No. 25-119

In the Supreme Court of the United States

HIGHLAND CAPITAL MANAGEMENT, L.P.,
Petitioner,

v.

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

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondents resort to a downright frivolous argument that this Court "cannot" now review the issue that it declined to review when the ink was barely dry on *Purdue* and this case was in an interlocutory posture. When they address the acknowledged circuit conflicts raised by the petition, they hide behind *Purdue* and run away from the *text* of 11 U.S.C. § 524(e)—even though both challenged holdings rested *entirely* on the Fifth Circuit's misreading of that statute and *Purdue* did not even arguably endorse that misreading.

Distinguished bankruptcy scholars have explained to this Court in an amicus brief that the decisions below misread *Purdue*, misread the statute, and have "pernicious" practical consequences. And the impending task of lower courts to implement *Purdue* is a reason to *grant*—not to deny—certiorari. Respondents' preferred course of still more delay means only that the circuits would remain on divergent paths.

I. The Court Has Authority To Review The Exculpation Question

This Court has authority to review *any* issue pressed or passed upon below. Pet. 18 n.2 (citing *United States* v. *Williams*, 504 U.S. 36, 40-45 (1992)). When a subsequent cert. petition is filed, this Court reviews issues raised in prior interlocutory decisions, even if it has denied a prior petition raising the same issues. Pet. 15 n.1 (citing *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504 (2001) (per curiam)); see also *Virginia Mil. Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial

of certiorari). Both principles allow the Court to review Highland's exculpation question. The point is not even debatable.

So NexPoint doesn't debate it. Instead, it **ignores those dispositive authorities entirely**. NexPoint argues (at 1, 10-12) that, because Highland did not cross-appeal to the Fifth Circuit, this Court "has no authority to consider" the exculpation question. According to NexPoint, Highland had to make a pointless and futile gesture: file a cross-appeal from the bankruptcy court order that implemented *Highland I* and ask the Fifth Circuit to reconsider the issue it had decided in *Highland I*. Nonsense.

First, as this Court explained in *Williams*, it can review an issue that the court of appeals passes on *even if* no party, appellant or otherwise, raises the issue. 504 U.S. at 40-45. Nothing in the Court's discussion of that rule requires that an appellee file a cross-appeal. The Fifth Circuit in *Highland I* and *Highland II* passed on the question of permissible exculpation under 11 U.S.C. § 524(e). See Pet. 17-19 & n.2.

Second, NexPoint is wrong that the *Highland I* appeal "came to an end when this Court denied certiorari on July 2, 2024," and that *Highland II* is "a separate and distinct appeal." BIO11 n.8. Both decisions are appeals in the same case concerning the same non-debtor protections in the same bankruptcy plan. And *Highland II* follows directly from *Highland I*'s remand, making *Highland I* an interlocutory decision. Indeed, respondents previously argued that "*Highland II* amounts to nothing more than a ministerial opinion" concerning the "implement[ation]" of *Highland I*. Opp. to Application

for Stay of Mandate at 3, No. 24A1154 (filed June 5, 2025). Denial of certiorari in *Highland I*, therefore, does not prevent Highland "from raising the same issues in a later petition." *Virginia Mil. Inst.*, 508 U.S. 946 (Scalia, J., respecting the denial of certiorari).

This settled rule, too, allows an appellee to seek this Court's review without cross-appealing before the court of appeals. For instance, in *Garvey*, which Highland cited in its petition (at 15 n.1), this Court reviewed a subsequent Ninth Circuit decision enforcing the mandate of a prior decision (and again remanding), even though it had denied cert. to review the prior decision. 532 U.S. at 508 n.1. There was no cross-appeal in that case. See *Garvey* v. *Major League Baseball Players Ass'n*, 243 F.3d 547 (9th Cir. 2000). And the Court did not consider the denial of cert. after the first decision to have ended the appeal or prevented the petitioner from raising the issue again in a second cert. petition.

"Supreme Court review of a final judgment opens up the entire case, including all relevant interlocutory orders that may have been entered by the court of appeals or the district court. The Court can reach back and correct errors in the interlocutory proceedings below, even though no attempt was made at the time to secure review of the interlocutory decree or even though such an attempt was made without success." Stephen M. Shapiro et al., *Supreme Court Practice* § 2.3, at 2-16 (11th ed. 2019); see, *e.g.*, *Washington* v. *Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979); *Panama R.R. Co.* v. *Napier Shipping Co.*, 166 U.S. 280, 284 (1897) ("while the court of appeals may have been limited on the second appeal to questions arising upon the

amount of damages, no such limitation applies to this court"); *Mount Soledad Mem'l Ass'n* v. *Trunk*, 567 U.S. 944 (2012) (Alito, J., respecting the denial of certiorari) ("the Federal Government is free to raise the same issue in a later petition following entry of a final judgment").[1] What is NexPoint's argument for departing from this black-letter rule that the Court has applied often and never, to our knowledge, wavered from? To pretend that it does not exist.

Third, NexPoint confuses the requirement to file a cross-appeal to seek favorable relief from a court of appeals with the requirement to file a cross-petition to seek favorable relief from this Court. This Court generally will not alter a decision of a court of appeals in favor of a respondent if the respondent has not filed a cross-petition for cert. See, *e.g.*, *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 72 (2013). And a court of appeals will generally not alter a judgment in favor of an appellee if the appellee has not filed a cross-appeal. See, *e.g.*, *United States* v. *Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924). But that does not mean a party must file a cross-appeal before the court of appeals before *this* Court can review the error.

NexPoint's cases are inapposite. In *Helvering* v. *Pfeiffer*, the Court declined to consider an argument after the court of appeals refused to consider it

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[1] In *United States* v. *Broce*, 488 U.S. 563 (1989), the United States did not petition after an en banc decision but did petition after a remand and further appeal. This Court reversed because it disagreed with the en banc decision. The second appellate decision had merely "held that the District Court's finding of a single conspiracy was not clearly erroneous." *Id.* at 569.

because there was no cross-appeal. 302 U.S. 247, 251 (1937). In *Greenlaw* v. *United States*, the Court's requirement that the party have cross-appealed to the court of appeals was based on the party-presentment rule. 554 U.S. 237, 244 (2008). The *Williams* rule, though, recognizes this Court's authority to address issues *outside* of the party-presentment rule when the court of appeals passes on them. And *Swarb* v. *Lennox* was a direct appeal from a district court. 405 U.S. 191 (1972).[2]

This contention is frivolous.

II. The Questions In The Petition Are Certworthy

1. Section 524(e) of the Bankruptcy Code provides, in its entirety, that, "[e]xcept as provided in subsection (a)(3) of this section, 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." Exculpation clauses and gatekeeper provisions have *nothing to do with* "the liability of any other entity on * * * such debt." They concern potential *postpetition* liabilities of fiduciaries who—unlike the Sacklers in *Purdue*—enter the bankruptcy case with no prior connection to the debtor that could give rise to joint and several or derivative liability on "such debt." See Brief for Amici Curiae Professors Anthony

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[2] Even if none of this were true, the Court *still* could review an error in the first opinion that led directly to the error in the second. See *Cisneros* v. *Alpine Ridge Grp.*, 508 U.S. 10, 19 (1993) (reversing constitutional decision, without addressing its reasoning, because it flowed from an earlier and final appellate decision that got the meaning of a contract "almost precisely backwards").

J. Casey *et al.*, in Support of Petitioner ("Amici Br.") 19.

No wonder that the Fifth Circuit is on the minority side of a circuit split concerning the meaning of section 524(e). In that court, section 524(e) has become an "edict" depriving bankruptcy courts of power to protect fiduciaries who assist the estate. Pet. 18; Pet. App. 11a. But at least the Fifth Circuit—unlike NexPoint in this go-round—honestly acknowledges the conflict: "The simple fact of the matter is that there is a circuit split concerning the effect and reach of § 524(e)." Pet. App. 47a; see also Pet. App. 47a n.14 (rejecting arguments that its holding would create a "clear circuit split" because "[t]here already is one"). And, as the Fifth Circuit recognized, that split has persisted for more than two decades. See *ibid.* (citing cases from 1990 and 2002). Such a glaring and entrenched circuit split on an important statutory question is enough to warrant this Court's review.

NexPoint also does not seriously contest that the Fifth Circuit has split with its sister circuits over the scope of the *Barton* doctrine. On this, the most NexPoint can muster is speculation that, perhaps, the Fifth Circuit didn't mean what it said in *Highland II* when it expressly observed that "[o]ther circuits" had "extended the *Barton* doctrine to protect a wider variety of court-appointed and court-approved fiduciaries and their agents" than it was willing to. Pet. App. 13a n.6.

NexPoint claims that "*Highland II* acknowledges that the *Barton* doctrine extends not only to bankruptcy trustees but to any other 'bankruptcy-court-appointed officer.'" BIO20 (quoting Pet. App.

12a). And this, NexPoint asserts, shows that "it is not at all apparent how the Fifth Circuit's description of the *Barton* doctrine in *Highland II* departs from the approaches taken" in other circuits. BIO21.

Highland II "acknowledges" no such thing; it does *not* say that *Barton* extends to "any" court-appointed officer. See Pet. App. 12a. NexPoint is simply inserting words into the opinion—the word "any," in particular—that are not there.

In the language that NexPoint selectively misquotes, *Highland II* simply quotes prior cases to observe that, where *Barton* has applied in the Fifth Circuit, it has applied to "bankruptcy-court-appointed officer[s]." But *Highland II*, leveraging its misinterpretation of section 524(e), then closes the universe of court-appointed officers eligible for *Barton* protection to include only the "abovenamed non-debtor individuals"—meaning, the trustee and the creditors' committee. Pet. App. 13a. That is why *Highland II* drew its distinction with "other circuits" that protected "a wider variety of court-appointed and court-approved fiduciaries and their agents." *Ibid.*

2. Faced with two open and acknowledged circuit splits, NexPoint relies heavily on its argument that, given *Purdue*'s recency, this Court should wait before taking up the issues presented in this petition. See BIO12-19. But NexPoint has it backwards. It is because lower courts are now tasked with applying *Purdue* that resolving the preexisting split over section 524(e) is urgent. The courts of appeals are already in open conflict with respect to non-debtor protections in bankruptcy based on competing interpretations of section 524(e), and failure to resolve the conflict now guarantees disarray.

With respect to the exculpation question, NexPoint urges this Court to wait for the lower courts to ground an exculpation clause in authority other than sections 105(a) and 1123(b)(6), implying—but never outright arguing—that *Purdue* foreclosed exculpations based on those provisions. BIO15. *Purdue*, of course, did no such thing. The decision's discussion of section 105(a) is confined to a footnote. See *Harrington* v. *Purdue Pharma L.P.*, 603 U.S. 204, 216 n.2 (2024). Exculpation clauses protect those who "carry out" the other provisions of the Code to achieve a successful bankruptcy, which is precisely what section 105(a) authorizes. And exculpation clauses—which set a standard of care for those negotiating, confirming, and implementing the *debtor's* plan—also fit comfortably within *Purdue*'s understanding of section 1123(b)(6). Because non-debtor protections like the ones at issue here are supported by the texts of both sections 105(a) and 1123(b)(6), there is no reason for the Court to wait indefinitely until a lower court holds that another provision authorizes non-debtor protections. The split over section 524(e) demands attention now.

NexPoint also suggests that, in expressly cabining its holding in *Purdue*, this Court did not mean to leave open the lawfulness of exculpation clauses. Only this Court knows for sure, but the evidence available to outsiders strongly suggests that the propriety of other plan protections, like exculpation clauses, is an issue this Court had in mind. The dissent in *Purdue* discussed exculpation clauses at some length and took as a given that they were lawful before and after *Purdue*. 603 U.S. at 264-265 (Kavanaugh, J., dissenting). The majority did not contend otherwise. At oral argument, Justice

Sotomayor had pressed the United States for its view of how the Court could write its opinion to avoid prohibiting exculpation clauses. Tr. of Oral Arg. 37-38. Thus, as NexPoint itself previously acknowledged, the best reading of *Purdue* is that it did not resolve the issue for exculpation clauses. See Supplemental Brief for NexPoint Advisors, L.P. and NexPoint Asset Management, L.P. at 5, No. 22-631 (filed June 28, 2024).

NexPoint's argument for this Court to delay resolving the *Barton* split is similarly misguided. NexPoint claims that the decisions from other circuits lack sufficient reasoning to warrant this Court's review. NexPoint is wrong.

First, *Highland II* connected its minority view of the *Barton* doctrine to its minority view of section 524(e). It saw section 524(e) as the reason that it could not uphold the gatekeeper provision. Pet. App. 11a. Thus, all of the other circuits' analysis of section 524(e) is relevant. See, *e.g.*, *Blixseth* v. *Credit Suisse*, 961 F.3d 1074, 1082-1084 (9th Cir. 2020).

Second, the opinions that comprise the circuit split are far from devoid of reasoning. *Lawrence* v. *Goldberg*, 573 F.3d 1265 (11th Cir. 2009), in particular, contains paragraphs of reasoning. See *id.* 1269-1270. Quoting its prior holding in *Carter* v. *Rodgers*, 220 F.3d 1249 (11th Cir. 2000), the court explained the reason for the *Barton* doctrine as to bankruptcy trustees:

> If the trustee is burdened with having to defend against suits by litigants disappointed by his actions on the court's behalf, his work for the court will be

> impeded. Without the requirement of leave, trusteeship will become a more irksome duty, and so it will be harder for courts to find competent people to appoint as trustees. Trustees will have to pay higher malpractice premiums, and this will make the administration of the bankruptcy laws more expensive. Furthermore, requiring that leave to sue be sought enables bankruptcy judges to monitor the work of the trustees more effectively.

573 F.3d at 1269 (cleaned up).

The Eleventh Circuit wasn't done. It went on to apply *Barton* to the other court-approved fiduciaries seeking protection in that case: an investigator hired by the trustee to locate assets, and creditors who financed the bankruptcy investigation. See *id.* at 1270. These non-debtors "functioned as the equivalent of court appointed officers" and were being sued for acts "taken in their official capacities." *Ibid.*

The Ninth Circuit in *In re Crown Vantage, Inc.*, 421 F.3d 963 (9th Cir. 2005), which gave leave-of-court protection to a post-confirmation liquidating trust, also expounded on the rationale behind *Barton* at length. See *id.* at 970-971. According to the Ninth Circuit, "the policies underlying the *Barton* doctrine *apply with greater force to bankruptcy proceedings* than to other proceedings involving receivers" because the "requirement of uniform application of bankruptcy law dictates that all legal proceedings that affect the administration of the bankruptcy estate be brought either in bankruptcy court or with leave of the bankruptcy court." *Id.* at 971 (emphasis

added); accord *In re Lowenbraun*, 453 F.3d 314, 321 (6th Cir. 2006).

NexPoint urges this Court to "wait for the circuit courts to clarify and crystallize the disagreement." BIO21. But the disagreement is already clear. And, considering that this Court has not expounded the scope of the *Barton* doctrine since the 19th century, there is no framework from this Court around which the lower courts should be expected to "crystallize" their analysis.

Ultimately, *Highland II* strongly demonstrates the need for this Court to get involved now. The Fifth Circuit has not only entrenched its outlier position on section 524(e) but allowed it to metastasize and infect the *Barton* doctrine. *Highland II* viewed *Purdue* as supporting its atextual reading of the provision. See Pet. App. 11a (citing its outlier position of 524(e), then immediately claiming that *Purdue* was decided "[i]n accordance with this principle"). On the other hand, as the petition (at 27-28) and amici (at 10, 14) observe, lower courts outside the Fifth Circuit continue to approve various non-debtor protections, including exculpation and gatekeeper provisions. NexPoint's plea for this Court to sit on its hands and wait "to resolve a disagreement . . . if one emerges," BIO13, thus rings hollow—disagreement already exists.

III. The Fifth Circuit Is Wrong

Notably absent from the Brief In Opposition is any attempt to defend the Fifth Circuit's minority construction of section 524(e). That's because the construction is indefensible. The text of the provision is quite clear—it limits the effects of the debtor's discharge on the discharged debt; it does not divest the bankruptcy court of other powers.

And this statutory error matters. As amici observe, the Fifth Circuit's error is "[p]ernicious." Amici Br. 15. The error threatens the Constitution's requirement that the bankruptcy laws be "uniform." *Id.* at 17-18. And the inability of bankruptcy participants to obtain modest liability protections increases the already onerous costs of chapter 11, further depleting the value of the estates. *Id.* at 22.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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