Nos. 22-631 & 22-669

IN THE
Supreme Court of the United States

HIGHLAND CAPITAL MANAGEMENT, L.P.,
Petitioner,
v.
NEXPOINT ADVISORS, L.P., ET AL.,
Respondents.

NEXPOINT ADVISORS, L.P. AND
NEXPOINT ASSET MANAGEMENT, L.P.,
Petitioners,
v.
HIGHLAND CAPITAL MANAGEMENT, L.P., ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR NEXPOINT ADVISORS, L.P. AND NEXPOINT ASSET MANAGEMENT, L.P.

BENOIT QUARMBY
MOLOLAMKEN LLP
430 Park Ave.
New York, NY 10022

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
EUGENE A. SOKOLOFF
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for NexPoint Advisors, L.P. and NexPoint Asset Management, L.P.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, NexPoint Advisors, L.P. and NexPoint Asset Management, L.P. state that the corporate disclosure statements included in the petition in No. 22-669 and the response brief in No. 22-631 remain accurate.

IN THE

Supreme Court of the United States

NO. 22-631

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Petitioner,

v.

NEXPOINT ADVISORS, L.P., ET AL.,

Respondents.

NO. 22-669

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

Petitioners,

v.

HIGHLAND CAPITAL MANAGEMENT, L.P., ET AL.,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

SUPPLEMENTAL BRIEF FOR NEXPOINT ADVISORS, L.P. AND NEXPOINT ASSET MANAGEMENT, L.P.

NexPoint Advisors, L.P. and NexPoint Asset Management, L.P. ("NexPoint"), petitioners in No. 22-669 and respondents in No. 22-631, respectfully submit this supplemental brief concerning this Court's recent decision in

Harrington v. *Purdue Pharma L.P.*, No. 23-124 (June 27, 2024). *Purdue* confirms the need for this Court's review in these cases.

STATEMENT

These cases arise out of the Chapter 11 reorganization of Highland Capital Management, L.P. ("Highland"). Highland's reorganization plan included broad exculpatory and injunctive provisions that purported to insulate a host of non-debtors who had not themselves declared bankruptcy from liability for misconduct—even for ordinary post-confirmation business operations. The Fifth Circuit invalidated those provisions as applied to most third parties, but upheld them with respect to certain parties. Pet. App. in No. 22-669, at 23a-32a.

Both Highland and NexPoint have sought this Court's review. In No. 22-631, Highland asks this Court to review the Fifth Circuit's holding that exculpation clauses that purport to discharge liabilities of parties who have not themselves filed for bankruptcy are generally prohibited. In No. 22-669, NexPoint urges that the Fifth Circuit fell short of what the law requires by upholding provisions that exculpate Highland's independent directors for a broad range of misconduct. That ruling, NexPoint explains, rests on an erroneous standard for immunity that implicates an acknowledged three-way circuit conflict.

At this Court's invitation, the United States filed an *amicus* brief in these cases on October 19, 2023. The United States recommended that the Court hold both petitions pending its decision in *Harrington* v. *Purdue Pharma L.P.*, No. 23-124, which this Court has now decided. U.S. Br. 12. *Purdue* involved third-party *releases* that purported to insulate Sackler family members from a broad range of tort claims. These cases, by contrast, involve third-party *exculpations* that foreclose

liability for post-petition conduct and exclude claims for gross negligence or willful misconduct. U.S. Br. 5, 9-10.

In its *amicus* brief, the United States explained that that distinction does not make exculpation provisions any less problematic. "An exculpation clause is a particular type of third-party release." U.S. Br. 11. For that reason, "many exculpation clauses raise significant concerns similar to those posed by nonconsensual third-party releases, including that exculpation clauses lack express authorization under the Code; that they secure outcomes that conflict with the text, structure, and purposes of the Code; and that they purport to extinguish claims of both individuals and sovereigns without consent." *Ibid.* The United States concluded that "[t]his Court's decision in *Purdue* is likely to shed light on considerations relevant to the question presented in [Highland's] petition in this case" and that "the reasoning of the *Purdue* decision [could also] shed light on considerations relevant to the questions presented in NexPoint's petition." *Id.* at 12.

This Court decided *Purdue* on June 27, 2024. No. 23-124. Relying heavily on the statutory text, the Court held that bankruptcy courts lacked authority to grant third-party releases to parties who had not themselves sought bankruptcy protection. Slip op. at 7-20. The Court did not expressly address whether bankruptcy courts may grant third-party exculpations. *Ibid.*

ARGUMENT

Purdue confirms the need for this Court's review of both Highland's petition in No. 22-631 and NexPoint's petition in No. 22-669.

I. While Highland's petition in No. 22-631 challenges the Fifth Circuit's rejection of the exculpation clauses as applied to most parties, *Purdue* supports the Fifth Cir-

cuit's decision—and strongly so. Relying on the statutory text, *Purdue* held that bankruptcy courts lack authority to grant releases to non-debtors who have not themselves declared bankruptcy. The court of appeals in *Purdue* had invoked a Chapter 11 provision that authorizes plans to "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. §1123(b)(6). This Court rejected that reasoning. It noted that "[p]aragraph (6) is a catchall phrase tacked on at the end of a long and detailed list of specific directions." Slip op. at 10. Such provisions "must be interpreted in light of [their] surrounding context." *Ibid.* "When Congress authorized 'appropriate' plan provisions in paragraph (6)," the Court explained, "it did so only after enumerating five specific sorts of provisions, all of which concern *the debtor*—its rights and responsibilities, and its relationship with its creditors." *Id.* at 11. Section 1123(b)(6)'s catchall provision "should be similarly constrained" to encompass only provisions that affect *the debtor's* rights and obligations. *Ibid.* In a footnote, the Court also rejected certain respondents' reliance on another Code provision, Section 105(a). Slip op. at 9 n.2. That provision could not justify third-party releases either because it "serves only to '"carry out"' authorities expressly conferred elsewhere in the code." *Ibid.*

Purdue's textual analysis confirms that the Fifth Circuit properly rejected the Highland plan's expansive non-debtor exculpations. In the Fifth Circuit, Highland relied on the same two statutory provisions this Court discussed in *Purdue* to justify the exculpations. Pet. App. in No. 22-669, at 24a-27a. Highland relied on those same provisions again in this Court. Pet. in No. 22-631, at 16, 21. What this Court said about the provisions in *Purdue* applies equally to Highland's arguments here: Section

1123(b)(6) authorizes only plan provisions that relate to *the debtor's* rights and obligations, and Section 105(a) authorizes only plan provisions that carry out powers the Code grants elsewhere. Neither provision allows bankruptcy courts to extinguish claims against third parties who have not themselves declared bankruptcy—whether through releases or exculpations. *Purdue* confirms that the Fifth Circuit's decision was correct.

Nonetheless, NexPoint agrees that review of Highland's petition is warranted. The Court's decision in *Purdue* never expressly addressed exculpation clauses. That omission was notable because the dissent discussed exculpation clauses in a paragraph that assumed their validity. See slip op. at 40 (dissent). Moreover, while the United States has correctly observed that exculpations are merely one category of non-debtor releases that raise many of the same concerns, U.S. Br. 11, some courts have held that releases and exculpations should be treated differently, see, *e.g.*, *Blixseth* v. *Credit Suisse*, 961 F.3d 1074, 1081-1085 (9th Cir. 2020), cert. denied, 141 S. Ct. 1394 (2021). Lower courts are unlikely to read *Purdue* as conclusively resolving this issue for exculpation clauses. Absent further review, the circuit conflict is likely to persist. This Court should grant Highland's petition and affirm the Fifth Circuit.

II. NexPoint's petition in No. 22-669 should likewise be granted. The issues in NexPoint's petition are independently certworthy, reflecting an acknowledged three-way circuit conflict. They are also intertwined with the issues Highland presents.

As NexPoint's petition explains, the Fifth Circuit upheld provisions in Highland's plan that insulated independent directors from liability for a broad range of post-petition misconduct short of gross negligence. Pet.

App. in No. 22-669, at 28a. The court did so based on Fifth Circuit precedent holding that bankruptcy trustees are entitled to qualified immunity for such misconduct provided they are not grossly negligent. *Id.* at 27a (citing *In re Smyth*, 207 F.3d 758, 762 (5th Cir. 2000)). But the courts of appeals are openly divided over whether that standard is correct. The First, Second, Ninth, and Eleventh Circuits interpret that immunity to permit suits for ordinary negligence. Pet. in No. 22-669, at 22-23. The Fourth, Sixth, Seventh, and Tenth Circuits require intentional misconduct. *Id.* at 23. And the Fifth Circuit has adopted the "intermediate position" that it applied below, allowing suits only for "gross negligence." *Id.* at 23-24.

The U.S. Trustee previously urged the Fifth Circuit to reconsider its gross negligence standard, urging that the court had "overlooked contrary, binding authority." Pet. in No. 22-669, at 26-27 (quoting *In re Schooler*, 725 F.3d 498, 511-512 n.10 (5th Cir. 2013)). The Fifth Circuit's gross negligence standard, the U.S. Trustee explained, "is not easily reconciled with the Supreme Court decisions holding that trustees, generally, and bankruptcy trustees, specifically, may be sued for simple negligence." *Ibid.* That same criticism applies here. The Court granted review in *Purdue* even though essentially every party other than the U.S. Trustee supported the plan. Slip op. at 2 (dissent). The U.S. Trustee's position warrants similar consideration here.

Highland's petition in No. 22-631 only underscores the need to review NexPoint's petition in No. 22-669 as well. The issues in the two cases are tightly interwoven. A ruling prohibiting third-party exculpations may do little to settle the disarray if courts continue to grant broad protections to third parties based on expansive views of immunity. Reviewing those issues together is necessary

to end a serious abuse of the bankruptcy system—efforts of non-debtors to discharge their own obligations without declaring bankruptcy themselves, thereby obtaining the bankruptcy system's benefits while avoiding its corresponding obligations and safeguards.

CONCLUSION

The Court should grant both Highland's petition in No. 22-631 and NexPoint's petition in No. 22-669.

Respectfully submitted.

BENOIT QUARMBY
MOLOLAMKEN LLP
430 Park Ave.
New York, NY 10022

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
EUGENE A. SOKOLOFF
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for NexPoint Advisors, L.P. and NexPoint Asset Management, L.P.

JUNE 2024