

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. :

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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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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-312, Florida Department of Revenue versus Piccadilly Cafeterias.

Mr. Makar.

ORAL ARGUMENT OF SCOTT D. MAKAR
ON BEHALF OF THE PETITIONER

MR. MAKAR: Mr. Chief Justice, and may it please the Court:

The virtues of reading Congress' grant of the stamp tax exemption, 1146(c), to only post-confirmation transfers is threefold. First, it's faithful to the language of the statute, which requires that there be a plan confirmed, as the courts in NVR and Hechinger have held, and draws a simple bright-line test at the point of confirmation, at which point the bankruptcy judge has the power to grant that tax exemption.

It's also faithful to the principle that taxation exemption statutes, which this is a case involving one, must be narrowly construed if they were to stay under principles of federalism. And it also avoids the intrusion into the State's tax system, keeping in mind the important fact that approximately three-quarters

1 of 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 three -- for
13 example, a 363 sale order where the property is being
14 sold, in that order there is a -- an exemption granted by
15 the bankruptcy judge.

16 JUSTICE BREYER: But so what? Isn't that --
17 I mean, I'd assume that's totally illegal, that you
18 get -- 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'd 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

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: 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 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 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 -- or 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 speaks
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 the 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 -- part of what I'm confirming is
10 the sale that took place three years ago, so you can file
11 for a 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 -- I mean, what does that

1 mean, there has to be a filing for bankruptcy? That the
2 confirmation of the plan can't go back before then?

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 the plan confirmation, the
10 plan confirmed. The authority for the bankruptcy judge
11 to 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 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 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 -- all right, what is
16 the reason? That's what I want you to focus on, for
17 making that 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 is that --

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 the -- 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: Well, that's our argument, which
16 is 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 appeared to be one

1 of those so-called pre-packaged sort of plans where it
2 was arranged and was sort of put together outside a
3 formal plan confirmation process. Under the Bankruptcy
4 Code, 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 pre-confirmation transfers ever eligible? We don't think
14 they -- 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, and then the transfer of the security --
19 this is not a securities case -- but the transfer of the
20 property is 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 of the plan, because the tax liability is going to save
6 them a 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 here 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

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 States, has not -- is being broadly expanded. In
17 fact, what 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 in 75 percent of the
23 cases if the exemption is being granted unjustifiably,
24 the State has to expend resources on litigation. And
25 there is now a new test, and there has to be going back

1 to court, and there is --

2 JUSTICE BREYER: It's not the litigation.
3 What you've said so far is, at least as I have taken it
4 in, that the practical harm is the following: There will
5 be a certain number of transfers that take place after
6 the filing, but before the actual confirmation; and in
7 respect to those transfers, the State is left in a
8 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 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: Well, sure. As I say, the notice
24 provision is one. The State may not get notice. For
25 example, in NVR, there's 5,000-and-something transfers of

1 property that happened in the State of Florida that we
2 never get notice of to object to them. If it is in a 363
3 context, we probably don't get notice because we don't
4 own the property that is being transferred.

5 All this pre-confirmation effort and
6 expenditure of resources on -- the State will have to
7 monitor these --

8 JUSTICE SCALIA: What about the solvency --
9 excuse me, what about the solvency of the person who has
10 tentatively been declared exempt from your tax; so,
11 therefore, you can't go get him right away? This is not
12 the ordinary citizen. This is somebody who is on the
13 edge of bankruptcy. You would normally want to get your
14 money out of him as soon as possible before he squanders
15 what is left, right?

16 MR. MAKAR: Well, absolutely --

17 JUSTICE SCALIA: And would it -- would it
18 not happen with some frequency that, even though you
19 could have collected the tax three years earlier, by the
20 time it turns out for sure that there's never going to
21 be a Chapter 11 confirmation --

22 JUSTICE STEVENS: Isn't the tax imposed on
23 the purchaser, not the bankrupt's estate?

24 MR. MAKAR: I'm sorry, Justice?

25 JUSTICE STEVENS: Isn't the tax imposed on

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

2 MR. MAKAR: Under -- under Florida law it is
3 imposed upon the transaction and it can either be repaid
4 by the buyer or the seller. But on the question here --

5 JUSTICE GINSBURG: That's what I don't
6 understand about the -- how the Florida system works, I
7 thought you don't get -- you don't get the transfer
8 recorded until you pay the tax. I thought that's what
9 Florida law was.

10 MR. MAKAR: That's correct. But here what
11 is happening is with these pre-confirmation orders that
12 are coming out with regularity, those are being used to
13 prevent the taxes from being paid and the recordation
14 of --

15 JUSTICE BREYER: Why can't you just say
16 that? Why can't you say, you want to record this
17 transaction, pay the tax. And when you come in later,
18 because it was confirmed, show us the paper. We'll give
19 you the money back.

20 How does that interfere with -- with
21 anything?

22 MR. MAKAR: Well, it becomes an
23 administrative burden.

24 JUSTICE BREYER: Why is it an administrative
25 burden? The burden is entirely on the people who want

1 their money back. They come in. They file a piece of
2 paper. It says Federal bankruptcy judge signed, plan
3 confirmed, and it would take, I guess, a few minutes to
4 read through it to see they're telling the truth, which
5 you always have the problem in a tax, and then you give
6 them their money back.

7 MR. MAKAR: Well, again, what is happening
8 with these orders being granted, sometimes the State
9 doesn't even know about it, and sometimes --

10 JUSTICE BREYER: Of course, you can't file
11 it if they don't tell the State. So if they're not
12 going to tell you, they're not going to have their
13 transfer recorded.

14 I mean, look, we're going into this, and on
15 the other side, of course, there is the following
16 consideration: That there are creditors who are owed a
17 lot of money; and all these creditors are in a room; and
18 they think, if I can sell these assets tomorrow, I'm
19 going to get a lot more money than I will if I have to
20 wait for six months. That's why we want to go through
21 with this.

22 Now isn't that an important bankruptcy
23 interest, to make the creditors more whole?

24 MR. MAKAR: Well, the State of Florida
25 doesn't want to stand in the way of -- nor do the other

1 States -- in the way of maximizing the value of the
2 estate.

3 And in the situation here we're talking
4 about a very small tax. It's only imposed in this
5 limited context for when a confirmation plan comes out
6 in Chapter 11.

7 JUSTICE SCALIA: Mr. Makar, you were going
8 to address, I take it, the assumption that
9 Justice Breyer has asked you to make, which is that the
10 language here is ambiguous. And your position is, I
11 take it, that "confirmed" means "confirmed"?

12 MR. MAKAR: Well, absolutely. I don't
13 concede away our first argument. I think it's very
14 powerful, which is that the language of the statute,
15 itself, put in the context of this Chapter 11
16 confirmation process, read in its context, which is from
17 the post-confirmation section, powerfully supports the
18 position that this is a post-confirmation transfer
19 exemption.

20 CHIEF JUSTICE ROBERTS: I don't -- I don't
21 understand why this is a big deal. Assuming that was
22 news to me, that this only arises after the filing of a
23 bankruptcy petition, and you are looking forward to
24 confirmation of the plan, this tax only applies at the
25 transfer of title.

1 Why don't you just get your deal together
2 and just say, well, the closing is going to be the day
3 after confirmation of the bankruptcy plan?

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

5 CHIEF JUSTICE ROBERTS: And that's when you
6 transfer title, and that's when you have to pay the
7 stamp tax.

8 MR. MAKAR: Well, that, in the ordinary
9 course of things, is what the statute envisions.
10 That's, of course, not what happened here, but that's
11 the ordinary course. And this exemption --

12 JUSTICE SCALIA: Sometimes don't they want
13 the transfer to be effective whether or not there is a
14 later confirmation? I thought that that was the
15 assumption here: That some of these transfers they want
16 to be effective whether or not a confirmation occurs
17 later.

18 MR. MAKAR: Well, and that's what happens in
19 some of these cases that are transferred to Chapter 7 or
20 dismissed, where they get the tax exemption and then get
21 out of the Chapter 11 whirl, having gotten the tax
22 exemption, leaving the State to have to unravel what has
23 been done.

24 That's the beauty and simplicity of the
25 bright-line rule of Hechinger and NVR, which is that the

1 language of the statute says post -- it says confirmed
2 plan. So it is at that point that the authority of the
3 bankruptcy judge to grant the exemption -- the exemption
4 exists and, thereby, makes it self-executing in the
5 sense that the plan is confirmed. The order of
6 confirmation provides the authority for the exemption;
7 and from that point forward it works with -- with some
8 simplicity. It is a very straightforward application of
9 the statute.

10 And it's the most natural reading of the
11 statute, as well. So I don't want the Court to at all
12 feel as if I'm conceding ground on the language of the
13 statute or the structure of the code and how it applies
14 here.

15 What I -- I think there may be some
16 confusion is simply that in these three-quarters of the
17 cases these exemptions are being granted, and it is a
18 problem for the States to have to go out there and
19 track them down and figure out what's going on in these
20 cases and trying to unravel those exemptions. So it is in
21 that regard I -- I want to make that --

22 JUSTICE STEVENS: May I just ask this
23 because I guess this has been the rule in Florida for
24 awhile. There's a problem, and has the problem been
25 that you actually don't get the money? Or it's an

1 administrative problem, keeping track of things and
2 finding out whether or not you are entitled to it?

3 MR. MAKAR: Justice Stevens, it could be
4 both. It could be that we don't know about it, so we
5 don't get the money. It gets filed, and then we don't --
6 the order is filed with the clerk of court, and,
7 therefore, the money isn't received --

8 JUSTICE STEVENS: Are there any studies
9 showing how much money you've actually lost by this
10 practice?

11 MR. MAKAR: No. We've looked at it to see
12 if there's any data. There's nothing that I can give to
13 you with any reliability. I would say, anecdotally,
14 that it is in the low millions rather than the -- I mean,
15 obviously the stamp tax in the State of Florida is
16 important -- has been in the billions of dollars overall;
17 but that's not the issue here. So -- but it is quite a
18 few millions of dollars that we believe is --

19 JUSTICE STEVENS: Did I understand you
20 correctly? You say you have, in fact, lost millions of
21 dollars in failure to get taxes under this rule?

22 MR. MAKAR: Anecdotally, like I say,
23 this is in conversations with the Department of Revenue
24 and so forth. There's just no hard data. And that's one
25 of the problems in this area, since -- I did provide the

1 Court with some data about the number of plans that are
2 confirmed versus dismissed, and so forth, and the number
3 of filings. We have about a thousand --

4 JUSTICE STEVENS: It would seem to me that,
5 normally, because you do require recording, that there
6 would be -- it wouldn't be all that difficult to keep
7 track of all these cases in which there had been
8 transferred -- pre-confirmation transfers. And if you
9 did have some filed in the computer that had them all
10 there, as soon as the -- if the confirmation did not
11 occur, you could just go ahead and send out the bills.

12 MR. MAKAR: Well, that system does not
13 exist. I don't know how difficult it would be. I would
14 suspect -- things sound simple sometimes in theory, and
15 then in practice they become very difficult in a State
16 as populous as --

17 JUSTICE KENNEDY: I guess your point is
18 that the whole -- the virtue of the stamp tax is that it
19 is virtually automatic on recording, and you don't have
20 to send out notices, and so forth.

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

22 JUSTICE KENNEDY: The whole point of the
23 stamp tax.

24 MR. MAKAR: Absolutely, and it makes it at
25 that point in time certain. And the -- the virtue,

1 again, of the -- of the bright-line rule is that it
2 provides certainty, predictability, and -- and --

3 CHIEF JUSTICE ROBERTS: How long does it
4 typically take from the filing of the petition to
5 confirmation of the bankruptcy plan?

6 MR. MAKAR: Mr. Chief Justice, the study I
7 cited to the Court about the number of cases it could
8 be -- has data in there. It looks to be -- it
9 was 4,000, or something along this line. It looks to be
10 like the average is about -- I think it is around 450 to
11 600 days. I would have to pull the data and look real
12 closely. But that's on average. Some can be very
13 quick; some can take longer, depending on
14 the complexity.

15 A pre-packaged plan like the one we have
16 before us here, it's not clear here why they couldn't
17 have had the plan confirmed before the transfer. This
18 wasn't a perishable commodity or things along those
19 lines. But there is not a whole lot of data.

20 JUSTICE STEVENS: Is it -- another question
21 I had: Is it not true that even under your rule there
22 will be a number of cases that, even though it was clear
23 that the transaction was after the confirmation, there's
24 an issue as to whether it was under the -- under the
25 plan?

1 MR. MAKAR: That issue could actually arise;
2 and that was the Jacoby case that, in our view, sort of
3 spawned a lot of the problems here.

4 There may be some issues arising
5 post-confirmation. We concede that. That -- but that's
6 going to be less often than if we have the range of
7 pre-confirmation. Because if we have the range of
8 pre-confirmation transfers now being subject to
9 litigation, it's going to be at least multiples -- in
10 terms of the burden on the State.

11 JUSTICE KENNEDY: I had one question as to
12 operation of the tax in Florida.

13 Suppose a transaction -- there's no
14 bankruptcy. A transaction is completed. Stamps are
15 paid. There is then a suit to rescind the transaction
16 on the ground of fraud or mistake. Do you get your
17 money back from the stamp tax?

18 MR. MAKAR: There is a refund mechanism for
19 certain situations. I'm not sure if that one would be
20 covered, but I believe it would be. So there are --
21 there are some mechanisms to get a refund back under the
22 State's systems.

23 If there are no further questions, I will
24 reserve my time for rebuttal.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Brunstad.

2 ORAL ARGUMENT OF ERIC BRUNDSTAD, JR.

3 ON BEHALF OF THE RESPONDENT

4 MR. BRUNSTAD: Mr. Chief Justice, and may it
5 please the Court:

6 The scarcest and most precious commodity in
7 a Chapter 11 case is cash. Without cash, you cannot
8 even get to confirmation.

9 The way in which most debtors generate the
10 cash necessary to get to confirmation, to pay all of the
11 things that have to be paid in cash on confirmation is
12 through asset sales.

13 In fact, this tax exemption is more
14 important for pre-confirmation transfers to the
15 confirmation process than post-confirmation transfers.

16 Here in this case, if you look at the joint
17 appendix page 127, you can see the things that had to be
18 paid on confirmation of this plan, including
19 administrative expenses.

20 In section 1129, Congress set forth the
21 requirement that certain things have to be paid in cash.
22 Every dollar that is spent to pay a stamp tax cannot be
23 used to pay employee claims, cannot be used to pay for
24 goods and services the debtor desperately needs to
25 reorganize, and cannot be offered to creditors to get

1 their vote in favor of the plan.

2 There is no reason, no reasonable reason why
3 Congress would have wanted to allow the exemption for a
4 thousand-dollar transfer that occurs after confirmation,
5 but not to a ten-million-dollar transfer that occurs
6 just prior to confirmation.

7 JUSTICE SCALIA: Because you don't know
8 whether that second one will ever be a sale under a
9 plan, which is what the code requires. It has to be a
10 transfer under a plan. And when it occurs, you don't
11 know whether it is going to be an under plan or not.

12 MR. BRUNSTAD: Well, Justice Scalia, I think
13 that depends on how you define the term "under." And,
14 getting back to your prior question --

15 JUSTICE SCALIA: At the time it occurs it
16 doesn't matter how you define the term. There is no way
17 at the time it occurs to say that this is a transfer
18 under a plan. There hasn't been a confirmed plan.

19 MR. BRUNSTAD: There has not been a
20 confirmed plan, but there is often --

21 JUSTICE SCALIA: Yes, that's what it requires
22 under a plan confirmed.

23 MR. BRUNSTAD: Well, it requires that there
24 be a plan confirmed. Now, it doesn't say "confirmed
25 plan." Where Congress intended to foreclose discussion,

1 it says --

2 JUSTICE SCALIA: It says "a plan confirmed."
3 How do you know at the time the transfer is made whether
4 it is under a plan confirmed?

5 MR. BRUNSTAD: You don't necessarily know,
6 Justice Scalia.

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

8 JUSTICE SOUTER: In fact, you do know, I
9 presume, on the statistics that the odds are three to
10 one against there being a confirmed plan.

11 MR. BRUNSTAD: Yes, Justice Souter, but that
12 underscores how difficult it is to confirm plans in
13 Chapter 7, why Congress wanted to make it easier by
14 providing this tax relief. You need cash to confirm.
15 For example, the administrative expenses --

16 JUSTICE SOUTER: I guess I am -- I don't
17 quite follow the leap you just made.

18 MR. BRUNSTAD: Well, the whole purpose of
19 1146(a) is tax relief. It is tax relief to provide more
20 dollars for other Chapter 11 purposes. You cannot
21 confirm a plan without hard, cold cash.

22 In the LTD bankruptcy, the administrative
23 expenses that had to be paid in full prior to the
24 effective date of the plan were north of \$200 million.
25 This really makes a difference. This is a live,

1 flesh-and-blood problem.

2 JUSTICE GINSBURG: But the point -- I
3 thought, Mr. Brunstad, that the question was asked: So
4 the State is not going to get its tax at the time of the
5 asset transfer, because the cash is needed to eventually
6 have a plan that works. So the State doesn't get its
7 tax.

8 And then it turns out that there is no plan;
9 that the case is dismissed. What happens then? Florida
10 has to get back -- at that point gets the tax that it
11 wanted up front?

12 MR. BRUNSTAD: Justice Ginsburg, the
13 practice is to escrow the funds so they will be
14 available as an administrative expense if it turns out
15 there is no confirmed plan.

16 In addition, this is no different than any
17 other asset sale in bankruptcy where if the tax
18 exemption is not allowed, they claim it as an
19 administrative expense.

20 JUSTICE GINSBURG: They are all paid up
21 front, but they are put into escrow. Is that what you
22 are telling me?

23 MR. BRUNSTAD: That is the practice,
24 Justice Ginsburg. And the reason why Florida is never
25 harmed is because the procedures are the same whether it

1 is a Chapter 11 case or Chapter 7. They have to come to
2 the bankruptcy court and file a request for payment of
3 this kind of tax anyway.

4 JUSTICE BREYER: So there is no case, to
5 your knowledge -- not millions of dollars, but there is
6 no case, to your knowledge, where, in fact, people
7 transferred the assets; they thought there would be a
8 plan confirmed; there was no plan confirmed; and then
9 the State was not paid?

10 MR. BRUNSTAD: None that I'm aware of,
11 Justice Breyer. And here is why that shouldn't happen.
12 It is theoretically possible, but here is why that
13 should not happen.

14 Because when the -- a transfer is made under
15 section 360(c) -- excuse me, 363 -- the transfers are
16 made free and clear of all claims in interest. That's
17 what section 363 provides.

18 If the State wants to get its tax, in the
19 ordinary course it comes into the bankruptcy court
20 anyway, just as Florida did in this case, to file a
21 request for payment of the tax.

22 JUSTICE SCALIA: You would have no reason to
23 know the answer to that question. You are not the
24 State.

25 The State has told us that millions of

1 dollars have -- have been lost in taxes not recovered.

2 MR. BRUNSTAD: But that's because the
3 exemption applies, Justice Scalia. The courts apply this
4 exemption in Chapter 11. This only applies in Chapter
5 11, not Chapter 7.

6 JUSTICE SOUTER: Isn't it odd that the --
7 isn't it odd that the Congress would have required, we
8 will assume, this escrow procedure when the odds are
9 three to one against the non-taxability?

10 It seems to me that just as matter of simple
11 efficiency, they would not have required this elaborate
12 procedure when the odds are that the procedure would be
13 to no avail to the bankruptcy State -- the State.

14 MR. BRUNSTAD: No, Justice Souter, because
15 the purpose of Chapter 11, as we know, is to facilitate
16 reorganization, rehabilitation, saving jobs. It is very
17 difficult. Congress understood it would be difficult.
18 That's why it made Chapter 11 more liberal than former
19 Chapter 10 under the Bankruptcy Act of 1898. That's why
20 we have this tax relief, to provide more dollars that
21 are available to make that process actually work. This
22 is a real flesh-and-blood problem.

23 CHIEF JUSTICE ROBERTS: Is it often the
24 case -- and I don't know, but is it often the case that
25 the people who are engaged in one these asset purchases

1 are, in fact, the creditors themselves? In other words,
2 they are owed a lot of money and said, well, let's --
3 basically, let's take over the business and run it
4 ourselves? Is it --

5 MR. BRUNSTAD: Sometimes, Chief Justice
6 Roberts, but not often. And the reason why we have
7 these asset sales quickly in bankruptcy, think of the
8 warehouse of the bananas. If you file bankruptcy, you
9 have got to sell those bananas right away. You can't
10 wait for months and months and months until the plan is
11 confirmed, because there's nothing left to sell.

12 Here we have a business which we call the
13 melting ice cube. It is an operating business with
14 employees, but we've got to get it into the hands of
15 somebody with capital quickly. Otherwise, this business
16 is going to be -- shut its doors. All of those people
17 will be let go. That's why we had a quick sale here:
18 To preserve value, to preserve jobs.

19 We couldn't wait until the plan-confirmation
20 process played out. And, in fact, there could not have
21 been a confirmed plan without the sale because the
22 creditors were fighting too hard about who was going to
23 get what. We had to have the sale first, and we had to
24 do it quickly to maximize the value, preserve the
25 business, save the jobs.

1 CHIEF JUSTICE ROBERTS: Well, I assume that
2 the creditors have an interest in that as well. I don't
3 know how -- I mean, they are the ones who could move
4 quickly to get the confirmation of the plan, because
5 they are -- they are the ones whose interests have to be
6 addressed before the plan can be confirmed.

7 So wouldn't they have an interest in -- in
8 melting bananas, or whatever?

9 (Laughter.)

10 MR. BRUNSTAD: Chief Justice Roberts, the
11 answer to that question is that the creditors have
12 diverse interests. Secure creditors often want to
13 liquidate quickly. They want to get their collateral
14 liquidated because they may be paid in full out of that.
15 That may leave nothing for the unsecured creditors, the
16 tort victims, the employees who have wage claims, the
17 Pension Benefit Guaranty Corporation.

18 In order for there to be cash for those
19 entities, a more negotiated sale or a different process
20 might have to be followed. That's what happened in this
21 case. There was enough to pay the secured creditors in
22 full and give a 45 to 50 percent distribution to
23 unsecured creditors, including the Pension Benefit
24 Guaranty Corporation.

25 JUSTICE ALITO: You say the test is whether

1 it is instrumental. The transfer has to be instrumental
2 to the plan, is that correct?

3 MR. BRUNSTAD: That is a standard that we
4 offer, Justice Alito.

5 JUSTICE ALITO: Is that different from
6 "necessary"?

7 MR. BRUNSTAD: Yes, it is. It is -- it is
8 more open.

9 JUSTICE ALITO: Well, what does it mean?

10 MR. BRUNSTAD: Well, basically, Justice
11 Alito, it encompasses almost any pre-confirmation
12 transfer. It's a wide open standard. I want to be up
13 front about that. You could say -- you could use a
14 dictionary definition of under in accordance with, it's
15 about the same. It would cover all of pre-petition --
16 I'm sorry -- the pre-confirmation transfers where you
17 ultimately have a confirmed plan, because all of them
18 will be generating cash that make confirmation possible.

19 CHIEF JUSTICE ROBERTS: I understand your
20 arguments about the desirability. How do you squeeze it
21 into the statutory language?

22 MR. BRUNSTAD: Well, a couple --

23 CHIEF JUSTICE ROBERTS: It's got to be under
24 a plan and you're suggesting that it's under the plan
25 before there is a plan.

1 MR. BRUNSTAD: Well, the standard -- the
2 test that 1146(a) requires is that there be a plan
3 confirmed under section 1129. So we have three parts of
4 the statute. We have an incident of transfer, that's
5 undisputed. We do in this case have a plan confirmed
6 under section 1129. And we do, in fact, have a stamp
7 tax. The question --

8 JUSTICE SCALIA: You missed the crucial --
9 the crucial part. The transfer has to be under a plan
10 confirmed. I mean, that's the troublesome language.
11 The transfer has to be under a plan confirmed.

12 MR. BRUNSTAD: But we know, Justice Scalia,
13 that in -- where the same language is used, in section
14 365(g), it cannot possibly mean post-confirmation
15 events. It cannot possibly. Because section 365(g)
16 addresses assumptions or rejections of executory
17 contracts under a plan confirmed under Chapter 11. That
18 cannot happen post confirmation because, as this Court
19 said properly in *Bildisco*, assumption or rejection must
20 occur prior to confirmation of a plan.

21 So the same language used elsewhere in the
22 statute, exactly the same, cannot possibly mean
23 post-confirmation. It must mean something else. And we
24 think it means a transfer that occurs either before or
25 after confirmation as long as you have a confirmed plan.

1 Now, it's also critical that where Congress
2 intended to foreclose the debate to require that there
3 be a plan first, such as in section 1142(b) or section
4 511(b), Congress said "under a confirmed plan." You
5 cannot insert a verb between confirmed and plan, where
6 it's confirmed plan.

7 In this section, Congress -- in 1146(a),
8 Congress said plan confirmed under section 1129. Does
9 that mean plan that has been confirmed, plan that may be
10 confirmed, plan that is confirmed? It's ambiguous.
11 It's ambiguous.

12 Again, in section 1142(b), Congress
13 expressly dealt with transfers under a plan -- under a
14 confirmed plan. And in context, that distinct language
15 means there was a plan first, and then it authorizes
16 parties under the plan to make the transfers that are
17 authorized under the confirmed plan.

18 JUSTICE SOUTER: Is it -- is it relevant, as
19 your friend on the other side pointed out, that the
20 particular section in question occurs within the statute
21 under the general heading of "Post-Confirmation
22 Matters"?

23 MR. BRUNSTAD: No, Justice Souter. And
24 here's why. We know, for example, in section
25 1145(c)(2), which is also part of subchapter 3, that

1 expressly applies to an exemption for sales of
2 securities between the petition date and the
3 confirmation date.

4 In addition, section 1146(b) itself allows
5 for requests for determination of the tax effects of the
6 plan before the confirmation date. So we know for a
7 fact that the rules in subpart 3, some of them apply to
8 pre-confirmation periods, requests, and exemptions.

9 JUSTICE SOUTER: But isn't the -- isn't the
10 normal reading, if we're going to give any weight to the
11 placement in the statute at all -- and I think we're
12 entitled to give some, that unless there is the kind of
13 clarity that you've just been describing in these two
14 exceptions, that, in fact, the placement there indicates
15 that it is dealing with a post-confirmation matter?

16 MR. BRUNSTAD: I think it is entitled to
17 some weight, Justice Souter, but I think it is
18 completely undercut by the fact that some of the very
19 provisions of subchapter 3 by their terms apply to
20 pre-confirmation events.

21 Similarly, some the provisions of subchapter
22 2, section 1127(b) applies expressly to
23 post-confirmation matters. Congress was not consistent
24 in placement -- placing things exclusively under one
25 heading or another.

1 JUSTICE GINSBURG: Mr. Brunstad, there's an
2 aspect of the way this looks that I -- I don't
3 understand, and you're an expert in this area. Perhaps
4 you can explain it to me.

5 You have one of these 363(b) sales of
6 property, and then you have a global settlement with the
7 creditors. What function does the plan serve after
8 you've had all that? The assets have been sold. The
9 creditors have made a settlement. There's going to be
10 no reorganization; whatever there is, is going to be
11 distributed.

12 What is the function of having a plan after
13 all that confirmed? I know one purpose of it is that
14 you avoid paying the stamp tax. But is there any other
15 purpose once you've had already settled that the sale is
16 made, the creditors agree on how it's going to
17 be divided up? What is the function that the plan
18 serves?

19 MR. BRUNSTAD: That's an excellent question,
20 Justice Ginsburg. And the answer is, I think, important.
21 And there is an excellent answer, and that is, whereas
22 Chapter 7 liquidations are sort of off-the-rack, Chapter
23 11 liquidations are custom-made. The plan is
24 custom-made and tailored to the particular assets and
25 circumstances of the particular case.

1 The assets that were sold in this case was
2 not all the assets to be sold, Justice Ginsburg. That
3 often happens. And this plan provides for the orderly
4 liquidation in a specific way of the assets that
5 weren't, in fact, sold.

6 There also are all kinds of claims that have
7 to be resolved and dealt with. This plan, in a
8 customized way, dealt with the resolution of those
9 claims -- the PBGC liabilities, tort liabilities, all
10 different kinds of liabilities and concerns -- in a much
11 more efficient and tailor-made way than could have
12 happened if the case had been converted to an
13 off-the-rack Chapter 7 case.

14 There is a test which the lawyers and the
15 courts apply as to whether we should stay in Chapter 11
16 when the situation has been that most of the assets have
17 been sold or whether we should convert to Chapter 7, and
18 that is whether it's in the best interests of the
19 creditors and the best interests of the estate to stay
20 in the Chapter 11.

21 That test was met here. It was clearly in
22 the best interest to stay in the Chapter 11, because we
23 got that customized procedure: A plan administrator who
24 was appointed subsequently who is continuing to
25 liquidate assets and distribute the proceeds. We have

1 all kinds of benefits.

2 Now, it is not possible to confirm a Chapter
3 11 plan simply to escape tax liabilities. Section 1129
4 says you cannot confirm a plan if the primary purpose is
5 to escape tax liabilities. So there is a protection for
6 the State there as well.

7 Here, of course, the primary purpose of
8 confirming the plan was not just to he avoid tax
9 liabilities. It was to do all these other
10 administrative things in a custom-made way.

11 JUSTICE SCALIA: What is the section you
12 mentioned earlier that uses "under" in a -- in a sense
13 that clearly applies to pre-confirmation?

14 MR. BRUNSTAD: Section 365(g),
15 Justice Scalia.

16 JUSTICE SCALIA: Yes, I've been looking for
17 it, and I can't --

18 MR. BRUNSTAD: We quote it in part on page
19 38 of our brief. And it is quoted in part on page 17 of
20 the Petitioner's brief.

21 JUSTICE SCALIA: Did you make that argument
22 there?

23 MR. BRUNSTAD: Yes. Yes, Justice Scalia.
24 On pages 38 and -- 37, 38, and 39, we specifically talk
25 about section 365(g)(1), and we cite the Bildisco case

1 and specifically made the point --

2 JUSTICE SCALIA: How does that provision
3 read? Do you have it quoted here?

4 MR. BRUNSTAD: I do, Justice Scalia. Let me
5 quote it for you exactly. Section 365(g) deals with
6 what the effect of a rejection -- I'm sorry -- effect of
7 breaching an executory contract is. And there are two
8 subparts, 365(g)(1), which provides: "If such contract
9 or lease has not been assumed under this section or" --
10 here's the language that is the same -- "under a plan
11 confirmed under Chapter 11."

12 So, if the contract or lease has not been
13 assumed or -- under this section, section 365, or under
14 a plan confirmed under Chapter 11, then the breach is
15 basically deemed to have existed just immediately prior
16 to the filing of the bankruptcy case.

17 It is exactly the same language. And it is
18 also in (g)(2), the same language is used yet again.

19 It cannot be the case that the election to
20 assume or reject an executory contract can occur
21 post-confirmation. It cannot. Why? Because, as this
22 Court explained in *Bildisco*, the assumption or rejection
23 must occur prior to confirmation, up until the point of
24 confirmation, is the language that this Court used. The
25 lower court decision, the *TWA* case, et cetera, all say

1 exactly the same thing. And there's an important reason
2 for that.

3 The standard for assumption or rejection,
4 even if it is elected in a plan, is you have to satisfy
5 section 365. And that has to be done through a court
6 order, through a court proceeding that has to occur
7 essentially before the court actually confirms the plan.

8 So the same language used --

9 JUSTICE SOUTER: Why? Why?

10 MR. BRUNSTAD: Because the debtor has to
11 elect -- the debtor has to make a decision before
12 confirmation so we know what's going to happen to the
13 property, and so the creditor can timely file a claim
14 if it is going to be rejection, because the creditor
15 does not file a claim for rejection damages from
16 rejection of the contract until the assumption or
17 rejection is determined. That particular thing is
18 postponed.

19 But we must know that prior to confirmation
20 because we have to know how to treat the creditor's
21 claim; if we have to pay that creditor significant
22 money, what's going to happen to the property. For
23 example, Justice Souter, suppose it is a contract to
24 purchase a Boeing 767 for \$600 million. The debtor
25 might file for bankruptcy, one of the airlines files for

1 bankruptcy and might have to decide whether to honor
2 that obligation or to reject that obligation, assume it
3 or reject. We need to have that information. We need
4 to know if the debtor is going to have to pay that \$600
5 million before confirmation. We can't wait until after
6 because it's too important to the plan. It's too
7 important in dealing with the asset.

8 That's why all the courts, including this
9 one, have said you must make the assumption-or-rejection
10 election up until confirmation, never after. So it
11 can't be the case that the specific language "under a
12 plan confirmed under Chapter 11" as used in section 365
13 refers to post-confirmation, but that is in fact the
14 same language used in section 1146.

15 Now, contrast that with the language used in
16 sections 1142(b) or 511(b), which talks about a
17 "confirmed plan." And, in context, that language
18 clearly means a plan comes first. Congress could have
19 used that same formulation in section 1146(a); it chose
20 not to. And under Russello and the other precedents of
21 this Court's canons of construction, we should give that
22 semantic choice deference. And, again, there's a
23 reason. So a statute --

24 CHIEF JUSTICE ROBERTS: Your argument there
25 is that "under a plan confirmed" means something

1 different than "under a confirmed plan"?

2 MR. BRUNSTAD: In context, yes, Chief
3 Justice Roberts. And if you look at section 1142(b), I
4 think you can -- you can actually see in context why
5 that so clearly means -- that so clearly means the plan
6 comes first and then is confirmed. But again, it's
7 different language that is used.

8 CHIEF JUSTICE ROBERTS: Do you -- do you
9 agree with the proposition that you only go back so far
10 as the filing of a petition? Well, what in your
11 argument suggests that that's a logical stopping point?
12 It seems to me that if you don't take the date of
13 confirmation, I don't know why all of your policy
14 arguments wouldn't cause you to go back further.

15 MR. BRUNSTAD: By statute, Chief Justice
16 Roberts, section 103 provides that the provisions of
17 Chapter 11, in Chapter 11, including section 1146, apply
18 only in a Chapter 11 case. There is no case --

19 CHIEF JUSTICE ROBERTS: Yes, but we've
20 already shown a willingness to abandon that type of
21 limitation with "under a plan confirmed." So, you know,
22 the consideration of the prior transfer is going to take
23 place in the context of a bankruptcy case.

24 MR. BRUNSTAD: The only sections that apply
25 basically to pre-bankruptcy, pre-petition matters, are

1 the avoidance powers in section, for example, the
2 preference actions in section 547, the fraudulent
3 transfer provisions in section 548. Those things
4 expressly apply to pre-bankruptcy events, and they say,
5 before the -- "90 days before the commencement of the
6 case," those kinds of things. When Congress wanted to
7 reach back before the petition date, it used very
8 specific terms of art, very specific authorizations.

9 Nothing like that appears anywhere in
10 section 1146(a), and for good reason. It's very clear,
11 and every court to have looked at this has so held, that
12 1146(a) does not apply before the case is commenced.
13 And that makes sense because the purpose is to give tax
14 relief to facilitate the Chapter 11 process. You want
15 to have cash available --

16 JUSTICE STEVENS: Let me just ask this. As
17 a practical matter does the judge, the bankruptcy judge,
18 enter some kind of an order approving the transfer, even
19 though it's pre -- pre-confirmation, an order to
20 establish the tax exemption?

21 MR. BRUNSTAD: Yes, Justice Stevens. In
22 fact, that has to happen.

23 JUSTICE STEVENS: So it would have to be
24 after the filing of the bankruptcy proceeding.

25 MR. BRUNSTAD: Yes, Justice Stevens, it

1 must. And under section 363, the Bankruptcy Court must
2 approve sales like this on notice to creditors, which
3 would include the State. And here, in fact, what
4 happened is consistent with what happens in almost every
5 bankruptcy case. Because the State has an interest, a
6 taxing interest, in the transfer, the State will get
7 notice, which Florida gave here. They have an
8 opportunity to come and object if they wish to, which
9 they did here.

10 There are actually more protections for the
11 State for pre-confirmation transfers than
12 post-confirmation transfers. After the confirmation of
13 the plan, the Bankruptcy Court's work is essentially
14 done, and then you're just out in the world under the
15 plan and the debtor is making sales and transfers.
16 There isn't the opportunity for the State to come in and
17 actually object to things as there is pre-confirmation.

18 So here the State actually has more
19 protections for the pre-confirmation sales --

20 CHIEF JUSTICE ROBERTS: How do you know
21 whether to pay the tax or not? I mean, you know that
22 the bankruptcy petition has been filed, but you really
23 don't know whether there's going to be a plan confirmed
24 under Chapter 11. How do you know whether to pay or
25 not?

1 MR. BRUNSTAD: Well, for example --

2 CHIEF JUSTICE ROBERTS: I assume there are
3 penalties if you don't pay on time.

4 MR. BRUNSTAD: There's a very practical
5 reason for that question, Chief Justice Roberts, and
6 that is in this case the Bankruptcy Court specifically
7 determined in his order, judge in his order, that the
8 exemption would apply. So that was determined in the
9 order. Of course --

10 CHIEF JUSTICE ROBERTS: But this doesn't
11 happen for some time down the road, right?

12 MR. BRUNSTAD: Well --

13 CHIEF JUSTICE ROBERTS: Up to, I guess -- we
14 were told up to 400 days.

15 MR. BRUNSTAD: Well, you can't have a sale
16 until the Bankruptcy Court approves it. In the process
17 of approval, the Bankruptcy Court was asked and made the
18 determination that 1146(a) would apply. Now, what
19 happens then is the State can come in and has the right
20 to file a request for payment of administrative expense
21 and the funds are escrowed, because if in fact there
22 ends up not being a confirmed Chapter 11 plan, then the
23 State is entitled to its tax, and the money is then paid
24 to the State, its request for payment of administrative
25 expenses is allowed, and it gets its money. But this can

1 make --

2 JUSTICE SCALIA: It's always escrowed? Is
3 that --

4 MR. BRUNSTAD: It's not always escrowed,
5 Justice Scalia.

6 JUSTICE SCALIA: Is that a uniform practice?

7 MR. BRUNSTAD: That is the practice, but
8 it's not uniform because in some cases there's no need
9 for an escrow. There are some cases in which we know
10 there's going to be enough cash available that the State
11 will be paid, so we don't need that safety. But the
12 State can always ask for it, and if the State asks for
13 it I'm almost certain in most cases it will get it.

14 JUSTICE ALITO: Is it relevant that this is
15 a tax-exemption provision?

16 MR. BRUNSTAD: Well, I think it's relevant
17 in the sense that Congress was clearly intending here to
18 grant tax relief to Chapter 11 debtors to facilitate the
19 Chapter 11 process. It's not a tax exemption, Justice
20 Alito, in the sense of, for example, an exemption to a
21 revenue-raising provision. In other words, you could
22 have a State statute that says: The purpose of the
23 statute is to raise taxes and we'll create exemptions.
24 That's one context. And there it might make sense to
25 say: Well, look, where the overall purpose of the

1 statute is to raise revenue, we might construe the
2 exceptions to that purpose narrowly.

3 Here the purpose of Chapter 11 is to
4 facilitate the Chapter 11 process. So I think we
5 construe this revenue-raising -- no, I'm sorry -- this
6 tax relief measure consistent with that overall purpose.

7 JUSTICE GINSBURG: Why shouldn't we look to
8 see how it was in the Internal Revenue Code with respect
9 to the Federal State tax exemption? That I think leaves
10 no room for argument. This case might be argued either
11 way about does it apply to preconfirmed plan asset
12 transfers? But as I understand it, this section 4382(b)
13 was limited to post-confirmation transfers, that is
14 transfers made within five years after confirmation of
15 the plan.

16 MR. BRUNSTAD: That's the limitation that
17 the United States wanted to add to section 267 of the
18 Bankruptcy Act of 1898. Congress did not grant the
19 United States' request. The United States said this is
20 administratively too difficult to administer, and
21 Congress rejected that testimony from the representative
22 of the Treasury and enacted section 267 over the
23 objection of the United States.

24 Now, the United States after the Excise Tax
25 Reduction Act, I think of 1965, does not really have

1 many excise taxes. And so the testimony of the
2 Commissioner of the Internal Revenue Code -- Revenue
3 Service in 1978, when the Bankruptcy Code was being
4 adopted, was that the United States doesn't really care
5 about stamp taxes. It really didn't have a position on
6 it.

7 JUSTICE GINSBURG: Well, what was -- what
8 did section -- I'm not talking about -- you mentioned
9 267. 42 -- 4382(b), what did that say?

10 MR. BRUNSTAD: I'm sorry, Justice Ginsburg?
11 I -- 42?

12 JUSTICE GINSBURG: Section -- 26 U.S.C.
13 4382(b).

14 MR. BRUNSTAD: 4382(b)?

15 JUSTICE GINSBURG: Yes.

16 MR. BRUNSTAD: Was that the revenue
17 provisions --

18 JUSTICE GINSBURG: That was in the 1954
19 Code. I'm not talking about 1898.

20 MR. BRUNSTAD: That one I'm not certain of,
21 Justice Ginsburg.

22 JUSTICE GINSBURG: I thought that said that
23 the tax exemption was limited to transfers
24 post-confirmation.

25 MR. BRUNSTAD: No, Justice Ginsburg. There

1 the three -- the history of the development of the
2 statute is section 77(b)(F) and then went to section 267
3 and then went to section 1146. That's the direct --

4 JUSTICE GINSBURG: Maybe you can straighten
5 me out, because where I get this from is the brief for
6 the State, and it's at page 17, mentions the
7 now-repealed 4382(b).

8 MR. BRUNSTAD: That may, Justice Ginsburg,
9 have been a mirror provision. Before 1938, the
10 tax-exemption provisions under the Bankruptcy Code were
11 mirrored. There was a provision in the Bankruptcy Act
12 in section 77(b)(F). There were also mirroring
13 provisions under the bankruptcy -- under the Internal
14 Revenue Code. Those were eliminated and instead we just
15 have section 267 under the Bankruptcy Act of 1898, which
16 dealt with the exemption in bankruptcy.

17 Justice Ginsburg, I think that, going back
18 to your earlier point, I think it's important to
19 underscore that the context of this case is different
20 from other contexts in which the discussion of how we
21 should construe a tax exemption applies. I think the
22 Court here should apply the analysis that it applied in
23 Dolan, where the Court was considering application of a
24 similar canon of narrow construction, and the Court
25 said: Well, in construing the Federal Tort Claims Act,

1 in juxtaposition to this concept that we construe
2 waivers of sovereign immunity narrowly, we don't apply
3 that because that would basically run afoul of the
4 purpose of the Federal Tort Claims Act provisions.

5 The same thing here. The proper rule of
6 resolution where we have an ambiguous statute is to look
7 to the purpose of the statute, and the purpose here is
8 to make Chapter 11 easier by granting tax relief. And I
9 think that, consistent with that purpose, the Court
10 should construe section 1146(a) --

11 JUSTICE SCALIA: Well --

12 MR. BRUNSTAD: Yes, Justice Scalia?

13 JUSTICE SCALIA: You know, we've said in
14 other opinions no -- no statute pursues its purposes at
15 all costs. And the limitations contained in a statute
16 are as much a part of its purpose as the broad purpose
17 that you just mentioned. I mean, if a -- if a "plan
18 confirmed" means a plan confirmed, that limitation is
19 part of the purpose no less than the broad purpose that
20 you express.

21 MR. BRUNSTAD: Well, that -- that's true in
22 general, Justice Scalia, but if Congress had really
23 wanted to narrow the purpose here to post-confirmation,
24 it would have surely used the temporal limitations it
25 used, for example in section 1127, where the Court said

1 before -- the Congress said before confirmation you do
2 this; after confirmation you do that. That is a -- that
3 is a standard legislative technique used throughout the
4 Bankruptcy Code that was not used in section 8.

5 JUSTICE SCALIA: Maybe, but "under a plan
6 confirmed" seems under normal interpretation of language
7 to me to mean under a plan that has been confirmed.

8 MR. BRUNSTAD: Well, I think, Your Honor, as
9 the Court stated in Ardestani, quote, "The word 'under'
10 has many dictionary definitions, and we must draw its
11 meaning from its context," close quote. And under
12 Robinson, the Court looked to, where there was an
13 ambiguous statute, the purpose as the way to resolve the
14 ambiguity, and I submit that should happen here.

15 Thank you very much.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Brunstad.

18 Mr. Makar, you have five minutes remaining,
19 and during those five minutes I hope you'll give an
20 answer if you have one to the 365(g)(1) argument that
21 your friend has made.

22 REBUTTAL ARGUMENT OF SCOTT D. MAKAR

23 ON BEHALF OF THE PETITIONER

24 MR. MAKAR: Sure, I'm be glad to, Mr. Chief
25 Justice.

1 365(g) here speaks in terms of a rejection
2 of an executory contract --

3 JUSTICE SCALIA: Is that spelled out
4 somewhere in the -- is its text somewhere in these
5 materials?

6 MR. MAKAR: The full text? I'm sorry; it is
7 not.

8 JUSTICE BREYER: It's on page 38, the last
9 line, the next to the last line.

10 JUSTICE SCALIA: Not the full, not the full
11 section, though.

12 JUSTICE BREYER: The red brief.

13 JUSTICE SCALIA: Just little snippets of it.

14 JUSTICE BREYER: Yes.

15 MR. MAKAR: Right. This provision 365(g)
16 says the rejection of an executory contract constitutes a
17 breach of such contractual relief if the contractual
18 relief is not under a section under a plan. What that
19 means is that it's deemed rejected if, at the time of
20 plan confirmation -- not before, but at the time of plan
21 confirmation. If it's not in the plan, it's deemed a
22 rejection -- rejected. That's merely a -- an instrument
23 to say when the contract is -- is deemed rejected. If
24 it's in the plan it's not rejected. If it's not in the
25 plan -- it doesn't get --

1 JUSTICE BREYER: No, no. I'm sorry.
2 Doesn't the rejection have to take place prior to the
3 plan being confirmed?

4 MR. MAKAR: No. It says the rejection --

5 JUSTICE BREYER: Does it or doesn't it?
6 Prior to in your opinion or not prior to?

7 MR. MAKAR: The rejection may occur before
8 that, but what the statute is referring to -- is the
9 rejection of an executory contract constitutes a breach,
10 it's defining when it is a breach. And it's only
11 determined -- it can only be determined to be a breach --

12 JUSTICE BREYER: I'm sorry. I don't
13 understand how that would work. I have a contract with
14 Boeing for \$500 million. I decide to reject it.

15 Now if that breach doesn't occur until the
16 plan is confirmed, how does the trust -- how does the
17 bankruptcy judge know how to treat Boeing as a creditor?

18 MR. MAKAR: Well, at the point of -- the
19 statute speaks in terms of the point of plan
20 confirmation.

21 JUSTICE BREYER: I understand that. But I'm
22 sorry -- doesn't the plan which is confirmed have a
23 list of the creditors and how they are treated?

24 MR. MAKAR: Sure.

25 JUSTICE BREYER: All right. How do we write

1 the plan if, in fact, no breach has occurred and he
2 hasn't become a creditor until the plan is, in fact,
3 confirmed?

4 MR. MAKAR: Well, I'm not sure I am
5 following. But I think the language of the statute here
6 is in a different context, which is saying that the
7 rejection is -- constitutes a breach if it has not been
8 assumed, and at that point it has not been assumed, but
9 at the point of confirmation --

10 JUSTICE KENNEDY: I can understand -- just
11 taking a quick look at 365(g), why it serves a different
12 purpose and a different function.

13 But the Respondent's point was, you have to
14 interpret "under" differently under your view, under
15 365, than under the statute at issue.

16 Do you agree with that?

17 MR. MAKAR: No. No. Because under a plan
18 confirmed in 365(g) relates to the point of confirmation
19 or beyond, and we believe under 1146(c) or under 1146(a)
20 since Congress has readopted it.

21 CHIEF JUSTICE ROBERTS: So your argument is
22 that you don't have a rejection of the executory contract
23 -- contract -- until the plan is confirmed? That's
24 what Congress --

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

1 That's -- at that point. That doesn't undermine the
2 argument that under a plan confirmed, in 1146(c) means at
3 the point of confirmation or beyond.

4 The most natural reading of 1146(c) is to
5 provide this post-confirmation transfer exemption. No
6 one is contesting that. That's the natural reading of
7 the -- of the statute.

8 And the point here of there being more
9 protection and, pre-confirmation is simply not the case.
10 The State is not on notice of many of these transfers as
11 an MVR. Those were transfers that were outside the
12 ordinary course of business. We would get no notice
13 of that. And in the ordinary course of 363 practice,
14 the parties that have an interest in the property -- the
15 State doesn't- -- do not get notice of that proceeding.
16 So there's -- this notion that there's more protection
17 pre-confirmation than post-confirmation is just
18 unsupportable.

19 In -- in conclusion, Your Honors, this is a
20 tax exemption statute, and under this Court's principles
21 it should be narrowly construed. It shouldn't be
22 expanded to this pre-confirmation transfers with all the
23 problems it creates, in the three quarters of the cases
24 that don't get confirmed, and have all these intrusions
25 upon the State and local governments in the collections

1 of their stamp tax. For that reason we ask the Eleventh
2 Circuit be reversed. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
4 The case is submitted.

5 (Whereupon, at 12:06 p.m., the case in the
6 above-entitled matter was submitted.)

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