No. 25-119

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

BRIEF FOR *AMICI CURIAE* PROFESSORS ANTHONY J. CASEY, BROOK E. GOTBERG, JOSHUA C. MACEY, ROBERT K. RASMUSSEN, AND DAVID A. SKEEL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[*]

Amici are nationally recognized professors of law who teach courses and seminars in bankruptcy law and reorganization, corporate governance, and business law. Anthony J. Casey is the Donald M. Ephraim Professor of Law and Economics and Faculty Director of the Center on Law and Finance at the University of Chicago Law School. Brook E. Gotberg is a Professor of Law at Brigham Young University J. Reuben Clark Law School. Joshua C. Macey is an Associate Professor of Law at Yale Law School. Robert K. Rasmussen is the J. Thomas McCarthy Trustee Chair in Law and Political Science at the University of Southern California Gould School of Law. David A. Skeel is the S. Samuel Arsht Professor of Corporate Law at the University of Pennsylvania Carey Law School.

Amici have published numerous articles and treatises that focus on the text, structure, legislative history, and policy objectives of title 11 of the United States Code (the "Bankruptcy Code") and the practical economic implications of the bankruptcy system. Accordingly, *amici* have a strong interest in the correct interpretation of the Bankruptcy Code and the effective implementation of the public policies that bankruptcy law is designed to promote, including the proper understanding and salutary use of exculpation and gatekeeper provisions in effecting successful Chapter 11 reorganizations.

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[*] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice of *amici*'s intention to file this brief, at least ten days prior to the deadline.

SUMMARY OF THE ARGUMENT

Chapter 11 proceedings can be messy and contentious: Numerous parties battle to obtain slices of a finite pie, and parties disappointed with the confirmed Chapter 11 plan have an incentive to relitigate matters, bringing claims against those who shepherded the debtor through a successful reorganization.

Those dynamics present a problem for debtors in complex Chapter 11 cases. On the one hand, they need the assistance of capable and experienced individuals to steer them through the process. On the other hand, those same individuals have little incentive to offer their services to debtors if they face the prospect of significant liability and litigation from disgruntled parties at the end of that process. Without protection, they will leave the market or increase their costs to cover insurance. Either way, the estate is worse off.

As courts around the country have recognized, exculpation and gatekeeper provisions provide two straightforward solutions to these problems. Under an exculpation provision, a small group of individuals and entities who are integral to a restructuring effort—most often, estate fiduciaries like a debtor's directors, officers, and advisors, along with officially appointed bodies like an unsecured creditors' committee—are shielded from suits alleging that they committed negligence during the course of the bankruptcy proceeding. Notably, they can still face suits alleging more serious wrongdoing, such as gross negligence, fraud, and willful misconduct. In this way, exculpation provisions in a Chapter 11 plan facilitate the participation of key groups of individuals and entities without the fear of meritless negligence suits from especially litigious parties. Given their self-evident value, exculpation provisions are commonplace in confirmed Chapter 11 plans in complex bankruptcy cases.

Gatekeeper provisions require the bankruptcy court's permission before certain parties integral to a restructuring effort can be sued. As the name suggests, the bankruptcy court serves as a gatekeeper by screening claims against the protected parties for colorability before allowing them to proceed. These provisions are distinct from exculpation provisions. Rather than set a standard of care for suits against the protected parties, they allow the court to screen for frivolous suits. Gatekeeper provisions have a long vintage, tracing their genesis to *Barton v. Barbour*, 104 U.S. 126 (1881), in which this Court accepted the proposition that "before suit is brought against a receiver [in bankruptcy,] leave of the court by which he was appointed must be obtained." *Id.* at 128.

Despite the wide acceptance of exculpation and gatekeeper provisions as both grounded in the Bankruptcy Code and vital to successful Chapter 11 proceedings, the Fifth Circuit has essentially reduced them to a nullity in a pair of recent decisions. These decisions diverge from those of other courts of appeals, are legally erroneous, and undermine the efficient and uniform functioning of the bankruptcy system. In *In re Highland Cap. Mgmt., L.P. (Highland I)*, 48 F.4th 419 (5th Cir. 2022), the Fifth Circuit held that an exculpation provision in a Chapter 11 plan of reorganization cannot extend beyond the debtor, the trustees, and the creditors' committee—leaving all other parties integral to a successful reorganization unprotected. *Id.* at 437. In so holding, the court erroneously relied on 11 U.S.C. §524(e)—a provision of the Bankruptcy Code that defines the effect of the discharge of the debt of the debtor and has no relation to exculpation. Specifically, the court held that "§524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code"—while candidly acknowledging that "there is a circuit split concerning the effect and reach of §524(e)" in which the Fifth Circuit is in the distinct minority. *Id.* at 436.

On direct appeal from the bankruptcy court after remand, Petitioner's plan again came before the Fifth Circuit, this time to address its gatekeeper provision. The Fifth Circuit doubled down on its prior flawed reasoning in *Highland I*, holding that "the Plan's Gatekeeper Clause [must] be narrowed coextensively with the definition of 'Exculpated Parties' used in the Exculpation Provision." *In re Highland Cap. Mgmt., L.P. (Highland II)*, 132 F.4th 353, 362 (5th Cir. 2025). Once more, the court relied on §524(e), even though the scope of a discharge of the debtor's debt has nothing to do with the bankruptcy court's authority to screen meritless claims against critical plan participants. The Fifth Circuit also cited this Court's decision in *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024), which, like §524(e), is inapplicable to gatekeeper provisions. The Court's narrow holding in *Purdue* addressed the bankruptcy court's authority to approve nonconsensual third-party releases governing prepetition conduct, not its ability to filter frivolous litigation based on conduct during bankruptcy proceedings. As in *Highland I*, the Fifth Circuit in *Highland II* conceded that "[o]ther circuits" have allowed gatekeeper provisions to apply to a "wider variety of court-appointed and court-approved fiduciaries and their agents." 132 F.4th at 360 n.6.

The Fifth Circuit's anomalous decisions in *Highland I* and *Highland II* cry out for this Court's review. They erroneously rely on an inapposite Bankruptcy Code provision, §524(e), to bar any meaningful use of exculpation and gatekeeper provisions. Other circuits have correctly concluded that §524(e) is no barrier to broader use of exculpation and gatekeeper provisions, which the Code otherwise authorizes. The Fifth Circuit's position on these provisions lacks support and threatens deleterious consequences for the viability of Chapter 11 debtors' restructuring efforts. This Court should grant review and restore much-needed uniformity to the Bankruptcy Code by holding that §524(e) does not preclude broad applicability of exculpation and gatekeeper provisions.

ARGUMENT

I. Exculpation Provisions Are Necessary And Commonplace Features Of Reorganization Plans in Chapter 11 Cases.

The Bankruptcy Code permits companies to file for bankruptcy under either Chapter 7 or Chapter 11. In a Chapter 7 bankruptcy, a trustee liquidates a company's prepetition assets and distributes them to creditors. *See* 11 U.S.C. §701 *et seq.* In a Chapter 11 bankruptcy, the objective is different. *See* 11 U.S.C. §1101 *et seq.* The "two recognized policies underlying Chapter 11" are "preserving going concerns and maximizing property available to satisfy creditors." *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 435 (1999). Consistent with those policies, "[i]n Chapter 11, debtor and creditors try to negotiate a plan that will govern the distribution of valuable assets from the debtor's estate and often keep the business operating as a going concern." *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 455 (2017). Obtaining plan confirmation is "the statutory goal of every chapter 11 case." 7 *Collier on Bankruptcy* ¶ 1129.01 (16th ed. 2021).

In "many Chapter 11 bankruptcies," no trustee is appointed; rather, the debtor—as "debtor-in-possession"—"administer[s] the bankruptcy estate as a fiduciary for the estate's creditors," *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 124 (2015), exercising "the rights and powers of a trustee," *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 n.3 (2000); *see* 11 U.S.C. §1107(a). In such cases, the debtor-in-possession is controlled by the estate fiduciaries, including its officers and directors, who "carry out the fiduciary responsibilities of a trustee." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985).

In a complex Chapter 11 bankruptcy case, a debtor frequently cannot achieve the goal of plan confirmation on its own. Instead, it requires substantial assistance from third parties. A debtor's directors, officers, advisors, and other parties—such as the official committees appointed during the bankruptcy case and their associated professionals, *see* 11 U.S.C. §§1102, 1103—are often indispensable to the successful formulation, negotiation, implementation, and consummation of a Chapter 11 plan. *Cf. In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) ("The committee members and the debtor are entitled to retain professional services to assist in the reorganization.").

At the same time, convincing these persons to lend critical assistance to reorganization efforts is no easy task. Chapter 11 proceedings are "highly litigious."

Blixseth v. Credit Suisse, 961 F.3d 1074, 1084 (9th Cir. 2020). In Chapter 11 proceedings, "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 Alpha Nat. Res., Inc.*, 556 B.R. 249, 261 (Bankr. E.D. Va. 2016); *see also In re Chemtura Corp.*, 439 B.R. 561, 610 (Bankr. S.D.N.Y. 2010). As the Ninth Circuit summarized (in a more colorful fashion), parties "battle each other tirelessly" in Chapter 11 proceedings, and "oxe[n] … are gored" as a result. *Blixseth*, 961 F.3d at 1084. The nature of Chapter 11, which requires compromise and shared sacrifice among stakeholders, means that not all involved will be content with the outcome. Those who are not may look for opportunities to relitigate matters and extract additional recoveries from other sources. The threat of such litigation makes it more difficult and costly to hire advisors necessary to the process.

Fortunately, the Bankruptcy Code has long provided flexibility for debtors and bankruptcy courts alike "to ensure that capable, skilled individuals are willing to assist in the reorganization efforts in chapter 11 cases" despite the risks of postpetition litigation and liability. *Alpha Nat. Res.*, 556 B.R. at 260-61. Section 1123(b)(6) of the Code provides that "a plan may … include any other appropriate provision not inconsistent with the applicable provisions of [Chapter 11]." 11 U.S.C. §1123(b)(6). Relatedly, §105(a) of the Code empowers a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code]." 11 U.S.C. §105(a). In turn, courts regularly invoke these two statutory provisions to approve Chapter 11 plans containing exculpation provisions. *See, e.g.*, *Blixseth*, 961 F.3d at 1084; *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 657-58 (7th Cir. 2008); *In re Murray Metallurgical Coal Holdings, LLC*, 623 B.R. 444, 500 (Bankr. S.D. Ohio 2021).

The mechanics of exculpation provisions are straightforward. In general, exculpation provisions state that certain parties who played a critical role in the bankruptcy case—such as estate fiduciaries like a debtor's directors, officers, and advisors, as well as committee members and their associated professionals—will not face liability for allegedly negligent actions taken during the case. But they make likewise clear that those persons can still face liability for serious wrongdoing, such as gross negligence, willful misconduct, or fraud. *See, e.g.*, *In re Enron Corp.*, 326 B.R. 497, 501, 504 (S.D.N.Y. 2005) (affirming bankruptcy court's order confirming plan with a "customary" exculpation provision that carved out claims for "gross negligence or willful misconduct, including, … fraud"); Am. Bankr. Inst., *Commission to Study the Reform of Chapter 11* 251 (2014) (explaining that "[a] typical exculpatory clause may protect the debtor's directors, officers, employees, advisors, and professionals").

Exculpation provisions thus strike a necessary and appropriate balance in Chapter 11 proceedings. On the one hand, exculpation provisions allow persons and entities who are critical to a successful restructuring "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. On the other hand, exculpation provisions do not let those parties completely off the hook; by establishing the same "standard of liability" that applies whenever persons who have a "fiduciary duty" are involved, exculpation provisions typically permit suits for gross negligence, willful misconduct, or fraud. *PWS*, 228 F.3d at 246. As a result, exculpation provisions "provide[] a degree of finality to the [e]xculpated [p]arties and 'assure[] them they will not be second-guessed and hounded by'" easy-to-plead negligence suits "'following the conclusion of the bankruptcy case.'" *Murray*, 623 B.R. at 501 (quoting *Alpha Nat. Res.*, 556 B.R. at 261).

Precisely because exculpation provisions do not provide "blanket immunity" to covered parties, *Airadigm*, 519 F.3d at 657, they are materially different from certain other types of provisions in Chapter 11 plans—*viz.*, release provisions, with which exculpation provisions are often confused. There are two forms of release provisions: (1) a debtor release, under which a debtor extinguishes its own claims, which are property of the estate, *see* 11 U.S.C. §1123(b)(3)(A), and (2) a non-debtor release (also known as a third-party release), which involves the release of claims held by nondebtor third parties against other non-debtor third parties, *see* 11 U.S.C. §§1123(b)(6), 105(a). Both debtor and non-debtor releases "*eliminat[e]*" a covered party's liability "*altogether*," *PWS*, 228 F.3d at 247 (emphases added), and there is often no limitation on the scope and time of the claims released; thus, they can easily (and are often intended to) immunize *pre*petition conduct. In *Purdue*, this Court recently held that the Bankruptcy Code does not authorize nonconsensual third-party releases. 603 U.S. at 227.

In contrast, exculpation provisions merely "set[] forth the applicable standard of liability" in future litigation, *PWS*, 228 F.3d at 247—namely, by demanding that "the challenged conduct … at least rise to the level of gross negligence," *Murray*, 623 B.R. at 501—and they generally apply only to "actions that occurred *during* the bankruptcy proceeding, *not before*," *Blixseth*, 961 F.3d at 1081 (emphases added). Accordingly, this Court's narrow holding in *Purdue* regarding nonconsensual third-party releases does not affect the permissibility of exculpation provisions. 603 U.S. at 226 ("As important as the question we decide today are ones we do not."); *see also In re Smallhold, Inc.*, 665 B.R. 704, 725 (Bankr. D. Del. 2024) ("Nothing in *Purdue Pharma* can be read to call into question the kind of exculpation approved by the Third Circuit in *In re PWS*.").

In light of the importance of exculpation provisions and their targeted nature, it is "commonplace" to include such provisions covering a wide range of integral parties in Chapter 11 plans today. *PWS*, 228 F.3d at 245. Indeed, bankruptcy courts nationwide routinely approve Chapter 11 plans containing such provisions, including even after this Court's holding in *Purdue*. *See, e.g.*, *McAlary v. Cash Cloud Inc.*, 2025 WL 2206176, at *5 (D. Nev. Aug. 4, 2025).

Like the plans that are approved in many other complex Chapter 11 cases, Petitioner's plan of reorganization includes an exculpation provision. The exculpation provision states that a limited set of parties who played an essential role in Highland's restructuring—including Highland, certain Highland employees and officers, Highland's general partner, the independent directors, the Unsecured Creditors' Committee and its members, and the professionals retained by Highland and the Unsecured Creditors' Committee—are not liable for specified bankruptcy-related "conduct occurring on or after the Petition Date," unless that conduct "constitute[s] bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct." Fifth Amended Plan, Bankr. Dkt. 1943, Ex. A at 9, 47-48. As that language indicates, the exculpation provision is virtually indistinguishable from the exculpation provisions that courts around the country have approved for years. If anything, the exculpation provision here—which is explicitly limited to estate fiduciaries—is even more straightforward than such provisions in other Chapter 11 plans, which often provide protection to parties beyond just estate fiduciaries. *See, e.g.*, *Murray*, 623 B.R. at 502 (explaining that "limit[ing]" exculpation provisions to estate fiduciaries alone "has not gained acceptance" broadly).

Given that the exculpation provision here is unremarkable, it would pass muster even in the garden-variety Chapter 11 case. But as the bankruptcy court repeatedly stressed, this case is "not garden variety for so many reasons." Pet.App.95a; *see also id.* at 91a, 99a-100a, 104a-107a, 109a; Bench Ruling on Confirmation, Bankr. Dkt. 1917 at 6, 8-9, 13-14, 18, 19 ("Ruling Tr."). Indeed, this case exemplifies why exculpation provisions are beneficial if not critical in complex Chapter 11 cases.

More precisely, this case involved a debtor that had to file for bankruptcy specifically because it had made the ill-advised decision (under the stewardship of then-CEO James Dondero) to engage in "serial litigat[ion]" for "a decade or more … in multiple forums all over the world." Pet.App.95. That "culture of constant litigation" persisted after the petition date with Dondero still at the helm. Pet.App.102a-103a. Ultimately, to avoid the appointment of a trustee, Dondero agreed to relinquish control of Highland and to step aside as an officer and director. But as the bankruptcy court explained, "it was not … easy to get … highly qualified persons to serve as independent board members." Pet.App.103a. "Naturally," the bankruptcy court noted, "they were worried about getting sued no matter how defensible their efforts—given the litigation culture that enveloped Highland historically." *Id.* Hence, "none" of the three independent directors "would have taken on the role of independent director without … exculpation for mere negligence claims." *Id.*

In the bankruptcy court's view, it was crucial not only that those independent directors agreed to assist, but also that an exculpation provision was included in the confirmed plan. As the court explained, the independent directors "completely changed the trajectory" of this case and helped achieve an outcome that is "nothing short of a miracle." Pet.App.104a-105a. Meanwhile, Dondero—who the bankruptcy court "ha[d] good reason to believe" wanted to accomplish nothing more than to "disrupt[]" this Chapter 11 proceeding—threatened to "'burn the place down'" if he did not get his way. Pet.App.107a, 151a-152a; *see also* Ruling Tr. at 41 ("Dondero has shown no hesitancy to litigate with former employees in the past, to the nth degree, and there is every reason to believe he would again in the future, if able."). Thus, the bankruptcy court explained, "[i]f ever" a Chapter 11 plan needed to include an exculpation provision, "it is this one." Pet.App.151a.

II. Gatekeeper Provisions Likewise Are Necessary And Commonplace Features Of Reorganization Plans in Chapter 11 Cases.

Gatekeeper provisions similarly protect individuals and entities integral to a debtor's restructuring efforts. A gatekeeper provision is a plan provision that requires leave of court before certain parties—typically fiduciaries and their agents—can be sued. Like exculpation provisions, and unlike debtor or third-party releases, gatekeeper provisions do not themselves release any claims; rather, they function as a procedural step that requires the bankruptcy court to deem a claim colorable before it may proceed. *See* L. James Dickinson & Hugh M. Ray, III, *Gatekeeping Provisions May Provide an Alternative to Nonconsensual Releases*, 42 Am. Bankr. Inst. J. 26, 26 (Dec. 2023) ("'Gatekeeping' is not a release; it is an injunction preventing lawsuits against critical plan participants before the bankruptcy court that determines that there is a 'colorable claim' that it or some other court will adjudicate.").

The bankruptcy court's authority to approve gatekeeper provisions stems from this Court's holding in *Barton*, which established that "before suit is brought against a receiver [in bankruptcy,] leave of the court by which he was appointed must be obtained." 104 U.S. at 128. "An unbroken line of cases" has extended the *Barton* doctrine to bankruptcy trustees. *In re Linton*, 136 F.3d 544, 545 (7th Cir. 1998); *see also In re Lehal Realty Assocs.*, 101 F.3d 272, 276 (2d Cir. 1996) ("A well-recognized line of cases" extends the *Barton* doctrine to the trustee.). As the Fifth Circuit recognized in *Highland II*, 132 F.4th at 360 n.6, numerous courts of appeals have broadened the scope of *Barton* beyond trustees to also include other fiduciaries and their agents. *See, e.g.*, *In re Yellowstone Mountain Club, LLC*, 841 F.3d 1090, 1095 (9th Cir. 2016) (expanding the *Barton* doctrine to members of an unsecured creditors' committee); *Lawrence v. Goldberg*, 573 F.3d 1265, 1270 (11th Cir. 2009) (applying the *Barton* doctrine to the trustee's attorneys and creditors who "functioned as the equivalent of court appointed officers"); *Gordon v. Nick*, 1998 WL 559734, at *2 (4th Cir. Sept. 2, 1998) (per curiam) (extending the *Barton* doctrine to "the debtor's managing partner").

Gatekeeper provisions are especially distinct from release provisions because they function "as a procedural mechanism, not a substantive bar." *BlockFi Inc.*, 2025 WL 2024312, at *4 (Bankr. D.N.J. July 18, 2025); *see also In re Christensen*, 598 B.R. 658, 665 (Bankr. D. Utah 2019) ("*Barton* is strictly a 'jurisdictional gatekeeping doctrine[.]'") (citation omitted). Thus, as with exculpation provisions, this Court's holding in *Purdue* regarding nonconsensual third-party releases is inapplicable to gatekeeper provisions. *See BlockFi Inc.*, 2025 WL 2024312, at *5 ("Movant's reliance on *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024) is likewise misplaced. … The *Purdue* decision therefore has no bearing on the Court's findings in this case [regarding a gatekeeper provision].").

As discussed above, "the litigation culture that enveloped Highland historically," Pet.App.103a, underscores the precise need for a gatekeeper provision in Petitioner's plan. Absent such a provision, debtors in a similar position will be hard-pressed to find crucial advisors to guide them through the bankruptcy process. In sum, as this case exemplifies, this Court's intervention is needed because gatekeeper provisions are critical components of complex Chapter 11 plans.

III. The Fifth Circuit's View Of Exculpation And Gatekeeper Provisions Is Anomalous And Pernicious.

A. In its first decision concerning Petitioner's plan—*Highland I*—the Fifth Circuit significantly narrowed the permissible scope of exculpation provisions, holding that such provisions may only extend to "the debtor, the creditors' committee and its members for conduct within the scope of their duties, and the trustees within the scope of their duties." 48 F.4th at 437 (internal citations omitted). The court ruled that exculpating any other non-debtor parties—including the debtor's officers, attorneys, and financial advisors—was "unlawful" and struck those exculpations from the plan. *Id.* at 427 n.4, 438. According to the Fifth Circuit, its restrictive approach to exculpation provisions is "[c]onsistent with §524(e)" of the Bankruptcy Code, *id.* at 438—a provision of the Code that merely defines the effect of the discharge of the debt of the debtor, *see* 11 U.S.C. §524(e). Specifically, the court held that "§524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code." *Highland I*, 48 F.4th at 436.

In its second decision regarding Petitioner's plan—*Highland II*—the Fifth Circuit doubled down on its *Highland I* ruling to similarly restrict gatekeeper provisions, mandating that they be limited to the same subset of individuals identified in *Highland I*. 132 F.4th at 360. The court again relied on §524(e), concluding that the gatekeeper provision was impermissibly "broad" in violation of that section. *Id.* Furthermore, without addressing the important distinctions between third-party releases and gatekeeper provisions, the Fifth Circuit referenced this Court's decision in *Purdue* regarding the former for support. *Id.* at 358. The court did so despite acknowledging that gatekeeper provisions are grounded in this Court's holding in *Barton*, which affirmed a leave-of-court requirement to protect an equity receiver in bankruptcy.

As the Fifth Circuit itself recognized, its holdings in *Highland I* and *Highland II* contravene most other circuits' positions on these issues. As the court noted in *Highland I*, its ruling on exculpation provisions directly conflicts with the Second, Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits' "reading [of] §524(e) to allow varying degrees of limited third-party exculpations." *See* 48 F.4th at 436. For example, the Ninth Circuit has held that "§524(e) does not bar a narrow exculpation clause … that is … focused on actions of various participants in the [p]lan approval process and relating only to that process." *Blixseth*, 961 F.3d at 1082. In so holding, the Ninth Circuit highlighted the fundamental "distinction between claims for the underlying debt"—which §524(e) addresses—and claims "relating specifically to the bankruptcy proceedings"—which an exculpation provision governed by §1123(b)(6) and §105(a) addresses. *Id.* at 1083. The Third Circuit likewise has concluded that a "commonplace" exculpation provision "does not come within the meaning of §524(e)" because such a provision "does not affect the liability of [exculpated] parties, but rather states the standard of liability under the [Bankruptcy] Code." *PWS*, 228 F.3d at 245. Similarly, the Eleventh Circuit has found that "[p]ursuant 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); *see also 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[.]"). In short, numerous courts of appeals disagree with the Fifth Circuit on not just *whom* an exculpation provision can protect, but *why* the provision is not so restricted.

In *Highland II*, the Fifth Circuit refused to "extend[] the *Barton* doctrine to give bankruptcy courts gatekeeping power over claims against non-debtors." 132 F.4th at 359. Instead, the court confined *Barton*'s scope to cover only trustees and other officers appointed by the bankruptcy court. *Id.* In doing so, the court acknowledged that "[o]ther circuits have extended the *Barton* doctrine to protect a wider variety of court-appointed and court-approved fiduciaries and their agents." *Id.* at 360 n.6; *see, e.g.*, *Yellowstone*, 841 F.3d at 1095 (expanding the *Barton* doctrine to members of an unsecured creditors' committee); *Lawrence*, 573 F.3d at 1270 (applying the *Barton* doctrine to the trustee's attorneys and creditors); *In re Lowenbraun*, 453 F.3d 314, 321-22 (6th Cir. 2006) (applying *Barton* to the trustee's attorney); *Gordon*, 1998 WL 559734, at *2 (extending the *Barton* doctrine to the debtor's managing partner).

The Fifth Circuit's approach to exculpation and gatekeeper provisions marks a departure from the prevailing interpretation in most other circuits and threatens a fundamental principle of bankruptcy law: uniformity. The Constitution demands "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, §8, cl. 4. In turn, this Court has recognized time and again that uniform interpretation and application of the complex Bankruptcy Code is critical. *See, e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012) ("The Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law."); *McKenzie v. Irving Tr. Co.*, 323 U.S. 365, 370 (1945) (noting that bankruptcy law is "intended to have uniform application throughout the United States"); *see also* Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 Colum. L. Rev. 1709, 1715-16 (2020) ("Where every relationship of a certain type is incomplete and requires judicial intervention upon the occurrence of the same event, a uniform bankruptcy system that deals with those relationships will produce consistency, efficiency, and market predictability."). "[D]ifferences in precedent" lead to inconsistent results and can "distort incentives for venue choice in certain cases." Anthony J. Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 Emory Bankr. Dev. J. 463, 480 (2021); *see also* Adam J. Levitin, Purdue*'s Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 Tex. L. Rev. 1079, 1128-50 (2022) (describing the various ways in which forum shopping "upsets Chapter 11's carefully calibrated balance between debtor and creditor rights").

B. The Fifth Circuit's position on the permissible scope of exculpation and gatekeeper provisions set forth in *Highland I* and *Highland II* is not only markedly out of step with other circuits, but plainly incorrect. In articulating its view, the court relied almost exclusively on 11 U.S.C. §524(e), but that provision plays no role in the inquiry. Section 524(e) provides 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). By its plain language, this provision only defines the effect of the "discharge of the debt of the debtor" and does not otherwise affect what a court can approve in a plan of reorganization.

In contrast, exculpation and gatekeeper provisions address liability of certain key parties for their actions during the bankruptcy case. Exculpation provisions protect a limited group of integral individuals and entities from suits alleging negligence in their assistance to the debtor throughout the bankruptcy proceedings. These provisions do "not affect the liability of [exculpated] parties, but rather state[] the standard of liability under the [Bankruptcy] Code." *PWS*, 228 F.3d at 245. Gatekeeper provisions, which allow the bankruptcy court to assess the colorability of claims before they may proceed against certain critical parties, similarly do not affect third-party liability, much less the effect of the debtor's discharge. Because §524(e) does not address the bankruptcy court's authority to protect third parties for their postpetition conduct, it is not relevant to the validity of both essential provisions. *See Blixseth*, 961 F.3d at 1083 (noting "the distinction between claims for the underlying debt and other claims, such as those relating specifically to the bankruptcy proceedings"); *Seaside*, 780 F.3d at 1078 ("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[.]").

Rather, both provisions are authorized and governed by §1123(b)(6) and §105(a) of the Bankruptcy Code, which grant bankruptcy courts broad authority over matters related to bankruptcy proceedings. *See United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990) (noting "the traditional understanding that bankruptcy courts, as courts of equity, have broad authority"). Section 1123(b)(6) provides that "a plan may … include any other appropriate provision not inconsistent with the applicable provisions of [Chapter 11]." 11 U.S.C. §1123(b)(6). Relatedly, §105(a) empowers a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code]." 11 U.S.C. §105(a). Exculpation and gatekeeper provisions protect key advisors who help "carry out" the Code's provisions, *id.*, and are "not inconsistent with" the Code, 11 U.S.C. §1123(b)(6). While §524(e) is silent on exculpation and gatekeeper provisions, the two more relevant statutes—§1123(b)(6) and §105(a)—plainly authorize them.

Other authority also contradicts the Fifth Circuit's cramped view of exculpation and gatekeeper provisions. Section 1125(e) of the Code provides that "[a] person that solicits acceptance … of a plan, in good faith and in compliance with the applicable provisions of this title … is not liable, on account of such solicitation … for violation of any applicable law, rule, or regulation governing solicitation of acceptance … of a plan." 11 U.S.C. §1125(e). Limiting exculpation provisions to the debtor, the creditors' committee, and trustees—and excluding any other non-debtor parties like the debtor's officers, attorneys, and financial advisors—"conflicts with" the "analogous protections" provided by §1125(e) to a "broad array of persons." *In re*

Astria Health, 623 B.R. 793, 799-800 (Bankr. E.D. Wash. 2021). Gatekeeper provisions, moreover, trace their authority to this Court's decision in *Barton*, which endorsed a leave-of-court requirement for suits against a receiver serving a trustee role. 104 U.S. at 128. The reasoning behind that doctrine applies equally to directors and officers of a debtor-in-possession, who are likewise serving in a fiduciary trustee role. *See* 11 U.S.C. §1107(a); *Baker Botts*, 576 U.S. at 124.

The Fifth Circuit also invoked this Court's holding in *Purdue*, but that case is likewise inapposite here. *Purdue* arose in the mass-tort context and involved a sweeping nonconsensual third-party release of prepetition conduct and future claims unrelated to the bankruptcy proceeding. 603 U.S. at 211. By contrast, the provisions at issue here concern third parties' postpetition conduct.

Moreover, unlike the broad release in *Purdue*, exculpation and gatekeeper provisions do not operate as absolute bars to liability. *See PWS*, 228 F.3d at 245 (An exculpation provision "does not affect the liability of [exculpated] parties, but rather states the standard of liability under the [Bankruptcy] Code."); *BlockFi Inc.*, 2025 WL 2024312, at *4 (Gatekeeper provisions function "as a procedural mechanism, not a substantive bar."). Therefore, *Purdue* has little if nothing to say about the issues presented here. *See*, *e.g.*, *Purdue*, 603 U.S. at 226 ("As important as the question we decide today are ones we do not."); *Smallhold*, 665 B.R. at 725 ("Nothing in *Purdue Pharma* can be read to call into question the kind of exculpation approved by the Third Circuit in *In re PWS*."); *BlockFi Inc.*, 2025 WL 2024312, at *5 ("The *Purdue* decision therefore has no bearing on the Court's findings in this case [regarding a gatekeeper provision].").

The Fifth Circuit's position on exculpation and gatekeeper provisions renders them generally meaningless and has seriously destabilizing consequences. These provisions are designed to protect third parties 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." *Chemtura*, 439 B.R. at 610. Given the "highly litigious" nature of Chapter 11 proceedings, *Blixseth*, 961 F.3d at 1094, a prohibition on such provisions would make it nearly impossible "to ensure that capable, skilled individuals are willing to assist in the reorganization efforts in chapter 11 cases," *Murray*, 623 B.R. at 501. After all, "who would want to work in such a messy, contentious situation, only to be sued for alleged negligence for less-than-perfect end results?" Ruling Tr. at 26; *see also 3 Norton Bankr. L. & Prac.* §49:1 (3d ed. 2021) (explaining that it is the "rare case in which the debtor has enough assets to pay all creditors in full"). The inevitable result of having fewer "capable, skilled individuals … willing to assist in … reorganization efforts" will be fewer successful Chapter 11 reorganizations—which preserve value, save jobs, and provide other welfare-maximizing benefits—and more conversions to Chapter 7 liquidation. Moreover, to the extent that some professionals remain willing to provide much-needed services, they would price the inevitability of postpetition litigation into the cost of those services, leaving an even smaller pie to be divided among creditors.

This is precisely the sort of case where the Court's intervention is warranted. The circuits are concededly split—on not one but two issues involving bankruptcy law, which the Constitution requires to be "uniform." The minority position is legally erroneous. The issues are exceptionally important, recurring, and have nationwide impact. And this case shows why these provisions are crucial if not necessary to successful reorganizations in Chapter 11 proceedings. Leaving critical advisors and other integral persons vulnerable to litigation by disgruntled parties will result in a marked decrease in those willing to assist debtors, fewer successful reorganizations, more Chapter 7 conversions, and smaller estates for the benefit of all creditors. That result has nothing to recommend it, underscoring the urgent need for this Court's review.

CONCLUSION

The Court should grant the petition.

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Respectfully submitted,

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