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

SUPPLEMENTAL BRIEF FOR RESPONDENTS

JONATHAN F. MITCHELL
Mitchell Law PLLC
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

MICHAEL J. EDNEY
Counsel of Record
BRENDAN J. ANDERSON
MARK C. INGRAM
Morgan Lewis Bockius LLP
1111 Pennsylvania Avenue NW
Washington, D.C. 20004
(202) 739-3000
michael.edney
@morganlewis.com

Counsel for Respondents

RULE 29.6 DISCLOSURE STATEMENT

NexPoint Advisors L.P.'s majority owner is The Dugaboy Investment Trust and NexPoint Asset Management L.P.'s majority owner is Highland Capital Management Services Inc. No publicly held company owns 10 percent or more of either of those entities' ownership interests.

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The Solicitor General correctly recommends that this Court deny Highland's petition for certiorari. The alleged circuit split is illusory and immature, as the implications of *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024), have not adequately percolated through the lower courts. *See* Brief for the United States as Amicus Curiae ("U.S. Br."), at 18 ("[T]he lower courts have not had a meaningful opportunity to apply [*Purdue*'s] guidance to exculpation and gatekeeper clauses."). In particular, lower courts have not considered whether 11 U.S.C. §§ 105(a) and 1123(b)(6)—or other provisions in the Bankruptcy Code—authorize exculpation and gatekeeper provisions protecting a broad range of nondebtors involved in a bankruptcy proceeding. *Purdue* was decided

only two years ago, and the lower courts and courts of appeals have not yet had an opportunity to apply *Purdue* to these issues.

Highland fails to identify a mature circuit conflict over whether 11 U.S.C. § 524(e) bars courts from exculpating nondebtors arising *after Purdue*. In its petition for certiorari and reply, Highland identifies circuit cases that predate *Purdue*. *See* Pet. 16–17; *see also* U.S. Br. at 19–20. In its supplemental brief Highland raises post-*Purdue* cases,[1] but none of those cases indicate a split among the circuit courts, much less one developed enough for this Court's review. Nor do they address the questions presented in Highland's petition.

First, the post-*Purdue* cases arise only in bankruptcy or district courts, and none of them have reached the courts of appeals. *See, e.g.*, *In re Lutheran Home and Services for the Aged, Inc.*, 2026 WL 626606, at *32 (N.D. Ill. Bankr. Mar. 4, 2026) (recognizing the Seventh Circuit has not weighed in on the extent of an exculpation clause). This is reason enough to deny certiorari, as this Court resolves splits between courts of appeals, not district courts. *See* Sup. Ct. R. 10(a).

Second, the post-*Purdue* cases that Highland identifies merely confirm *Purdue*'s prohibition against broad-based nonconsensual third-party releases that the Fifth Circuit held impermissible in *Highland I* and *Highland II*. *See, e.g.*, *In re Purdue Pharma L.P.*, 675 B.R. 632, 666 (S.D.N.Y. Bankr. 2025) ("[T]he Plan contains only consensual non-debtor releases"); *In re Smallhold, Inc.*, 665 B.R.

1. Pet. Supp. Br. at 1–2.

704, 709–10 (D. Del. Bankr. 2024) (same); *In re Lutheran Home and Services*, 2026 WL 626606, at *35; *McAlary v. Cash Cloud Inc.*, 2025 WL 2206176, at *5 (D. Nev. Aug. 4, 2025) (approving exculpation clause narrowly releasing claims against participants in the Plan approval process rather than nondebtors).

Third, as the Solicitor General points out, the decisions in which circuit courts disagreed regarding the extent to which nondebtors may be exculpated or protected by broad gatekeeping provisions predated this Court's decision in *Purdue*. U.S. Br. at 19–20. This Court's analysis of several bankruptcy code provisions and their authorization *vel non* of protecting non-debtors against litigation bears heavily on the question presented in this case. If this Court is to resolve disagreements among the circuit courts on these issues, it should do so with the benefit of those circuit courts addressing the effect of this Court's *Purdue* decision.

That is sufficient to deny the petition. But even if Highland had identified a sufficiently mature circuit conflict, there remains a serious jurisdictional hurdle to this Court's review, particularly as to the first question presented regarding the scope of the exculpation clause. That is because Highland failed to cross-appeal from the bankruptcy court's order confirming the revised plan narrowing the exculpation clause following the Fifth Circuit's ruling in *Highland I*. Resp. Br. in Opp. at 10. The respondents were the only parties to appeal the bankruptcy court's order, and the cross-appeal rule prohibits a nonappealing party from seeking to "supplement the decree with respect to a matter not dealt with below." *United*

States v. American Railway Express Co., 265 U.S. 425, 435 (1924); *see also Helvering v. Pfeiffer*, 302 U.S. 247, 251 (1937) ("[A]n appellee cannot without a cross-appeal attack a judgment entered below."). Highland seeks to supplement the proceedings arising from *Highland II* with a matter not dealt with below, namely the scope of the exculpation provision. The appellate courts therefore lack jurisdiction to consider the scope of the exculpation provision due to Highland's failure to cross-appeal.

The Solicitor General disagrees, claiming that this Court may consider any decision entered in a case before it, even if that issue was not preserved for appeal or presented to the court below for consideration. U.S. Br. at 13–14. On this point, the Solicitor General is incorrect.

The Solicitor General relies on *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001), but *Garvey* is distinguishable and did not consider the cross-appeal rule. *Garvey* resolved whether a petition filed by an appellee in the court of appeals after the second appeal in a case could encompass issues that had also arisen in the prior appeal when the same party had appealed both times and the issues were raised in both appeals *Id.* at 508 n.1. The Court held that the petition filed from the second appeal could encompass these issues. *Ibid.* This is in stark contrast to Highland's arguments before the court of appeals here, in which it failed to raise the exculpation-clause issue on appeal in *Highland II* when the bankruptcy court has issued an unfavorable judgment on this issue. *See* Pet. 28–30.

Garvey does not stand for the broad proposition that a litigant need not take a cross appeal from an unfavorable

aspect of a district-court judgment to preserve the issue for Supreme Court review. This is what Highland asks the Court to conclude here.

The Solicitor General claims that *Urie v. Thompson*, 337 U.S. 163 (1949), supports its reading of *Garvey*. U.S. Br. at 14. The Court reasoned the petitioner in *Urie* need not relitigate an issue a second time through state courts to preserve it for review because the petitioner "brought the claim to this Court at his first opportunity[.]" 337 U.S. at 171. Here, Highland is not bringing the exculpation clause issue to this Court at its first opportunity. In fact, Highland *already brought* the issue to the Court's attention two years ago, and this Court denied certiorari. *See Highland Capital Management, L.P. v. Nex-Point Advisors, L.P.*, 144 S. Ct. 2714 (2024) (Mem). Highland could have attempted to bring the issue again if it preserved its appellate rights through a cross appeal, but it failed to do so.

Contrary to the Solicitor General's assertion that appealing the bankruptcy's application of the Fifth Circuit's mandate in narrowing the exculpation clause would be an "empty formality," U.S. Br. at 14, Highland should have cross-appealed to preserve its rights. As in *Helvering*, an issue not raised below is inappropriate to raise for the first time at this Court. 302 U.S. at 251 ("[A]n appellee cannot without a cross-appeal attack a judgment entered below.").

That cross-appealing would not have been a formality is underscored by the circumstances of this case. A major issue for the circuit courts considering the scope of exculpation clauses is this Court's decision in *Purdue*, which

occurred in between the first and second decisions of the Fifth Circuit in the case below. If Highland had objected to and cross-appealed the narrowing of the exculpation clause in line with *Highland I*, it could have argued how this Court's intervening *Purdue* decision affected the appropriate scope of the exculpation clause in this case. And giving the Fifth Circuit that opportunity might have alleviated a reason not to grant review now: That "the lower courts have not had a meaningful opportunity to apply [*Purdue*'s] guidance to exculpation and gatekeeper clauses." U.S. Br. at 18. "Even the Fifth Circuit has not done so. *Purdue* had not yet been decided at the time of *Highland I*, and the court of appeals discussed *Purdue* only in passing in *Highland II*." *Id.* That situation is in part due to Highland's failure to cross-appeal the bankruptcy court's narrowing of the exculpation clause and its failure to argue to the Fifth Circuit in *Highland II* the effect of this Court's intervening *Purdue* decision.

Any other rule would create perverse incentives. For example, it could encourage litigants that perceive a low likelihood of success before a particular appellate-court panel to keep an issue from its consideration and further explanation, seeking better prospects of success in this Court. This would also remove issues from consideration at the intermediate appellate courts, permitting petitioners to leapfrog matters past a segment of the judicial system directly to this Court.

At a minimum, the existence of the jurisdictional issue makes this petition a poor vehicle for reviewing either question presented. The Court grants "certiorari only in those cases that will enable [it] to resolve particularly

important questions." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 536 (1992). A petition such as this, which would require the Court to spend significant time and resources determining a fact-specific jurisdictional issue is not a case that enables it to resolve any important legal questions — even if any were present in this case. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (denying petition as improvidently granted where, among other things, deciding it "would require a threshold examination of whether petitioner has standing to challenge such statutes and regulations."); *cf. Medellin v. Dretke*, 544 U.S. 660, 664 (2005) (denying petition for writ of certiorari as improvidently granted where there were "several threshold issues" that could "render advisory or academic [the Court's] consideration of the questions presented.").

As shown above, and in the respondents' brief in opposition, the jurisdictional issue with the second question presented is serious and would require party briefing and Court consideration. This would divert briefing space and argument time away from the merits of the questions presented by the petition. So even if the Court were to think that these questions merit consideration, and even if it were to think that a mature circuit split exists, it should still decline to resolve those issues in this case where it would have to resolve a fact-specific jurisdictional issue before reaching the merits of the questions presented.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

JONATHAN F. MITCHELL
Mitchell Law PLLC
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

MICHAEL J. EDNEY
Counsel of Record
BRENDAN J. ANDERSON
MARK C. INGRAM
Morgan Lewis Bockius LLP
1111 Pennsylvania Avenue NW
Washington, D.C. 20004
(202) 739-3000
michael.edney@
morganlewis.com