1   IN THE SUPREME COURT OF THE UNITED STATES

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3   FLORIDA DEPARTMENT OF   :

4   REVENUE,   :

5   Petitioner   :

6   v.   :   No. 07-312

7   PICCADILLY CAFETERIAS, INC.   :

8   - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Wednesday, March 26, 2008

11

12   The above-entitled matter came on for oral

13   argument before the Supreme Court of the United States

14   at 11:06 a.m.

15   APPEARANCES:

16   SCOTT D. MAKAR, ESQ., Solicitor General, Tallahassee,

17   Fla.; on behalf of the Petitioner.

18   G. ERIC BRUNSTAD, JR., ESQ., Hartford, Conn.; on behalf

19   of the Respondent.

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C O N T E N T S

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1   P R O C E E D I N G S

2   (11:06 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   next in Case 07-312, Florida Department of Revenue

5   versus Piccadilly Cafeterias.

6   Mr. Makar.

7   ORAL ARGUMENT OF SCOTT D. MAKAR

8   ON BEHALF OF THE PETITIONER

9   MR. MAKAR: Mr. Chief Justice, and may it

10   please the Court:

11   The virtues of reading Congress' grant of

12   the stamp tax exemption, 1146(c), to only

13   post-confirmation transfers is threefold. First, it's

14   faithful to the language of the statute, which requires

15   that there be a plan confirmed, as the courts in NVR and

16   Hechinger have held, and draws a simple bright-line test

17   at the point of confirmation, at which point the

18   bankruptcy judge has the power to grant that tax

19   exemption.

20   It's also based upon the principle that

21   taxation exemption statutes, which this is a case

22   involving one, must be narrowly construed if they are to

23   stay under principles of federalism. It also avoids the

24   intrusion into the State's tax system, keeping in mind

25   the important fact that approximately three-quarters of

3

1   these Chapter 11 cases never get to plan confirmation.

2   Instead, in three quarters of the cases you have, as in

3   Lamie and in the Hartford case, you may have a case

4   convert to Chapter 7 or have it be dismissed.

5   So a pre-confirmation tax exemption granted

6   by the bankruptcy judge at any point prior to

7   confirmation --

8   JUSTICE BREYER: I don't understand that.

9   If it's never confirmed, then I guess the tax is okay,

10   isn't it?

11   MR. MAKAR: Well, Justice Breyer, what

12   happens in these situations is that a -- for example, a

13   363 sale order where the property is being sold, in that

14   order there is an exemption granted by the bankruptcy

15   judge.

16   JUSTICE BREYER: But so what? Isn't that --

17   I mean, I assume that's totally illegal, that you get --

18   I thought we're talking about this provision where

19   everybody agrees that it has to be under a plan

20   confirmed under section 1129. So if there's no plan

21   confirmed, I don't know how you would fall within this

22   exemption.

23   MR. MAKAR: Well, that's our point exactly,

24   Your Honor.

25   JUSTICE BREYER: Fine. If it's your point

4

1   exactly, then I guess I must agree with that. I'll hear

2   from the other side. Except I thought your point was it

3   makes it difference whether the transfer takes place

4   before the plan is confirmed or after. So I may be just

5   confused about that.

6   MR. MAKAR: Well, what happens in these

7   situations before confirmation where there is a 363

8   order that transfers, that the bankruptcy court then

9   says this is entitled to an exemption, at that point in

10   time the State of Florida or whatever State is denied

11   the revenue that would otherwise --

12   JUSTICE BREYER: Oh, no, I'm asking you

13   this. You then concede -- let me for my own point of

14   view; forget what the -- maybe I'm confused about the

15   facts or maybe I'm not. But let's suppose there is a

16   plan and it is confirmed. The transfer, however, took

17   place a month earlier where a private group of creditors

18   came together, every creditor, with the debtor and they

19   worked out a sale tomorrow, and they transferred the

20   assets tomorrow. Four months later, the plan that

21   includes every word of that goes before the bankruptcy

22   judge, the bankruptcy judge thoroughly understands the

23   situation, and he says: I confirm the plan.

24   Now, under those -- in that circumstance, I

25   guess you now are -- are you prepared to concede that

 1   Florida cannot tax?

 2   MR. MAKAR: No, Your Honor.

 3   JUSTICE BREYER: Of course not. So then --

 4   then the fact that there is no plan seems to me

 5   irrelevant, that situation, from the present case.

 6   So now let's look at this case, where there

 7   is a plan and it is confirmed. My question, going back

 8   to what I thought the facts are, is this: Imagine the

 9   situation I've just described -- thorough investigation

10   later by the bankruptcy judge; plan including it is

11   confirmed. And you say if the transfer took place first

12   you can assert your tax, but if the transfer took place

13   second, after the plan, you can't.

14   And my question, if I'm right on my

15   assumption, is I'd like you to provide a reason why any

16   human being, a reasonable human being, would want to

17   make that distinction?

18   Why would anyone want to say we want to give

19   all the money to the creditors and not let Florida get

20   some if it takes place, the transfer, after the

21   confirmation, but would think differently about it and

22   would want Florida to get some if the transfer takes

23   place before the confirmation, which confirmation

24   describes everything in depth, is thoroughly

25   investigated, et cetera? What reason could there be for

1 such a distinction?

2   MR. MAKAR: Well, two things,

3 Justice Breyer. First of all, the Bankruptcy Code speak

4 in terms of a -- 1146(c) speaks in terms of a "plan

5 confirmed."

6   JUSTICE BREYER: I'm not speaking of the

7 language for the moment. I want you to forget about the

8 language and assume the language is ambiguous. That's a

9 different question. My question is, assuming that the

10 language is ambiguous, as every lower court has found,

11 assuming that, however, is there any reason why a

12 reasonable human being would make this distinction?

13 That's my question. And there may be an answer, but I

14 want to know what answer is.

15   MR. MAKAR: Sure. In this context --

16   JUSTICE SCALIA: I mean, you could say this

17 was Congress, right?

18   MR. MAKAR: I'm sorry?

19   JUSTICE BREYER: That is not an answer.

20   (Laughter.)

21   JUSTICE BREYER: I would appreciate an

22 answer to the question.

23   MR. MAKAR: Well, Justice Breyer, I think

24 the practical reason is Congress has created a

25 structured Bankruptcy Code, in which there is a plan

1   confirmation process structure that Congress has

2   provided here. And in this particular case, and in

3   perhaps the hypothetical, this was done outside the plan

4   confirmation process. In other words, this sale was

5   done even before a plan was even filed.

6   CHIEF JUSTICE ROBERTS: I suppose one of the

7   reasons would be how far do you go back? I mean, you go

8   back three years and say, well, you know, the bankruptcy

9   judge can say, part of what I'm confirming is the sale

10   that took place three years ago, so you can file for a

11   refund, I guess.

12   MR. MAKAR: Well, that's the fundamental

13   problem we have.

14   JUSTICE BREYER: That's the problem? If

15   that's the problem, I thought that there had to be a

16   filing for bankruptcy before any of this kicks in.

17   MR. MAKAR: Well, there certainly is. There

18   has to be a filing for --

19   JUSTICE BREYER: Okay. Then the answer

20   can't be you could go back 50 years. The answer would

21   have to be you go back until the filing for bankruptcy.

22   CHIEF JUSTICE ROBERTS: Well, why does there

23   have to be -- there has to be a filing for bankruptcy

24   before you get a plan confirmed, but I didn't understand

25   that to be the threshold before -- what does that mean,

1   there has to be a filing for bankruptcy? That the

2   confirmation of the plan can't go back before that?

3   MR. MAKAR: Well --

4   CHIEF JUSTICE ROBERTS: It goes back before

5   then in a lot of cases to look for preferential

6   transfers and things like that.

7   MR. MAKAR: Well, sure, but here what we

8   have is the language of the statute, 1146(c), is keyed

9   in to a key event, which is plan confirmation, the plan

10   confirmed. The authority for the bankruptcy judge to

11   grant the tax --

12   CHIEF JUSTICE ROBERTS: I thought your

13   answer to Justice Breyer was saying there's another key

14   event and that's the filing of the petition for

15   bankruptcy.

16   MR. MAKAR: Well, that has -- I don't see

17   that as having any relevance as to the authority of the

18   bankruptcy judge to grant the tax exemption. The

19   question I understood was how far back can can you go?

20   And our position on that is opening this up to

21   pre-confirmation transfers creates all sorts of

22   problems.

23   JUSTICE BREYER: What? That's what I want

24   to know. And I'll add a qualification. I'd say I would

25   read into this a context, and the context is the whole

1   section that gives the exemption from the State law only

2   kicks in when you file for bankruptcy.

3   So, I -- now, it's my question. I guess I

4   could make the hypothetical the the way I want to make

5   it, and the way I want to make it is that this section

6   applies once it kicks in, the bankruptcy filing, and it

7   does not distinguish between the pre- and the

8   post-confirmation, you know, where the confirmation

9   takes place after the transfer or the transfer after the

10   confirmation.

11   You're arguing to the contrary. And what I

12   want to know is what reason there is? Do I have to

13   repeat the question?

14   MR. MAKAR: No. No.

15   JUSTICE BREYER: What is the reason? That's

16   what I want you to focus on, for making that

17   distinction.

18   MR. MAKAR: Well, as I understand the

19   question, Justice Breyer, you're concerned about the

20   pre-confirmation transfer that ultimately gets wrapped

21   into a plan that's ultimately confirmed and why

22   shouldn't that be occurring? Our position --

23   JUSTICE SCALIA: That's what the whole case

24   is about.

25   MR. MAKAR: Right. And that's the language

1   of the statute in our view provides that the authority

2   flows from the confirmed plan.

3   JUSTICE SCALIA: He wants a reason why that

4   might be. Do you know many instances in which Congress

5   has set up a system in which you cannot determine

6   whether a State tax is valid or invalid until some

7   future event at an indeterminate time which may be three

8   years later? Is that customary --

9   MR. MAKAR: No, in fact --

10   JUSTICE SCALIA: -- for someone not to know

11 whether the tax is payable or not for sure until three

12 years later?

13   MR. MAKAR: No, that's exactly our argument.

14   JUSTICE SCALIA: Isn't that a good reason?

15   MR. MAKAR: That's our argument, which is

16 that it is -- is not narrowly construing the statute.

17 It's broadly construing it, as the Eleventh Circuit

18 found --

19   JUSTICE GINSBURG: There's another

20 assumption then that was in Justice Breyer's question

21 about, well, you have to have the petition, the

22 bankruptcy petition. But in this very case wasn't the

23 sale -- wasn't the basic arrangement made the day before

24 the petition was filed?

25   MR. MAKAR: Right. This appears to be one

11

1 of those so-called pre-packaged plans where it was

2 arranged and was sort of put together outside a formal

3 plan confirmation process. Under the Bankruptcy Code,

4 typically there's the filing of the petition --

5   JUSTICE STEVENS: Absolutely.

6   MR. MAKAR: -- and filing of the plan --

7   JUSTICE STEVENS: You were asked, and I

8 think tried to answer and never got your answer out, and

9 I'd like to hear: What is it you were saying about

10 cases in which pre-confirmation transfers are made and

11 the tax exemption is made? Did you start to tell us

12 that you might never recover the tax later on? Or what

13 kind of a problem does it create?

14   MR. MAKAR: That's precisely my point. In

15 three-quarters of these cases approximately, these

16 exemptions can be given.

17   JUSTICE STEVENS: Yes, but then the question

18 is, can you nevertheless, in an untimely fashion,

19 eventually get the tax imposed and the tax collected?

20   MR. MAKAR: Possibly. If it's in escrow,

21 possibly. It takes a tremendous amount of monitoring in

22 these cases. There's a problem with notice. The State

23 doesn't get notice.

24   JUSTICE KENNEDY: Are there also instances

25 -- and, again, I'm interested in Justice Breyer's

1   question and Justice Stevens's question, the practical

2   reasons that might have prompted the statute to be drawn

3   in the way that you say it's been drawn. Are there also

4   instances where a transaction goes through and is later

5   unwound, is later set aside? So that the tax has to be

6   refunded?

7   MR. MAKAR: Yes. I mean, that could be a

8   possibility. That's our position, that this is sort of

9   turning this into a refund statute, perhaps in some

10   instances, by allowing all these pre-confirmation

11   transfers to be eligible for the exemption, keeping in

12   mind that this whole question in this case is: Are

13   preconfirmation transfers ever eligible? We don't think

14   they -- that they are because, as the courts in NVR and

15   Hechinger said, the natural, simple, bright-line test is

16   if you get to plan confirmation, if you've gone through

17   the process that Congress has established, and you get a

18   plan confirmed, then the transfer of the security --

19   this is not a securities case -- but the transfer of the

20   property has at that point been exempt from the tax.

21   So in our view, the purpose of the statute

22   would be thwarted by allowing all these pre-confirmation

23   exemptions. As I say, in 25 percent of the cases

24   perhaps you will get the plan confirmed, and perhaps --

25   CHIEF JUSTICE ROBERTS: Counsel, I'm not

1 sure I understand the practical consequences of your

2 position. I assume that if you're right, people who

3 have an interest in buying the bankrupt business will

4 wait or have to wait until after confirmation of the

5 plan, because the tax liability is going to save them a

6 lot of money. Is it going to work in that case?

7   MR. MAKAR: Work in the sense that --

8   CHIEF JUSTICE ROBERTS: I mean, will the

9 effect of your plan be that it will discourage people

10 who come along and want to buy a bankrupt business?

11   MR. MAKAR: No. I think we have to put this

12 in context. What we have is a Chapter 11

13 reorganization. And then Chapter 7 of course is

14 liquidation, which is typically where the assets of the

15 company would be liquidated and sold off, and you have a

16 trustee. Here we have a different context. This

17 reorganization -- Congress established this

18 reorganization process.

19   JUSTICE GINSBURG: But are you not -- are

20 you questioning -- what I understand to be the case,

21 it's not at all uncommon for a Chapter 11 these days to

22 have the 363(b) sale of property, then have some kind of

23 global settlement, and then distribute all the assets,

24 never have any kind of reorganization. And I didn't

25 understand that it was necessary to kick the case over

14

1 into Chapter 7.

2   Aren't there many cases filed under Chapter

3 11 that end up with no reorganization?

4   MR. MAKAR: There are a number. There are a

5 number. And I'm not sure exactly the number, but it's a

6 small but growing percentage in which the debtors are

7 taking advantage of Chapter 11 to liquidate rather than

8 go through Chapter 7. And there's reasons for that. It

9 may be that the debtor in possession of the company has

10 greater control than a trustee would and so forth.

11   Our point is that this is -- in this

12 liquidation context, it's basically trying to hammer a

13 Chapter 7 peg into a Chapter 11 hole, because what is

14 happening here is the tax exemption that Congress has

15 set up here, which should be narrowly construed in favor

16 of the State, is being broadly expanded. In fact, what

17 the Eleventh Circuit did below --

18   JUSTICE SCALIA: What harm is done? Could

19 you tell us in just a few words, what's the harm?

20 That's what Justice Breyer's concerned about.

21   MR. MAKAR: Well, the harm, Justice Scalia,

22 is that in these instances -- as I said, in cases where

23 he exemption is being granted unjustifiably, the State

24 has to expend resources on litigation. And there is now

25 a new test, and there has -- it is going back to court,

1   and there is --

2   JUSTICE BREYER: And it's not the

3   litigation. What you've said so far is, at least as I

4   have taken it in, that the practical harm is the

5   following: There will be a certain number of transfers

6   that take place after the filing, but before the actual

7   confirmation; and in respect to those transfers, the

8   State is left in a position of uncertainty.

9   You don't know if you can assert your tax or

10   not assert your tax until that transfer is later

11   confirmed as part of the confirmed plan or not.

12   That's what I take it as you're having said.

13   And then I think I'll hear in a minute somebody say, but

14   that kind of uncertainty is rife in the tax laws. It

15   often occurs that a taxing authority is not certain

16   about how to characterize a transaction until later

17   events take place which are part of, or related to, the

18   transaction; and the IRS and all the State tax

19   departments survive.

20   So if I'm right in guessing that, discuss.

21   (Laughter.)

22   JUSTICE BREYER: That's all I can say.

23   MR. MAKAR: The notice provision is one.

24   The State may not get notice. For example in NVR,

25   there's 5,000-and-something transfers of property that

16

1   happened in the State of Florida that we never get

2   notice of to object to them. If it is in a 363 context,

3   we probably don't get notice because we don't own the

4   property that is being transferred.

5   All this pre-confirmation effort and

6   expenditure of resources on -- the State has to monitor

7   these --

8   JUSTICE SCALIA: What about the solvency of

9   the person who has tentatively been declared exempt from

10   your tax; so, therefore, you can't go get him right

11   away? This is not the ordinary citizen. This is

12   somebody who is on the edge of bankruptcy. You would

13   normally want to get your money out of him as soon as

14   possible before he squanders what is left, right?

15   MR. MAKAR: Well, I --

16   JUSTICE SCALIA: And would it -- would it

17   not happen with some frequency that, even though you

18   could have collected the tax three years earlier, by the

19   time it turns out for sure that there's never going to

20   be a Chapter 11 confirmation --

21   JUSTICE STEVENS: Isn't the tax imposed on

22   the purchaser, not the bankrupt's estate?

23   MR. MAKAR: I'm sorry, sir?

24   JUSTICE STEVENS: Isn't the tax imposed on

25   the purchaser, rather than the bankrupt's estate?

1   MR. MAKAR: Under -- under Florida law it is

2   imposed upon the transaction and is repaid by the buyer

3   or the seller. But on the question here --

4   JUSTICE GINSBURG: What I don't understand

5   about the -- how the Florida system works, I thought you

6   don't get -- you don't get the transfer recorded until

7   you pay the tax. I thought that's what Florida law was.

8   MR. MAKAR: That's correct. But here what

9   is happening is with the pre-confirmation orders that

10   are coming out with regularity, those are being used to

11   prevent the taxes from being paid and the recordation

12   of --

13   JUSTICE BREYER: Why can't you just say

14   that? Why can't you say, you want to record this

15   taxation, pay the tax. And when you come in later,

16   because it was confirmed, show us the paper. We'll give

17   you the money back.

18   How does that interfere with -- with

19   anything?

20   MR. MAKAR: Well, it becomes an

21   administrative burden.

22   JUSTICE BREYER: Why is it an administrative

23   burden? The burden is entirely on the people who want

24   their money back. They come in. They file a piece of

25   paper. It says Federal bankruptcy judge signed, plan

18

1   confirmed, and it would take, I guess, a few minutes to

2   read through it to see they're telling the truth, which

3   you always have the problem in a tax, and then you give

4   them their money back.

5   MR. MAKAR: Well, again, what is happening

6   with these orders being granted, sometimes the State

7   doesn't even know about it, and sometimes --

8   JUSTICE BREYER: Of course, you can't file

9   it if they don't tell the State. So if they're not

10   going to tell you, they're not going to have their

11   transfer recorded.

12   I mean, look, we're going into this, and on

13   the other side, of course, there is the following

14   consideration: That there are creditors who are owed a

15   lot of money; and all these creditors are in a room; and

16   they think, if I can sell these assets tomorrow, I'm

17   going to get a lot more money than I will if I have to

18   wait for six months. That's why we want to go through

19   with this.

20   Now isn't that an important bankruptcy

21   interest, to make the creditors more whole?

22   MR. MAKAR: Well, the State of Florida

23   doesn't want to stand in the way of -- nor do the other

24   States -- in the way of maximizing the value of the

25   estate.

1   And in the situation here we're talking

2   about a very small tax. It's only imposed in this

3   limited context as to when a confirmation plan comes out

4   in Chapter 11.

5   JUSTICE SCALIA: Mr. Makar, you were going

6   to address, I take it, the assumption that

7   Justice Breyer has asked you to make, which is that the

8   language here is ambiguous. And your position is, I

9   take it, that "confirmed" means "confirmed"?

10   MR. MAKAR: Well, absolutely. I don't

11   concede away our first argument. I think it's very

12   powerful, which is that the language of the statute,

13   itself, put in the context of this Chapter 11

14   confirmation process, read in its context, which is from

15   the post-confirmation section, powerfully supports the

16   position that this is a post-confirmation transfer

17   exemption.

18   CHIEF JUSTICE ROBERTS: I don't understand

19   why this is a big deal. Assuming that was news to me,

20   that this only arises after the filing of a bankruptcy

21   petition, and you are looking forward to confirmation of

22   the plan, this tax only applies at the transfer of

23   title.

24   Why don't you just get your deal together

25   and just say, well, the closing is going to be the day

1 after confirmation of the bankruptcy plan?

2   MR. MAKAR: Well -- and then --

3   CHIEF JUSTICE ROBERTS: And that's when you

4 transfer title, and that's when you have to pay the

5 stamp tax.

6   MR. MAKAR: Well, that, in the ordinary

7 course of things, is what the statute envisions.

8 That's, of course, not what happened here, but that's

9 the ordinary course. And this exemption --

10   JUSTICE SCALIA: Sometimes don't they want

11 the transfer to be effective whether or not there is a

12 later confirmation? I thought that that was the

13 assumption here: That some of these transfers they want

14 to be effective whether or not a confirmation occurs

15 later.

16   MR. MAKAR: Well, and that's what happens in

17 some of these cases that are transferred to Chapter 7 or

18 dismissed, where they get the tax exemption and then get

19 out of the Chapter 11 whirl, having gotten the tax

20 exemption, leaving the State to have to unravel what has

21 been done.

22   That's the beauty and simplicity of the

23 bright-line rule of Hechinger and NVR, which is that the

24 language of the statute says post -- it says confirmed

25 plan. So it is at that point that the authority of the

1 bankruptcy judge to grant the exemption -- the exemption

2 exists and, thereby, makes it self-executing in the

3 sense that the plan is confirmed. The order of

4 confirmation provides the authority for the exemption;

5 and from that point forward it works with -- with

6 simplicity. It is a very straightforward application of

7 the statute.

8   And it's the most natural reading of the

9 statute, as well. So I don't want the Court to at all

10 feel as if I'm conceding ground on the language of the

11 statute or the structure of the code and how it applies

12 here.

13   What I'm -- where I think there may be some

14 confusion is simply that in these three-quarters of the

15 cases these exemptions are being granted, and it is a

16 problem for the States to have to go out there and to

17 track them down and figure out what's going on in these

18 cases and try to unravel the exemption. So it is in

19 that regard that I -- if one of the exemptions --

20   JUSTICE STEVENS: May I just ask this

21 question? I guess this has been the rule in Florida for

22 awhile. There's a problem, and has the problem been

23 that you actually don't get the money? Or is it an

24 administrative problem, keeping track of things and

25 finding out whether or not you are entitled to it?

1   MR. MAKAR: Justice Stevens, it could be

2   both. I think it could that be we don't know about it,

3   so we don't get the money. It gets filed, and then we

4   don't -- the order is filed with the clerk of court,

5   and, therefore, the money isn't received --

6   JUSTICE STEVENS: Are there any studies

7   showing how much money you've actually lost by this

8   practice?

9   MR. MAKAR: No. We've looked at it to see

10   if there's any data. There's nothing that I can give to

11   you with any reliability. I would say, anecdotally,

12   that it is in the low millions rather than the --

13   obviously the stamp tax in the State of Florida has been

14   in the billions of dollars overall; but that's not the

15   issue here. So -- but it is quite a few millions of

16   dollars that we believe is --

17   JUSTICE STEVENS: Did I understand you

18   correctly? You say you have, in fact, lost millions of

19   dollars from the failure to get access under this rule?

20   MR. MAKAR: Anecdotally, yes. As I said,

21   this is in conversations with the Department of Revenue

22   and so forth. There's just no hard data. That's one of

23   the problems in this area, since -- I did provide the

24   Court with some data about the number of plans that are

25   confirmed versus dismissed, and so forth, and the number

23

1   of filings. We have about a thousand --

2   JUSTICE STEVENS: It would seem to me that,

3   normally, because you do require recording, that there

4   would be -- it wouldn't be all that difficult to keep

5   track of all these cases in which there had been

6   transferred pre-confirmation transfers. And if you did

7   you have some filed in the computer that had them all

8   there, as soon as the -- if the confirmation did not

9   occur, you could just go ahead and send out the bills.

10   MR. MAKAR: Well, that system does not

11   exist. I don't know how difficult it would be. I would

12   suspect -- things sound simple sometimes in theory, and

13   then in practice they become very difficult in a State

14   as populous as --

15   JUSTICE KENNEDY: I guess your point is

16   that, as a whole, the virtue of the stamp tax is that it

17   is virtually automatic on recording, and you don't have

18   to send out notices, and so forth.

19   MR. MAKAR: Well, absolutely. And --

20   JUSTICE KENNEDY: The whole point of the

21   stamp tax.

22   MR. MAKAR: Absolutely, and it makes it at

23   that point in time certain. And the virtue, again, of

24   this bright-line rule is that it provides certainty,

25   predictability, and -- and --

1   CHIEF JUSTICE ROBERTS: How long does it

2   typically take from the filing of the petition to

3   confirmation of the bankruptcy plan?

4   MR. MAKAR: Mr. Chief Justice, the study I

5   cited to the Court about the number of cases it could

6   be -- has data in there. It looks to be -- it

7   was 4,000, or something along this line. It looks to be

8   like the average is about -- I think it is around 450 to

9   600 days. I would have to pull the data and look real

10   closely. But that's on average. Some can be very

11   quick; some can take longer, depending on

12   the complexity.

13   A pre-packaged plan like the one we have

14   before us here, it's not clear here why they couldn't

15   have had the plan confirmed before the transfer. This

16   wasn't a perishable commodity or things along those

17   lines. But there is not a whole lot of data.

18   JUSTICE STEVENS: Is it -- another question

19   I had: Is it not true that even under your rule there

20   will be a number of cases that, even though it was clear

21   that the transaction was after the confirmation, there's

22   an issue as to whether it was under the plan?

23   MR. MAKAR: That issue could actually arise;

24   and that was the Jacoby case that, in our view, sort of

25   spawned a lot of the problems here.

1   There may be some issues arising

2   post-confirmation. We concede that. That -- but that's

3   going to be less often than if we have the range of

4   pre-confirmation. Because if we have the range of

5   pre-confirmation transfers now being subject to

6   litigation, it's going to be at least multiples of -- in

7   terms of the burden on the State.

8   JUSTICE KENNEDY: I had one question as to

9   operation of the tax in Florida.

10   Suppose a transaction -- there's no

11   bankruptcy. A transaction is completed. Stamps are

12   paid. There is then a suit to rescind the transaction

13   on the ground of fraud or mistake. Do you get your

14   money back from the stamp tax?

15   MR. MAKAR: There is a refund mechanism for

16   certain situations. I'm not sure if that one would be

17   covered, but I believe it would be. There are -- there

18   are some me mechanisms to get a refund back under the

19   State's systems.

20   If there are no further questions, I will

21   reserve my time for rebuttal.

22   CHIEF JUSTICE ROBERTS: Thank you, counsel.

23   Mr. Brunstad.

24   ORAL ARGUMENT OF ERIC BRUNDSTAD, JR.

25   ON BEHALF OF THE RESPONDENT

26

1   MR. BRUNSTAD: Mr. Chief Justice, and may it

2   please the Court:

3   The scarcest and most precious commodity in

4   a Chapter 11 case is cash. Without cash, you cannot

5   even get to confirmation.

6   The way in which most debtors generate the

7   cash necessary to get to confirmation, to pay all of the

8   things that have to be paid in cash on confirmation is

9   through asset sales.

10   In fact, this tax exemption is more

11   important for pre-confirmation transfers to the

12   confirmation process than post-confirmation transfers.

13   Here in this case, if you look at the joint

14   appendix page 127, you can see the things that had to be

15   paid on confirmation of this plan, including

16   administrative expenses.

17   In section 1129, Congress set forth the rule

18   that certain things have to be paid in cash. Every

19   dollar that is spent to pay a stamp tax cannot be used

20   to pay employee claims, cannot be used to pay for goods

21   and services the debtor desperately needs to reorganize,

22   and cannot be offered to creditors to get their vote in

23   favor of the plan.

24   There is no reason, no reasonable reason why

25   Congress would have wanted to allow the exemption for a

1   thousand-dollar transfer that occurs after confirmation,

2   but not to a ten-million-dollar transfer that occurs

3   just prior to confirmation.

4   JUSTICE SCALIA: Because you don't know

5   whether that second one will ever be a sale under a

6   plan, which is what the code requires. It has to be a

7   transfer under a plan. And when it occurs, you don't

8   know whether it is going to be an under plan or not.

9   MR. BRUNSTAD: Well, Justice Scalia, I think

10   that depends on how you define the term "under." And,

11   getting back to your prior question --

12   JUSTICE SCALIA: At the time it occurs it

13   doesn't matter how you define the term. There is no way

14   at the time it occurs to say that this is a transfer

15   under a plan. There hasn't been a confirmed plan.

16   MR. BRUNSTAD: There has not been a

17   confirmed plan, but there is often --

18   JUSTICE SCALIA: It requires under a plan

19   confirmed.

20   MR. BRUNSTAD: Well, it requires that there

21   be a plan confirmed. Now, it doesn't say "confirmed

22   plan." Where Congress intended to foreclose discussion,

23   it says --

24   JUSTICE SCALIA: It says "a plan confirmed."

25   How do you know at the time the transfer is made whether

28

1   it is under a plan confirmed?

2   MR. BRUNSTAD: You don't necessarily know,

3   Justice Scalia.

4   JUSTICE SCALIA: You don't at all know.

5   JUSTICE SOUTER: In fact, you do know, I

6   presume, on the statistics that the odds are three to

7   one against there being a confirmed plan.

8   MR. BRUNSTAD: Yes, Justice Souter, but that

9   underscores how difficult it is to confirm plans in

10   Chapter 7, why Congress wanted to make it easier by

11   providing this tax relief. You need cash to confirm.

12   For example, the administrative expenses --

13   JUSTICE SOUTER: I am -- I don't quite

14   follow the leap you just made.

15   MR. BRUNSTAD: Well, the whole purpose of

16   1146(a) is tax relief. It is tax relief to provide more

17   dollars for other Chapter 11 purposes. You cannot

18   confirm a plan without hard, cold cash.

19   In the LTD bankruptcy, the administrative

20   expenses that had to be paid in full prior to the

21   effective date of the plan were north of $200 million.

22   This really makes a difference. This is a live,

23   flesh-and-blood problem.

24   JUSTICE GINSBURG: I thought, Mr. Brunstad,

25   that the question was asked: So the State is not going

1   to get its tax at the time of the asset transfer,

2   because the cash is needed to eventually have a plan

3   that works. So the State doesn't get its tax.

4   And then it turns out that there is no plan;

5   that the case is dismissed. What happens then? Florida

6   has to get back -- at that point gets the tax that it

7   wanted up front?

8   MR. BRUNSTAD: Justice Ginsburg, the

9   practice is to escrow the funds so they will be

10   available as an administrative expense if it turns out

11   there is no confirmed plan.

12   In addition, this is no different than any

13   other asset sale in bankruptcy where if the tax

14   exemption is not allowed, they claim it as an

15   administrative expense.

16   JUSTICE GINSBURG: They are all paid up

17   front, but they are put into escrow. Is that what you

18   are telling me?

19   MR. BRUNSTAD: That is the practice,

20   Justice Ginsburg. And the reason why Florida is never

21   harmed is because the procedures are the same whether it

22   is a Chapter 11 case or Chapter 7. They have to come to

23   the bankruptcy court and file a request for payment of

24   this kind of tax anyway.

25   JUSTICE BREYER: So there is no case, to

30

1   your knowledge -- not millions of dollars, but there is

2   no case, to your knowledge, where, in fact, people

3   transferred the assets; they thought there would be a

4   plan confirmed; there was no plan confirmed; and then

5   the State was not paid?

6   MR. BRUNSTAD: None that I'm aware of,

7   Justice Breyer. And here is why that shouldn't happen.

8   It is theoretically possible, but here is why that

9   should not happen.

10   Because when the -- a transfer is made under

11   section 360(c) -- excuse me, 363 -- the transfers are

12   made free and clear of all claims in interest. That's

13   what section 363 provides.

14   If the State wants to get its tax, in the

15   ordinary course it comes into the bankruptcy court

16   anyway, just as Florida did in this case, to file a

17   request for payment of the tax.

18   JUSTICE SCALIA: You would have no reason to

19   know the answer to that question. You are not the

20   State.

21   The State has told us that millions of

22   dollars have been lost in taxes not recovered.

23   MR. BRUNSTAD: That's because the exemption

24   applies, Justice Scalia. The courts apply this

25   exemption in Chapter 11. It is only applied in Chapter

31

1   11, not Chapter 7.

2   JUSTICE SOUTER: Isn't it odd that the --

3   isn't it odd that the Congress would have required, we

4   will assume, this escrow procedure when the odds are

5   three to one against the non-taxability?

6   It seems to me that just as matter of simple

7   efficiency, they would not have required this elaborate

8   procedure when the odds are that the procedure would be

9   to no avail to the bankruptcy State -- the State.

10   MR. BRUNSTAD: No, Justice Souter, because

11   the purpose of Chapter 11, as we know, is to facilitate

12   reorganization, rehabilitation, saving jobs. It is very

13   difficult. Congress understood it would be difficult.

14   That's why it made Chapter 11 more liberal than former

15   Chapter 10 under the Bankruptcy Act of 1898. That's why

16   we have this tax relief, to provide more dollars that

17   are available to make that process actually work. This

18   is a real flesh-and-blood problem.

19   CHIEF JUSTICE ROBERTS: Is it often the

20   case -- and I don't know, but is it often the case that

21   the people who are engaged in one these asset purchases

22   are, in fact, the creditors themselves? In other words,

23   they are owed a lot of money and said, well, let's --

24   basically, let's take over the business and run it

25   ourselves?

32

1   MR. BRUNSTAD: Sometimes, Chief Justice

2   Roberts, but not often. And the reason why we have

3   these asset sales quickly in bankruptcy, think of the

4   warehouse of the bananas. If you file bankruptcy, you

5   have got to sell those bananas right away. You can't

6   wait for months and months and months until the plan is

7   confirmed, because there's nothing left to sell.

8   Here we have a business which we call the

9   melting ice cube. It an operating business with

10   employees, but we've got to get it into the hands of

11   somebody with capital quickly. Otherwise, this business

12   is going to be -- shut its doors. All of those people

13   will be let go. That's why we had a quick sale here:

14   To preserve value, to preserve jobs.

15   We couldn't wait until the plan-confirmation

16   process played out. And, in fact, there could not have

17   been a confirmed plan without the sale because the

18   creditors were fighting too hard about who was going to

19   get what. We had to have the sale first, and we had to

20   do it quickly to maximize the value, preserve the

21   business, save the jobs.

22   CHIEF JUSTICE ROBERTS: Well, I assume that

23   the creditors have an interest in that as well. I don't

24   know how -- I mean, they are the ones who could move

25   quickly to get the confirmation of the plan, because

1 they are the ones whose interests have to be addressed

2 before the plan can be confirmed.

3   So wouldn't they have an interest in the

4 melting bananas, or whatever?

5   (Laughter.)

6   MR. BRUNSTAD: Chief Justice Roberts, the

7 answer to that question is that the creditors have

8 diverse interests. Secure creditors often want to

9 liquidate quickly. They want to get their collateral

10 liquidated because they may be paid in full out of that.

11 That may leave nothing for the unsecured creditors, the

12 tort victims, the employees who have wage claims, the

13 Pension Benefit Guaranty Corporation.

14   In order for there to be cash for those

15 entities, a more negotiated sale or a different process

16 might have to be followed. That's what happened in this

17 case. There was enough to pay the secured creditors in

18 full and give a 45 to 50 percent distribution to

19 unsecured creditors, including the Pension Benefit

20 Guaranty Corporation.

21   JUSTICE ALITO: You say the test is whether

22 it is instrumental. A transfer has to be instrumental

23 to the plan, is that correct?

24   MR. BRUNSTAD: That is a standard that we

25 offer, Justice Alito.

34

1   JUSTICE ALITO: That is different from

2   "necessary"?

3   MR. BRUNSTAD: Yes, it is. It is -- it is

4   more open.

5   JUSTICE ALITO: Well, what does it mean?

6   MR. BRUNSTAD: Well, basically, Justice

7   Alito, it encompasses almost any pre-confirmation

8   transfer. It's a wide open standard. I want to be up

9   front about that. You could say -- you could use a

10   dictionary definition of under in accordance with, it's

11   about the same. It would cover all of pre-petition --

12   I'm sorry -- the pre-confirmation transfers where you

13   ultimately have a confirmed plan, because all of them

14   will be generating cash that make confirmation possible.

15   CHIEF JUSTICE ROBERTS: I understand your

16   arguments about the desirability. How do you squeeze it

17   into the statutory language?

18   MR. BRUNSTAD: Well, a couple --

19   CHIEF JUSTICE ROBERTS: Under a plan and

20   you're suggesting that it's under the plan before there

21   is a plan.

22   MR. BRUNSTAD: Well, the standard -- the

23   test at 1146(a) requires that there be a plan confirmed

24   under section 1129. So we have three parts of the

25   statute. We have an incident of transfer, that's

1   undisputed. We do in this case have a plan confirmed

2   under section 1129. And we do, in fact, have a stamp

3   tax. The question --

4   JUSTICE SCALIA: You missed the crucial --

5   the crucial part. The transfer has to be under a plan

6   confirmed. I mean, that's the troublesome language.

7   The transfer has to be under a plan confirmed.

8   MR. BRUNSTAD: But we know, Justice Scalia,

9   that in -- where the same language is used, in section

10   365(g), it cannot possibly mean post-confirmation

11   events. It cannot possibly. Because section 365(g)

12   addresses assumptions or rejections of executory

13   contracts under a plan confirmed under Chapter 11. That

14   cannot happen post confirmation because, as this Court

15   said properly in Bildisco, assumption or rejection must

16   occur prior to confirmation of a plan.

17   So the same language used elsewhere in the

18   statute, exactly the same, cannot possibly mean

19   post-confirmation. It must mean something else. And we

20   think it means a transfer that occurs either before or

21   after confirmation as long as you have a confirmed plan.

22   Now, it's also critical that where Congress

23   intended to foreclose the debate to require that there

24   be a plan first, such as in section 1142(b) or section

25   511(b), Congress said "under a confirmed plan." You

1   cannot insert a verb between confirmed and plan, where

2   it's confirmed plan.

3   In this section, Congress -- in 1146(a),

4   Congress said plan confirmed under section 1129. Does

5   that mean plan that has been confirmed, plan that may be

6   confirmed, plan that is confirmed? It's ambiguous.

7   It's ambiguous.

8   Again, in section 1142(b), Congress

9   expressly dealt with transfers under a plan -- under a

10   confirmed plan. And in context, that distinct language

11   means there was a plan first, and then it authorizes

12   parties under the plan to make the transfers that are

13   authorized under the confirmed plan.

14   JUSTICE SOUTER: Is it relevant, as your

15   friend on the other side pointed out, that the

16   particular section in question occurs within the statute

17   under the general heading of "Post-Confirmation

18   Matters"?

19   MR. BRUNSTAD: No, Justice Souter. And

20   here's why. We know, for example, in section

21   1145(c)(2), which is also part of subchapter 3, that

22   expressly applies to an exemption for sales of

23   securities between the petition date and the

24   confirmation date.

25   In addition, section 1146(b) itself allows

37

1   for requests for determination of the tax effects of the

2   plan before the confirmation date. So we know for a

3   fact that the rules in subpart 3, some of them apply to

4   pre-confirmation periods, requests, and exemptions.

5   JUSTICE SOUTER: But isn't the -- isn't the

6   normal reading, if we're going to give any weight to the

7   placement in the statute at all -- and I think we're

8   entitled to give some, that unless there is the kind of

9   clarity that you've just been describing in these two

10   exceptions, that, in fact, the placement there indicates

11   that it is dealing with a post-confirmation matter?

12   MR. BRUNSTAD: I think it is entitled to

13   some weight, Justice Souter, but I think it is

14   completely undercut by some of the very provisions of

15   subchapter 3 by their terms apply to pre-confirmation

16   events.

17   Similarly, some the provisions of subchapter

18   2, section 1127(b) applies expressly to

19   post-confirmation matters. Congress was not consistent

20   in placement -- placing things exclusively under one

21   heading or another.

22   JUSTICE GINSBURG: Mr. Brunstad, there's an

23   aspect of the way this looks that I don't understand,

24   and you're an expert in this area. Perhaps you can

25   explain it to me.

1   You have one of these 363(b) sales of

2   property, and then you have a global settlement with the

3   creditors. What function does the plan serve after you

4   have all that? The assets have been sold. The

5   creditors have made a settlement. There's going to be

6   no reorganization; whatever there is, is going to be

7   distributed.

8   What is the function of having a plan after

9   all that confirmed? I know one purpose of it is that

10   you avoid paying the stamp tax. But is there any other

11   purpose once you have already settled that the sale is

12   made, the creditors agree on how it's going to

13   be divided up? What is the function that the plan

14   serves?

15   MR. BRUNSTAD: That's an excellent question,

16   Justice Ginsburg. The answer is, I think, important.

17   And there is an excellent answer, and that is, whereas

18   Chapter 7 liquidations are sort of off-the-rack, Chapter

19   11 liquidations are custom-made. The plan is

20   custom-made and tailored to the particular assets and

21   circumstances of the particular case.

22   The assets that were sold in this case was

23   not all the assets to be sold, Justice Ginsburg. That

24   often happens. And this plan provides for the orderly

25   liquidation in a specific way of the assets that

1   weren't, in fact, sold.

2   There also are all kinds of claims that have

3   to be resolved and dealt with. This plan, in a

4   customized way, dealt with with the resolution of those

5   claims -- the PBGC liabilities, tort liabilities, all

6   different kinds of liabilities and concerns -- in a much

7   more efficient and tailor-made way than could have

8   happened if the case had been converted to an

9   off-the-rack Chapter 7 case.

10   There is a test which the lawyers and the

11   courts apply as to whether we should stay in Chapter 11

12   when the situation has been that most of the assets have

13   been sold or whether we should convert to Chapter 7, and

14   that is whether it's in the best interests of the

15   creditors and the best interests of the estate to stay

16   in the Chapter 11.

17   That test was met here. It was clearly in

18   the best interest to stay in the Chapter 11, because we

19   got that customized procedure: A plan administrator who

20   was appointed subsequently who is continuing to

21   liquidate assets and distribute the proceeds. We have

22   all kinds of benefits.

23   Now, it is not possible to confirm a Chapter

24   11 plan simply to escape tax liabilities. Section 1129

25   says you cannot confirm a plan if the primary purpose is

1   to escape tax liabilities. So there is a protection for

2   the State there as well.

3   Here, of course, the primary purpose of

4   confirming the plan was not just to he avoid tax

5   liabilities. It was to do all these other

6   administrative things in a custom-made way.

7   JUSTICE SCALIA: What is the section you

8   mentioned earlier that uses "under" in a sense that

9   clearly applies to pre-confirmation?

10   MR. BRUNSTAD: Section 365(g),

11   Justice Scalia.

12   JUSTICE SCALIA: I'm looking for it, and I

13   can't --

14   MR. BRUNSTAD: We quote it in part on page

15   38 of our brief. And it is quoted in part on page 17 of

16   the Petitioner's brief.

17   JUSTICE SCALIA: Did you make that argument

18   there?

19   MR. BRUNSTAD: Yes. Yes, Justice Scalia.

20   On pages 38 and -- 37, 38, and 39, we specifically talk

21   about section 365(g)(1), and we cite the Bildisco case

22   and specifically made the point --

23   JUSTICE SCALIA: How does that provision

24   read? Do you have it quoted here?

25   MR. BRUNSTAD: I do, Justice Scalia. Let me

1   quote it for you exactly. Section 365(g) deals with

2   what the effect of a rejection -- I'm sorry -- effect of

3   breaching an executory contract is. And there are two

4   subparts, 365(g)(1), which provides: "If such contract

5   or lease has not been assumed under this section or" --

6   here's the language that is the same -- "under a plan

7   confirmed under Chapter 11."

8   So, if the contract or lease has not been

9   assumed or -- under this section, section 365, or under

10   a plan confirmed under Chapter 11, then the breach is

11   basically deemed to have existed just immediately prior

12   to the filing of the bankruptcy case.

13   It is exactly the same language. And it is

14   also in (g)(2), the same language is used yet again.

15   It cannot be the case that the election to

16   assume or reject an executory contract can occur

17   post-confirmation. It cannot. Why? Because, as this

18   Court explained in Bildisco, the assumption or rejection

19   must occur prior to confirmation, up until the point of

20   confirmation, is the language this Court used. The

21   lower court decision, the TWA case, et cetera, all say

22   exactly the same thing. And there's an important reason

23   for that.

24   The standard for assumption or rejection,

25   even if it is elected in a plan, is you have to satisfy

42

1   section 365. And that has to be done through a court

2   order, through a court proceeding that has to occur

3   essentially before the court actually confirms the plan.

4   So the same language used --

5   JUSTICE SOUTER: Why? Why?

6   MR. BRUNSTAD: Because the debtor has to

7   elect -- the debtor has to make a decision before

8   confirmation so we know what's going to happen to the

9   property, and so the creditor can timely final a claim

10 if it is going to be rejection, because the creditor

11 does not file a claim for rejection damages for

12 rejection of the contract until the assumption or

13 rejection is determined. That particular thing is

14 postponed.

15   But we must know that prior to confirmation

16 because we have to know how to treat the creditor's

17 claim; if we have to pay that creditor significant

18 money, what's going to happen to the property. For

19 example, Justice Souter, suppose it is a contract to

20 purchase a Boeing 767 for $600 million. The debtor

21 might file for bankruptcy, one of the airlines files for

22 bankruptcy and might have to decide whether to honor

23 that obligation or to reject that obligation, assume it

24 or reject. We need to have that information. We need

25 to know if the debtor is going to have to pay that $600

1 million before confirmation. We can't wait until after

2 because it's too important to the plan. It's too

3 important in dealing with the asset.

4   That's why all the courts, including this

5 one, have said you must make the assumption-or-rejection

6 election up until confirmation, never after. So it

7 can't be the case that the specific language "under a

8 plan confirmed under Chapter 11" as used in section 365

9 refers to post-confirmation, but that is in fact the

10 same language used in section 1146.

11   Now, contrast that with the language used in

12 sections 1142(b) or 511(b), which talks about a

13 "confirmed plan." And, in context, that language

14 clearly means a plan comes first. Congress could have

15 used that same formulation in section 1146(a); it chose

16 not to. And under Russello and the other precedents of

17 this Court's canons of construction, we should give that

18 semantic choice its deference. And, again, there's a

19 reason. So a statute --

20   CHIEF JUSTICE ROBERTS: Your argument there

21 is that "under a plan confirmed" means something

22 different than "under a confirmed plan"?

23   MR. BRUNSTAD: In context, yes, Chief

24 Justice Roberts. And if you look at section 1142(b), I

25 think you can -- you can actually see in context why

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 1   that so clearly means -- that so clearly means the plan

 2   comes first and then is confirmed. But again, it's

 3   different language that is used.

 4   CHIEF JUSTICE ROBERTS: Do you -- do you

 5   agree with the proposition that you only go back so far

 6   as the filing of the petition? Well, what in your

 7   argument suggests that that's a logical stopping point?

 8   It seems to me that if you don't take the date of

 9   confirmation, I don't know why all of your policy

10   arguments wouldn't cause you to go back further.

11   MR. BRUNSTAD: By statute, Chief Justice

12   Roberts, section 103 provides that the provisions of

13   Chapter 11, in Chapter 11, including section 1146, apply

14   only in a Chapter 11 case. There is no case --

15   CHIEF JUSTICE ROBERTS: Yes, but we've

16   already shown a willingness to abandon that type of

17   limitation with "under a plan confirmed." So, you know,

18   the consideration of the prior transfer is going to take

19   place in the context of a bankruptcy case.

20   MR. BRUNSTAD: The only sections that apply

21   basically to pre-bankruptcy, pre-petition matters, are

22   the avoidance powers in section, for example, the

23   preference actions in section 547, the fraudulent

24   transfer provisions in section 548. Those things

25   expressly apply to pre-bankruptcy events, and they say,

1 before the -- "90 days before the commencement of the

2 case," those kinds of things. When Congress wanted to

3 reach back before the petition date, it used very

4 specific terms of the art, very specific authorization.

5   Nothing like that appears anywhere in

6 section 1146(a), and for good reason. It's very clear,

7 and every court to have looked at this has so held, that

8 1146(a) does not apply before the case is commenced.

9 And that makes sense because the purpose is to give tax

10 relief to facilitate the Chapter 11 process. You want

11 to have cash available --

12   JUSTICE STEVENS: Let me just ask this. As

13 a practical matter does the judge, the bankruptcy judge,

14 enter some kind of an order approving the transfer, even

15 though it's pre-confirmation, an order to establish the

16 tax exemption?

17   MR. BRUNSTAD: Yes, Justice Stevens. In

18 fact, that has to happen.

19   JUSTICE STEVENS: So it would have to be

20 after the filing of the bankruptcy proceeding.

21   MR. BRUNSTAD: Yes, Justice Stevens, it

22 must. And under section 363, the Bankruptcy Court must

23 approve sales like this on notice to creditors, which

24 would include the State. And here, in fact, what

25 happened is consistent with what happens in almost every

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1   bankruptcy case. Because the State has an interest, a

2   taxing interest, in the transfer, the State will get

3   notice, which Florida gave here. They have an

4   opportunity to come and object if they wish to, which

5   they did here.

6   There are actually more protections for the

7   State for pre-confirmation transfers than

8   post-confirmation transfers. After the confirmation of

9   the plan, the Bankruptcy Court's work is essentially

10   done, and then you're just out in the world under the

11   plan and the debtor is making sales and transfers.

12   There isn't the opportunity for the State to come in and

13   actually object to things as there is pre-confirmation.

14   So here the State actually has more

15   protections for the pre-confirmation sale --

16   CHIEF JUSTICE ROBERTS: How do you know

17   whether to pay the tax or not? I mean, you know that

18   the bankruptcy petition has been filed, but you really

19   don't know whether there's going to be a plan confirmed

20   under Chapter 11. How do you know whether to pay or

21   not?

22   MR. BRUNSTAD: Well, for example --

23   CHIEF JUSTICE ROBERTS: I assume there are

24   penalties if you don't pay on time.

25   MR. BRUNSTAD: There's a very practical

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1   reason for that question, Chief Justice Roberts, and

2   that is in this case the Bankruptcy Court specifically

3   determined in his order, judge in his order, that the

4   exemption would apply. So that was determined in the

5   order. Of course --

6   CHIEF JUSTICE ROBERTS: But this doesn't

7   happen for some time down the road, right?

8   MR. BRUNSTAD: Well --

9   CHIEF JUSTICE ROBERTS: Up to, I guess -- we

10   were told up to 400 days.

11   MR. BRUNSTAD: Well, you can't have a sale

12   until the Bankruptcy Court approves it. In the process

13   of approval, the Bankruptcy Court was asked and made the

14   determination that 1146(a) would apply. Now, what

15   happens then is the State can come in and has the right

16   to file a request for payment of administrative expense

17   and the funds are escrowed, because if in fact there

18   ends up not being a confirmed Chapter 11 plan, then the

19   State is entitled to its tax, and the money is then paid

20   to the State, its request for payment of administrative

21   expenses is allowed, and it gets is money. But this can

22   make --

23   JUSTICE SCALIA: It's always escrowed? Is

24   that --

25   MR. BRUNSTAD: It's not always escrowed,

 1   Justice Scalia.

 2   JUSTICE SCALIA: Is that a uniform practice?

 3   MR. BRUNSTAD: That is the practice, but

 4   it's not uniform because in some cases there's no need

 5   for an escrow. There are some cases in which we know

 6   there's going to be enough cash available that the State

 7   will be paid, so we don't need that safety. But the

 8   State can always ask for it, and if the State asks for

 9   it I'm almost certain in most cases it will get it.

10   JUSTICE ALITO: Is it relevant that this is

11   a tax-exemption provision?

12   MR. BRUNSTAD: Well, I think it's relevant

13   in the sense that Congress was clearly intending here to

14   grant tax relief to Chapter 11 debtors to facilitate the

15   Chapter 11 process. It's not a tax exemption, Justice

16   Alito, in the sense of, for example, an exemption to a

17   revenue-raising provision. In other words, you could

18   have a State statute that says: The purpose of the

19   statute is to raise taxes and we'll create exemptions.

20   That's one context. And there it might make sense to

21   say: Well, look, while the overall purpose of the

22   statute is to raise revenue, we might construe the

23   exceptions to that purpose narrowly.

24   Here the purpose of Chapter 11 is to

25   facilitate the Chapter 11 process. So I think we

1   construe this revenue-raising -- I'm sorry -- this tax

2   relief measure consistent with that overall purpose.

3   JUSTICE GINSBURG: Why shouldn't we look to

4   see how it was in the Internal Revenue Code with respect

5   to the Federal State tax exemption? That I think leaves

6   no room for argument. This case might be argued either

7   way about does it apply to preconfirmed plan asset

8   transfers? But as I understand it, this section 4382(b)

9   was limited to post-confirmation transfers, that is

10 transfers made within five years after confirmation of

11 the plan.

12   MR. BRUNSTAD: That's the limitation that

13 the United States wanted to add to section 267 of the

14 Bankruptcy Act of 1898. Congress did not grant the

15 United States' request. The United States said this is

16 administratively too difficult to administer, and

17 Congress rejected that testimony from the representative

18 of the Treasury and enacted section 267 over the

19 objection of the United States.

20   Now, the United States after the Excise Tax

21 Reduction Act, I think of 1965, does not really have

22 many excise taxes. And so the testimony of the

23 Commissioner of the Internal Revenue Code -- Revenue

24 Service in 1978, when the Bankruptcy Code was being

25 adopted, was that the United States doesn't really care

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1   about stamp taxes. It really didn't have a position on

2   it.

3   JUSTICE GINSBURG: Well, what was -- what

4   did section -- I'm not talking about -- you mentioned

5   267. 42 -- 4382(b), what did that say?

6   MR. BRUNSTAD: I'm sorry, Justice Ginsburg?

7   JUSTICE GINSBURG: Section -- 26 U.S.C.

8   4382(b).

9   MR. BRUNSTAD: 4382(b)?

10   JUSTICE GINSBURG: Yes.

11   MR. BRUNSTAD: Was that the revenue

12   provisions --

13   JUSTICE GINSBURG: That was in the 1954

14   Code. I'm not talking about 1898.

15   MR. BRUNSTAD: That one I'm not certain of,

16   Justice Ginsburg.

17   JUSTICE GINSBURG: I thought that said that

18   the tax exemption was limited to transfers

19   post-confirmation.

20   MR. BRUNSTAD: No, Justice Ginsburg. There

21   the three -- the history of the development of the

22   statute is section 77(b)(F) and then went to section 267

23   and then went to section 1146. That's the direct --

24   JUSTICE GINSBURG: Maybe you can straighten

25   me out, because where I get this from is the brief for

1   the State, and it's at page 17, mentions the

2   now-repealed 4382(b).

3   MR. BRUNSTAD: That may, Justice Ginsburg,

4   have been a mirror provision. Before 1938, the

5   tax-exemption provisions under the Bankruptcy Code were

6   mirrored. There was a provision in the Bankruptcy Act

7   in section 77(b)(F). There were also mirroring

8   provisions under the bankruptcy -- under the Internal

9   Revenue Code. Those were eliminated and instead we just

10   have section 267 under the Bankruptcy Act of 1898, which

11   dealt with the exemption in bankruptcy.

12   Justice Ginsburg, I think that, going back

13   to your earlier point, I think it's important to

14   underscore that the context of this case is different

15   from other contexts in which the discussion of how we

16   should construe a tax exemption applies. I think the

17   Court here should apply the analysis that it applied in

18   Dolan, where the Court was considering application of a

19   similar canon of narrow construction, and the Court

20   said: Well, in construing the Federal Tort Claims Act,

21   in juxtaposition to this concept that we construe

22   waivers of sovereign immunity narrowly, we don't apply

23   that because that would basically run afoul of the

24   purpose of the Federal Tort Claims Act provisions.

25   The same thing here. The proper rule of

1   resolution where we have an ambiguous statute is to look

2   to the purpose of the statute, and the purpose here is

3   to make Chapter 11 easier by granting tax relief. And I

4   think that, consistent with that purpose, the Court

5   should construe section 1146(a) --

6   JUSTICE SCALIA: Could I?

7   MR. BRUNSTAD: Yes, Justice Scalia?

8   JUSTICE SCALIA: You know, we've said in

9   other opinions no -- no statute pursues its purposes at

10   all costs. And the limitations contained in a statute

11   are as much a part of its purpose as the broad purpose

12   that you just mentioned. I mean, if a -- if a "plan

13   confirmed" means a plan confirmed, that limitation is

14   part of the purpose no less than the broad purpose that

15   you express.

16   MR. BRUNSTAD: Well, that -- that's true in

17   general, Justice Scalia, but if Congress had really

18   wanted to narrow the purpose here to post-confirmation,

19   it would have surely used the temporal limitations it

20   used, for example in section 1127, where the Court said

21   before -- the Congress said before confirmation you do

22   this; after confirmation you do that. That is a -- that

23   is a standard legislative technique used throughout the

24   Bankruptcy Code that was not used in section 8.

25   JUSTICE SCALIA: Maybe, but "under a plan

53

1   confirmed" seems under normal interpretation of language

2   to me to mean under a plan that has been confirmed.

3   MR. BRUNSTAD: Well, I think, Your Honor, as

4   the Court stated in Ardestani, quote, "The word 'under'

5   has many dictionary definitions, and we must draw its

6   meaning from its context," close quote. And under

7   Robinson, the Court looked to, where there was an

8   ambiguous statute, the purpose as the way to resolve the

9   ambiguity, and I submit that should happen here.

10   Thank you very much.

11   CHIEF JUSTICE ROBERTS: Thank you,

12 Mr. Brunstad.

13   Mr. Makar, you have five minutes remaining,

14 and during those five minutes I hope you'll give an

15 answer if you have one to the 365(g)(1) argument that

16 your friend has made.

17   REBUTTAL ARGUMENT OF SCOTT D. MAKAR

18   ON BEHALF OF THE PETITIONER

19   MR. MAKAR: Sure, I'm be glad to, Mr. Chief

20 Justice.

21   365(g) here speaks in terms of a rejection

22 of an executory contract --

23   JUSTICE SCALIA: Is that spelled out

24 somewhere in the -- is its text somewhere in these

25 materials?

1   MR. MAKAR: The full text? I'm sorry; it'

2   not.

3   JUSTICE BREYER: It's on page 38, the last

4   line, the next to the last line.

5   JUSTICE SCALIA: Not the full, not the full

6   section, though.

7   JUSTICE BREYER: The red brief.

8   JUSTICE SCALIA: Just little snippets of it.

9   JUSTICE BREYER: Yes.

10   MR. MAKAR: This provision 365(g) says the

11   rejection of an executory contract constitutes a breach

12   of such contractual relief if the contractual relief is

13   not under a section under a plan. What that means is

14   that it's deemed rejected if, at the time of plan

15   confirmation -- not before, but at the time of plan

16   confirmation. If it's not in the plan, it's deemed a

17   rejection, rejected. That's merely a -- an instrument

18   to say when the contract is -- is deemed rejected. If

19   it's in the plan it's not rejected. If it's not in the

20   plan -- it doesn't get --

21   JUSTICE BREYER: No, no. I'm sorry.

22   Doesn't the rejection have to take place prior to the

23   plan being confirmed?

24   MR. MAKAR: It says the rejection --

25   JUSTICE BREYER: Does it or doesn't it?

 1   Prior to in your opinion or not prior to?

 2   MR. MAKAR: Rejection may occur before that,

 3   but the -- is referring to -- rejection in an executory

 4   contract constitutes a breech, the -- when it is a

 5   breach. And it's only determined -- determined to be a

 6   breach --

 7   JUSTICE BREYER: I'm sorry. I don't

 8   understand how that would work. I have a contract with

 9   Boeing for $500 million. I decide to reject it.

10   Now if that breach doesn't occur until the

11   plan is confirmed, how does the trust -- how does

12   bankruptcy judge know how to treat Boeing as a creditor?

13   MR. MAKAR: Well, at the point of -- the

14   statute speaks in terms of the point of plan

15   confirmation.

16   JUSTICE BREYER: I understand that. But I'm

17   sorry -- doesn't the plan which its confirmed have a

18   list of the creditors and how they are treated?

19   MR. MAKAR: Sure.

20   JUSTICE BREYER: All right. How do we write

21   the plan if, in fact, no breach has occurred and he

22   hasn't become a creditor until the plan is, in fact,

23   confirmed?

24   MR. MAKAR: Well, I'm not sure I am

25   following. But I think the language of the statute here

1   is in a different context, which is saying that the

2   rejection is -- constitutes a breach but gas not been

3   assumed, and at that point it has not been assumed, but

4   at the point of confirmation --

5   JUSTICE KENNEDY: I can understand -- just

6   taking a quick look at 365(g), why it serves a different

7   purpose and a different function.

8   But the Respondent's point was, you have to

9   interpret "under" differently under your view, under

10   365, than under the statute at issue.

11   Do you agree with that?

12   MR. MAKAR: No. No. Because under a plan

13   confirmed in 365(g) relates to point of confirmation or

14   beyond, and we believe under 1146(c) or under 1146(a,

15   Congress has readopted it.

16   CHIEF JUSTICE ROBERTS: So your argument is

17   that you don't have a rejection of the executory conduct

18   -- contract -- until the plan is confirmed? That's

19   what Congress --

20   MR. MAKAR: That's what -- I'm sorry yes.

21   That's -- at that point. That doesn't undermine the

22   argument that under a plan confirmed, 1146(c) means at

23   the point of confirmation or beyond.

24   The most natural reading of 1146(c) is to

25   provide this post-confirmation transfer exemption. No

1 one is contesting that. That's the natural reading of

2 the -- of the statute.

3   And the point here of there being more

4 protection and, for example, is simply not the case.

5 The State is not on notice ob many of these transfers as

6 an MVR. Those were transfers that were outside the

7 ordinary course of business. We would give not notice

8 of that. And in the ordinary course of 363 practice,

9 parties that have an interest in the property -- the

10 State doesn't- -- do not get notice of that proceeding.

11 So that -- this notion that there's more protection in

12 pre-confirmation than post-confirmation is just

13 unsupportable.

14   In -- in conclusion, Your Honors, this is a

15 tax exemption statute, and under this Court's principles

16 it should be narrowly construed. It shouldn't be

17 expanded to this pre-confirmation transfers with all the

18 problems it creates, in the three quarters of cases that

19 don't get confirmed, and have all these intrusions upon

20 them, but -- local governments in their collection of

21 the stamp tax. For that reason we ask the Eleventh

22 Circuit be reversed. Thank you.

23   CHIEF JUSTICE ROBERTS: Thank you, Counsel.

24 The case is submitted.

25   (Whereupon, at 12:06 p.m., the case in the

1   above-entitled matter was submitted.)

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