No. 10-875

IN THE

Supreme Court of the United States

LYNWOOD D. HALL AND BRENDA A. HALL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* DONALD W. DAWES AND PHYLLIS C. DAWES IN SUPPORT OF PETITIONERS

Mark J. Lazzo
MARK J. LAZZO, P.A.
3500 N. Rock Road
Bldg. 300, Suite B
Wichita, KS 67226
(316) 263-6895

G. Eric Brunstad, Jr.
Counsel of Record
Collin O'Connor Udell
Matthew J. Delude
Kate O'Keeffe
DECHERT LLP
90 State House Square
Hartford, CT 06103
(860) 524-3999
eric.brunstad@dechert.com

Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae Donald W. Dawes and Phyllis C. Dawes respectfully submit this brief in support of Petitioners Lynwood D. Hall and Brenda A. Hall. Like the Halls, the Daweses owned and operated a family farm. Like the Halls, the Daweses filed a chapter 12 plan of reorganization that proposed to treat the IRS's tax claim arising from the post-petition disposition of certain farm property as a general, non-priority obligation under section 1222(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 1222(a)(2)(A). The IRS objected. Like the Ninth Circuit in *Hall v. United States*, Pet. App. 1, the Tenth Circuit held in the Daweses' case that section 1222(a)(2)(A) did not authorize the bankruptcy court to treat the IRS's tax claim as a dischargeable, non-priority debt. *United States v. Dawes (In re Dawes)*, No. 09-3129, 2011 WL 2450930, at *8 (10th Cir. June 21, 2011).

On August 17, 2011, the Daweses filed a petition for writ of certiorari in their case (no. 11-

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both Petitioners and Respondent have consented to the filing of this brief. Copies of Petitioners' and Respondent's consents are filed herewith.

217). Because the questions presented in *Hall* and *Dawes* are identical, the Daweses anticipate that the Court may hold their petition pending a decision in the Halls' case and, following a decision, "GVR" their case (if appropriate). For this reason, the outcome here is likely to directly affect the outcome of the Daweses' case.

The purpose of this brief is to address matters that bear on the Court's resolution of the important bankruptcy question presented: whether taxes arising from the post-petition sale of farm assets are entitled to non-priority treatment under section 1222(a)(2)(A). Section 1222(a)(2)(A) provides that post-petition taxes that would otherwise be entitled to payment on a priority basis are instead to be treated as non-priority claims that the debtor may discharge short of full payment. In general, priority claims are enumerated in section 507 of the Bankruptcy Code, 11 U.S.C. § 507, and include post-petition taxes set forth in section 503(b) of the Code, 11 U.S.C. § 503(b). The point of section 1222(a)(2)(A) is to give the reorganizing chapter 12 debtor a tax break by demoting certain priority tax claims to non-priority status so they can be paid on a reduced basis from funds available to pay general unsecured claims, with any unpaid balance discharged in bankruptcy.

The court below sidestepped section 1222(a)(2)(A) by concluding that the IRS's claim for post-petition taxes arising from the sale of

property belonging to the debtors' bankruptcy estate did not qualify as a priority claim under section 507 because the taxes were not "incurred by the estate" within the meaning of section 503(b). The court based its theory *not* on the Bankruptcy Code, but rather on section 1399 of the Internal Revenue Code ("IRC"), 26 U.S.C. § 1399. The Ninth Circuit's theory is unsound, and the purpose of this brief is to illustrate how it is at war with basic principles of bankruptcy administration, the Code's treatment of administrative expenses, the text and purpose of sections 1222(a)(2)(A) and 503(b), and the historical treatment of tax claims in bankruptcy. The Daweses respectfully submit that, in deciding this controversy, the Court would benefit from consideration of the matters addressed in this brief.

STATEMENT

On August 9, 2005, the Halls filed for chapter 12 bankruptcy relief. Pet. App. 35. By operation of law, the filing of a chapter 12 petition creates a bankruptcy estate consisting of all of the debtors' property, including any farming assets. 11 U.S.C. §§ 541, 1207. Accordingly, when the Halls commenced their bankruptcy case, their farmland passed to their estate.

On September 22, 2005, the Halls moved to sell their 320-acre farm for the sum of $960,000, and the bankruptcy court granted their motion. Pet. App. 35. The sale of the farm

resulted in a capital gains tax of about $29,000. *Id.* In their First Amended Plan, the Halls proposed to include this tax liability as a non-priority, unsecured claim payable from available funds after more senior claims were satisfied, with any unpaid balance to be discharged upon the Halls' completion of the payments called for under their plan. J.A. 31-36. As authority for this disposition, the Halls invoked section 1222(a)(2)(A), 11 U.S.C. § 1222(a)(2)(A). As noted, section 1222(a)(2)(A) authorizes a chapter 12 debtor to treat certain "priority" claims as non-priority, general obligations.

The IRS objected. It argued that the tax liability resulting from the sale was not entitled to treatment under section 1222(a)(2)(A) on the theory that the tax liability was not a "priority" claim. Priority claims are set forth in section 507(a) of the Code, 11 U.S.C. § 507(a), and include (but are not limited to) administrative priority tax claims "incurred by" a debtor's bankruptcy "estate" under section 503(b), *id.* §§ 503(b), 507(a). The IRS argued that the capital gains taxes in question were not "incurred by" the Halls' "estate" within the meaning of section 503(b), but rather belong outside the bankruptcy process as a claim against the Halls personally. As support for this theory, the IRS invoked sections 1398 and 1399 of the IRC. 26 U.S.C. §§ 1398, 1399. Section 1399 provides that "no separate taxable entity shall result from the commencement of a case" under the Bankruptcy

Code "[e]xcept any case to which section 1398 applies." *Id.* § 1399. Section 1398 creates an exception to section 1399 for cases "under chapter 7 . . . or chapter 11 . . . of title 11 of the United States Code in which the debtor is an individual." *Id.* § 1398. Citing section 1399, the IRS argued that the tax was incurred by the Halls, not their estate, and thus the tax became essentially immune from the bankruptcy process.

The bankruptcy court agreed with the IRS. It concluded: "[b]ecause the taxes arising from the postpetition sale of the farm do not qualify as an administrative expense under § 503(b) and are not entitled to priority under § 507, they do not fall within the purview of § 1222(a)(2)(A)'s exception and may not 'be treated as an unsecured claim that is not entitled to priority.'" Pet. App. 46.

On appeal, however, the district court reversed, holding that the Halls could "treat postpetition income taxes incurred from the postpetition sale of their farm as a liability of the estate, dischargeable under § 1222, and the plan may propose payment of such expenses by the estate." Pet. App. 23. In reaching this conclusion, the district court quoted with approval the district court's decision in *In re Knudsen*, 389 B.R. 643, 680-81 (N.D. Iowa 2008), stating: "[t]he bankruptcy court's fundamental error, this court finds, was accepting the IRS's characterization of the pertinent provisions as federal in-

come tax provisions found in the Bankruptcy Code, when they are properly understood as bankruptcy provisions to be construed in accordance with the Bankruptcy Code and bankruptcy policy to promote the effective reorganization of family farming operations." Pet. App. 32.

The IRS appealed to the Ninth Circuit, which in turn reversed the district court. Pet. App. 16. Like the bankruptcy court, the Ninth Circuit conducted its analysis by looking outside the Bankruptcy Code to sections 1398 and 1399 of the IRC. Pet. App. 6-7. Citing section 1399, the court reasoned that, because the commencement of a chapter 12 case does not create a separate taxable entity for purposes of the IRC, the Halls' chapter 12 estate could not have "incurred" the taxes in question for purposes of section 503(b), *id.*, and thus section 1222(a)(2)(A) was inapplicable. Pet. App. 6. Instead, the court stated that "the tax is payable in full because it is incurred and owed by the debtor outside of the plan. . . ." Pet. App. 8 n.2.

In dissent, Judge Paez disagreed, writing that "Congress's intent was clear: it wanted to help family farmers keep their farms by allowing them to sell farm assets to pay off debts without being liable for the full amount of any capital gains tax arising from the sale, regardless of whether they sold the assets before or after filing their chapter 12 petition." Pet. App. 16. (Paez, J., dissenting). This appeal followed.

SUMMARY OF ARGUMENT

Section 1222(a)(2)(A) of the Bankruptcy Code provides that, in chapter 12 cases, priority claims held by governmental entities may be treated as non-priority obligations. For purposes of section 1222(a)(2)(A), section 507 lists the claims that are generally entitled to priority, and these include administrative expenses under section 503(b). In turn, section 503(b) includes as administrative expenses "the actual, necessary costs and expenses of preserving the estate" and cites as an example "any tax . . . incurred by the estate . . . except a tax of a kind specified in section 507(a)(8)." (Section 507(a)(8) applies to certain kinds of pre-petition income taxes).

The court below determined that, by operation of section 1399, the IRS's claim for capital gains taxes arising from the post-petition sale of farmland belonging to the Halls' bankruptcy estate is not an administrative expense because the taxes were not "incurred by the estate." If that is correct, however, what exactly is the IRS's claim for bankruptcy purposes? The Ninth Circuit concluded that the taxes are the Halls' obligation personally and not an administrative debt of their estate. But that makes no sense as a rule of law because in many bankruptcy cases (including most of the biggest ones), that will mean the IRS will lose any payment entitlement whatsoever, and the rule adopted below other-

wise makes a hash out of the bankruptcy process.

For example, as the court below acknowledged, section 1399 applies equally to corporate chapter 11 and chapter 7 bankruptcy cases. Pet. App. 10 n.4. Significantly, in *all* corporate chapter 7 cases, and most corporate chapter 11 proceedings, the debtor's bankruptcy estate acquires and liquidates the debtor's assets, leaving behind no surviving "debtor" with any property. Under the Ninth Circuit's approach, if a corporate chapter 7 or 11 estate sells a very valuable asset and incurs $1 million in taxes to the IRS, this debt cannot be paid as an administrative expense because it has not been "incurred by the estate." Instead, it somehow remains exclusively an obligation of the debtor on the theory that, under section 1399, the filing of a bankruptcy case does not create a separate taxable entity. Of course, by definition, the "debtor" in a liquidating chapter 7 or chapter 11 case has been stripped of its property and will thus lack the wherewithal to pay the claim. As a result, the IRS may recover nothing.

The fundamental error of the decision below is that it conflates two entirely separate questions: (1) the bankruptcy law question of how tax claims should be treated in bankruptcy, with (2) the tax law question of who is responsible for filing a tax return for a bankrupt debtor and/or the debtor's bankruptcy estate, and

whether, for tax purposes, the debtor should be consolidated with the debtor's estate. Critically, there is no evidence that, in enacting section 1399 to deal with the second question, Congress intended section 1399 to supplant and fundamentally undermine the carefully constructed bankruptcy apparatus dealing with the first. In this case, the IRS seeks to import improperly a provision of the IRC to effectively disrupt and largely dismantle not only section 1222(a)(2)(A), but also the operation of a significant part of section 503(b). This is a dangerous theory that, ironically, can only hurt the IRS in liquidating bankruptcy cases in which the debtor is not an individual.

The decision below conflicts with this Court's precedents regarding the broad scope of administrative expense liability, s*ee, e.g., Reading Co. v. Brown,* 391 U.S. 471, 485 (1968) (holding that unliquidated tort liabilities are properly administrative expenses), as well as the Court's prior conclusion that post-petition taxes are entitled to administrative priority, *see Nicholas v. United States*, 384 U.S. 678, 687-88 (1966). There is no evidence that when Congress enacted section 1399, it intended to overturn decades of settled precedent that taxes arising from the post-petition sale of property of the debtor's bankruptcy estate are entitled to administrative priority status. Moreover, the clear understanding that such taxes *are* entitled to administrative priority is what animated Congress's passage of

section 1222(a)(2)(A) in the first place. In essence, the theory of the court below is that when Congress enacted section 1222(a)(2)(A), it misunderstood the nature of the problem it thought it was solving – that the kinds of taxes it understood to be administrative expenses and that it directed be given non-priority status and discharged are in fact obligations only of the debtor outside the bankruptcy process that may not be discharged. Given the history of the treatment of post-petition taxes as administrative expenses, that view is implausible in the extreme.

The decision below is also flawed analytically for an additional reason: it seeks to create an implied exception to the Bankruptcy Code's treatment of claims through the importation of an alien provision of another part of the United States Code that was not designed for that purpose. Once again, it is implausible that Congress authorized such a move. More important, there is simply insufficient evidence – textual or otherwise – to overcome the presumption that when Congress intends to create exceptions to relief under the Bankruptcy Code, it does so expressly and not by such obscure circumlocution. *See FCC v. NextWave Personal Commc'ns, Inc.*, 537 U.S. 293 (2003); *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985).

Furthermore, the legislative histories of section 1222(a)(2)(A) and section 503(b)(1)(B)(i) seriously undermine the reasoning of the court

below. Chapter 12 was "designed to give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land." H.R. REP. NO. 99-958, at 48 (1986). Senator Grassley, the original proponent of section 1222(a)(2)(A), proposed to amend section 1222 to reduce the priority of claims owed to governmental entities as a result of the sale of certain assets during a bankruptcy reorganization in order to "free up capital for investment in the farm, and help farmers stay in the business of farming." 145 CONG. REC. S764 (daily ed. Jan. 20, 1999) (statement of Sen. Grassley). When he first offered the language that would eventually become section 1222(a)(2)(A), he explained that it was intended to cover the situation presented in this case. *See id.* In the years that followed as this provision worked its way through Congress, the Senator never wavered from that initial interpretation, no one contradicted it, and he was ultimately successful in getting his language enacted. *Compare* S. 260, 106th Cong. § 3 (1999); Stat. App. 16a *with* 11 U.S.C. § 1222(a)(2)(A); Stat. App. 5a. Section 1222(a)(2)(A) was clearly intended to provide the relief Petitioners request.

Additionally, the legislative history of section 503(b) supports Petitioners' position. The senate report discussing that section referred to administrative expenses under section 503(b)(2) as including taxes incurred "*in administering the debtor's estate*" or "*during the case*." S. REP. NO.

95-989, at 66 (1978) (emphases added). These statements sensibly refer to post-petition tax claims such as the one at issue here. The decision below should be reversed.

ARGUMENT

A. A Federal Tax Debt Arising Out of a Chapter 12 Debtor's Post-Petition Sale of a Farm Asset is an Administrative Claim Subject to Treatment Under Section 1222(a)(2)(A) and Discharge Under Section 1228.

By operation of law, when a debtor commences a bankruptcy case, a bankruptcy estate is created consisting of all of the debtor's property wherever located and by whomever held. 11 U.S.C. § 541; *Ohio v. Kovacs*, 469 U.S. 274, 284 n.12 (1985) ("The commencement of a case under the Bankruptcy Code creates an estate which, with limited exceptions, consists of all of the debtor's property wherever located."). In addition, the federal court in which the case is commenced is vested with exclusive *in rem* jurisdiction over all property of the bankruptcy estate, and the estate is formed *in custodia legis*. 28 U.S.C. § 1334(e); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004); *Straton v. New*, 283 U.S. 318, 320-21 (1931). Accordingly, if a governmental entity (including the IRS) has seized possession of property in which the estate has an interest before the debtor commences its

bankruptcy case, the bankruptcy court may direct the entity to relinquish possession of the property to the representative of the estate (*i.e.*, either the debtor or the trustee) so that the property may be administered as part of the estate. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 211-12 (1983). In this case, when the Halls commenced their bankruptcy case, their farmland passed to their estate, where it remained until it was sold. Further, any right to payment the IRS has with respect to the sale of this asset properly constitutes a "claim" in the Halls' bankruptcy case entitled to the treatment prescribed by section 1222(a)(2)(A) and to the discharge provisions of section 1228. Nothing in section 1399 of the IRC alters this result.

1. The IRS's right to payment of the capital gains taxes in question is a post-petition administrative expense claim.

Under the Bankruptcy Code, a debtor's monetary obligations constitute "claims" against the debtor's estate. 11 U.S.C. § 101(5); *see Katchen v. Landy*, 382 U.S. 323, 336 (1966) ("bankruptcy . . . converts the creditor's legal claim into an equitable claim to a pro rata share of the *res*"). As this Court has determined, the term "claim" is defined broadly to mean literally any "right to payment." 11 U.S.C. § 101(5); *Cohen v. De La Cruz*, 523 U.S. 213, 218 (1998) ("a 'claim' is defined . . . as a 'right to payment' . . . and a

'right to payment,' we have said, 'is nothing more nor nothing less than an enforceable obligation'") (quoting *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990)). Similarly, the Code defines the term "debt" broadly to mean any "liability on a claim." 11 U.S.C. § 101(12). As the Court has explained, the terms "claim" and "debt" are synonymous and reflect "Congress' broad rather than restrictive view of the class of obligations that qualify as a 'claim' giving rise to a 'debt.'" *Davenport*, 495 U.S. at 558 (citing H.R. REP. NO. 95-595, at 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 6266 (describing the definition of "claim" as the "broadest possible" and noting that the Bankruptcy Code "contemplates that all legal obligations of the debtor . . . will be able to be dealt with in the bankruptcy case.")). In this case, the IRS's claim for capital gains taxes is clearly a "claim" (and, correspondingly, a "debt") within the meaning of the Bankruptcy Code.

In general, the Code treats claims as either "pre-petition" or "post-petition" in nature, depending on whether they arise before or after the debtor commences a bankruptcy case. A "creditor" holding a pre-petition claim (including a governmental entity) is generally entitled to file a "proof of claim" with the bankruptcy court. 11 U.S.C. §§ 101(10), 101(15), 101(27), 501(a); Fed. R. Bankr. P. 3001, 3002. Subject to certain exceptions, only creditors (including governmental units) that file proofs of claim may receive distributions from the debtor's bankruptcy estate.

Fed. R. Bankr. P. 3002(a); *New York v. Irving Trust Co.*, 288 U.S. 329, 332-33 (1933). Section 502(b) governs the allowance and disallowance of proofs of claim. 11 U.S.C. § 502; *see Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 449-50 (2007) (discussing the operation of section 502).

In contrast, a person holding a post-petition claim is entitled to file a request for payment of an administrative expense. 11 U.S.C. § 503(a). Section 503(b) governs the allowance and disallowance of administrative expense claims. *Id.* § 503(b). Just as section 502(b) screens out allowable proofs of claim, section 503(b) screens out allowable administrative expense obligations. In general, post-petition taxes incurred during the course of bankruptcy are treated as expenses of administration, without the need to file any proof of claim or request for payment. *Nicholas v. United States*, 384 U.S. 678, 687-88 (1966) ("[T]axes incurred during the arrangement period are expenses of the Chapter XI proceedings and are therefore technically a part of the first priority under s 64a(1)"); *In re Colortex Indus., Inc.*, 19 F.3d 1371, 1381-82 (11th Cir. 1994) (confirming continued validity of this rule under the Bankruptcy Code); *cf. United States v. Noland*, 517 U.S. 535, 543 (1996) ("Congress could have, but did not, deny . . . postpetition tax penalties the first priority given to other administrative expenses, and bankruptcy courts may not take it upon themselves to

make that categorical determination . . . ."). Thus, in the ordinary course, the IRS's claim for any capital gains taxes owing as a result of the post-petition sale of the Halls' farmland would be treated as an administrative debt.

2. The IRS's claim is a priority obligation subject to the provisions of section 1222(a)(2)(A).

Bankrupt debtors typically lack the ability to pay all claims in full, and certain claims are entitled to priority treatment under section 507 of the Code – meaning they are entitled to be paid ahead of general unsecured claims. 11 U.S.C. § 507. Administrative expenses allowed under section 503(b) are granted the second highest level of priority under section 507(a)(2). *Id*. § 507(a)(2). In the ordinary course, the IRS's tax claim would be entitled to this treatment and thus paid ahead of more junior claims. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 4-5 (2000) (noting that, as a rule, administrative expenses are "entitled to priority over prepetition unsecured claims."). In chapter 12 cases, however, this basic rule is modified by section 1222(a)(2)(A).

A chapter 12 debtor is required to file a plan providing for the treatment of the debtor's debts. 11 U.S.C. § 1221. In general, the plan is required to provide for the full payment of all claims entitled to priority under section 507(a),

including administrative expenses under section 503(b). *Id.* §§ 503(b), 507(a)(2), 1222(a)(2). Section 1222(a)(2)(A), however, recognizes an exception for "a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation." *Id.* § 1222(a)(2)(A). This provision directs that, so long as the debtor receives a discharge, such a claim "shall be treated as an unsecured claim that is not entitled to priority under section 507." *Id.* Consistent with the historic understanding that post-petition taxes are administrative expenses, section 1222(a)(2)(A) properly applies to treat the IRS's claim in this case as a nonpriority, general unsecured claim that the debtor may discharge without payment in full.

3. The IRS's claim is a dischargeable debt.

As this Court has explained in the chapter 11 context, "[a] preconfirmation debt [i.e., a debt arising before confirmation of a plan including post-petition claims] is dischargeable unless it falls within an express exception to discharge." *FCC v. NextWave Personal Commc'ns, Inc.*, 537 U.S. 293, 303 (2003). The same rule applies in chapter 12.

The scope of a debtor's discharge in chapter 12 is governed principally by section 1228. 11 U.S.C. § 1228. Pursuant to section 1228(a),

the debtor is typically entitled to receive a discharge after completing all payments called for under the plan. Critically, the discharge extends to all debts "provided for" under the plan, other than certain claims specifically excepted. *Id.* §§ 523, 1228(a); *see also id.* § 524 (specifying the effect of a discharge in bankruptcy); 8 COLLIER ON BANKRUPTCY ¶ 1228.02[4], at 1228-4-6 (16th ed. 2011) (discussing the scope of the discharge under section 1228).

In this case, the IRS's claim for capital gains taxes arising from the post-petition sale of farmland belonging to the Halls' bankruptcy estate is not excepted from discharge under any provision of the Code, including sections 1228 or 523. Further, there is no reason why the Halls may not "provide for" the debt in their plan. Thus, it properly falls within the scope of section 1228 and is dischargeable.

The court below suggested that the Halls could not "provide for" the IRS's claim in their plan based on its reading of section 1227. Pet. App. 8 n.2. Section 1227 provides that the terms of a confirmed plan bind "creditors," and the term "creditor" is defined in section 101(10) of the Code to mean only a person holding a prepetition claim. 11 U.S.C. § 101(10). The court's reliance on section 1227 to support its analysis, however, is unsound. Nothing in section 1227 purports to limit the contents of a debtor's plan, which is the province of section 1222. In turn,

nothing in section 1222 restricts the contents of a plan to the treatment of the claims of "creditors" holding pre-petition claims. On the contrary, section 1222 expressly contemplates the treatment of post-petition claims. More important, nothing in section 1227 purports to limit the scope of the discharge under section 1228. Indeed, as is relevant here, section 1228(a) expressly discharges debts "allowed under section 503 of this title" (i.e., all administrative expense claims). *Id.* § 1228(a).

The effect of a discharge under section 1228 is specified in section 524. *Id.* § 524. This section is also not limited to the claims of "creditors" holding pre-petition claims. Rather, it clearly provides that a discharge under section . . . 1228 operates to void the "personal liability of the debtor" with respect to "any debt discharged under section . . . 1228." *Id.* § 524(a)(1). These terms plainly encompass the IRS's claim in this case.

4. Nothing in section 1399 of the IRC changes the operation of section 1222(a)(2)(A) or 1228.

As noted, section 1399 provides that "no separate taxable entity shall result from the commencement of a case" under the Bankruptcy Code "[e]xcept any case to which section 1398 applies." 26 U.S.C. § 1399. Nothing in this section alters the effect of section 1222(a)(2)(A).

The mere fact that the filing of a chapter 12 case does not trigger the creation of a "separate taxable entity" for purposes of the IRC does not mean that, for purposes of the Bankruptcy Code, the IRS's claim cannot be an administrative obligation. It simply means that the estate and the debtor are treated as a consolidated entity such that whatever tax liabilities may arise during the course of a bankruptcy case will be treated as an obligation of the debtor and the estate in combination.

In addition, nothing in section 1399 even remotely purports to alter the discharge provisions of section 1228. Critically, regardless of how the IRS wishes to characterize its post-petition claim, it remains a "debt" that the Halls may "provide for" in their plan and discharge.

At bottom, the IRS seeks to create an exception to the Code's discharge provisions through a creative interpretation of section 1399. That is not legitimate. When Congress wishes to create exceptions to the discharge and other provisions of bankruptcy relief, it knows how to do so and does so expressly. *See NextWave*, 537 U.S. at 302; *Kovacs*, 469 U.S. at 279; *Toibb v. Radloff*, 501 U.S. 157, 161 (1991). The IRS's invocation of section 1399 falls far wide of the mark.

This Court's decision in *Ohio v. Kovacs* is particularly analogous. There, the State of Ohio

obtained a state court injunction ordering Kovacs to clean up a hazardous waste disposal site. 469 U.S. at 275. Kovacs filed a bankruptcy petition, and the State sought a declaration that Kovacs's clean-up obligation was not dischargeable in bankruptcy because it was not a "debt" or "claim." *Id.* at 277. The Court noted that section 523(a) listed nine types of debt saved from discharge and that Ohio's claim was not among the exceptions. *Id.* at 278. Ohio argued that its claim was not really a "claim" for bankruptcy purposes because Ohio sought specific performance rather than money damages. Rejecting this argument, the Court observed that "it is apparent that Congress desired a broad definition of a 'claim'" and could have restricted the concept if it had wanted to do so. *Id.* Ultimately, the Court declined to accept Ohio's argument and infer another exception to the discharge. *Id.* Like Ohio's ill-fated argument in *Kovacs*, the IRS's position in this case devolves into a convoluted request for an exception to the clear language of section 1222(a)(2)(A) and 1228 that this Court should properly decline.

The Court should likewise reject the IRS's argument in this case for yet another reason: in contrast to section 1399, section 1222(a)(2)(A) is the more precise and more recent enactment directed specifically to the issue at hand. As this Court has explained, "a specific policy embodied in a later federal statute should control [this Court's] construction of the [earlier] statute,

even though it ha[s] not been expressly amended." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)). This is so because the "'classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.'" *Id.* (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988)). As explained more fully below, it is clear that section 1222(a)(2)(A) was intended to provide the specific relief Petitioners seek in this case. To the extent of any conflict between section 1399 and 1222(a)(2)(A), the more precise and focused purpose of section 1222(a)(2)(A) should control.

5. If accepted, the Ninth Circuit's interpretation of section 1399 would mean that the IRS cannot collect post-petition taxes in non-individual chapter 7 and chapter 11 cases.

The Ninth Circuit's theory likewise makes a hash of the Code because treating the IRS's claim as an obligation of the debtor outside the bankruptcy process would divest the IRS of any realistic payment entitlement in most cases involving corporate chapter 7 and 11 liquidation cases.

For example, in a corporate chapter 7 case, the debtor is divested of all of its property so the property can be liquidated and the proceeds distributed to creditors; nothing is left with the debtor, which generally dissolves under state law when the bankruptcy case ends. Thus, under the Ninth Circuit's theory, treating the IRS's claim for post-petition taxes as an obligation of the debtor means that the tax will never be paid because the corporate chapter 7 debtor is not a surviving entity and will have no funds to pay it.

The same result would occur in a liquidating corporate chapter 11 case. Chapter 11 permits corporate debtors to liquidate their assets, either through sales during the course of the case or under the terms of a confirmed plan. 11 U.S.C. §§ 363 (providing for the sales of assets during the course of a case), 1123(b)(4) (stating that a chapter 11 plan may "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds among holders of claims or interests"). As in a corporate chapter 7 case, the debtor in a liquidating chapter 11 case is not a surviving entity and will not have any funds to pay the IRS's post-petition claim.

In her concurrence in *Kovacs*, Justice O'Connor discussed this very type of problem. She noted that "[t]he Court's holding that the cleanup order was a 'claim' within the meaning of § 101(4) also avoids potentially adverse conse-

quences for a State's enforcement of its order when the debtor is a corporation." 469 U.S. at 286 (O'Connor, J., concurring). She explained that "[i]n a Chapter 7 proceeding under the Bankruptcy Code, a corporate debtor transfers its property to a trustee for distribution among the creditors who hold cognizable claims, and then generally dissolves under state law. Because the corporation usually ceases to exist, it has no postbankruptcy earnings that could be utilized by the State to fulfill the cleanup order. The State's only recourse in such a situation may well be its 'claim' to the prebankruptcy assets." *Id.* That observation applies here with equal force.

As many courts of appeals have held, the law takes the much more sensible position that post-petition taxes are entitled to administrative priority. *E.g., In re Pac.-Atl. Trading Co.*, 64 F.3d 1292, 1301 (9th Cir. 1995) ("Because the estate was in existence [when the tax was incurred], we conclude that the corporate income taxes . . . were 'incurred by the estate.'"); *In re L.J. O'Neill Shoe Co.*, 64 F.3d 1146, 1148 (8th Cir. 1995) (affording administrative expense priority to corporate income tax based on income earned post-petition); *In re Columbia Gas Transmission Corp.*, 37 F.3d 982, 986 (3d Cir. 1994) (declining to afford administrative expense priority where "the event giving rise to the property tax . . . occurred before the petition for bankruptcy had been filed."); *United States v.*

Friendship College, Inc., 737 F.2d 430, 432 (4th Cir. 1984) (affording administrative expense priority for income tax withheld from wages earned while conducting business in Chapter 11 reorganization). The IRS's position here is at war with these precedents and should be rejected.

B. The IRS's Position Conflicts with the Historical Treatment of Post-Petition Tax Claims in Bankruptcy.

It is axiomatic that "[w]hen Congress amends the bankruptcy laws, it does not write 'on a clean slate,'" *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (quoting *Emil v. Hanley*, 318 U.S. 515, 521 (1943)), and that the Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Cohen*, 523 U.S. at 221 (quoting *Davenport*, 495 U.S. at 563); *see also United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 221 (1996); *Davenport*, 495 U.S. at 565 (O'Connor, J., dissenting) ("This Court carefully has set forth a method for statutory analysis of the Bankruptcy Code. . . . To determine the drafters' intent, the Court presumes that Congress intended to keep continuity between pre-Code judicial practice and the enactment of the Bankruptcy Code in 1978.") (citations omitted); *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 218 (1936) ("To fix the meaning of these

provisions [of the Bankruptcy Act] there is need to keep in view the background of their history."). Consistent with this principle, the Court has held that, in construing the provisions of the Bankruptcy Code, it will not presume that Congress intended to overturn an established bankruptcy practice *sub silentio*, but instead will require any intent to change the law to be "unmistakably clear." *Cohen*, 523 U.S. at 222.

This rule makes sense. The Bankruptcy Code is a complex codification of equitable principles developed over the past two centuries largely in response to experience in the administration of insolvency proceedings. In drafting the Code, Congress relied repeatedly on preexisting judicial doctrine and reference to existing practice both to fill out and to inform the Code's essential meaning. The Court's interpretive methodology presumes the continuance of preexisting bankruptcy practices. Of course, Congress may alter or abrogate preexisting legal procedures as it pleases, even those of longstanding importance and duration (except as the Constitution commands otherwise), but as the cases cited above demonstrate, the abrogation of preexisting bankruptcy doctrine requires proof of clear and unmistakable disavowal, not simply oblique inferences of implicit repeal.

Claims of the United States have long enjoyed priority in bankruptcy. The Act of 1800 gave preferred treatment to debts due the Unit-

ed States, Act of Apr. 4, 1800, ch. 19, §§ 29, 62, 2 Stat. 19, 29, 36 (repealed 1803), as did the Act of 1841, Act of Aug. 19, 1841, ch. 9, §§ 5, 6, 5 Stat. 440, 444-46 (repealed 1843).

The Act of 1867 defined five classes of claims entitled to priority payment, including administrative expenses and taxes due the United States. Act of Mar. 2, 1867, ch. 176, §§ 27, 28, 14 Stat. 517, 529-531 (repealed 1878). This basic priority scheme was carried over to the 1898 Bankruptcy Act.

As originally passed, section 64 of the 1898 Act divided priority into two subsections – 64a and 64b. Act of July 1, 1898, ch. 541, § 64, 30 Stat. 544, 563 (repealed 1979). Section 64a covered "all taxes legally due and owing by the bankrupt to the United States." *Id.* § 64a. Section 64b set out certain preferred debts, granting first priority to "the actual and necessary cost of preserving the estate subsequent to filing the petition." *Id.* § 64b. Section 64a directed, however, that "[t]he court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States . . . in advance of the payment of dividends to creditors." *Id.* § 64a. This particular clause generated an "immense amount of litigation" centered on the relative priority afforded tax claims in the growing number of cases where the estate was not large enough to pay in full all priority debts. Ralph F. Colin, *The Priority of the United States in the Payment of Its*

Claims Against a Bankrupt, 24 COLUM. L. REV. 360, 360 (1924). Ultimately, the clause came to be "regarded as clearly giving the payment of taxes priority over wage claims and even the expenses of administration." 6 REMINGTON ON BANKRUPTCY § 2808 (5th ed. 1952); *see also In re West Coast Rubber Co.*, 268 U.S. 1, 4 (1925).

In 1926, Congress amended section 64 further, Act of May 27, 1926, ch. 406, § 15, 44 Stat. 662, 666-67 (repealed 1979), and in 1938, the Chandler Act reworded the section by merging subsections 64a and 64b, Act of June 22, 1938, ch. 575, 52 Stat. 840, 874 (repealed 1979). As amended, section 64a gave first priority to "the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition." *Id.* Fourth priority was given to "taxes legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof." *Id.* Following that amendment, no substantive changes of relevance were made to section 64.

In 1966, this Court held that section 64a(1) conferred first priority to post-petition taxes. *Nicholas,* 384 U.S. at 687-88. In *Nicholas*, the Court addressed the manner in which interest on claims for unpaid income, social security, and excise taxes should be calculated in a Chapter XI proceeding. *Id*. at 686. In the course of its decision, the Court determined that post-petition taxes are properly administrative ex-

penses: "Taxes incurred in the pre-arrangement [i.e., pre-petition] period must be content with a fourth priority under s 64a(4) of the Bankruptcy Act. On the other hand, taxes incurred during the arrangement period [*i.e.*, post-petition] are expenses of the Chapter XI proceedings and are therefore technically a part of the first priority under s 64a(1)." *Id.* at 687-88.

Following *Nicholas*, "it was well established that administrative status and the attendant first priority of distribution under Section 64a(1) applied to *any* post-petition expenses, including taxes of *any* kind, so long as the claimant demonstrated that such expenses were reasonable and necessary for the preservation of the bankruptcy estate." *In re Lumara Foods of America, Inc.*, 50 B.R. 809, 813 (N.D. Ohio 1985) (emphasis in original); *see also In re Mark Anthony Constr., Inc.*, 886 F.2d 1101, 1106 (9th Cir. 1989) (holding that interest accruing on unpaid post-petition taxes should be given priority as an administrative expense) ("the specific common law rule laid down in *Nicholas* survives the enactment of the Code and allows interest accruing on unpaid post-petition taxes to be given first priority as an administrative expense."); 6 REMINGTON ON BANKRUPTCY § 2822 (5th ed. 1952) ("If the trustee conducts the bankrupt's business, any taxes paid or incurred in the course of doing so are administration expenses."). Indeed, following *Nicholas*, courts (including this Court) repeatedly held that taxes assessed after

a petition for bankruptcy was filed were administrative expenses under section 64a(1) rather than taxes "due and owing by the bankrupt" under section 64a(4). *See, e.g., In re Luster*, 981 F.2d 277, 280-81 (7th Cir. 1992); *In re Lambertville Rubber Co.*, 111 F.2d 45, 49 (3d Cir. 1940); 3A COLLIER ON BANKRUPTCY ¶ 64.401, at 2151 (14th ed. 1975) ("Taxes accruing after bankruptcy are a cost of administration and entitled to a first priority.").[2]

There is no evidence – let alone evidence that is "unmistakably clear" – that Congress intended to change this historic practice, either when it enacted the Bankruptcy Code in 1978, when it subsequently enacted section 1399 of the IRC, or when it enacted section 1222(a)(2)(A) of the Bankruptcy Code in 2005. Accordingly, the Court should conclude that the historic practice endures.

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[2] *See also Haggerty v. Michigan Trust Co.*, 286 U.S. 334, 344 (1932) (post-petition franchise taxes were expenses of administration); *In re John Horne Co.*, 220 F.2d 33, 34-35 (7th Cir. 1955) (claims for federal unemployment and income taxes that accrued prior to filing petition are "taxes" under § 64a(4) and those accruing after filing are costs of administration under § 64a(1)); *McColgan v. Maier Brewing Co.*, 134 F.2d 385, 387 (9th Cir. 1943); *In re Fonda*, 126 F.2d 604 (2d Cir. 1942); *Missouri v. Earhart*, 111 F.2d 992, 995 (8th Cir. 1940); *In re R.M. Rose Co.*, 285 F. 685, 689 (6th Cir. 1923).

C. The Legislative History to Sections 1222(a)(2)(A) and 503(b) Demonstrate Congress's Intent to Reduce the Priority of Claims for Taxes Incurred During the Chapter 12 Reorganization Process to Enable Family Farmers to Successfully Reorganize.

Chapter 12 was "designed to give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land." H.R. REP. NO. 99-958, at 48 (1986). When Congress added chapter 12 to the Bankruptcy Code in 1986, it included a seven-year sunset provision because chapter 12 was "a new chapter aimed at a specific class of debtors," and Congress wanted to "evaluate both whether the chapter [was] serving its purpose and whether there [was] a continuing need for a special chapter for the family farmer" before determining "whether or not to make th[e] chapter permanent." *Id.* Following its original enactment, Congress extended chapter 12's expiration date numerous times and ultimately made the chapter permanent in the 2005 amendment to the Bankruptcy Code known as the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). 147 CONG. REC. H4953 (daily ed. July 31, 2001) (statement of Rep. Baldwin); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1001(a), 119 Stat. 23, 185 (2005).

As part of its permanent addition of chapter 12 to the Bankruptcy Code, Congress enacted section 1222(a)(2)(A) to help farmers "reorganize by keeping the tax collectors at bay." 145 CONG. REC. S764 (daily ed. Jan. 20, 1999) (statement of Sen. Grassley). Prior to the enactment of BAPCPA, tax claims by the IRS were afforded special priority, and former section 1222(a)(2) required that any chapter 12 plan had to pay those claims in full. 11 U.S.C. § 1222(a)(2) (2004) ("The plan shall . . . provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim."). As a result, the IRS would often have an effective veto over a chapter 12 debtor's plan of reorganization.

Senator Grassley, the original proponent of section 1222(a)(2)(A) and ultimately the primary sponsor of BAPCPA, sought to change that dynamic by amending section 1222(a)(2) to reduce the priority of claims owed to governmental entities as a result of the sale of certain assets during a chapter 12 bankruptcy reorganization in order to "free up capital for investment in the farm, and help farmers stay in the business of farming." 145 CONG. REC. S764 (daily ed. Jan. 20, 1999) (statement of Sen. Grassley); *see also In re Knudsen*, 389 B.R. 643, 660 (N.D. Iowa 2008); 7 NORTON BANKRUPTCY LAW & PRACTICE § 133:6 n.2 (3d ed. 2010). This theme of reducing

the tax effect of sales during reorganization in order to free up capital for the reorganization process was forcefully and consistently emphasized by Senator Grassley from the moment he initially proposed the language that became section 1222(a)(2)(A) to the moment he saw his proposed legislation become a reality.

Senator Grassley's proposal originated in 1997 in response to a particular case: *In re Specht*, No. 96-21022-D (N.D. Iowa April 9, 1997). In *Specht*, the court determined that the debtor's proposed post-petition deeding of 80 acres would lead to taxable income that ultimately undermined the feasibility of the debtor's chapter 12 plan. *See* Appellants' Br. at 12-13, *In re Knudsen*, 389 B.R. 643 (N.D. Iowa 2008) (No. C07-3011-MWB). A lawyer involved in the case brought the decision to Senator Grassley's attention. *Id.* at 13; *see also* 145 CONG. REC. S764 (daily ed. Jan. 20, 1999) (statement of Sen. Grassley) (acknowledging that lawyer). In response, on January 20, 1999, Senator Grassley introduced a bill entitled the "Safeguarding America's Farms Entering the Year 2000 Act," known as the "Safety 2000" Act. The relevant text of that proposed act, reproduced at Stat. App. 16a, is effectively identical to the language of section 1222(a)(2)(A). *Compare* S. 260, 106th Cong. § 3 (1999); Stat. App. 16a *with* 11 U.S.C. § 1222(a)(2)(A); Stat. App. 5a. Senator Grassley explained the origin and purpose of his proposal as follows:

> "Safety 2000" also helps farmers to reorganize by keeping the tax collectors at bay. Under current law, farmers often face a crushing tax liability if they need to sell livestock or land in order to reorganize their business affairs. . . . [H]igh taxes have caused farmers to lose their farms. Under the bankruptcy code, the I.R.S. must be paid in full for any tax liabilities *generated during a bankruptcy reorganization*. If the farmer can't pay the I.R.S. in full, then he can't keep his farm. This isn't sound policy. Why should the I.R.S. be allowed to veto a farmer's reorganization plan? "Safety 2000" takes this power away from the I.R.S. *by reducing the priority of taxes during proceedings*. This will free up capital for investment in the farm, and help farmers stay in the business of farming.

145 CONG. REC. S727, 764 (daily ed. Jan. 20, 1999) (statement of Sen. Grassley) (emphasis added).

Although the Safety 2000 Act was not ultimately passed as a stand-alone bill, its provisions were incorporated in other bills, including ultimately BAPCPA. For example, on February 24, 1999, the relevant text was included in H.R. 833, introduced in the House as the Bankruptcy Reform Act of 1999. *See* H.R. 833, 106th Cong. § 1004 (1999); Stat. App. 16a-17a. On March 16,

1999, Senator Grassley incorporated the language into S. 625, introduced in the Senate also as the Bankruptcy Reform Act of 1999. *See* 145 CONG. REC. S2738, 2764 (daily ed. Mar. 16, 1999); S. 625, 106th Cong. § 1004 (1999); Stat. App. 17a. When discussing the proposed bill, Senator Grassley explained that the proposed revision to chapter 12 that ultimately became section 1222(a)(2)(A) would "reduce[] the priority of capital gains tax liabilities for farm assets *sold as part of a reorganization plan*. . . [in order to] allow[] cash-strapped farmers to sell livestock, grain, and other farm assets to generate cash flow when liquidity is essential to maintaining a family farm operation." 145 CONG. REC. S11093 (daily ed. Sept. 21, 1999) (statement of Sen. Grassley); *see also id.* (letter of Senators Grassley, Johnson, Brownback, Kerrey, and Daschle entered into the record) (same); 145 CONG. REC. S14052, 14055 (daily ed. Nov. 5, 1999) (statement of Sen. Grassley) (same).

The House ultimately passed H.R. 833 and sent it to the Senate for consideration. 145 CONG. REC. H2771 (daily ed. May 5, 1999); Stat. App. 18a. The Senate then essentially passed S. 625 by replacing the text of H.R. 833 with the text of S. 625 and requested a conference with the House. 146 CONG. REC. S255 (daily ed. Feb. 2, 2000). Although there were significant differences between the two chambers' bills, they were virtually identical with respect to what eventually became section 1222(a)(2)(A). *Compare* S. 625,

106th Cong. § 1004 (1999); Stat. App. 17a *with* H.R. 833, 106th Cong. § 201 (1999); Stat. App. 18a. As Senator Grassley explained, there was no conflict on this provision because both "the House and Senate agreed to reduce the priority of capital gains tax liabilities for farm assets sold *as a part of a chapter 12 reorganization plan*." 146 CONG. REC. S6249 (daily ed. June 30, 2000) (statement of Sen. Grassley) (emphasis added); *see also* 146 CONG. REC. S5384 (daily ed. June 20, 2000) (statement of Sen. Grassley) ("The bi-cameral agreement broadens the definition of 'family farmer' and permits farmers *in chapter 12* to avoid crushing capital gains taxes *when selling farm assets to generate cash flow*.") (emphases added).

H.R. 833 was not ultimately enacted, but Senator Grassley later reintroduced the legislation (with the relevant section again included) as the Bankruptcy Reform Act of 2000. *See* S. 3186, 106th Cong. § 1003 (2000); Stat. App. 18a-19a. Senator Grassley again emphasized the significance of the tax relief to be provided by changes to chapter 12 for farmers undergoing reorganization. *See* 146 CONG. REC. S10775 (daily ed. Oct. 19, 2000) (statement of Sen. Grassley) ("this conference report gives farmers *in chapter 12* much-needed capital gains tax relief.") (emphasis added); 146 CONG. REC. S11413 (daily ed. Oct. 31, 2000) (statement of Sen. Grassley) ("The bankruptcy bill lets farmers *in bankruptcy* avoid capital gains taxes. This will free up resources that

would have otherwise been forced to go to the Federal Treasury, that would otherwise go down the black hole of the IRS, to be invested in farming operations.") (emphasis added); 146 CONG. REC. S11632 (daily ed. Dec. 6, 2000) (statement of Sen. Grassley) ("*we have also changed the tax laws so that farmers will be able to avoid capital gains taxes when they are forced to sell something by the referee of bankruptcy*. This will free up resources then to be invested in a farming operation that would otherwise go down the black hole of the IRS.") (emphasis added). Congress passed that legislation, but it was ultimately pocket vetoed by then-President Clinton. *See* 146 CONG. REC. H9817, 9840 (daily ed. Oct. 12, 2000); 146 CONG. REC. S11663, 11730 (daily ed. Dec. 7, 2000).

Following the 2000 election, on January 30, 2001, Senator Grassley introduced the Bankruptcy Reform Act of 2001, once again including the language ultimately incorporated in the current section 1222(a)(2)(A). *See* S. 220, 107th Cong. § 1003 (2001); Stat. App. 19a-20a; S. 420, 107th Cong. § 1003 (2001); Stat. App. 20a. In a Senate hearing on that bill, he provided a written statement that the relevant language was intended to provide relief from the capital gains tax burden related to assets "sold as part of a reorganization plan." *The Bankruptcy Reform Act of 2001: Hearings Before the S. Comm. on the Judiciary*, 107th Cong. 121 (2001) ("S. 220 also reduces the priority of capital gains tax liabilities

for farm assets sold as a part of a reorganization plan, which will allow cash-strapped farmers to sell livestock, grain, and other farm assets to generate cash flow when liquidity is essential to maintaining a family farm operation.") (emphasis added); *see also* 147 CONG. REC. S1808 (daily ed. Mar. 5, 2001) (statement of Sen. Grassley) ("The bill lets farmers *in bankruptcy* avoid capital gains taxes.") (emphasis added). Senator Grassley's view of the bill was also adopted by Senator Collins, who successfully amended the bill to expand access to chapter 12 to certain fishermen as well as family farmers. 147 CONG. REC. S2357-58 (daily ed. Mar. 15, 2001). Senator Collins explained that "[t]he chapter 12 debtor is . . . given the freedom to sell off parts of his or her property *as part of a reorganization plan*." 147 CONG. REC. S2155 (daily ed. Mar. 12, 2001) (statement of Sen. Collins) (emphasis added). That Act was ultimately passed by the Senate but never became law. *See* 147 CONG. REC. S2379 (daily ed. Mar. 15, 2001). Senator Collins's amendment was nevertheless incorporated into the final enactment of BAPCPA.

With BAPCPA, Senator Grassley was ultimately successful in getting his language enacted. *Compare* S. 260, 106th Cong. § 3 (1999); Stat. App. 16a *with* 11 U.S.C. § 1222(a)(2)(A); Stat. App. 5a. Prior to final passage, he spoke as the sponsor in support of the BAPCPA and echoed his earlier comments, reiterating the importance of the bill's provision to

"let[] farmers *in bankruptcy* avoid capital gains tax. . . [which] is very important because it will free up resources to be invested in farming operations. . . ." 151 CONG. REC. S1857 (daily ed. Mar. 1, 2005) (statement of Sen. Grassley) (emphasis added).

The legislative history behind section 1222(a)(2)(A) demonstrates a remarkably clear intent to reduce the priority of tax claims incurred post-petition to enable family farmers to successfully reorganize their affairs in a Chapter 12 bankruptcy. The decision of the court below is clearly at odds with this intent.

In addition, the legislative history of section 503(b) of the Bankruptcy Code further undermines the decision below. The Senate Reports discussing this provision referred to administrative expenses under section 503(b)(2) as including taxes incurred "*in administering the debtor's estate*" or "*during the case*." S. REP. NO. 95-989, at 66 (1978) (emphases added); *see also Knudsen*, 581 F.3d at 708-09. These statements necessarily contemplate post-petition tax claims, just as Senator Grassley's comments did. They also reflect the established historical view regarding the treatment of post-petition tax claims as administrative expenses, further contradicting the analysis of the court below.

CONCLUSION

For the foregoing reasons, and the reasons contained in Petitioners' brief, the decision of the court below should be reversed.

Respectfully submitted,

Mark J. Lazzo	G. Eric Brunstad, Jr.
MARK J. LAZZO, P.A.	*Counsel of Record*
3500 N. Rock Road	Collin O'Connor Udell
Bldg. 300, Suite B	Matthew J. Delude
Wichita, KS 67226	Kate O'Keeffe
(316) 263-6895	DECHERT LLP
	90 State House Square
	Hartford, CT 06103
	(860) 524-3999
	eric.brunstad@dechert.com
August 24, 2011	*Counsel for Amici Curiae*

STATUTORY APPENDIX

11 U.S.C. § 503(b)(1)(B)(i): Allowance of administrative expenses

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--

(1) . . . (B) any tax--

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title;

11 U.S.C. §§ 507(a)(2), 507(a)(8): Priorities

(a) The following expenses and claims have priority in the following order:

***

(2) Second, administrative expenses allowed under section 503(b) of this title, unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized under section 13(3) of the Federal Reserve Act (12 U.S.C. 343), and any fees and charges assessed against the estate under chapter 123 of title 28.

***

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for--

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition--

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of--

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on--

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise--

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection

action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

11 U.S.C. § 1222(a)(2)(A): Contents of plan

(a) The plan shall--

***

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless--

(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge;

26 U.S.C. § 1398: Rules relating to individuals' Title 11 cases

(a) Cases to which section applies.--Except as provided in subsection (b), this section shall apply to any case under chapter 7 (relating to li-

quidations) or chapter 11 (relating to reorganizations) of Title 11 of the United States Code in which the debtor is an individual.

(b) Exceptions where case is dismissed, etc.--

(1) Section does not apply where case is dismissed.--This section shall not apply if the case under chapter 7 or 11 of Title 11 of the United States Code is dismissed.

(2) Section does not apply at partnership level.--For purposes of subsection (a), a partnership shall not be treated as an individual, but the interest in a partnership of a debtor who is an individual shall be taken into account under this section in the same manner as any other interest of the debtor.

(c) Computation and payment of tax; basic standard deduction.--

(1) Computation and payment of tax.--Except as otherwise provided in this section, the taxable income of the estate shall be computed in the same manner as for an individual. The tax shall be computed on such taxable income and shall be paid by the trustee.

(2) Tax rates.--The tax on the taxable income of the estate shall be determined under subsection (d) of section 1.

(3) Basic standard deduction.--In the case of an estate which does not itemize deductions, the basic standard deduction for the estate for the taxable year shall be the same as for a married individual filing a separate return for such year.

(d) Taxable year of debtors.--

(1) General rule.--Except as provided in paragraph (2), the taxable year of the debtor shall be determined without regard to the case under Title 11 of the United States Code to which this section applies.

(2) Election to terminate debtor's year when case commences.--

(A) In general.--Notwithstanding section 442, the debtor may (without the approval of the Secretary) elect to treat the debtor's taxable year which includes the commencement date as 2 taxable years--

(i) the first of which ends on the day before the commencement date, and

(ii) the second of which begins on the commencement date.

(B) Spouse may join in election.--In the case of a married individual (within the meaning of section 7703), the spouse may elect to have the debtor's election under subparagraph (A) also apply to the spouse, but only if the debtor and the spouse file a joint return for the taxable year referred to in subparagraph (A)(i).

(C) No election where debtor has no assets.--No election may be made under subparagraph (A) by a debtor who has no assets other than property which the debtor may treat as exempt property under section 522 of Title 11 of the United States Code.

(D) Time for making election.--An election under subparagraph (A) or (B) may be made only on or before the due date for filing the return for the taxable year referred to in subparagraph (A)(i). Any such election, once made, shall be irrevocable.

(E) Returns.--A return shall be made for each of the taxable years specified in subparagraph (A).

(F) Annualization.--For purposes of subsections (b), (c), and (d) of section 443, a return filed for either of the taxable years referred to in subpa-

ragraph (A) shall be treated as a return made under paragraph (1) of subsection (a) of section 443.

(3) Commencement date defined.--For purposes of this subsection, the term “commencement date” means the day on which the case under Title 11 of the United States Code to which this section applies commences.

(e) Treatment of income, deductions, and credits.--

(1) Estate's share of debtor's income.--The gross income of the estate for each taxable year shall include the gross income of the debtor to which the estate is entitled under Title 11 of the United States Code. The preceding sentence shall not apply to any amount received or accrued by the debtor before the commencement date (as defined in subsection (d)(3)).

(2) Debtor's share of debtor's income.--The gross income of the debtor for any taxable year shall not include any item to the extent that such item is included in the gross income of the estate by reason of paragraph (1).

(3) Rule for making determinations with respect to deductions, credits, and employment taxes.--Except as otherwise provided in this section, the

determination of whether or not any amount paid or incurred by the estate--

(A) is allowable as a deduction or credit under this chapter, or

(B) is wages for purposes of subtitle C,

shall be made as if the amount were paid or incurred by the debtor and as if the debtor were still engaged in the trades and businesses, and in the activities, the debtor was engaged in before the commencement of the case.

(f) Treatment of transfers between debtor and estate.--

(1) Transfer to estate not treated as disposition.--A transfer (other than by sale or exchange) of an asset from the debtor to the estate shall not be treated as a disposition for purposes of any provision of this title assigning tax consequences to a disposition, and the estate shall be treated as the debtor would be treated with respect to such asset.

(2) Transfer from estate to debtor not treated as disposition.--In the case of a termination of the estate, a transfer (other than by sale or exchange) of an asset from the estate to the debtor shall not be treated as a disposition for purposes

of any provision of this title assigning tax consequences to a disposition, and the debtor shall be treated as the estate would be treated with respect to such asset.

(g) Estate succeeds to tax attributes of debtor.--The estate shall succeed to and take into account the following items (determined as of the first day of the debtor's taxable year in which the case commences) of the debtor--

(1) Net operating loss carryovers.--The net operating loss carryovers determined under section 172.

(2) Charitable contributions carryovers.--The carryover of excess charitable contributions determined under section 170(d)(1).

(3) Recovery of tax benefit items.--Any amount to which section 111 (relating to recovery of tax benefit items) applies.

(4) Credit carryovers, etc.--The carryovers of any credit, and all other items which, but for the commencement of the case, would be required to be taken into account by the debtor with respect to any credit.

(5) Capital loss carryovers.--The capital loss carryover determined under section 1212.

(6) Basis, holding period, and character of assets.--In the case of any asset acquired (other than by sale or exchange) by the estate from the debtor, the basis, holding period, and character it had in the hands of the debtor.

(7) Method of accounting.--The method of accounting used by the debtor.

(8) Other attributes.--Other tax attributes of the debtor, to the extent provided in regulations prescribed by the Secretary as necessary or appropriate to carry out the purposes of this section.

(h) Administration, liquidation, and reorganization expenses; carryovers and carrybacks of certain excess expenses.--

(1) Administration, liquidation, and reorganization expenses.--Any administrative expense allowed under section 503 of Title 11 of the United States Code, and any fee or charge assessed against the estate under chapter 123 of Title 28 of the United States Code, to the extent not disallowed under any other provision of this title, shall be allowed as a deduction.

(2) Carryback and carryover of excess administrative costs, etc., to estate taxable years.--

(A) Deduction allowed.--There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (i) the administrative expense carryovers to such year, plus (ii) the administrative expense carrybacks to such year.

(B) Administrative expense loss, etc.--If a net operating loss would be created or increased for any estate taxable year if section 172(c) were applied without the modification contained in paragraph (4) of section 172(d), then the amount of the net operating loss so created (or the amount of the increase in the net operating loss) shall be an administrative expense loss for such taxable year which shall be an administrative expense carryback to each of the 3 preceding taxable years and an administrative expense carryover to each of the 7 succeeding taxable years.

(C) Determination of amount carried to each taxable year.--The portion of any administrative expense loss which may be carried to any other taxable year shall be determined under section 172(b)(2), except that for each taxable year the computation under section 172(b)(2) with respect to the net operating loss shall be made before the computation under this paragraph.

(D) Administrative expense deductions allowed only to estate.--The deductions allowable under this chapter solely by reason of paragraph (1),

and the deduction provided by subparagraph (A) of this paragraph, shall be allowable only to the estate.

(i) Debtor succeeds to tax attributes of estate.--In the case of a termination of an estate, the debtor shall succeed to and take into account the items referred to in paragraphs (1), (2), (3), (4), (5), and (6) of subsection (g) in a manner similar to that provided in such paragraphs (but taking into account that the transfer is from the estate to the debtor instead of from the debtor to the estate). In addition, the debtor shall succeed to and take into account the other tax attributes of the estate, to the extent provided in regulations prescribed by the Secretary as necessary or appropriate to carry out the purposes of this section.

(j) Other special rules.--

(1) Change of accounting period without approval.--Notwithstanding section 442, the estate may change its annual accounting period one time without the approval of the Secretary.

(2) Treatment of certain carrybacks.--

(A) Carrybacks from estate.--If any carryback year of the estate is a taxable year before the estate's first taxable year, the carryback to such carryback year shall be taken into account for

the debtor's taxable year corresponding to the carryback year.

(B) Carrybacks from debtor's activities.--The debtor may not carry back to a taxable year before the debtor's taxable year in which the case commences any carryback from a taxable year ending after the case commences.

(C) Carryback and carryback year defined.--For purposes of this paragraph--

(i) Carryback.--The term “carryback” means a net operating loss carryback under section 172 or a carryback of any credit provided by part IV of subchapter A.

(ii) Carryback year.--The term “carryback year” means the taxable year to which a carryback is carried.

<u>26 U.S.C. § 1399:</u> No separate taxable entities for partnerships, corporations, etc.

Except in any case to which section 1398 applies, no separate taxable entity shall result from the commencement of a case under Title 11 of the United States Code.

S. 260, 106th Cong. § 3 (1999): CONTENTS OF PLAN – AMEND

Section 1222(a)(2) of title 11, United States Code, is amended to read as follows:

'(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –

'(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge;

H.R. 833, 106th Cong. § 1004 (1999): CERTAIN CLAIMS OWED TO GOVERNMENTAL UNITS.

(a) Contents of Plan. Section 1222(a)(2) of title 11, United States Code, is amended to read as follows:

"(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –

"(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge;

S. 625, 106th Cong. § 1004 (1999): CERTAIN CLAIMS OWED TO GOVERNMENTAL UNITS.

(a) CONTENTS OF PLAN- AMEND Section 1222(a)(2) of title 11, United States Code, is amended to read as follows:

'(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless—

'(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge;

<u>H.R. 833, 106th Cong. § 201 (1999):</u>[1]

(b) CONTENTS OF CHAPTER 12 PLAN - *Section 1222(a)(2) of title 11, United States Code*, is amended to read as follows:

"(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –

"(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge;

<u>S. 3186, 106th Cong. § 1003 (2000):</u>
CERTAIN CLAIMS OWED TO GOVERNMENTAL UNITS.

(a) CONTENTS OF PLAN - Section 1222(a)(2) of title 11, United States Code, is amended to read as follows:

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[1] As passed by the House of Representatives on May 5, 1999.

“(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless—

“(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge;

S. 220, 107th Cong. § 1003 (2001): CERTAIN CLAIMS OWED TO GOVERNMENTAL UNITS.

(a) Contents of Plan - Section 1222(a)(2) of title 11, United States Code, is amended to read as follows:

“(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –

“(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor’s farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under sec-

tion 507, but the debt shall be treated in such manner only if the debtor receives a discharge;

S. 420, 107th Cong. § 1003 (2001): CERTAIN CLAIMS OWED TO GOVERNMENTAL UNITS.

(a) CONTENTS OF PLAN - Section 1222(a)(2) of title 11, United States Code, is amended to read as follows:

"(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –

"(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge;