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# Time Is Money—An Argument for Expedient Review of Bankruptcy Cases

Robert Nuse

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## Time Is Money—An Argument for Expedient Review of Bankruptcy Cases

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#### I. Introduction

The Constitution grants Congress the power to establish uniform bankruptcy laws in the United States.<sup>1</sup> Although James Madison believed that this power was so intertwined with Congress's power to regulate and would be a strong enough prophylactic on potential bankruptcy petitioners' ability to perpetrate frauds that the wisdom of granting Congress this power would not be called into question,<sup>2</sup> had Madison any idea of the number of businesses and individuals who would come to seek bankruptcy protection every year, he likely would have referred to these statistics in arguing the necessity of granting Congress this power.<sup>3</sup> Eighty percent of businesses fail in their first year.<sup>4</sup> Of those that make it past their first year, approximately half make it to their fifth.<sup>5</sup> One third will last ten years.<sup>6</sup> During the fiscal year ending on September 30, 2016, there were 805,580 total bankruptcy petitions filed by individuals and businesses in the Bankruptcy courts.<sup>7</sup> For comparison, in that same period, 291,851 civil cases were brought in the district courts, and 77,357 criminal proceedings were brought.<sup>8</sup> It should come as no surprise, therefore, that the Supreme Court has regularly issued writs of certiorari in bankruptcy disputes to provide

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\* J.D. Candidate, 2019, Seton Hall University School of Law; B.A., *summa cum laude*, 2011, Monmouth University. I would like to thank my editors, Professor Stephen Lubben, Joseph DiCarlo, and Catherine Soliman for their help and support in writing this Comment.

<sup>1</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>2</sup> THE FEDERALIST No. 42, at 260 (James Madison) (Garry Wills ed., 2003).

<sup>3</sup> See generally Stephen Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RES. L. REV. 319 (2013) (explaining that many of Madison's Jeffersonian-Republican allies did not understand Article I, Section 8, Clause 4 as granting Congress exclusive authority to pass bankruptcy laws, and instead argued that this power was reserved to the States). See also Andrew B. Dawson, *Better Than Bankruptcy?*, 69 RUTGERS L. REV. 137 (2016) (discussing the possibility of parallel state and federal bankruptcy laws).

<sup>4</sup> Cf. Keith Speights, *Success Rate: What Percentage of Businesses Fail in Their First Year?*, USA TODAY (May 21, 2017), <https://www.usatoday.com/story/money/business/small-business-central/2017/05/21/what-percentage-of-businesses-fail-in-their-first-year/101260716/>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Judicial Business, 2016*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/judicial-business-2016>.

<sup>8</sup> *Id.*

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guidance on issues of statutory and constitutional interpretation.<sup>9</sup>

On March 27, 2017, the Supreme Court issued a writ of certiorari to the Ninth Circuit in the case of *U.S. Bank National Association v. Village at Lakeridge*.<sup>10</sup> Although the petitioner, U.S. Bank National Association<sup>11</sup> raised three issues on appeal, the Supreme Court granted certiorari only as to the second.<sup>12</sup> In the words of the petitioner, the Supreme Court agreed to decide

[w]hether the appropriate standard of review for determining non-statutory insider status is the *de novo* standard of review applied by the Third, Seventh and Tenth Circuit Courts of Appeal, or the clearly erroneous standard of review adopted for the first time by the Ninth Circuit Court of Appeal in this action.<sup>13</sup>

Although the respondent and amicus curiae argued the question did not merit review,<sup>14</sup> the Court was presumably swayed by the petitioner’s assertion that the dispute raised important questions about the correct interpretation of the Bankruptcy Code, which will impact both Title 11 bankruptcy disputes and commercial transactions.<sup>15</sup> In the Petition for the Writ, the petitioner argued that the case would serve as an effective vehicle for the Court to resolve a Circuit split regarding the proper standard of review for determining whether a lower court has correctly classified a party to a bankruptcy as a “non-statutory insider.”<sup>16</sup> The petitioner further argued that a decision by the Supreme Court would impact many areas of bankruptcy and fraudulent conveyance law.<sup>17</sup>

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<sup>9</sup> *E.g.*, *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017); *Sturges v. Crowninshield*, 17 U.S. 122 (1819).

<sup>10</sup> 137 S. Ct. 1372 (2017).

<sup>11</sup> By and through CW Captial Asset Management, LLC. For the sake of clarity, this Comment shall refer to this party as either “the petitioner” or “debtor.”

<sup>12</sup> Petition for Writ of Certiorari, *U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge*, 138 S. Ct. 960 (2018); 137 S. Ct. at 1327.

<sup>13</sup> Petition for Writ of Certiorari, *supra* note 12, at i.

<sup>14</sup> Brief for the Respondent in Opposition at 11–16, *U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge*, 138 S. Ct. 960 (2018); Brief for the United States as Amicus Curiae Supporting Respondents at 12–16, *U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge*, 138 S. Ct. 960 (2018).

<sup>15</sup> Reply Brief for Petitioner in Response to Brief of the United States as Amicus Curiae at 1, *U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge*, 138 S. Ct. 960 (2018).

<sup>16</sup> Petition for Writ of Certiorari, *supra* note 12, at 19.

<sup>17</sup> *Id.*

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Beyond the issues raised by the parties, however, is the ripple effect that each of the Supreme Court’s decisions on issues of statutory interpretation has upon the jurisprudence of the larger field. Each decision implicates not just the Bankruptcy Code,<sup>18</sup> but arguably the Federal Rules of Civil Procedure, Federal Rules of Appellate Procedure, and canons of appellate review. Of all of these rules, the one most heavily implicated is Federal Rule of Civil Procedure 52, which provides in relevant part that “[f]indings of fact, . . . must not be aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”<sup>19</sup> The Rules Advisory Committee has noted that Rule 52 bolsters the legitimacy and credibility of the district courts,<sup>20</sup> a conclusion with which the Supreme Court has agreed.<sup>21</sup> The implications of Rule 52(a), however, reach beyond the ambit of appellate-trial court relations. For instance, in *Cooper v. Harris*,<sup>22</sup> the Supreme Court reaffirmed (or at least favorably cited) the plurality decision in *Hernandez v. New York*,<sup>23</sup> which adopted a state court’s findings of fact, subject to review for clear error under Rule 52(a), as a matter of federalism.<sup>24</sup> The Court of Appeals for the Second Circuit has also deferred to the judgments of the district courts in the realm of international relations, and reviews the decisions of the district courts to extend comity to the courts of foreign jurisdictions on an abuse of discretion basis.<sup>25</sup> Although one may distinguish notions of comity from findings of fact and a court’s resolution of factual disputes, the Second Circuit distinguished comity as principle of convenience and expediency, implicitly recognizing

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<sup>18</sup> Cf. generally Leif M. Clark, *The Ripple Effect*, 20-6 AMERICAN BANKRUPTCY INSTITUTE JOURNAL 31 (July/Aug. 2001).

<sup>19</sup> FED. R. CIV. P. 52(a)(6).

<sup>20</sup> Cf. FED. R. CIV. P. 52(a) advisory committee’s note to 1985 amendment.

<sup>21</sup> E.g. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 837 (2015).

<sup>22</sup> 137 S. Ct. 1455 (2017).

<sup>23</sup> 500 U.S. 352 (1991).

<sup>24</sup> *Cooper*, 137 S. Ct. at 1468 (citing *Hernandez*, 500 U.S. at 369).

<sup>25</sup> See *Corporación Mexicana de Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración y Producción*, 832 F.3d 92, 100 (2d Cir. 2016).

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and sanctioning the division of labor between the trial courts charged with resolving questions of fact and the appellate courts charged with resolving of questions of law.<sup>26</sup>

Any determination by the Supreme Court in this case, whether the Court decides to empower the trial courts or to concentrate more power in the hands of the appellate courts, is likely to impact areas of the law outside of bankruptcy. Oliver Wendell Holmes, Jr. once wrote that “[t]he reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view. We could reconstruct the corpus from them if all that went before were burned.”<sup>27</sup> In other words, the work of restating the law is a generational project in which each reported decision plays its part. By agreeing to decide this case, the Roberts Court may further develop current jurisprudence on the topic.

This Comment will proceed as follows. Part II will discuss the relevant statute<sup>28</sup> and its legislative history, and the framework the Courts of Appeals follow when analyzing, interpreting, and applying the statute. For illustration, this Comment will analyze the Tenth Circuit’s application of this framework in its decision in *Anstine v. Carl Zeiss Meditec AG (In re U.S. Medical, Inc.)*.<sup>29</sup> Part III will then introduce the Ninth Circuit case which precipitated the controversy, *U.S. Bank National Association v. Village at Lakeridge, LLC. (In re Village at Lakeridge, LLC.)*<sup>30</sup> Part IV will summarize the substantive arguments advanced by the parties to the case and the United States as a friend of the Court. Finally, Part V will argue that the Court should follow the path laid out by the Respondent and best articulated by the United States. Part VI briefly concludes.

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<sup>26</sup> See *id.* at 106 (quoting *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971)).

<sup>27</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

<sup>28</sup> Bankruptcy Reform Act, 11 U.S.C. § 101(31) (2012).

<sup>29</sup> 531 F.3d 1272 (10th Cir. 2008).

<sup>30</sup> 814 F.3d 993 (9th Cir. 2016), *aff’d*, 138 S. Ct. 960 (2018).

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## II. Statutory Framework

### A. Analysis of the Relevant Statute

Before deciding the proper appellate standard for review for a bankruptcy court's determination that an individual or entity is an insider, it is necessary to determine who is an insider for the purposes of approving a reorganization plan. The relevant statute is section 101 of the Bankruptcy Reform Act.<sup>31</sup> Two sections of Title 11 provide definitions and rules of construction, respectively.<sup>32</sup> Section 101 spells out the definitions that apply to Title 11 (Bankruptcy), and section 102 provides Rules of Construction.<sup>33</sup> At issue in *Lakeridge* is whether an individual may be classified as what the bankruptcy courts refer to as a “non-statutory insider.”<sup>34</sup> Before defining this term of art, however, it is useful to discuss its congressionally-defined doppelganger, “statutory insiders.”

Section 101(31) defines the term “insider.”<sup>35</sup> The definition is divided into six sections, labelled (A)–(F). Section 101(31) begins by stating, “[t]he term ‘insider’ includes . . . .”<sup>36</sup> The subsection is then subdivided into individuals, corporations, partnerships, elected officials of a municipality, affiliates of the debtor, and managing agents of the debtor.<sup>37</sup> The Code enumerates under each subsection individuals who qualify as insiders for the purpose of the statute.<sup>38</sup> Persons who fit into one of the classes of people enumerated by Congress are counted by courts as “statutory” or “per se” insiders.<sup>39</sup> The legislative history of section 101(31) states that statutory

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<sup>31</sup> 11 U.S.C. § 101(31).

<sup>32</sup> §§ 101(31), 102(3).

<sup>33</sup> § 102.

<sup>34</sup> *Lakeridge*, 137 S. Ct. at 1327; 814 F.3d at 996. *E.g.* Speier v. Argent Mgmt., LLC (*In re Palmdale Hills Prop., Inc.*), No. 8:08-bk-17206-ES, 2017 WL 4573691, at \*5 (Bankr. C.D. Cal., Oct. 12, 2017).

<sup>35</sup> 11 U.S.C. § 101(31).

<sup>36</sup> *Id.*

<sup>37</sup> §§ 101(31)(A)–(F).

<sup>38</sup> *See* §§ 101(31)(A)–(F).

<sup>39</sup> *E.g.*, *Lakeridge*, 814 F.3d at 999; Longview Aluminum, LLC v. Brandt (*In re Longview Aluminum, LLC*), 657 F.3d 507, 509 (7th Cir. 2011).

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insiders are presumed to have “a sufficiently close relationship with the debtor that [their] conduct is made subject to closer scrutiny than those dealing at arm’s length with the debtor.”<sup>40</sup> The circuit courts have defined an arm’s length transaction as one made by parties acting in good faith, in the ordinary course of business, and intended to serve independent interests.<sup>41</sup>

Notably, when creating these lists of statutory insiders, Congress chose to use the word “includes.”<sup>42</sup> This word was not accompanied by any limiting language.<sup>43</sup> Courts, therefore, have presumed that Congress’s list of insiders is not exhaustive, and that others may qualify as insiders. These people and entities are called “non-statutory insiders.”<sup>44</sup> “Non-statutory insiders” have been defined as “those entities[or persons] which, while not listed in the statutory definition, have a sufficiently close relationship with [the] debtor that their conduct is made subject to closer scrutiny than those dealing at arm’s length with debtor . . . .”<sup>45</sup> The crux of the analysis, therefore, is a close relationship between the creditor and debtor, such that a court may presume that the two are not truly dealing at arm’s length.<sup>46</sup>

As stated above, this category of non-statutory insiders is a product of judicial interpretation of legislative language.<sup>47</sup> More specifically, the recognition of this class of insiders is a function of the courts’ interpretation of Congress’s language in § 101(31), and of Congress’s intent in both carving out a class of insiders and choosing to use the word “include” in § 101(31).

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<sup>40</sup> S. REP. No. 95-989, at 25 (1977), as reprinted in 1978 U.S.C.C.A.N. 5787, 5810; see, e.g., *Lakeridge*, 814 at 999; *Longview Aluminum*, 657 F.3d at 509.

<sup>41</sup> *Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1277 n.4 (10th Cir. 2008) (quoting *Arm’s-Length Transaction*, BLACK’S LAW DICTIONARY 109 (6th ed. 1990)). *Arm’s-Length*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Of, relating to, or involving dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship”). See also *Shubert v. Lucent Techs., Inc. (In re Winstar Comms., Inc.)*, 554 F.3d 382, 399 (3d Cir. 2009).

<sup>42</sup> Bankruptcy Reform Act, 11 U.S.C. §101(31) (2012).

<sup>43</sup> *Cf. id.*

<sup>44</sup> E.g., *Weinman v. Walker (In re Adams Aircraft Indus.)*, 805 F.3d 888, 894 (10th Cir. 2015).

<sup>45</sup> *U.S. Med.*, 531 F.3d at 1276 (quoting *Rupp v. United Sec. Bank (In re Kunz)*, 489 F.3d 1072, 1078-79 (10th Cir. 2007)).

<sup>46</sup> *U.S. Med.*, 531 F.3d at 1280. For definitions of “arm’s length,” see *supra* note 4141 and accompanying text.

<sup>47</sup> E.g., *Adams Aircraft Indus.*, 805 F.3d at 894.

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Congress did not define the word “include,” but it did provide a relevant rule of construction. Section 102(3) of the Bankruptcy Reform Act is the “Rules of Construction” section of Title 11. In that section, Congress clarified that “‘includes’ and ‘including’ are not limiting.”<sup>48</sup> Black’s Law Dictionary provides further clarification, defining “include” as, “[t]o contain as a part of something. The participle [‘including’] typically indicates a partial list . . . .”<sup>49</sup> The Supreme Court has approved of recourse to lay and legal dictionaries when the Bankruptcy Code is unclear, instructing lower courts that they may consult dictionaries and the Bankruptcy Rules to shed light upon the meanings of words not defined in the Code itself.<sup>50</sup> Of the many dictionaries courts have referred to, Black’s Law Dictionary is especially authoritative and persuasive.<sup>51</sup> Alexander Hamilton provided additional guidance in the *Federalist*, wherein he reminded his readers that legal interpretation must always be guided by common sense, and that the worth of an interpretation may be judged by its fidelity to its source.<sup>52</sup> Occam’s razor is as incisive in legal interpretation as it is in philosophical musing.

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<sup>48</sup> § 102(3).

<sup>49</sup> *Include*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>50</sup> *Schwab v. Reilly*, 560 U.S. 770, 783 (2010) (citing *Rousey v. Jacoway*, 544 U.S. 320, 330 (2005)).

<sup>51</sup> See Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 83 (2010) (“Justices of the United States Supreme Court have used more than 120 different dictionaries in their opinions . . . . [T]he most widely cited law dictionary is Black’s Law Dictionary”). *But see* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 67 (1994) (“I want to reemphasize what should be obvious. ‘Plain meaning’ as a way to understand language is silly. In interesting cases, meaning is not ‘plain;’ it must be imputed; and the choice among meanings must have a footing more solid than [sic] a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures. Any theory of meaning must be jurisprudential.”); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 177–78 (2011) (“Because of the vastness of linguistic experience and the limited time and resources of editors, no dictionary can capture every shred of nuance or each idiosyncratic meaning a word may acquire when combined with others. Nor can a dictionary tell the interpreter which among multiple competing senses of a word Congress intended to use. No one—not even the staunchest textualist—believes that the role of the dictionary in interpretation is straightforward, formulaic, or without complication.”); Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012), <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism> (“[There] are more persuasive points than the dictionary’s definition . . . . Dictionaries are mazes in which judges are soon lost. A dictionary-centered textualism is hopeless.”).

<sup>52</sup> THE FEDERALIST No. 83, at 506 (Alexander Hamilton) (Garry Wills, ed., 2003).

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Congress did not intend to create an exhaustive list of insiders in drafting and enacting § 101(31). Courts infer this intent because Congress’s use of the word “includes” is nonexclusive on its face, and the Rules of Construction provided by § 102(3) further support an expansive reading.<sup>53</sup> A fair interpretation of § 102(3) thus compels the conclusion Congress did not intend to create a list of exclusive categories. Instead, Congress provided sample categories which are meant to serve as illustrations, and not as an exhaustive list.<sup>54</sup> Although fairly implied by § 101(31), the Code itself does not explicitly define “non-statutory insider.”<sup>55</sup> Because a non-statutory classification exists beyond the scope of a statute, the definition of such a classification is left to the courts. As of April 2018, the Supreme Court has not defined the term “non-statutory insider” in the context of § 101(31), or generally for the purposes of a bankruptcy proceeding. The task, therefore has been left to the Circuit Courts of Appeals. According to the leading treatise, *Collier on Bankruptcy*, the inquiry boils down to whether the creditor’s business dealings with the debtors were conducted at arm’s length.<sup>56</sup> Examination of relevant case law is instructive.<sup>57</sup>

### B. Illustrative Case, *U.S. Medical, Inc.*

In *U.S. Med.*, the Tenth Circuit was asked to review the determination of a bankruptcy court, reversed by a bankruptcy appellate panel, that an entity was a non-statutory insider.<sup>58</sup> The facts upon which the bankruptcy court made its determination were not in dispute by the time the case reached the Tenth Circuit.<sup>59</sup> The debtor, U.S. Medical, Inc., distributed new and used medical equipment, and the creditor, Carl Zeiss AG, was a German company that produced surgical

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<sup>53</sup> See COLLIER ON BANKRUPTCY § 101.31 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

<sup>54</sup> *Rupp v. United Sec. Bank (In re Kunz)*, 489 F.3d 1072, 1078-79 (10th Cir. 2007) (quoting *In re Krehl*, 86 F.3d 737, 741 (7th Cir.1996)).

<sup>55</sup> See generally 11 U.S.C. § 101(31).

<sup>56</sup> COLLIER, *supra* note 53.

<sup>57</sup> *Id.*

<sup>58</sup> *Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1273-74 (10th Cir. 2008).

<sup>59</sup> *Id.* at 1274.

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equipment and aesthetic lasers.<sup>60</sup> The debtor became the creditor’s exclusive distributor in North America, and the creditor became the debtor’s exclusive manufacturer of lasers.<sup>61</sup> As part of this “strategic alliance,” *inter alia*, the creditor had the right to appoint a member of the debtor’s board of directors, and acquired a 10.6% ownership stake in the debtor.<sup>62</sup> The creditor appointed Dr. Bernard Seitz, its CEO, to the debtor’s board of directors, pursuant to the parties’ agreement.<sup>63</sup> Dr. Seitz attended every meeting of the board, either in person or by telephone.<sup>64</sup> Although Dr. Seitz had access to all of the debtor’s financial information, he never cast a vote in any decision regarding a payment to the creditor.<sup>65</sup> All day-to-day financial interactions between the creditor and the debtor were handled for the creditor by another individual.<sup>66</sup>

After experiencing financial difficulties, the debtor voluntarily filed for Chapter 7 bankruptcy.<sup>67</sup> In a subsequent adversary proceeding between the former partners, the Trustee invoked section 547(b)(4)(B) and sought to avoid certain transfers, claiming that the creditor was an insider within the scope of section 101(31).<sup>68</sup> The bankruptcy court agreed with this assertion, finding that the creditor was a non-statutory insider in the context of section 101(31) because of the “extreme closeness” between debtor and creditor.<sup>69</sup> The bankruptcy court reached this decision despite finding no evidence that Dr. Seitz controlled or sought to control the debtor, or sought to exercise any kind of undue influence upon the debtor.<sup>70</sup> Upon appeal, the bankruptcy appellate panel reversed, pointing out that not all creditors and debtors who happen to have some

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *U.S. Med.*, 531 F.3d at 1274.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (citing Bankruptcy Reform Act §§ 547(b)(4)(B), 101(31)).

<sup>69</sup> *Id.*

<sup>70</sup> *U.S. Med.*, 531 F.3d at 1274.

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sort of close relationship are to be counted as insiders simply by dint of their closeness.<sup>71</sup>

The Tenth Circuit’s opinion began by declaring the appropriate standard of review.<sup>72</sup> First, the Tenth Circuit stated that it was the court’s duty to independently review the decision of the bankruptcy court, and not the decision of the bankruptcy appellate panel.<sup>73</sup> The court agreed with the appellate panel that a whether a creditor is a non-statutory insider is typically a question of fact.<sup>74</sup> Because the facts of the case at bar, however, were previously settled or admitted, and all that remained was to draw a legal conclusion from those facts, the court found that the question it confronted was a mixed one of law and fact, in which legal aspects predominated.<sup>75</sup> Thus, the court concluded that *de novo* review was the appropriate standard.<sup>76</sup>

The Tenth Circuit relied on Title 11’s Rules of Construction and *In re Kunz*<sup>77</sup> to bolster its analysis of the two categories of insiders created by section 101(31).<sup>78</sup> The Tenth Circuit observed that each of the two categories of insiders (statutory and non-statutory insiders) “is based on either one of two relational classifications.”<sup>79</sup> The first class is statutory or per se insiders.<sup>80</sup> These are individuals or entities for whom, on account of “affinity or consanguinity,”<sup>81</sup> Congress has created a conclusive presumption of preferential treatment by the debtor.<sup>82</sup> In other words, “[t]he per se insider is considered to be close enough to the debtor to demand preferential treatment as a matter of law, regardless of whether the insider has any actual control over the actions of the debtor.”<sup>83</sup>

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<sup>71</sup> *Id.* at 1275 (citing *In re U.S. Med., Inc.*, 370 B.R. 340, 345 (B.A.P. 10th Cir. 2007)).

<sup>72</sup> *U.S. Med.*, 531 F.3d at 1275.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1275.

<sup>77</sup> *Rupp v. United Sec. Bank (In re Kunz)*, 489 F.3d 1072 (10th Cir. 2007)

<sup>78</sup> Bankruptcy Reform Act, 11 U.S.C. § 102(3) (2012).

<sup>79</sup> *U.S. Med.*, 531 F.3d at 1275 (quoting *Kunz*, 489 F.3d at 1078-79).

<sup>80</sup> *U.S. Med.*, 531 F.3d at 1275.

<sup>81</sup> *Id.* (quoting *Kunz*, 489 F.3d at 1074-75).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1277 (quoting *Kunz*, 489 F.3d at 1079).

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The Court determined quickly that the creditor was not a statutory insider.<sup>84</sup> First, the Tenth Circuit determined that the creditor did not fit any of the categories listed by Congress in section 101(31).<sup>85</sup> Centering the inquiry on the issue of control, the Tenth Circuit ruled that absent a creditor's exercise of some degree of direct control over the functions of its debtor, a creditor could not be counted as a statutory insider.<sup>86</sup> Accordingly, because the creditor did not exercise control over U.S. Medical, Inc., and Dr. Seitz did not vote in any board meeting regarding a payment to the creditor, there was no further reason for the court to conclude that the creditor was a statutory insider.<sup>87</sup> The court did not address, however, whether the creditor became a statutory insider of debtor under section 101(31)(B)(i) by virtue of Dr. Seitz's service on debtor's board of directors.<sup>88</sup> The bankruptcy appellate panel's opinion is similarly silent on that issue.<sup>89</sup> There are at least two possible explanations for this disposition. First, the argument simply may not have been made by the debtor and was considered waived. Second, and more likely, is that although Dr. Seitz did serve on debtor's board of directors, Dr. Seitz himself was not debtor's creditor. The authorities have consistently interpreted section 101(31)(B)(i) to refer to natural persons.<sup>90</sup> In keeping with this working definition of "director," it is not possible for a corporation, such as creditor, to serve as a "director" for purposes of section 101(31)(B)(i). Creditor, thus, did not become a statutory insider of debtor because of its agent's service on debtor's board of directors.

The second class is non-statutory insiders.<sup>91</sup> Here, a finding of insider status is similarly based upon a relationship between the creditor and the debtor which is close enough to compel the

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<sup>84</sup> *See id.* at 1278-79.

<sup>85</sup> *See Id.* at 1280.

<sup>86</sup> *Cf. id.* at 1278 n.5.

<sup>87</sup> *See id.* at 1280.

<sup>88</sup> *Cf. id.*

<sup>89</sup> *Cf. In re U.S. Med., Inc.*, 370 B.R. 340 (B.A.P. 10th Cir. 2007).

<sup>90</sup> *E.g.*, *Rupp v. United Sec. Bank (In re Kunz)*, 489 F.3d 1072, 1077 (10th Cir. 2007); *In re Glob. Aviation Holdings*, 478 B.R. 142, 147-48 (Bankr. E.D.N.Y. 2012); *In re Borders Grp., Inc.*, 453 B.R. 459, 468 (Bankr. S.D.N.Y. 2011).

<sup>91</sup> *U.S. Med.*, 531 F.3d at 1276

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conclusion that the creditor may gain an advantage simply because of the affinity between the parties.<sup>92</sup> Relying on the legislative history of section 101(31),<sup>93</sup> the Tenth Circuit adopted the Seventh Circuit’s conclusion in *Krehl*<sup>94</sup> that, in determining non-statutory insider status, a court must look not only to the relationship between the parties, but also to the parties’ conduct, with an eye for whether the transactions between them were conducted at arm’s length.<sup>95</sup>

The Tenth Circuit formulated its two-part test for “non-statutory insider” status accordingly. The first step of the inquiry is a factual one, and requires a court to determine whether there is a close relationship between the creditor and the debtor.<sup>96</sup> Second, the court must determine whether there is anything other than closeness between the parties that suggests that any transactions between the parties were not, in fact, conducted at arm’s length.<sup>97</sup> The Tenth Circuit clarified that the relationship between parties need not only be close, “but also at less than arm’s length.”<sup>98</sup> Thus, when determining whether a party is a non-statutory insider, the court must examine both the larger relationship between the parties, and specific transactions between the parties. Presumably, a party may, in theory, be a non-statutory insider regarding a specific transaction or series of transactions, without all transactions between the parties being so tainted.

As part of its *de novo* review of the Bankruptcy Court’s determination that the creditor was a non-statutory insider, the Tenth Circuit applied the aforementioned test to the Bankruptcy Court’s findings of fact.<sup>99</sup> Although the Tenth Circuit implicitly credited the Bankruptcy Court’s finding that there was a close relationship between the parties such as to satisfy the first prong of

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<sup>92</sup> *Id.* at 1276 (quoting *Kunz*, 489 F.3d at 1074-75).

<sup>93</sup> See S. REP. No. 95-989, at 25 (1977), as reprinted in 1978 U.S.C.C.A.N. 5787, 58105.

<sup>94</sup> *In re Krehl*, 86 F.3d 737, 742 (7th Cir.1996).

<sup>95</sup> *U.S. Med.*, 531 F.3d at 1277 (quoting *Krehl*, 86 F.3d at 742).

<sup>96</sup> *U.S. Med.*, 531 F.3d at 1277.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1278.

<sup>99</sup> *Id.*

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the test, the Tenth Circuit held that the Bankruptcy Court erred by failing to apply the second prong of the test.<sup>100</sup> Had the bankruptcy court done so, the court would not have found that the creditor was a non-statutory insider because none of the transactions between the parties were conducted at less than arm's length, and the creditor did not exert control or undue influence over the debtor.<sup>101</sup> The Tenth Circuit implied that without any such inappropriate transactions, a party could not be found to be a non-statutory insider.<sup>102</sup> The Tenth Circuit thus affirmed the decision of the bankruptcy appellate panel, and found that the creditor was not a non-statutory insider.<sup>103</sup>

With the statutory framework established and an example of its application provided,<sup>104</sup> the next section will discuss the Ninth Circuit decision which gave rise to the current controversy, *In re Lakeridge*.<sup>105</sup>

### III. The Current Case—*Lakeridge*

The debtor Village at Lakeridge, had one member, MBP Equity Partners.<sup>106</sup> MBP was managed by a five-person board of directors, one of whom was Kathie Bartlett. Bartlett shared a close business and personal relationship with Dr. Robert Rabkin.<sup>107</sup> At the time the debtor filed for bankruptcy, two companies held claims on debtor's assets.<sup>108</sup> U.S. Bank had a claim for \$10 million, and MBP had a claim for \$2.76 million.<sup>109</sup> MBP decided to sell its unsecured claim.<sup>110</sup> Bartlett approached Rabkin with an offer to sell MBP's claim to him.<sup>111</sup> Rabkin purchased the

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<sup>100</sup> *Id.*

<sup>101</sup> *U.S. Med.*, 531 F.3d at 1278.

<sup>102</sup> *Id.* at 1280 (quoting *Rupp v. United Sec. Bank (In re Kunz)*, 489 F.3d 1072, 1079 (10th Cir. 2007)).

<sup>103</sup> *See U.S. Med.*, 531 F.3d at 1282.

<sup>104</sup> *See generally Shubert v. Lucent Techs., Inc. (In re Winstar Comms., Inc.)*, 554 F.3d 382 (3d Cir. 2009) (where although the creditor did not exercise actual control over debtor, because creditor exerted undue influence over debtor and their transactions were at less than arm's length, creditor was a non-statutory insider).

<sup>105</sup> 814 F.3d 993 (9th Cir. 2016), *aff'd*, 138 S. Ct. 960 (2018).

<sup>106</sup> *Id.* at 996-97.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 997.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Lakeridge*, 814 F.3d at 997.

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claim for \$5000.<sup>112</sup> U.S. Bank deposed Rabkin, and questioned him about his relationship with Lakeridge, MBP, and Bartlett.<sup>113</sup> Rabkin testified that he had no knowledge of or relationship with Lakeridge or MBP, but admitted that he did have a close relationship with Bartlett, and that he saw her regularly.<sup>114</sup> Rabkin testified that he purchased MBP's claim solely as an investment, one which he characterized as risky.<sup>115</sup>

U.S. Bank moved to designate Rabkin's claim, and bar him from casting a vote on the reorganization plan.<sup>116</sup> U.S. Bank argued that Rabkin was both a statutory and a non-statutory insider under 11 U.S.C. § 101(31).<sup>117</sup> In determining whether Rabkin was a statutory insider, the bankruptcy court evaluated both MBP's relationship with Lakeridge, and Rabkin's relationship with Lakeridge.<sup>118</sup> The bankruptcy court determined that insider status could attach to a claim, and be imputed to an assignee thereof, and that if a statutory insider sold or assigned a claim to a non-insider party, that second party would become a statutory insider as a matter of law.<sup>119</sup> In determining whether Rabkin was a non-statutory insider, the bankruptcy court evaluated a number of criteria, including whether Rabkin exercised control over Lakeridge, the closeness of Rabkin's relationship with Bartlett and whether he purchased gifts for her or paid her bills and living expenses, and whether Bartlett exercised control over Rabkin and whether she purchased gifts for him or paid his bills and living expenses.<sup>120</sup> The bankruptcy court found that Rabkin was not a non-statutory insider because the above-mentioned criteria were not satisfied.<sup>121</sup> The bankruptcy

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 997-98.

<sup>117</sup> *Lakeridge*, 814 F.3d at 998.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

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court, however, did find that Rabkin was a statutory insider.<sup>122</sup> Because Rabkin had acquired the claim from MBP, an insider, Rabkin had become an insider by virtue of this acquisition of MBP's claim.<sup>123</sup> On appeal, the bankruptcy appellate panel affirmed the bankruptcy court's finding that Rabkin was not a non-statutory insider, but reversed its finding that Rabkin was a statutory insider, explaining that insider status cannot be imputed through sale or assignment, but must instead be determined on a case-by-case basis.<sup>124</sup>

The Ninth Circuit began its disposition of the case by declaring the applicable standard of review.<sup>125</sup> The Ninth Circuit declared that it reviewed a bankruptcy court's determination that a person is a statutory insider *de novo*.<sup>126</sup> Next, the Ninth Circuit implied that questions of assignment are questions of law, subject to *de novo* review.<sup>127</sup> The Ninth Circuit further stated that "[e]stablishing the definition of non-statutory insider status is . . . a purely legal inquiry,"<sup>128</sup> again subject to *de novo* review.<sup>129</sup> Finally, the Ninth Circuit classified the determination of whether an individual or entity qualifies as a non-statutory insider under that definition is a question of fact, subject to review only for clear error.<sup>130</sup>

The Ninth Circuit determined that Rabkin was neither a statutory nor a non-statutory

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<sup>122</sup> *Id.*

<sup>123</sup> *Lakeridge*, 814 F.3d at 998.

<sup>124</sup> *Id.* (internal citation omitted).

<sup>125</sup> *Id.* at 999.

<sup>126</sup> *Id.*

<sup>127</sup> *Lakeridge*, 814 F.3d at 999 (citing *Miller Ave. Prof'l & Promot'l Servs. v. Brady* (*In re Enter. Acquis'n Partners*), 319 B.R. 626, 630 (B.A.P. 9th Cir. 2004)).

<sup>128</sup> *Lakeridge*, 814 F.3d at 999. (citing *Stahl v. Simon* (*In re Adamson Apparel, Inc.*), 785 F.3d 1285, 1289 (9th Cir. 2015)).

<sup>129</sup> *Lakeridge*, 814 F.3d at 999 (citing *In re Adamson Apparel, Inc.*, 785 F.3d at 1289).

<sup>130</sup> *Lakeridge*, 814 F.3d at 999. (citing *Friedman v. Shelia Plotsky Brokers, Inc.* (*In re Friedman*), 126 B.R. 63, 70 (B.A.P. 9th Cir. 1991); *In re Adamson Apparel*, 785 F.3d at 1289. This Ninth Circuit rule appears to derive from *In re Uvas Farming Corp.*, 89 B.R. 889, 892 (Bankr. D.N.M. 1988), in which the District of New Mexico's Bankruptcy Court held that "[t]he determination of insider status is a question of fact. The definitions in 11 U.S.C. § 101(30)(B) are flexible and must be found on a case-by-case basis. 'Control,' then, has no fixed definition, but is often defined by example and by an examination of the facts." This holding will be discussed later in this Comment.

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insider.<sup>131</sup> In disposing of the claim that Rabkin was a statutory insider, the Ninth Circuit held that a person or entity does not become a statutory insider merely by acquiring a claim from such a party.<sup>132</sup> Rather, insider status may attach only to a claimant, and may not be assessed as a property of a particular claim.<sup>133</sup> In reaching this conclusion, the Ninth Circuit conducted a grammatical analysis. The Ninth Circuit declared that “‘insider,’ as used in the Bankruptcy Code, is a noun, referring to a person . . . . The term ‘insider’ is not . . . an adjective used to describe the property of a claim.”<sup>134</sup> Rabkin, therefore, did not become a statutory insider solely by acquiring an insider’s claim.<sup>135</sup> Because there was no other basis upon which to find that Rabkin was a statutory insider, the Ninth Circuit concluded that Rabkin was not a statutory insider.<sup>136</sup>

The Ninth Circuit reviewed the bankruptcy court’s determination that Rabkin was not a non-statutory insider under the clear error standard of review.<sup>137</sup> The Ninth Circuit determined that non-statutory insider status is a question of fact.<sup>138</sup> In assessing Rabkin’s non-statutory status or lack thereof, the Ninth Circuit applied the Tenth Circuit’s test from *U.S. Med.*<sup>139</sup> The Ninth Circuit further clarified that courts cannot assign non-statutory insider status to a creditor solely because courts may find that creditors and debtors have a close relationship.<sup>140</sup>

The Ninth Circuit found that the bankruptcy court did not clearly err in finding that Rabkin was not a non-statutory insider.<sup>141</sup> The court observed that U.S. Bank had produced no evidence that Rabkin’s relationships with either Lakeridge or Bartlett were similar enough to those flagged

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<sup>131</sup> *Lakeridge*, 814 F.3d at 1003.

<sup>132</sup> *Id.* at 999-1000

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1000.

<sup>135</sup> *Id.* at 1003.

<sup>136</sup> *Id.* at 1001.

<sup>137</sup> *Lakeridge*, 814 F.3d at 1002.

<sup>138</sup> *Id.* (citing FED. R. CIV. P. 52(a)(6); *Rand v. Rowland*, 154 F.3d 952, 957 n.4 (9th Cir. 1998)).

<sup>139</sup> *Lakeridge*, 814 F.3d at 1001 (citing 531 F.3d 1272, 1277 (2008)).

<sup>140</sup> *Lakeridge*, 814 F.3d at 1001.

<sup>141</sup> *Id.* at 1003.

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by Congress in section 101(31) to warrant the kind of close scrutiny normally reserved for statutory insiders.<sup>142</sup> In addition to crediting the bankruptcy court’s findings regarding the degree to which Rabkin and Bartlett exercised control over one another and their finances were intertwined,<sup>143</sup> the court emphasized that “[n]othing in § 101(31) or case law indicates it would be improper for a debtor to sell, or even give, a claim to a friend if the friend is acting of his own volition and neither party is engaged in bad faith.”<sup>144</sup> Finally, the court found that Rabkin purchased his interest in Lakeridge solely as a business investment, and behaved as reasonable business-person operating at arm’s length would.<sup>145</sup>

Judge Clifton concurred in part and dissented in part.<sup>146</sup> Judge Clifton agreed with the majority to the extent that the majority found Rabkin was not a statutory insider.<sup>147</sup> Judge Clifton did not agree with the majority, however, that Rabkin was not a non-statutory insider.<sup>148</sup> Judge Clifton first looked to MBP’s motivation in entering into the transaction, finding ill-intent as MBP’s primary motivation was to hand the unsecured claim to a friendly party whom MBP could rely on to vote for the reorganization plan.<sup>149</sup> Judge Clifton then looked into Rabkin’s motivations.<sup>150</sup> He concluded that Rabkin “did a favor for a friend, and if it made some money for himself, so much the better.”<sup>151</sup>

Judge Clifton next determined whether, under the second prong of the test, Rabkin and Bartlett conducted business at arm’s length.<sup>152</sup> For Judge Clifton, the fact that Rabkin and Bartlett

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<sup>142</sup> *Id.* at 1002-03.

<sup>143</sup> *Id.* at 1003.

<sup>144</sup> *Id.*

<sup>145</sup> *See id.*

<sup>146</sup> *Lakeridge*, 814 F.3d at 1003 (Clifton, J., concurring and dissenting).

<sup>147</sup> *Id.* at 1004.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 1004-05.

<sup>151</sup> *Id.* at 1005.

<sup>152</sup> *Lakeridge*, 814 F.3d at 1005 (Clifton, J., concurring and dissenting).

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did not engage in any bargaining or negotiation was dispositive.<sup>153</sup> According to Judge Clifton, this alone “‘compels the conclusion’ that Rabkin and Bartlett’s relationship was ‘close enough to gain an advantage attributable simply to affinity rather than to the course of dealings between the parties,’”<sup>154</sup> and make Rabkin a non-statutory insider.<sup>155</sup> Finally, Judge Clifton took issue with the standard of review the majority applied to the bankruptcy court’s determinations, stating that the trial court’s determination of Rabkin’s legal status is a mixed question of fact and law, properly subject to *de novo* review.<sup>156</sup>

As stated in the introduction, U.S. Bank petitioned the Supreme Court for a writ of certiorari, raising three questions for the Court to consider.<sup>157</sup> The Supreme Court granted certiorari only as to the second question. The next section of this Comment will lay out the substantive arguments advanced by the parties to the controversy, and the United States as *amicus curiae*.

### IV. The Parties’ Arguments

#### A. The Petitioner’s Argument

The petitioner posited that all standard of review questions are divided into three categories: (1) issues of fact, which appellate courts review for clear error; (2) issues of law, which appellate courts review *de novo*; and (3) mixed issues of law and fact, the standard of review for which there is currently no consensus.<sup>158</sup> According to the petitioner, the Supreme Court has defined mixed questions as questions in which “the historical facts are admitted or established, the

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.* (quoting *Rupp v. United Sec. Bank (In re Kunz)*, 489 F.3d 1072, 1079 (10th Cir. 2007)).

<sup>155</sup> *Lakeridge*, 814 F.3d at 1005 (Clifton, J., concurring and dissenting).

<sup>156</sup> *Id.* at 1006 (citing *Murray v. Bammer (In re Bammer)*, 131 F.3d 788, 792 (9th Cir. 1997) (“Mixed questions presumptively are reviewed by us *de novo* because they require consideration of legal concepts and the exercise of judgment about the values that animate legal principles.”)).

<sup>157</sup> Petition for Writ of Certiorari, *supra* note 12, at i.

<sup>158</sup> Brief for Petitioner at 23, *U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge*, 138 S. Ct. 960 (2018).

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rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.”<sup>159</sup>

Although the Ninth Circuit treated the term “insider” as invoking settled issues of law, the petitioner pointed out that the Bankruptcy Code never fixes a hard and fast definition of “insider.”<sup>160</sup> The petitioner further alleged that the bankruptcy court necessarily made a number of legal determinations when interpreting the Ninth Circuit’s test for determining whether a party qualifies as a non-statutory insider.<sup>161</sup> The factors that guided the bankruptcy court’s determination as to whether Rabkin was a non-statutory insider were not explicitly enumerated in prior Ninth Circuit jurisprudence, and the determination of which facts a bankruptcy court should consider in determining whether an individual or entity is a non-statutory insider is thus a question of law, not a question of historical fact.<sup>162</sup> Because, the petitioner argued, the bankruptcy court formulated an idiosyncratic test for determining non-statutory insider status after reviewing other cases, this exercise was fundamentally a legal one.<sup>163</sup>

The petitioner observed that the majority of the other circuits (including the Third, Seventh, Tenth, and Eleventh), have held that this is a mixed question of law and fact subject to *de novo* review.<sup>164</sup> The Fourth and Fifth Circuits agree with the Ninth Circuit, and review a bankruptcy court’s determination that a party qualifies as a non-statutory insider for clear error.<sup>165</sup> The petitioner, however, argued that the proper standard of review in this case is *de novo*.<sup>166</sup> The petitioner reached this conclusion by applying four tests which the Supreme Court has articulated

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<sup>159</sup> *Id.* at 26 (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 24.

<sup>163</sup> *Id.* at 33.

<sup>164</sup> Brief for the Petitioner, *supra* note 158, at 33.

<sup>165</sup> *Id.* at 31-32.

<sup>166</sup> *See generally, id.*

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to determine when a mixed question of fact and law warrants *de novo*, as opposed to clear error, review.<sup>167</sup>

The first test mentioned by the petitioner is the “predominance of law or fact test.”<sup>168</sup> Under this test, “[t]he question often devolves to a simple matter of determining whether the legal question ‘is analytically more akin to a fact or a legal conclusion.’”<sup>169</sup> This case, petitioner argued, wherein the issue of whether the lower court applied the proper standard is central, is properly considered predominantly legal, and is subject to *de novo* review.<sup>170</sup> “Where trial courts must determine the norms that govern whether a party satisfies a particular legal status, such a question is primarily legal in nature and requires *de novo* review.”<sup>171</sup>

The petitioner relied on *Miller v. Fenton*, in which the Supreme Court was asked to determine whether, in a federal habeas corpus proceeding, a lower court’s determination of the voluntariness of a criminal confession is an issue of fact entitled to deference under the federal habeas statute as a finding of fact.<sup>172</sup> Writing for the Court, Justice O’Connor focused on the mixed nature of the inquiry, implicating issues of law and of fact.<sup>173</sup> The Court decided that the question was predominantly a legal one, as it involved issues of legislative intent and *stare decisis*, and “the voluntariness inquiry[] subsum[ed] . . . a complex of values . . . .”<sup>174</sup>

The second test applied by the petitioner is the historical test.<sup>175</sup> The historical test calls for a two-part inquiry. It first asks whether the controlling statute provides a clear indication as to

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<sup>167</sup> *Id.* at 36.

<sup>168</sup> *Id.* at 36-37.

<sup>169</sup> *Id.* at 37 (quoting *Miller v. Fenton*, 474 U.S. 104, 116 (1985)).

<sup>170</sup> Brief for the Petitioner, *supra* note 158, at 39.

<sup>171</sup> *Id.* at 40.

<sup>172</sup> 474 U.S. 104, 105-06 (1985).

<sup>173</sup> *See id.* at 114-16.

<sup>174</sup> *Id.* at 115-16 (internal citation omitted).

<sup>175</sup> Brief for the Petitioner, *supra* note 158, at 42.

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which standard of review is appropriate.<sup>176</sup> If it does not, the Court proceeds to the second part, in which the Court looks the history of appellate practice, and confirms long-standing appellate practice.<sup>177</sup> The petitioner argued that the historical practice in bankruptcy law is for appellate courts to recognize lower courts' interpretations of undefined but fairly implied legal characterizations in the Bankruptcy Code as matters of statutory interpretation, and to subject them to *de novo* review.<sup>178</sup> Therefore, it would be in keeping with the traditional practice of the appellate courts to apply *de novo* review to bankruptcy courts' treatment of undefined terms in the Bankruptcy Code.<sup>179</sup>

The petitioner's third test is the functional analysis test.<sup>180</sup> This test is intended to assess whether, as an administrative matter, a particular actor within the judicial branch is better able to dispose of an issue in a particular case than another judicial actor.<sup>181</sup> The petitioner argued that appellate courts are better suited to decide questions invoking norms and standards that animate and give substance to statutory interpretation.<sup>182</sup> Because the application of the Ninth Circuit's test for non-statutory insider status calls for statutory interpretation, imparts serious legal consequences, and does not call for factual determinations, the question is well-suited for disposition by the appellate courts.<sup>183</sup> Although, again echoing *Miller*,<sup>184</sup> the petitioner conceded that there are circumstances in which trial courts are better equipped to dispose of the issues than are appellate courts, the petitioner argued that nothing in the determination of insider-status

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 44.

<sup>180</sup> Brief for the Petitioner, *supra* note 158, at 45.

<sup>181</sup> *Id.* at 46 (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)).

<sup>182</sup> *Id.* at 47.

<sup>183</sup> *Id.* at 46-47.

<sup>184</sup> *See* 474 U.S. 104, 114 (1985).

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invokes the special provinces and duties of the lower courts.<sup>185</sup> Conversely, the petitioner asserted appellate courts are, at the least, no less able than the lower courts to make such determinations on account of their inability to interact with witnesses, take testimony, and engage in other fact-finding activities.<sup>186</sup> The petitioner also stressed the need for uniformity in the interpretation of the Bankruptcy Code.<sup>187</sup> In addition to pointing out that the Constitution itself calls for such uniformity,<sup>188</sup> the petitioner argued that *de novo* review would discourage forum-shopping<sup>189</sup> and encourage stability in other areas of bankruptcy law.<sup>190</sup>

The final test which the petitioner argued should lead the Court to adopt the *de novo* standard of review is the ultimate issue test.<sup>191</sup> The ultimate issue test asks “whether the issue is dispositive of the broader question under consideration, i.e., whether it is an ‘ultimate issue’ that ‘clearly impl[ies] the application of standards of law.’”<sup>192</sup> Where legal issues are the ultimate issues, *de novo* review is proper.<sup>193</sup> The petitioner argued that because the open-ended nature of an inquiry into insider status and the Ninth Circuit’s uncertain standard requires bankruptcy courts to engage in statutory interpretation and answer questions of law when conducting the inquiry, the inquiry is inherently legal or quasi-legal in nature.<sup>194</sup>

In making this argument, the petitioner relied on *Pullman-Standard v. Swint* and its discussion of *Baumgartner v. United States*.<sup>195</sup> In *Pullman-Standard*, a Title VII discrimination

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<sup>185</sup> Brief for the Petitioner, *supra* note 158, at 50.

<sup>186</sup> *See id.* at 50-52.

<sup>187</sup> *Id.* at 49-50.

<sup>188</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>189</sup> *See* Brief for the Petitioner, *supra* note 158, at 49-50.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 52.

<sup>192</sup> *Id.* (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 286 n. 16 (1982)).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 53.

<sup>195</sup> 456 U.S. 273 (1982); 322 U.S. 665 (1944).

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case, the district court had found no discriminatory intent on the part of the employer.<sup>196</sup> The Fifth Circuit, however, reversed, finding that the differences in the terms of employment and working conditions for black workers and white workers at Pullman-Standard was a product of discriminatory intent.<sup>197</sup> In reversing the district court, the Fifth Circuit distinguished what was purported to be the “ultimate fact,” did not apply the level of deference called for in Federal Rule of Civil Procedure 52(a)(6), and argued that it had authority under *Baumgartner* to conduct an independent, *de novo* review of the dispositive finding of fact.<sup>198</sup> The Supreme Court, however, reversed, and chastised the Fifth Circuit, accusing that court of over-reading *Baumgartner*:

Whatever *Baumgartner* may have meant by its discussion of “ultimate facts,” it surely did not mean that whenever the result in a case turns on a factual finding, an appellate court need not remain within the constraints of Rule 52(a). *Baumgartner*’s discussion of “ultimate facts referred not to pure findings of fact—as we find discriminatory intent to be in this context—but to findings that “clearly [imply] the application of standards of law.”<sup>199</sup>

The Court, however, did not provide an example of the true application of this test.<sup>200</sup>

### B. The Respondent’s Argument

The respondent argued that a bankruptcy court’s determination that a party is a non-statutory insider should be reviewed for clear error.<sup>201</sup> The respondent argued that the determination that a party is a non-statutory insider is a question of fact, which itself turns on whether the transaction at issue was conducted at arm’s length.<sup>202</sup> The answer to the secondary question is a factual one.<sup>203</sup> The respondent also cited *Miller* for its own purposes, arguing that the ultimate issue of intent that the Court had characterized as a question of fact in *Pullman-*

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<sup>196</sup> *Baumgartner*, 456 U.S. at 275.

<sup>197</sup> *Id.* (quoting *Swint v. Pullman-Standard*, 624 F.2d 525, 533-34 (5th Cir. 1980)).

<sup>198</sup> *Id.* at 286-88.

<sup>199</sup> *Id.* at 286 n.16 (quoting *Baumgartner*, 322 U.S. at 671).

<sup>200</sup> *See Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

<sup>201</sup> Brief for the Respondent at 20, *U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge*, 138 S. Ct. 960 (2018).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

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*Standard* was similar to the question of intent that the respondent believed was dispositive in determining whether Rabkin had dealt at arm’s length with Bartlett.<sup>204</sup> The respondent also cited *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.* for the proposition that because a factual determination may nearly dispose of the case, that does not “render the subsidiary question a legal one.”<sup>205</sup> The respondent did not analyze the case in terms of the four tests the petitioner outlined, arguing that there are not, as petitioner asserts, four different legal tests, but a single multi-part framework.<sup>206</sup>

The respondent argued that even if the Court found the question to be a mixed question of law and fact, appellate courts must still defer to the bankruptcy courts, and apply a more lenient standard of review.<sup>207</sup> The respondent argued the petitioner was wrong insofar as the petitioner argued that any determination of non-statutory insider status is inherently a mixed question of law and fact.<sup>208</sup> The respondent reiterated that once the bankruptcy court had made its finding of fact, “it automatically followed that Rabkin was not a non-statutory insider (since that fact is dispositive under the controlling standard). As such, just as in *Pullman-Standard*, this is inherently a fact question, and it is subject to review for clear error.”<sup>209</sup> The respondent further argued that the Ninth Circuit’s standard for determining non-statutory insider status is settled and clear, and required no interpretation by the bankruptcy court.<sup>210</sup> Finally, the respondent argued that deference is due to trial courts for their special capacity to make findings of fact.<sup>211</sup>

### C. The Amicus Curiae United States of America’s Arguments

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<sup>204</sup> See *id.* at 22 (citing *Pullman-Standard*, 456 U.S. at 286).

<sup>205</sup> *Id.* (quoting *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 842 (2015) (internal quotation marks omitted)).

<sup>206</sup> *Id.* at 26 n.10.

<sup>207</sup> Brief for the Respondent, *supra* note 201, at 23.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> See *id.* at 24.

<sup>211</sup> *Id.* at 29.

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On October 3, 2016, the then-Acting Solicitor General was invited to file a brief expressing the views of the United States.<sup>212</sup> The United States as amicus curiae supporting the respondent filed a brief on August 18, 2017.<sup>213</sup> In it, the amicus urged caution and restraint, reminding the Court that “[d]etermining the proper standard of review . . . requires precise determination of the particular issue raised on appeal.”<sup>214</sup> The United States asserted that mixed questions of fact and law are severable, and that questions of statutory interpretation are reviewed *de novo* while questions of fact are reviewed for clear error.<sup>215</sup> The United States argued that the Supreme Court has distinguished between questions of law and questions of fact.<sup>216</sup> The Supreme Court has routinely held that it is a court’s duty to define the appropriate standard, and the jury’s duty to find facts.<sup>217</sup> The amicus curiae argued that a court’s need to define and apply a legal standard as part of its analysis does not mean that incidental or subsidiary findings of fact are to be treated as legal conclusions.<sup>218</sup> A court does not need to apply a single standard of review to the entire case merely because the issues appear to be comingled, as appellate courts have long been able to distinguish between factual and legal matters.<sup>219</sup>

The amicus granted that an appellate court should review *de novo* the choice or articulation of the legal test or standard a bankruptcy court actually uses when determining if an individual or entity is a non-statutory insider.<sup>220</sup> Because appellate courts are better suited to determine open-ended issues of statutory interpretation, appellate courts should conduct *de novo* reviews of lower

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<sup>212</sup> U.S. Bank. Nat’l Ass’n v. Vill. at Lakeridge, 137 S. Ct. 268 (2016).

<sup>213</sup> Brief for the United States as Amicus Curiae Supporting the Respondent at 12, U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge, 138 S. Ct. 960 (2018).

<sup>214</sup> *Id.*

<sup>215</sup> *See id.* (citing FED. R. CIV. P. 52(a)(6)).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 13.

<sup>218</sup> *Id.*

<sup>219</sup> Brief for the United States as Amicus Curiae, *supra* note 213, at 10 (quoting Teva Pharms. USA, Inc. v. Sandoz, Inc., 135 S. Ct. 831, 839 (2015)).

<sup>220</sup> *Id.* at 15.

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courts' statutory constructions.<sup>221</sup> The United States, however, maintained that whether a transaction was conducted at arm's length is a question of fact, the nature of which militates for clear-error review.<sup>222</sup> For the purposes of the Bankruptcy Code, the motivation behind a party's transactions is determinative of whether the transaction was conducted at arm's length.<sup>223</sup> The Supreme Court has recognized intent as a question of fact.<sup>224</sup> The amicus agreed with the respondent when it argued that, under *Miller* and *Teva Pharmaceuticals.*, the fact that a factual determination is dispositive does not transform it into a legal conclusion.<sup>225</sup> The amicus also argued that the history of appellate practice indicates a preference for deferential review in cases such as this, where a bankruptcy court has determined that a party is a non-statutory insider.<sup>226</sup>

### D. The Petitioner's Response

The petitioner responded to the respondent's and the amicus curiae's arguments.<sup>227</sup> The petitioner accused its adversaries of offering a facile solution—"[m]ixed questions of fact and law have divided the circuits and bedeviled courts and scholars precisely because they defy such easy answers."<sup>228</sup> A binary approach represents a false dichotomy as legal and factual issues are so intertwined.<sup>229</sup> The petitioner also asserted that the respondents offer a false dichotomy as to the issue of mixed questions of fact and law.<sup>230</sup> There is, in fact, a middle ground, as is recognized by

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<sup>221</sup> *Id.* at 16-17.

<sup>222</sup> *Id.* at 17.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 18 (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982)).

<sup>225</sup> Brief for the United States as Amicus Curiae, *supra* note 213, at 14 (citing *Miller v. Fenton*, 474 U.S. 104, 113 (1985); *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 842 (2015)).

<sup>226</sup> See Brief for the United States as amicus curiae, *supra* note 213, at 19 (collecting cases).

<sup>227</sup> Reply Brief for Petitioner, *supra* note 15, at 1.

<sup>228</sup> *Id.*

<sup>229</sup> See *id.*

<sup>230</sup> *Id.* at 2.

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the various legal tests the Supreme Court has devised to decide whether mixed questions should be uniformly subject to *de novo* review.<sup>231</sup>

The petitioner also accused its adversaries of moving the goalposts and changing the terms of the test the bankruptcy court and the Ninth Circuit applied in determining whether Rabkin was a non-statutory insider.<sup>232</sup> The relevant question was whether the transaction was conducted at arm’s length.<sup>233</sup> The adjectival phrase is meant to describe the transaction, and not the transactors’ states of mind.<sup>234</sup> What’s more, the petitioner, argued, if the bankruptcy court’s inquiry were solely factual, and the test clear and settled, it would not have needed to scour the decisions of other courts in order to formulate its test.<sup>235</sup> “The issue is whether the [b]ankruptcy [c]ourt’s selection of the relevant factors for determining non-statutory insider status (e.g., whether cohabitation or commingling of finances are foremost considerations) is normative and therefore reviewed *de novo*.”<sup>236</sup> According to the petitioner, the respondents never refuted the petitioner’s central point that a court’s selection of the most relevant factors necessary for applying a broad standard such “arm’s length” is by definition normative, and therefore must be reviewed *de novo*.<sup>237</sup> The petitioner reiterated its arguments from its earlier brief that the Constitution calls for uniformity in the field of bankruptcy law, and that the disparity between the circuits as to the definition of non-statutory insider status is untenable.<sup>238</sup>

### V. An Argument in Favor of a Sensible Division of Labor

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<sup>231</sup> See *id.* at 3.

<sup>232</sup> See *id.* at 2-3

<sup>233</sup> Reply Brief for Petitioner, *supra* note 15, at 3.

<sup>234</sup> *Id.* at 2.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 3.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 3-4.

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The respondent and United States as amicus curiae articulate the correct standard of review. As a preliminary matter, precisely on account of the difficulties to which the petitioner calls the Court's attention, severance of the legal and factual components of a bankruptcy court's decision to classify a party as a non-statutory insider is necessary in order for an appellate court to carry out an accurate and meaningful review. As J. L. Clark observed long ago,

I am unable to see the law and the fact from the same viewpoint nor at the same time. They have their origin in different sources. One is from the sovereign, the other from the subject. They arise in different altitudes. They may, and probably do flow through the same plain. They intermingle, possibly, but they never mix. That is they do not blend or unite and form a new compound any more than water and the soil through which it flows mix. The most that can be said of the mixture is that it is a hyphenated muddy water the result of a disturbed condition of things, which must settle back into its original elements of water and soil in order to become useful.<sup>239</sup>

In surveying the authorities, it is important to note that no per se rule governs whether mixed questions of law and fact are categorically reviewed *de novo* or for clear error. The Supreme Court has held that simply describing as questions as “mixed” does not establish that it necessarily receives *de novo* review, and that there is no such rigid or categorical rule.<sup>240</sup>

How, then, are the appellate courts to proceed? It is instructive to consider exactly what the appellate courts are reviewing when they examine a bankruptcy court's finding that a party is a non-statutory insider. In making that determination, a bankruptcy court carries out three tasks. First, the bankruptcy court makes findings of fact. Second, the bankruptcy court reviews the law of the circuit in which the bankruptcy court sits, and fixes upon the legal status that will guide the court's determination of the issues. Third, the bankruptcy court applies the facts to the law.<sup>241</sup>

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<sup>239</sup> J.L. Clark, *A Mixed Question of Law and Fact*, 18 YALE L.J. 404, 405 (1909).

<sup>240</sup> *Ornelas v. United States*, 517 U.S. 690, 701 (1996).

<sup>241</sup> *See, e.g., generally, In re Pioneer Carriers, LLC*, No. 16-36356, 2018 WL 798876 (Bankr. S.D. Tex. Feb. 8, 2018) (making findings of fact, fixing upon standard, and drawing conclusions therefrom); *In re Litton*, No.: 15-12871-JDW, 2018 WL 632315 (Bankr. N.D. Miss. Jan. 30, 2018) (same).

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How should the circuit courts of appeals review each of these judicial functions? In the first category, Federal Rule of Civil Procedure 52(a)(6) appears to explicitly control—“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous . . . .”<sup>242</sup> But, the petitioner asserts, this Rule does not apply uniformly to all findings of fact.<sup>243</sup> The petitioner argues, citing precedent, that the Supreme Court has historically reserved a special place for questions of “ultimate fact,” subjecting them to *de novo* review.<sup>244</sup> The petitioner maintains that this tradition is alive and well, and that federal appellate courts may conduct *de novo* review of findings of fact which necessarily compel a bankruptcy court’s determination.<sup>245</sup> The petitioner, however, misstates the law. Rule 52(a) “applies to findings of fact, including those described as ‘ultimate facts’ because they may determine the outcome of litigation.”<sup>246</sup> To be clear, the Rule “applies to both subsidiary and ultimate facts.”<sup>247</sup> Therefore, even if a bankruptcy court applies a test such as the Ninth and Tenth Circuits’ which turns upon a finding of fact (namely that parties dealt at less than arm’s length), the circuit court reviewing the bankruptcy court’s findings of fact must subject those findings only to review for clear error.<sup>248</sup>

In the second category, the parties are unanimous that appellate courts may review a bankruptcy court’s identification and interpretation of controlling law *de novo* as a question of

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<sup>242</sup> FED. R. CIV. P. 52(a)(6). *See also, e.g.*, *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015) (“First, we review the District Court’s factual findings under the deferential ‘clear error’ standard. This standard does not entitle us to overturn a finding ‘simply because [we are] convinced that [we] would have decided the case differently.’”) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)).

<sup>243</sup> Reply Brief for the Petitioner, *supra* note 15, at 20 (citing *Bogardus v. Comm’r*, 302 U.S. 34, 38-39 (1937); *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937)).

<sup>244</sup> Reply Brief for the Petitioner, *supra* note 15, at 20 (citing *Bogardus*, 302 U.S. at 338-39; *Tex-Penn Oil Co.*, 300 U.S. at 491).

<sup>245</sup> Brief for the Petitioner, *supra* note 158, at 52-53.

<sup>246</sup> *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984) (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982)).

<sup>247</sup> *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 837 (2015).

<sup>248</sup> *E.g., Vacat’n Vill., Inc. v. Clark Cty.*, 497 F.3d 902, 910 (9th Cir. 2007).

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law.<sup>249</sup> Little time need be spent here; the Supreme Court has spoken clearly.<sup>250</sup> The Court has further stated that “[where] statutory terms are at issue, their interpretation is a question of law and it is the [appellate] court’s duty to define the appropriate standard.”<sup>251</sup> As was discussed above, although the federal courts recognized the category of non-statutory insiders without explicit congressional instruction, such a category of persons, such a status, was fairly implied by the language of 11 U.S.C. § 101(31) and the Rule of Construction provided in section 102(3), and thus fairly inferred by the federal courts. Therefore, it is an especially proper exercise of the appellate courts’ power to subject a bankruptcy court’s interpretation of case law to searching review.

With the exception of the alleged carve-out for ultimate facts, however, the foregoing sections are uncontroversial, and would likely be readily stipulated by the parties to this controversy. Again, the controversy revolves around what the appellate courts are to do with mixed questions of fact and law. The respondent and amicus curiae argue for the most utile and expeditious path of review—severance of a bankruptcy court’s factual and legal findings and application of the fact to the law, and independent review of each element.<sup>252</sup>

Before arguing for this course of action, the question must be answered—do appellate courts have the power to sever lower courts’ findings of facts from their legal conclusions, and those courts’ application of the found facts to the legal conclusions? The Supreme Court has held that they do—“Courts of appeals have long found it possible to separate factual from legal matters.”<sup>253</sup> This holds true in the bankruptcy context. At least the Second, Third, and Seventh

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<sup>249</sup> Brief for the Petitioner, *supra* note 158, at 23; Brief for the Respondent, *supra* note 201, at 17; Brief for the United States as Amicus Curiae, *supra* note 213, at 11S.

<sup>250</sup> *E.g.*, *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014) (quoting *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)) (“Traditionally, decisions on ‘questions of law’ are ‘reviewable *de novo*[.]’”).

<sup>251</sup> *Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (1995).

<sup>252</sup> Brief for the Respondent, *supra* note 201, at 17-18; Brief for the United States as Amicus Curiae, *supra* note 213, at 10.

<sup>253</sup> *Teva Pharms.*, 135 S. Ct. at 839 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-948 (1995)).

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Circuits have held that they can sever a bankruptcy court’s findings of fact from its legal determinations, and review them separately.<sup>254</sup> What’s more, the Supreme Court has established that “the application-of-legal-standard-to-fact sort of question . . . , commonly called a ‘mixed question of law and fact,’ has typically been resolved by juries.”<sup>255</sup> This too militates for clear error review.

In addition to abstract legal reasoning, substantive policy and the realities of the world also implicitly advocate for the determination of non-statutory insider status on a case-by-case basis. In *Lakeridge*, the Ninth Circuit’s authority for the proposition that a determination of non-statutory insider status is ultimately a question of fact reviewable for clear error derives from the Fifth Circuit’s decision in *In re Missionary Baptist Foundation of America, Inc.*<sup>256</sup> There, the Fifth Circuit determined that clear error was the proper standard of review, even though it retained power to correct a lower court’s interpretation of the law through *de novo* review.<sup>257</sup> In the case that incorporated the idea into Ninth Circuit jurisprudence, *UVAS Farming Corp. v. Laviana Investments, N.V.*,<sup>258</sup> the bankruptcy court used the language of *Missionary* to bolster its argument that the facts upon which a court may find a party to be a non-statutory insider are exactly those—facts.<sup>259</sup> Because the analysis turned upon a finding of fact, it followed that the conclusion was likewise factual.<sup>260</sup> Accordingly, the Ninth Circuit believed that clear review applied.<sup>261</sup>

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<sup>254</sup> *Barclays Capital, Inc. v. Giddens (In re Lehman Brothers Holdings)*, 761 F.3d 303, 308 (2d Cir. 2014); *Phoenician Mediterranean Villa, LLC v. Swope (In re J & S Props.)*, 872 F.3d 138, 142 (3d Cir. 2017); *Levin v. Verizon Business Global (In re Onestar Long Distance, Inc.)*, 872 F.3d 526, 530 (7th Cir. 2017).

<sup>255</sup> *United States v. Gaudin*, 515 U.S. 506, 512 (1995).

<sup>256</sup> *U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge, LLC (In re Vill. at Lakeridge, LLC)*, 814 F.3d 993, 999 (9th Cir. 2016), *aff’d*, 138 S. Ct. 960 (2018) (citing *Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman)*, 126 B.R. 63, 70 (9th Cir. B.A.P. 1993), *overruled on other grounds, Zachary v. Cal. Bank & Tr.*, 811 F.3d 1191 (9th Cir. 2016) (citing 712 F.2d 206 (5th Cir. 1983))).

<sup>257</sup> *See id.* at 209-10.

<sup>258</sup> *In re UVAS Farming Corp.*, 89 B.R. 889 (Bankr. D.N.M. 1988).

<sup>259</sup> *Id.* at 892.

<sup>260</sup> *See id.*

<sup>261</sup> *Lakeridge*, 814 F.3d at 999.

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The District of New Mexico’s bankruptcy court also identified one of the important policies which advocate for clear error review: flexibility.<sup>262</sup> Because legal issues do not arise in sterile classroom settings or terms, it is important that the bankruptcy courts have the ability and confidence to dispose of legal issues as they actually arise, without fearing excessive second-guessing by the appellate courts. The federal courts recognized the class of non-statutory insiders because they realized that Congress, by enumerating a few, necessarily left membership in the class open to those not on the congressional roll call. Although the petitioner was correct to argue that uniformity is a key value called for in the Constitution in the field of bankruptcy law,<sup>263</sup> under a severed standard of review, the circuit courts would still be afforded an opportunity to refine and clarify the controlling law but allow the bankruptcy courts to proceed expeditiously in the disposition of cases.

This second value, efficiency, would also be served by a severed standard, for two reasons. First, the process of appellate review would be streamlined if the appellate courts were required to closely review only a bankruptcy court’s legal findings, and not their factual ones. Second, it is important to keep in mind that when a company or individual has declared bankruptcy, time is of the essence. Especially in the case of a bankrupt company or entity, the bankrupt party’s assets dwindle and depreciate, and the creditors’ claims shrink in value accordingly. The course of appellate review can run years.<sup>264</sup> It is in the best interest of the creditors and the debtors, as well

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<sup>262</sup> *UVAS Farming Corp.*, 89 B.R. at 891-92.

<sup>263</sup> U.S. CONST. art. I, § 8, cl. 4. *See generally* THE FEDERALIST No. 80 (Alexander Hamilton) (Garry Wills ed., 2003) (calling for uniformity in interpretation and development of federal law).

<sup>264</sup> For example, in *Lakeridge*, the debtor filed for Chapter 11 bankruptcy relief on June 16, 2011. U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge, LLC (*In re* Vill. at Lakeridge, LLC), 814 F.3d 993, 997 (9th Cir. 2016), *aff’d*, 138 S. Ct. 960 (2018). The Bankruptcy Appellate Panel issued its opinion on April 5, 2013. *In re* Vill. at Lakeridge, LLC, No. 11-51994-BTB, 2013 WL 1397447 (B.A.P. 9th Cir.); the Ninth Circuit ruled on February 8, 2016. *Lakeridge*, 814 F.3d. The Supreme Court announced the proper standard of review on March 5, 2018. U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge, 138 S. Ct. 960 (2018).

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as the judiciary, that the matters be settled quickly, while there is still money on the table. A partitioned standard of review thus is in the interest of all the involved parties.

Finally, the text and the spirit of Rule 52(a) militate in favor of a split standard of review. Rule 52(a)(1) calls for a court sitting without a jury (as a bankruptcy court does) to “find the facts specially and state its conclusions of law separately.”<sup>265</sup> A reviewing appellate court may apply a different standard of review to the trial court’s findings and conclusions, respectively. This rule also plays an indispensable part in allocating the power and responsibility between trial and appellate courts.<sup>266</sup> The Supreme Court, in construing this Rule, time and again has emphasized the irreplaceable advantage trial courts enjoy by having direct access to the evidence and being able to assess the demeanor, temper, and tics of live witnesses, in contrast to the disadvantage conferred by the cold records with which appellate courts are confronted.<sup>267</sup>

A partitioned standard of review would also ease the burden on appellate courts, and further enable them to carry out their indispensable function in developing substantive law.<sup>268</sup> As Benjamin Cardozo wrote over 100 years ago, appellate courts exist not simply for the sake of “declaring justice between man and man, but . . . settling the law. . . not for the individual litigant, but for the indefinite body of litigants, whose causes are potentially involved in the specific cause at issue.”<sup>269</sup> Rule 52, in dividing the labor between the trial and appellate courts, facilitates the missions of each. For at least three decades the Supreme Court has been of the opinion that even if Rule 52(a) allowed an appellate court to undertake a *de novo* review of a trial court’s findings

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<sup>265</sup> FED. R. CIV. P. 52(a)(1).

<sup>266</sup> Edward H. Cooper, *Civil Rule 50(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645 (1988).

<sup>267</sup> *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985). *See also, e.g.* *Cooper v. Harris*, 137 S. Ct. 1455, 1461 (2017); *Teva Pharms, USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 845 (2015) (Thomas, J., dissenting); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

<sup>268</sup> Cooper, *supra* note 266, at 652. *See also* *Teva Pharms.*, 135 S. Ct. at 851 (Thomas, J., dissenting).

<sup>269</sup> Dennis Crouch, *Wrongly Affirmed Without Opinion*, 52 WAKE FOREST L. REV. 561 (2017) (quoting Benjamin N. Cardozo, JURISDICTION OF THE COURT OF APPEALS § 6 (2d ed. 1909)).

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of fact, the contribution an appellate court would make towards the accurate establishment of historical would be negligible, come at a disproportionate cost of judicial resources, and delegitimize the trial courts.<sup>270</sup> By calling for a partitioned standard of review, the Court may, in one action, bolster the legitimacy of the Rules of Civil Procedure and the trial courts, and relieve the burden on the appellate courts.

### VI. Conclusion

Although this controversy at first glance may seem arcane and to touch upon only a small part of a niche field of the law, a deeper analysis of this case reveals that this dispute can have a significant effect on the field of bankruptcy law and appellate review standards. As the petitioner argued in the Petition for Certiorari, any decision the Supreme Court makes in this case has the potential to affect wide swaths of commercial law. Companies may reorganize themselves based upon fears of extensive post-bankruptcy litigation should the Supreme Court hold that *de novo* review, rather than clear error review, is the appropriate standard. The decision will also implicate current jurisprudence of statutory interpretation, and influence how appellate courts, attorneys, and scholars regard trial court's necessary interpretation of statutory law when carrying out legal tests and applying facts to legal standards. It will also impact how trial and appellate courts will interact—are the circuits to defer to the bankruptcy courts, or are the bankruptcy courts to operate under the watchful eyes of the circuits? The circuits should defer to the bankruptcy courts, in order to facilitate the speedy and efficient disposition of bankruptcy disputes. Although the petitioner is correct in arguing that uniformity and legal certainty are virtues unto themselves, such uniformity and certainty should not be pursued at the expense of justice and equity, which demand flexibility. The Supreme Court's dicta in *Hana Fin. v. Hana Bank*<sup>271</sup> also applies in the bankruptcy context.

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<sup>270</sup> *Teva Pharms.*, 135 S. Ct. at 837 (citing *Anderson*, 470 U.S. at 574-75).

<sup>271</sup> 135 S. Ct. 907 (2015).

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“[D]ecisionmaking in fact-intensive disputes necessarily requires judgment calls.”<sup>272</sup> It is of no concern that similarly situated finders of fact may come to different conclusions when evaluating the same set of facts. It is not enough to say that the unpredictability makes a situation untenable.<sup>273</sup> As Justice Holmes philosophically put it, “certainty generally is an illusion, and repose is not the destiny of man.”<sup>274</sup> It is the strength, rather than the weakness, of the trial courts that they may be flexible. The Supreme Court should recognize this and enable the bankruptcy courts.<sup>275</sup>

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<sup>272</sup> *Id.* at 912.

<sup>273</sup> *See id.*

<sup>274</sup> Holmes, *supra* note 27, at 465.

<sup>275</sup> The Supreme Court decided this case on March 5, 2018. The Court determined “that a clear-error standard should apply,” *U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge*, 138 S. Ct. 960, 963 (2018), because “conferral of that status often turns on whether the person’s transactions with the debtor (or another of its insiders) were at arm’s length.” *Id.* The Court granted that this determination is a mixed question of law and fact, *id.* at 965, and found the determination of whether a transaction could be described as one conducted at arm’s length to be “about as factual sounding as any mixed question gets.” *Id.* at 968. Accordingly, review only for factual determinations, or clear error, is the appropriate standard. *Id.* at 968-69.