted); *see also Van Huffel*, 284 U.S. at 228. And if this is so for tax liens, it is all the more so for taxes themselves. Thus, the Court concluded in *Irving Trust*,

> The Federal government possesses supreme power in respect of bankruptcies. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated.

288 U.S. at 333 (citation omitted).

Similarly, the Court held in *Gardner* that the "reorganization court" possesses "broad powers over all types of liens." 329 U.S. at 576. Indeed, "while valid liens existing at the commencement of bankruptcy proceedings have always been preserved, it has long been a function of the bankruptcy court to ascertain their validity and extent and to determine the method of their liquidation." *Id.* Citing *Irving Trust* and *Van Huffel*, 284 U.S. 225, this Court has recognized that "in bankruptcy cases . . . the authority of the court to deal with the lien of a State has long been recognized." *Gardner*, 329 U.S. at 576. Were that not the case, "the assertion by a State of a lien would pull out chunks of an estate from the reorganization court and transfer a part of the struggle over the corpus into tax bureaus and other state tribunals." *Id.* at 577. This would "seriously impair the power of the court to administer the estate and . . . to promulgate a reorganization plan." *Id.* It would also "fly in the teeth" of the exclusive jurisdiction promised to the bankruptcy court by statute. *Id.*; *see* 28 U.S.C. § 1334.

Read together, these cases stand for the principle that the essential, core functions of the bankruptcy law bind the States, whether or not they consent, because the bankruptcy law demands the uniform administration against all creditors of a collective proceeding that affects the rights of many parties, including the States. If all creditors were not so bound, the bankruptcy court could not administer the estate in a systematic fashion consistent with the fundamental goals of bankruptcy law and the Constitution's Bankruptcy Clause itself. *Railway Labor Ex-*

ecutives' Ass'n v. Gibbons, 455 U.S. 457, 472 (1982) ("The Framers sought to provide Congress with the power to enact uniform laws on the subject [of bankruptcies] enforceable among the States.").

In sum, once property is in *custodia legis*, in the exclusive *in rem* jurisdiction of the bankruptcy court, the State may not tax the property or transfers of property from the estate for their own purposes. Moreover, because this alternative ground for affirmance has not been fully addressed by the courts of appeals in this context, the Court should deny Florida's petition for a writ of certiorari in this case.

C. The Eleventh Circuit Correctly Construed the Statutory Language "Under a Plan Confirmed" Contained in 11 U.S.C. § 1146(c).

Florida's arguments in support of its contention that it is entitled to collect taxes fare no better. Here, too, the principal cases upon which it relies are the Fourth Circuit's decision in *NVR* and the Third Circuit's decision in *Hechinger*. As discussed, the Fourth Circuit employed a textual approach to section 1146(c). Rejecting the reasoning of the lower courts that the necessity of the transfers to NVR's reorganization and emergence from bankruptcy satisfied section 1146(c)'s requirement that the transfers be made "under a plan confirmed," the Fourth Circuit held that "the language of § 1146(c) is plain and requires no great manipulation to interpret its terms." *NVR*, 189 F.3d at 457. Using dictionary definitions of the word "under," the Fourth Circuit reasoned that "we cannot say that a transfer made prior to the date of plan confirmation could be subordinate to, or authorized by, something that did not exist at the date of transfer—a plan confirmed by the court." *Id.* Justifying its conservative reading of the statutory language, the court noted that "tax exemptions should be construed narrowly in favor of the state." *Id.*

The Fourth Circuit concluded that "[i]f a debtor is able to develop a chapter 11 reorganization and obtain confirmation, then the debtor is to be afforded relief from certain taxation to facilitate the implementation of the reorganization plan." *Id.* at 458. The next sentence reveals the misstep that led it and the Third Circuit astray: "Before a debtor reaches this point, however, *the state and local tax systems may not be subject to federal interference.*" *Id.* (emphasis supplied). As discussed above, this conclusion contravenes over a century of settled precedent concerning the *in custodia legis* doctrine and the exclusive *in rem* jurisdiction of the bankruptcy court.

Although it declined to take a textual approach, the Third Circuit reiterated in *Hechinger* the Fourth Circuit's emphasis on the canons of construction that "tax exemption provisions are to be strictly construed," and that "federal laws that interfere with a state's taxation scheme must be narrowly construed in favor of the state." 335 F.3d at 254. Like the Fourth Circuit, the Third Circuit missed the point that that it was the exclusive *in rem* jurisdiction of the bankruptcy court, holding Piccadilly's property *in custodia legis*, rather than a federal law that was "interfering" with the State's taxation scheme. Looking to other parts of the Bankruptcy Code for support, along with two canons of construction, *id.* at 253-54, the Third Circuit construed the phrase "under a plan confirmed" to mean "authorized by a plan confirmed," and held that "a real estate transaction is made 'under a plan confirmed under section 1129' only where the sale is authorized by the terms of a previously confirmed Chapter 11 plan." *Id.* at 257. Because "the real estate transactions here were made pursuant to the authority conferred by other Bankruptcy Code provisions and occurred before the confirmation of a plan, those transactions were not entitled to the Section 1146(c) exemption from stamp taxes and similar taxes." *Id.*

In the decision below, the Eleventh Circuit reached a different conclusion, holding that "§ 1146(c)'s tax exemption may apply to those pre-confirmation transfers that are necessary to the consummation of a confirmed plan of reorganization, which, at the very least, requires that there be some nexus between the pre-confirmation transfer and the confirmed plan." Pet. App. 8a-9a. In other words, the *necessity* of the transfers to the confirmation of a plan, rather than the *timing* of the transfers, determines whether the State was entitled to tax the transfers. *Id.* at 7a. In reaching this conclusion, the Eleventh Circuit relied on an Eleventh Circuit opinion, *In re T.H. Orlando Ltd.*, 391 F.3d 1287 (11th Cir. 2004), that concluded that the phrase "'under a plan' refers to a transfer that is necessary to the consummation of a confirmed Chapter 11 plan." Pet. App. 6a (quoting 391 F.3d at 1292). Interestingly, *Orlando* itself readily harmonized the existing precedents, stating that *NVR* and *Hechinger* held that "under a plan" means "authorized by a plan confirmed," and that the Second Circuit's decision in *City of New York v. Jacoby-Bender*, 758 F.2d 840, 842 (2d Cir. 1985), recognized that "a chapter 11 plan *impliedly* authorizes any transfer that is necessary to the consummation of the plan." *Orlando*, 391 F.3d at 1291. In other words, "[a] transfer 'under a plan' refers to a transfer authorized by a confirmed Chapter 11 plan. In turn, a plan authorizes any transfer that is necessary to the consummation of the plan." *Id.*

Even if the doctrine of *in custodia legis* were not dispositive, the better reasoned approach is that taken by the Eleventh Circuit. To begin with, the text of the statute is ambiguous. As the Eleventh Circuit concluded, it can "plausibly be read either as describing eligible transfers to include transfers 'under a plan confirmed' regardless of *when* the plan is confirmed *or*, as [Florida] argues, imposing a temporal restriction on when the confirmation of the plan must occur." Pet. App. at 7a; *see also NVR*, 189 F.3d at 458-59 (Wilkinson, J., concurring) ("It is not plain to me that section 1146(c) contains a temporal element. It is also not clear that one must read the section to say anything about the relationship between plan confirmation and the timing of the transfer."). As Judge Wilkinson reasoned in *NVR*:

> It is equally possible that the provisions requires only that the transfer occur "under"—i.e., that it be inferior or subordinate to "a plan" that is ultimately "confirmed." In other words, the fact rather than the timing of plan confirmation is the critical issue. In a complicated reorganization a debtor-in-possession may operate for some time pursuant to the

> terms of an unconfirmed plan while it negotiates with its creditors.

Id.; *see also In re Beulah Church of God in Christ Jesus, Inc.*, 316 B.R. 41, 46 (Bankr. S.D.N.Y. 2004) ("'confirmed' as used in section 1146(c) may be read as either fixing the date of the transfer or describing a condition, which may be a condition subsequent."). The dictionary does not resolve the difficulty. *Id.* (listing various dictionary definitions of "under" as "subject to the restraint or obligation of: *under contract*," "subject to the authority, rule or control of: *under a dictatorship*," "in the process of: *under discussion*," and "in view of; because of: *under these conditions*"). Even the Third Circuit conceded that "[t]he preposition 'under' is of course very common, and it can have many different meanings in different contexts." *Hechinger*, 335 F.3d at 252 (noting that *Webster's Dictionary* listed 13 different definitions for the work "under," and that *Random House Dictionary* listed 27 definitions). This is the very essence of ambiguity.

Although *Hechinger* looked to other provisions in the Bankruptcy Code for guidance, *id.* at 253-54, on the basis that words in the Bankruptcy Code should have the same meaning, the word "'under' is used in nearly two hundred different sections of the Bankruptcy Code. When 'under' can be a preposition, adverb, adjective, noun, or verb, and it is used so frequently, . . . this canon of statutory interpretation is of little value." *Id.* at 258 (Nygaard, J., dissenting) (citation omitted).

While the Third and Fourth Circuits made much of the maxim that "tax exemptions are narrowly construed," the Eleventh Circuit correctly emphasized that "we are not to abrogate the purpose of the exemption through too narrow an application." Pet. App. 8a (quoting *Hechinger*, 335 F.3d at 259 (Nygaard, J., dissenting)). As the Eleventh Circuit noted, this is particularly true in view of the principle that "a remedial statute such as the Bankruptcy Code should be liberally construed." Pet. App. 8a. This approach supports Congress's purpose in enacting section 1146, which was "to facilitate reorganizations through giving tax relief." *Jacoby-Bender*, 758 F.2d at 841; *cf. NVR*, 189 F.3d at 459 (Wilkinson, J., concurring) (describing central purpose of the bankruptcy laws as "permitting business debtors to reorganize and restructure their debts in order to revive the debtors' businesses and thereby preserve jobs and project investors").

The legislative history of section 1146(c), while scant, supports the Eleventh Circuit's analysis. *Hechinger*, 335 F.3d at 259 n.2 (Nygaard, J., dissenting). The House Judiciary Committee Report states:

> Another provision that affects the method of taxation in bankruptcy applies only in chapter 11. Section 1146(c) 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. Section 1146(c) of title 11 *broadens* the exemption to any stamp tax or similar tax on a security or a transfer instrument dealt with under the con-

> solidated chapter 11. No opposition has been voiced with respect to this section.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 281 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6238 (quoted in *Jacoby-Bender*, 758 F.2d at 841) (emphasis supplied).

Although section 267 had similar "under the plan" language, the "direct predecessor of section 267," section 77B(f), used the language "to *make effective* any plan." *Hechinger*, 335 F.3d at 259 n.2 (Nygaard, J., dissenting) (emphasis supplied). The import of this language was passed down to section 267 from section 77B(f). According to the Collier treatise, "the provisions of [section] *267* . . . make it clear that the exemption conferred relates only to transactions otherwise taxable which serve to execute *or make effective a plan* confirmed under Chapter X." *Id.* (quoting 6A COLLIER ON BANKRUPTCY ¶ 15.08 at 840 (14th ed. 1977)) (emphasis supplied). The Eleventh Circuit's construction is thus in accord with the history of section 1146(c). *See Jacoby-Bender*, 758 F.2d at 842 ("Quite clearly, 11 U.S.C. § 1146(c) of the Bankruptcy Code relates back, so far as state and local taxes are concerned, to section 267 of Chapter X of the old Bankruptcy Act.").

As the Eleventh Circuit noted in the decision below, "when Congress wanted to place a temporal restriction in the Bankruptcy Code, it did so expressly." Pet. App. 7a (listing examples). The examples listed by the Eleventh Circuit illustrate that "Congress knows how to create time limitations. When it wants to attach these restrictions to statutes, it does."

United States v. Wright, 48 F.3d 254, 256 (7th Cir. 1995); *see United States v. Naftalin*, 441 U.S. 768, 773 (1979) ("The short answer is that Congress did not write the statute that way."). No liberal reading triggered by the remedial nature of the Bankruptcy Code would supply a temporal limitation completely absent from the statutory text.

Finally, the Eleventh Circuit's approach properly takes account of the practical realities of chapter 11 reorganization cases. In the ordinary course, 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." Pet. App. 8a. Bankruptcy courts, perhaps because they are closest to these practicalities, have been vocal on this point. *See, e.g., In re Webster Classic Auctions, Inc.*, 318 B.R. 216, 219 (Bankr. M.D. Fla. 2004) (stating that the reversal by *NVR* and *Hechinger* of bankruptcy court findings "perhaps impl[ies] the sometimes academic exercise of statutory interpretation may be overshadowing the practical realities of bankruptcy reorganization"); *id.* ("As Chapter 11 reorganization is a sophisticated process, this Court finds inserting an artificial preconfirmation v. postconfirmation line of demarcation into the § 1146(c) analysis fails to recognize the complexities the reorganizing debtor often faces."); *Beulah*, 316 B.R. at 50 ("As importantly, focusing on the role of the particular transfer at issue in enabling the debtor's plan, rather than on a temporal test, recognizes the realities of how distressed businesses are restructured in chapter 11.").

* * * *

The foregoing points reinforce the argument that the certiorari review should not be granted on the basis of the shallow and ill-defined circuit split presented here. Again, only three circuits have weighed in on the issue raised in the Petition; the two circuits that have agreed as to the ultimate conclusion have done so for different reasons; and the Eleventh Circuit, on the other side, has expressly stated that it will "leave for another day an attempt to set forth a framework for determining the circumstances under which § 1146(c)'s tax exemption may apply to preconfirmation transfers." Pet. App. 9a. To warrant certiorari review, a petition should present a fully defined and mature circuit split, one that reflects a thorough elucidation of the rationales behind, and the ramifications of, the respective positions of the circuit courts. This Petition does not come close to meeting that standard and is thus premature.

The Petition also presents no issue of extraordinary public importance warranting this Court's intervention. The Bankruptcy Code's provision governing exemption from stamp taxes, with minimal interpretation by the courts of appeals, does not present the extraordinary type of dispute that would justify this Court's intervention.

D. Any Claim by Florida Challenging the Bankruptcy Court's Order Approving the Asset Sale May Be Statutorily Moot under Section 363(m) of the Bankruptcy Code.

Although it received notice of the asset sale, Florida failed to appeal the bankruptcy court's February 13, 2004 order approving the sale and to request and obtain a stay pending appeal within ten days from the entry of the order. Accordingly, Florida's claim that the asset sale entitles it to collect taxes is statutorily moot.

The Bankruptcy Code leaves no doubt that a stay pending appeal is a precondition to an appeal from an order approving a sale of estate property under 11 U.S.C. § 363(m). *See* 11 U.S.C. § 363(m) ("The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, *unless such authorization and such sale or lease were stayed pending appeal.*"); Fed. R. Bankr. P. 8002(a).

This requirement serves important policies. *In re CGI Indus., Inc.*, 27 F.3d 296, 299 (7th Cir. 1994) (stating that two complementary policies support § 363(m)'s conclusion: (1) the importance of encouraging finality in bankruptcy sales by protecting good-faith purchasers; and (2) the court's general jurisdictional bar from deciding cases in which it cannot provide a remedy). It is therefore well settled that once

once a sale under section 363(b)(1) becomes final and a stay is not entered, the sale cannot be reviewed on appeal.

In construing 11 U.S.C. § 363(m), the majority of courts of appeals follow a per se rule, mooting appeals absent a stay. *Veltman v. Whetzal*, 93 F.3d 517, 521 n.4 (8th Cir. 1996) (affirming dismissal of appellant's appeal of bankruptcy court's order confirming sale of estate property free and clear of appellant's interest where appellants were provided with sufficient notice that property was to be sold free and clear of their interest and holding that failure of appellants to timely appeal order deprived the appellate court of jurisdiction); *United States v. Salerno*, 932 F.2d 117, 122-23 (2d Cir. 1991) (appeal moot where sale order is not stayed and the sale is consummated); *Anheuser-Busch, Inc. v. Miller (In re Stadium Mgmt. Corp.)*, 895 F.2d 845, 847 (1st Cir. 1990) ("The effect of § 363(m) is that when an order confirming a sale to a good faith purchaser is entered and a stay of that sale is not obtained, the sale becomes final and cannot be reversed on appeal . . . Absent a stay, the court must dismiss a pending appeal as moot because the court has no remedy that it can fashion even if it would have determined the issues differently.") (internal quotation marks and citations omitted); *Cargill, Inc. v. Charter Int'l Oil Co (In re The Charter Co.)*, 829 F.2d 1054, 1056 (11th Cir. 1987) ("Because [section 363(m)] prevents an appellate court from granting effective relief if a sale is not stayed, the failure to obtain a stay renders the appeal moot."); *Hicks v. Pearlstein (In re Magwood)*, 785 F.2d 1077, 1080 (D.C. Cir. 1986) (under section

363(m), where no stay has been obtained, court cannot reverse sale of property to good faith purchaser); *Vista Del Mar Assocs., Inc. v. West Coast Land Fund (In re Vista Del Mar Assoc., Inc.)*, 181 B.R. 422, 424 (B.A.P. 9th Cir. 1995) ("[W]hen an appellant fails to obtain a stay from an order that permits a sale of the debtor's asset, the appeal will be rendered moot regardless of whether the purchaser has taken irreversible steps following the sale."). The Eleventh Circuit follows the majority approach. *Charter Co.*, 829 F.2d at 1056.[2]

As this Court has long recognized, "the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions." *Mills v. Green*, 159 U.S. 651, 653 (1895). This Court should deny the petition for the additional reason that Florida's challenges to the bankruptcy court's order approving the sale may be moot.

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[2] A minority of courts recognize a limited exception to the general proscription of section 363(m). *See Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 499 (3d Cir. 1998); *Golfland Entertainment Ctrs. v. Peak Inv., Inc. (In re BCD Corp.)*, 119 F.3d 852, 856 (10th Cir. 1997); *In re Lloyd*, 37 F.3d 271, 273 (7th Cir. 1994). Courts in these jurisdictions will not dismiss an appeal of a bankruptcy court's sale order pursuant to section 363(m) if the court is able to afford the appellant a "measure of effective relief" that would not affect the "validity" of the sale, even though the appellant failed to obtain a stay. *Krebs*, 141 F.3d at 499.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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