Nos. 22-631 & 22-669

IN THE
Supreme Court of the United States

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

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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.

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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.

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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 sup-

plemental brief in response to the amicus brief filed on behalf of the United States in both cases on October 19, 2023, pursuant to this Court's invitation of May 15, 2023.

ARGUMENT

I. The United States recommends that these cases be held pending the Court's decision in *Harrington* v. *Purdue Pharma L.P.*, No. 23-124 (to be argued Dec. 4, 2023). NexPoint agrees with that recommendation. As the Solicitor General explains, *Purdue* presents issues closely related to the ones at issue in these two petitions. The Court's decision in *Purdue* may therefore shed light on the proper disposition of these cases. U.S. Br. 12.

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 third parties from liability for misconduct short of gross negligence in connection with the reorganization—even for ordinary post-confirmation business operations. The Fifth Circuit invalidated those provisions in large part. 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 third parties who have not themselves filed for bankruptcy are generally prohibited. In No. 22-669, NexPoint urges that the Fifth Circuit did not go far enough, having upheld the provisions with respect to Highland's independent directors, even for ordinary post-confirmation business operations. That ruling, NexPoint explains, rests on an erroneous standard for trustee immunity that implicates an acknowledged three-way circuit conflict.

The United States correctly notes that *Purdue* presents closely related issues that may bear strongly on the proper disposition of these petitions. Purdue's reorganization plan contains third-party releases that purport to extinguish a wide range of claims against members of the Sackler family, who did not themselves seek bankruptcy protection. J.A. in No. 23-124, at 851-853. The question presented in *Purdue* asks this Court to decide whether such non-consensual third-party releases are permissible. Pet. Br. in No. 23-124, at i.

Purdue arguably differs from NexPoint and Highland's case in that Purdue's plan involves third-party releases that purport to eliminate a broad range of claims, whereas Highland's plan involves third-party exculpations that apply only to post-petition conduct short of gross negligence. As the United States explains, however, that distinction does not make the 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.*

NexPoint elaborated on those points in the amicus brief it filed in *Purdue*. See NexPoint Br. in No. 23-124, at 16-27 (filed Sept. 27, 2023). As that brief explains, there is no principled basis for distinguishing third-party exculpations from third-party releases: Both offend the text and structure of the Bankruptcy Code for the same reasons. NexPoint thus urged this Court to reverse the judgment in *Purdue* and hold that the Bankruptcy Code

broadly prohibits third-party releases, while avoiding unnecessary language that could suggest that exculpation clauses might be treated differently. *Ibid.* In any event, whatever the precise phrasing of the Court's ruling in *Purdue*, there is no question that the ruling may bear on the questions presented here. The Court should therefore hold these petitions pending its decision in *Purdue*, as the United States recommends.

II. NexPoint parts ways with the government on a narrower issue. The government does not dispute that, if the Court ultimately grants Highland's petition in No. 22-631, it should grant NexPoint's petition in No. 22-669 as well. But the government suggests that NexPoint's petition is not *independently* worthy of review. U.S. Br. 12. On that issue, the government is incorrect.

As NexPoint's petition explains, the Fifth Circuit upheld provisions in Highland's plan that insulated the independent directors from liability for 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. *Id.* at 27a (citing *In re Smyth*, 207 F.3d 758, 762 (5th Cir. 2000)). But the courts of appeals are openly divided over that standard. 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 an "intermediate position" that requires "gross negligence." *Id.* at 23-24.

The government does not dispute the existence of that longstanding three-way circuit conflict. Nor does it question the issue's importance. Indeed, the U.S. Trustee previously urged the Fifth Circuit to reconsider its gross

negligence standard, urging that the court had "overlooked contrary, binding authority, and that a 'gross negligence standard is not easily reconciled with the Supreme Court decisions holding that trustees, generally, and bankruptcy trustees, specifically, may be sued for simple negligence.'" Pet. in No. 22-669, at 26-27 (quoting U.S. Trustee Br. in *In re Schooler*, No. 12-10677 (5th Cir. July 12, 2013)). While the government briefly alludes to Highland's objections over whether NexPoint's questions are fairly presented in this case (U.S. Br. 12), the government pointedly does not endorse those objections or take issue with any of NexPoint's responses. Cert. Reply in No. 22-669, at 2-6.

The government highlights statements in NexPoint's prior filings urging that "review of [NexPoint's] questions is '*particularly* imperative if the Court is inclined to grant [Highland's] petition'" and that "the questions in [NexPoint's] petition [are] 'intertwined' and 'related' to the question presented [Highland's] petition." U.S. Br. 12 (emphasis added). But the fact that review of NexPoint's two questions would be *particularly* warranted if the Court grants Highland's petition does not mean those questions are otherwise unworthy of review. NexPoint's first question presented, in particular, implicates a longstanding circuit conflict on an important bankruptcy law question on which the government has previously argued against the approach the court adopted below. That question warrants review whether or not the Court grants Highland's petition.[1]

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[1] The government inadvertently misdescribes the Fifth Circuit's decision below when it states that the court "upheld the remainder of [Highland's] plan [apart from the exculpation provision], including the plan's injunction and gatekeeper provisions." U.S. Br. 7. The

CONCLUSION

The Court should hold Highland's petition in No. 22-631 and NexPoint's petition in No. 22-669 pending its decision in *Purdue*, and then grant both petitions.

Respectfully submitted.

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NOVEMBER 2023

Fifth Circuit expressly held that "[NexPoint's] primary contention [regarding the injunction and gatekeeper provisions]—that the Plan's injunction 'is broad' by releasing non-debtors in violation of § 524(e)—is resolved by our striking the impermissibly exculpated parties" from those provisions. Pet. App. in No. 22-669, at 35a. The court of appeals thus made clear that its ruling on the exculpation provisions applied equally to the injunction and gatekeeper provisions. The court's amendments to its opinion in response to the petition for rehearing confirm the court's intent. See NexPoint Br. in Resp. in No. 22-631, at 7 n.1.

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CERTIFICATE OF COMPLIANCE

Pursuant to this Court's Rule 33.1(h), I hereby certify that the Supplemental Brief for NexPoint Advisors, L.P. and NexPoint Asset Management, L.P. contains 1,242 words, excluding parts of the document that are exempted by Rule 33.1(d).

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

Executed on November 6, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2023, I caused the Supplemental Brief for NexPoint Advisors, L.P. and NexPoint Asset Management, L.P. to be served on the counsel of record as follows:

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I hereby certify that all parties required to be served have been served. I declare under penalty of perjury that the foregoing is true and correct.

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