No. 18-957

IN THE

Supreme Court of the United States

NEXTERA ENERGY, INC.,
Petitioner,
v.

ELLIOTT ASSOCIATES, L.P.,
ELLIOTT INTERNATIONAL, L.P.,
ENERGY FUTURE HOLDINGS CORP., AND
LIVERPOOL LIMITED PARTNERSHIP,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY BRIEF FOR PETITIONER

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The Third Circuit's holding below is clear and unequivocal: Section 503 "applies to ***all*** requests for termination[] fees, as long as the claimed right to recover arose [in bankruptcy]." App. 28a n.4 (internal quotation marks and alterations omitted; emphasis supplied). That blanket holding squarely conflicts with the Fifth Circuit's longstanding rule, under which approval of a termination fee is subject only to Section 363's "business judgment standard." *In re ASARCO, L.L.C.*, 650 F.3d 593, 601 (5th Cir. 2011). In addition to deepening that conflict, the

decision below also entrenches the longstanding disagreement between the nation's two leading bankruptcy courts on this recurring and important question of bankruptcy law. Pet. 21-25. And because each jurisdiction to have addressed the issue applies its chosen Bankruptcy Code provision (Section 363 or Section 503) as a bright-line rule, the supposed factual distinctions respondents invoke are—as the Third Circuit put it below—"immaterial" to the question presented. App. 29a n.4.

Respondents cannot persuasively deny the "clear circuit split" on the question presented.[1] So instead, they invent a new argument that certiorari is unwarranted because of a supposed contractual waiver by NextEra of its entitlement to have the bankruptcy court apply the proper legal standard. That argument fails. In applying Section 503, the lower courts relied entirely on a perceived "statutory requirement," without mentioning the contract provision respondents now cite. *See* App. 28a; App. 79a-83a. Moreover, by its terms, that provision (which is silent as to standard of review, JA182) merely assured NextEra that, consistent with existing Third Circuit precedent, the Debtors would seek administrative priority for NextEra's claim if and when it became payable. As explained below, that contractual obligation of ***the Debtors*** could not,

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[1] Kevin M. Baum, *It's Not About Breaking Up: A Contract-Consideration Based 'Dowry' As An Alternative To Breakup Fees In Bankruptcy*, 2012 Ann. Survey of Bankr. Law 11 (2012); *see also, e.g.*, *In re JW Res., Inc.*, 536 B.R. 193, 195 (Bankr. E.D. Ky. 2015) ("The Fifth Circuit recently rejected the Third Circuit's reliance on administrative expense treatment as the only appropriate standard" for termination fees.").

and did not, supplant ***NextEra's*** entitlement to approval under Section 363.

The Court should not permit this acknowledged, longstanding disagreement among the lower courts to persist. The conflict "undermine[s] the stability and reliability of the bankruptcy system," Br. for Nat. Assoc. of Bankr. Trustees ("NABT Br.") 5, and prevents bankrupt entities in important jurisdictions from structuring asset sales according to their business needs. As this case demonstrates, the impact on estates (and, therefore, on creditors and the economy as a whole) can reach into the billions of dollars, thereby hindering bankruptcy law's most fundamental values. Opportunities for this Court to resolve the conflict are rare, and this case presents a particularly suitable vehicle. The Court should therefore grant certiorari.

I. THE CIRCUITS ARE SPLIT ON THE QUESTION PRESENTED.

A. The Third And Fifth Circuits Are In Conflict As To The Proper Standard Of Review For Breakup Fees In Bankruptcy.

The circuit split this case presents is longstanding and widely acknowledged by courts, commentators, and the leading bankruptcy treatise. *See* Pet. 2-5, 12-25. Bankruptcy trustees agree as well. NABT Br. 3-4. Yet despite that consensus, respondents argue that the split is illusory because (1) the Third Circuit has not adopted a "blanket rule," Opp. 22, and (2) the Fifth Circuit has distinguished the Third Circuit's cases, Opp. 25-28. Both assertions fail.

1. The Third Circuit has unquestionably adopted a blanket rule. Whatever doubt could have existed before the decision below, that decision makes clear

beyond dispute that the Third Circuit applies Section 503 to "***all*** requests for termination[] fees" in bankruptcy as a matter of "statutory requirement." App. 28a & n.4 (emphasis added). As a result, the supposedly "atypical circumstances" respondents attempt to ascribe to this case, Opp. 22-25, have no bearing on the question presented. As the Third Circuit clearly held, such factual distinctions are "immaterial" to its legal rule. App. 29a n.4. And that rule squarely conflicts with the rule applied by the Fifth Circuit. Pet. 4 & n.1.

Respondents nevertheless hypothesize that, despite its oft-expressed hostility to breakup fees, the Third Circuit would welcome a supposedly "typical" termination fee involving a stalking-horse bidder. Opp. 24-25, 28-29. As Judge Rendell recognized in dissent, that speculation "defies logic and common sense." *See* App. 37a. The supposed differences between such a fee and the one disallowed here are "a red herring"; the only distinction is that the fee at issue here became payable. App. 36a-38a & n.2.

This is therefore the prototypical case in which a termination fee should have been approved by deferring to the debtor's business judgment, given the bankruptcy court's unaltered finding that "the evidence overwhelmingly indicate[d] that a breakup fee was necessary to induce" NextEra's market-clearing bid, which, viewed *ex ante*, represented massive value to the Debtors. JA578; Pet. 29. A stalking-horse fee would face the same review in the Third Circuit. Indeed, contrary to respondents' contention, Opp. 25, the Third Circuit has pointedly refused to bless such termination fees, instead promising only the same hindsight-tainted, Section

503 "judgment call" that applied here under the Third Circuit's blanket rule. App. 29a-30a.

Nor are respondents correct that, simply by obtaining initial approval, putative bidders can avoid the uncertainty the Third Circuit's rule fosters. Opp. 25, 29-31. In the Third Circuit, as the decision below starkly illustrates, such approval does not shield against a court's after-the-fact rewriting of heavily negotiated terms based on its initial failure to "fully appreciate" how every "risk" addressed in a 300-page merger agreement might play out in every hypothetical circumstance. App. 32a; *see also* JA76-381.[2] And the Third Circuit's standard creates inefficiency even when applied *ex ante*, because it strips decision-making authority from those "with the most intimate knowledge of the assets of the estate and the relevant market." NABT Br. 3. Debtors and trustees—not courts—are in the best position to assess business risks. That is why the law has for a century embraced the business-judgment rule the Fifth Circuit applies—which is the rule the Third Circuit "rejected" below. App. 28a; *see* Pet. 23-24, 30-34.

2. Nor does the Fifth Circuit's effort in *ASARCO* to distinguish ***prior*** Third Circuit cases negate the circuit split that now unquestionably exists in light of the decision below. *Cf.* Opp. 25-28. The premise of

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[2] Thus, the occasional, *ex ante* approval of stalking-horse termination fees within the Third Circuit inspires no confidence given that court's affirmance of the bankruptcy court's hindsight decision to retroactively invalidate only the portion of the Termination Fee that resulted in payment. *Cf.* Opp. 25, 29-31. As this case shows, regardless of initial approval, the Third Circuit's rule fosters intolerable uncertainty by raising the concern that fees will be retroactively invalidated ***if they come due***. See, e.*g.*, Pet. 23-24.

the Fifth Circuit's effort was its hope that the Third Circuit would ***not*** apply Section 503 as a bright-line rule. Pet. 19-21. The decision below extinguishes that optimism. Moreover, the supposed difference between the "due diligence reimbursement fees" allowed in *ASARCO* and formal breakup fees is illusory, *see* Pet. 21, as evidenced both by respondents' failure to defend it and by the broad acknowledgement of a circuit split on this question.

B. The Nation's Two Most Important Bankruptcy Courts Are Also Divided, And Will Likely Stay That Way Without This Court's Review.

The question presented also divides (among others) the nation's two most important bankruptcy courts. *See* Pet. 21-25. Respondents do not address that disagreement, except to assert, without citation, that the standard of review has never determined a case's outcome. Opp. 27 n.7. This case itself refutes that contention. *See infra* at 7-8.

Respondents also suggest that, despite the longstanding disagreement among lower courts, this Court should stay its hand until the Second Circuit weighs in. Opp. 28 n.7. But the split between the Third and Fifth Circuits alone warrants this Court's review. *See, e.g.*, Pet. 28-29. Moreover, Second Circuit review is unlikely to be forthcoming given the severe impediments to appellate review of termination fees. Pet. 27-28. Indeed, in the 26 years since the Second Circuit "expressed willingness to review" the issue "in an appropriate case," Opp. 28 n.7, no such case has arisen. During that time, the Second Circuit has more than once deemed the issue unreviewable, *e.g.*, Pet. 28 & nn.14-15, even as the question has frequently recurred in, and divided,

lower courts across the country, Pet. 12-25, 26-29. The Court should not forgo this rare opportunity to resolve that division.

II. THIS CASE IS AN EXCELLENT VEHICLE.

A. The Third Circuit's Rejection Of The Fifth Circuit's Rule Was Dispositive.

Respondents contend that the Third Circuit's rejection of the Fifth Circuit's standard was not dispositive, Opp. 31-32, but the record belies that contention. The bankruptcy court never altered its finding that the evidence "overwhelmingly" showed that the Termination Fee was "necessary to induce" NextEra's extremely valuable bid. JA578; Pet. 29.[3] The court further acknowledged that the amount of the fee was appropriate and bargained-for, and that the Debtors obtained valuable concessions from NextEra in exchange. Pet. 29-30 & n.17. Even after the fee became payable because the Debtors terminated NextEra's transaction to pursue another one, the Debtors told the court the Fee "was a calculated risk worth taking," which they took "with their eyes wide open." JA1203:1-13; Pet. 8. Indeed, they said, they originally thought Elliott's effort to invalidate the Fee was Machiavellian, but then deemed that characterization "harsh and unfair"—to Machiavelli. JA1206:6-8.

This case therefore presents the prototypical example of a termination fee that would have been approved under the Fifth Circuit's rule, which

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[3] Respondents' suggestion that the lower courts saw no potential upside in the Termination Fee, Opp. 31-32, is revealed to be false by the very sentences respondents cite. *See*, *e.g.* App. 32a ("[T]he Termination Fee provision had the potential of providing a large benefit to the estates * * *.").

requires approval if, at the time of the deal, "the debtor had a good faith belief that the fee would benefit the estate." *See* App. 28a; Pet. 12-15, 30-34. It was only by "reject[ing]" that rule, App. 28a, that the Third Circuit could invalidate the Termination Fee.

B. This Case's Procedural Posture Emphasizes, Rather Than Undermines, The Need For This Court's Review.

Respondents' contention that this case's procedural posture is a reason to deny certiorari has things exactly backwards. *Cf.* Opp. 32-34. The bankruptcy court initially approved a heavily negotiated agreement that included $275 million in deal insurance to protect an $18.7 billion, market-clearing bid that NextEra otherwise would not have made. When that insurance came due, the court retroactively revoked its approval because, at the time of approval, ***the court*** supposedly failed to "fully appreciate" the deal's allocation of "risk[s]." App. 32a. That supposed misunderstanding would have been irrelevant under the business judgment rule, which exists to eliminate judicial authority to weigh business risks, particularly through hindsight. Pet. 30-34; *see also,* App. 39a (Rendell, J., dissenting) (reconsideration or not, bankruptcy court erred by "focus[ing] on later events, namely the denial of regulatory approval, as depriving the bid of value"). Yet, under the Third Circuit's rule, the claimed misunderstanding became the case's "critical fact." App. 32a-35a. The bankruptcy court's reconsideration of its prior approval therefore underscores that the standard of review was the deciding factor.

Nor does this case's posture make it unrepresentative. *Cf.* Opp. 32-34. The Third Circuit

made clear that the reconsideration posture was irrelevant to the standard under Section 503. App. 28a-29a. Indeed, the *ex post* nature of the Third Circuit's analysis was typical of its cases applying that provision. *See* Pet. 33-34. That hindsight-based analysis review only points up the stark difference between the Third Circuit's review and the deference to the debtor's *ex ante* business judgment that prevails under Section 363. Moreover, there are substantial impediments to review of the issue in circumstances other than the one in which this case arises. *See* Pet. 27-29.

III. RESPONDENTS' NEWLY RAISED WAIVER ARGUMENT IS MERITLESS.

Disregarding the actual grounds for the decision below, respondents contend, for the first time in this case, that—unbeknownst to the lower courts—NextEra has waived by contract the legal requirements of Section 363. Opp. 1-2, 19-21. That non-jurisdictional argument was never passed upon below and is wrong in any event. It therefore poses no obstacle to resolution of the question presented.

1. Respondents contend without citation that "the bankruptcy court did not simply apply [Section 503] based on circuit precedent," but instead did so in reliance on the Merger Agreement's terms. Opp. 19 n.5. That contention is wrong. The bankruptcy court's discussion of the standard of review focused exclusively on circuit precedent, with no suggestion (much less an alternative holding) that the term now invoked by respondents had any relevance. *See* App. 79a-83a (granting reconsideration because court committed "legal error" by "approv[ing] the Termination Fee ***under O'Brien***") (emphasis added).

The same is true of the Third Circuit's holding. In the course of an extensive discussion of circuit precedent, that court made clear that it was applying Section 503 as a "statutory requirement," not because of any supposed waiver. App. 27a-30a & n.4. Indeed, the provision on which respondents now rely went completely unmentioned.

Respondents' newly-identified contractual argument is thus unrelated to the actual basis of the decision below and does not affect, much less foreclose, this Court's review of the Third Circuit's holding. *Cf., e.g.*, Stephen M. Shapiro et al., *Supreme Court Practice* § 4.4(e) (10th ed. 2013). Nor do respondents contend that their new defense is somehow jurisdictional, such that it requires resolution before the question presented may be addressed. *Cf., e.g.*, *Abdur'Rahman* v. *Bell*, 537 U.S. 88, 89 (2002) (Stevens, J., dissenting from dismissal of writ). Therefore, to the extent respondents' contract defense is available to them at all, it is at most a potential alternative argument on remand in the court of appeals. As such, it does not counsel against certiorari. *See, e.g.*, *Beard* v. *Kindler*, 558 U.S. 53, 62 (2009).

2. In any event, the argument is incorrect. The provision invoked by respondents does not purport to override the Bankruptcy Code's requirements. The appropriate standard of approval for the Merger Agreement as a whole—including the Termination Fee provision—was Section 363's business judgment rule. *See* Pet. 30-34. Had approval under that rule not been foreclosed by circuit precedent, the Debtors would have been required to pay NextEra $275 million within five business days once they abandoned the NextEra deal and closed a different

transaction. JA182. While the Debtors (or NextEra) could have separately sought administrative-expense status for the claim associated with the Debtors' obligation, *see generally* 11 U.S.C. § 507 (providing that, at confirmation, "administrative expenses" must be paid ahead of most other unsecured claims), the potential for that additional entitlement had no bearing on the appropriateness of approval of the obligation itself under Section 363.

The contractual provision respondents invoke does not purport to—and did not—limit NextEra's ability to obtain such approval. By its terms, the provision applied only "to the extent" the Termination Fee was already "approved by the Bankruptcy Court." JA182. It therefore did not commit the Debtors, much less NextEra or the bankruptcy court, to a particular standard for approval itself. Indeed, when the Debtors sought approval shortly after executing the Merger Agreement, they initially invoked the business-judgment standard they now say was waived, JA400-02, before being reminded by an objector that circuit precedent foreclosed it. *See* JA569 (accusing Debtors of "[i]gnoring the controlling Third Circuit law"). Notably, even that objector did not contend that the agreement's terms had any bearing on the question. *Id.*

Nor did it. The provision respondents invoke sought to ***benefit*** NextEra, by guaranteeing administrative priority (or the Debtors' best effort to obtain it) if the Fee became payable. JA182 ("The Termination Fee, to the extent approved by the Bankruptcy Court, shall constitute an administrative expense of the [Debtors] under the Bankruptcy

Code").[4] The provision said nothing about NextEra's legal entitlement to approval of the Merger Agreement's terms under Section 363, and certainly did not purport to alter NextEra's or the bankruptcy court's legal obligations under that statute. It is that approval, and those statutory obligations, that are the subject of NextEra's petition.

3. The courts below evaluated the Debtors' request for approval under Section 503, rather than Section 363, not because of any contractual provision that was never raised, but because binding circuit precedent required that review as a matter of law. Even respondents concede that NextEra had no obligation to ask the lower courts to disregard that binding circuit precedent and apply Section 363 instead. Opp. 19 n.5; *see also, e.g.*, *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 289 (1993) (granting review of issue decided under binding circuit precedent). Accordingly, that NextEra omitted such futile requests has no bearing on the need or ability of the Court to resolve a long-

[4] The granting of administrative priority to termination fees after business-judgment approval under Section 363 is common outside the Third Circuit. *See, e.g.*, *In re Genco Shipping & Trading Ltd.*, 509 B.R. 455, 461 (Bankr. S.D.N.Y. 2014) (approving, under business judgment rule, "termination fee" that "will be treated as an administrative expense"); Order Authorizing and Approving Merger Agreement at 5-6, *In re AMR Corp.*, Ch. 11 No. 11-15463 (Bankr. S.D.N.Y. May 10, 2013) (fee approved under business judgment rule would "constitute an allowed administrative expense" if it "bec[a]me payable"). To deem requests for such treatment as waiving an entitlement to approval under the business judgment standard—even when the lower courts do not—would further decrease the likelihood that this Court will have an opportunity to resolve the circuit split the petition presents.

acknowledged, pervasive, and recurring conflict on an important question of federal law.

CONCLUSION

This Court should grant the petition for certiorari and reverse the judgment.

Respectfully submitted,

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