No.

In the Supreme Court of the United States

HIGHLAND CAPITAL MANAGEMENT, L.P.,
Petitioner,

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Harrington* v. *Purdue Pharma L.P.*, 603 U.S. 204, 227 (2024), this Court held "only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants." *Purdue* cited but did not analyze 11 U.S.C. § 524(e), and its expressly limited holding did not resolve the longstanding circuit split about the meaning of that provision. The Fifth Circuit has long been on the minority side of that circuit split.

Through two opinions that severely limited two protections for nondebtors who are instrumental in the bankruptcy process from liability arising from the bankruptcy case itself, the Fifth Circuit has not just entrenched but vastly extended its minority reading of section 524(e)—even while recognizing that "there is a circuit split concerning the effect and reach of § 524(e)," App., *infra*, 47a—and adopted the extreme position that virtually no nondebtor bankruptcy participants can receive any protection. Its holdings sharpen splits with five circuits.

The questions presented are:

1. Whether a bankruptcy court can act as a gatekeeper to screen noncolorable lawsuits against nondebtor bankruptcy participants.

2. Whether a bankruptcy court can to a limited degree exculpate nondebtor bankruptcy participants from liability for conduct arising from the bankruptcy process.

PARTIES TO THE PROCEEDING

Petitioner 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 Management, L.P.* v. *NexPoint Asset Management, L.P.*, No. 23-10911 (judgment entered Sept. 16, 2024)
- *Highland Capital Management, L.P.* v. *NexPoint Asset Management, L.P.*, No. 23-10921 (judgment entered Sept. 16, 2024)
- *NexPoint Advisors, L.P.* v. *Highland Capital Management, L.P.*, 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 Management, L.P.*, No. 24-10880 (pending)

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 Mar. 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* remanded to bankruptcy court Mar. 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 (leave for interlocutory appeal denied 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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OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-19a, 20a-54a) are reported at 132 F.4th 353 and 48 F.4th 419. The orders of the bankruptcy court confirming the plan of reorganization (App., *infra*, 85a-198a) and later conforming the plan to the court of appeals' first opinion (App., *infra*, 59a-84a) are not reported.

JURISDICTION

The court of appeals entered judgment on March 18, 2025. The court of appeals denied rehearing on April 28, 2025. App., *infra*, 199a-200a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Bankruptcy Code are set forth in the appendix. App., *infra*, 201a-214a.

PRELIMINARY STATEMENT

The bankruptcy system greatly needs clarity about whether nondebtors can be protected from liability for their work *in the bankruptcy case itself*. That question differs radically from the question this Court recently addressed in *Harrington* v. *Purdue Pharma L.P.*, 603 U.S. 204 (2024), which involved nondebtors' attempt to obtain a release from liability for *pre*-bankruptcy torts. Extending and perpetuating the reasoning that underlay its own prior precedents—but was not the rationale of *Purdue*—the Fifth Circuit declined to distinguish between full nondebtor releases and more modest protections for bankruptcy participants.

Giving new meaning to the old saw that no good deed goes unpunished, the Fifth Circuit has struck from petitioner's chapter 11 reorganization plan two important protections for the persons who, according to the bankruptcy court, achieved a "miracle" when they shepherded petitioner through its highly contentious bankruptcy. Both decisions implicate related circuit splits that this Court should resolve concerning the protection of nondebtors against liability arising from the bankruptcy process itself.

In the most recent decision, the Fifth Circuit held that the plan's "gatekeeper provision"—which required leave of court to filter out meritless lawsuits against certain persons and entities—was improperly broad because it protected various nondebtors, even though the bankruptcy court found as fact that those nondebtors were key to the bankruptcy's success and would not have participated without such protection. The Fifth Circuit's most recent decision follows its September 2022 decision, which struck certain nondebtors from the reorganization plan's exculpation provision. That provision had exculpated specified persons and entities who guided petitioner during the bankruptcy case from liability for simple negligence related to the bankruptcy proceedings.

Following circuit precedent—and contrary to the precedents of most other courts of appeals—the Fifth Circuit rested both decisions on a clear misreading of section 524(e) of the Bankruptcy Code and a misunderstanding of the rationale for gatekeeper provisions. The most recent decision also relied on a superficial and unreasoned reference to this Court's recent decision in *Purdue*.

The Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits disagree with the Fifth. In those circuits—even after *Purdue*—bankruptcy courts have the authority to protect nondebtor persons and entities involved in the bankruptcy from liability arising from the bankruptcy case. In those circuits, section 524(e) has not been misconstrued to divest the bankruptcy court of power to protect nondebtors.

The facts of this case starkly illustrate the need for nondebtor protections in bankruptcy. Petitioner is an SEC-registered investment advisor that, during its bankruptcy, continued to manage billions of dollars of financial assets. Petitioner's professionals and related entities have faced a barrage of litigation about their bankruptcy-related conduct from petitioner's ousted and disgruntled founder—a "serial litigator," as the bankruptcy court accurately called him—who objected to petitioner's reorganization and threatened to "burn the place down" when he did not get his way in the bankruptcy. See App., *infra*, 96a, 153a.

In these circumstances, the bankruptcy court found that two protections were necessary to prevent the estate and key individuals from being swamped with frivolous litigation arising from conduct that occurred during the bankruptcy case: limited exculpation; and a "gatekeeper" leave-of-court requirement for suits against certain participants. The latter type have been used in plans of reorganization ever since this Court's decision 144 years ago in *Barton* v. *Barbour*, 104 U.S. 126 (1881). But the Fifth Circuit struck both protections (with limited exceptions). In doing so, it has put at risk the ability of entities in contentious reorganization

proceedings to attract qualified professionals to assist them.

STATEMENT

I. Legal Background

1. The bankruptcy discharge, which releases the debtor from obligations on its prepetition debts, gives the debtor a 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, captioned "Effect of discharge," contains general provisions applicable across all chapters.

The mechanics of the discharge are specific: 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 debt against any nondebtors is unaffected by the debtor's discharge. *Id.* § 524(e); see 4 *Collier on Bankruptcy* ¶ 524.05 (16th ed. 2022). Section 524(e) 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).

2. Under the Code, the bankruptcy court is a court of equity, *Young* v. *United States*, 535 U.S. 43, 50

(2002), and 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. Before and after adoption of the Code in 1978, almost a century after *Barton*, courts have continued to apply *Barton*'s leave-of-court requirements. Courts have applied those protections to bankruptcy participants other than an equity receiver, 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.

II. Factual And Procedural Background

A. The Parties

Petitioner Highland Capital Management, L.P., is the reorganized chapter 11 debtor. Highland, a global investment adviser founded in 1993, provided investment management and advisory services, managing billions of dollars of assets, both directly and through affiliates.

Respondents NexPoint Asset Management, L.P. and NexPoint Advisors, L.P. are registered investment advisors owned or controlled by James Dondero, Highland's founder and former CEO. Respondents advise investment funds—also controlled by Dondero—that are serviced by petitioner.

B. Petitioner's Chapter 11 Bankruptcy

Petitioner'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*, 96a. Rather, petitioner's chapter 11 case was brought on 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 petitioner's CEO. *Ibid.* As the bankruptcy court found, Dondero is a "serial litigator" whose litigiousness caused petitioner to file for bankruptcy and strapped it with more than a billion dollars in claims. See *id.* at 29a; 96a.

Petitioner filed for chapter 11 bankruptcy on October 16, 2019. Concerned about Dondero's ability to serve as an estate fiduciary, the U.S. Trustee moved to appoint a chapter 11 trustee to manage petitioner's estate. Petitioner ultimately avoided the appointment of a trustee by entering into a settlement agreement with the creditors' committee (the "Governance Settlement"). That settlement—approved by the bankruptcy court—changed petitioner'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 petitioner and its reorganization. The bankruptcy court later approved one of petitioner's independent directors, James P. Seery, Jr., to be petitioner'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 protected parties. The order appointing Seery as CEO and CRO included similar protections for Seery in his additional roles. 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*, 104a (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." *Id.* at 102a.

Once appointed, Seery and the other independent directors began to negotiate settlements with petitioner'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 petitioner. Petitioner's chapter 11 plan is an "asset monetization plan" in which distributions to creditors will result from the orderly winddown and sale of petitioner's holdings and other assets over the course of several years. App., *infra*, 93a. The bankruptcy court

described this plan, and its overwhelming creditor support, as "nothing short of a miracle." *Id.* at 106a.

Dondero, on the other hand, had advocated for a reorganization plan that would reinstall him as CEO of an ongoing enterprise. After petitioner and other stakeholders rejected those proposals, Dondero threatened to "burn the place down." App., *infra*, 153a.

As the list of related proceedings in this petition (pp. iii-viii, *supra*) reflects, it was no idle threat. Dondero and entities under his control have attempted to frustrate petitioner's reorganization at every turn by, among other things, objecting to nearly every settlement between petitioner and its creditors, challenging nearly every motion, appealing from nearly every order, obstructing petitioner's trading activity, and threatening petitioner'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 petitioner and its reorganization were not going to stop, petitioner's confirmed chapter 11 plan provided three "Plan Protections" to certain persons and entities whose efforts were going to 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*, 66a-67a, 178a-179a. The Exculpated Parties are, among others, petitioner and its agents, the independent directors, the creditors' committee and its members, and service professionals retained by petitioner and the committee. *Id.* at 66a.

Second, the plan enjoins certain persons—defined as the "Enjoined Parties"—from taking actions to interfere with the implementation and consummation of the plan. App., *infra*, 69a. 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*, 71a-72a. The Protected Parties include the Exculpated Parties as well as the persons and entities tasked with implementing Highland's plan, including the reorganized Highland, the Claimant Trustee, the Litigation Sub-Trust Trustee, the oversight board and their respective professionals, and others. *Ibid.*

The bankruptcy court found that all three Plan Protections were necessary to the success of petitioner's plan. The bankruptcy court found "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*, 153a.

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

C. The Fifth Circuit Substantially Limits The Exculpation Provision

In its first decision addressing petitioner's plan (*Highland I*), 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*, 47a. 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 45a. Those entities, the court held, were entitled to exculpation from liability under other provisions of the Bankruptcy Code. See *id.* at 49a-50a.

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*, 49a-50a. Those persons and entities include petitioner's 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.

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*, 47a.

Certain respondents sought panel rehearing, asking the court to clarify whether the persons and entities that it had struck from the plan's exculpation provision must likewise be left unprotected by the plan's injunction and gatekeeper provisions. In response, the court of appeals—without requesting or receiving a response to the rehearing petition—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*, 7a. In an extension application filed in this Court on December 16, 2022, respondents described that edit as "a minor technical change." No. 22A303, Appl. at 4.

Both sides filed petitions for writs of certiorari. See No. 22-631 and No. 22-669. Highland's petition addressed 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 Brief for Respondents NexPoint Advisors, L.P. and NexPoint Asset Management, L.P. (No. 22-631). In May 2023, this Court called for the views of the Solicitor General, who recommended holding both petitions pending disposition of *Purdue*. See Brief of United States (No. 22-631). 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.

D. The Fifth Circuit Substantially Limits The Gatekeeper Provision

While the petitions were pending before this Court, the 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 had changed just a single sentence of its opinion. On remand, the parties debated whether the same limitation applied to the plan's gatekeeper provision.

1. 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' revised 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*, 81a. Consequently, it did not have the retroactive impact of a discharge.

Second, the gatekeeper provision "did not effectuate a release or an absolution of any liability." *Id.* at 82a. The gatekeeper provision, according to the bankruptcy court, did not raise the same nondebtor-release issues as the exculpation clause.

2. On direct appeal from the bankruptcy court after remand (*Highland II*), the Fifth Circuit

reversed, 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 addressed two issues: the scope of its prior opinion and the substantive effect of section 524(e) on the gatekeeper provision. Respondents argued that the court had not meant it when it first wrote in *Highland I* that "[t]he injunction and gatekeeper provisions are * * * perfectly lawful"; and that the replacement of that sentence with "[w]e now turn to the Plan's injunction and gatekeeper provisions" in response to a rehearing petition was enough to show that the court had limited the parties protected by the gatekeeping provision. Petitioner, defending the bankruptcy court's contrary conclusion, noted among other things that no sentence in the entire *Highland I* opinion linked section 524(e) and the gatekeeper provision, that the gatekeeper provision in no way resembled the "discharge" that section 524(e) arguably limits, and that it was implausible that the court had intended such a sweeping change when changing a single sentence in response to a rehearing petition.

Agreeing with respondents, the court in *Highland II* wrote "that a proper reading of *Highland I* requires that the definition of 'Protected Parties' used in the Plan's Gatekeeper Clause be narrowed coextensively with the definition of 'Exculpated Parties' used in the Exculpation Provision." App., *infra*, 18a. "Any other reading," the court claimed, would constitute an exercise of

"authority [that] is patently beyond the power of an Article I court under § 105." *Id.* at 19a.

To support the latter conclusion, the court declared that its minority reading of section 524(e) stated a "bedrock principle[] concerning bankruptcy courts' power to protect non-debtors." App., *infra*, 14a. Under this "edict," and, "[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." *Id.* at 11a. Without exploring the differences between releases and gatekeeper protections, the court of appeals applied the same legal constraints to the gatekeeper provision and struck most nondebtors from it.

The court of appeals also held that the *Barton* doctrine did not support the gatekeeper provision here. 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." App., *infra*, 13a n.6.

Petitioner moved for a stay of the mandate pending the filing of its petition for certiorari. The court of appeals ordered a response from respondents but then denied the motion on May 22, 2025. App., *infra*, 58a, 55a-57a. Petitioner applied for a stay from this Court. No. 24A1154. Justice Alito granted an administrative stay on May 29 and ordered a response. On June 9, Justice Alito denied the stay application.

REASONS FOR GRANTING THE PETITION

This case is an ideal candidate for certiorari.[1] It cleanly tees up not one, but two, circuit splits that have generated conflicting views over a bankruptcy court's authority to protect nondebtor bankruptcy participants for their conduct in the bankruptcy case. The first split is over the meaning of section 524(e) of the Code. The second is over the scope of the *Barton* doctrine. The Fifth Circuit has put itself on the minority side of both of those splits, and as a result has hamstrung bankruptcy courts' ability to guard from abusive and disruptive litigation persons who voluntarily enter the bankruptcy proceedings to assist the debtor and the court with vital functions.

Clarity on these issues is necessary: In every corporate reorganization of even modest complexity, disputes and litigation abound, and the bankruptcy

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[1] It is 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). For example, in *Major League Baseball Players Association* v. *Garvey*, 532 U.S. 504 (2001) (per curiam), this Court summarily reversed a Ninth Circuit decision as to which cert. had previously been denied even though the second cert. petition sought review only of the three-paragraph second opinion enforcing the mandate of the prior opinion. Denial of certiorari as to an earlier judgment does not preclude 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 an order the bankruptcy court entered on remand from the first decision.

process is improved greatly (and the costs to the estate reduced) by giving participants some protection.

I. The Decisions Below Sharpen Multiple, Related, Circuit Splits

1. As the Fifth Circuit observed in its first decision, "[t]he simple fact of the matter is that there is a circuit split concerning the effect and reach of § 524(e)." App., *infra*, 47a. That section reads: "Except as provided in subsection (a)(3) of this section, 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."

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 (as its language suggests), not as an implicit divestment of the bankruptcy court's authority to craft protections for nondebtors (which its language nowhere mentions). 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 simply "preserv[ing] 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) ("we do not construe § 524(e) so that it limits the equitable power of the bankruptcy court").

The Fifth Circuit, by contrast, has adopted and now amplified a different view of section 524(e)—and that minority view was the principal basis for the two decisions below. App., *infra*, 11a-12a, 45a-49a. Specifically, the Fifth Circuit has construed section 524(e) as stripping bankruptcy courts of the power to craft any protections for nondebtors who participate in the bankruptcy itself.

In *Highland I*, the court of appeals described section 524(e) as a "categorical[] bar" to nondebtor exculpation. App., *infra*, 47a. Relying on *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009), but with no analysis of the provision's actual text, *Highland I* characterized section 524(e) as a "statutory bar" to the nondebtor exculpation provision before it. App., *infra*, 45a. Entrenching its minority view, the court of appeals said that *Pacific Lumber* was "not blind to the countervailing view" of section 524(e) but rejected the opportunity to narrow or distinguish *Pacific Lumber*. See *id.* at 48a-49a.

After doubling down on its minority view in *Highland I*, the Fifth Circuit proceeded to *extend* it in an unprecedented way in *Highland II*.[2] Although gatekeeping provisions have been used since the 19th century and no court other than the Fifth Circuit has ever thought it worthwhile to consider whether section 524(e) has any bearing on them at all, *Highland II* vaunted the circuit's minority reading of section 524(e) as a "bedrock principle[] concerning bankruptcy courts' power to protect non-debtors." App., *infra*, 14a. 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 but affirmatively divests bankruptcy courts' authority to protect nondebtors. To use the Fifth Circuit's own term, section 524(e) is an "edict" (*id.* at 11a) proclaiming that bankruptcy courts lack authority to protect the independent participants in the bankruptcy process—which 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 the

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[2] It makes no difference whether, as the second panel asserted, the issue concerning the gatekeeping provision had been resolved (cryptically) in *Highland I* or was resolved for the first time in *Highland II*. All issues resolved by the panel in *Highland I* are properly before this Court under the authorities cited in note 1, *supra*. In addition, the issue was unquestionably passed on in *Highland II*, and this Court has power to review any issue pressed or passed upon below. *United States* v. *Williams*, 504 U.S. 36, 40-45 (1992).

fact 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 give nondebtors what is effectively a release from pre-petition claims. *Id.* at 226 ("As important as the question we decide today are ones we do not.").

2. The Fifth Circuit's most recent decision also implicates a second split related to the scope of protections available for nondebtors: whether bankruptcy courts may impose a leave-of-court requirement—known as the *Barton* doctrine—to protect nondebtor bankruptcy participants.

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*, 13a. 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 it was breaking with "[o]ther circuits," which have extended *Barton* protection to various categories of nondebtors. See App., *infra*, 13a n.6 (noting its split with *Lawrence* v. *Goldberg*, 573 F.3d 1265 (11th Cir. 2009); *In re Lowenbraun*, 453 F.3d 314 (6th Cir. 2006); *Gordon* v. *Nick*, 162 F.3d 1155 (4th Cir. 1998) (Table) (per curiam); *In re Ditech Holding Corp.*, No. 19-10412 (JLG), 2021 WL 3716398 (Bankr. S.D.N.Y. Aug. 20, 2021)).[3]

In *Lawrence*, the Eleventh Circuit extended *Barton* protection to professionals hired by a

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[3] 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).

bankruptcy trustee, as well as to certain creditors who had financed the bankruptcy investigation. 573 F.3d at 1270. Those bankruptcy participants were entitled to bankruptcy protection because they functioned effectively as court-appointed officers. *Ibid.* In *Lowenbraun*, the Sixth Circuit extended *Barton* protection to a trustee's attorney. 453 F.3d at 321-322. And in *Gordon*, the Fourth Circuit held that "the [*Barton*] doctrine is applicable to suits against the debtor's managing partner," extending the doctrine to a debtor's owner. 162 F.3d 1155. The nondebtors protected in *Lawrence* and *Gordon* fall outside the narrow categories of nondebtors entitled to gatekeeper protection according to the decision below.

Purdue comes even less close to resolving this question than it does to resolving the split concerning section 524(e). As the bankruptcy court correctly observed, a gatekeeper provision is not a release at all. App., *infra*, 82a. The gatekeeper provision establishes a basic procedural hurdle to protect the bankruptcy process.

The only way a putative claim can be blocked under the gatekeeper provision is if a judge—subject to appellate review—examines it and determines that it is not even "colorable." That is very far afield from the Sacklers' effort to be released for *pre*petition opioid liability after looting the company, and it isn't even arguably governed by section 524(e)'s limitation on "discharge[s]." Yet the Fifth Circuit, in open conflict with other circuits, acted as if section 524(e), *Pacific Lumber*, and *Purdue* resolved the permissible scope of gatekeeper protections.

3. The circuit splits recognized by the Fifth Circuit—especially the court's view of section 524(e)—

have manifested in circuit conflicts over the lawfulness of two specific types of protections often used to safeguard the bankruptcy process.

First, the Fifth Circuit shredded the gatekeeper provision in petitioner's plan. Even though the gatekeeper provision is a procedural hurdle that does not substantively affect anyone's claims or release liability, the Fifth Circuit gutted it, merely because it protected nondebtors.

But such leave-of-court protections are commonplace in bankruptcy cases—and they are regularly used to protect nondebtors for their work related to the bankruptcy case. See, *e.g.*, *In re Cumberbatch*, 657 B.R. 683, 696-699 (Bankr. E.D.N.Y. 2024) (applying *Barton* protection to a trustee's real estate broker); *In re Ditech Holding Corp.*, No. 19-10412 (JLG), 2021 WL 3716398, at *10 (Bankr. S.D.N.Y. Aug. 20, 2021) (applying *Barton* to plan administrator and claims representative); *In re Swan Transp. Co.*, 596 B.R. 127, 137 (Bankr. D. Del. 2018) (applying *Barton* to cover the trustee of a post-confirmation liquidating trust); *In re MF Glob. Holdings Ltd.*, 562 B.R. 866, 875 (Bankr. S.D.N.Y. 2017) (applying *Barton* to protect a plan administrator); *In re W.B. Care Ctr., LLC*, 497 B.R. 604, 611 (Bankr. S.D. Fla. 2013) (applying *Barton* to protect the debtor's accounting firm and CRO); *In re Brownsville Prop. Corp.*, 473 B.R. 89, 91-92 (Bankr. W.D. Pa. 2012) (applying *Barton* to protect a real estate broker retained by trustee); *In re Silver Oak Homes, Ltd.*, 167 B.R. 389, 395 (Bankr. D. Md. 1994) (*Barton* could cover debtor's officers and directors). All of these procedural protections are unlawful under the Fifth Circuit's view.

Second, the Fifth Circuit dismantled the exculpation provision in petitioner's plan. That provision exculpated certain persons for conduct *relating to the administration of the case*. App., *infra*, 27a-28a, 178a-179a. In the majority of circuits, bankruptcy courts still have that authority. Indeed, the Third, Seventh, Eleventh, and Ninth Circuits disagree with the Fifth and have held that a bankruptcy court has authority to exculpate or release nondebtors for conduct undertaken in connection with the bankruptcy itself.[4]

Again, these cases reject the Fifth Circuit's expansive reading of section 524(e) of the Code. The majority view is that section 524(e)—the fifth subsection of a section captioned "Effect of discharge"—merely limits the scope and impact of the debtor's discharge in bankruptcy. *Blixseth* is particularly instructive. The Ninth Circuit, like the Fifth, had construed section 524(e) to bar third-party releases. Yet in *Blixseth* the Ninth Circuit declined to extend that holding to exculpation clauses. 961 F.3d

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[4] See *Blixseth*, 961 F.3d at 1081 (upholding exculpation clause that applied to any "act or omission in connection with, relating to or arising out of the Chapter 11 cases"); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d at 1076 (upholding release that covered "any act, omission, transaction or other occurrence in connection with, relating to, or arising out of the Chapter 11 Case"); *In re Airadigm Commc'ns, Inc.*, 519 F.3d at 647 (upholding the release of third-party financier for "any act or omission arising out of or in connection with the confirmation of this Plan except for willful misconduct") (alteration marks omitted); *In re PWS Holding Corp.*, 228 F.3d at 246 (upholding exculpation clause that covered non-debtor bankruptcy participants "for any act or omission in connection with * * * the Chapter 11 Cases").

at 1082-1084. The Fifth Circuit expressly disagreed. App., *infra*, 47a.

Critically, *Purdue* did not abrogate these cases or hold that nondebtor exculpations for bankruptcy-related conduct were unlawful. *Purdue* arose in the mass-tort context and involved a nondebtor "release and an injunction" that "sought to void not just current opioid-related claims against [the Sackler] family, but future ones as well." 603 U.S. at 211. That sweeping Sackler release would "ban not just claims by creditors participating in the bankruptcy proceeding, but claims by anyone who might otherwise sue Purdue." *Ibid.* In other words, the plan sought to release the Sacklers (*i.e.*, nondebtors) from liability arising from their allegedly tortious prepetition conduct—conduct that had no connection whatsoever to the bankruptcy process. The Sacklers were, in this Court's estimation, effectively receiving the benefit of a bankruptcy discharge, which was unlawful, because a discharge is "usually reserved for the debtor alone." *Id.* at 221.

This Court characterized its holding as "only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants." 603 U.S. at 227. And it cabined its holding further by emphasizing that it applied to just the narrow question before it. See *id.* at 226 ("As important as the question we decide today are ones we do not."). Indeed, respondents themselves have 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." Supplemental Brief for NexPoint Advisors, L.P. and NexPoint Asset Management, L.P. at 5, No. 22-631 (filed June 28, 2024) ("Supp. Br."). And respondents *agreed* with petitioner that "the circuit conflict [on exculpation clauses] is likely to persist" post-*Purdue*. *Ibid*.

In sum, the decisions below involve two different, but related, circuit splits—the meaning of section 524(e) and the scope of the *Barton* doctrine.

II. The Questions Presented Are Recurring, Are Important, And Need An Answer

1. 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 often losers. And the losers often don't go quietly.

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

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 assure[] 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).

It is for these reasons that the American Bankruptcy Institute ("ABI") recommends "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 ABI likewise recommends that bankruptcy plans should be permitted to include an exculpatory clause "that covers parties participating in the chapter 11 case." *Id.* at 250. The lawfulness of bankruptcy protections for nondebtor bankruptcy participants is an issue that arises constantly and needs a clear answer.

Indeed, the Fifth Circuit's reliance on *Purdue* and section 524(e) reflects the desperate need for clarity from this Court. *Purdue* dealt with an extreme and different scenario: a complete nondebtor release that extinguished tens of billions of dollars of pre-petition liability, including claims held by persons who did not participate in the bankruptcy process, and including claims for fraud and willful misconduct. 603 U.S. at 211-212. But most protections for bankruptcy-related liability—like the provisions here—are more mine-run.

Moreover, the expressly cabined decision in *Purdue* contains almost no guidance or reasoning to help lower courts determine what sort of nondebtor protections (if any) are allowed. Beyond a few passing citations, *Purdue* said nothing of the meaning of section 524(e)—which the Fifth Circuit (even before *Purdue*) had relied on to reach a different view of exculpation clauses than other circuits. Nor did *Purdue*—beyond stating that its holding was limited to nonconsensual releases that "effectively" discharged claims against nondebtors—respond to the dissent's discussion of exculpation clauses. In other words, *Purdue* provided virtually no guidance for lower courts for how to assess protections for nondebtor bankruptcy participants. Respondents were therefore right when they previously represented that "*Purdue* confirms the need for this Court's review of [*Highland I*]." Supp. Br. 3.

Bankruptcy courts continue to confront the need for nondebtor protections of various shapes and sizes. See, *e.g.*, *In re Hal Luftig Co.*, 667 B.R. 638, 657-664 (Bankr. S.D.N.Y. Feb. 24, 2025) (extending the automatic stay to a nondebtor); *In re Hopeman Bros.,*

Inc., 667 B.R. 101, 108 (Bankr. E.D. Va. Jan. 24, 2025) (issuing an injunction against third parties as to seller in section 363 sale); *In re Parlement Techs., Inc.*, 661 B.R. 722, 728 (Bankr. D. Del. 2024) (assessing request for a preliminary injunction that protected nondebtors where claims against them would interfere with reorganization efforts); *In re Coast to Coast Leasing, LLC*, 661 B.R. 621, 624 (Bankr. N.D. Ill. 2024) (issuing a TRO against creditors from suing guarantors).

This issue demands clarity and there is no reason to delay any longer. The circuit split over the meaning of section 524(e) has persisted for decades. And this Court has *never* clarified the scope of the *Barton* doctrine in the 140 years since *Barton*. Clarity on these issues is needed, and the issues are more than ripe.

III. The Fifth Circuit Is Wrong

Through its two opinions below, the Fifth Circuit held that *Barton* protection and exculpation cannot cover the nondebtors who do most of the hard work in a corporate bankruptcy. Not the debtor's employees. Not its officers. Not trusts or entities established to implement the bankruptcy plan. And not the professionals who advise the debtor in bankruptcy. The law is not so restrictive.

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. 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 clauses 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.

IV. This Case Is An Ideal Vehicle

This case is an ideal vehicle. It gives this Court the chance to resolve two circuit splits at once, provide guidance to lower courts, and avoid needless confusion after *Purdue*. Both the bankruptcy court and the court of appeals decided the issues presented following extensive briefing and argument. Moreover, the Fifth Circuit reversed petitioner's confirmed plan solely as to certain of its nondebtor exculpations and gatekeeper provisions; it otherwise affirmed confirmation of the plan in full. App., *infra*, 54a.

Indeed, the protections here have become the focal point of the proceedings below, as Dondero continues to launch a barrage of frivolous legal attacks and appeals to try to disrupt petitioner's bankruptcy plan. The case, therefore, acutely illustrates the need for nondebtor bankruptcy protections and clarity in this area of law.

Finally, now that the case has advanced beyond the interlocutory posture that it was in when this Court considered Highland's prior certiorari petition, 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).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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