No. 22-631

In the Supreme Court of the United States

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Petitioner,

v.

NEXPOINT ADVISORS, L.P., *et al.*,

Respondents.

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

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner submits this supplemental brief under Rule 15.8 to address this Court's decision in *Harrington* v. *Purdue Pharma L. P.*, No. 23-124 (June 27, 2024).

Purdue makes Highland's petition (No. 22-631) and NexPoint's petition (No. 22-669) ripe for action. This Court should deny NexPoint's petition (No. 22-669) for the reasons stated in the brief in opposition, which are unaffected by *Purdue*. But the Court should grant Highland's petition (No. 22-631) because it provides a readymade vehicle to decide the validity of non-debtor exculpation clauses in bankruptcy. At minimum, this Court should grant the petition, vacate the judgment below, and remand for further consideration in light of *Purdue*.

1. In *Purdue*, this Court held that Section 1123(b)(6) of the Bankruptcy Code does not authorize the kinds of nonconsensual third-party releases long used in mass-tort bankruptcy cases. Slip Op. 16. The Court stressed that it decided only that issue. Slip Op. 19 ("As important as the question we decide today are the ones we do not.").

Although the Court did not specifically list the validity of exculpation clauses—the kind of plan provision at issue in this case—among the questions it was leaving undecided, the Court did emphasize that it was not resolving a number of issues that otherwise might have been thought to be implicitly affected by its holding. Most notably, the Court explicitly reserved judgment on the validity of *consensual* third-party releases. Slip Op. 19. Because no one has identified any source of statutory authority for such releases other than Section 1123(b)(6), *see*

Dissenting Op. 38, it is clear that the Court has left for resolution in future cases many Section 1123(b)(6) issues other than the precise issue that it decided.

2. One such issue is presented by Highland's petition, which addresses whether the Bankruptcy Code categorically prohibits bankruptcy courts from confirming Chapter 11 plans with so-called "exculpation clauses." Such clauses exculpate persons who guided a debtor's bankruptcy case from liability for simple negligence for their post-petition conduct associated with the debtor and its reorganization. There is an acknowledged circuit split concerning whether the Bankruptcy Code treats exculpation clauses (like the one in this case) the same as, or differently from, third-party releases affecting pre-petition claims (like the ones in *Purdue*).

The Ninth Circuit has long considered third-party releases of pre-petition claims to be unauthorized by statute, but nevertheless held that exculpation clauses affecting post-petition conduct are permissible. *Blixseth* v. *Credit Suisse*, 961 F.3d 1074, 1084 (9th Cir. 2020), cert. denied, 141 S. Ct. 1394 (2021). In *Blixseth*, the Ninth Circuit said that it was placing itself in direct conflict with the Fifth Circuit on that point. *Id.* at 1085 n.7. And the Fifth Circuit, in the opinion below, agreed that the two circuits' positions are incompatible. See 22-631 Pet. App. 30a. Thus, even after *Purdue*—indeed, *especially* after *Purdue*—there is an urgent need to resolve the distinct question of the validity of exculpation clauses.

As acknowledged by four Justices, "[w]ithout * * * exculpation clauses, 'competent professionals would be deterred from engaging in the bankruptcy process, which would undermine the main purpose of chapter 11—achieving a successful restructuring.'" Dissenting

Op. 40 (citing amicus briefs of American College of Bankruptcy and Highland). "For that reason," the dissent continued, "bankruptcy courts routinely approve exculpation clauses under §1123(b)(6)." Dissenting Op. 40. There will be doubt about the validity of such clauses until this Court resolves the doubt.

3. Not only is there a need to resolve that question, but also it is now clearer than ever that the Ninth Circuit's view—blessing exculpation clauses but forbidding third-party releases—is the better view of the law.

First, in *Purdue*, this Court did not treat Section 524(e), the Bankruptcy Code provision on which the Fifth Circuit has long relied to invalidate releases *and* exculpations, as the broad prohibition that the Fifth Circuit perceives it to be.

Second, the principal rationale of *Purdue*—that there is no statutory authority for releasing non-debtors from their pre-bankruptcy tort liability without subjecting all of their assets to the bankruptcy process—has nothing to do with exculpation clauses. Exculpation clauses protect persons who guide the debtor through bankruptcy—estate fiduciaries, for instance—for the risk they take on in this role. No one would or should expect them to subject all their assets to bankruptcy.

Third, this Court's holding that a nonconsensual release of third-party liability cannot be an "other appropriate provision" of a reorganization plan, under Section 1123(b)(6), does not logically extend to exculpation clauses. Such clauses are much more closely related to the debtor and to its bankruptcy case and so have much more to be said for their "appropriate[ness]" than third-party releases.

4. There is no good reason to await further percolation of this issue in the lower courts, and therefore no sufficient reason to grant, vacate, and remand (GVR) instead of granting certiorari and accepting briefs and oral arguments on the merits. There is already a circuit split and the issue has been continuously addressed by courts around the country, with differing outcomes for years.

Furthermore, the closeness of the vote in *Purdue*, and the majority's express disclaimer of resolution of any issues beyond the case's actual holding, will predictably result in massive uncertainty in the lower courts over the many issues left undecided. Although the lower courts can of course be expected to pay careful attention to the text of the Code and related tools of statutory interpretation, all of the most difficult issues will turn on what constitutes an "other appropriate provision" of a reorganization plan as this Court construed those words in *Purdue*. It is only this Court, not judges of the lower courts, that can provide definitive answers to those questions. Early guidance from this Court would obviate years and years of fruitless uncertainty.

CONCLUSION

Highland's petition for a writ of certiorari, No. 22-631, should be granted. NexPoint's petition, No. 22-669, should be denied.

Respectfully submitted.

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