No. 22-669

IN THE
Supreme Court of the United States

NEXPOINT ADVISORS, L.P. AND
NEXPOINT ASSET MANAGEMENT, L.P.,

Petitioners,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P., ET AL.,

Respondents.

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

REPLY FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state that the corporate disclosure statement included in the petition remains accurate.

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REPLY FOR PETITIONERS

Highland does not dispute that there is an entrenched three-way circuit conflict over the standard that governs a bankruptcy trustee's immunity. Nor does it dispute that the conflict is important and warrants the Court's review. Highland urges only that this case is not the right one in which to resolve that conflict because the question was not squarely presented below. That argument misstates the record and disregards the Fifth Circuit's reasoning, which squarely passed on the issue.

With respect to NexPoint's second question, Highland nowhere denies that a bankruptcy plan that purported to relieve a debtor from ordinary post-bankruptcy business liabilities would be a grave departure from basic bank-

ruptcy principles and conflict with several court of appeals decisions. Highland tries to avoid review only by walking back the expansive protections it persuaded the court below to endorse. But the plan provisions speak for themselves.

Highland spends most of its opposition complaining about the alleged "litigiousness" of Mr. Dondero and other entities. Those accusations are groundless, but more importantly, irrelevant. The Fifth Circuit correctly held that a party's purported litigiousness does not permit a court to exercise powers Congress withheld. The Fifth Circuit went astray only by not following that principle through to its logical conclusion.

This case offers a rare opportunity to resolve multiple circuit conflicts and bring much-needed clarity to the law. The Court should grant both Highland's petition and this one as well.

I. NexPoint's First Question Warrants Review

Highland does not dispute the existence or importance of the wide-ranging circuit conflict over the scope of a bankruptcy trustee's common-law qualified immunity. The First, Second, Ninth, and Eleventh Circuits permit suits for ordinary negligence. Pet. 22-23. The Fourth, Sixth, Seventh, and Tenth Circuits require intentional misconduct. *Id.* at 23. The Fifth Circuit takes an "intermediate position" that requires "gross negligence." *Id.* at 23-24. Authorities have regularly highlighted that entrenched conflict. *Id.* at 24-25. And the U.S. Trustee has emphasized the issue's importance, urging the Fifth Circuit to reconsider its position. *Id.* at 26-27.

Highland's only response is to assert that this is not the right case in which to review that important issue. Its arguments lack merit.

A. Highland first asserts that this case is a poor vehicle because it "does not involve common-law qualified immunity," but instead "the legality of *plan provisions* that established gross negligence as the standard of liability." Br. in Opp. 11-13. That argument ignores the court of appeals' reasoning. The Fifth Circuit upheld the plan provisions *precisely because*, in its view, they tracked the qualified immunity standard.

Applying circuit precedent, the Fifth Circuit held that Section 524(e) "categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code." Pet. App. 25a-26a. The plan provisions purporting to exculpate the Independent Directors were therefore permissible *only* if there was some legal basis for them beyond the plan itself. The Fifth Circuit located that basis in the qualified immunity of bankruptcy trustees. Citing *In re Smyth*, 207 F.3d 758 (5th Cir. 2000), it explained that it had "recognized a limited qualified immunity [for] bankruptcy trustees unless they act with gross negligence." Pet. App. 27a. It held that the Independent Directors were "entitled to all the rights and powers of a trustee." *Id.* at 28a. It therefore concluded that the Independent Directors had "limited qualified immunity for any actions short of gross negligence." *Ibid.* The Fifth Circuit's ruling on the plan provisions thus rises or falls with that Circuit's standard for the qualified immunity of bankruptcy trustees.[1]

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[1] Highland discusses, at some length, whether the protections that courts accord to bankruptcy trustees are better viewed as common-law protections or implied statutory protections. Br. in Opp. 13-14. That discussion, while theoretically interesting, is irrelevant. The important point is that, whatever the *origins* of the protections, courts disagree about their *scope*. Pet. 22-24.

B. Highland also urges that this case is a poor vehicle because the Independent Directors "are *not* bankruptcy trustees" and were granted trustee protections only "by analogy." Br. in Opp. 13. That argument likewise ignores the Fifth Circuit's reasoning.

The court's opinion is clear: "As the bankruptcy court's governance order clarified, nontraditional as it may be, the Independent Directors were appointed to act together *as the bankruptcy trustee* for Highland Capital." Pet. App. 28a (emphasis added). The court thus held that the Independent Directors were, in fact, trustees. To be sure, the parties disputed that point below. NexPoint urged that the Independent Directors were *not* trustees and could *not* benefit from trustee protections. NexPoint C.A. Br. 35. Highland responded that the Independent Directors did "essentially serve[ ]" as "trustee[s]." Highland C.A. Br. 29 n.25. The Fifth Circuit accepted Highland's view. Pet. App. 28a. No party has asked this Court to review that case-specific holding. As the case comes to this Court, the Independent Directors *are* bankruptcy trustees who were granted protections because of that trustee status. The parties' earlier dispute over a nonjurisdictional predicate to the question presented does not make this case a bad vehicle. To the contrary, the absence of any dispute over that issue at *this* stage confirms that this is a suitable case for review.

C. Finally, Highland claims that NexPoint never objected to the gross negligence standard below. Br. in Opp. 13. That claim is both incorrect and irrelevant.

NexPoint did expressly object to the plan's protective provisions on the ground that they purported to shield the Independent Directors from claims for ordinary negligence. NexPoint urged that Fifth Circuit precedent "broadly foreclosed nonconsensual releases and exculpa-

tions of third-party claims" and that "the Plan violates these dictates" by "exculpat[ing] *claims for negligence* that may be held by the Appellants and others against numerous non-debtor parties." NexPoint C.A. Br. 25-26 (emphasis added). NexPoint argued that the plan's exculpatory provisions "directly and unmistakably violate" precedent because "the Plan exculpates *against negligence liabilities*." *Id.* at 27 (emphasis added). NexPoint thus objected, not only to the existence of the third-party exculpations, but also to the specific category of claims they exculpated: ordinary negligence claims. Had the Fifth Circuit followed the lead of the First, Second, Ninth, and Eleventh Circuits—all of which permit claims against bankruptcy trustees for ordinary negligence—that objection would have prevailed. Pet. 22-23.[2]

Regardless, the Fifth Circuit clearly *passed upon* the issue: The court explicitly cited its prior decision in *Smyth* adopting the gross negligence standard and then applied that standard to uphold the plan provisions in this case. Pet. App. 27a-28a. This Court will review an issue that was either "pressed *or* passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41-43 (1992) (emphasis added); see also *Va. Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented * * * ."). The

[2] NexPoint's objection was sufficient to preserve the issue regardless of how extensive its arguments were below. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). That rule makes particular sense in a case like this where binding circuit precedent already forecloses an issue.

Fifth Circuit's ruling squarely tees up the issue for this Court's review.

II. NexPoint's Second Question Warrants Review

Highland has no good arguments against review on the second issue either. The Fifth Circuit upheld plan provisions that shield Highland from ordinary post-bankruptcy business liabilities. Highland does not dispute that, *if* the plan has that effect, the Fifth Circuit's ruling conflicts with decisions of several other courts of appeals. Highland disputes only whether the plan in fact has that effect. It does. Highland's contrary arguments ignore unambiguous plan language.

Highland urges that the plan's *exculpatory* provision does not apply to post-bankruptcy conduct because it covers only the "debtor" and not the "reorganized debtor." Br. in Opp. 15. In fact, that provision covers the "Debtor *and its successors*." Pet. App. 168a § I.B.62 (emphasis added). Even accepting Highland's concession, Highland admits that the plan's *other* protections—the injunction and gatekeeping provisions—are not so limited. Those provisions expressly apply to *both* the "Debtor" *and* the "Reorganized Debtor." *Id.* at 169a § I.B.105; *id.* at 194a-196a § IX.F. NexPoint thus admits, as it must, that the injunction and gatekeeping provisions "continue[ ] to have effect beyond the plan's effective date." Br. in Opp. 16.

Highland tries to downplay that impact by claiming that those provisions apply only to the "implementation" and "consummation" of the plan and then ascribing artificially narrow meanings to those terms. Br. in Opp. 16-17. The premise of that argument is wrong. Those protections are *not* limited to "implementation" and "consummation" of the plan. Rather, the gatekeeping provision applies to any claim relating to "the administration of the Plan" or "the *wind down of the business of the*

Debtor or Reorganized Debtor." Pet. App. 195a § IX.F (emphasis added). Highland does not even attempt to explain how *those* terms could have narrow meanings. They plainly sweep in ordinary post-bankruptcy business liabilities.

In any event, Highland's argument fails even with respect to "implementation." Whatever that term may reach in a typical bankruptcy, it is sprawling here. Highland's reorganization plan calls for the company to continue running its business for three years or longer while it gradually winds down operations and pays off creditors. Pet. App. 187a-188a § IV.C.6-.7; *id.* at 183a-184a § IV.B.14. The "implementation" of that plan necessarily sweeps in ordinary post-bankruptcy business liabilities.

Highland scrounges around for other evidence of narrow meaning, but comes up empty-handed. Highland points out that Section 1123(a)(5) of the Bankruptcy Code lists examples of "implementation" of a plan. Br. in Opp. 16. But, as Highland admits, that list is "non-exclusive." *Ibid.*; see 11 U.S.C. § 1123(a)(5) (prefacing list with the words "such as"). Nothing about that non-exclusive list refutes the obvious point that, when a debtor's plan includes running its business, the "implementation" of that plan also includes running its business.

Highland urges that "article IV of Highland's plan carefully describes its 'Means for Implementation.'" Br. in Opp. 16. Indeed it does: One of the "means for implementation" that Article IV lists is that "the Reorganized Debtor will continue to manage the Reorganized Debtor Assets (which shall include, for the avoidance of doubt, serving as the investment manager of the Managed Funds)." Pet. App. 187a § IV.C.6. Far from helping Highland, that language makes the expansive scope of the plan's protective provisions clearer still.

Finally, Highland asserts that it disclaimed a broad interpretation of the provisions during a bankruptcy court hearing. Br. in Opp. 17. But Highland misstates what it said there. Certain objectors protested that "the injunction language in the plan, including the language preventing actions to interfere with the implementation and consummation of the plan, is so broad and ambiguous that their rights are or may be improperly impacted, especially any rights to remove the manager for acts of malfeasance." Bankr. Ct. Dkt. 1905 at 152:6-11 (2/3/21 Hr'g Tr.). Highland acknowledged that those were "legitimate concerns" and proposed to "modify [the] plan through a provision in the confirmation order" to address them. *Id.* at 153:1-19. The proposed modification stated: "Notwithstanding anything in the plan * * *, the CLO Objecting Parties will not be precluded from exercising their contractual or statutory rights in the CLOs based on negligence, malfeasance, or any wrongdoing, *but before exercising such rights shall come to this Court to determine whether those rights are colorable* * * *." *Id.* at 153:3-9 (emphasis added). Highland points to no provision in the confirmation order where the court actually adopted that proposal. See Pet. App. 65a-166a. And regardless, the proposal confirms that, even for the CLO Objecting Parties, the *gatekeeping* provision applies with full force.

Highland thus fails to show that the plan's injunction and gatekeeping provisions mean anything less than what they say. Those provisions purport to shield Highland from ordinary post-bankruptcy business liabilities, both by enjoining claims that allegedly "interfere" with its business operations and by requiring parties to obtain the bankruptcy court's permission before suing. The Fifth Circuit's decision to approve those provisions trans-

forms bankruptcy from a "fresh start" into a perpetual "get out of jail free" card—or at the very least, a perpetual right to play by different rules. Other courts of appeals regularly hold that, once a debtor emerges from bankruptcy, it must abide by the same rules as any other business: It leaves behind the bankruptcy court's supervision, but also the bankruptcy court's protection. Pet. 30-31. The Fifth Circuit held the opposite here.

III. The Court Should Review All Three Questions Together

Highland fails to address the obvious synergies that NexPoint's petition offers. By granting both petitions, the Court can settle three circuit conflicts in the same case. That is far more efficient than addressing them piecemeal. Moreover, a ruling prohibiting third-party exculpations may do little to settle the disarray if courts continue to grant broad protections based on expansive conceptions of common-law immunity. This Court's review of all three questions is essential to bring uniformity to this confused area of the law. Pet. 15.

Rather than address those considerations, Highland slings mud, arguing that the Court should deny NexPoint's petition because Mr. Dondero is litigious. Br. in Opp. 2-7. Needless to say, NexPoint has a different perspective: Mr. Dondero and other entities have had many occasions to appeal because the bankruptcy court so often exceeded its authority.

During the bankruptcy, for example, Highland settled another investor's claims by purchasing assets stated to be worth $22.5 million. See Compl. in *Charitable DAF Fund, L.P.* v. *Highland Cap. Mgmt., L.P.*, No. 3:21-cv-00842, Dkt. 1 ¶¶32-36 (N.D. Tex. Apr. 12, 2021). Highland allegedly knew the assets were worth far more—at least $41.75 million—but failed to disclose more recent

valuations so it could benefit at the expense of other investors. *Id.* ¶¶37-50. When those investors sued, the bankruptcy court dismissed the claims, but the district court reversed and remanded. See *Charitable DAF Fund, L.P.* v. *Highland Cap. Mgmt., L.P.*, No. 3:21-cv-03129, Dkt. 28 (N.D. Tex. Sept. 2, 2022).

In another instance, the bankruptcy court tried to insulate a contempt ruling from review by stating that it would "add on a sanction of $100,000 for each level of rehearing, appeal, or petition for [certiorari] that the Alleged Contemnors may choose to take with regard to this Order, to the extent any such motions for rehearing, appeals, or petitions for certiorari are not successful." *Charitable DAF Fund LP* v. *Highland Cap. Mgmt. LP*, No. 3:21-cv-01974, Dkt. 49 at 13 n.62 (N.D. Tex. Sept. 28, 2022), appeal pending on other grounds, No. 22-11036 (5th Cir.). Highland did not even defend that novel ruling on appeal, and the district court vacated it. *Id.* at 13.

Those incidents amply prove that one party's "litigiousness" is another party's diligent protection of its legal rights. None of them has the slightest relevance to the issues before *this* Court. The Fifth Circuit correctly recognized that a bankruptcy court's views about a party's litigiousness "do not alter whether [the court] has statutory authority to exculpate a non-debtor." Pet. App. 28a. Nor do they alter the standard that governs a trustee's qualified immunity or the principle that a bankruptcy discharge does not grant prospective protections from ordinary post-bankruptcy business liabilities. Highland's *ad hominem* attacks are irrelevant and provide no reason for this Court to exclude otherwise important issues from the scope of its review.

CONCLUSION

The Court should grant both Highland's petition in No. 22-631 and NexPoint's petition in this case.

Respectfully submitted.

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