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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether section 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?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, State of Florida, on behalf of the Department of Revenue, State of Florida, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 484 F.3d 1299 and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a-9a. The final summary judgment and opinion of the bankruptcy court granting summary judgment in favor of respondent Piccadilly are unreported and are reproduced at Pet. App. 31a-41a. The opinion of the district court affirming the bankruptcy court is unreported and is reproduced at Pet. App. 10a-30a.

JURISDICTION

The judgment of the Eleventh Circuit was entered on April 18, 2007. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

11 U.S.C. § 1146(a) (previously 1146(c)) of the Bankruptcy Code, entitled "Special Tax Provisions" and which is reproduced in the appendix, states:

> (a) 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.

Pet. App. 42a.

STATEMENT

Section 1146(c) (now 1146(a))[1] of the Bankruptcy Code allows debtors in bankruptcy to avoid the imposition of "stamp" or "other similar" taxes on the sale of their property if done "under a plan confirmed" pursuant to Chapter 11 of the Code. This statutory authority provides a strategic means of avoiding such taxes, provided the asset transfers are "under a plan confirmed" by a bankruptcy court, whose authority to grant the tax exemption is set forth in the Code.

Section 1146(c) provides this tax relief for two reasons: to assist in the implementation of confirmed plans that provide for sales of the debtor's assets and to relieve the debtor from taxes thereby providing a potential benefit to other creditors. On the other hand, state governments are entitled to collect revenues from stamp and other similar taxes on debtors' property unless the statutory requirements of section 1146(c) are met, particularly the requirement that the exemption be triggered only "under a plan confirmed" under the Code. State governments therefore have a strong interest in ensuring that the tax exemption is applied in a uniform, non-arbitrary way that does not expand the exemption beyond its limited parameters.[2]

The tax exemption authorized in section 1146(c), however, is not being applied in a uniform way across the country. The courts of appeals are sharply divided on the meaning of the phrase "under a plan confirmed" as used in section 1146(c), resulting in wide disparities and arbitrariness

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[1] Newly renumbered section 1146(a) will be referred to herein as section 1146(c), both of which have identical language. Pet. App. 42a.

[2] While this case does not directly involve efforts to expand the section 1146(c) exemption beyond the stamp tax, debtors frequently seek to do so. Moreover, while the stamp tax is often less than one percent in a given bankruptcy case, the aggregate financial impact of the Eleventh Circuit's interpretation of the exemption is significant.

in its application nationwide. *See* Pet. App. 5a-9a. Two courts of appeals have applied the plain meaning of this phrase, finding a bright line temporal test and holding that the tax exemption does not apply to transfers made prior to confirmation of a plan. *See id.* The Eleventh Circuit takes a sharply different view of the phrase, however, holding that the tax exemption may apply to some asset transfers, undefined by section 1146(c), that occurred prior to the existence of a confirmed plan. *See* Pet. App. 9a. A Second Circuit decision, while not ruling on the temporal application of the statute, has taken a position that both sides in the debate have cited as being consistent with their respective views, further exacerbating the confusion.

These two positions, relating to the temporal application of section 1146(c), create a clear and irreconcilable conflict. Indeed, the Eleventh Circuit has taken the most extreme position to date by extending the tax exemption to asset transfers – such as the one at issue – which are undefined by the language of section 1146(c) and can occur at the very commencement of the bankruptcy case, well before a plan is even proposed, much less confirmed.

A. Statutory Background.

Congress has long recognized that certain tax exemptions can be effective in assisting reorganization plans confirmed under the bankruptcy laws. The predecessor of section 1146(c) was first added to the Bankruptcy Act of 1898 in section 77(B)(f) of the Bankruptcy Act amendments of 1934. It exempted "the 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" from federal stamp taxes. *See* 11 U.S.C. § 207(f) (repealed 1938). Four years later, Congress amended the Act by expanding the exemption to *state* and federal taxes on securities or transfers under a confirmed chapter X plan. *See* 11 U.S.C. § 667 (1938, repealed 1978);

see also In re New York, N.H. & H.R. Co., 95 F.2d 483 (2d Cir. 1938).

The current language states that the "issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." 11 U.S.C. § 1146(a). This language has not been altered since 1938. Congress has had the opportunity to amend the language on a number of occasions when it enacted major revisions to the Bankruptcy Code in 1938, 1978 and 1984. Notably, Congress had a recent opportunity to amend the language of section 1146(c) in its major revision of the Bankruptcy Code in 2005 but, instead, merely renumbered it as section 1146(a).

B. Factual Background.

On October 28, 2003, Piccadilly Cafeterias, Inc. ("Piccadilly") executed an asset purchase agreement with Piccadilly Acquisition Corporation ("PAC"). PAC agreed to purchase all of Piccadilly's assets for $54 million. One day later, on October 29, 2003, Piccadilly filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code.

At the same time, Piccadilly also filed a motion pursuant to 11 U.S.C. § 363(b)(1), requesting authorization to sell substantially all of its assets outside of the ordinary course of business. Piccadilly also requested an exemption from stamp taxes on the asset sale pursuant to 11 U.S.C. § 1146(c). The Department of Revenue objected to both of Piccadilly's requests.

On December 4, 2003, upon request by Piccadilly, the bankruptcy court approved an auction through which the highest bidder would be entitled to purchase Piccadilly's assets. The winning bid of $80 million was from Piccadilly Investments, Inc. On January 24, 2004, Piccadilly and a committee of senior secured note holders, along with a

committee of unsecured creditors, entered into a global settlement, setting the priority of distribution among Piccadilly's creditors.

On February 13, 2004, the bankruptcy court approved the sale of Piccadilly's assets to Piccadilly Investments. The court further held that the $80 million sale to Piccadilly Investments was exempt from stamp taxes under 11 U.S.C. § 1146(c), even though the sale was made prior to the global settlement, prior to any plan confirmation, and pursuant to the court's authority under section 363 and not its authority under Chapter 11 to confirm a plan. At the same time, the court approved the global settlement. The Department of Revenue moved to reconsider, vacate and/or amend the sale order. The motion was denied by the bankruptcy court. The sale of Piccadilly's assets closed on March 16, 2004.

Piccadilly then filed a plan of liquidation in Chapter 11 on March 26, 2004. It later filed an amended plan. The plan did not provide for any form of reorganization of Piccadilly, but merely provided for distribution of Piccadilly's assets in accordance with the terms of the global settlement. The Department of Revenue then commenced the adversary action at issue here, filing an objection to the plan along with a complaint against Piccadilly seeking a declaration that its pre-confirmation stamp taxes in the amount of $32,200 were not exempt under 11 U.S.C. § 1146(c). The bankruptcy court nonetheless confirmed the amended plan on October 21, 2004. The court denied the Department's motion to reconsider the confirmation order. The Department then amended its complaint against Piccadilly, and both parties filed motions for summary judgment on the issue of stamp taxes.

C. Proceedings Below.

1. *The Bankruptcy and District Courts.* The bankruptcy court, and the district court on appeal, both held that section 1146(c) should be read to allow a tax exemption for pre-confirmation transfers. The bankruptcy court held a hearing

and ruled in favor of Piccadilly on summary judgment, holding that the pre-confirmation asset sale was exempt from stamp taxes pursuant to 11 U.S.C. § 1146(c). According to the bankruptcy court, even though the sale occurred prior to plan confirmation, the sale of substantially all of Piccadilly's assets was still a transfer "under" its ultimately confirmed plan of reorganization because the sale was necessary to consummate the plan. Pet App. 40a-41a. The district court affirmed the bankruptcy court's implicit conclusion that the exemption can apply even when a transfer is made prior to confirmation of a reorganization plan.[3] Pet App. 29a.

2. *The Eleventh Circuit.* The court of appeals agreed and affirmed. Pet. App. 1a-9a. The court agreed with the district court that pre-confirmation transfers may constitute transfers "under a plan confirmed" pursuant to 11 U.S.C. § 1146(c).

After acknowledging that the precise issue was one of first impression in the Eleventh Circuit, the court expressly disagreed with the Third and Fourth Circuits, both of which had previously held that the exemption in section 1146(c) may *not* apply to pre-confirmation transfers of assets, such as the one in this case. Instead, the panel sided with the statutory interpretation found in a "somewhat similar" Eleventh Circuit case, as well as the reasoning of the Second Circuit in an "analogous" case involving section 1146(c), both of which held that the language "under a plan" refers to transfers that are "necessary to the consummation of a confirmed Chapter 11 plan."[4] Pet App. 6a.

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[3] The district court noted that the issue of the specific sale of Piccadilly's assets and the application of 11 U.S.C. § 1146(c) was not before it. Instead, the district court focused on whether the exemption for stamp taxes may ever apply to asset transfers completed before confirmation of a plan, which is the issue to be decided in this case.

[4] As explained below, the two cases that the Eleventh Circuit relied upon are distinguishable from those of the Third and Fourth Circuits as well as (Continued ...)

In this case, the Eleventh Circuit went even further. It held that the language "under a plan" is not bound by any temporal limitation, but instead section 1146(c)'s tax exemption may apply to *all* "pre-confirmation transfers that are necessary to the consummation" of an ultimately confirmed plan of reorganization. In other words, as long as a Chapter 11 plan is confirmed at some point in the future, and the pre-confirmation transfer was "necessary to the consummation" of that eventually confirmed plan, the Eleventh Circuit held that it does not matter that the plan *did not even exist* at the time of the transfer. As long as the pre-confirmation transfer was necessary, it may be considered "under" the later confirmed plan for purposes of the statute's stamp tax exemption.[5]

REASONS FOR GRANTING THE PETITION

This Court should grant this petition and resolve the existing circuit split over the meaning of section 1146(c) of the Bankruptcy Code, which exempts from stamp or similar taxes any asset transfer "under a plan confirmed under section 1129" of the Code.

Two circuits, the Third and Fourth Circuits, hold that the plain language of section 1146(c) only permits tax exemptions for transfers of assets occurring *after* a plan has been confirmed under section 1129 of the Bankruptcy Code. These circuits apply the statute's plain meaning, construing it to mean that a bankruptcy court may *not* retroactively approve tax exemptions for transfers of assets completed months or years prior to the plan's actual confirmation.

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this case because they involved asset transfers under *confirmed* reorganization plans thereby distinguishing them from the instant facts.

[5] Like the district court, the Eleventh Circuit noted that the parties had not briefed the issue of whether the section 1146(c) tax exemption was applicable to the asset sale in Piccadilly's particular case.

The Eleventh Circuit, however, holds that section 1146(c) applies to any transfer of assets, even those occurring months or years prior to the actual confirmation of a plan. By removing any requirement that the plan actually be confirmed, it expands the statute in such a boundless manner that it can apply to virtually any transaction in the case, regardless of when it occurred. In short, the statutory requirement that there be "a plan confirmed" becomes of little consequence, so long as a bankruptcy court eventually confirms a plan. The Eleventh Circuit's ruling warrants review because it squarely conflicts with decisions of other courts of appeals in a way that results in irreconcilable and arbitrary results.

It is important for the States to be able to determine the effect of the bankruptcy on their revenues and for other parties to know with certainty when a transaction will or will not be subject to this particular, albeit limited, tax. The test used by the Eleventh Circuit, and other lower courts that agree with it, introduces a high degree of uncertainty into the equation and ensures that the issue will need to be litigated in virtually every situation. Moreover, the Eleventh Circuit's ruling contravenes the plain language of section 1146(c), which both the Third and Fourth Circuits viewed as paramount.

It is important to note that Congress has had opportunities on many occasions to alter or create more specificity in the language of section 1146(c), but opted not to do so. Significantly, Congress' most recent opportunity came in 2005, *after* the decisions in the Third and Fourth Circuits were handed down. In passing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,[6] Congress chose only to renumber the Code sections, renumbering section 1146(c) as 1146(a), leaving the statute's plain language and meaning unchanged.

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[6] *See* Pub. L. No. 109-8, 119 Stat. 23 (effective October 17, 2005).

Lastly, the Eleventh Circuit's ruling that section 1146(c) may apply to pre-confirmation transfers, even those that occurred prior to the existence of any reorganization plan, has resulted in recurring abuses of the limited state tax exemption granted by Congress in section 1146(c). These abuses have become increasingly aggressive as parties are seeking exemptions from taxation for any and all transfers, well prior to the time those parties have proposed or formulated a plan of reorganization, as contemplated by the statute. This Court should resolve the issue of the limited applicability of section 1146(c) and the importance of applying the clear, unambiguous, and limited language of the exemption to prevent further abuse.

I. THE DECISION BELOW CREATES A CLEAR CIRCUIT SPLIT REGARDING THE AVAILABILITY OF TAX EXEMPTIONS UNDER SECTION 1146(C) OF THE BANKRUPTCY CODE.

The Eleventh Circuit's decision creates a clear and unmistakable circuit split regarding the applicability of 11 U.S.C. § 1146(c)'s tax exemption for transfers of assets made prior to the confirmation of a Chapter 11 plan. As discussed below, not only did the Eleventh Circuit disagree with the well-reasoned decisions of the Third and Fourth Circuits, it chose to apply two inapplicable and clearly distinguishable cases, resulting in a holding that stretches section 1146(c) well beyond its outer bounds.

1. *The Fourth Circuit.* The Fourth Circuit was the first court of appeals to squarely address the issue in this case. In 1999, the court addressed whether a home builder's pre-confirmation real property transfers, occurring during the period in which it was a Chapter 11 debtor but more than a year before confirmation of a reorganization plan, were exempt from transfer and recordation taxes under 11 U.S.C. § 1146(c). *See In re NVR Homes,* 189 F.3d 442, 447 (4th Cir. 1999). The court explicitly held that the debtor's pre-

confirmation transfers of real estate could not be considered "under a plan" for purposes of section 1146(c)'s exemption provision. *See id.* at 458.

The Fourth Circuit expressly rejected the contention that section 1146(c)'s "under a plan confirmed" language encompasses all transfers that are "essential to the confirmation of a plan." *Id.* at 456-57. The court explained that such a broad contention is "fundamentally flawed" because it "makes a plan's terms the master of § 1146(c), instead of deferring to the statute itself." *Id.* at 456. The court held that the statute itself exclusively controls the extent of its own operation, and the language of section 1146(c) is "plain and requires no great manipulation to interpret its terms." *Id.* at 456-57.

In interpreting the statute, the Fourth Circuit noted that this Court has held that statutes granting immunity from state taxation must be interpreted narrowly in favor of the state, otherwise private parties would "fervently pursue every possible tax advantage," even though not expressly given by Congress. *Id.* at 457 (*citing California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851-52 (1989)). In light of this principle, the court of appeals concluded that the plain language of section 1146(c), using the ordinary understanding of the words "under a plan confirmed," rejected the statute's application to transfers occurring prior to the existence of a confirmed reorganization plan. *See id.* at 457.

Although a plan was eventually "confirmed" under the statute, the Fourth Circuit reasoned that the word "under" does not include pre-confirmation transfers. *See id.* Turning to the meaning of the word "under" as found in a standard dictionary as well as *Black's Law Dictionary*, the court stated that the word "under" would ordinarily be understood to mean "inferior or subordinate," or "[w]ith the authorization of." *Id.* (internal quotation marks omitted). The court of appeals therefore concluded that logically, under the plain language of

section 1146(c), "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.*

In conclusion, the Fourth Circuit reasoned that the plain language of the statute reflects a balance struck by Congress. The statute entitles the debtor to relief from certain state taxation to facilitate the implementation of a *confirmed* reorganization plan, while preventing federal interference with state taxation before a debtor reaches the point of plan confirmation. *See id.* at 458.

2. *The Third Circuit.* The second court of appeals to directly deal with section 1146(c)'s potential application to pre-confirmation transfers was the Third Circuit. Like the situation in *NVR Homes*, the Third Circuit addressed a Chapter 11 debtor's claim that the proposed sale of real estate interests in aid of the plan confirmation process, but prior to the actual confirmation of a plan, should be exempt from state recording and transfer taxes. *See In re Hechinger Investment Company of Delaware, Inc.*, 335 F.3d 243, 246-47 (3d Cir. 2003). In an opinion written by Circuit Judge Alito, the Third Circuit expressly agreed with the reasoning and holding of the Fourth Circuit in *NVR Homes* that section 1146(c) does not apply to real estate transactions that occur prior to the confirmation of a plan under Chapter 11. *See id.* at 256-57.

The Third Circuit reasoned that the "most natural" reading of the "under a plan confirmed" language in the statute is to require that a transfer be "authorized" by a plan. *Id.* at 252. Judge Alito wrote that "[w]hen an action is said to be taken 'under' a provision of law or a document having legal effect, what is generally meant is that the action is 'authorized' by the provision of law or legal document." *Id.* As examples, if claims are made "under" federal statutes or rules such as 42 U.S.C. § 1983 or Federal Rule of Civil Procedure 12(b)(6), that means those laws or rules provide the authority to bring the claims in the first place. *See id.* Similarly, the court

explained, if a transfer is made "under" a plan as contemplated by section 1146(c), the plan itself must provide the authority for the transfer. *See id.* If a plan is not confirmed at the time of the transfers, then the plan cannot provide the authority for the transfers, and the state tax exemption cannot apply. *See id.*

The Third Circuit also noted two other reasons for interpreting the "under a plan confirmed" language of the exemption to mean "authorized by" a plan. First, the court pointed out that the word "under" appears three times in the same sentence in section 1146(c), and as such interpreting that word to mean "authorized by" or "pursuant to the authority conferred by" a plan would give the term "under" a "single, consistent meaning throughout Section 1146(c)." *Id.* at 253. The court therefore adhered to the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Id.* (*quoting Sorenson v. Sec. of the Treasury*, 475 U.S. 851, 860 (1986)) (citations and internal quotations omitted). Second, the court noted that the identical phrase "under a plan confirmed" appears in another provision of the Bankruptcy Code, 11 U.S.C. § 365(g), and in that section the phrase means "a plan that is confirmed pursuant to the authority conferred" by other sections of the Code. *Id.* at 254. Thus, the Third Circuit's interpretation of section 1146(c) would be consistent with the remainder of the Bankruptcy Code.

Similar to the Fourth Circuit's reasoning in *NVR Homes,* the Third Circuit concluded that the language of section 1146(c) is not ambiguous and can be given its clear and natural meaning. Moreover, both courts held that even if its language were ambiguous, section 1146(c)'s tax exemption provisions must be construed narrowly in favor of the state to prevent unwarranted federal interference. *See id.* Thus, both the Fourth and Third Circuits hold that pre-confirmation transfers are not authorized by a plan that does not yet exist, and as such are not entitled to tax exemptions under section 1146(c).

3. *The Second Circuit.* It has been argued that the Second Circuit has addressed the application of section 1146(c) to pre-confirmation transfers such as the instant case. Upon closer inspection, however, it becomes apparent that the Second Circuit's decision is distinguishable and only adds further confusion to the existing circuit split, thereby providing additional justification for this Court's review.

The Eleventh Circuit here, and the debtors in the Fourth and Third Circuit cases discussed above, each relied on *In re Jacoby-Bender*, 758 F.2d 840 (2d Cir. 1985), in support of their position that tax exemptions under 11 U.S.C. § 1146(c) may apply to asset transfers occurring prior to the confirmation of a reorganization plan. In *Jacoby-Bender*, however, the Second Circuit addressed whether a transfer made *after* confirmation of a plan, but not specifically referred to by the previously-approved plan, could still be considered "under a plan confirmed" as required by section 1146(c). *See id.* at 841. Under this distinguishable fact pattern, the Second Circuit concluded that a specific transfer of assets takes place "under a plan confirmed" as long as the transfer "is necessary to the *consummation* of a plan." *Id.* at 842 (emphasis added).

It is important to note that the Second Circuit was reviewing a *confirmed* plan, holding that it was clear that the plan was almost entirely premised on the sale of the building at issue. The city's primary objection was merely that the references in the confirmed plan to such a sale were not sufficiently specific. The court held that there was no reason to require such detail in the plan and rejected the city's readings of the statutory language. Nothing in the opinion, however, deals with or even suggests that a transfer *prior to confirmation* would have been covered. In fact, the bankruptcy court previously *denied* the debtor's effort to obtain an earlier ruling on the application of section 1146(c) at a time prior to the date the plan was confirmed. *See In re Jacoby-Bender, Inc.*, 34 B.R. 60, 62 (Bankr. S.D.N.Y. 1983).

The Fourth and Third Circuits in *NVR Homes* and *Hechinger*, however, have explicitly held that *Jacoby-Bender* is both distinguishable and inapplicable to cases where the debtor is claiming tax relief for transfers made *prior* to the existence or confirmation of a plan. The Fourth Circuit in *NVR Homes* noted that the "succinct issue" presented in *Jacoby-Bender* was "whether the *confirmed* reorganization plan encompassed the property sale" made after confirmation, and as such section 1146(c) may apply. 189 F.3d at 455 (emphasis added). In other words, the Second Circuit was only interpreting the reach of an existing confirmed plan, not a pre-confirmation transfer. *See id.*

The Fourth Circuit noted that, despite the clear indication of the limited nature of the issue before the Second Circuit in *Jacoby-Bender*, lower courts quickly began to extend its language and holding to apply not only to post-confirmation transfers "necessary to the *consummation* of a plan," but also to pre-confirmation transfers deemed "necessary to the *confirmation* of a plan." *Id.* at 456. As such, lower courts began to use the Second Circuit's decision to interpret the limits of section 1146(c) itself, as opposed to just the interpretation of a confirmed plan's provisions, as the Second Circuit had done in *Jacoby-Bender*.[7] This stretching of the Second Circuit's holding led to decisions allowing pre-confirmation transfers to fall within the statute's requirements for tax exemptions, as long as the transfers were necessary to the eventual confirmation of a plan. *See id.* And, since a plan of reorganization generally cannot be confirmed unless the debtor successfully operates during its term, this arguably means that every transaction during the case is "necessary" to the plan's confirmation, thus making the statutory language meaningless. As a result, the Second Circuit's decision has

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[7] *See, e.g., In re Lopez Dev., Inc.*, 154 B.R. 607, 609 (Bankr. S.D. Fla. 1993); *In re Permar Provisions, Inc.*, 79 B.R. 530, 534 (Bankr. E.D.N.Y. 1987); *In re Smoss Enter. Corp.*, 54 B.R. 950, 951 (Bankr. E.D.N.Y. 1985).

caused significant confusion among debtors, creditors, and lower courts.

The Third Circuit in *Hechinger* noted this confusion in rejecting the debtor's argument that *Jacoby-Bender's* analysis applied to its pre-confirmation sales of real estate interests. *See Hechinger*, 335 F.3d at 255. Judge Alito agreed with the Fourth Circuit that "[t]he *Jacoby-Bender* decision thus resolved the issue of whether the sale was authorized by the terms of the *previously* confirmed plan, not whether the sale was necessary to achieving the plan's confirmation." *Id.* (emphasis added). In so ruling, the Third Circuit reversed the decisions of both the district court and the bankruptcy court below, which had adopted the broad ruling espoused by the debtor as supporting tax exemptions for sales interests occurring prior to the adoption of a plan. *See id.* at 255-56.

In short, while the Second Circuit's decision is clearly distinguishable and not part of any direct conflict on the specific issue presented herein, the opinion has caused significant confusion as to its application. This confusion ultimately contributed to the circuit split that arose when the Eleventh Circuit issued its opinion in this case.

4. *The Eleventh Circuit.* In rejecting the decisions of the Fourth and Third Circuits in *NVR Homes* and *Hechinger*, respectively, the Eleventh Circuit created a clear split among the circuits on the issue of tax exemptions for pre-confirmation transfers under 11 U.S.C. § 1146(c). Indeed, the Eleventh Circuit's decision stretches section 1146(c) well beyond its statutory language by extending tax exemptions to almost any transfer of assets, even those occurring months or years prior to the existence of an actual confirmation plan.

Notably, the Eleventh Circuit relied upon its decision in *T.H. Orlando* in stating that section 1146(c)'s "under a plan confirmed" language "refers to a transfer authorized by a confirmed Chapter 11 plan," which in turn means "any transfer that is necessary to the *consummation* of the plan."

See Pet. App. 6a (*citing In re T.H. Orlando Ltd.*, 391 F.3d 1287, 1291 (11th Cir. 2004) (emphasis added). In other words, the Eleventh Circuit expanded section 1146(c)'s language beyond transfers authorized under *confirmed* plans to transfers that are later deemed "necessary to the *consummation* of a plan" – a far broader concept than set forth in the statute.

Ironically, the Eleventh Circuit in *T.H. Orlando* had explicitly *agreed* with the statutory interpretations in both *NVR Homes* and *Hechinger*, reasoning that "under a plan" refers to transfers that are "necessary to the consummation of a *confirmed* plan." 391 F.3d at 1291 (emphasis added).[8] Nonetheless, the panel below held that the prior endorsement in *T.H. Orlando* of the "strict temporal interpretation" of the Third and Fourth Circuits was mere dicta. *See* Pet. App. 6a, fn.2. In rejecting that dicta, the panel below interpreted *T.H. Orlando* as merely involving a "somewhat similar issue" that guided its application of section 1146(c). *See* Pet. App. 6a.

The Eleventh Circuit panel also significantly relied on the Second Circuit's decision in *Jacoby-Bender* to justify its broad interpretation of the language of section 1146(c). In so doing, the panel read the "under a plan confirmed" language nearly out of the statute in holding that the tax exemption will apply to any asset transfer, regardless of when it occurred, as long as a plan is ultimately confirmed and the transfer is deemed necessary for the consummation of the confirmed plan. The language of section 1146(c) cannot justifiably be stretched so far. Given the polar extremes of the statutory interpretations of the Third and Fourth Circuits versus the

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[8] *T.H. Orlando* dealt with the scope of the transfers that could be authorized by a confirmed plan, and whether section 1146(c) could be read so broadly as to exempt transfers made by non-debtor parties, so long as those transfers were part of an interrelated transaction that would aid in the consummation of the debtor's plan. *See In re T.H. Orlando*, 391 F.3d at 1291-92. That analysis has its own issues, but is clearly a different issue than the one raised here.

Eleventh Circuit, this Court should grant review and resolve what has become a significant, irreconcilable circuit conflict resulting in a lack of uniformity on an important tax and bankruptcy issue.[9]

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[9] Commentators have recognized this clear and irreconcilable conflict among lower federal courts and the need for this Court to resolve it. *See, e.g.*, Paul D. Leake & Mark G. Douglas, *Charting The Evolution Of The Chapter 11 Transfer Tax Exemption: Different Subsection, Same Lack Of Clarity*, JNL. OF BANKR. L. 2007.06-4 (June 2007). Leake and Douglas have concluded that "there are no clear guidelines on the scope of the tax exemption" in current section 1146(a). *Id.* They claim that this is because section 1146(a) "is ambiguous enough to invite competing interpretations concerning the types of sales that qualify for the tax exemption." *Id.* ("The increasing lack of certainty spawned by these rulings should act as a catalyst for Supreme court review of the issue."). This "widening rift" among lower courts and lack of clarity means this Court should "resolve the controversy." *Id.* ("With *Piccadilly Cafeterias,* the rift among the circuits is widening with little hope of resolution anytime soon."). Leak & Douglas further point out that the need for review is especially evident because, as previously noted, Congress failed to clarify the scope of the language of section 1146(c) when it simply renumbered the section as 1146(a) in its sweeping 2005 amendments to the Bankruptcy Code. *See id.* ("[T]he new bankruptcy legislation, which implemented the most sweeping reform of U.S. bankruptcy law in over a quarter-century, amended Section 1146 by eliminating subsections (a) and (b), but left the text of subsection (c) (now Section 1146(a)) unchanged."); *see also* Honorable Nancy C. Dreher, *Eleventh Circuit parts with the Third and Fourth Circuits and holds that the § 1146(c) exemption from state stamp taxes applies to preconfirmation sales*, BANKRUPTCY SERVICE CURRENT AWARENESS ALERT (June 2007); Paul D. Leake & Mark G. Douglas, *Testing the Limits of the Chapter 11 Transfer Tax Exemption: In Search of the Meaning of "Under a Plan Confirmed"*, 1 N.Y.U. J. L. & BUS. 839, 855 (Summer 2005); Walter C. Little, *Bankruptcy: In Re Webster Classic Auctions: Is the Door Finally Open for a Practical Application of § 1146(c)?*, 79 FLA. BAR J. 28 (December 2005); Karen Cordry, *The Incredible Expanding Section 1146(c),* 21 AM. BANK. INST. J. 10 (Dec-Jan. 2003).

II. THE DECISION BELOW CONTRAVENES THE PLAIN LANGUAGE OF SECTION 1146(C), WHICH CONGRESS HAS NOT CHANGED SINCE 1938.

The existing circuit split alone warrants this Court's review, which is necessary to provide uniform nationwide guidance on the meaning of section 1146(c)'s language. Moreover, the Eleventh Circuit's interpretation of section 1146(c) cannot be reconciled with the plain language of that provision, which has remained unchanged for almost 70 years.

As the Fourth Circuit reasoned in *NVR Homes*, it is section 1146(c)'s plain meaning that is paramount; and, in determining the limits of that meaning, federal courts should be mindful that the terms of the exemption "should be construed narrowly in favor of the state." *NVR Homes,* 189 F.3d at 457. The Fourth Circuit correctly concluded that "Congress, by its plain language, intended to provide exemptions only to those transfers *reviewed and confirmed* by the court" as part of the plan process. *Id.* at 458 (emphasis added). Any other interpretation allows some future plan's terms to control the availability of the limited tax exemption, rather than the terms of the statute itself. *See id.* at 456.

As noted, the Third Circuit in *Hechinger* agreed with this reasoning, concluding that the "most natural" reading of the "under a plan confirmed" language in the statute is to require that a transfer be "authorized" by a plan. *See In re Hechinger*, 335 F.3d at 252. Judge Alito correctly reasoned that actions taken "under" a provision of law or a document having legal effect are actions "authorized" by the law or legal document, meaning the law or document provides the authority for the actions in the first place. *See id.* That means that if a plan for reorganization is not confirmed (or, as in this case, *did not even exist*) at the time of the transfers, then the plan cannot provide the authority for the transfers and the state tax exemption cannot apply. *See id.*

Notably, the language of section 1146(c) has not changed in almost 70 years. It is significant that Congress has had the opportunity to amend the language on several occasions when it enacted major revisions to the Bankruptcy Code in 1938, 1978, and 1984. Most recently, Congress had the opportunity to amend the language of section 1146(c) in its major revision of the Bankruptcy Code in 2005, well *after* the Fourth and Third Circuits gave their interpretation of the statute's applicability. Notably, this significant 2005 overhaul to the Bankruptcy Code was titled "The Bankruptcy Abuse Prevention and Consumer Protection Act." Rather than legislatively overruling the decision of the Fourth and Third Circuits in *NVR Homes* and *Hechinger*, respectively, Congress merely renumbered section 1146(c) as section 1146(a).

As courts have repeatedly noted, the Congressional intent underlying section 1146(c) was to grant certain limited state tax exemptions to assist in the implementation of reorganization plans confirmed under the bankruptcy laws. This Court should grant review to rectify the Eleventh Circuit's overbroad view of section 1146(c), an interpretation that contravenes the plain language of the statute and the intent of Congress as expressed in section 1146(c).

III. REVIEW IS WARRANTED BECAUSE OF THE INCREASINGLY PREVALENT GRANT OF UNJUSTIFIED TAX EXEMPTIONS AND OTHER RELATED ABUSES.

The existing confusion, and the overbroad nature of the Eleventh Circuit's holding, have made it increasingly common for companies "to enter bankruptcy with a plan for sale to be effected almost immediately after the bankruptcy case is filed with a planned distribution scheme blessed by the court, a

practice which arguably gives little more than lip service" to applicable bankruptcy principles.[10]

Indeed, the Eleventh Circuit's decision "only makes it easier for the process to go forward" and "[c]reditors who get the wrong end of these swift sales are increasingly unhappy; abuses will inevitably bring negative reactions from the bankruptcy courts."[11] Notably, the bankruptcy plan process provides for significant creditor involvement and control. Thus, to allow this tax exemption to be granted without requiring that statutory requirements be met circumvents the very protections that Congress created for creditors.

Moreover, section 1129(d) explicitly provides that a plan may not be confirmed if "the principal purpose of the plan is the avoidance of taxes." 11 U.S.C. § 1129(d). Where, as is increasingly common, most or all of the debtor's assets are liquidated through pre-confirmation sales, and the plan merely distributes those assets in a way only slightly different from a traditional Chapter 7 liquidation, it is difficult to view these plans as being confirmed for any purpose other than avoiding these taxes.

Further, if the Eleventh Circuit's expansive, non-textual approach is adopted, it will likely only fuel the "creative" approaches of debtors to further expand the exemption's reach. Even before its decision in *Piccadilly*, the Eleventh Circuit's decision in *T.H. Orlando* was criticized because it "invites all manner of creative tinkering with Chapter 11 plans" such that asset transfers can be structured "in such a way that they can be characterized, rightly or wrongly, as 'necessary to the consummation' of a plan of

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[10] *See* Honorable Nancy C. Dreher, *Eleventh Circuit parts with the Third and Fourth Circuits and holds that the § 1146(c) exemption from state stamp taxes applies to preconfirmation sales*, BANKRUPTCY SERVICE CURRENT AWARENESS ALERT (June 2007).

[11] *Id.*

reorganization." Paul D. Leake & Mark G. Douglas, *Testing the Limits of the Chapter 11 Transfer Tax Exemption: In Search of the Meaning of "Under a Plan Confirmed"*, 1 N.Y.U. J. L. & BUS. 839, 855 (Summer 2005). Accordingly, "[s]uch machinations will only make life harder for bankruptcy judges called upon to adjudicate the confirmability of a Chapter 11 plan." *Id.*

Notably, in *T.H. Orlando*, the Eleventh Circuit allowed a transfer of assets between two *non-debtor* parties to be exempted from the tax. Because the underlying transfer was arguably necessary for the debtor to receive its loan, the court held that it could prevent the collection of taxes on the third-party transactions of non-debtors. The potential for abuse under the Eleventh Circuit's interpretation of the scope of the statutory exemption is apparent.

These types of machinations are the natural result of the Eleventh Circuit's overly broad construction of section 1146(a). The bankruptcy courts in the Eleventh Circuit have increasingly faced attempts to get their approval of tax exemptions immediately upon the filing of a bankruptcy petition and long before any plan is proposed, let alone confirmed. As a result, it has become increasingly necessary for the Florida Department of Revenue to not only oppose efforts to obtain premature tax exemptions, but to attempt to require that any tax revenues be placed in escrow until a plan is actually proposed and confirmed.

Finally, it bears noting that actual confirmed plans result in only a percentage of the cases filed. For this reason, granting tax exemptions at the beginning of a case – with an expectation that a plan will be proposed and ultimately approved down the road – is putting the cart before the horse. In some instances, tax exemptions are being granted at the outset of a case, even though it is speculative that a plan will ever be confirmed and long before the appropriate standards for the grant of the exemption are actually ripe for review. This process finds no support in the Code and creates

additional difficulties and complexities, which will once again continue to proliferate under the Eleventh Circuit's view.

For these additional pragmatic reasons, this Court's review of the appropriate limits of section 1146(a)'s tax exemption is even more important given the split of authority in the circuit courts.

CONCLUSION

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

Respectfully submitted,

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