

No. 25-119

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 FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Almost 4 years ago, in *Highland I*, the Fifth Circuit correctly observed that “there is a circuit split concerning the effect and reach of [11 U.S.C.] § 524(e),” Pet. App. 47a, citing cases going back as far as 1990. See also Pet. App. 47a n.14. The Solicitor General does not and cannot contend that that circuit conflict was resolved by *Harrington v. Purdue Pharma, L.P.*, 603 U.S. 204 (2024). On the contrary, in *Highland II*, the Fifth Circuit’s minority position metastasized to invalidate a gatekeeper provision—and, at the same time, courts in the majority have no reason to change their position. At least one court of appeals that correctly anticipated *Purdue* held that an exculpation clause is permitted by section 524(e) even though a nonconsensual third-party release is not. *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1084 (9th Cir. 2020), cert. denied, 141 S. Ct. 1394 (2021).*

* Post-*Purdue* litigation in the lower courts has confirmed what respondents admitted two years ago—this “circuit conflict is likely to persist” without this Court’s review. Supplemental Brief for Respondents at 5, No. 22-631 (filed June 28, 2024). Indeed, in *Purdue* itself, the bankruptcy judge on remand approved a “customary and appropriate exculpation” clause, without mentioning this Court’s decision on third-party releases. *In re Purdue Pharma L.P.*, 675 B.R. 632, 666 (Bankr. S.D.N.Y. 2025). To the extent the lower courts have addressed this Court’s *Purdue* decision, they have concluded that it “does not apply” to exculpations, *McAlary v. Cash Cloud Inc.*, 2025 WL 2206176, at *5 (D. Nev. Aug. 4, 2025) (following *Blixseth*), and does nothing to “call into question” circuit precedent on the majority side of the split. *In re Smallhold, Inc.*, 665 B.R. 704, 725 (Bankr. D. Del. 2024) (following *In*

So why not resolve a mature circuit conflict that will not dissipate without action by this Court? Not because it is unimportant. The Solicitor General admits that “[t]he authority of bankruptcy courts to use exculpation and gatekeeping to protect participants in bankruptcy proceedings from litigation is an important question of bankruptcy law.” Br. 12. Not because it is not recurring. The Solicitor General admits that “[t]he questions presented are * * * very likely to recur.” Br. 2. Not because this case is a poor vehicle. The Solicitor General acknowledges that both issues are cleanly presented. Br. 12-15. Not because the Fifth Circuit is right. The Solicitor General acknowledges that our argument—that section 524(e)’s plain text, especially the words “such debt,” shows that it does not apply here—“has force.” Br. 15-16.

No, the Solicitor General offers only the flimsy reason that courts have not yet had a sufficient opportunity to address *other* provisions that might eventually bear on the validity of exculpation and gatekeeper clauses, 11 U.S.C. § 105(a) & § 1123(b)(6). Br. 16-19. And, even there, the Solicitor General cannot bring himself to say that any court *should* invalidate such clauses for lack of affirmative

re PWS Holding Corp., 228 F.3d 224, 246 (3d Cir. 2000)). The lower courts agree that “[t]here is a split in the way courts view exculpations” and—unless this Court resolves the split—those courts will continue needing to “determine which camp has the better read” of section 524(e). *In re Lutheran Home & Servs. for the Aged, Inc.*, 2026 WL 626606, at *32-35 (Bankr. N.D. Ill. Mar. 4, 2026) (rejecting the Fifth Circuit’s approach because section 524(e) “does not comment on” the validity of exculpation clauses, without any mention of this Court’s decision in *Purdue*).

authorization. Rather, he all but admits that section 105(a) authorizes these clauses. Br. 17 (“To be sure, Section 105(a) might have more purchase in this context insofar as the exculpation and gatekeeper provisions, unlike the release in *Purdue*, focus on the protected parties’ conduct in the bankruptcy proceeding itself.” (citing, and expressing no disagreement with, Pet. 30)). What’s more, courts have been upholding these clauses for decades without *ever* suggesting that bankruptcy courts lack affirmative authority. See *Casey et al.* Amicus Br. 2-3, 7-8, 11-12, 13-14; *Purdue*, 603 U.S. at 264-265 (Kavanaugh, J., joined by The Chief Justice, Justice Sotomayor, and Justice Kagan, dissenting). But cf. Pet. App. 48a (rejecting reliance on sections 105(a) and 1123(b)(6) *because of* how the court construed section 524(e)).

The Solicitor General’s position boils down to saying that this Court should let a mature circuit conflict fester because a different issue that might be relevant has not yet sufficiently developed—without any indication that courts have been getting that issue wrong or that a conflict is ever likely to develop.

If this Court grants certiorari, petitioner anticipates that the Solicitor General will support petitioner on the merits. See, *e.g.*, *E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45 (2025) (unanimously agreeing on the merits with petitioner and the United States after a denial recommendation); *Cantero v. Bank of America*, 602 U.S. 205 (2024) (same); *American Trucking Ass’ns, Inc. v. City of Los Angeles*, 569 U.S. 641 (2013) (same); *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59 (2003) (same); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988) (same). True, in each of

the cited cases, the Solicitor General’s invitation brief expressly agreed with petitioners on the merits, whereas here the Solicitor General stops short. But it would be hard to reconcile any contrary position with the Solicitor General’s concessions that our section 524(e) argument “has force” and that our section 105(a) argument “ha[s] * * * purchase.”

Four Justices noted in *Purdue*, without contradiction by the majority, that exculpation clauses are necessary to attract “competent professionals” to “engag[e] in the bankruptcy process.” 603 U.S. at 265 (Kavanaugh, J., dissenting). And here there is a *factual finding*, never challenged as clearly erroneous, to that exact effect. Pet. App. 150a. The record is clean and the issues are consequential.

Note that ***no one***—not the Solicitor General, not respondents, not the Fifth Circuit—has written ***a single word*** answering petitioner’s argument that the plain text of section 524(e), and in particular its concluding words “such debt,” resolves in petitioner’s favor the section 524(e) issue. If the Court grants certiorari, it could choose to resolve that issue alone, or to address also the question of affirmative authority that the Solicitor General’s brief raises. Cf. *Purdue*, 603 U.S. at 227 (resolving issue of affirmative authority, on which there was no circuit split, but not the section 524(e) issue, on which there was). Either way, no one has offered a good reason to leave a longstanding circuit split untouched and allow a manifestly erroneous and inequitable pair of rulings to stand, just so that lower courts can spill more ink on the issues.

CONCLUSION

For the foregoing reasons, and those stated in the petition and reply, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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