No. 15-1509

In the Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE, ET AL., PETITIONERS

v.

THE VILLAGE AT LAKERIDGE, LLC, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Bankruptcy Code, 11 U.S.C. 101 *et seq.*, affords special treatment to creditors who are considered "insiders" under the Code. The Code provides that, before a Chapter 11 plan of reorganization may be approved, at least one class of impaired claims must vote in favor of the plan, determined "without including any acceptance of the plan by any insider." 11 U.S.C. 1129(a)(10). The questions presented are as follows:

1. Whether a creditor who obtains a claim from an insider automatically acquires the original claimholder's insider status.

2. Whether a bankruptcy court's determination of insider status with respect to a particular claimholder should be reviewed de novo or for clear error.

3. Whether a creditor's status as a non-statutory insider should be determined based on whether the claimholder is functionally equivalent to one of the enumerated types of statutory insiders.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. Chapter 11 of the Bankruptcy Code provides for the reorganization of financial obligations of a business enterprise or individual. 11 U.S.C. 1101 *et seq.* Chapter 11 bankruptcies are implemented according to a "plan" (usually, but not always, filed by the debtor, 11 U.S.C. 1121) that assigns to "classes" the various allowed claims against the debtor and specifies the treatment each class of claims shall receive under the plan, 11 U.S.C. 1122, 1123. A court generally may confirm a proposed Chapter 11 plan only if each class of creditors "has accepted the plan"

or "is not impaired under the plan." 11 U.S.C. 1129(a)(8)(A) and (B); see 11 U.S.C. 1124. In certain circumstances, however, the Code provides a mechanism for confirming a plan that impairs the claims or interests of a non-consenting creditor. 11 U.S.C. 1129(b). In order to be confirmable over the objection of an impaired creditor, the plan must satisfy a number of criteria, including the requirement that "at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider." 11 U.S.C. 1129(a)(10). The questions presented in this case concern the circumstances in which a creditor should be treated as an "insider" for purposes of that provision.

b. The Bankruptcy Code contains a non-exhaustive list of persons and entities with "insider" status. 11 U.S.C. 101(31). When, as here, the debtor is a corporation, "[t]he term 'insider' includes * * * (i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor." 11 U.S.C. 101(31)(B). Persons or entities falling into one of those categories are generally referred to as "statutory insiders." Because the statutory definition of "insider" is non-exhaustive, bankruptcy law also recognizes that other persons (and entities) can be "non-statutory insiders." Such persons do not fall within any of the categories listed in Section 101(31), but they have "a sufficiently close relationship with the debtor that [their] conduct is made subject to closer scrutiny than those dealing at arms length with the debtor." S. Rep. No. 989, 95th Cong., 2d Sess. 25 (1978) (Senate Re-

port); H.R. Rep. No. 595, 95th Cong. 1st Sess. 312 (1977) (House Report); see 2 *Collier on Bankruptcy*, ¶ 101.31, at 101-142 (Allen N. Resnick & Henry J. Sommer, eds., 16th ed. 2016) (*Collier*) (explaining that "a creditor may only be a non-statutory insider of a debtor when the creditor's transaction of business with the debtor is not at arm's length") (citation omitted). Congress left the definition of "insider" somewhat "open ended because the term is not susceptible of precise specification." House Report 314.

Under the Bankruptcy Code, dealings between an insider and a corporate debtor are subject to particularly close scrutiny. See 2 *Collier* ¶ 101.31, at 101-140 ("An 'insider' generally is an entity whose close relationship with the debtor subjects any transactions made between the debtor and such entity to heavy scrutiny."). The Code also bars insiders from exercising some of the prerogatives that other creditors possess. In a Chapter 7 case, for example, an insider is not permitted to vote for a candidate for trustee. 11 U.S.C. 702(a)(3); see 11 U.S.C. 303(b)(2) (excluding insiders when determining whether a sufficient number of creditors has joined together to initiate an involuntary bankruptcy). Insider status is also a factor in determining whether a pre-petition transfer may be avoided, 11 U.S.C. 547(b)(4)(B), 548(a)(1)(B)(IV), and whether certain debts may be discharged in a Chapter 7 bankruptcy, 11 U.S.C. 727(a)(7).

2. Respondent[1] is a limited liability corporation with only one member, MBP Equity Partners 1, LLC

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[1] Although the case caption on this Court's docket indicates that there are multiple petitioners and respondents in this case, the petition for a writ of certiorari indicates (Pet. ii) that U.S. Bank National Association is the sole petitioner and that The Village at

(MBP). Pet. App. 3a. MBP is managed by a board of five members, one of whom is Kathy Bartlett. *Ibid.* MBP and Bartlett are both statutory insiders of respondent. *Id.* at 16a. Bartlett "shares a close business and personal relationship" with Dr. Robert Rabkin. *Id.* at 3a. The controversy in this case concerns the question whether Rabkin is also an insider of respondent.

In June 2011, respondent filed a voluntary petition for bankruptcy under Chapter 11 of the Code. Pet. App. 3a. At that time, respondent had two creditors: petitioner held a fully secured claim worth approximately $10 million, and MBP held an unsecured claim worth approximately $2.76 million. *Ibid.* On September 14, 2011, respondent filed a proposed plan of reorganization that would impair both claims. See C.A. E.R. 340, 347-351, 379-383. Because petitioner would not consent to the proposed plan, see *id.* at 578-579, the plan could not be confirmed unless another non-insider claim that would be impaired by the plan voted to accept the plan. But the only other claim was held by MBP, a statutory insider. See 11 U.S.C. 101(31)(B). In the absence of a confirmable plan, respondent would have been liquidated and MBP would have had little hope of recovering on its unsecured claim or on its ownership of respondent. Pet. App. 20a-21a.

Acting on behalf of MBP's board, Bartlett approached Rabkin and offered to sell MBP's $2.76 million claim to him for $5000. Pet. App. 4a. Rabkin agreed to the proposal without negotiating over the price or investigating what the claim might be worth.

Lakeridge, LLC is the sole respondent. In this brief, we refer to those parties as petitioner and respondent, respectively.

Id. at 4a, 19a-20a. Petitioner then moved to designate Rabkin's claim as an insider claim and to disallow it for voting purposes. *Id.* at 5a.

3. The bankruptcy court granted petitioner's motion. Pet. App. 61a-70a. The court found that "Dr. Rabkin is not a non-statutory insider because, among other things, (a) Dr. Rabkin does not exercise control over the Debtor; (b) Dr. Rabkin does not cohabitate with Ms. Bartlett, and does not pay Ms. Bartlett's bills or living expenses; (c) Dr. Rabkin has never purchased expensive gifts for Ms. Bartlett; (d) Ms. Bartlett does not exercise control over Dr. Rabkin; (e) Ms. Bartlett does not pay Mr. Rabkin's bills or living expenses; and (f) Ms. Bartlett has never purchased expensive gifts for Dr. Rabkin." *Id.* at 66a. The court further found that MBP's "insider claim was not assigned to Dr. Rabkin in bad faith to create an impaired, consenting class for purposes of cramdown." *Id.* at 67a. The bankruptcy court concluded, however, that Rabkin was a statutory insider because "Dr. Rabkin, as the assignee of the claim, acquired the same status as" statutory insider MBP when he purchased the claim. *Id.* at 67a.

4. The Bankruptcy Appellate Panel of the Ninth Circuit reversed. Pet. App. 28a-60a.

The panel held that Rabkin was not a statutory insider because he does not fall within any of the enumerated categories in the statutory definition, Pet. App. 39a-41a; see 5 U.S.C. 101(31), and because the assignee of an insider claim does not automatically become a statutory insider by virtue of the assignment, Pet. App. 45a-48a. The panel upheld the bankruptcy court's determination that Rabkin was not a non-statutory insider. *Id.* at 41a-44a. The panel noted

that "a non-statutory insider is one 'who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor.'" *Id.* at 41a. (quoting *Freidman* v. *Sheila Plotsky Brokers, Inc. (In re Freidman)*, 126 B.R. 63, 70 (B.A.P. 9th Cir. 1991)). That closer scrutiny, the court explained, requires both an "examination for an arms-length transaction" and an assessment of whether "the creditor 'exercises such control or influence over the debtor as to render their transaction not arms-length.'" *Id.* at 42a (quoting *Miller* v. *Schuman (In re Schuman)*, 81 B.R. 583, 586 (B.A.P. 9th Cir. 1987)). The panel concluded that, "[w]hile others might come to a different conclusion," the bankruptcy court had not clearly erred in concluding on the basis of Rabkin's and Bartlett's testimony that Rabkin was not a non-statutory insider. *Id.* at 44a.

5. The court of appeals affirmed. Pet. App. 1a-27a.

All three members of the court of appeals agreed that "[a] person does not become a statutory insider solely by acquiring a claim from a statutory insider." Pet. App. 10a; see *id.* at 19a. The majority noted that "bankruptcy law distinguishes between the status of a claim and that of a claimant." *Id.* at 10a. It explained that "[i]nsider status pertains only to the claimant" and "is not a property of a claim." *Ibid.* The court also stated that "a person's insider status is a question of fact that must be determined after the claim transfer occurs." *Ibid.*

A majority of the court of appeals also upheld the bankruptcy court's determination that Rabkin was not a non-statutory insider. Pet. App. 13a-18a. The court explained that it applies de novo review to "the bankruptcy court's definition of non-statutory insider sta-

tus, which is a purely legal question," *id.* at 15a n.13, while "review[ing] the bankruptcy court's factual finding for clear error," *id.* at 15a. On the legal question, the court agreed with the bankruptcy court that, in determining whether a creditor is a non-statutory insider, "[a] court must conduct a fact-intensive analysis to determine if a creditor and debtor shared a close relationship and negotiated at less than arm's length." *Id.* at 14a. The majority also held that the bankruptcy court's factual findings on the nature of Rabkin's relationship with Bartlett and MBP and on the nature of the transaction transferring MBP's claim to Rabkin were "not clearly erroneous." *Id.* at 16a.[2] The majority held that the bankruptcy court had not clearly erred in concluding that neither Rabkin's relationship with respondent nor Rabkin's relationship with insider Bartlett was "sufficiently close to compare with any category listed in § 101(31)." *Id.* at 16a. The majority further held that the bankruptcy court had not clearly erred in concluding that the transaction had been conducted at arm's length. *Id.* at 17a n.15.

Judge Clifton dissented from the court of appeals' conclusion that Rabkin was not a non-statutory insider. Pet. App. 19a-27a. Although Judge Clifton agreed with the criteria used by the majority to identify non-statutory insiders, he would have held that the bank-

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[2] In response to the dissent's conclusion that Rabkin was a non-statutory insider, the majority explained that "[t]he dissent did not preside over the evidentiary hearing and did not hear the evidence in person," and that the court of appeals "cannot substitute its judgment for that of the bankruptcy court 'simply because it is convinced that it would have decided the case differently.'" Pet. App. 16a n.14 (quoting *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985)); see *id.* at 17a n.16.

ruptcy court had clearly erred in concluding that Rabkin did not satisfy those criteria. *Id.* at 19a. Judge Clifton explained that, in his view, "[t]he facts make clear that this transaction was negotiated at less than arm's length." *Ibid.*; see *id.* at 19a-22a. Although Judge Clifton agreed that the bankruptcy court's analysis of the relationship between Rabkin and Bartlett "would support a finding that Rabkin and Bartlett are separate financial entities," in his view it would "not show that the transaction was conducted" at arm's length. *Id.* at 23a.

DISCUSSION

The court of appeals correctly stated the legal standards for determining whether a creditor is a statutory or non-statutory insider, and it correctly articulated the applicable standard of appellate review. The court's articulation of those legal principles does not conflict with any decision of this Court or of another court of appeals. The court's application of the governing legal standard in conducting clear-error review of the bankruptcy court's factual findings raises no issue of general importance. Further review is not warranted.

A. The First Question Presented Does Not Warrant This Court's Review

Petitioner argues (Pet. 7-19) that, because Rabkin purchased his claim from a statutory insider, Rabkin should be treated as a statutory insider as well. The court of appeals correctly rejected that argument, and its ruling does not conflict with any decision of this Court or another court of appeals.

1. Section 1129 of the Bankruptcy Code permits a bankruptcy court to confirm a "cram-down" plan—*i.e.*,

a plan of reorganization that impairs the rights of an objecting creditor—only if certain requirements are satisfied. 11 U.S.C. 1129. One such requirement is the acceptance of the plan by "at least one class of claims that is impaired under the plan * * * , determined without including any acceptance of the plan by any insider." 11 U.S.C. 1129(a)(10). For purposes of Section 1129(a)(10), "[a] class of claims has accepted a plan if such plan has been accepted by creditors * * * that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors * * * that have accepted or rejected such plan." 11 U.S.C. 1126(c). When, as here, each class of claims contains only one creditor, that creditor (if he is a non-insider) may decide whether to accept or reject a plan. When a class of creditors contains both insiders and non-insiders, only the votes of non-insider creditors may be considered in determining whether the class has accepted a proposed plan.

Although Section 1129(a)(10) refers to acceptance of a plan by a "class of claims," a "claim" is not literally capable of accepting or opposing a plan. Rather, as Section 1126(c) makes clear, the determination whether particular "claims" have accepted a plan turns on whether the requisite number of creditors who hold those claims has accepted it. Section 1129(a)(10)'s reference to "acceptance of the plan by any insider" reinforces that understanding because the statutory definition of "insider" turns on attributes of an individual or entity holding a claim, not on attributes of the claim itself. See 11 U.S.C. 101(31). Thus, in carrying out Section 1129(a)(10)'s directive to disregard "any acceptance of the plan by any insider," the court

should focus on whether the creditor who purports to accept the plan is an insider, not on any attribute of the claim itself or on whether an insider previously owned the claim.

Focusing on the insider status of a current claimholder, rather than on the ownership history of a claim, is consistent with the logic and purposes of the relevant Code provisions. A creditor who is also an insider often has a substantial interest, not necessarily shared by other creditors, in ensuring that a debtor business continues to operate rather than liquidating. As a result, an insider will often have an incentive to accept impairment under a plan of reorganization so that it may continue to benefit, by virtue of its insider status, from the debtor's ongoing operation. Because an insider is in a position to advance its own interests by influencing the drafting of a proposed plan, moreover, the degree of impairment it may be willing to accept does not reflect the type of arm's-length bargaining that would be reflected in the acceptance of impairment by a non-insider creditor. "The exclusion of insiders in deciding whether a plan has been accepted by impaired creditors is intended to prevent conflicts of interest that can arise when a creditor has substantial influence over the debtor beyond what is implicit in being a creditor," and to reduce the "risk of collusion between an insider creditor and the debtor at the expense of other creditors." *In re South Beach Sec., Inc.*, 606 F.3d 366, 377-378 (7th Cir. 2010).

The conflict-of-interest concerns described above are tied to the identity and possible incentives of the claimholder who purports to accept a plan, not to the nature or ownership history of the underlying claim. An insider's potential conflict of interest is not less-

ened when it holds a claim that it purchased from an outsider. By the same token, an outsider who purchases a claim from an insider would not inherit the insider's motives for voting to accept a proposed plan. As Judge Clifton explained in his dissent below, "[a]s long as the interest previously owned by a statutory insider was acquired by an independent party, for bona fide reasons, uninfected with the unique motivations of the insider, there is no reason that the insider taint should always be unshakeable." Pet. App. 19a. The court of appeals was therefore correct to reject petitioner's argument that a creditor who purchases a claim from an insider automatically takes on insider status.

2. Petitioner argues (Pet. 14) that other courts of appeals "have recognized the applicability of the general law of assignment in bankruptcy cases," and that (Pet. 16) "[t]he Ninth Circuit's refusal to apply general assignment law for purposes of plan voting conflicts with" those decisions. There is no conflict among the courts of appeals about whether an outsider who purchases an insider's claim automatically obtains insider status for purposes of Section 1129(a)(10). As petitioner acknowledges (Pet. 14-16), all of the decisions on which it relies applied general assignment principles in construing *other* provisions of the Code. And all of the court of appeals decisions that petitioner contends conflict with the decision below address provisions of the Code (or of the predecessor Bankruptcy Act, ch. 541, 30 Stat. 544) that identify particular types of *claims* that should be disallowed in bankruptcy. See Pet. 14-15 (citing *In re KB Toys Inc.*, 736 F.3d 247, 251-254 (3d Cir. 2013); *Goldie* v. *Cox*, 130 F.2d 695, 720 (8th Cir. 1942); *Swarts* v. *Siegel*, 117

F. 13, 15 (8th Cir. 1902).[3] The approach of those courts does not conflict with the approach of the court below, however, because the Code provisions at issue in those cases address the treatment of particular types of claims, not the treatment of particular types of claimholders.

B. The Second Question Presented Does Not Warrant This Court's Review

Petitioner contends (Pet. 19-24) that this case implicates a conflict in the circuits about whether a determination of non-statutory insider status should be reviewed de novo or for clear error. That argument lacks merit. The court of appeals applied the correct standard of appellate review, and that aspect of the court's decision does not conflict with any decision of this Court or of any other court of appeals.

The court of appeals correctly explained that, when an appellate court reviews a trial court's determination concerning a creditor's insider status, the trial court's conclusions of law are reviewed de novo and its findings of fact are reviewed for clear error. Pet. App. 8a. Petitioner contends (Pet. 19) that the court of appeals' approach conflicts with "the majority of circuit courts * * * , which hold that questions of insider status are mixed questions of law and fact to be reviewed *de novo*." A mixed question is a question

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[3] Petitioner also contends that the decision below conflicts with another decision of the Ninth Circuit. See Pet. 15 (citing *Boyajian* v. *New Falls Corp. (In re Boyajian)*, 564 F.3d 1088, 1091 (2009)). Because the court in *Boyajian* did not address the effect for purposes of Section 1129(a)(10) of assigning an insider claim, that decision does not conflict with the decision below. In any event, an intra-circuit conflict is not a basis for review by this Court.

that involves the application of a legal standard to the facts of a particular case.

All of the decisions on which petitioner relies agree that insider status is a mixed question of fact and law. See *Schubert* v. *Lucent Techs., Inc. (In re Winstar Commc'ns, Inc.)*, 554 F.3d 382, 394-395 (3d Cir. 2009); *Anstine* v. *Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1275 (10th Cir. 2008); *Miami Police Relief & Pension Fund* v. *Tabas (In re Florida Fund of Coral Gables, Ltd.)*, 144 Fed. Appx. 72, 74 (11th Cir. 2005); *In re Krehl*, 86 F.3d 737, 742 (7th Cir. 1996); see *Browning Interests* v. *Allison (In re Holloway)*, 955 F.2d 1008, 1014-1015 (5th Cir. 1992) (explaining, in the context of reviewing a determination of insider status, that a bankruptcy court's findings of fact are reviewed for clear error while its legal conclusions are reviewed de novo).[4] Those courts also agree that, when an appellate court reviews a trial court's resolution of a mixed question, it should apply deferential (clear-error) review to any trial-court factual findings and de novo review to both the trial court's articulation of the governing legal standard and the trial court's application of that standard to those factual findings. *In re Winstar Commc'ns, Inc.*, 554 F.3d at 395 (3d Cir.); *Christopher* v. *Cox (In re Cox)*, 493

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[4] Petitioner cites (Pet. 20) *Koch* v. *Rogers (In re Broumas)*, 135 F.3d 769, 1998 WL 77842 (1998) (Tbl.), in which the Fourth Circuit stated that "insider status is determined by a factual inquiry into the debtor's relationship with the alleged insider," and held that the bankruptcy court's findings on that question were not "clearly erroneous." *Id.* at *7-*8. That statement is not inconsistent with the court of appeals' approach in this case because there appears to have been no dispute as to the applicable legal standard in *Broumas*, leaving only a dispute about the correctness of the bankruptcy court's factual findings.

F.3d 1336, 1340 n.9 (11th Cir. 2007); *Gullickson* v. *Brown (In re Brown)*, 108 F.3d 1290, 1292 (10th Cir. 1997); *In re Holloway*, 955 F.2d at 1014 (5th Cir.); *Samson* v. *Alton Banking & Trust Co. (In re Ebbler Furniture & Appliances, Inc.)*, 804 F.2d 87, 89 (7th Cir. 1986). That is what the court of appeals did in this case.

To be sure, the court of appeals' opinion includes some imprecise language. The court stated, for example, that "[t]he bankruptcy court's finding that Rabkin does not qualify as a non-statutory insider is not clearly erroneous," Pet. App. 16a—a statement that, viewed in isolation, appears to elide the separate factual and legal components of the bankruptcy court's ultimate conclusion as to Rabkin's insider status. But the court of appeals elsewhere made clear that it was applying clear-error review to the bankruptcy court's factual findings, and de novo review to the court's articulation of the legal standard. See *id.* at 8a ("Establishing the definition of non-statutory insider status is * * * a purely legal inquiry. We review questions of law de novo."); *id.* at 15a n.13 (explaining that the court of appeals had "reviewed de novo the bankruptcy court's definition of non-statutory insider status, which is a purely legal question," and had then "analyze[d] whether the facts of this case are such that Rabkin met that definition, which is a purely factual inquiry and properly left to clear error review").

Although the bankruptcy court cited an array of facts indicating that Rabkin is not a non-statutory insider, see Pet. App. 66a-67a, that court did not find in so many words that Rabkin's purchase of MBP's claim was an "arm's length transaction." Petitioner suggests

that this omission is significant. Pet. 21 n.4. But the various findings that the bankruptcy court did make—including the finding that MBP's "insider claim was not assigned to Dr. Rabkin in bad faith to create an impaired, consenting class," Pet. App. 67a—are properly understood as an implicit determination that the sale was made at arm's length.

In any event, in determining whether the Ninth Circuit misstated the legal principles that govern appellate review of bankruptcy-court decisions, the salient point is that the court of appeals understood the bankruptcy court to have found that an arm's-length sale occurred. The Ninth Circuit stated that "[t]he [bankruptcy] court's failure to use the words 'arm's length transaction' is irrelevant. The court's entire explanation is a description of why the transaction was conducted at arm's length and, hence, why Rabkin was not an insider." Pet. App. 17a n.15. Any doubt as to whether the court of appeals correctly construed the bankruptcy court's findings is confined to the circumstances of this case and raises no issue of general importance.

Judge Clifton in dissent suggested that, if the bankruptcy court found that the sale of MBP's claim was made at arm's length, that finding was clearly erroneous. See Pet. App. 19a ("The facts make it clear that this transaction was negotiated at less than arm's length."). The dissenting opinion identifies substantial grounds for doubting the bankruptcy court's determination that Rabkin acquired the claim for legitimate investment purposes, rather than as a means of benefiting a statutory insider with whom he had a close personal relationship. But the parties' dispute as to the motives of MBP and Rabkin for transferring

the claim raises a purely factual issue. See, *e.g.*, *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010) (explaining that the "state of a man's mind is as much a fact as the state of his digestion") (citations omitted). And the question whether the bankruptcy court's resolution of that factual dispute was clearly erroneous does not warrant this Court's review. See Sup. Ct. R. 10 (stating that this Court generally does not grant a petition for a writ of certiorari to correct "erroneous factual findings or the misapplication of a properly stated rule of law.").

C. The Third Question Presented Does Not Warrant This Court's Review

Finally, petitioner seeks (Pet. 24-28) this Court's review of the court of appeals' articulation of the legal standard for determining non-statutory insider status. Review of that question is unwarranted because the court of appeals correctly stated the legal standard, and its articulation of that standard does not conflict with any decision of this Court or of any other court of appeals.

Under the definition of "insider" set forth in Section 101(31), "[a]n insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor." House Report 312; Senate Report 25. In determining whether a creditor is a non-statutory insider (*i.e.*, a person who should be treated as an insider even though he does not fall within the non-exhaustive list of examples contained in Section 101(31)), courts should therefore "focus[] on two factors: (1) the closeness of the relationship between the parties; and (2) whether the transaction was negotiated at arm's length." 5 *Collier* ¶ 547.03[6], at

547-35 to 547-36. That analysis is "a case-by-case decision based on the totality of the circumstances." *In re Longview Aluminum, L.L.C.*, 657 F.3d 507, 509 (7th Cir. 2011). The court of appeals in this case recognized and applied that standard. See Pet. App. 14a ("A court must conduct a fact-intensive analysis to determine if a creditor and debtor shared a close relationship and negotiated at less than arm's length.").

Petitioner appears to agree (Pet. 24-27) that a court should determine non-statutory insider status by examining both the closeness of the relationship between a creditor and the debtor and whether the relevant transaction was conducted at arm's length. Petitioner contends (Pet. 26), however, that the court of appeals departed from that standard "by imposing an additional requirement that the relationship must be the functional equivalent of a statutory insider." Petitioner bases that contention (see Pet. 24) on the court of appeals' statement that a person does not qualify as a non-statutory insider unless "the closeness of its relationship with the debtor is comparable to that of the enumerated insider classifications in § 101(31)." Pet. App. 13a.

Viewed in context, however, that statement merely explains that "[a] court cannot assign non-statutory insider status to a creditor simply because it finds that the creditor and debtor share a close relationship." Pet. App. 14a. Consistent with congressional intent, the court of appeals looked not simply at whether the relationship in question could be colloquially described as "close," but at whether the creditor shared a "sufficiently close relationship with the debtor that [the creditor's] conduct is made subject to closer scrutiny than those dealing at arms [sic] length with the

debtor." *Id.* at 9a (quoting Senate Report 25; House Report 312) (second set of brackets in original). In other cases, the Ninth Circuit has similarly explained that it determines non-statutory insider status by examining whether a "relationship compels the conclusion that the individual or entity has a relationship with the debtor, close enough to gain an advantage attributable simply to affinity rather than to the course of business dealings between the parties." *Dye* v. *Brown (In re AFI Holding, Inc.)*, 530 F.3d 832, 849 (9th Cir. 2008) (citation omitted). That approach is consistent with the text and purpose of the relevant statutory provisions.

Petitioner's argument (Pet. 24-27) that the court of appeals' decision conflicts with decisions of other circuits is premised on its erroneous contention (Pet. 24) that the court below imposed a "'functional equivalent' test." Like the Ninth Circuit, the other courts of appeals on whose decisions petitioner relies (see Pet. 24-26) examine whether a relationship is "close enough to gain an advantage attributable simply to affinity" or is "sufficiently close" that the creditor's "conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor." *In re U.S. Med., Inc.*, 531 F.3d at 1276 (10th Cir.) (quoting *Rupp* v. *United Sec. Bank (In re Kunz)*, 489 F.3d 1072, 1078-1079 (10th Cir. 2007) (emphasis and internal quotation marks omitted)); see *In re Longview Aluminum, L.L.C.*, 657 F.3d at 509 (7th Cir.) ("[O]ur case law has also held that the term insider can also encompass anyone with a 'sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor.'") (quoting *In re Krehl*, 86 F.3d at 741-

742); see *In re Winstar Commc'ns, Inc.*, 554 F.3d at 396-397 (3d Cir.) ("the question 'is whether there is a close relationship [between debtor and creditor] and . . . anything other than closeness to suggest that any transactions were not conducted at arm's length.'") (quoting *In re U.S. Med., Inc.*, 531 F.3d at 1277).[5]

As explained above, the parties' dispute about Rabkin's "non-statutory insider" status turns on the motivation for Rabkin's acquisition of MBP's claim. The dissenting judge below concluded that "the only logical explanation for Rabkin's actions here" was that Rabkin "did a favor for a friend." Pet. App. 21a. The majority noted the dissent's assessment but concluded that "the bankruptcy court's explanation that Rabkin made a speculative investment at a relatively low cost and with the potential for a big payoff is equally logical." *Id.* at 17a n.16. Whatever the merits of those competing views of the record, that dispute raises no legal issue warranting this Court's review.

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[5] Petitioner is also wrong in arguing (Pet. 24-25) that the decision below conflicts with decisions of the Third and Tenth Circuit by holding that "actual control" is a prerequisite to a finding of non-statutory insider status. The Ninth Circuit here agreed that "actual control is not required to find non-statutory insider status." Pet. App. 14a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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