No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Applicant,

v.

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

Respondents.

EMERGENCY APPLICATION FOR STAY OF MANDATE AND JUDGMENT PENDING THE FILING AND DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING

Applicant is Highland Capital Management, L.P., the reorganized Chapter 11 debtor in the bankruptcy proceedings below, and the appellee in the court of appeals.

Respondents are NexPoint Advisors, L.P. and NexPoint Asset Management, L.P. These Respondents were the appellants in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Highland Capital Management, L.P., has no parent corporation, and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

United States Court of Appeals (5th Cir.):

- *Dondero* v. *Highland Capital Management, L.P.*, No. 21-10219 (dismissed May 18, 2021)
- *NexPoint Advisors, L.P.* v. *Highland Capital Management, L.P.*, No. 21-10449 (judgment entered Aug. 19, 2022)
- *Highland Capital Management Fund Advisors, L.P.* v. *Highland Capital Management, L.P.*, No. 22-10189 (judgment entered Jan. 11, 2023)
- *NexPoint Advisors, L.P.* v. *Pachulski Stang Ziehl & Jones, L.L.P.*, No. 22-10575 (judgment entered July 19, 2023)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 22-10831 (judgment entered Feb. 28, 2023)
- *Dondero* v. *Highland Capital Management, L.P.*, No. 22-10889 (judgment entered July 1, 2024)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 22-10960 (judgment entered July 31, 2023)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 22-10983 (judgment entered July 28, 2023)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 22-11036 (judgment entered Apr. 4, 2024)
- *In re: Hunter Mountain Investment Trust*, No. 23-10376 (petition for writ of mandamus denied Apr. 12, 2023)

- Highland Capital v. NexPoint Asset, No. 23-10911 (judgment entered Sept. 16, 2024)
- *Highland* v. *NexPoint*, No. 23-10921 (judgment entered Sept. 16, 2024)
- *NexPoint Advisors* v. *Highland Capital Mgmt.*, No. 24-10267 (judgment entered Dec. 5, 2024)
- *Dondero* v. *Jernigan*, No. 24-10287 (judgment entered Nov. 5, 2024)
- *Charitable DAF Fund* v. *Highland Capital*, No. 24-10880 (appeal dismissed Apr. 23, 2025)

United States District Court (N.D. Tex.):

- *Dondero* v. *Highland Capital Management, L.P.*, No. 3:20-cv-03390-X (dismissed Mar. 8, 2022)
- *UBS Securities LLC* v. *Highland Capital Management, L.P.*, No. 3:20-cv-03408-G (dismissed June 14, 2021)
- *Dondero* v. *Highland Capital Management, L.P.*, No. 3:21-cv-00132-E (leave to appeal denied Feb. 11, 2021)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 3:21-cv-00261-L (judgment entered Sept. 26, 2022)
- *Highland Capital Management Fund Advisors L.P.* v. *Highland Capital Management L.P.*, Nos. 3:21cv-00538-N, 3:21-cv-00539-N, 3:21-cv-00546-N, 3:21cv-00550-N (administratively closed July 12, 2022)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-00842-B (administratively closed Oct. 18, 2021)
- *Highland Capital Management, L.P.* v. *Highland Capital Management Fund Advisors, L.P.*, Nos. 3:21-cv-881-X, 3:21-cv-880-X, 3:21-cv-1010-X, 3:21cv-1378-X, 3:21-cv-1379-X, 3:21-cv-03160-X, 3:21-cv3162-X, 3:21-cv-3179-X, 3:21-cv-3207-X, 3:22-cv00789-X (case terminated Dec. 23, 2024)
- *Official Committee of Unsecured Creditors* v. *CLO Holdco Ltd.*, No. 3:21-cv-01112-C (case terminated June 7, 2023)
- *PCMG Trading Partners XXIII, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-01169 (administratively closed July 6, 2022)
- *Official Committee of Unsecured Creditors* v. *CLO Holdco Ltd.*, No. 3:21-cv-01173-X (dismissed May 6, 2022)
- *Official Committee of Unsecured Creditors* v. *CLO Holdco Ltd.*, No. 3:21-cv-01174-S (case terminated May 23, 2024)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 3:21-cv-01295-X (judgment entered Sept. 22, 2022)

- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-1585 (administratively closed Oct. 6, 2021)
- *Dondero* v. *Highland Capital Management, L.P.*, No. 3:21-cv-01590-N (judgment entered Aug. 18, 2022)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-01710-N (administratively closed July 6, 2022)
- *Highland Capital Management Fund Advisors, L.P.* v. *Highland Capital Management, L.P.*, No. 3:21-cv-01895-D (judgment entered Jan. 28, 2022)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, Nos. 3:21-cv-01974-X, 3:21-cv-1979-S (judgment entered Sept. 28, 2022)
- *Dugaboy Investment Trust* v. *Highland Capital Management, L.P.*, No. 3:21-cv-02268-S (dismissed Aug. 8, 2022)
- *NexPoint Advisors, L.P.* v. *Pachulski Stang Ziehl & Jones, L.L.P.*, Nos. 3:21-cv-03086-K, 3:21-cv3088-K, 3:21-cv-3094-K, 3:21-cv-3096-K, 3:21-cv3104-K (judgment entered May 9, 2022)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, Nos. 3:21-cv-03129-B, 3:22-cv00695-B (judgment entered Sept. 2, 2022)
- *Kirschner* v. *Okada*, Nos. 3:22-cv-00203-S, 3:22-cv229-S, 3:22-cv-253-S, 3:22-cv-367-S, 3:22-cv-369-S, 3:22-cv-370-S (administratively closed Aug. 15, 2023)
- *NexPoint Advisors, L.P.* v. *Kirschner*, No. 3:22-cv00335-L (judgment entered June 28, 2024)
- *CLO Holdco Ltd.* v. *Kirschner*, No. 3:22-cv-02051-B (case terminated May 18, 2023)
- *NexPoint Advisors, L.P.* v. *Highland Capital Management, L.P.*, No. 3:22-cv-02170-S (judgment affirmed Feb. 28, 2024)
- *Charitable DAF Fund, L.P.* v. *Highland Capital Management, L.P.*, No. 3:22-cv-02280-S (stipulation of dismissal Feb. 22, 2023)
- *Charitable DAF Fund, L.P. v. Highland Capital Management, L.P.*, No. 3:22-cv-02802-S (case terminated Aug. 8, 2023)
- *Highland Capital Management Fund Advisors L.P. v. Highland Capital Management L.P.*, No. 3:23-cv-00573-E (stayed)
- *Dondero v. Jernigan*, No. 3:23-cv-00726-S (Petition for Writ of Mandamus denied March 8, 2024)
- *Hunter Mountain Investment Trust v. Muck Holdings L.L.C*, No. 3:23-cv-00737-N (interlocutory appeal denied Apr. 11, 2023)

- *Charitable DAF Fund L.P. v. Highland Capital Management, L.P.*, No. 3:23-cv-01503-B (judgment entered Sept. 10, 2024)
- *Hunter Mountain Investment Trust v. Highland Capital Management, L.P.*, No. 3:23-cv-02071-E (*sua sponte* remand to bankruptcy court March 21, 2025)
- *NexPoint Real Estate Partners, L.L.C. v. Highland Capital Management, L.P.*, No. 3:24-cv-01479-S (pending)
- *Dugaboy Investment Trust v. Highland Capital Management, L.P.*, No. 3:24-cv-01531-X (pending)
- *Hunter Mountain Investment Trust v. Highland Capital Management, L.P.*, No. 3:24-cv-01786-L (pending)
- *Hunter Mountain Investment Trust v. Highland Capital Management, L.P.*, No. 3:24-cv-01787-L (denying leave for interlocutory appeal Oct. 29, 2024)

United States Bankruptcy Court (N.D. Tex.):

- *In re Highland Capital Management, L.P.*, No. 19-34054 (confirmation order entered Feb. 22, 2021)

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TO THE HONORABLE SAMUEL A. ALITO, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Pursuant to Rule 23 of the Rules of this Court and 28 U.S.C. §§ 1651, 2101(f), Applicant Highland Capital Management, L.P., (Highland) respectfully applies for a stay of the mandate of the United States Court of Appeals for the Fifth Circuit associated with its March 18, 2025, judgment (App., *infra*, 20a) pending the filing and disposition of its forthcoming petition for a writ of certiorari and further proceedings in this Court.

Without a stay from this Court, the mandate of Fifth Circuit will issue on May 30, 2025.

INTRODUCTION

This case presents multiple related circuit splits concerning a bankruptcy court's power to protect from harassment those persons and entities who do the hard, unglamorous work of trying to turn around failing companies in bankruptcy. In two decisions below, the Fifth Circuit has recognized that it has adopted a minority view on two issues on which there are circuit splits. These issues warrant this Court's attention—as even the Respondents have agreed previously.

But a stay of the Fifth Circuit's mandate is first needed to preserve the value of the reorganization, nearly six years of hard bankruptcy work, and the promises that induced the service of those who shepherded Highland through a contentious bankruptcy.

Some context: As the bankruptcy court found as fact, Highland's Chapter 11 was caused by its former CEO's serial litigiousness, which strapped Highland with "a

myriad of massive, unrelated, business litigation claims * * * after a decade or more of contentious litigation in multiple forums all over the world." That man is James Dondero, and he has tried since 2019 to obstruct Highland's bankruptcy at every turn after he was replaced as CEO. In the bankruptcy proceedings, he and entities under his control have "lob[bed] objections" without a "good faith basis," earned multiple contempt findings, and filed more than *fifty* appeals to the district court and Fifth Circuit. Because of the decisions that the petition for a writ of certiorari will challenge—in particular, divesting the bankruptcy court of authority to act as a gatekeeper to screen out lawsuits that are not even colorable—Dondero now threatens to bring Highland full circle: mired in litigation, bleeding value that rightfully belongs to its legitimate stakeholders.

A stay is required to keep this gatekeeper protection in place while Highland petitions this Court for review. The bankruptcy court found as fact that none of the persons who stepped up to help Highland through Chapter 11 would have done so without the promise of gatekeeper protection. The same is true for those now charged with implementing Highland's Chapter 11 plan. The Fifth Circuit decision has shredded the gatekeeper provision and exposed those individuals to an untold number of lawsuits. Indeed, in opposing a stay below, Respondents did not disavow that they plan to sue imminently if the gatekeeper falls, even temporarily.

This Court should grant a stay because there is at least a reasonable probability that this Court will grant certiorari and reverse the judgment below, and because of the irreparable harm that will befall Highland and its people without one.

First, there is a reasonable probability that four Justices would vote to grant review. The Fifth Circuit decisions expressly implicate two different circuit splits related to protections for bankruptcy participants—the meaning of Section 524(e) of the Bankruptcy Code and the scope of the *Barton* doctrine (see *Barton* v. *Barbour*, 104 U.S. 126 (1881)), which allows bankruptcy courts to impose leave-of-court requirements to screen meritless suits. Highland previously filed a petition raising the Section 524(e) issue and Respondents *agreed* that it was worthy of review. See No. 22-631. This Court has already demonstrated an interest in the issue, as it called for the views of the Solicitor General and denied the petitions only following its decision in *Harrington* v. *Purdue Pharma L.P.*, 603 U.S. 204 (2024). All agree that *Purdue* did not resolve the issues, and the four dissenting Justices in *Purdue* already drew salient distinctions between the kinds of protections at issue in this case and the mass-tort release in *Purdue*.

Second, there is a "fair prospect" that this Court will reverse because the Fifth Circuit's minority reading of Section 524(e) cannot be squared with that provision's plain text, which speaks only of limiting the potential effects of the debtor's discharge, not divesting the bankruptcy court of authority.

Third, Highland, its people, and its reorganization will be irreparably harmed without a stay. Even a temporary loss of the promised gatekeeper protections amounts to a permanent loss, as Highland and its key individuals are dragged to forums near and far to respond to new lawsuits. This litigation threatens the reorganization efforts and value belonging to stakeholders, a uniquely cognizable

injury in the bankruptcy context. As to the balance of equities, Respondents face no harm by a stay—if they have colorable claims, they can still bring them; they just have to follow the gatekeeping procedure.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 4a-19a, 41a-70a) are reported at 132 F.4th 353 ("*Highland I*") and at 48 F.4th 419 ("*Highland II*"). The orders of the bankruptcy court confirming the plan of reorganization (App., *infra*, 71a-160a) and later conforming the plan to the court of appeals' opinion (*id.* at 22a-40a) are not reported.

JURISDICTION

The Fifth Circuit entered judgment and an accompanying written decision on March 18, 2025. App., *infra*, 20a. Highland petitioned for panel rehearing and rehearing en banc, which the Fifth Circuit denied on April 28, 2025. *Id.* at 2a. Highland moved for a stay of mandate, which the Fifth Circuit denied on May 22, 2025. *Id.* at 1a. This Court has authority to stay the Fifth Circuit's judgment and mandate pending the filing and disposition of a writ of certiorari. 28 U.S.C. §§ 1651(a), 2101(f).

STATEMENT OF THE CASE

A. Legal background

1. A principal goal of bankruptcy law is to afford the debtor a "fresh start." *Schwab* v. *Reilly*, 560 U.S. 770, 791 (2010). The bankruptcy discharge, which releases the debtor from obligations on its prepetition debts, gives the debtor that fresh start.

Only the debtor is entitled to a bankruptcy discharge. See *Harrington* v. *Purdue Pharma L.P.*, 603 U.S. 204, 214-215 (2024).

Each of the Bankruptcy Code chapters under which debtors can seek relief specifies how and when the debtor's discharge occurs. See 11 U.S.C. §§ 727, 944, 1192, 1228, 1328. Section 524 provides general provisions, applicable across all chapters, concerning the effect of a debtor's discharge. 11 U.S.C. § 524. The mechanics of the discharge are precise: Under Section 524, discharge does not extinguish the debtor's underlying debt. Rather, discharge "voids any judgment * * * of the debtor" and "operates as an injunction" against creditors from pursuing actions against the debtor. 11 U.S.C. § 524(a). But the underlying debt itself otherwise remains valid and enforceable. Liability on that pre-petition debt against any nondebtors is unaffected by the debtor's discharge. See 4 *Collier on Bankruptcy* ¶ 524.05 (16th ed. 2025).

Section 524(e) makes this point explicit. It states, "[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).

2. Under the Code, the bankruptcy court is vested with the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105(a). In *Barton* v. *Barbour*, 104 U.S. 126 (1881), this Court adopted a leave-of-court requirement before a suit could be brought against an equity receiver in bankruptcy. In light of *Barton* and the bankruptcy court's broad powers to carry out the other provisions of the Code, courts

have since applied *Barton*'s leave-of-court requirements to other bankruptcy participants, including trustees, in their capacity as court-appointed officers. See, *e.g.*, *In re Linton*, 136 F.3d 544, 545 (7th Cir. 1998). The plan provisions requiring leave of court before certain parties can be sued are often referred to as "gatekeeper" provisions.

B. Proceedings below

1. Highland's bankruptcy and reorganization

Highland's path to bankruptcy was far from typical. It did not suffer a business calamity, have problems with its vendors or landlords, or default on payments to its lenders. App., *infra*, 78a-79a. Rather, Highland's Chapter 11 case was caused by "a myriad of massive, unrelated, business litigation claims that it faced * * * after a decade or more of contentious litigation in multiple forums all over the world" instigated by Dondero when he was Highland's CEO. App., *infra*, 79a. As the bankruptcy court found, Dondero is a "serial litigator" whose litigiousness caused Highland to file for bankruptcy and strapped it with *more than a billion dollars* in claims. See *id.* at 78a-79a.

Highland filed for Chapter 11 bankruptcy on October 16, 2019. Skeptical of Dondero's ability to serve as an estate fiduciary, the U.S. Trustee moved to appoint a Chapter 11 trustee to manage the estate. But Highland—and Dondero—avoided the appointment of a trustee by entering into a settlement agreement with its creditors' committee (the "Governance Settlement"). That settlement—approved by the bankruptcy court—changed Highland's management and governance during the pendency of the bankruptcy case.

The Governance Settlement removed Dondero from all control positions at Highland. It appointed three outside, independent directors to manage Highland and its reorganization. The bankruptcy court later approved one of Highland's independent directors, James P. Seery, Jr., to be Highland's new CEO and Chief Restructuring Officer ("CRO").

To induce the independent directors' service, the Governance Settlement (a) limited their and their agents and advisors' prospective liability to claims asserting willful misconduct or gross negligence, and (b) required the bankruptcy court to act as a gatekeeper by screening for colorability any claims against the parties. The order appointing Seery as CEO and CRO included similar protections for Seery in his additional role. The bankruptcy court found as fact that, without the exculpation and gatekeeper provisions, "*none of the independent directors would have taken on the role*" because of the "litigation culture that enveloped Highland historically." App., *infra*, 83a (emphasis added). "[I]t was not * * * easy to get such highly qualified persons to serve as independent board members" because of Highland's "culture of constant litigation." *Ibid.* These individuals "were worried about getting sued no matter how defensible their efforts." *Ibid*. The bankruptcy court found that "this [Governance Settlement] and the appointment of the independent directors changed the entire trajectory of the case and saved the Debtor from the appointment of a trustee." *Ibid.*

Once appointed, Seery and the other independent directors began to negotiate settlements with Highland's principal creditors, paving the way for approval of the

resulting reorganization plan by creditors holding 99.8% in dollar amount of the claims against Highland. Highland's Chapter 11 plan is an "asset monetization plan" in which distributions to creditors will result from the orderly winddown and sale of Highland's holdings and other assets over the course of several years. App., *infra*, 75a. The bankruptcy court described this plan, and its overwhelming creditor support, as "nothing short of a miracle." *Id.* at 86a.

Dondero, on the other hand, had advocated for a reorganization plan that would reinstall him as CEO of an ongoing enterprise. After Highland and other stakeholders rejected those proposals, Dondero threatened to "burn the place down." App., *infra*, 123a.

As the list of related proceedings in this application (pp. i-iv, *supra*) reflects, this was no idle threat. Dondero and entities under his control have attempted to frustrate Highland's reorganization at every turn by, among other things, objecting to nearly every settlement between Highland and its creditors, challenging nearly every motion, appealing nearly every order, obstructing Highland's trading activity, and threatening Highland's employees. These various obstructions have resulted in *two* contempt findings against Dondero and one against certain of his controlled entities, including one arising from an attempted meritless lawsuit against Seery in violation of the order appointing him CEO and CRO, and more than *fifty* appeals to the district court and Fifth Circuit.

In recognition that such attacks on Highland and its reorganization were not going to stop, Highland's confirmed Chapter 11 plan provided three "Plan

Protections" to certain persons and entities whose efforts would be vital to the plan's success:

First, the plan exculpates certain persons and entities—defined as the "Exculpated Parties"—for conduct relating to the administration of the case (including the negotiation and implementation of the plan) from liability other than for bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct. App., *infra*, 27a-28a. The Exculpated Parties are, among others, Highland and its agents, the independent directors, the creditors' committee and its members, and service professionals retained by Highland and the committee. *Ibid*.

Second, the plan enjoins certain persons—defined as "Enjoined Parties"—from taking actions to interfere with the implementation and consummation of the plan. App., *infra*, 29a. The Enjoined Parties include Dondero and his related entities.

Third, the plan has a gatekeeper provision, which precludes the Enjoined Parties from commencing claims against any defined "Protected Party" without first obtaining the bankruptcy court's determination that the proposed claim is colorable. App., *infra*, 30a-31a. The Protected Parties include the reorganized debtor, its employees, its Independent Directors, the professionals retained during the bankruptcy case, the oversight committee and its members and others tasked to implement the reorganization plan. *Ibid*.

The bankruptcy court found that all three Plan Protections were necessary to the success of Highland's plan. The bankruptcy court found as fact that "that the proposed Exculpated Parties might expect to incur costs that could swamp them and

the reorganization based on the prior litigious conduct of Mr. Dondero and his controlled entities." App., *infra*, 123a. None of these protections implicate liability related to the Debtor's pre-petition debts as none of the Protected Parties were liable on those debts or even involved with Highland pre-petition.

The bankruptcy court confirmed the plan, which then took effect. The Fifth Circuit authorized a direct appeal under 28 U.S.C. § 158(d).

2. The Fifth Circuit substantially limits the exculpation provision

In its first decision addressing Highland's plan, the court of appeals affirmed the confirmation order in its entirety except for the plan's exculpation provision, which it held violated 11 U.S.C. § 524(e) as construed in *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009). The court held that "§ 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code." App., *infra*, 64a. The court concluded that "the exculpation here partly runs afoul of that statutory bar on non-debtor discharge by reaching beyond Highland Capital, the Committee, and the Independent Directors." *Id.* at 62a. Those entities, the court held, were entitled to exculpation from liability under other provisions of the Bankruptcy Code. See *id.* at 66a.

By contrast, the court of appeals held that other persons or entities—whose exculpation was not, in the court's view, grounded in a specific provision of the Bankruptcy Code—could not be exculpated from any liability because of Section 524(e). App., *infra*, 66a-67a. Those persons and entities include Highland's post-petition appointed officers and agents and certain retained service professionals—even though the bankruptcy court had found protection of each to be

indispensable to the plan's success, and those entities were not even involved with Highland pre-petition.

The court of appeals acknowledged that "[t]he simple fact of the matter is that there is a circuit split concerning the effect and reach of § 524(e)," and that the Fifth Circuit had adopted the minority position in that split. App., *infra*, 64a.

Certain respondents sought panel rehearing, asking the court to clarify whether the gatekeeper provision must likewise be strictly limited to protect only the three entities—the debtor, the Independent Directors, and the creditors' committee—that the court of appeals had found as permissibly exculpated.

In response, the court of appeals altered a single sentence of its opinion, changing the sentence, "[t]he injunction and gatekeeper provisions are, on the other hand, perfectly lawful," to "[w]e now turn to the Plan's injunction and gatekeeper provisions." App., *infra*, 18a.

Both sides filed petitions for writ of certiorari. See No. 22-631 and No. 22-669. Highland's petition raised the question of the application and scope of Section 524(e). Respondents—the same NexPoint entities that are Respondents here—*agreed* with Highland that its petition was worthy of certiorari. See Br. for Respondents NexPoint Advisors, L.P. and NexPoint Asset Management, L.P., No. 22-631 (Feb. 10, 2023). In May 2023, this Court called for the views of the Solicitor General, who recommended holding both petitions pending disposition of *Purdue*. See Br. of United States, No. 22-631 (Oct. 19, 2023). After *Purdue* was decided, both sides filed supplemental briefs, again *agreeing* that this Court should grant review. But this Court—perhaps because

of the case's interlocutory posture from ongoing litigation as to the allowable scope of the Plan Protections—denied certiorari.

3. The Fifth Circuit limits the gatekeeper provision

While the petitions were pending before this Court, this case returned to the bankruptcy court along with instructions from the Fifth Circuit to modify the reorganization plan in accordance with the court of appeals' September 2022 decision. Recall: The Fifth Circuit had struck from the definition of Exculpated Parties everyone except the debtor, the creditors' committee, and the Independent Directors; certain parties had asked for clarification as to whether the gatekeeper provision must be similarly limited; and the Fifth Circuit changed just a single sentence of its opinion. On remand, the parties debated whether the same limitation applied to the plan's gatekeeper provision.

The bankruptcy court held that the gatekeeper provision did not need to be narrowed. To reach that decision, the bankruptcy court closely scrutinized the court of appeals' opinion. But it also supported its conclusion with the following observations:

First, the "Gatekeeper Provision is largely forward-looking, to prevent interference with post-Effective-Date management as they consummate the Plan." App., *infra,* 38a. Consequently, it did not have the same retroactive impact of a discharge. And second, the gatekeeper provision "did not effectuate a release or an absolution of any liability." *Ibid.* The gatekeeper provision, according to the bankruptcy court, did not raise the same nondebtor release issues as the exculpation.

On March 18, 2025, again on direct appeal from the bankruptcy court, the Fifth Circuit reversed the bankruptcy court, holding that the gatekeeper provision must also be restricted to protect only the debtor, the Independent Directors, and the creditors' committee; no other nondebtors could be protected. App., *infra*, 19a.

The Fifth Circuit again grounded its decision principally on its circuit-specific reading of Section 524(e), which it described as a "bedrock principle[] concerning bankruptcy courts' power to protect non-debtors." App., *infra*, 15a. But it also cited this Court's *Purdue* decision. App., *infra*, 12a-13a. The court of appeals treated the gatekeeper provision as if it were the same as a third-party release, and therefore, held that it could not extend to protect nondebtors. The court wrote, "[e]ven before *Purdue Pharma*, this court had held * * * that any provision that non-consensually releases non-debtors from liability for debts and/or conduct, and any injunction that acts to shield non-debtors from such liability, must be struck from a bankruptcy confirmation plan." *Ibid.* Said differently, the court of appeals applied the same legal constraints to the procedural gatekeeper provision protecting bankruptcy participants as this Court had applied to an effective nondebtor discharge purporting to resolve liability to huge numbers of nonparticipating tort victims.

The court of appeals also held that the *Barton* doctrine did not support the gatekeeper provision here. App., *infra*, 14a (discussing *Barton* v. *Barbour*, 104 U.S. 126 (1881)). Recognizing that it was generating *another* circuit split, the court of appeals noted that "[o]ther circuits" had "extended the *Barton* doctrine to protect a wider variety of court-appointed and court-approved fiduciaries and their agents." *Id.*

at 14a-15a n.6. But the Fifth Circuit expressly disagreed with those decisions, holding that its reading of Section 524(e) precluded gatekeeping protections for nondebtors. *Id.* at 14a ("We have never extended the *Barton* doctrine to give bankruptcy courts gatekeeping power over claims against non-debtors.").

Highland moved for a stay of the mandate pending the filing of its petition for certiorari on May 5, 2025. The court of appeals ordered a response from Respondents but ultimately denied the motion on May 22, 2025. Without a stay, the Fifth Circuit's mandate will issue on May 30, 2025.

REASONS FOR GRANTING THE STAY

Under 28 U.S.C. § 2101(f), this Court may stay proceedings pending the filing and disposition of a petition for a writ of certiorari. To obtain such a stay, an applicant must show "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Ibid.*

I. There Is A Reasonable Probability That This Court Will Grant Certiorari

A. The Fifth Circuit's decisions implicate two related circuit splits

Among the reasons this Court grants writs of certiorari is that a court of appeals "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a); see also Stephen

M. Shapiro et al., *Supreme Court Practice* § 4.4, at 4-11 (11th ed. 2019) (*Supreme Court Practice*) ("The Supreme Court often * * * will grant certiorari where the decision of a federal court of appeals * * * is in direct conflict with a decision of another court of appeals on the same matter of federal law." (emphasis omitted)); *Libby* v. *Fecteau*, No. 24A1051 (May 20, 2025), slip op. 2 (Jackson, J., dissenting) (in the stay/injunction context discussing "our normal certiorari factors, such as demonstrating the need to resolve a circuit split"). The Fifth Circuit itself acknowledged two different circuit splits that this case implicates.

First, as the court of appeals observed, "the simple fact of the matter is that there is a circuit split concerning the effect and reach of § 524(e)." App., *infra*, 64a.

The majority of circuits—the Third, Fourth, Sixth, Seventh, Ninth, and Eleventh—read Section 524(e) as a mere limitation on the effects of the debtor's discharge, not as a divestment of the bankruptcy court's authority. In those circuits' view, "Section 524(e), by its terms, only provides that a discharge of the debtor does not affect the liability of non-debtors on claims by third parties against them for the debt discharged in bankruptcy." *In re PWS Holding Corp.*, 228 F.3d 224, 245 (3d Cir. 2000). "Pursuant to § 524(e), the discharge of the debtor's debt does not itself affect the liability of a third party, but § 524(e) says nothing about the authority of the bankruptcy court." *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015) (expressly "disagree[ing] with the position of the minority circuits with respect to § 524(e)"). Section 524(e) "makes clearer the distinction between claims for the underlying debt and other claims, *such as those relating specifically to the*

bankruptcy proceedings." *Blixseth* v. *Credit Suisse*, 961 F.3d 1074, 1083 (9th Cir. 2020) (emphasis added).

The majority of circuits read Section 524(e) as essentially a "saving clause" that "preserves rights that might otherwise be construed as lost after the reorganization," such as the right of a creditor to collect from a guarantor on the liability discharged. *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 656 (7th Cir. 2008); see also *In re Dow Corning Corp.*, 280 F.3d 648, 657 (6th Cir. 2002) (explaining that Section 524(e) "explains the effect of a debtor's discharge"); *In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989) ("[W]e do not construe § 524(e) so that it limits the equitable power of the bankruptcy court[.]").

The Fifth Circuit, by contrast, has a different view of Section 524(e) that was the principal basis for the two decisions below. Specifically, the Fifth Circuit has construed Section 524(e) to operate as a broad prohibition to virtually all protections for nondebtors in bankruptcy, even ones that bear little if any resemblance to a release or discharge.

In its first opinion, the court of appeals described Section 524(e) as a "categorical[] bar" to nondebtor exculpation. App., *infra*, 64a. Relying on its prior decision in *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009), but with no analysis of the provision's actual text, the Fifth Circuit's first decision characterized Section 524(e) as a "statutory bar" to the nondebtor exculpation provision before it. App., *infra*, 62a. Entrenching its minority view, the court of appeals expressly acknowledged that *Pacific Lumber* was "not blind to the countervailing view" of

Section 524(e), but expressly rejected the opportunity to narrow or distinguish *Pacific Lumber*. See *id.* at 64a, 66a.

After entrenching its minority view in its first decision, the Fifth Circuit proceeded to *extend* it in the second. The decision vaunted the circuit's minority reading of Section 524(e) as a "bedrock principle[] concerning bankruptcy courts' power to protect non-debtors." App., *infra*, 15a. That passage perfectly encapsulates the Fifth Circuit's inflated view of the provision: Section 524(e) does not merely describe a limitation on the effects of the debtor's discharge; Section 524(e) is an affirmative divestment of bankruptcy courts' authority to protect nondebtors. To use the Fifth Circuit's own term, Section 524(e) is seen as an "edict" (App., *infra*, 12a) proclaiming that bankruptcy courts lack authority to protect the independent participants of the bankruptcy process—which, of course, is not at all what the text of the statute says.

The Fifth Circuit's second decision cited *Purdue* for additional support for its view of Section 524(e), but *Purdue* said nothing to resolve the conflict over the provision's meaning. *Purdue* focused almost exclusively on the scope of 11 U.S.C. § 1123(b)(6) and that the Sacklers (owners of Purdue Pharma) were receiving benefits that went beyond the formal bankruptcy discharge afforded to debtors. Although this Court in the background section of *Purdue* cited *Pacific Lumber* as part of the circuit split this Court granted certiorari to resolve (603 U.S. at 214 n.1), this Court did not adopt the reasoning of *Pacific Lumber*. Rather, this Court cited Section 524(e) only thrice—twice (*id.* at 215, 221) for the proposition that "[g]enerally" a discharge

operates only in favor of the debtor and once (*id.* at 222) for the proposition that another subsection operates "notwithstanding" Section 524(e). And the Court expressly noted that its decision was a narrow one that addressed only the specific question presented in *Purdue* about a bankruptcy court's power to effectively release nondebtors from pre-petition claims. 603 U.S. at 226 ("As important as the question we decide today are ones we do not.").

Second, the Fifth Circuit also acknowledged a circuit split over the scope of the *Barton* doctrine.

The *Barton* doctrine arises from federal common law and this Court's decision in *Barton* v. *Barbour*, 104 U.S. 126 (1881), which affirmed a leave-of-court requirement to protect an equity receiver in bankruptcy. "An unbroken line of cases, including Judge Hand's [decision in *Vass* v. *Conron Bros. Co.*, 59 F.2d 969 (2d Cir. 1932),]" has extended the doctrine to bankruptcy trustees. *In re Linton*, 136 F.3d 544, 545 (7th Cir. 1998). The supporting rationale is that, if the trustee "is burdened with having to defend against suits by litigants disappointed by his actions on the court's behalf, his work for the court will be impeded." *Ibid.*

In its most recent decision, the Fifth Circuit held that *Barton* does not provide bankruptcy courts authority to protect most court-approved fiduciaries and their agents—a conclusion it reached by drawing a connection between *Barton* and its view of Section 524(e). The court wrote, "we have never extended the *Barton* doctrine to give bankruptcy courts gatekeeping power over claims against non-debtors." App., *infra*, 14a. In the Fifth Circuit's view, whatever power *Barton* confers on a bankruptcy

court cannot be exercised in a way that violates Section 524(e)'s "edict" proscribing nondebtor protections.

As with Section 524(e), the Fifth Circuit expressly acknowledged that other courts, both at the circuit and district court level, have extended *Barton* protection to various categories of nondebtors. See App., *infra*, 14a n.6 (noting its split with *Lawrence* v. *Goldberg*, 573 F.3d 1265 (11th Cir. 2009) (extending *Barton* to creditors who had financed the bankruptcy investigation); *Gordon* v. *Nick*, 162 F.3d 1155 (4th Cir. 1998) (Table) (per curiam) (extending *Barton* to debtor's managing partner); *In re Lowenbraun*, 453 F.3d 314 (6th Cir. 2006) (applying *Barton* to trustee's counsel); and *In re Ditech Holding Corp.*, No. 19-10412 (JLG), 2021 WL 3716398 (Bankr. S.D.N.Y. Aug. 20, 2021) (extending *Barton* to a plan administrator and claims representative).[1]

B. These issues are important and recurring

Protections for bankruptcy participants are a critical tool to facilitate successful corporate bankruptcies. Corporate bankruptcy involves deeply entrenched stakeholders fighting tooth-and-nail over a limited (but often quite large) pot of money. By their very nature, these proceedings produce winners and losers. And the losers often don't go quietly, with this case being an extreme example.

Nondebtor bankruptcy participants are often caught in the crossfire. Basic protection—like the gatekeeper and exculpation provisions here—for these nondebtor

[1] The split runs even deeper than the Fifth Circuit recognized. The Ninth Circuit has extended *Barton* to cover the trustee of a post-confirmation liquidating trust. *In re Crown Vantage, Inc.*, 421 F.3d 963, 973 (9th Cir. 2005).

participants "assist the debtor in achieving a confirmable plan" because bankruptcy participants, like committees, estate fiduciaries, certain lenders, and professionals "may not be willing to undertake [their roles] in the face of litigation risk." American Bankruptcy Institute, Report of Commission to Study the Reform of Chapter 11, at 251 (2014) (ABI Study). Until they started to get confused with third-party releases in other kinds of cases, protections of this sort were not even particularly controversial.

Protections for bankruptcy participants "are included so frequently in chapter 11 plans because stakeholders all too often blame others for failures to get the recoveries they desire; seek vengeance against other parties; or simply wish to second guess the decisionmakers in the chapter 11 case." *In re Chemtura Corp.*, 439 B.R. 561, 610 (Bankr. S.D.N.Y. 2010). These protections "give[] a certain measure of finality to the interested parties and their professionals, and assures them they will not be second-guessed and hounded by meritless claims following the conclusion of the bankruptcy case." *In re Alpha Nat. Res., Inc.*, 556 B.R. 249, 261 (Bankr. E.D. Va. 2016). They allow parties "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. Indeed, four Justices in *Purdue* have already acknowledged that, "[w]ithout * * * exculpation clauses, competent professionals would be deterred from engaging in the bankruptcy process, which would undermine the main purpose of chapter 11—achieving a successful

restructuring." 603 U.S. at 264-265 (Kavanaugh, J., dissenting) (internal quotation marks and citation omitted). The majority did not disagree.

It is for these reasons that an American Bankruptcy Institute (ABI) commission recommended "extend[ing] the *Barton* doctrine to *any* professionals retained by any trustee, estate neutral, or statutory committee or its members." ABI Study at 44 (emphasis added). And the commission likewise recommended that bankruptcy plans should be permitted to include an exculpatory clause "that covers parties participating in the chapter 11 case." *Id.* at 250.

Indeed, even after *Purdue*, bankruptcy courts across the country continue to confront the need for nondebtor protections of various shapes and sizes. A few recent examples: One court extended the automatic stay to a nondebtor. *In re Hal Luftig Co.*, 667 B.R. 638, 657-664 (Bankr. S.D.N.Y. 2025). Another court issued an injunction against third parties as to the seller in an asset sale covered by Section 363 of the Code. *In re Hopeman Bros., Inc.*, 667 B.R. 101, 108 (Bankr. E.D. Va. 2025). Still another issued a temporary restraining order against creditors from suing certain guarantors. *In re Coast to Coast Leasing, LLC*, 661 B.R. 621, 624 (Bankr. N.D. Ill. 2024). And still another assessed a request for a preliminary injunction that protected nondebtors where claims against those nondebtors were alleged to have interfered with reorganization efforts. *In re Parlement Techs., Inc.*, 661 B.R. 722, 728 (Bankr. D. Del. 2024).

Yet the Fifth Circuit has inflated Section 524(e) into a "bedrock principle[ ]" divesting the bankruptcy courts of "*power* to protect non-debtors." App., *infra*, 15a

(emphasis added). That reading of Section 524(e) has now greatly complicated corporate reorganizations in the Fifth Circuit, starting with Highland's own.

C. This Court has already demonstrated interest in the case

This Court has already demonstrated an interest in this case. Indeed, the Court's call for the views of the Solicitor General on Highland's first petition, Docket No. 22-631 (May 15, 2023), which presented the Section 524(e) circuit split, is as clear evidence as any that the questions Highland will raise in its forthcoming petition are "substantial." Fed. R. App. P. 41(d). In response, the Solicitor General did *not* take the position that these issues are unworthy of this Court's review—only that the petitions should be held pending *Purdue*.

As further evidence of the "substantial" questions here, although the parties have agreed on little during the years-long fight over Highland's future, both sides agree that Supreme Court review is warranted. Both parties sought Supreme Court review of *Highland I*, and both sides agreed that Highland's petition should be granted.[2] Indeed, even after *Purdue*, both sides continued to agree that the Section 524(e) circuit split presents a certworthy issue. In its supplemental brief filed after *Purdue*, these NexPoint Respondents admitted that "[l]ower courts are unlikely to read *Purdue* as conclusively resolving this issue for exculpation clauses."

[2] See Highland Capital Management, L.P., Petition for a Writ of Certiorari, No. 22-631 (filed Jan. 5, 2023); Br. for Respondents NexPoint Advisors, L.P. and NexPoint Asset Management, L.P., at 2, No. 22-631 (filed Feb. 10, 2023) (agreeing that the issue warranted certiorari); NexPoint Advisors, L.P. and NexPoint Asset Management, L.P., Petition for a Writ of Certiorari, No. 22-669 (filed Jan. 16, 2023).

Supplemental Brief for NexPoint Advisors, L.P. and NexPoint Asset Management, L.P., at 5, No. 22-631 (filed June 28, 2024).

This Court's ultimate denial of Highland's petition should not be outcome determinative here. At the time of the first petition, this case was in an interlocutory posture, with ongoing proceedings in the bankruptcy court about the allowable scope of the gatekeeper provision. Now that the Fifth Circuit has finally decided that issue, the case is no longer interlocutory, and thus the issues are now "better suited for certiorari." *Abbott* v. *Veasey*, 580 U.S. 1104 (2017) (statement of Roberts, C.J., respecting the denial of certiorari).

Last, for the avoidance of doubt, it is entirely appropriate for this Court to review the reasoning of both Fifth Circuit opinions when reviewing the most recent one. "Denial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought from the final judgment." Stephen M. Shapiro, et al., *Supreme Court Practice* § 4.18, at 4-58 (11th ed. 2019). Denial of certiorari as to an earlier judgment does not preclude a petitioner "from raising the same issues in a later petition, after final judgment has been rendered." *Virginia Mil. Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). Here, both opinions arise on review of a single bankruptcy plan, and the second decision reviews a decision the bankruptcy court reached on remand from the first decision.

II. There Is A Fair Prospect That This Court Will Reverse

The Fifth Circuit is not just on the minority side of both circuit splits, it is also on the wrong side of them. There is thus a "fair prospect" that this Court would reverse the decisions below.

Start with the split over Section 524(e). The provision states, in relevant part, that "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). That language is clear and precise. It means that for any debt of the debtor that is discharged in bankruptcy—meaning, the specific, mechanical, debtor discharge described in Section 524(a) that "voids any judgment" and "operates as an injunction"—the liability of other entities on that same debt ("such debt") remains unchanged. Section 524(e) cabins the potential effects of the "discharge of the debtor." It does not, as the Fifth Circuit claims, strip the bankruptcy courts of powers that they otherwise possess to safeguard their proceedings and the independent professionals appointed to shepherd the debtor through the proceedings. The majority of the circuits have interpreted Section 524(e) correctly, as essentially a "saving clause" that "preserves rights [on the debtor's debt] that might otherwise be construed as lost after the reorganization." *In re Airadigm Commc'ns, Inc.*, 519 F.3d at 656. Section "524(e) makes clearer the distinction between claims for the underlying debt and other claims, *such as those relating specifically to the bankruptcy proceedings*." *Blixseth*, 961 F.3d at 1083 (emphasis added). Thus, Section 524(e) is no bar to either the gatekeeper provision or the exculpation in Highland's plan, because neither of those protections purports to affect the co-liability of another on Highland's

discharged debt. Indeed, the protections have nothing at all to do with Highland's discharged liabilities.

Once Section 524(e) is properly clarified as not creating a broad prohibition on protection for bankruptcy participants for their conduct in connection to the bankruptcy case, the question becomes whether bankruptcy courts otherwise possess the power to order such protections. They do.

This Court has recognized that Code Sections 105(a) and, in the context of plan confirmation, 1123(b)(6) vest the bankruptcy court with broad authority for matters related to the bankruptcy itself. See *United States* v. *Energy Res. Co.*, 495 U.S. 545, 549 (1990).

Section 105(a) states that the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." That is what these gatekeeper and exculpation provisions do—protect the persons who are, in a quite literal sense, "carry[ing] out" the other provisions of the Code. 11 U.S.C. § 105(a). Section 1123(b)(6) of the Code allows a bankruptcy plan to "include any other appropriate provision not inconsistent with the applicable provisions of this title." In *Purdue*, this Court emphasized that Section 1123(b)(6), given the paragraphs preceding it, was necessarily limited to plan provisions relating to the debtor, its estate, and its relationship with creditors. 603 U.S. at 215-220. Bankruptcy protections like the gatekeeper and exculpation clause cohere to that reasoning—they protect persons and entities from liability and harassment for their work to negotiate, confirm, consummate, and implement the *debtor's* bankruptcy plan.

* * *

The Court does not need to find that the Fifth Circuit actually erred in order to grant Highland's requested stay. At this juncture, Highland need demonstrate only "a fair prospect" of reversal by a majority of this Court. *Maryland* v. *King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (citation omitted). It is hard to deny such a prospect here. Given "the considered analysis of courts on the other side of the split, there is a fair prospect that this Court will reverse the decision below." *Id.* at 1303.

III. Highland And Those Who Have Worked Tirelessly For Its Reorganization Will Suffer Irreparable Harm

A denial of a stay will irreparably harm Highland's reorganization, as well as those persons who have worked tirelessly for almost six years towards its successful reorganization, because James Dondero and entities he controls will likely immediately try to repeat the conduct that forced Highland into bankruptcy in the first place by launching a barrage of litigation in their continued efforts to obstruct the conclusion of the reorganization.

This is not speculation. Highland's history, and these proceedings, are proof. As the bankruptcy court found, the reason that Highland went bankrupt in the first place was because of the "massive, unrelated, business litigation claims * * * after a decade or more of contentious litigation in multiple forums all over the world" instigated by Dondero when he was Highland's CEO. App., *infra*, 79a. Denying a stay will bring Highland full circle—forcing it to answer and defend myriad meritless lawsuits, which should first be screened for colorability by the gatekeeper provision

in the bankruptcy court. The proceedings in this very case are but a microcosm of the wasteful litigation that Dondero is capable of generating. See Related Proceedings, pp. i-iv, *supra*. The bankruptcy court found that Dondero has "lob[bed] objections to the Plan" without "a good faith basis." App., *infra*, 88a. He and his entities, including these Respondents, have filed more than *fifty* appeals to the district court and Fifth Circuit. And they have filed suits in state and federal courts in New York and even the Royal Court of Guernsey over conduct related to Highland's bankruptcy proceedings.

Even a temporary loss of gatekeeper protection is an irreparable one. The purpose of the gatekeeper provision is to prevent the Protected Parties—who shepherded Highland through bankruptcy, and those who are now charged with implementing its bankruptcy plan—from being pulled to far-flung forums to defend frivolous lawsuits filed by Dondero and his entities. Indeed, the bankruptcy court specifically found that such protection was necessary because otherwise those estate fiduciaries would reasonably be "expect[ed] to incur costs that could swamp them and the reorganization based on the prior litigious conduct of Mr. Dondero and his controlled entities." App., *infra*, 123a. In their response to Highland's motion for a stay in the court of appeals, Respondents could not even bring themselves to disavow the fact that Dondero is geared up to launch another barrage of litigation against the Protected Parties as soon as possible. Instead, they expressly reserved their rights to do so. See Response to Mot. to Stay 19-20 & n.3, CA5 Dkt. 96 ("reserv[ing] all rights" to file new suits after the mandate issues).

Dondero and entities under his control filed multiple gatekeeper motions in the bankruptcy court to try to bring suit. See *Hunter Mountain Investment Trust's Emergency Motion for Leave to File Verified Adversary Proceeding* (Bank. Dkt. No. 3699) (seeking leave to sue Highland's CEO and two unrelated entities on behalf of the estate for actions allegedly arising from "claims trading"); *Motion for Leave to File a Delaware Complaint* (Bank. Dkt. No. 4000) (seeking leave to commence an action in Delaware Chancery Court to remove Highland's Claimant Trustee). These known suits are the tip of the iceberg.

Defending these obstructive lawsuits will absorb the Protected Parties' time and energy, waste resources that rightfully belong to Highland's stakeholders, and further delay the implementation of Highland's plan and conclusion of this case. This type of irreparable harm has unique purchase in the bankruptcy context, where courts "have repeatedly found irreparable harm * * * when actions brought against nondebtor officers and principals would distract them from the debtor's daily business affairs and divert resources from the debtor's reorganization efforts." *SAS Overseas Consultants* v. *Benoit*, No. 99-cv-1663, 2000 WL 140611, at *4 (E.D. La. Feb. 7, 2000) (compiling cases). Courts have likewise found that irreparable injury exists where, as here, outside litigation would "impair reorganization efforts and drain resources and time." *In re LTL Mgmt., LLC*, 645 B.R. 59, 82 (Bankr. D.N.J. 2022); *see also In re Kmart Corp.*, 285 B.R. 679, 688 (Bankr. N.D. Ill. 2002) (extending the automatic stay

to nondebtors where "proceedings against the nondebtor could cause irreparable harm to the debtor by diverting resources need[ed] for its reorganization").[3]

There are also settled expectations that will be forever lost if gatekeeper protection is even temporarily removed.

First, the bankruptcy court found as fact that, without the exculpation and gatekeeper provisions, those who led Highland through its bankruptcy would not have taken on those roles because of the "litigation culture that enveloped Highland historically." App., *infra*, 84a. Referring to the Independent Directors, the bankruptcy court found that before taking the job, they "were worried about getting sued no matter how defensible their efforts." *Ibid*. In other words, they took these jobs *because of* the promise of gatekeeper protection. The same is equally true of the many other persons and entities now charged with finishing the bankruptcy by implementing reorganization the plan—a plan that the bankruptcy court described as "nothing short of a miracle." *Id.* at 86a.

And second, the district court previously denied Highland's motion to have Dondero given vexatious-litigant status because the district court believed that the "bankruptcy court has already entered a Gatekeeper Order to prohibit claims by Dondero." *Highland Cap. Mgmt., L.P.* v. *NexPoint Asset Mgmt., L.P.*, No. 21-cv-880, 2024 WL 5202496, at *2 (N.D. Tex. Dec. 23, 2024). In other words, the district court

[3] It is sometimes said that "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974). However true that may be in other contexts, the costs of defending litigation in a bankruptcy case are such that Congress has created an *automatic* stay at the outset of each case. 11 U.S.C. § 362. In this case, although the automatic stay of course expired long ago, the very litigiousness of Dondero and his entities is what caused bankruptcy in the first place, demonstrating that what are considered truisms in other contexts are factually untrue here.

expressly found that it was "not necessary for [it] to act here where the bankruptcy court can and has," including by entering the Gatekeeper Provision, which it understood as having already been "affirmed by the Fifth Circuit." *Ibid.* The Fifth Circuit's recent decision undoes these settled expectations.

* * *

A short stay to allow Highland to file a petition for a writ of certiorari will not irreparably harm Dondero or Respondents. They can still pursue any meritorious claims that they may have against the Protected Parties (including the nondebtors struck by the panel) under the procedures of the gatekeeper provision. But, if the gatekeeper protection is removed on issuance of the mandate, all of its value will be lost, along with significant value of the estate—and the estate will continue to be mired in significant litigation that will obstruct distributions to stakeholders and prevent the conclusion of these cases.

IV. The Court Should Issue An Administrative Stay to Allow It Io Consider The Application Fully

The Court should grant an administrative stay to enable full consideration of the merits of this stay application. Highland filed this application just five days (two business days) after the Fifth Circuit's order, and the Fifth Circuit's mandate will issue on May 30, 2025. Given that timing—and the irreparable harm that Highland would suffer if the mandate issues—the Court should grant a brief administrative stay of the Fifth Circuit's mandate and judgment while it considers this application.

CONCLUSION

The Court should grant the motion and stay the mandate and judgment in this case, pending the Supreme Court's disposition of Highland's forthcoming petition for a writ of certiorari. Highland also respectfully asks the Court to administratively stay the issuance of the mandate and judgment pending disposition of this Application.

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