No. 23-124

In the Supreme Court of the United States

WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, REGION 2, PETITIONER

v.

PURDUE PHARMA L.P., ET AL.

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

BRIEF OF HIGHLAND CAPITAL MANAGEMENT, L.P., AS *AMICUS CURIAE* IN LIMITED SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

1. Highland Capital Management, L.P. recently emerged from a contentious—and *still* very litigious—chapter 11 bankruptcy. Highland's confirmed reorganization plan has an exculpation provision that limits certain persons' and entities' liability arising from their post-petition, bankruptcy-related actions to instances of bad faith, fraud, gross negligence, or criminal or willful misconduct. Highland's plan does not release any third party's pre-petition liability to any non-debtor.

[1] No counsel for a party authored this brief, in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to this brief's preparation or submission.

The Fifth Circuit affirmed the Highland plan's exculpation provision in part. *In re Highland Cap. Mgmt., L.P.*, 48 F.4th 419 (5th Cir. 2022). It held that Highland's plan *could* exculpate such post-petition liability of the debtor, the official creditors' committee and its members, and the debtor's court-approved independent directors. *Id.* at 437-438. But the Fifth Circuit applied its precedent to hold that 11 U.S.C. § 524(e) categorically prohibits Highland's chapter 11 plan from exculpating any post-petition liability for any other non-debtors. *Ibid.*

Highland has petitioned (in No. 22-631) for a writ of certiorari to review the latter conclusion, which conflicts with the conclusion reached by the majority of other circuits. Respondents in that case (and *amici* here)—NexPoint Advisors, L.P. and NexPoint Asset Management, L.P. (collectively, NexPoint)—have petitioned (in No. 22-669) for further review of aspects of the Fifth Circuit's ruling upholding certain exculpations. On May 15, 2023, this Court called for the views of the solicitor general on both petitions.

The United States submitted its brief on October 19, 2023, urging that Highland's and NexPoint's petitions be held pending the resolution of this case. The United States characterized exculpations as a "type of third-party release," while explaining various ways in which typical exculpation provisions differ from the kind of releases at issue in this case. See Nos. 22-631 & 22-669 U.S. Br. 9-11. "While a third-party release often purports to extinguish pre-petition liability of nondebtors," the government explained, "an exculpation clause addresses the liability of non-debtors for post-petition conduct." *Id.* at 11 (citing No. 22-631 Pet. App. 29a and *In re PWS Holding Corp.*, 228 F.3d 224, 246-247 (3d Cir. 2000)). The government

contended that both kinds of plan provisions may implicate "similar" concerns and, therefore, that the Court's resolution of this case may "shed light" on the question presented in Highland's petition. *Id.* at 11-12.

Highland thus has an interest in ensuring that any conclusion the Court reaches in this case—about the nonconsensual release of third-party pre-petition liabilities to non-debtors—does not undermine the validity of plan provisions exculpating post-petition, bankruptcy-related negligence claims against estate fiduciaries and other appropriate bankruptcy parties.

2. An exculpation provision is critically important to the success of Highland's plan. Before its bankruptcy, Highland was a multibillion-dollar, SEC-registered investment adviser that provided global money management and advisory services. It was forced into chapter 11, the bankruptcy court explained, by "a myriad of massive, unrelated, business litigation claims * * * after a decade or more of contentious litigation in multiple forums all over the world." No. 22-631 Pet. App. 52a.

Much of that litigation was instigated by Highland's co-founder and then-CEO, James Dondero, and his web of controlled and related entities (including NexPoint). Soon after Highland entered bankruptcy, both the U.S. Trustee and Highland's official creditors' committee expressed serious concerns that a Dondero-led Highland could not act as a faithful estate fiduciary given Dondero's history of self-dealing, fraud, and other misconduct.

To resolve those concerns, and to avoid the value-destructive appointment of a trustee, the bankruptcy court approved an agreement between Highland and the official creditors' committee that installed three

independent directors to govern Highland during its bankruptcy. The court also approved Dondero's replacement as Highland's CEO by one of those independent directors. Highland's new independent directors were experts in complex financial restructurings and included a former bankruptcy judge. The bankruptcy court later observed that these appointments "changed the entire trajectory of the case" and facilitated the successful confirmation of a reorganization plan. No. 22-631 Pet. App. 58a.

Convincing those well-credentialed individuals to serve as Highland's independent directors was no easy feat. Each knew that Dondero is a "serial litigator," and so none was eager to become Dondero's latest lawsuit target as a price of agreeing to assist with Highland's reorganization. No. 22-631 Pet. App. 52a, 60a. Accordingly, both appointment orders included, among other safeguards, provisions to exculpate these independent directors from simple-negligence liability for their conduct relating to the administration of the bankruptcy case. That exculpation was also included in Highland's plan.

The bankruptcy court found that "none of the independent directors would have taken on the role" without exculpation and other safeguards, because of the "litigation culture that enveloped Highland historically." No. 22-631 Pet. App. 60a. Without those protections, the court found that the independent directors and other exculpated parties "might expect to incur costs that could swamp them and the reorganization based on the prior litigious conduct of Mr. Dondero," who explicitly threatened to "burn the place down" if he didn't get his way during Highland's bankruptcy. *Id.* at 111a.

These concerns animating the Highland plan's exculpation provision proved to be prescient. Dondero has made good on his threat by frustrating Highland's reorganization at every turn. Dondero and entities he controls have filed ten separate appeals in the Fifth Circuit—challenging to the *nth* degree nearly every substantive bankruptcy court order in the case. Further, since confirmation of Highland's plan, the bankruptcy court has twice found Dondero in contempt of court for circumventing a gatekeeping provision in the appointment orders to sue one of Highland's independent directors without pre-approval, and otherwise interfering with Highland's successful reorganization. See *Charitable DAF Fund LP* v. *Highland Cap. Mgmt. L.P.*, No. 3:21-cv-01974-X, 2022 WL 4538466 (N.D. Tex. Sept. 28, 2022), appeal pending, No. 22-11036 (5th Cir. argued Sept. 5, 2023); *Dondero* v. *Highland Cap. Mgmt. L.P.*, No. 3:21-cv-1590-N, Dkt. 42 (N.D. Tex. Aug. 17, 2022), appeal pending, No. 22-10889 (5th Cir. argued Sept. 6, 2023).

SUMMARY OF ARGUMENT

I. Section 524(e) does not prohibit chapter 11 plans from modifying third-party liabilities. The plain language of the statute states only that the discharge "of a debt of the debtor" does not itself affect anyone else's liability on that same debt. No mandatory language in section 524(e) limits the bankruptcy court's authority under other provisions of the Bankruptcy Code. By relying on section 524(g)'s asbestos exception to graft a broader meaning onto section 524(e), petitioner and *amici* (including NexPoint) ignore Congress's explicit command that subsection (g) shall not be read to modify, impair, or

supersede the previously enacted subsection (e). Instead, the legality of plan provisions affecting third-party liability is governed by section 1123(b)(6), which authorizes such provisions where "appropriate" and not in conflict with any code provisions applicable to the plan at issue.

II. In any event, even if the Court holds that a chapter 11 plan's nonconsensual release of third-party pre-petition liability is never authorized by the Bankruptcy Code (or prohibited under section 524(e)), then it should not reach the separate question of whether chapter 11 plans may exculpate estate fiduciaries' and other entities' negligence liability for their post-petition, bankruptcy-related conduct. Petitioner is not challenging any exculpation provision in Purdue Pharma's plan. Exculpations are distinct from releases and serve a different and important purpose in facilitating many debtors' reorganizations. Indeed, in Highland's case, exculpation provisions were necessary to secure highly qualified independent directors and professionals to shepherd Highland to a successful emergence from bankruptcy.

ARGUMENT

Section 524(e) of the Bankruptcy Code does not prohibit the third-party releases in Purdue Pharma's plan, or otherwise restrict a bankruptcy court's authority to adjust third-party liability. Rather, chapter 11 plan provisions affecting third-party liabilities are authorized, in "appropriate" circumstances, by 11 U.S.C. § 1123(b)(6).

In any event, no matter what the Court holds about nonconsensual releases of third-party pre-petition liabilities to non-debtors—or about the

releases at issue in this case[2]—it should not undermine the legality of exculpation provisions that establish a standard of care for estate fiduciaries' and other case participants' post-petition, bankruptcy-related conduct. See Am. Coll. Bankr. Br. 9-13 (explaining why exculpation clauses are distinct from third-party releases and why the Court should refrain from "cast[ing] doubt on the effectiveness of these commonplace and vitally important provisions").

A. Section 524(e) Does Not Prohibit Chapter 11 Plans From Making Appropriate Modifications To Non-Debtor Liabilities

1. A debtor can be afforded a discharge in a case under each chapter of the Bankruptcy Code. See 11 U.S.C. §§ 727, 944, 1141, 1192, 1228, 1328. Section 524 of the Bankruptcy Code, 11 U.S.C. § 524, specifies the "effect of discharge" under any of those provisions. It provides that discharge does not extinguish any underlying debt of the debtor. Rather, the effect of discharge is only to void the debtor's direct, personal liability on that debt and to enjoin actions against the debtor (or certain of the debtor's property) to collect on that debt. 11 U.S.C. § 524(a). The debt otherwise remains valid and enforceable. Accordingly, past or future judgments on that debt against non-debtors are unaffected by the debtor's discharge, and creditors may pursue recovery on the debt from any such liable non-debtors (or their property). See 4 Collier on Bankruptcy ¶ 524.05 (16th ed. 2023).

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[2] Highland has no position on whether the releases in Purdue Pharma's plan are "appropriate" under section 1123(b)(6).

Section 524(e) makes that last point explicit. It states that, "[e]xcept as provided in subsection (a)(3) of this section" (which deals with certain community-property debts), "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). Like the rest of section 524, therefore, subsection (e) is limited to describing the effect of a debtor's discharge.

More specifically, it is limited to clarifying the discharge's lack of effect on any liability of others on a discharged "debt of the debtor." The entire focus of the provision is on "such debt" that is subject to the debtor's discharge. 11 U.S.C. § 524(e). It has nothing to do with liabilities that are not debts "of the debtor." See *In re Dow Corning Corp.*, 280 F.3d 648, 657 (6th Cir. 2002) (Section 524(e) "does not prohibit the release of a non-debtor.").

For example, section 524(e) has nothing to do with the sort of non-debtor liabilities exculpated by Highland's plan. That provision limits estate fiduciaries' liability for claims asserting they took unreasonable steps to reorganize Highland. Such a post-petition negligence claim is not—and could not be—a "debt of the debtor" addressed by section 524(e). Section 524(e) thus has nothing to do with whether plan provisions other than the debtor's discharge, or other bankruptcy court orders (such as, in Highland, the court's pre-confirmation appointment and exculpation of Highland's new independent directors), can limit or release the liability of third parties under appropriate circumstances.

The Seventh Circuit reached that conclusion in *In re Airadigm Communications, Inc.*, 519 F.3d 640 (7th Cir. 2008), based on the same "natural reading" of

section 524(e). As the court explained, the text "does not foreclose a third-party release from a creditor's claims," because it lacks any "mandatory terms" like "shall" or "will," or any other terms even "purport[ing] to limit the bankruptcy court's powers." *Id.* at 656; see also *Monarch Life Ins. Co.* v. *Ropes & Gray*, 65 F.3d 973, 979 (1st Cir. 1995) (acknowledging cases holding that section 524(e) lacks "language of prohibition" (quoting *In re Heron, Burchette, Ruckert & Rothwell*, 148 B.R. 660, 687 (Bankr. D.D.C. 1992)); *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1047 (7th Cir. 1993) ("[A] per se rule disfavoring all releases in a reorganization plan would be * * * unwarranted, if not a misreading of [section 524(e)]."). The Seventh Circuit observed that section 524(e) instead operates as a "saving clause" that is intended to "preserve[] rights that might otherwise be construed as lost after the [debtor's] reorganization," *Airadigm Commc'ns*, 519 F.3d at 656—namely, the right to sue co-obligors to recover from them on a debt that has been discharged as to a debtor.

2. Petitioner relies (at Br. 35) on section 524(g) to argue that "the absence of any express exception to Section 524(e)" *other than* in subsection (g), in connection with asbestos liability, suggests that the Bankruptcy Code does not otherwise authorize third-party releases. NexPoint tacks on (at Br. 8-10) the further contention that the same should go for non-debtor exculpations. This reliance on section 524(g) is misplaced for two principal reasons.

First, when Congress enacted section 524(g) in 1994, it explicitly disclaimed that the new provision had any effect on the bankruptcy court's existing authority. Congress included a "rule of construction" in the statute that states plainly that nothing in

section 524(g) "shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(b), 108 Stat. 4117 (codified at 11 U.S.C. § 524 note).

NexPoint nevertheless tries (at Br. 10) to justify interpreting section 524(e) through reference to section 524(g) as merely drawing "reasonable inferences" about how the 1994 Congress understood section 524(e), and not as a modification of any pre-1994 bankruptcy court authority. But NexPoint's contention is that "Section 524(g)'s Narrow Exception * * * *Precludes* Other Third-Party Releases and Exculpations." NexPoint Br. 8 (emphasis added). Congress's explicit rule of construction prohibits that application of section 524(g) to narrow the bankruptcy court's authority. And that same rule of construction likewise precludes petitioner's contention that subsection (g)'s express exception to subsection (e)—but no other such exception—means that section 524(e) therefore must prohibit third-party releases. Pet. Br. 35.

Second, in any event, "the view of a later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie* v. *United States*, 519 U.S. 79, 90 (1996); see also *Tax & Acct. Software Corp.* v. *United States*, 301 F.3d 1254, 1266 (10th Cir. 2002) ("Congress must change the wording of the statute itself if it wishes to change the meaning of the statute."). Even if some members of Congress thought in 1994 that subsection (e) *might* be construed to conflict with the authority being granted by new subsection (g), and therefore that a belt-and-suspenders caveat was warranted, their post-enactment

interpretation of subsection (e) does not control the meaning of the Bankruptcy Act of 1978.[3] And, of course, the 1994 Congress's legislative choice to explicitly *preclude* any interpretation of the new provision to modify, impair, or supersede any prior bankruptcy court authority underscores that the 1994 Congress affirmatively wanted to avoid affecting in any way the meaning of the previously enacted subsection (e).

3. The legality of chapter 11 plan provisions that affect third-party liabilities to non-debtors is thus not governed by section 524(e) but, rather, by section 1123(b)(6), which authorizes plans to include "*any* other *appropriate* provision not inconsistent with the applicable provisions" of the Bankruptcy Code. 11 U.S.C. § 1123(b)(6) (emphasis added). Neither third-party releases, nor more limited exculpation provisions, are inconsistent with the text and purpose of section 524(e) for the reasons described above. Accordingly, the correct analysis focuses on whether the scope of any release or exculpation provision in a chapter 11 plan is "appropriate" for the circumstances of that case.

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[3] At the time subsection (g) was enacted, some courts were issuing third-party releases involving both asbestos and non-asbestos claims. See, *e.g.*, *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F.2d 89, 93 (2d Cir. 1988) (asbestos); *In re A.H. Robins Co.*, 880 F.2d 694, 700-702 (4th Cir.), cert. denied, 493 U.S. 959 (1989) (non-asbestos); *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 293 (2d Cir. 1992) (non-asbestos). And some of those courts explicitly rejected the argument that such releases were prohibited by section 524(e). *A.H. Robins Co.*, 880 F.2d at 702. If the 1994 Congress believed that these courts were contravening section 524(e) by issuing third-party releases, it could have—but did not—amend section 524(e) to make that clear.

Highland's case demonstrates the wisdom of adhering to that statutory scheme. The presence of an exceptionally litigious founder and former officer would have driven away people whose voluntary, independent participation in Highland's reorganization was, as the bankruptcy court found, *essential* to its success. The bankruptcy court understandably exercised its authority to approve a plan that exculpated those individuals' negligence liability in connection with their performance of case-related duties.

Accordingly, this Court should hold—as most courts have—that section 524(e) does not prohibit bankruptcy courts from adjusting third-party liabilities—either through releases of pre-petition liability, or through more narrow exculpations of estate fiduciaries' negligence liability in connection with the bankruptcy case. And it should confirm that chapter 11 plans may include such provisions in "appropriate" circumstances under section 1123(b)(6).

B. Exculpation Provisions Are Different From Third-Party Releases

In all events, the Court should reject NexPoint's invitation to expand the question presented by treating releases and exculpation provisions as indistinguishable. They are not. Rather, there are important differences between (i) a release of a third party's pre-petition liability to non-debtors for particular conduct, and (ii) a limited exculpation of negligence liability for post-petition, bankruptcy-related conduct by estate fiduciaries and other key participants in the reorganization process.

1. Exculpation provisions in chapter 11 plans—including in Highland's plan—provide narrowly

tailored limitations of estate fiduciaries' and other case participants' post-petition liability relating to the bankruptcy. They have nothing to do with any entity's co-liability on any pre-petition debts of the debtor. By exculpating those actors from their own potential negligence liability, these provisions establish a standard of care requiring actions to be taken without bad faith, gross negligence, or wrongful intent. That standard is consistent with the commonplace standards of the business judgment rule applied in corporate law. Indeed, corporate directors and officers are routinely exculpated from any negligence liability for their management of an enterprise under corporate law that applies outside of bankruptcy. *E.g.*, Del. Code Ann. tit. 8, § 102(b)(7) (permitting Delaware corporations to exculpate their directors and officers for breaches of their duty of care—*i.e.*, negligence).

2. Nearly a decade ago, an American Bankruptcy Institute commission reviewed the state of the bankruptcy law, and described how "exculpatory clauses differ from estate or third-party releases." American Bankruptcy Institute, Report of Commission to Study the Reform of Chapter 11, at 250 (2014) (ABI Study).[4] "A release," the commission explained, "generally is a relinquishment of claims and causes of action that the debtor or third parties may have against certain nondebtor parties." *Ibid.* By contrast, an "exculpatory clause is more akin to limited immunity for the identified parties for conduct during the chapter 11 case." *Ibid.*; see also Nos. 22-631 & 22-669 U.S. Br. 11 (similar).

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[4] Available at http://commission.abi.org/final-report. Highland's current CEO, James Seery, served on the ABI commission that produced the ABI Study.

The ABI commission observed that courts "tend to approve exculpation when it is reasonable considering the specific circumstances of the case," and cited numerous examples. ABI Study 250. Specifically, it found that courts had deemed an exculpation clause to be reasonable where it was "narrowly tailored, exculpated only negligent conduct, and was in the best interests of the estate." *Id.* at 250-251 (citing *In re Enron Corp.*, 326 B.R. 497, 504 (S.D.N.Y. 2005)).

The commission also described the "policy justifications underlying exculpation" as "including encouraging parties to engage in the process and assist the debtor in achieving a confirmable plan—actions that committees, committee members, other estate representatives and their professionals, and certain parties (such as key lenders) may not be willing to undertake in the face of litigation risk." ABI Study 251; see also *ibid.* ("Exculpation provisions are frequently included in chapter 11 plans because stakeholders all too often blame others for failure to get the recoveries they desire; seek vengeance against other parties; or simply wish to second-guess the decision makers in the chapter 11 case." (quoting *In re DBSD N. Am., Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009))).

As a result, and after careful study, the ABI commission "determined that immunity for conduct arguably constituting simple negligence should be subject to exculpation." ABI Study 252. It further determined that such exculpation should continue to be extended, in appropriate cases, to estate representatives and other persons and entities who "actively engaged in the reorganization or plan process and could be the target of litigation by claimants unhappy with, among other things, the

results of the chapter 11 case or their recoveries under the plan." *Id.* at 251-252.

3. Most courts likewise distinguish between narrow exculpation provisions and broader third-party releases.

For example, the Ninth Circuit has adopted the minority view that section 524(e) prohibits third-party releases but nevertheless has held "that § 524(e) does not bar a narrow exculpation clause" that is "focused on actions of various participants in the Plan approval process and relating only to that process." *Blixseth* v. *Credit Suisse*, 961 F.3d 1074, 1082 (9th Cir. 2020). Unlike a full release for pre-petition actions, the Ninth Circuit explained, an exculpation clause limits only "liability for acts or omissions arising out of the Chapter 11 proceedings," which are "highly litigious." *Id.* at 1078, 1084. Such provisions are "'narrow in both scope and time,'" and do not "affect obligations relating to the claims filed by creditors and discharged through the bankruptcy proceedings." *Id.* at 1081 (quoting *In re Yellowstone Mountain Club, LLC*, 460 B.R. 254, 272 (Bankr. D. Mont. 2011), aff'd, 584 F. App'x 676 (9th Cir. 2014)).

The Ninth Circuit further explained that, unlike releases of pre-petition liability, the only effect of exculpation is to allow estate fiduciaries and others "to engage in the give-and-take of the bankruptcy proceeding without fear of subsequent litigation over any potentially negligent actions in those proceedings." *Blixseth*, 961 F.3d at 1084. Thus, although the Ninth Circuit maintains that third-party releases are prohibited under section 524(e), it held that sections 105(a) and 1123 of the Bankruptcy Code provide "authority to approve an exculpation clause intended to trim subsequent litigation over acts taken

during the bankruptcy proceedings and so render the Plan viable." *Ibid.*

The Third Circuit likewise upheld an exculpation provision against a section 524(e) challenge because exculpation "does not affect the liability of [third parties], but rather states the standard of liability under the Code, and thus does not come within the meaning of § 524(e)." *In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000). Such a limitation of liability for bankruptcy-related conduct, the court recognized, is "a commonplace provision in Chapter 11 plans." *Ibid.* The Third Circuit distinguished its prior rejection, in another case, of a full release for a debtor's directors and officers for their own liability on pre-petition debts that were discharged as to the debtor. See *ibid.* (citing *In re Continental Airlines*, 203 F.3d 203, 211 (3d Cir. 2000)); see also *National Heritage Found., Inc.* v. *Highbourne Found.*, No. 13-1608, 2014 WL 2900933, at *1 n.2 (4th Cir. June 27, 2014) (affirming a decision that a chapter 11 plan's third-party release was unenforceable but that its exculpation provision was enforceable).

4. Indeed, the *only* circuit that appears to treat releases and exculpations as indistinguishable, and that reads section 524(e) to prohibit a chapter 11 plan from including either of them without non-debtor consent, is the Fifth Circuit. See *In re Highland Cap. Mgmt., L.P.*, 48 F.4th 419, 436 (5th Cir. 2022); see also *In re Pacific Lumber Co.*, 584 F.3d 229, 252-253 (5th Cir. 2009). The Fifth Circuit's *Highland* decision is the subject of Highland's unopposed petition for certiorari in No. 22-631.

Highland's plan, and the exceptional circumstances in which it was proposed and confirmed, demonstrates how exculpation provisions can be

critical to the success of a chapter 11 case. In Highland, the bankruptcy court found that securing highly qualified independent directors was essential to Highland's successful reorganization. No. 22-631 Pet. App. 58a. And those directors, the bankruptcy court found, would not have taken on their roles without exculpation safeguards because of former CEO James Dondero's relentless litigation campaign. *Id.* at 60a. Indeed, Dondero had explicitly threatened to "burn [Highland] down" if he didn't get his way during the bankruptcy proceedings—and then proceeded to try to do that through incessant legal challenges to every jot and tittle of Highland's reorganization. *Id.* at 111a. If the bankruptcy court had not had the authority to exculpate the independent directors from attacks on the reasonableness of their post-petition conduct in the form of negligence claims, then they would have declined to come aboard to avoid bearing the brunt of Dondero's litigious zeal, and Highland's reorganization likely would have failed.

Given the important differences between exculpation and releases, and the critical importance of exculpation to Highland's and other chapter 11 cases, even if this Court were to hold that the Bankruptcy Code does not authorize third-party releases, or that section 524(e) prohibits them, then the Court should nevertheless refrain from addressing in this case whether bankruptcy courts are authorized to confirm chapter 11 plans that include exculpation provisions. That question should be resolved, if necessary, on full briefing and argument

in a case that squarely presents it—as does Highland's petition in No. 22-631.[5]

CONCLUSION

The Court should hold that 11 U.S.C. § 524(e) does not categorically prohibit chapter 11 reorganization plans from adjusting the liability of non-debtors where appropriate, and in all events it should not undermine the legality of plan exculpation provisions that limit non-debtor liability for post-petition conduct in connection with the bankruptcy case.

[5] In all events, the Court should not grant NexPoint's separate petition for the reasons Highland has stated in response to that petition. See Highland Br. in Opp., No. 22-669 (Feb. 21, 2023). Moreover, if the Court were to hold in this case that section 524(e) addresses only the effect of discharge on any co-obligor's liability on the debtor's debts, and does not categorically prohibit chapter 11 plans from limiting or releasing third-party liabilities under appropriate circumstances, then Highland would expect to address the effect of such a holding on its petition by filing a supplemental brief in No. 22-631.

Respectfully submitted.

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