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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

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

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

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

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 the 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

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

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

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 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

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

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

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

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?

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.

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

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

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

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

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

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 its 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

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

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 breach, 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 has 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 of 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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