No. 25-119

In the Supreme Court of the United States

HIGHLAND CAPITAL MANAGEMENT, L.P., PETITIONER

v.

NEXPOINT ADVISORS, L.P., ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

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.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

INTRODUCTION

In *Harrington* v. *Purdue Pharma L.P.*, 603 U.S. 204 (2024), this Court held 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," including claims arising from events predating the bankruptcy, "without the consent of affected claimants." *Id.* at 227. This case involves related questions about whether the Bankruptcy Code authorizes a bankruptcy court to shield nondebtors from claims related to the bankruptcy proceeding itself without the potential claimants' consent. In 2023, when this case previously came to the Court on

petitions for writs of certiorari from both sides raising largely the same issues, the Solicitor General responded to this Court's invitation to file a brief by advising the Court to hold the petitions pending its resolution of *Purdue*. The Court did so and then, after deciding *Purdue*, denied those petitions.

The Court should again deny review. Although respondents err in contending that one of the two questions presented is unreviewable in light of the case's procedural posture, they are correct that review of both questions would be premature. As before, the issues here overlap significantly but not completely with what the Court addressed in *Purdue*. But the courts of appeals—including the Fifth Circuit in its two decisions in this case—have not yet had a meaningful opportunity to apply *Purdue* to the kinds of nondebtor protections at issue here. The questions presented are complex and very likely to recur. The Court should allow them to percolate in the lower courts before endeavoring to resolve them.

STATEMENT

1. a. "Congress' power under the [Constitution's] Bankruptcy Clause contemplates an adjustment of a failing debtor's obligations" and the distribution of "the property of the debtor among his creditors." *Railway Labor Execs.' Ass'n* v. *Gibbons*, 455 U.S. 457, 466 (1982) (brackets, citations, and internal quotation marks omitted). Bankruptcy is thus the "subject of the relations between a[] * * * debtor and his creditors, extending to his and their relief." *Wright* v. *Union Cent. Life Ins. Co.*, 304 U.S. 502, 513-514 (1938) (citation omitted). The Bankruptcy Code seeks to give the honest but unfortunate debtor a "'fresh start'" while ensuring the maximum possible "equitable distribution" to creditors by

exercising "jurisdiction over all of the debtor's property." *Central Va. Community Coll.* v. *Katz*, 546 U.S. 356, 363-364 (2006); see *Stellwagen* v. *Clum*, 245 U.S. 605, 617 (1918).

That fresh start comes primarily from the debtor's ability to receive a discharge of its pre-bankruptcy debts, except for those that Congress deemed nondischargeable, such as an individual debtor's debts "for money * * * to the extent obtained by * * * fraud." 11 U.S.C. 523(a)(2)(A); see 11 U.S.C. 1141(d). The Code thus "releases *a debtor* from personal liability with respect to any discharged debt by voiding any past or future judgments on the debt and by operating as an injunction to prohibit creditors from attempting to collect or to recover the debt." *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440, 447 (2004) (emphasis added). Such a discharge is powerful: It "voids any judgment * * * , to the extent that such judgment is a determination of the personal liability of the debtor" with respect to a discharged debt; it "operates as an injunction against" any action "to collect, recover or offset any such debt as a personal liability of the debtor"; and, with certain exceptions, it "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, [certain] property of the debtor * * * acquired after the commencement of the case." 11 U.S.C. 524(a). But the Code states 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).

b. Two years ago, in *Purdue*, *supra*, this Court considered whether a Chapter 11 reorganization plan could include a broad release and injunction shielding *non-*

debtors from claims by third parties to the bankruptcy without those third parties' consent. See 603 U.S. at 209. Before *Purdue*, the courts of appeals had disagreed over the permissibility under the Code of such nonconsensual "third-party releases." See *id.* at 214 & n.1.

This Court held that the 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*, 603 U.S. at 227. The Court explained that the owners of the debtor there (members of the Sackler family) were nondebtors who sought "what essentially amounts to a discharge," even though a discharge generally "operates only for the benefit of the debtor against its creditors and 'does not affect the liability of any other entity.'" *Id.* at 215 (quoting 11 U.S.C. 524(e)). The Court held that 11 U.S.C. 1123(b), which governs matters that bankruptcy courts may include in reorganization plans, did not authorize the release of claims against the Sacklers. See *Purdue*, 603 U.S. at 215-224. It observed that the first five paragraphs of Section 1123(b) were inapplicable because "[t]hey permit a plan to address claims and property belonging to a debtor or its estate" and "to modify the rights of creditors who hold claims against the debtor or its estate." *Id.* at 216. In light of that focus on "*the debtor*" and "its relationship with its creditors," the Court declined to read the final "catchall" paragraph of Section 1123(b) as authorizing a third-party release like the Sacklers'. *Id.* at 218; see 11 U.S.C. 1123(b)(6) (authorizing the court to "include any other appropriate provision not inconsistent with the applicable provisions of [the Code]"). Nor, the Court concluded, did Section 105(a) of the Code support the release, because that provision "serves only

to 'carry out' authorities expressly conferred elsewhere in the code." *Purdue*, 603 U.S. at 217 n.2 (citation omitted); see 11 U.S.C. 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code].").

Justice Kavanaugh dissented, joined by the Chief Justice and Justices Sotomayor and Kagan. *Purdue*, 603 U.S. at 227-278. In disputing, among other things, the majority's reading of Section 1123(b)(6), the dissent noted that bankruptcy courts regularly grant "other kinds of non-debtor releases" under that provision, including "[e]xculpation clauses [that] shield the estate's fiduciaries and other professionals (non-debtors) from liability for their work on the reorganization plan." *Id.* at 262, 264.

c. This case concerns provisions, including an exculpation clause, that relieve nondebtors from liability for certain actions taken after the commencement of a bankruptcy case. Only a single provision of the Code expressly addresses such relief. Section 1125(e) provides that a person who, "in good faith and in compliance with the applicable provisions of [the Code]," "solicits acceptance or rejection of a plan" or participates in "the offer, issuance, sale, or purchase of a security, offered or sold" in connection with the plan "is not [thereby] liable * * * for violation of any applicable law * * * governing solicitation of acceptance or rejection of a plan or" those securities transactions. 11 U.S.C. 1125(e). The exculpation clause at issue here covers a broad range of conduct that does not fall within the terms of Section 1125(e).

2. a. Petitioner Highland Capital Management, L.P. is an investment firm that was co-founded by James Dondero. Pet. App. 2a. In 2019, when petitioner filed a

bankruptcy petition seeking to reorganize under Chapter 11, Dondero was serving petitioner as a director and officer. *Ibid.*

Despite allegations of management misconduct, the bankruptcy "did not proceed under the governance of a traditional Chapter 11 trustee." Pet. App. 23a. Instead, the Unsecured Creditors' Committee negotiated an agreement with Dondero under which he would "step[] down as director and officer of [petitioner]" to serve as an "unpaid portfolio manager." *Ibid.* The creditors' committee then "selected a board of three independent directors to act as a quasitrustee and to govern" petitioner. *Id.* at 24a.

During the bankruptcy, Dondero proposed several reorganization plans that the creditors' committee and the independent directors opposed. Pet. App. 3a. When those plans failed, Dondero "began to frustrate the proceedings by objecting to settlements, appealing orders, seeking writs of mandamus, interfering with [petitioner's] management, threatening employees, and canceling trades between [petitioner] and its clients." *Ibid.* (quoting *id.* at 24a). The bankruptcy court held Dondero in civil contempt and sanctioned him. *Ibid.* Petitioner's independent directors insisted that he resign, which he did in October 2020. *Ibid.*

In the meantime, the creditors' committee and the independent directors agreed on a proposed reorganization plan. Pet. App. 3a. "Anticipating Dondero's continued litigiousness," the proposed plan included provisions to shield from certain lawsuits petitioner; its employees, general partner, and independent directors; the creditors' committee and successor entities; an oversight board tasked with managing certain assets after plan confirmation; professionals retained in the bank-

ruptcy case; and a broad universe of related persons. *Ibid.* (citation omitted); see *id.* at 3a-5a.

In its exculpation clause, the confirmed plan permanently extinguished claims against the protected parties based on conduct relating to "(1) the filing and administration of the [bankruptcy] case, (2) the negotiation and solicitation of votes preceding the Plan, (3) the consummation, implementation, and funding of the Plan, (4) the offer, issuance, and distribution of securities under the Plan before or after the filing of the bankruptcy, and (5) any related negotiations, transactions, and documentation." Pet. App. 27a-28a (summarizing the clause); see *id.* at 177a-178a (reprinting the clause). The exculpation clause did not extend to actions by petitioner's general partner and its employees that predated the appointment of the independent directors, and it excepted claims arising from "acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct." *Id.* at 28a.

The plan's injunction provision enjoined individuals and entities that held claims against or equity interests in petitioner, and various other bankruptcy participants, from interfering with the implementation or consummation of the plan. Pet. App. 4a-5a; see *id.* at 179a-180a (reprinting the provision).

The paragraph with the injunction provision also included a so-called "gatekeeper" provision. See Pet. App. 5a-6a, 70a, 152a-153a; see *id.* at 180a-181a (reprinting the provision). As to claims that related to the bankruptcy case but were not extinguished by the exculpation clause, the gatekeeper provision precluded the enjoined parties from filing a claim against a bankruptcy participant without seeking leave from the bankruptcy court and obtaining that court's determination, as the

gatekeeper, that the "claim or cause of action is colorable." *Id.* at 72a, 181a.

b. Dondero and several other interested parties objected to the plan, including to the exculpation, injunction, and gatekeeper provisions. Pet. App. 6a. Among the objectors were two entities owned or controlled by Dondero: respondents NexPoint Asset Management, L.P. and NexPoint Advisors, L.P. *Ibid.* The United States Trustee also objected to the exculpation clause, explaining that it constituted an impermissible nonconsensual release of nondebtors' claims against other nondebtors that extended beyond the parties who could be protected by common-law immunity. See *ibid.*; Bankr. Ct. Doc. 1671, at 4 (Jan. 5, 2021).[1]

The bankruptcy court confirmed the plan, as modified in respects that are not material here. See Pet. App. 84a-197a. The court concluded that the exculpation clause was justified by Dondero's "prior litigious conduct." *Id.* at 151a-152a. In particular, the court found that the costs that the exculpated parties "might incur defending against" the claims covered by the provisions were "likely to swamp either the [e]xculpated [p]arties or the reorganization." *Id.* at 151a (citation omitted). The court also observed that the exculpation clause was consistent with Fifth Circuit decisions recognizing a limited form of qualified immunity for creditors' committee members and bankruptcy trustees. *Id.* at 147a-152a. In approving the exculpation and gatekeeper provisions in their entirety, the court invoked general provisions of the Code recognizing bankruptcy courts' re-

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[1] The United States Trustee is a Department of Justice official, appointed by the Attorney General, 28 U.S.C. 581(a)(6), who "may raise and may appear and be heard on any issue in any case or proceeding under [the Code]," 11 U.S.C. 307.

sidual equitable authority over bankruptcy proceedings. *Id.* at 156a-157a.

3. a. On direct appeal from the bankruptcy court to the Fifth Circuit under 28 U.S.C. 158(d)(2), the court of appeals reversed the bankruptcy court's confirmation order in part and affirmed in part. Pet. App. 20a-54a. Like the parties and the decision below, we refer to that appeal and that decision as *Highland I*.

With respect to the exculpation clause, *Highland I* applied circuit precedent holding that 11 U.S.C. 524(e) "categorically bars third-party exculpations absent express authority." Pet. App. 47a. The court of appeals also rejected petitioner's contention that, as some other courts of appeals have found, the requisite authority is provided by 11 U.S.C. 105(a) and 1123(b)(6). Pet. App. 46a, 48a. The court explained, however, that the "limited qualified immunity" that it viewed as applying to "creditors' committee members for actions within the scope of their statutory duties" and to "bankruptcy trustees unless they act with gross negligence" could provide a "source[] of authority" for exculpating certain nondebtors. *Id.* at 48a-49a.

Consistent with that reasoning, *Highland I* vacated the exculpation clause to the extent that it protected entities beyond "the debtor, the creditors' committee and its members for conduct within the scope of their duties," and "the [bankruptcy] trustees within the scope of their duties." Pet. App. 50a. The court of appeals also determined that, although petitioner's estate was not governed by a trustee, the independent directors—who were "appointed to act together as the bankruptcy trustee for [petitioner]"—were "entitled to all the rights and powers of a trustee," including "limited qual-

ified immunity for any actions short of gross negligence." *Ibid.*

As originally issued, the court of appeals' opinion in *Highland I* then stated that the plan's "injunction and gatekeeper provisions are, on the other hand, perfectly lawful." 2022 WL 3571094, at *13. The court subsequently granted panel rehearing and amended that sentence to state, "We now turn to the Plan's injunction and gatekeeper provisions." Pet. App. 51a; see *id.* at 21a. Otherwise unchanged, the opinion then concluded that the overbreadth of the injunction provision had been "resolved by * * * striking the impermissibly exculpated parties." *Id.* at 51a-52a. And the court held that the gatekeeper provision was lawful under the "*Barton* doctrine," named after this Court's decision in *Barton* v. *Barbour*, 104 U.S. 126 (1881), which allows a bankruptcy court to require parties to "obtain leave of the bankruptcy court before initiating an action in district court when the action is against the trustee or other bankruptcy-court-appointed officer, for acts done in the actor's official capacity." Pet. App. 53a (citation omitted); see *Barton*, 104 U.S. at 128.

b. Both petitioner and respondents filed petitions for writs of certiorari seeking this Court's review of the Fifth Circuit's rulings in *Highland I* on the exculpation provision. See Pet. 11. At the invitation of this Court, the Solicitor General filed an amicus curiae brief recommending that the petitions be held pending this Court's resolution of *Purdue*. See 22-631 U.S. Cert. Amicus Br. 1, 9, 13. Several months later, after the Court decided *Purdue*, it denied both petitions. See 144 S. Ct. 2714 (No. 22-631); 144 S. Ct. 2715 (No. 22-669).

4. On remand from the Fifth Circuit, the bankruptcy court narrowed the scope of the plan's exculpation

clause in accordance with the court of appeals' instructions. Pet. App. 76a (limiting exculpated parties to the debtor, independent directors, and the creditors' committee and its members). But the bankruptcy court declined to modify the gatekeeper provision, which the court viewed as unaffected by the court of appeals' decision in *Highland I*. *Id.* at 82a-83a.

5. a. Respondents (and only respondents) appealed to the Fifth Circuit under 28 U.S.C. 158(d)(2), contending that the bankruptcy court had erred by failing to narrow the gatekeeper clause in parallel with the exculpation clause and that even a narrowed gatekeeper clause would exceed the bankruptcy court's authority. Pet. App. 8a-9a. The court of appeals reversed. *Id.* at 1a-19a. We refer to that appeal and that decision as *Highland II*.

In *Highland II*, the court of appeals held that the bankruptcy court had failed to implement the "instructions in *Highland I* when it declined to narrow" the gatekeeper clause. Pet. App. 9a. After noting this Court's decision in *Purdue*, the court of appeals explained that it had "never extended the *Barton* doctrine to give bankruptcy courts gatekeeping power over claims against nondebtors" besides the trustee and other court-appointed officers. *Id.* at 13a; see *id.* at 11a-12a. The court further stated that its prior opinion in *Highland I*, particularly as amended on panel rehearing, was best read to direct the bankruptcy court to narrow the exculpation and gatekeeping provisions *pari passu*. *Id.* at 14a-18a. "Any other reading," the court explained, "would improperly grant the bankruptcy court authority to enforce what is perhaps the broadest gatekeeper injunction ever written into a bankruptcy confirmation plan." *Id.* at 19a.

b. Petitioner filed a petition for rehearing en banc and a motion to stay the court's mandate pending the filing and disposition of a petition for a writ of certiorari, both of which were denied by the court of appeals. Pet. App. 55a-58a, 198a-199a. Petitioner renewed its stay request in this Court, and Justice Alito denied the stay application. 2025 WL 1621149 (No. 24A1154).

DISCUSSION

Petitioner contends (Pet. 28-30) that the court of appeals erred in narrowing the scope of the reorganization plan's exculpation and gatekeeper clauses in *Highland I* and *II*. Respondents contend (Br. in Opp. 9-21) that this Court cannot consider the exculpation issue in this case's current posture and that, in any event, the Court's review of the questions presented would be premature. In the view of the United States, respondents are incorrect on the first point but correct on the second. The authority of bankruptcy courts to use exculpation and gatekeeping to protect participants in bankruptcy proceedings from litigation is an important question of bankruptcy law. But the Court should deny review in order to afford the lower courts an opportunity to apply this Court's recent and highly relevant guidance in *Harrington* v. *Purdue Pharma L.P.*, 603 U.S. 204 (2024), to the kinds of nondebtor protections at issue here.

1. As a threshold matter, this Court would have authority to review, at petitioner's behest, both questions presented. Respondents contend (Br. in Opp. 10) that the Court "cannot consider or resolve" the second question, regarding the scope of the exculpation provision, because the court of appeals resolved that issue in *Highland I* and petitioner did not cross-appeal to reraise that issue in *Highland II*. Respondents invoke the "cross-appeal rule," under which "an appellate court

may not alter a judgment to benefit a nonappealing party." *Greenlaw* v. *United States*, 554 U.S. 237, 244 (2008).

Even assuming—as respondents imply[2]—that the cross-appeal rule is jurisdictional, cf. *Greenlaw*, 554 U.S. at 245 (declining to resolve that question), it does not apply here. It is true that petitioner, not having cross-appealed in *Highland II*, could not have obtained affirmative relief from the Fifth Circuit in its resolution of respondents' appeal, and if nobody had appealed, there would not even have been a *Highland II* decision. But in this Court, petitioner is seeking review on certiorari, so it is not a "nonappealing party" (*id.* at 244) to which the cross-appeal rule would apply. And petitioner may seek this Court's review of questions that were decided by the court of appeals in *Highland I* as well as in *Highland II*, contra Br. in Opp. 11 n.8. This Court has long maintained that it has "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (citing *Mercer* v. *Theriot*, 377 U.S. 152 (1964) (per curiam), and *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)); see *Panama R.R.* v. *Napier Shipping Co.*, 166 U.S. 280, 284 (1897) ("Upon such writ the entire case is before us for examination.").

That rule is consistent with the text of the certiorari statute, which grants this Court jurisdiction to review "[c]ases" in the courts of appeals, 28 U.S.C. 1254, not

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[2] Br. in Opp. 1 ("This Court has no authority"); *id.* at 9 ("The Court cannot rule"); *id.* at 11 ("a fatal and insurmountable obstacle").

just the most recent "judgment or decree" in a case, 28 U.S.C. 1254(1). The rule also serves judicial economy by enabling the Court generally to wait for cases to become final in the lower courts before deciding whether to grant review. See *National Football League* v. *Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (statement of Kavanaugh, J., respecting the denial of certiorari) (a case's "interlocutory posture is a factor counseling against this Court's review"). Respondents cite no precedent holding that the Court's authority to review the entire case on certiorari is contingent upon the petitioner's having cross-appealed in the appeal directly preceding the petition for certiorari. As petitioner notes, for example (Cert. Reply Br. 3), no such cross-appeal was taken by the petitioner in the second trip to the Ninth Circuit in *Garvey*. See 532 U.S. at 508; see also *Urie* v. *Thompson*, 337 U.S. 163, 171 (1949) (finding it unnecessary for petitioner, having lost an earlier appeal in an interlocutory posture, "to relitigate that claim a second time through the state courts in order to preserve it for our consideration on review of the final judgment rendered in the cause").

Requiring petitioner to have cross-appealed in *Highland II* in order to re-challenge the Fifth Circuit's narrowing of the exculpation clause in *Highland I* would have been an empty formality. Even without such a cross-appeal, the court made clear in *Highland II* that it was adhering to the views on exculpation that it had taken in *Highland I*. See Pet. App. 10a-19a.

Respondents' authorities (Br. in Opp. 10-12) are inapposite. Several merely applied the usual cross-appeal rule, holding that a court of appeals had erred by granting relief to a nonappealing party. See, *e.g.*, *Greenlaw*, 554 U.S. at 254 (court of appeals ordered an increased

criminal sentence in the absence of a government cross-appeal); *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479-482 (1999) (court of appeals reversed unappealed injunctions); *Morley Constr. Co.* v. *Maryland Cas. Co.*, 300 U.S. 185, 189-193 (1937) (court of appeals ordered new relief for a nonappealing party). But the Fifth Circuit did not grant any relief to petitioner in *Highland II*. In *Helvering* v. *Pfeiffer*, 302 U.S. 247 (1937), this Court refused to consider a claim that, unlike the exculpation issue here, had *never* been properly raised in the court of appeals. See *id.* at 250-251. And in *United States* v. *American Railway Express Co.*, 265 U.S. 425 (1924), the Court merely distinguished the cross-appeal rule from the principle that a prevailing, nonappealing party can *defend* a judgment on any ground "appearing in the record." *Id.* at 435. Respondents' invocation of the cross-appeal rule is misplaced.

2. Although respondents' jurisdictional objection is unfounded, the Court should nevertheless deny review.

a. Petitioner contends (Pet. 28-30) that the court of appeals erred in narrowing the reorganization plan's exculpation and gatekeeper provisions to protect only the debtor, the creditors' committee and its members, and the independent directors (excluding, for example, the debtor's general partner and various professionals who worked on the bankruptcy case). Petitioner principally faults (Pet. 2-3, 28-29) the court for holding that those broader protections were prohibited by 11 U.S.C. 524(e), which speaks only to the liability of nondebtors on the debt being discharged—not to their liability for post-petition conduct related to the bankruptcy proceedings, which is the subject of the exculpation and gatekeeper clauses. See *ibid.* (providing that a "discharge of a debt of the debtor" generally "does not af-

fect the liability of any other entity on, or the property of any other entity for, *such debt*") (emphasis added); cf. Pet. App. 7a, 11a-12a, 15a-16a.

Although petitioner's argument about Section 524(e) has force, deciding that issue—as petitioner appears to acknowledge, Pet. 29—would not resolve the more fundamental question whether bankruptcy courts have the requisite *affirmative* authority to exculpate nondebtors and to act as a gatekeeper for certain suits. For example, only one provision of the Bankruptcy Code expressly immunizes bankruptcy participants for certain post-petition conduct, see 11 U.S.C. 1125(e); p. 5, *supra*, and the exculpation clause here sweeps well beyond the scope of that provision. Courts "generally presume that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Intel Corp. Inv. Policy Comm.* v. *Sulyma*, 589 U.S. 178, 186 (2020) (brackets and citation omitted). Even if Section 524(e) does not directly prohibit exculpation and gatekeeper clauses like the ones at issue, it may reflect Congress's assumption that other liabilities of nondebtors are beyond the scope of the Code and therefore beyond the authority of bankruptcy courts to extinguish. This Court suggested as much in *Purdue*. See 603 U.S. at 215 ("Generally, * * * a discharge operates only for the benefit of the debtor against its creditors and 'does not affect the liability of any other entity.'") (quoting 11 U.S.C. 524(e)).

b. For affirmative authority, petitioner invokes (Pet. 29-30) 11 U.S.C. 105(a) and 1123(b)(6). But *Purdue* casts doubt on that theory. There, this Court agreed with the Second Circuit that "'§ 105(a) alone cannot justify' the imposition of nonconsensual third-party releases because it serves only to 'carry out' authorities expressly

conferred elsewhere in the code." *Purdue*, 603 U.S. at 217 n.2 (citation omitted). To be sure, Section 105(a) might have more purchase in this context insofar as the exculpation and gatekeeper provisions, unlike the release in *Purdue*, focus on the protected parties' conduct in the bankruptcy proceeding itself. See Pet. 30 (arguing that the provisions "protect the persons who are, in a quite literal sense, 'carry[ing] out' the other provisions of the Code") (brackets in original). But petitioner cites no authority adopting that subtle reading of Section 105(a).

As for Section 1123(b)(6), petitioner suggests that it authorizes the exculpation and gatekeeper provisions because they relate to the debtor and its bankruptcy. Pet. 30 (citing *Purdue*, 603 U.S. at 215-220). That elastic interpretation of Section 1123(b)(6) is difficult to square with *Purdue*. After all, the Sackler release surely related to Purdue and its bankruptcy: The released parties owned and controlled Purdue, and the release was a central element of Purdue's reorganization plan. See *Purdue*, 603 U.S. at 260 (Kavanaugh, J., dissenting) ("the non-debtor releases here did not just 'concern' the debtor, they were critical to the debtor's reorganization"). Yet the Court held that Section 1123(b)(6) did not authorize that release. And while petitioner cites *United States* v. *Energy Resources Co.*, 495 U.S. 545 (1990), that decision upheld under Sections 105(a) and 1123(b)(6) a plan provision that, unlike the provisions here, directly concerned a debtor's relationship with its creditors, by regulating the Internal Revenue Service's treatment of the debtor's tax payments. See *id.* at 547, 549-550.

c. Petitioner's arguments accordingly turn on whether Sections 105(a) and 1123(b)(6) authorize excul-

pation and gatekeeper provisions that protect a broad range of nondebtor participants in the bankruptcy proceeding. But those questions are not yet ready for this Court's resolution. The first and only time that the Court has closely interpreted the pertinent Code provisions was in *Purdue*, which is therefore highly relevant to the questions presented in this case. For example, the exculpation clause here arguably falls within the literal terms of the *Purdue* Court's holding 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. Justice Kavanaugh's dissenting opinion specifically flagged the potential relationship between the Court's holding and the lawfulness of such provisions. *Id.* at 264; see *In re Chemtura Corp.*, 439 B.R. 561, 611 (Bankr. S.D.N.Y. 2010) (describing exculpation clauses as "first cousins" of "'third-party releases'").

Because *Purdue* was decided less than two years ago, the lower courts have not had a meaningful opportunity to apply that decision's guidance to exculpation and gatekeeper clauses. Even the Fifth Circuit has not done so. *Purdue* had not yet been decided at the time of *Highland I*, and the court of appeals discussed *Purdue* only in passing in *Highland II*, see Pet. App. 11a. *Purdue* may also prompt consideration about whether sources of law besides Sections 105(a) and 1123(b)(6) authorize some degree of exculpation or gatekeeping. See, *e.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) (holding that Section 1103(c) of the Code contains an implicit "limited grant of immunity to [creditors'] committee members"); see also 11 U.S.C. 1103(c) (enumerating the powers of such committees).

Absent some special need for expedition, this Court generally resolves legal questions only after they have been aired and decided in multiple courts of appeals. See *Trump* v. *CASA, Inc.*, 606 U.S. 831, 855-856 (2025); *id.* at 899 (Sotomayor, J., dissenting). And the legality of nondebtor protections in bankruptcy proceedings is not a simple question to resolve, as the Court implicitly recognized when noting the limits of its decision in *Purdue* itself. See, *e.g.*, 603 U.S. at 226 ("As important as the question we decide today are ones we do not."). Similar caution counsels against taking up the questions presented now.

3. Nor is there a conflict in the lower courts that is otherwise ripe for this Court's resolution.

a. Petitioner contends that the Court's immediate review is necessary to resolve disagreement in the courts of appeals over whether 11 U.S.C. 524(e) bars courts from exculpating nondebtors for bankruptcy-related conduct. See Pet. i (discussing only Section 524(e) in the questions presented); Pet. 16-17 (citing *PWS Holding Corp.*, 228 F.3d at 245 (3d Cir.); *In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir.), cert. denied, 493 U.S. 959 (1989); *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009); *In re Dow Corning Corp.*, 280 F.3d 648, 657 (6th Cir.), cert. denied, 537 U.S. 816 (2002); *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 656 (7th Cir. 2008); *Blixseth* v. *Credit Suisse*, 961 F.3d 1074, 1083 (9th Cir. 2020), cert. denied, 141 S. Ct. 1394 (2021); and *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir.), cert. denied, 577 U.S. 823 (2015)).

Although petitioner suggests that *Highland I* imposes "a categorical bar to nondebtor exculpation," Pet. 17 (brackets and internal quotation marks omitted), the court of appeals did not entirely preclude bankruptcy

courts from exculpating nondebtors. See Pet. App. 50a (approving exculpation of creditors' committee and independent directors); see also *id.* at 14a (approving gatekeeping by the bankruptcy court for properly exculpated nondebtors). Moreover, as noted above, p. 16, *supra*, answering only the Section 524(e) question would accomplish little, because it would not suffice to resolve whether and to what extent the Code actually authorizes exculpation. As to that latter question, all of the cases that petitioner cites predate *Purdue*—indeed, most of them were part of the same conflict that supported review in *Purdue*. See 603 U.S. at 214 n.1 (citing *Pacific Lumber*, *Seaside Engineering*, *Airadigm*, *Dow Corning*, and *A.H. Robins*). The re-assertion of that same conflict simply reinforces the need for the courts of appeals to assess *Purdue*'s impact.

b. Petitioner also describes a conflict between the Fifth Circuit and several other circuits over the permissible scope of gatekeeper clauses. Pet. 20 & n.3 (citing *Gordon* v. *Nick*, 162 F.3d 1155 (4th Cir. 1998) (tbl.) (per curiam); *In re Lowenbraun*, 453 F.3d 314 (6th Cir. 2006); *In re Crown Vantage, Inc.*, 421 F.3d 963, 973 (9th Cir. 2005); and *Lawrence* v. *Goldberg*, 573 F.3d 1265 (11th Cir. 2009)). But all of those cases also predate *Purdue*, whose analysis of Sections 105(a) and 1123(b)(6) is relevant to gatekeeper clauses as well. While *Barton* v. *Barbour*, 104 U.S. 126 (1881), is cited in support of bankruptcy courts' authority to play a gatekeeping role, petitioner invokes (Pet. 30) Sections 105(a) and 1123(b)(6) as authority for the gatekeeper clause in this plan. None of the court of appeals cases that petitioner cites squarely addresses the extent to which Sections 105(a) and 1123(b)(6) authorize gatekeeping; three of the four

do not even cite those Code provisions. But see *Crown Vantage*, 421 F.3d at 975-977 (discussing Section 105(a)).

Furthermore, the gatekeeper clause here appears to protect a wider range of parties than was at issue in each of the other cases petitioner cites. Compare Pet. App. 72a (noting that this gatekeeper clause applied to "several parties that were not even in existence prior to [plan] confirmation"); *id.* at 19a (describing the clause as "perhaps the broadest gatekeeper injunction ever written into" a reorganization plan), with, *e.g.*, *Lawrence*, 573 F.3d at 1270 (approving gatekeeping for those who "functioned as the equivalent of court-appointed officers by helping the Trustee"). It is therefore unclear whether the clause would have been sustained in any circuit. Accordingly, neither of the asserted circuit conflicts is currently fit for this Court's resolution. But, given how "commonplace" gatekeeper clauses are, Pet. 22, and how "[b]ankruptcy courts continue to confront the need for nondebtor protections of various shapes and sizes," Pet. 27, this Court is likely to have future opportunities to consider the issues.

c. Petitioner asserts (Pet. 25-28) that exculpation and gatekeeping are important to protecting bankruptcy participants from vexatious litigation brought by disgruntled stakeholders like James Dondero. But petitioner nowhere suggests that even those broad exculpation and gatekeeper provisions actually succeeded in restraining Dondero while they were in effect. See Pet. 9 (noting that the original plan took effect upon confirmation in 2021).

Further percolation would be especially helpful because broad exculpation and gatekeeper clauses raise serious countervailing policy concerns. However salutary such nondebtor protections may be, they neces-

sarily risk barring meritorious legal claims, and they do so without a clear basis in the Code. For those reasons, the United States, in its capacities as both the Nation's largest creditor and watchdog of the bankruptcy system, regularly objects to excessively broad exculpation and gatekeeping provisions in reorganization plans. Courts should view with skepticism assertions that legally questionable plan provisions are indispensable to the success of a particular reorganization or to the operation of the bankruptcy system. See, *e.g.*, *Czyzewski* v. *Jevic Holding Corp.*, 580 U.S. 451, 461, 471 (2017); cf. Pet. 9. In the meantime, as we explained in our previous invitation brief in this case, courts have their own "inherent power to dismiss actions brought by litigants that they deem to be acting vexatiously or in bad faith and to impose sanctions on such litigants." 22-631 U.S. Cert. Amicus Br. 10; cf. Pet. App. 54a n.19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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