No. 24A1154

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.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY OF MANDATE AND JUDGMENT PENDING THE FILING AND DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

JEFFREY N. POMERANTZ
JOHN A. MORRIS
GREGORY V. DEMO
PACHULSKI STANG ZIEHL & JONES LLP
10100 Santa Monica Blvd. 13th Floor
Los Angeles, CA 90067
(310) 277-6910

ROY T. ENGLERT, JR.
Counsel of Record
BRANDON L. ARNOLD
PAUL BRZYSKI
SHIKHA GARG
HERBERT SMITH FREEHILLS KRAMER (US) LLP
2000 K Street NW, 4th Floor
Washington, DC 20006
(202) 775-4500
roy.englert@hsfkramer.com

Counsel for Applicant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Table of Authorities—Continued
Page(s)

Statutes

Miscellaneous

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

INTRODUCTION

Respondents' opposition rests on a series of mistaken premises. They argue that the questions that Highland would present are too "stale" to review because they were decided in a prior appeal. They likewise claim that Highland forfeited one of those questions by not seeking certiorari on that issue before. But, for more than a century, this Court has consistently and frequently rejected such arguments and made clear that certiorari puts the entire case before the Court.

Respondents previously agreed that whether Section 524(e) categorically bars bankruptcy courts from enacting non-debtor protections is still a certworthy question after *Purdue*. Although Respondents have now reversed course and urge the Court to let the issue percolate after *Purdue*, they have admitted that *Purdue* did not address these issues and will not resolve the decades-old conflict among the courts of appeals. Nor is there any serious argument that *Purdue* will affect the circuit split over the proper scope of gatekeeping provisions under the *Barton* doctrine. In short, these issues merit the Court's review.

Highland will suffer irreparable harm without a stay because the entire point of gatekeeping provisions is to protect against the kind of unwarranted and wasteful litigation that drove Highland into bankruptcy in the first place and the litigiousness that Highland's former leader has shown throughout the bankruptcy proceedings and beyond. This Court should stay the Fifth Circuit's mandate pending its disposition of Highland's petition for certiorari.

ARGUMENT

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

Highland's forthcoming petition will raise two certworthy questions. One is about the reach and scope of Section 524(e) of the Bankruptcy Code. The second is about the permissible reach of gatekeeping protections under the *Barton* doctrine.

This Court's longstanding rule, stated in the disjunctive, is that it can review any issue pressed or passed on below. *United States* v. *Williams*, 504 U.S. 36, 41 (1992). The scope of Section 524(e) was passed on in both *Highland I* and *Highland II*, the pre- and post-remand decisions the petition will challenge. The *Barton* issue was explicitly passed on in *Highland II*, and that holding was inextricably based on *Highland II*'s agreement with *Highland I* about the scope of Section 524(e). It is therefore beyond any serious debate that both questions are squarely presented by the decisions below and subject to this Court's certiorari review. But see *infra*, n.1 (noting that the Fifth Circuit's statement explaining why it denied a stay reflects a serious misunderstanding of this point).

Those decisions deepened splits on both issues that have divided the courts of appeals for decades. And there is a reasonable possibility that this Court will grant review now that the decisions are final, even though it previously denied review of the interlocutory decision in *Highland I*.

Respondents have little to say about the importance of those issues. Instead, they raise procedural objections to review and argue that the prior denial of certiorari

"weigh[s] strongly against" a grant here. Resp. 22-23. Neither argument is persuasive.

A. Respondents argue that there is nothing to review here. Disregarding the "'pressed or passed upon' rule," *Williams*, 504 U.S. at 44 n.5, they say (at 19-20) that "this case does not present the issues raised by Highland" because the Fifth Circuit's latest order was only a "ministerial" decision considering whether the bankruptcy court properly followed its mandate in *Highland I*.

To the extent Respondents mean to suggest that it makes any difference whether it was *Highland I* or *Highland II* in which the Fifth Circuit passed on the issues that Highland will raise on certiorari, they are wrong. This Court rejected this same argument more than twenty years ago in *Major League Baseball Players Association* v. *Garvey*, 532 U.S. 504 (2001) (per curiam). There, the court of appeals' first decision ruled on the merits of the dispute, and the second decision was a three-paragraph order ruling that the district court "did not properly apply [the] mandate" from the first decision. *Garvey* v. *Major League Baseball Players Ass'n*, 243 F.3d 547 (9th Cir. 2000).

Before this Court, the respondent argued that "because the Association's petition was filed more than 90 days after *Garvey I*, [the Court] cannot consider a challenge raising issues resolved in that decision." 532 U.S. at 508 n.1. This Court disagreed and summarily reversed. It explained that "there is no question that the Association's petition was filed in sufficient time for us to review *Garvey II*, and we have authority to consider questions determined in earlier stages of the litigation

where certiorari is sought from the most recent of the judgments of the Court of Appeals." *Ibid.*; accord *Mount Soledad Mem'l Ass'n* v. *Trunk*, 567 U.S. 944 (2012) (Alito, J., statement respecting denial of certiorari) (noting that petitioner was "free to raise the same issue in a later petition").

Respondents similarly argue that it is "too late" to review the gatekeeper provision because Highland did not seek review of that issue in its prior petition. Resp. 21. But this Court rejected that argument more than a century ago. See *Panama R.R. Co.* v. *Napier Shipping Co.*, 166 U.S. 280, 284 (1897) (holding that certiorari brings "the entire case [] before us for examination"). That rule persists today. The Court can review "the entire case, including all relevant interlocutory orders that may have been entered by the court of appeals * * * * even [if] no attempt was made at the time to secure review of the interlocutory decree or even though such an attempt was made without success." Stephen M. Shapiro et al., Supreme Court Practice § 2.3, p. 2-16 (11th ed. 2019) (Supreme Court Practice) (explaining that a party is "entitled to wait until a final judgment is entered before seeking certiorari review").

In any event, both questions are presented in *Highland II*. That opinion indisputably addressed whether it was appropriate for a bankruptcy court to protect non-debtors under a gatekeeping provision. App.11a; see Resp. 20 (acknowledging that *Highland II* addressed the "existence or scope of any gatekeeping provision"). Respondents argue (at 19) that *Highland II* did not address the scope of Section 524(e), but that assertion is belied by the opinion itself. *Highland II* held that

"the bankruptcy court exceeded its power under the Bankruptcy Code by allowing the Plan to improperly protect non-debtors" through the gatekeeper provision. App.11a. It then spent several pages discussing the Fifth Circuit's Section 524(e) precedent (App.11a-13a), leading to its conclusion that "[t]he clear weight of Supreme Court and Fifth Circuit precedent dictates our holding" about the permissible scope of the gatekeeper provision (App.19a). Thus, *Highland II*'s holding both was based on and expanded the Fifth Circuit's past precedent on the scope of Section 524(e) to apply equally to the permissible reach of gatekeeping provisions.[1]

B. Respondents claim (at 23-24) that the Court's denial of review in *Highland I* weighs strongly against review now. This Court has repeatedly stated that a denial of certiorari "does not represent an expression of any opinion concerning" the certworthiness of the questions presented. *Wrotten* v. *New York*, 560 U.S. 959 (Sotomayor, J., statement respecting denial of certiorari) (internal quotation marks omitted); see also, *e.g.*, *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) (A "denial of certiorari imparts no implication or inference concerning the Court's view of the merits."). This Court can and does grant review after a

[1] After this Court issued an administrative stay, the Fifth Circuit issued an order respecting its denial of Highland's motion to stay its mandate. Supp.App.162a. Reflecting a failure to understand *either* the "pressed or passed upon" rule *or* the rule that after a denial of certiorari the petitioner is "free to raise the same issue in a later petition," *Mount Soledad*, 567 U.S. at 944 (Alito, J., statement respecting denial of certiorari), the court below wrote that "the questions that Highland Capital asserts it would include in its petition for certiorari do not appear to be reviewable because they were not the subject of this appeal," Supp.App.162a. The court claimed to have "merely confirmed the instruction" from *Highland I* (*i.e.*, the same argument this Court rejected in *Garvey*) and not to have "created nor deepened any circuit split." *Ibid.* But *Highland II* openly acknowledged that its "limited" view of the bankruptcy court's gatekeeping power broke from "[o]ther circuits [that] have extended the *Barton* doctrine to protect a wider variety of court-appointed and court-approved fiduciaries and their agents." App.14a n.6.

previous denial on the same issue. See, *e.g.*, *Cook Cnty.* v. *U.S.* ex rel. *Chandler*, 538 U.S. 119 (2003); *Nat'l Credit Union Admin.* v. *First Nat'l Bank & Tr. Co.*, 522 U.S. 479 (1998); *Mercer* v. *Theriot*, 377 U.S. 152 (1964) (per curiam). Just a week ago, in *Hertz Corp.* v. *Wells Fargo Bank, N.A.*, No. 24-1062, the Court called for the views of the Solicitor General even though the decision sought to be reviewed in that case had agreed with two other decisions on which the Court had recently denied certiorari.[2]

Here, both issues remain unresolved and implicate important and recurring issues of bankruptcy law. As *Highland I* acknowledged, the Fifth Circuit's approach to the effect and reach of Section 524(e) is at odds with other circuits, including the Third, Fourth, Sixth, Seventh, Ninth, and Eleventh. App.64a; see also Stay App. 15-17. That question remains unresolved after *Purdue* and warrants this Court's review—as Respondents themselves argued last year. Supplemental Brief for NexPoint Advisors, L.P. and NexPoint Asset Management, L.P. at 5, No. 22-631 (filed June 28, 2024) ("Supp. Br."); see also Stay App. 17-18.

Highland II swept gatekeeping provisions within the Fifth Circuit's increasingly expansive reading of Section 524(e), even though it acknowledged that its approach conflicted with the approach taken by at least the Fourth, Sixth, and Eleventh Circuits. App.14a n.6; see also Stay App. 19 n.1 (noting split with the Ninth Circuit too). Respondents now try to claim (at 21-22) that split is not "crisp," but they

[2] See Brief in Opposition at 11, No. 24-1062 (filed April 29, 2025) ("This Court recently denied petitions for writs of certiorari raising the same question presented. See *In re PG&E Corp.*, 46 F.4th 1047 (9th Cir. 2022), cert denied, 143 S. Ct. 2492 (2023) (No. 22-733); *In re Ultra Petroleum Corp.*, 51 F.4th 138 (5th Cir. 2022), cert denied, 143 S. Ct. 2495 (2023) (No. 22-772). The same result is warranted here.").

do not—and cannot—dispute that the Fifth Circuit's restrictive view of *Barton* conflicts with decisions of those circuits. Given how common non-debtor protections—like the exculpation and gatekeeping provisions here—are in bankruptcy plans across the country, there is an urgent need for this Court to clarify the appropriate scope of those protections.

Respondents suggest (at 25-26) that these questions would benefit from further percolation in the circuit courts "with the full benefit of this Court's reasoning in *Purdue*." But *Purdue* did not speak to either of the questions presented here. It nowhere considered the proper scope of Section 524(e). It never once mentioned the power of bankruptcy courts to act as gatekeepers. And Respondents themselves have candidly admitted that "*Purdue* never expressly addressed exculpation clauses," which was a "notable" omission given that "the dissent discussed exculpation clauses in a paragraph that assumed their validity." Supp. Br. 5.[3] Indeed, Respondents previously agreed that "the circuit conflict [on exculpation clauses] is likely to persist" post-*Purdue*. *Ibid*. The Fifth Circuit likewise stressed that its decisions here applied "principles that have been the law of [that] circuit for decades." Supp.App.162a. In

[3] In the oral argument in *Purdue*, Justice Sotomayor brought up Highland Capital by name and asked the Deputy Solicitor General "how do we write this not to affect [*Highland Capital*] or any others that have to do –." Deputy Solicitor General Gannon responded that the government sees similarities in the analysis but "[t]here's also a common law immunity doctrine floating around in the context of exculpation clauses. I think the Court could say you're resolving a dispute like this, this is waiving, you know, prepetition claims that are property that is not property of the estate. That's – that's the – this most egregious form of a nonconsensual release and leave that for another day if you need to." Tr. of Oral Argument at 37-39 (Dec. 4, 2023), No. 23-124. And this Court indeed declared in its ultimate *Purdue* opinion that "[a]s important as the question we decide today are ones we do not." *Harrington* v. *Purdue Pharma L.P.*, 603 U.S. 204, 226 (2024). There is at least a "reasonable probability," which is all that is needed to grant Highland's application, that the "another day" Mr. Gannon referred to, to decide an "important * * * question * * * [this Court] d[id] not" decide in *Purdue*, has arrived. This is far from the usual case of speculation about this Court's level of interest in an issue, and far even from the usual case in which certiorari has been once denied.

short, there is little reason to believe that *Purdue* will change anything about these long-running splits, and no reason for this Court to delay review further.

If anything, these issues are "better suited for certiorari review" now than they were in the last, interlocutory petition. *Abbott* v. *Veasey*, 580 U.S. 1104, 1104 (2017) (Roberts, C.J., statement respecting denial of certiorari). Respondents argue (at 23) that "*Highland I* was not an interlocutory appeal" because it was an "appeal from a final order in the form of a plan confirmation." But that misunderstands what it means to be interlocutory *before this Court*. Whenever a court of appeals remands a case, whether on an interlocutory appeal or on an appeal from a final judgment, it is the remand that makes review by this Court interlocutory. See Supreme Court Practice § 3.7, p. 3-27 (explaining that the Court considers a judgment non-final when the appellate court orders "further proceedings on remand"). Whether the appeal was or was not from a final judgment has nothing at all to do with it.

Abbott, for example, was an appeal of a ruling after a "bench trial." 580 U.S. at 1104. Yet the Chief Justice concluded that the appeal was in an "interlocutory posture" because the court of appeals had reversed in part and remanded for further proceedings. *Ibid*. That is precisely what happened in *Highland I*. The court of appeals remanded to the bankruptcy court for "further proceedings" consistent with its opinion. App.70a. Now that those remand proceedings have concluded and the case is final, certiorari is more appropriate—not less.

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

To warrant a stay, Highland needs to demonstrate only that a "fair" prospect exists that the Court will reverse the decision below. That burden can be satisfied by

demonstrating that there is "considered analysis of courts on the other side of the split." *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). Highland's application does so, by explaining the careful reasoning of the many courts of appeals that have disagreed with the Fifth Circuit's approach to both Section 524(e) and the *Barton* doctrine. Stay App. 15-19, 24-26. Respondents ignore most of that and instead make two minor arguments about why certain arguments are unlikely to succeed. Neither is sufficient to show that there is not, at the very least, a "fair" prospect of reversal here.

First, Respondents argue (at 29) that the Court's holding in *Purdue* effectively rejected an argument that Section 105 and the savings clause in Section 1123(b)(6) empower bankruptcy courts to approve non-debtor exculpations and gatekeeping protections. But *Purdue* addressed only whether those provisions permitted the bankruptcy court to "discharge" the *pre*-petition tort claims against the Sackler family. 603 U.S. at 218-219 (rejecting dissent's interpretation of Section 1123(b)(6) in part because of specific characteristics of the Sackler release). It nowhere considered the distinct (and more limited) question whether bankruptcy courts can exculpate non-debtors based on their *post*-petition conduct in the bankruptcy itself. Indeed, Respondents have candidly admitted that "*Purdue* never expressly addressed exculpation clauses." Supp. Br. 5. And *Purdue* certainly never addressed the meaning of Section 524(e), which is the provision that led the Fifth Circuit to curtail bankruptcy courts' power even to screen post-petition claims for colorability through a gatekeeper provision. Indeed, *Purdue* scarcely mentions Section 524(e).

Respondents are, therefore, incorrect to suggest now that *Purdue* settled these questions that have long divided the courts of appeals.

Second, Respondents briefly argue (at 30) that there is "[no] reason" to believe that the Court would reverse the Fifth Circuit's ruling on the scope of the gatekeeper provision because the Court denied review of *Highland I* and *Highland II* does not address the issue. As discussed above, *Highland II* indisputably addressed the proper scope of a gatekeeper provision and extended the Fifth Circuit's misreading of Section 524(e). See, *e.g.*, App.19a; see also Resp. 20 (conceding that "the existence or scope of any gatekeeping provision" was the "only issue that the Fifth Circuit even remotely touched in *Highland II*"). In any event, that issue is plainly still subject to this Court's review. *Supra* pp. 3-4. And Respondents have little to say about the undisputed circuit split on the scope of the *Barton* doctrine or that—as *Highland II* acknowledged—the Fifth Circuit is in the minority of that split.

III. Highland And Its People Will Suffer Irreparable Harm Without A Stay

Highland, its reorganization, and those charged with implementing Highland's reorganization, will all suffer irreparable harm if the gatekeeper provision is disabled, even temporarily. As detailed in Highland's stay application, these harms include: (1) forever erasing the value of the gatekeeper provision, which the bankruptcy court found as fact induced the service of Highland's bankruptcy fiduciaries; (2) draining value from Highland that belongs to the legitimate stakeholders of the Highland estate; (3) exhausting significant time, resources, and effort needed to continue to implement Highland's bankruptcy plan and bring this

case to resolution; and (4) destroying the settled expectations of the parties and courts. See Stay App. 26-30.

Respondents do not deny that those harms will occur. They do not dispute that Dondero's litigiousness drove Highland into bankruptcy in the first place. App.79a. Nor can they dispute the bankruptcy court's factual finding that the gatekeeper provision (and other Plan Protections) were necessary to the success of Highland's plan because, without those provisions, those charged with implementing the plan "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.123a.[4] The entire point of that provision was to protect those charged with implementing the plan from claims that are not even colorable. Without a stay, that protection will be forever lost. Indeed, Respondents do not deny that Dondero and entities under his control plan to launch a fresh barrage of litigation the second the gatekeeper provision is disabled even temporarily.

Instead, Respondents argue that "[m]ere litigation expense" does not generally constitute irreparable harm. Resp. 15-16. But this Court has also long recognized that, when a party is entitled to protection from a claim, the loss of that protection is irreparable. Respondents' own authority illustrates this point. In *Coinbase, Inc.* v. *Bielski*, the district court invoked the "[m]ere litigation expense" mantra, but this

[4] Respondents half-heartedly try to minimize Dondero's litigiousness by claiming that he was merely "objecting to aspects of the bankruptcy process." Resp. 18. But the bankruptcy court found that those objections were "lob[bed]" without a "good faith basis," App.88a, and the fact that Dondero (or entities under his control) have taken fifty appeals from the bankruptcy court speaks for itself. And Dondero and entities he controls have filed *affirmative* claims against Highland and those charged with implementing its plan. See Stay App. 28.

Court noted that the benefits of arbitration "would be irretrievably lost" if a case could proceed while an appeal on arbitrability was ongoing. 599 U.S. 736, 743, 746 (2023) (internal quotation marks omitted).[5] That is equally true here. The benefit of the gatekeeper protection—not having to face non-colorable suits—will be forever lost without a stay.

The fact that this case arises from a bankruptcy provides further support for a stay. By their nature, corporate bankruptcies involve entrenched stakeholders fighting over a limited (but often quite large) pot of money. Given the often zero-sum nature of claims against a limited estate, the law aims to "prevent a race to the courthouse to dismember the debtor," and "preserv[e] value for various stakeholders." 7 *Collier on Bankruptcy* (16th ed. 2025) ¶ 1100.01. That is why courts have repeatedly found irreparable harm where litigation would "impair reorganization efforts and drain resources and time" from the estate. *In re LTL Mgmt., LLC*, 645 B.R. 59, 82 (Bankr. D.N.J. 2022); see Stay App. 28 (collecting similar cases). Respondents argue (at 17) that those cases don't involve "a stay of a circuit court mandate," but that is a non sequitur. Irreparable harm in another context is just as irreparable here. An application to stay the mandate does not require some higher showing of harm over and above that needed for any other stay or injunction.

Respondents contend (at 16) that such harm is not irreparable because Highland can "challenge [suits] through the normal litigation process." But that

[5] This Court has recognized in various contexts that a protection from having to answer certain claims is "effectively lost if a case is erroneously permitted to go to trial." *E.g.*, *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009) (internal quotation marks omitted).

invitation to litigate does nothing to remediate the harm of having to litigate claims that are not even colorable. Nor is it any answer to say that Highland "could always seek sanctions." Resp. 16. Sanctions do not prevent Highland from having to waste time and resources defending against non-colorable claims. To the contrary, they only cause the litigation to metastasize—prolonging these already protracted proceedings and bleeding even more value from the estate.

Finally, Respondents suggest (at 18) that Highland's reorganization is in such a late stage that "there are no 'stakeholders'" left for the gatekeeper provision to protect. Not so. First, Highland's fiduciaries charged with implementing the reorganization and currently protected by the gatekeeper, will be subject to non-colorable attacks if the gatekeeper falls. Second, Highland's pre-petition creditors holding Class 9 interests have not been paid in full. Third, Highland has entered into a settlement agreement to resolve the unvested contingent Class 10 interests to be issued to Hunter Mountain, which previously held 99.5% of the pre-petition limited partnership interests of Highland. To date, Hunter Mountain has not been paid a dime, and the timing and amounts of future payments to the pre-petition creditors and Hunter Mountain depend directly on, among other things, the resolution of outstanding litigation and cessation of Dondero's continued litigation campaign. Denying a stay, therefore, will only further drain the estate's resources and prolong this reorganization at the expense of Highland's other stakeholders.

At bottom, there is perhaps no stronger demonstration of the irreparable harm Highland (and those charged with implementing Highland's reorganization and its

stakeholders) will endure without a stay than Respondents' own admission of having caused hundreds of millions of dollars of harm to the estate. See Resp. 18. Although the amount alleged by Respondents is wrong, unless Respondents or Dondero now volunteer to reimburse Highland for additional expenses, that money is gone forever. The mandate here should be stayed to prevent further destruction of the estate.

CONCLUSION

The Court should grant Highland's application and stay the mandate, pending its disposition of Highland's forthcoming petition for a writ of certiorari.

June 9, 2025

Respectfully submitted,

JEFFREY N. POMERANTZ
JOHN A. MORRIS
GREGORY V. DEMO
PACHULSKI STANG ZIEHL & JONES LLP
10100 Santa Monica Blvd. 13th Floor
Los Angeles, CA 90067
(310) 277-6910

ROY T. ENGLERT, JR.
Counsel of Record
BRANDON L. ARNOLD
PAUL BRZYSKI
SHIKHA GARG
HERBERT SMITH FREEHILLS KRAMER (US) LLP
2000 K Street NW, 4th Floor
Washington, DC 20006
(202) 775-4500
roy.englert@hsfkramer.com

Counsel for Applicant