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 IN OPPOSITION

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QUESTIONS PRESENTED

This case stems from the 2021 approval of a bankruptcy plan incorporating two broad protections for non-debtors over the objection of potentially affected claimants: (1) an "exculpation provision" protecting a large group of entities beyond the debtor from liability for actions taken in connection with the bankruptcy; and (2) a "gatekeeper provision" requiring bankruptcy-court approval before legal action can proceed against an even broader group of entities and individuals. In 2022, the Fifth Circuit reversed the exculpation and gatekeeper provisions, mandating that these provisions be narrowed to protect only the debtor, the unsecured creditors committee and its members, and the debtor's independent directors. On remand, however, the bankruptcy court approved a revised bankruptcy confirmation plan that narrowed only the exculpation provision while leaving the gatekeeper provision unchanged. The NexPoint parties appealed the bankruptcy court's refusal to narrow the gatekeeper provision, but Highland Capital Management did not cross-appeal from the order confirming the revised plan and narrowing its exculpation clause. The Fifth Circuit held that the bankruptcy court erred by refusing to narrow the gatekeeper provision, and Highland is seeking certiorari from that decision on each of the following questions:

> 1. Whether the Fifth Circuit correctly limited the gatekeeper provision to protect only the debtor, the unsecured creditors committee and its members, and the debtor's independent directors.

2. Whether the Fifth Circuit correctly limited the exculpation provision to protect only the debtor, the unsecured creditors committee and its members, and the debtor's independent directors.

PARTIES TO THE PROCEEDING

Petitioner Highland Capital Management L.P. is the reorganized chapter 11 debtor in the bankruptcy proceedings and the appellee in the court of appeals. We will refer to the petitioner as "Highland" throughout this brief.

Respondents NexPoint Advisors L.P. and NexPoint Asset Management L.P. were the appellants in the court of appeals. We will refer to these respondents as "the NexPoint parties" or "NexPoint" throughout this brief.

RULE 29.6 DISCLOSURE STATEMENT

NexPoint Advisors L.P.'s majority owner is The Dugaboy Investment Trust and NexPoint Asset Management L.P.'s majority owner is Highland Capital Management Services Inc. No publicly held company owns 10 percent or more of either of those entities' ownership interests.

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BRIEF IN OPPOSITION

This Court has no authority to consider Highland's objections to the exculpation provision in the revised bankruptcy confirmation plan because Highland did not cross-appeal from the bankruptcy court's order adopting that plan. *See Swarb v. Lennox*, 405 U.S. 191, 201 (1972) ("In the absence of a cross appeal, the opposition is in no position to attack those portions of the District Court's judgment that are favorable to the plaintiff-appellants."); *Helvering v. Pfeiffer*, 302 U.S. 247, 251 (1937) ("[A]n appellee cannot without a cross-appeal attack a judgment entered below."). The Court should deny certiorari on Highland's second question presented for that reason alone.

The gatekeeper-provision issue is equally unworthy of this Court's review. The lower-court opinions that have ruled on the scope of the *Barton* doctrine regarding the ability of bankruptcy courts to require permission before litigation are entirely unreasoned, and no court has considered or discussed how this Court's recent decision in *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024), affects the permissible scope of gatekeeper clauses. The Court should wait for the lower courts to produce reasoned opinions and address the impact of *Purdue Pharma* before jumping in to resolve this issue.

OPINIONS BELOW

The opinion of the court of appeals in *In re Highland Capital Management, L.P.* (*Highland II*), which Highland is asking this Court to review, is reported at 132 F.4th 353 and reproduced at Pet. App. 1a–19a. The opinion of the court of appeals in the previous appeal (*Highland I*) is reported at 48 F.4th 419 and reproduced at Pet. App. 20a-54a.

The original order of the bankruptcy court confirming the plan of reorganization, which led to the appeal in *Highland I*, is unreported and reproduced at Pet. App. 85a–198a. The bankruptcy-court order confirming the revised bankruptcy confirmation plan after the Fifth Circuit's remand in *Highland I* is unreported and reproduced at Pet. App. 59a–84a.

JURISDICTION

The court of appeals entered its judgment on March 18, 2025, and denied rehearing on April 28, 2025. Pet. App. 199a–200a. Highland timely petitioned for certiorari on

July 28, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Bankruptcy Code are reproduced at Pet. App. 201a–214a.

STATEMENT

On October 16, 2019, petitioner Highland Capital Management L.P. ("Highland") filed for reorganization under Chapter 11 of the Bankruptcy Code. The bankruptcy process was contentious and led to many disputes between and among Highland's court-appointed management, the pre-bankruptcy litigation adversaries of Highland, and the owners of Highland, including its founder, James Dondero. Pet. App. 84a.

On February 22, 2021, the bankruptcy court confirmed a reorganization plan for Highland. Pet. App. 85a–198a. In addition to establishing a liquidation process, the plan draped non-debtors with protection from lawsuits, without the consent and over the objection of potentially affected claimants. The plan's "exculpation clause" insulated a litany of parties from liability (from the petition date onward) "in connection with or arising out of" the filing and administration of Highland's bankruptcy. Pet. App. 177a–178a.[1] This liability shield extended well be-

1. The exculpation clause still allowed these exculpated parties to be sued for bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct, but it insulated those parties from claims for simple negligence or breach of fiduciary duty arising

(continued…)

yond the debtor and covered its general partner, subsidiaries, managed funds, employees, officers, directors, and professionals; the three-member independent board the bankruptcy court appointed to manage Highland through bankruptcy; and the Unsecured Creditors Committee and its members and professionals. Pet. App. 66a–67a. Further, the plan exculpated all persons "related" to these specifically identified exculpated parties. *Id.* The plan defined these so-called "Related Persons" to include "all former, present, and future officers, directors, employees, managers, members, financial advisors, attorneys, accountants, investment bankers, consultants, professionals, advisors, shareholders, principals, partners, heirs, agents, other representatives, subsidiaries, divisions, and managing companies." Pet. App. 27a n.4; Fifth Amended Plan of Reorganization at 14, *In re Highland Cap. Mgmt., L.P.*, No. 19-34054-sgj-11 (Bankr. N.D. Tex. Nov. 24, 2020), Dkt. 1472.

The Plan also enjoined various parties—essentially, any entity or individual affiliated with Highland's equity owners, including Mr. Dondero—from pursuing any action against any of the exculpated parties arising from or relating to the bankruptcy proceedings, the plan, or the administration of the plan or the trusts created pursuant to the plan, without first seeking a ruling from the bankruptcy court that the action could proceed. Pet. App. 152a–154a; 179a–181a.

Embedded in the injunction provision is the "gatekeeper clause," which the Fifth Circuit correctly de-

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out Highland's bankruptcy or the administration of the court-confirmed plan. Pet. App. 177a–178a.

scribed as "perhaps the broadest gatekeeper injunction ever written into a bankruptcy confirmation plan." Pet. App. 19a. The clause required any enjoined party seeking to sue the protected parties to first obtain the bankruptcy court's determination that the action is "colorable." Pet. App. 181a. Under the plan, the bankruptcy court has the "sole and exclusive jurisdiction" to make this determination, and it retains that jurisdiction indefinitely. *Id.*

Several parties, including the NexPoint parties, appealed the bankruptcy court's confirmation order, arguing that the plan impermissibly protects non-debtors from lawsuits in violation of the Bankruptcy Code.

I. THE COURT OF APPEALS IN *HIGHLAND I* REJECTS THE EXCULPATION AND GATEKEEPER PROVISIONS AND MANDATES THEIR NARROWING

On appeal, the Fifth Circuit disapproved the exculpation and gatekeeper clauses to the extent they protected non-debtors from future lawsuits, and held that these provisions must be limited to the debtor (Highland), the independent directors of the debtor, and the unsecured creditors committee and its members. Pet. App. 21a, 44a–54. In doing so, the Fifth Circuit characterized the interlocking provisions insulating entities and individuals adjacent to the bankruptcy from liability as the "protection provisions." Pet. App. 27a, 44a. In response to concerns that the opinion might be read to disapprove only the exculpation clause and not the gatekeeper provision, the court of appeals granted a rehearing petition and clarified that the plan's gatekeeper requirement was similarly overbroad. Pet. App. 7a, 21a. The Fifth Circuit remanded the case to

the bankruptcy court with instructions to revise the plan consistent with its opinion. Pet. App. 54a.

Both sides petitioned for certiorari in response to the Fifth Circuit's ruling in *Highland I*. Highland's petition argued that the Fifth Circuit had deepened a circuit conflict over a bankruptcy court's authority to exculpate non-debtors.[2] NexPoint's petition challenged the Fifth Circuit's decisions to exculpate the debtor's independent directors and shield protected parties from liability for conduct occurring after consummation of the plan.[3] The Court called for the views of the Solicitor General, who urged this Court to hold the petitions pending resolution of *Purdue Pharma*. *See Highland Cap. Mgmt., L.P. v. NexPoint Advisors, L.P.*, Nos. 22-631 & 22-669 (S. Ct.), Brief of Amicus Curiae at 11. The Court held both petitions for *Purdue* but denied certiorari after considering post-*Purdue* supplemental briefs submitted by the parties. *See Highland Cap. Mgmt., L.P. v. Nex-Point Advisors, L.P.*, 144 S. Ct. 2714 (2024) (Mem); *NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P.*, 144 S. Ct. 2715 (2024) (Mem). This concluded the appeal in *Highland I*.

II. THE BANKRUPTCY COURT CONFIRMS A REVISED PLAN THAT NARROWED THE EXCULPATION PROVISION BUT LEFT THE GATEKEEPER CLAUSE UNCHANGED

In response to the Fifth Circuit's ruling and remand in *Highland I*, the bankruptcy court confirmed a revised

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2. *See Highland Cap. Mgmt., L.P. v. NexPoint Advisors, L.P.*, No. 22-631 (S. Ct.), Petitioner for a Writ of Certiorari at (i).

3. *See NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P.*, No. 22-669 (S. Ct.), Petition for a Writ of Certiorari at (i).

plan that narrowed the exculpation provision but left the gatekeeper clause unchanged. Pet. App. 76a–83a. The NexPoint parties appealed the bankruptcy court's order confirming this revised plan and asked the Fifth Circuit to narrow the gatekeeper provision. Highland did not file a cross-appeal, so it did not (and could not) ask the Fifth Circuit to revise the narrowed exculpation clause or alter the revised bankruptcy confirmation plan in any way.

The Fifth Circuit once again reversed the plan with respect to the bankruptcy court's gatekeeper clause, holding that the bankruptcy court had ignored its mandate from *Highland I* that required narrowing of the gatekeeper provision. Pet. App. 14a. The Fifth Circuit did not rule on the propriety or scope of the narrowed exculpation clause because Highland did not cross-appeal from the bankruptcy court's order confirming the revised plan. Highland therefore did not ask the Fifth Circuit to change the district court's order confirming the revised plan with the narrowed exculpation clause, and the Fifth Circuit lacked authority to consider any such change to the exculpation clause in the absence of an appeal from Highland. *See Helvering v. Pfeiffer*, 302 U.S. 247, 251 (1937) ("[A]n appellee cannot without a cross-appeal attack a judgment entered below.").

Highland petitioned for panel rehearing and rehearing en banc, but the Fifth Circuit denied both requests on April 28, 2025. Pet. App. 198a–199a.

III. THE FIFTH CIRCUIT AND THIS COURT DENY HIGHLAND'S ATTEMPTS TO STAY THE *HIGHLAND II* MANDATE

Highland asked the Fifth Circuit to stay the mandate in *Highland II* pending the petition for certiorari. But the Fifth Circuit denied this request, explaining that "the questions that Highland . . . would include in its petition for certiorari do not appear to be reviewable because they were not the subject of this appeal." Pet. App. 56a; *see also id.* (observing that the ruling in *Highland II* "merely confirmed the instruction that we had previously given" in *Highland I*); *id.* (observing that the "question actually raised" in the *Highland II* appeal was "whether the bankruptcy court properly implemented *Highland I*," which is "hardly a substantial question").

Highland then sought a stay from this Court. *See Highland Cap. Mgmt., L.P. v. NexPoint Advisors, L.P.*, No. 24A1154. Justice Alito granted an administrative stay but dissolved it eight days later after extensive briefing from the parties.

The mandate issued, and on August 29, 2025, the bankruptcy court modified the gatekeeper clause in accordance with the Fifth Circuit's instructions. *See* Order Approving Motion to Conform Plan at 2, *In re Highland Cap. Mgmt., L.P.*, No. 19-34054-sgj-11 (Bankr. N.D. Tex. Aug. 29, 2025), Dkt. 4378 (narrowing the parties protected by the gatekeeper provisions to the debtor, the unsecured creditors committee and its members, and the debtor's independent directors).

REASONS FOR DENYING THE PETITION

The Court cannot rule on the bankruptcy court's decision to narrow the exculpation clause in response to *Highland I* because Highland failed to appeal the bankruptcy court's order confirming the revised plan. So the court should deny certiorari on the exculpation-clause issues out of hand.

The issues surrounding the scope of the gatekeeper clause are not ready for this Court's review. The circuit court decisions addressing the scope of the *Barton* doctrine—concerning the ability of bankruptcy courts to require their permission before litigating certain cases—are entirely unreasoned. All of them are more than a decade and a half old. And none of them engage with or attempt to refute the Fifth Circuit's reasoning below. The lower courts should also have an opportunity to consider whether and how *Purdue Pharma* affects their analysis of these gatekeeper-clause issues before this Court grants certiorari to resolve them. The Court should deny certiorari and allow these issues to develop until the circuit courts disagree over the proper scope of gatekeeper clauses and address the implications of *Purdue Pharma*.

I. THE COURT CANNOT RULE ON THE EXCULPATION CLAUSE BECAUSE HIGHLAND DID NOT FILE A CROSS-APPEAL

1. Highland and its amici claim that the circuits are divided on whether section 524(e) of the Bankruptcy Code prohibits the type of exculpation clause that appeared in the original bankruptcy confirmation plan. *See* Pet. at 16–19; Brief for *Amici Curiae* Professors Anthony J. Casey et al., in Support of Petitioner ("Amici Br.") at 15–23. The

Fifth Circuit held in *Highland I* that section 524(e) allows exculpation clauses to shield only the debtor, the unsecured creditors committee and its members, and the independent directors of the debtor from lawsuits. Pet. App. 21a, 44a–54a. But Highland claims that other circuits allow exculpation clauses to protect a broader range of parties,[4] and its amici present an elaborate argument explaining why exculpation clauses of this scope are "necessary and commonplace" in Chapter 11 reorganization plans.[5]

Unfortunately for Highland, this Court cannot consider or resolve any of these issues. That is because Highland failed to cross-appeal from the bankruptcy court's order confirming the revised plan, which narrowed the exculpation clause in accordance with the Fifth Circuit's instructions in *Highland I*. Pet. App. 76a. Only the NexPoint parties appealed from the bankruptcy-court order confirming this revised plan,[6] and they asked the Fifth Circuit only to narrow the gatekeeper clause that the bankruptcy court had refused to modify in response to the Fifth Circuit's remand.[7] Highland cannot ask the appellate courts to modify the narrowed exculpation clause when it failed to cross-appeal from the bankruptcy court's order that adopted this exculpation provision. *See Helvering*, 302 U.S. at 251 ("[A]n appellee cannot without a cross-appeal attack a judgment entered below."). High-

4. Pet. at 16–19; *see also* Amici Br. at 16–17; Pet. App. 47a (describing this circuit split).
5. Amici Br. at 5–12.
6. Pet. App. 1a.
7. Appellants' Opening Brief at 2, *In re Highland Cap. Mgmt. L.P.*, No. 23-10534 (5th Cir. Aug. 15, 2023), Dkt. 32.

land can only defend what the bankruptcy court did against NexPoint's efforts to modify the revised confirmation plan on appeal. *See United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924) ("[T]he appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary. . . . But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record"). Highland can defend the gatekeeper provision that appears in the bankruptcy court's revised plan against NexPoint's efforts to narrow it on appeal. But it cannot attack the narrowed exculpation clause that the bankruptcy court adopted in the absence of a cross-appeal.[8]

Highland's failure to appeal presents a fatal and insurmountable obstacle to this Court's review of the exculpation clause. *See Greenlaw v. United States*, 554 U.S. 237, 244–45 (2008) ("This Court, from its earliest years, has recognized that it takes a cross-appeal to justify a remedy

8. The earlier plan that the bankruptcy court confirmed on February 22, 2021, included a broad exculpation clause that Highland could have defended in the appeal that produced the ruling in *Highland I*. Pet. App. 147a–152a, 177a–178a. But that appeal came to an end when this Court denied certiorari on July 2, 2024. *See Highland Cap. Mgmt., L.P.*, 144 S. Ct. 2714; *NexPoint Advisors, L.P.*, 144 S. Ct. 2715. Highland's current petition for certiorari arises from a separate and distinct appeal that NexPoint took from the bankruptcy court's order of February 27, 2023, which confirmed the *revised* plan with a narrowed exculpation clause that comports with *Highland I*. Pet. App. 59a–83a. So Highland is stuck with exculpation clause in the revised plan, and it needed to cross-appeal before asking this Court (or the Fifth Circuit) to alter the revised plan in any way.

in favor of an appellee."); *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 480 (1999) ("[I]n more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule."); *Morley Const. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191–92 (1937) (describing the cross-appeal rule as "inveterate and certain"). And Highland's petition does not flag this problem for the Court; its description of the appeal taken from the bankruptcy court's order confirming the revised plan is conspicuously silent on *who* appealed from this order—and (more importantly) *who did not* appeal. *See* Pet. at 12–13 ("On direct appeal from the bankruptcy court after remand (*Highland II*), the Fifth Circuit reversed").

Highland's failure to appeal from the bankruptcy court's order dooms its efforts to modify the exculpation clause, and that remains the case regardless of whether Highland's attorneys choose to acknowledge it. And this shortcoming also undermines Highland's claims that this case presents an "ideal vehicle" for resolving "two circuit splits at once," because Highland has not preserved wholly half of what it claims makes this case worthy of the Court's attention. Pet. at 30. Instead, this Court should reject review of the first question presented as well (regarding the gatekeeper provision), as Highland's failure to preserve portends a mess of parsing through those issues that Highland put forth here.

2. Even if Highland had preserved the exculpation issue by appealing the revised plan, certiorari would remain inappropriate because the lower courts have not yet considered the implications of *Purdue Pharma* for the type

of exculpation clause that appeared in the original bankruptcy confirmation plan. Highland and its amici insist that the nondebtor release that this Court nixed in *Purdue Pharma* is distinguishable from the exculpation clause that the Fifth Circuit narrowed in *Highland I*. Pet. at 1, 4, 18–19, 24–25; Amici Br. at 9–10. 21–22. But there is no question that this Court's decision in *Purdue Pharma* is *relevant to* bankruptcy court authority to protect nondebtors from litigation. The circuit courts should weigh in on *Purdue Pharma's* relevance and implementation, and this Court can then consider whether to resolve a disagreement thereon, if one emerges.

In *Purdue Pharma*, the Court was asked to decide whether Congress authorized a bankruptcy court, as part of a plan of reorganization, to release and enjoin parties other than the debtor corporation from litigation by third parties. 603 U.S. at 209. The Court granted certiorari to "resolve the circuit split" that had long divided the federal courts of appeals on that issue—the same division of authority that Highland says merits re-resolution now. *Compare id.* at 214 & n.1 *with* Pet. at 16–19. And the Court held that the bankruptcy court in *Purdue* was not permitted to release the non-debtors at issue in that case. 603 U.S. at 227.

Highland criticizes the Fifth Circuit—both in *Highland I* and its prior decision *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009)—for overreading Section 524(e) of the bankruptcy code to forbid complete or partial releases of liability of non-debtors. Pet. at 17–18. This Court in *Purdue Pharma* addressed many issues relevant to that holding. First, the Court held that any power to re-

lease parties from litigation must be grounded in some provision or provisions of the Bankruptcy Code. *See Purdue Pharma*, 603 U.S. at 215, 226.

Second, as Highland acknowledges (Pet. at 19), the Court looked to provisions of the code authorizing "discharge[s]" of liability, including Section 524(e), as an indication as to which parties a bankruptcy court may otherwise release from liability. *Purdue Pharma*, 603 U.S. at 215. And the Court determined "[g]enerally, too, the bankruptcy code reserves th[e] benefit [of a discharge] to 'the debtor'—the entity that files for bankruptcy." *Id.* at 221.

Third, Highland and its amici claim that code provisions other than Section 524(e) authorize bankruptcy courts to release or limit or require court permission before commencing litigation against parties who are not the debtor but who are associated with the bankruptcy. Pet. at 24, 29–30; Amici Br. at 7–8. They turn to Sections 1123(b)(6) and 105(a) of the code. Pet. at 29–30; Amici Br. at 7–8. But the Court in *Purdue Pharma* interpreted those provisions at length. 604 U.S. at 215–21. Section 1123(b)(6) of the code is a catch-all provision, allowing "other appropriate provision[s]" in a plan "not inconsistent with the applicable provisions of this title," at the end of the sequence of specific authorizations. 11 U.S.C. § 1123(b)(6). The Court held that Section 1123(b)(6) is informed and hemmed in by the specific references that precede it. And "[e]ach of those 'other' paragraphs authorizes a bankruptcy court to adjust claims without consent *only to the extent such claims concern the debtor*." 603 U.S. at 218–19 (emphasis added).

Section 105(a) of the code deserved even less attention as an independent source of authority to release parties other than the debtor, and this Court addressed it in a footnote. It is not an independent source of authority, but "serves only to 'carry out' authorities expressly conferred elsewhere in the code." *Id.* at 216 n.2.

If a circuit court is going to ground the authority to release or to regulate litigation against parties other than debtor in Sections 1123(b)(6) and 105(a) of the code, those circuit courts should do so only after considering this Court's guidance on how those terms should be interpreted. That updated and informed statutory analysis—with the benefit of this Court's *Purdue Pharma* decision—has thus far occurred only in the Fifth Circuit and is not yet subject to a disagreement among the circuit courts.

Fourth, Highland implies that the Court already has counseled lower courts against considering the extensive statutory analysis therein as relevant to anything other than the precise release at issue in *Purdue Pharma* itself. *See*, *e.g.*, Pet. at 24, 27. Highland quotes the Court: "As important as the question we decide today are ones we do not." *Purdue Pharma*, 603 U.S. at 226. What Highland leaves out is the Court's specification of the questions it did not address, and they concerned situations where claimants against non-debtors were "consenting" to the releases or the unwinding of plans that were not stayed. *Id.* at 226–27. The Court then reemphasized that it was holding "that the bankruptcy code does not authorize a release and injunction that . . . effectively seeks to discharge claims against a nondebtor without the consent of

affected claimants." *Id.* at 227. And that holding is certainly relevant to the circuit courts permitting or forbidding releases of litigation against the swath of parties beyond the debtor at issue in this case. Any lower court disagreement on these issues is not current until there are competing decisions informed by this Court's analysis in *Purdue Pharma*.

II. THE GATEKEEPER CLAUSE ISSUES ARE NOT CERTWORTHY

The Fifth Circuit's opinion in *Highland II* holds that the gatekeeper clause in Highland's bankruptcy confirmation plan, like the exculpation provision, may protect only the debtor, its independent directors, and the unsecured creditors committee and its members. *See* Pet. App. 9a; *see also id.* at 13a ("[W]e have never extended the *Barton* doctrine to give bankruptcy courts gatekeeping power over claims against non-debtors."). Highland claims that the Fifth Circuit's stance conflicts with rulings from other circuits that allow gatekeeper clauses to sweep more broadly,[9] and the Fifth Circuit itself acknowledged that other circuits allow gatekeeper clauses to protect "a wider variety of court-appointed and court-approved fiduciaries and their agents." Pet. App. 13a–14a n.6; *see also id.* (citing authorities). But the gatekeeper-clause issues are not ready for this Court's resolution, and the Court should allow the lower courts to continue wrestling with these issues before jumping into the mix.

To begin, the opinions from the courts that have weighed in on the permissible scope of gatekeeper pro-

9. Pet. App. 19a–22a.

visions do not present the type of sharpened and reasoned conflict that this Court generally seeks to resolve. Reflecting the undeveloped state of the law on this issue, the opinion in *Highland II* observes only that the Fifth Circuit "ha[s] never extended the *Barton* doctrine to give bankruptcy courts gatekeeping power over claims against non-debtors." Pet. App. 13a. The *Highland II* opinion also implies (although it never asserts) that the holding of *Purdue Pharma* counsels against using gatekeeper clauses to protect non-debtors from lawsuits. Pet. App. 10a.[10] The Fifth Circuit notes that other circuit courts may have

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10. The relevant passage discussing the impact of *Purdue Pharma* reads as follows:

> In accordance with this principle, the Supreme Court held recently in *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024), 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 the affected claimants." *Id.* at 227. Even before *Purdue Pharma*, this court had held the same: 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. *See, e.g.*, *In re Pac. Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009) (Fifth Circuit case law "seem[s] broadly to foreclose non-consensual non-debtor releases and permanent injunctions."); *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1059, 1061–62 (5th Cir. 2012); *In re Zale Corp.*, 62 F.3d [746,] 760 [(5th Cir. 1995)] ("[W]e must overturn a § 105 injunction if it effectively discharges a nondebtor.").

Pet. App. 11a–12a.

allowed gatekeeper provisions to extend further, but does not engage with the reasoning of those courts. Pet. App. 13a–14a n.6.

That is because there is no reasoning of those other circuit opinions with which to engage. Those opinions are old, precede *Purdue*, and do not sharpen any conflict in reasoning over the proper scope of gatekeeper clauses. *Lawrence v. Goldberg*, 573 F.3d 1265 (11th Cir. 2009), for example, holds that the *Barton* doctrine requires bankruptcy courts to preclear lawsuits brought against bankruptcy trustees and their court-appointed counsel. *See id.* at 1269. But the opinion in *Lawrence* provides no reasons for why the *Barton* doctrine should extend to these individuals; it merely cites a previous decision from the Eleventh Circuit that is equally bereft of reasoning on this point. *See id.* (citing *Carter v. Rodgers*, 220 F.3d 1249, 1253 (11th Cir. 2000)).

In re Lowenbraun, 453 F.3d 314 (6th Cir. 2006), offers nothing more than a bald assertion that "the *Barton* doctrine . . . applies to trustees' counsel as well as to trustees themselves," *id.* at 321, along with a citation of an earlier Sixth Circuit case that had declared (in conclusory fashion) that the bankruptcy trustee's counsel and court-appointed officers who represent the estate "are the functional equivalent of a trustee" whenever they "act at the direction of the trustee and for the purpose of administering the estate or protecting its assets." *In re DeLorean Motor Co.*, 991 F.2d 1236, 1241 (6th Cir. 1993). Finally, *Gordon v. Nick*, 162 F.3d 1155 (4th Cir. 1998) (Table) (per curiam), simply repeats this quote from *DeLorean* as its sole justification for extending the *Barton* doctrine to the

bankruptcy trustee's attorney and "other court-appointed officers who represent the bankruptcy estate." *Id.* None of these circuit-court decisions have presented a reasoned argument for why gatekeeper clauses should or should not extend to these individuals and entities beyond the debtor itself. And none of these opinions have considered, engaged, or made any attempt to refute a contrary view. The Court should wait until the lower-court opinions produce a thoughtful and thorough discussion that will inform this Court's analysis.

The Court also should wait until the lower courts have an opportunity to address whether (and to what extent) the holding of *Purdue Pharma* affects the permissible scope of gatekeeper provisions. Highland and its amici are correct to observe that *Purdue Pharma* does not resolve this issue,[11] but that does not mean that *Purdue Pharma* is irrelevant when deciding whether and how a bankruptcy court may regulate litigation against parties beyond the debtor or the limited other individuals the Fifth Circuit permitted below. *Purdue Pharma* suggests that bankruptcy courts should (at the very least) be cautious before shielding or absolving non-debtors from future litigation, as these individuals have not placed their assets into a bankruptcy estate and therefore cannot claim the "bargain" that the Bankruptcy Code offers to those who wish to thwart or cancel the enforcement of existing legal claims against them. *See Purdue Pharma*, 603 U.S. at 209. That is the principle that undergirds the holding of *Purdue Pharma*, and it is instructive for any court that must decide whether to approve an exculpation provision or a

11. Pet. at 21; Amici Br. at 16.

gatekeeper clause. The Court should allow the lower courts and litigants to consider the impact of *Purdue Pharma* before granting certiorari to rule on the permissible scope of gatekeeper provisions.

Finally, it is far from clear that there is any conflict between the law of the Fifth Circuit and the holdings of *Lawrence*, *DeLorean*, and *Gordon*. The Fifth Circuit's opinion in *Highland II* acknowledges that the *Barton* doctrine extends not only to bankruptcy trustees but to any other "'bankruptcy-court-appointed officer'"—and that it requires bankruptcy courts to pre-approve lawsuits brought against these individuals "'for acts done in the actor's official capacity' in a bankruptcy proceeding." Pet. App. 12a (quoting *Villegas v. Schmidt*, 788 F.3d 156, 159 (5th Cir. 2015)). Yet this statement tracks the Fourth, Sixth, and Eleventh Circuits' approach to the *Barton* doctrine, as each of these courts requires judicial preclearance for lawsuits brought against "court-appointed" bankruptcy officers when those claims arise from their conduct in the bankruptcy proceedings. *See Gordon*, 162 F.3d 1155 ("The *Barton* doctrine protects not only the trustee, but also other court-appointed officers who represent the bankruptcy estate"); *DeLorean*, 991 F.2d at 1241 ("We hold, as a matter of law" that the *Barton* doctrine applies to "counsel for trustee [and] court appointed officers who represent the estate"); *Lawrence*, 573 F.3d at 1269 ("[T]he *Barton* doctrine applies to actions against officers approved by the bankruptcy court when those officers function 'as the equivalent of court appointed officers.'" (quoting *Carter*, 220 F.3d at 1252 n.4)). And the Fifth Circuit did protect some parties beyond the debtor itself,

including the Court-appointed restructuring officer of the debtor and Court-appointed interim directors, even though they were not strictly trustees. Pet. App. at 49a–50a. The panel in *Highland II* apparently believed that there is daylight between the position that it staked out and the views espoused by these other courts,[12] but it is not at all apparent how the Fifth Circuit's description of the *Barton* doctrine in *Highland II* departs from the approaches taken in *Lawrence*, *DeLorean*, or *Gordon*. The Court should wait for the circuit courts to clarify and crystallize the disagreement (if any) before granting certiorari on this issue.

III. HIGHLAND'S POLICY ARGUMENTS DO NOT WARRANT CERTIORARI

Highland did not preserve the question presented regarding the power of bankruptcy courts to exculpate or release a wide range of parties beyond the debtor. The power of bankruptcy courts to require their permission before litigating against parties beyond the debtor has not been subject to a developed, reasoned, or recent split of authority in the lower courts and has not had the benefit of the lower courts examining the effects of *Purdue Pharma*.

Highland suggests that dire consequences will follow if bankruptcy courts cannot thwart or restrain lawsuits against service providers adjacent to the bankruptcy process—lawyers, accountants, financial advisors and

12. Pet. App. 13a n.6 ("Other circuits have extended the *Barton* doctrine to protect a wider variety of court-appointed and court-approved fiduciaries and their agents.").

others. Among other things, Highland and its amici worry that service providers will be reluctant to lend their efforts to the bankruptcy process or will charge higher fees for doing so. Pet. at 1–4, 15–16; Amici Br. at 2, 6–7.

As an initial matter, there is little justification for releasing or exonerating a wide swath of individuals and entities from meritorious litigation, as doing so would countermand the congressional, state legislative, and other judicial policy decisions to attach liability to certain conduct. With this case presenting "perhaps the broadest gatekeeper injunction ever written into a bankruptcy confirmation plan" (Pet. App. 19a.), the damage to the statutory and common law principles of civil liability guiding the conduct of participants in economic transactions would not be mitigated by the tight bankruptcy court supervision that might accompany the debtor corporation or (perhaps) its court-appointed management.

Turning to the prospect of unmeritorious or frivolous litigation, bankruptcy service providers are not alone in facing this threat. As the Fifth Circuit explained when denying a stay pending a petition for certiorari in this court, the affected parties have "tools to seek relief from burdensome litigation, such as sanctions." Pet. App. 57a. Congress and the courts have provided several avenues for doing just that. *See, e.g.*, 28 U.S.C. § 1927; Fed. R. Civ. P. 11(b)(1); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991) (discussing courts' inherent powers to sanction litigants).

Nor has Highland identified a real prospect of service providers turning their back on the bankruptcy process. In the largest law firms, litigation partners handling

bankruptcies and restructurings have become some of the most profitable and highest paid among their colleagues. In this case alone, law firms and other service providers were paid more than nine-figures by the estate. The financial margins in this work hardly suggest that bankruptcy specialists are teetering on giving it up, with the possibility *vel non* of a litigation protection not provided for other lines of professional specialties making the difference.[13]

In any event, the Bankruptcy Code is not the solution to all the world's problems, and this Court has consistently emphasized a cautious and narrowly circumscribed approach to interpreting judicial powers in bankruptcy matters. *See Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017). As the Court instructed in *Purdue*, "if a policy decision . . . is to be made, it is for Congress to make." 603 U.S. at 226. Bankruptcy law simply does not provide bankruptcy courts "a roving commission to resolve all [collective action] problems that happen its way, blind to the role other mechanisms," like legislation, "play in addressing them." *Id.* at 220.

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13 The instant case also does not present some extraordinary threat of unmeritorious litigation that requires the Court's special attention. The claims that Mr. Dondero or his associated entities are litigious arise from them objecting to aspects of the bankruptcy process, as it was occurring, before the bankruptcy court. Pet. at 6, 8, 31. The only affirmative litigation arising from this bankruptcy process has been initiated by the debtor and its trustee — as plaintiff — and against Mr. Dondero's associated entities as defendants.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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