No. 22-669

In the Supreme Court of the United States

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

Petitioners,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

JEFFREY N. POMERANTZ
JOHN A. MORRIS
GREGORY V. DEMO
PACHULSKI STANG ZIEHL & JONES LLP
10100 Santa Monica Blvd., 13th Fl.
Los Angeles, CA 90067

ROY T. ENGLERT, JR.
Counsel of Record
MATTHEW M. MADDEN
PAUL BRZYSKI
SHIKHA GARG
KRAMER LEVIN NAFTALIS & FRANKEL LLP
2000 K Street NW, 4th Fl.
Washington, DC 20006
(202) 775-4500
renglert@kramerlevin.com

Counsel for Respondent Highland Capital Management, L.P.

CORPORATE DISCLOSURE STATEMENT

Highland Capital Management, L.P., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

INTRODUCTION

Only one question presented by the decision below divides the courts of appeals and merits this Court's review: whether section 524(e) of the Bankruptcy Code categorically prohibits a chapter 11 plan of reorganization from exculpating or releasing non-debtor liability. Highland's petition (No. 22-631) presents that question and provides a clean vehicle for this Court to resolve the acknowledged, decades-old circuit split on it.[1] NexPoint agrees. 22-631 Resp. Br. (filed Feb. 10, 2023).

By contrast, the two additional questions identified by NexPoint are not even presented in this case. They do not merit review.

NexPoint's first additional question tangles up non-debtor exculpation under a reorganization plan with the legal standard generally governing a bankruptcy trustee's liability. This case did not involve a trustee, and thus the parties had no occasion to litigate the scope of a trustee's "common-law protections" from liability. Pet. 27. NexPoint now suggests that any exculpation granted to any non-debtor under any plan must exactly mirror such common-law limitations on a trustee's liability. Having thus tried to make this case about the common-law standard for a trustee's liability,

[1] We use "Highland" to refer to Highland Capital Management, L.P., which is petitioner in No. 22-631 and respondent in No. 22-669. We use "NexPoint" to refer to all of the petitioners in No. 22-669 and all of the respondents (other than those who have waived response) in No. 22-631.

NexPoint contends that the circuits are split on the metes and bounds of that common-law standard.

But NexPoint never made anything remotely resembling that argument in the courts below. The courts below therefore never addressed that argument. And, forfeiture aside, it is not cleanly presented for this Court's review because this case involves a provision in a bankruptcy plan of reorganization, not the common law.

NexPoint's second additional question likewise does not merit review. First, it is not presented: The reorganization plan in this case does not protect Highland, or anyone else, from "ordinary post-bankruptcy business liabilities." Pet. i. Accordingly, the decision below did not hold that it could. Rather, what the Fifth Circuit actually decided accords with established authority that bankruptcy courts may safeguard the consummation and implementation of a confirmed reorganization plan from unnecessary interference. The decisions cited by NexPoint do not demonstrate any additional circuit split on a legal issue relevant to the actual plan in this case.

STATEMENT

1. Highland is the reorganized debtor following a chapter 11 bankruptcy. NexPoint is a registered investment advisor owned and controlled by Highland's founder, James Dondero. Dondero was ousted as Highland's CEO during the bankruptcy.

Highland's path to bankruptcy was far from typical. It did not suffer a business calamity, have problems with its vendors or landlords, or default on payments to its lenders. Rather, Highland's chapter 11 case was brought on by "a myriad of

massive, unrelated, business litigation claims that it faced * * * after a decade or more of contentious litigation in multiple forums all over the world" instigated by Dondero when he was Highland's CEO. Pet. App. 75a. As the bankruptcy court found, Dondero is a "serial litigator" whose litigiousness caused Highland to file for bankruptcy and strapped it with more than a billion dollars in claims. *Id.* at 75a-77a.

Highland filed for chapter 11 bankruptcy in October 2019. The creditors' committee consisted of three entities holding litigation claims against Highland, and a litigation discovery vendor. Concerned about Dondero's ability to serve as an estate fiduciary, the U.S. Trustee moved to appoint a chapter 11 trustee to manage Highland's estate. Highland ultimately avoided the appointment of a trustee by entering into a settlement with the creditors' committee (the "Governance Settlement").

That Governance Settlement—approved by the bankruptcy court—changed Highland's management and governance during the pendency of the bankruptcy case. It removed Dondero from all control positions at Highland. It appointed three outside, independent directors to manage Highland and its reorganization. The bankruptcy court later approved one of the independent directors, James P. Seery, Jr., to be Highland's new CEO and Chief Restructuring Officer ("CRO").

To induce the independent directors' service, the Governance Settlement (a) limited their and their agents' and advisors' prospective liability to claims asserting willful misconduct or gross negligence, and (b) required the bankruptcy court to act as a

gatekeeper by screening for colorability any claims against the protected parties. The order appointing Seery as CEO and CRO included similar protections for Seery in his additional roles. The bankruptcy court found as fact that, without those exculpation and gatekeeper provisions, "none of the independent directors would have taken on the role" because of the "litigation culture that enveloped Highland historically." Pet. App. 81a-82a.

Neither NexPoint nor anyone else appealed from the Governance Settlement approval order or the subsequent order protecting Seery in his additional roles. The bankruptcy court later explained that the appointment of independent directors, under the Governance Settlement, "changed the entire trajectory of the case and saved the Debtor from the appointment of a trustee." Pet. App. 80a. Once appointed, Seery and the other independent directors began to negotiate settlements with Highland's principal creditors, paving the way for approval of the resulting reorganization plan by creditors holding 99.8% in dollar amount of the claims against Highland.

2. Highland's chapter 11 plan is an "asset monetization plan" in which distributions to creditors will result from the orderly winddown and sale of holdings and other assets over the course of several years. Pet. App. 71a. The bankruptcy court described this plan, and its overwhelming creditor support, as "nothing short of a miracle." *Id.* at 83a.

Dondero, by contrast, had advocated a reorganization plan that would reinstall him as CEO of an ongoing enterprise. After Highland and other stakeholders rejected those proposals, Dondero

explicitly threatened to "burn the place down." Pet. App. 125a.

It was no idle threat. See Pet. iv-vii (identifying 37 related legal proceedings). Dondero and entities under his control have attempted to frustrate Highland's reorganization by, among other things, objecting to nearly every settlement between Highland and its creditors, challenging nearly every motion, appealing from nearly every order, obstructing Highland's trading activity, and threatening Highland's employees. To date, these various obstructions have resulted in two contempt findings against Dondero and one against certain of his controlled entities, including one arising from an attempt to bring a meritless lawsuit against Seery in violation of the order appointing him CEO and CRO, and nine separate appeals by Dondero or his allies to the Fifth Circuit. (Respondent Highland has not had occasion to appeal anything to the Fifth Circuit.)

In recognition that such attacks on Highland and its reorganization were not going to stop, Highland's confirmed chapter 11 plan provided three "Plan Protections" to certain persons and entities whose efforts were going to be vital to the plan's success:

First, extending protections previously granted by two prior orders, the plan exculpates certain persons and entities—defined as the "Exculpated Parties"—from liability for conduct relating to the administration of the case (including the negotiation, consummation, and implementation of the plan) other than bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct. Pet. App. 189a. The Exculpated Parties are, among others, the debtor and its agents, the independent directors, the creditors'

committee and its members, and service professionals retained by Highland and the committee. Pet. App. 168a-169a. Some parties objected to this plan provision, but *not* on the ground that it set the wrong standard of liability for the protected parties.

Second, as is typical with plans of reorganization, the plan enjoins certain persons—the "Enjoined Parties"—from taking actions to interfere with the implementation and consummation of the plan. Pet. App. 168a, 194a-196a. The Enjoined Parties include Dondero and his related entities.

Third, the plan has a gatekeeper provision, which precludes the Enjoined Parties from commencing claims against any "Protected Party" without first obtaining the bankruptcy court's determination that the proposed claim is at least colorable. Pet. App. 169a-170a, 195a. The gatekeeper provision does not itself exculpate or release anyone's liability for anything.

3. The bankruptcy court confirmed the plan, including its three Plan Protections—which the court found as fact were necessary to the success of the plan. The bankruptcy court found "that the proposed Exculpated Parties might expect to incur costs that could swamp them and the reorganization based on the prior litigious conduct of Mr. Dondero and his controlled entities." Pet. App. 125a-126a.

The court rejected a host of confirmation objections pressed by Dondero and entities under his control and "question[ed] the good faith of Mr. Dondero's and the Dondero Related Entities' objections." Pet. App. 85a. The court expressed "good reason to believe that these parties are not objecting to protect economic interests they have in the Debtor but to be disruptors." *Ibid.*

The plan became effective in August 2021. The Fifth Circuit authorized a direct appeal from the confirmation order under 28 U.S.C. § 158(d).

4. On appeal, the parties vigorously debated *who* (under Fifth Circuit precedent) could lawfully receive the benefit of the exculpation clause. But no one raised any challenge to the *standard of liability* (gross negligence) set by the exculpation clause. The appellants raised numerous other issues as well.

The court of appeals affirmed the confirmation order, except for portions of the plan's exculpation provision that the court (erroneously) held were in violation of 11 U.S.C. § 524(e) because of whom they protected. The court held that "§ 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code." Pet. App. 25a-26a (citing *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009)).

On that basis, the court struck virtually all non-debtors from the Exculpated Parties who benefit from the plan's exculpation clause—including Highland's officers and agents and certain retained service professionals. Pet. App. 29a. The court of appeals acknowledged that "[t]he simple fact of the matter is that there is a circuit split concerning the effect and reach of § 524(e)," and that the Fifth Circuit was applying here the minority position in that split. *Id.* at 25a-26a. The court of appeals had no occasion to address the standard of liability in the exculpation clause, as opposed to whom that clause protected.

The two categories of non-debtors exempted from the court's broad holding on the effect of section 524(e) were the creditors' committee and its members and the independent directors. In the court's view, the

former was properly exculpated consistent with section 1103(c) of the Bankruptcy Code, which provides qualified immunity for creditors' committees performing their statutory duties. Pet. App. 27a (citing *Pacific Lumber*, 584 F.3d at 253, and 11 U.S.C. § 1103(c)). The latter were properly exculpated because the independent directors in this case had a role similar to that of a chapter 11 trustee and were thus "entitled to all the rights and powers of a trustee," who likewise enjoys qualified immunity during the performance of his or her duties. *Id.* at 28a (citing 11 U.S.C. § 1107(a)).

The court of appeals also addressed and upheld the plan's injunction and gatekeeper provisions, which are separate protections from the exculpation clause at issue in No. 22-631 and ostensibly at issue in No. 22-669. Specifically, the court rejected any challenge to the injunction's permanence. Pet. App. 30a. "Even assuming the issue was preserved," despite appellants' failure to challenge it in their briefs, a plan's "otherwise-lawful" injunction is not unlawful merely because it does not automatically expire. *Ibid.*

The court also affirmed the bankruptcy court's ruling that the injunction was not vague because the plan defined what it meant to interfere. Pet. App. 30a. On this point, the bankruptcy court had also concluded "that the terms 'implementation' and 'consummation' are neither vague nor ambiguous." *Id.* at 126a.

As for the gatekeeper provision, the court held that it "need not evaluate whether the bankruptcy court would have jurisdiction under every conceivable claim falling under the widest interpretation of the

gatekeeper provision." Pet. App. 32a. The Fifth Circuit opted to "leave that to the bankruptcy court in the first instance" on a case-by-case basis. *Ibid.*

5. Certain Dondero-controlled entities sought panel rehearing, asking the court to hold that the persons and entities it had struck from the plan's exculpation provision must likewise be left unprotected by the plan's injunction and gatekeeper provisions. In response, the court altered only one sentence of its opinion, without affecting its holding that "the injunction and gatekeeping provisions are sound." Pet. App. 23a.[2]

6. Highland filed a petition asking this Court to resolve a split among the circuits over whether section 524(e) categorically prohibits non-debtor releases and exculpation provisions. No. 22-631. NexPoint has now agreed that Highland's petition should be granted. 22-631 Resp. Br. (filed Feb. 10, 2023). Through its own petition and its acquiescence brief, NexPoint tries to persuade this Court to review issues that are not only not the subject of any circuit conflict acknowledged in the decision below, but also are not even *addressed* by the decision below.

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[2] NexPoint is mistaken that "[t]he new opinion clarified that the ruling on the exculpatory provision also applied to the injunction and gatekeeping provision." Pet. 13; see *In re Highland Cap. Mgmt., L.P.*, 57 F.4th 494, 498 (5th Cir. 2023) ("In September 2022, we affirmed the Plan in *all respects except one*, concluding that the Plan *exculpated* certain non-debtors beyond the bankruptcy court's authority." (emphasis added)). In any event, the scope of the plan's separate injunction and gatekeeper provisions has no bearing on the scope of the exculpation provision addressed by the petitions.

REASONS FOR DENYING THE PETITION

NexPoint concedes that Highland's separate petition, No. 22-631, squarely presents an important question on which the circuits are deeply divided and that merits this Court's review. The Fifth Circuit held—consistent with one other circuit, but contrary to numerous other circuits—that section 524(e) of the Bankruptcy Code categorically prohibits chapter 11 reorganization plans from including non-debtor releases and exculpations. Pet. App. 25a-26a. On that basis, the Fifth Circuit struck the plan's exculpation provision other than as applied to Highland, its court-appointed creditors' committee (and its members), and its court-approved independent directors. The parties agree that this Court should review the "entrenched circuit conflict" on that important issue, Pet. 16-21; accord 22-631 Resp. Br. 2, 7-11.[3]

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[3] NexPoint takes at least two mistaken positions with respect to that issue, one pertaining to its merits and one pertaining to its importance. Both issues can be much more fully addressed in merits briefing in No. 22-631. It is worth noting now, however, with regard to the merits, that NexPoint's proposed inference from the text of 11 U.S.C. § 524(g), see 22-631 Resp. Br. 15-16, has been expressly forbidden by Congress; see 11 U.S.C. § 524 note ("Nothing in subsection (a), or in the amendments made by subsection (a) [amending this section], shall be construed to modify, impair, or supersede *any other authority the court h*as to issue injunctions in connection with an order confirming a plan of reorganization." (emphasis added)). This is but one of many reasons why most circuits' construction of section 524(e) is correct and the Fifth and Tenth Circuits' outlier position is wrong. With regard to why the issue is important, it is true that section 524(e) has been cited indiscriminately by the Fifth Circuit and some other courts as a "categorical[]" bar to *both* garden-variety exculpation clauses (like the one contained in Highland's plan of reorganization) and controversial third-party

NexPoint is mistaken, however, in contending that the plan's remaining exculpation provision raises two additional issues that also merit review: (1) the independent directors' exculpation from simple-negligence liability relating to the chapter 11 case and plan, and (2) the plan's supposed protections from post-confirmation liability for "ordinary business conduct."

Neither of those two additional questions merits review—either independently or in conjunction with granting review of the question presented in No. 22-631. Accordingly, this Court should deny the petition in this case and grant No. 22-631.

I. NexPoint's First Question Presented Does Not Merit Review

NexPoint alleges (Pet. 22-26) a longstanding circuit split on the appropriate standard (simple negligence vs. gross negligence vs. intentional wrongdoing) by which a bankruptcy trustee can be held liable for breach of duty in the absence of a confirmed reorganization plan addressing that issue. But this case presents the Court no occasion to review any such division of authority.

This case involves the legality of *plan provisions* that established gross negligence as the standard of

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releases (a device common in mass-tort bankruptcy cases and used in some other cases). But it is false that they are the same thing. There are numerous legal differences. See generally Am. Bankr. Inst., Report of Comm'n to Study the Reform of Chapter 11, at 250-256 (2014), cited in 22-631 Pet. 18-19. And no one has expressed "outrage" about exculpation clauses as opposed to third-party releases. See 22-631 Resp. Br. 9-11 (trying to elide the distinctions and make this Court believe that exculpation clauses are controversial as a policy matter).

liability for, among others, *independent directors*. The plan provisions did so without *any* objection to that standard of liability either in the bankruptcy court or on appeal.

In the same *Pacific Lumber* case in which the Fifth Circuit erroneously construed section 524(e) to limit a bankruptcy court's power to approve third-party releases and exculpation clauses in a plan of reorganization, the court identified exceptions to that (idiosyncratic) rule. One exception, referenced in passing during a mootness analysis, was that *trustees* could receive liability protection under a plan because they also enjoyed qualified immunity at common law. Citing *In re Hilal*, 534 F.3d 498, 501 (5th Cir. 2008), which in turn cited *In re Smyth*, 207 F.3d 758, 762 (5th Cir. 2000), the court of appeals below merely recognized that its prior cases included "a limited qualified immunity to bankruptcy trustees unless they act with gross negligence." Pet. App. 27a.

No other circuit has addressed—one way or another—whether trustees enjoy an exception to any supposed prohibition in section 524(e). One reason most circuits have not addressed that question is because none, other than the Fifth and Tenth, reads that statute as prohibiting plans from exculpating or releasing non-debtors. With no bar to create an "exception" to, most circuits have had no reason to address whether the only proper standard of liability under any such exception is gross or simple negligence.

In re Smyth, NexPoint claims, conflicts with decisions of other circuits addressing the general standard for overcoming a bankruptcy trustee's common-law qualified immunity in the *absence* of a

plan provision addressing that issue. In this case, however, no party ever cited *In re Smyth* to the Fifth Circuit. There are many reasons why none did.

For starters, this case does not involve common-law qualified immunity, nor does it involve a bankruptcy trustee. Instead, it involves the scope of an exception to a supposed statutory prohibition that was indirectly derived from *In re Smyth*, through *In re Hilal* and *Pacific Lumber*, to a circuit-specific construction of section 524(e). Furthermore, this case involves only the application of that circuit-specific exception, by analogy, to persons and entities that are *not* bankruptcy trustees. Last and certainly not least, it involves the *unobjected-to* setting of the standard as gross negligence. The parties in the Fifth Circuit debated *who* benefits from the exception, not what the standard of liability is for those who benefit.

There is still another reason why no one cited *In re Smyth* below. NexPoint refers again and again to the "common-law" standard of protection for bankruptcy trustees, which in its telling is in "disarray." Pet. 26-28. NexPoint's argument muddles three distinct concepts, only one of which clearly originates in common law.

First, there is the common-law *Barton* doctrine:[4] the principle that, "without leave of the bankruptcy court, no suit may be maintained against a trustee for actions taken in the administration of the estate." 3 *Collier on Bankruptcy* ¶ 323.03 (16th ed. 2023); see *Lawrence* v. *Goldberg*, 573 F.3d 1265, 1270 (11th Cir. 2009); *In re Yellowstone Mountain Club, LLC*, 841 F.3d 1090, 1095 (9th Cir. 2016). That doctrine justifies

[4] See *Barton* v. *Barbour*, 104 U.S. 126 (1881).

the *gatekeeper* provision upheld by the Fifth Circuit, not the partially invalidated *exculpation* provision.

Next, there are cases interpreting section 1103(c) of the Code. These include the other two cases cited by NexPoint as expanding "common-law protections." Pet. 27 (citing *Pacific Lumber*, 584 F.3d at 253, and *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000)). But section 1103(c) is not common law; it's a statutory provision detailing the powers and duties of *creditors' committees*. Section 1103(c) is not implicated by NexPoint's question.

Finally, there is the issue of the standard governing trustees' liability for breaches of their duties, most of which are defined by statute. Although some courts cast this standard as arising from common law, *Red Carpet Corp. of Panama City Beach* v. *Miller*, 708 F.2d 1576, 1578 (11th Cir. 1983) (per curiam), the standard for trustee liability can also be viewed as flowing from the statutory duties themselves. Indeed, the court of appeals below all but stated that the independent directors were entitled to protection under "express authority in another provision of the Bankruptcy Code." Pet. App. 26a.

Common-law origins aside, the split of authority identified by NexPoint is limited to this narrow issue; the split does not encompass NexPoint's bogeyman of ill-defined "common-law protections." See *In re Smyth*, 207 F.3d at 761-762 (identifying the circuit split in the context of the duties enumerated in section 704 of the Bankruptcy Code). This case does not implicate that split.

II. NexPoint's Second Question Presented Does Not Merit Review

NexPoint contends (Pet. 29-34) that the court of appeals upheld the plan's exculpation of certain liability for Highland's "ordinary business conduct" over an "indefinite[]" post-confirmation period when its assets are being liquidated. Such a holding, NexPoint says, would be contrary to limits on the post-confirmation effect of a reorganization plan as articulated by at least four other circuits.

That contention fundamentally misunderstands the Fifth Circuit's ruling. It also manufactures a circuit split where there is none. Thus, NexPoint's second question is not presented in this case and does not merit this Court's review.

1. NexPoint's second question is based on an incorrect premise. NexPoint argues that the Fifth Circuit allowed exculpation of Exculpated Parties' actions indefinitely, including well beyond the plan's effective date. Pet. 29. Not so.

The Fifth Circuit struck all parties from the exculpation clause except for the debtor, the creditors' committee and its members, and the independent directors. Pet. App. 29a. Those entities cease to exist on the plan's effective date. There no longer is a debtor. There is only a reorganized debtor. Nor are there independent directors because those positions terminated on the plan's effective date.[5] *Id.* at 139a.

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[5] The independent directors' *pre*-confirmation service to Highland was covered by an exculpation provision in the bankruptcy court's order approving the Governance Settlement before the plan and confirmation order, and that separate order

Nor is there a creditors' committee, because that committee dissolved on the plan's effective date. *Id.* at 165a. There is therefore no post-effective-date exculpation under the Fifth Circuit's decision for this Court to review.

2. To be sure, the Fifth Circuit recognized that the plan's *injunction* continues to have effect beyond the plan's effective date. That provision enjoins a *different* set of individuals and entities "from taking any actions to interfere with the implementation or consummation of the Plan." Pet. App. 194a. To the extent NexPoint argues that the injunction's continued effect during implementation and consummation of the plan is an overreach of the bankruptcy court's authority worthy of this Court's review, it misconstrues the terms "implementation" and "consummation."

"Implementation" and "consummation" have a limited meaning under bankruptcy laws and the plan here. Section 1123(a)(5) of the Bankruptcy Code mandates that "a plan shall * * * provide adequate means for the plan's implementation," and states a non-exclusive list of what such "implementation" covers. Likewise, article IV of Highland's plan carefully describes its "Means for Implementation." The word "consummation" is also found in the Bankruptcy Code. For example, the "substantial consummation" of a plan is defined in section 1101(2) of the Code and is the source of a considerable body of caselaw. See, *e.g.*, *In re Mortgs. Ltd.*, 771 F.3d 623, 628 (9th Cir. 2014); *In re Charter Commc'ns, Inc.*, 691 F.3d

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is not at issue here. See Pet. App. 29a, n.15 (Governance Settlement is *res judicata*).

476, 482 (2d Cir. 2012); *In re Manges*, 29 F.3d 1034 (5th Cir. 1994).

At the hearing before the bankruptcy court, in response to the same unfounded criticism NexPoint makes in this Court, Highland *confirmed* that those terms have a limited meaning. Other Dondero-controlled entities had complained that, by applying any of the Plan Protections to conduct associated with plan implementation and consummation, the court would be granting an "advance get-out-of-jail free cards for future negligence and ordinary breaches of contract." See Highland Income Fund, *et al.*, C.A. Br. 2-3. Highland assured the bankruptcy court that providing Plan Protections to plan "implementation" and "consummation" would have no effect on the parties' ordinary contractual rights against Highland or any other party. Highland C.A. Br. 35 (citing 2/3/21 Hr'g Tr. 152-153, No. 19-34054, ECF No. 1905 (Bankr. N.D. Tex.)).

As defined and commonly understood, then, neither plan "implementation" nor "consummation" covers the reorganized debtor's post-confirmation "ordinary business conduct." Rather, each term applies only to specific categories of conduct, each associated with causing and facilitating the transactions and other events necessary to put the plan into effect.[6]

Bankruptcy Code section 1141(a) clearly allows the bankruptcy court to issue an injunction ordering

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[6] Because "implementation" and "consummation" cover only a limited range of post-effective-date conduct, the plan's original exculpation clause—including non-debtor exculpated parties who continue to exist after the effective date—still does not implicate NexPoint's second question.

parties to "refrain from taking actions if those actions interfere with implementation of the plan." 8 *Collier on Bankruptcy* ¶ 1142.03 (16th ed. 2023). And this Court has held that the bankruptcy court's jurisdiction to enforce its prior orders continues even after plan confirmation. *Travelers Indem. Co.* v. *Bailey*, 557 U.S. 137, 151 (2009). There is thus no unsettled question about the bankruptcy court's authority presented by NexPoint's second question.[7]

3. Because the plan does not exculpate any liability for "ordinary business conduct" after plan confirmation, the court of appeals never addressed the hypothetical question whether a chapter 11 plan could lawfully do so. Rather, the court's analysis of the plan's *exculpation provision* is dedicated *entirely* to the propriety of exculpating non-debtors in light of section 524(e). See Pet. App. 24a-29a. And the court's analysis of the *injunction* also does not support NexPoint's claim that the injunction could be applied as broadly as NexPoint asserts. See *id.* at 30a.

Nor is the decision below in conflict with the decisions in other circuits that NexPoint highlights. Two of those cases affirmatively support the decision below. The Eighth Circuit recognized in *In re Fairfield*

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[7] NexPoint attempts (Pet. 31) to argue that the Fifth Circuit's reference to the "permanency" of the injunction is an error warranting review. The court of appeals' discussion of the plan's injunction addressed NexPoint's "permanency" point in just one sentence, in which the court suggested that NexPoint and the other appellants had likely waived any such challenge by failing to brief it. Pet. App. 30a. Thus, even if the issue were an unsettled question otherwise suitable for this Court's review—which it is not—this case would not be an appropriate vehicle to decide it.

Communities, 142 F.3d 1093 (1998), that "a bankruptcy court may explicitly retain jurisdiction * * * over aspects of a plan related to its administration and interpretation." *Id.* at 1095. The Seventh Circuit stated a similar principle in *Pettibone Corp.* v. *Easley*, 935 F.2d 120 (1991), which held that a tort suit, the prevention of which was not "necessary for the consummation of the plan," could proceed against the reorganized debtor without violating the plan's injunction and releases. *Id.* at 123 (quoting 11 U.S.C. § 1142(b)).

NexPoint's other two cases do not concern any supposed limits on safeguarding the implementation of a confirmed plan. In *Southwest Marine Inc.* v. *Danzig*, 217 F.3d 1128, 1139-1140 (9th Cir. 2000), and *In re Sure-Snap Corp.*, 983 F.2d 1015, 1018 (11th Cir. 1993), the reorganized debtors incurred new liability after plan confirmation on their prepetition contracts. The courts upheld those liabilities based on the proposition that a bankruptcy discharge does not extinguish the debtor's prepetition agreements and obligations, out of which *post*-confirmation liabilities can still arise. In short, there is no circuit split on NexPoint's second question for this Court to resolve.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY N. POMERANTZ
JOHN A. MORRIS
GREGORY V. DEMO
PACHULSKI STANG ZIEHL & JONES LLP
10100 Santa Monica Blvd., 13th Fl.
Los Angeles, CA 90067

ROY T. ENGLERT, JR.
Counsel of Record
MATTHEW M. MADDEN
PAUL BRZYSKI
SHIKHA GARG
KRAMER LEVIN NAFTALIS & FRANKEL LLP
2000 K Street NW, 4th Fl.
Washington, DC 20006
(202) 775-4500
renglert@kramerlevin.com

Counsel for Respondent
Highland Capital Management, L.P.

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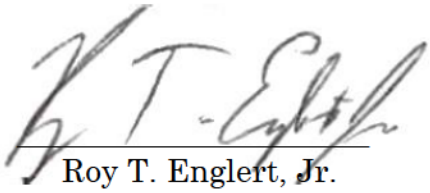
CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I, Roy T. Englert, Jr., a member of the Bar of this Court, certify that the Brief in Opposition in the above-captioned case contains 4,800 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.



Roy T. Englert, Jr.

Dated: February 21, 2023

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Respondents.

CERTIFICATE OF SERVICE

I, Roy T. Englert, Jr., counsel for respondent Highland Capital Management, L.P. and a member of the Bar of this Court, certify that, on February 21, 2023, three copies of the Brief in Opposition in the above-captioned case were sent by first-class mail to the following counsel:

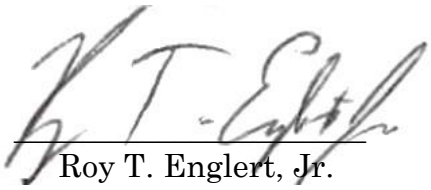
Jeffrey Alan Lamken
MoloLamken LLP
The Watergate, Suite 500
600 New Hampshire Ave., N.W.
Washington, DC 20037
Counsel for Petitioners NexPoint Advisors, L.P. and NexPoint Asset Management, L.P. (f/k/a as Highland Capital Management Fund Advisors, L.P.)

David R. Fine
K & L Gates, L.L.P.
17 N. 2nd Street
Harrisburg, PA 17101
Counsel for Respondents Highland Income Fund, NexPoint Strategic Opportunities Fund (n/k/a NexPoint Diversified Real Estate Trust), Highland Global Allocation Fund, and NexPoint Capital, Incorporated

Davor Rukavina
Munsch Hardt Kopf & Harr, P.C.
500 N. Akard Street, Suite 3800
Dallas, TX 75201
Counsel for Respondent James Dondero

Douglas Scott Draper
Heller, Draper & Horn, L.L.C.
650 Poydras Street, Suite 2500
New Orleans, LA 70130
Counsel for Respondents The Dugaboy Investment Trust and Get Good Trust

I further certify that all parties required to be served have been served.



Roy T. Englert, Jr.