No. 15-1509

In the Supreme Court of the United States

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

v.

THE VILLAGE AT LAKERIDGE, LLC

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the appropriate standard of review is de novo or clear error when reviewing a bankruptcy court's ultimate finding that a claimholder is or is not a non-statutory insider under 11 U.S.C. 101(31) of the Bankruptcy Code.

RULE 29.6 STATEMENT

The Village at Lakeridge, LLC is wholly owned by MBP Equity Partners 1, LLC, which itself is a privately held limited liability company in Nevada.[1]

[1] The case caption on this Court's docket indicates that there are multiple petitioners and respondents in the case, but the sole petitioner is U.S. Bank National Association and the sole respondent is The Village at Lakeridge, LLC. The full parties to the proceeding are otherwise listed in petitioner's brief (at ii).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 814 F.3d 993. The opinion of the bankruptcy appellate panel (Pet. App. 28a-60a) is unreported but available at 2013 WL 1397447. The order of the bankruptcy court (Pet. App. 61a-70a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2016. A petition for rehearing was denied on March 16, 2016 (Pet. App. 71a-73a). The petition for a writ of certiorari was filed on June 13, 2016, and granted in part on March 27, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 101(31) of Title 11 of the United States Code defines the term "insider," and is reproduced in the appendix to the petitioner's brief (at 2a-3a).

Rule 52 of the Federal Rules of Civil Procedure provides in pertinent part:

> Findings and Conclusions by the Court; Judgment on Partial Findings
>
> (a) Findings and Conclusions.
>
> * * *
>
> (6) *Setting Aside the Findings*. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.[2]

INTRODUCTION

A bankruptcy court's "non-statutory insider" determination requires a highly fact-intensive analysis that ultimately turns on whether the parties transacted at arm's length. Petitioner contends that this case-specific conclusion should be reviewed de novo: Every appellate body in the judicial-review process should redo the bankruptcy court's work, using scarce judicial resources to mine the record anew and examine transcripts of events that the bankruptcy judge witnessed in person. Petitioner is wrong on multiple levels. It misunderstands the insider analysis and the framework for determining the standard of review. For two reasons, this Court's standard-of-review precedents point squarely to clear-error review.

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[2] Rule 52 applies in the bankruptcy setting by virtue of Fed. R. Bankr. P. 7052 and 9014(c).

First, contrary to petitioner's primary assertion, the non-statutory insider determination is not a mixed question at all, but a pure question of ultimate fact. Whether a transaction was at arm's length is inherently bound up with the details of the transaction and the parties' motivations and intent. Just as in *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), those conclusions represent a finding of *fact* subject to clear error review.

Second, even if petitioner were correct that this is instead a mixed question, affirmance would still be proper under the Court's usual framework for examining mixed questions, which looks first to a statutory directive, then to historical tradition, and finally to functional considerations—asking which judicial actor is best positioned to decide the issue. There is no statutory directive here, and petitioner's contention that historical practice requires de novo review is obviously wrong—by petitioner's own count, the circuits have divided 4-3 on this question. By contrast, this Court has consistently used clear-error review to assess issues that lack a constitutional nexus. The functional considerations remove any doubt about the proper result. Questions of motivation, intent, and credibility plainly belong with the factfinder. And prescribing de novo review for two rounds of review reduces judicial economy, and delays what Congress intended to be the swift resolution of a bankruptcy reorganization. On the flip side, independent appellate examination offers little value for such case-specific determinations that are not imbued with broader, normative judgments. Clear-error review should apply, and the Ninth Circuit's decision should therefore be affirmed.

STATEMENT

1. a. In a Chapter 11 bankruptcy, the "debtor and creditors try to negotiate a plan that will govern the distribution of valuable assets from the debtor's estate and often keep the business operating as a going concern." *Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973, 978 (2017). The Bankruptcy Code provides detailed rules for the creation and confirmation of a reorganization plan. *E.g.*, 11 U.S.C. 1121-1129. The plan must designate classes of claims and specify the treatment of claims within each class. See 11 U.S.C. 1122, 1123.

The bankruptcy court generally may "confirm a plan only if" sixteen requirements are satisfied. 11 U.S.C. 1129(a). Among those requirements, every class that is "impaired" under the plan must approve the plan. 11 U.S.C. 1129(a)(8); see 11 U.S.C. 1126(c) ("A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, 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, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan."). A class is impaired if its "legal, equitable, [or] contractual rights" have been "[]altered." 11 U.S.C. 1124(1). The plan also must have been "proposed in good faith." 11 U.S.C. 1129(a)(3). Separately, any "party in interest" may ask the bankruptcy court to "designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title." 11 U.S.C. 1126(e).

Section 1129(b) provides an alternative path to confirmation where consent of every impaired class cannot be obtained in compliance with subsection (a)(8). Here the court must find that "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. 1129(b)(1). The other requirements of Section 1129(a) also still must be met, including the requirement that "at least one class" of impaired claims must approve the plan, "determined without including any acceptance of the plan by any insider." 11 U.S.C. 1129(a)(10).

b. The 1978 Bankruptcy Code added "insider" as "a new term." S. Rep. No. 989, 95th Cong., 2d Sess. 25 (1978). "An 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." *Ibid.* The Code categorically dubs certain persons and entities "insiders." See 11 U.S.C. 101(31). Courts call these "statutory" or "per se" insiders. Where 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).

Because this list is non-exclusive, courts have uniformly recognized that other persons and entities can qualify as "non-statutory" or "extra-statutory" insiders. *E.g.*, Pet. App. 9a (citing *Schubert* v. *Lucent Techs. Inc. (In re Winstar Commc'ns, Inc.)*, 554 F.3d 382, 395 (3d Cir. 2009)). Although the circuits have phrased the legal standard slightly differently, the general principle is that non-statutory "[i]nsider status may be based on a professional or business relationship with the debtor, * * * where such 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); accord, *e.g.*, *Anstine* v. *Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1276 (10th Cir. 2008). Accordingly, "courts have looked to the closeness of the relationship between the parties and to whether any transactions between them were conducted at arm's length." *In re Krehl*, 86 F.3d 737, 742 (7th Cir. 1996). The touchstone of the inquiry, however, is whether the parties transacted at arm's length: "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." *U.S. Med.*, 531 F.2d at 1280. Closeness alone does not suffice. *Id.* at 1277-1278. In all events, the inquiry is "highly fact-intensive" and demands a case-by-case analysis. *Weinman* v. *Walker (In re Adam Aircraft Indus., Inc.)*, 510 B.R. 342, 350 (B.A.P. 10th Cir. 2014).

2. Respondent, a limited liability company, owned and operated a commercial real estate property in Reno, Nevada. Pet. App. 30a. Respondent has one member, MBP Equity Partners 1, LLC (MBP). *Id.* at 3a. MBP is managed by a five-person board and has around twelve different investors through various investment mechanisms. *Ibid.*; J.A. 135-136. Kathleen Bartlett is a member of the board and an investor (through her deceased husband's 401(k)). J.A. 135-136. MBP's "full investor group" makes "major decisions," while the board retains authority over other matters. J.A. 136. Bartlett alone cannot make any decisions for MBP or respondent. J.A. 137. Both MBP and Bartlett are insiders for purposes of Section 1129.

Respondent entered Chapter 11 bankruptcy in June 2011 and filed its initial reorganization plan in September. Pet. App. 3a. Two creditors held claims on respondent's assets: petitioner, which held a secured claim of about $10 million derived from respondent's initial financing of its property purchase; and MBP, which held a $2.76 million unsecured claim. *Ibid.* The plan impaired both claims.

MBP's investor group decided to sell MBP's claim for $5,000. J.A. 137, 146. As they testified below, their reasoning was twofold: they thought that selling the claim would yield tax benefits, and the claim was worthless to MBP because MBP could not vote in favor of respondent's reorganization plan. Pet. App. 3a-4a & n.4; see also J.A. 137-138, 145. The group discussed several potential purchasers but settled on Dr. Robert Rabkin, a Reno local and retired surgeon. Pet. App. 4a; J.A. 106, 146.[3] Although Rabkin has no affiliation with respondent, MBP, or MBP's board, he and Bartlett "share[] a close business and personal relationship." Pet. App. 4a. Rabkin had met Bartlett, an experienced realtor, in 2010 when she helped him with a home search. J.A. 107, 142. At some point the relationship turned "romantic," J.A. 128, 142, but they do not live together, share credit cards, lend each other money, or give each other significant gifts. J.A. 121-122, 133-134, 143-144; Pet. App. 66a.

Executing the investor group's decision, Bartlett offered MBP's claim to Rabkin in September 2011. Pet. App. 4a. He understood that she did not individually have the power to sell the claim. J.A. 114-115. Rabkin considered the offer for a month or two, during which time he and Bartlett discussed the offer several times, and he walked through the property and likely saw a rent roll.

[3] Bartlett testified that she could not recall precisely why the group chose Rabkin, except to say that "he was around" and "in town" and "seemed like the most viable candidate at the time." J.A. 146. In light of the limited value of the claim (offered at $5000), it is unremarkable that the group did not devote extensive time to identify multiple bidders.

J.A. 108-109, 139. He did not conduct more extensive diligence because it "would have been very expensive" to do so. J.A. 110. Moreover, a $5000 investment was not "a significant" one for him given his "overall net worth." J.A. 134; see J.A. 154. Ultimately, Rabkin purchased the claim because "[i]t had the potential for a big payoff." J.A. 154 (bankruptcy court oral ruling); see J.A. 123 (Rabkin testimony that "the face value was really high" and "there was an opportunity to have a return on my investment"); J.A. 126 (stating that Bartlett indicated "that there was a possibility of making a profit").

Although Rabkin did not know the plan's payout for the claim when he purchased it, he later learned that the plan specified a $30,000 distribution and then negotiated with MBP for a higher payout in return for his vote. What spurred his higher demand was his deposition by petitioner. J.A. 116-117. At the deposition, petitioner's counsel offered to buy the claim for $50,000 and then for $60,000. Pet App. 4a-5a. Rabkin was "appalled" (J.A. 119) and reacted by stating he was "really amazed at a deposition that you go and you get into a negotiation." C.A. Record Excerpts 681. The attorney nonetheless repeatedly pushed Rabkin to accept $50,000 on the spot, while Rabkin repeatedly asked to consider the offer and confer with his own attorney. *Id.* at 680-694; see J.A. 119 (Rabkin testifying that petitioner's counsel "put [him] on the spot" and "badger[ed]" him). Petitioner's counsel finally relented in stating that Rabkin had a week to consider the $50,000 offer but the $60,000 offer had to be accepted "today." C.A. Record Excerpts 692; see J.A. 117. When Rabkin did not accept either offer, they lapsed. Pet. App. 5a.

The bankruptcy judge explicitly concluded that it was not "at all surprising" that Rabkin did not accept petitioner's offers. J.A. 155. That was because its attorney's "conduct" in making them was so "appalling," "offensive," and "highly inappropriate" that the judge felt compelled to "apologize" to Rabkin "[o]n behalf of the legal profession." J.A. 119-120. The court elaborated:

> [Y]ou've got somebody in a deposition, the lawyer offers him a check unannounced; that's just not the way business is done. And I frankly don't think that's the way depositions should be conducted. So it doesn't surprise me that Dr. Rabkin would be offended by that * * * . I just don't think that's a fair – I just don't think the manner in which that was presented gives rise to much of anything in terms of my decision. * * * I just think that that's a highly inappropriate setting to try and do it.

J.A. 150-151; see J.A. 121 (bankruptcy court explaining that the offer should not have been made "during the course of a deposition where you have somebody under oath. I think your conduct was bad. I don't know that it's sanctionable but I thought it was offensive.").

While Rabkin was understandably "[un]interested in dealing with the people who made the offer" in that manner (J.A. 155), he went back to Bartlett to demand "more money" from MBP, J.A. 141. Rabkin testified that the bases for his demand were that his legal expenses were more than he had anticipated and that petitioner's offer showed that the claim's "minimum value is worth at least" $60,000. J.A. 118; see *ibid.* ("I thought that my outlay would be somewhere on the order of 5,000 give or take. And it looks like there are going to be a lot more expenses."); J.A. 131. Rabkin made his vote for the plan contingent on this increase, and Bartlett responded that "the full group of investors" in MBP would have to approve the request. See J.A. 131, 141-142, 147. Rabkin's undisputed understanding was that if he voted for the plan, he would receive $60,000. See, *e.g.*, J.A. 130-131; Bankr. Doc. No. 255 at 75-

76 (counsel explaining to the bankruptcy court that Rabkin's "ballot was cast in favor of the plan with his understanding that the Debtor would follow through and come back to the Court and ask for permission to modify the treatment" to provide for $60,000).

Petitioner thus tells only a shred of the story when it states that it is "[un]disputed" and "[un]controverted" that Rabkin "rejected" its offers "even though the maximum he could be paid under the Plan for his $5,000 'investment' was $30,000." Br. 12. Petitioner omits the "appalling," "offensive" context of its offers (J.A. 120-121), and the undisputed testimony that everyone expected the plan to be amended to pay him $60,000, not $30,000. Indeed, although these facts escaped petitioner's statement, they did not elude the Ninth Circuit. The court noted that Rabkin "felt pressured to accept U.S. Bank's cash offer while he was under oath, without having time to review it first," and further quoted the bankruptcy court's negative reaction to petitioner's tactics. See Pet. App. 4a-5a & n.5. It also remarked that Rabkin cast his vote only "on the understanding that Lakeridge would amend the reorganization plan to increase his payout to an amount comparable to that offered by U.S. Bank." *Id.* at 18a.[4]

In light of that understanding, Rabkin voted to accept the plan. See, *e.g.*, Pet. App. 18a; J.A. 102, 130. Although profit was his only motive when he purchased the claim (Pet. App. 4a), he later realized "that there is some value in * * * having local ownership of" respondent's property. J.A. 133 ("I also feel that I'm proud of the community.").

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[4] Rabkin did not formally note this contingency on his ballot, but as the record shows and the Ninth Circuit confirms, there is no doubt about what he expected a modified plan to provide should he vote to approve it.

3. a. In July 2012 petitioner moved to designate Rabkin's claim as an "insider" claim and to disallow it for voting purposes. J.A. 64-82. It made three separate arguments: (1) Rabkin was a non-statutory insider; (2) MBP's assignment of the claim to Rabkin was made in bad faith; and (3) Rabkin became a statutory insider by acquiring his claim from an insider, *i.e.*, MBP. In an oral ruling memorialized in a written order, the court rejected the first two but accepted the third and accordingly denied confirmation.

First, the bankruptcy court rejected the contention that Rabkin is a non-statutory insider. The Court wrote that, "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.

Pet. App. 66a; see J.A. 154 (oral ruling: Bartlett is "one of five people who are on the management committee of the insider and from what I could tell, Dr. Rabkin didn't have any influence on them."); J.A. 148 (petitioner's counsel conceding that "it's obvious that Dr. Rabkin doesn't have any control over the Debtor"). Rabkin thus was not "a non-statutory insider because of his relationship with Ms. Bartlett." J.A. 153.

Second, the court rejected petitioner's bad-faith argument. The court reasoned that Rabkin's due diligence "was sufficient under the circumstances" and "Bartlett did not ask Dr. Rabkin to vote in favor of the Debtor's

Plan." Pet. App. 67a; see also J.A. 154 (oral ruling: "Certainly, there was not much due diligence done by Dr. Rabkin in this case. But his purchase was – the cost of buying the claim was relatively small. It wasn't significant in the overall scheme of Dr. Rabkin's finances or his various investment properties. It had the potential for a big payoff."). At bottom, Rabkin merely was "speculating on the possibility of getting paid," and that is not "a bad motive." J.A. 154.

The court again dismissed petitioner's reliance on Rabkin's refusal of the $50,000 and $60,000 offers. It summed up: "I understand the doctor or many people would have been put off by that kind of approach and I don't think it's at all surprising that he would reject it and not really be interested in dealing with the people who made the offer to him thereafter." J.A. 155.

Third, however, the court concluded that Rabkin became an insider through the assignment of MBP's claim. Pet App. 67a. According to the court, the assignment made Rabkin "acquire[] the same status as a statutory insider." *Ibid.* This conclusion meant that Rabkin's vote could not be counted, so the reorganization plan lacked the approval of any impaired class. Cf. 11 U.S.C. 1129(a)(10). The bankruptcy court thus denied confirmation. Pet. App. 68a.

b. Respondent appealed, and petitioner cross-appealed to challenge the findings on the non-statutory insider and bad-faith conclusions. The bankruptcy appellate panel (BAP) affirmed in part, reversed in part, and vacated in part. Pet. App. 29a-60a.

First, the BAP concluded that the bankruptcy court's finding on non-statutory insider status was not clearly erroneous. Pet. App. 41a-44a. "Whether a party is an insider in relation to a debtor is a question of fact reviewed for clear error." *Id.* at 37a. The court framed the legal standard as requiring consideration of "(1) the closeness of the parties and the relative control each has over the other, and (2) whether the degree of control is such that it would render its transaction with the debtor not arms-length." *Id.* at 42a-43a. It noted that "[t]he bankruptcy court heard testimony from Rabkin and Bartlett concerning Rabkin's motivations for purchasing the MBP Claim, the lack of control exerted by either Rabkin or Bartlett over each other's actions, and the nature of their relationship." *Ibid.* The BAP held that the court's conclusion was "supported by the testimony of the witnesses and other evidence presented at the hearing" and thus not clearly erroneous. *Id.* at 44a.

Next, the BAP rejected the bankruptcy court's "rul[ing] [that], as a matter of law, a non-insider becomes a statutory insider automatically by acquiring an insider claim." *Id.* at 45a. Assignment "does not by itself change the insider status of the claimant." *Id.* at 47a. The court's contrary ruling also was inconsistent with the principle that the insider-status inquiry "is fact-intensive[] and made on a case-by-case basis." *Ibid.*

Finally, the BAP held that it was not clear error to find absence of bad faith. *Id.* at 50a-54a. As the bankruptcy court concluded, Rabkin acted consistently with a legitimate profit motive. His purchase was "a speculative investment" that did not require any "special due diligence." *Id.* at 53a. As to petitioner's reliance on Rabkin's refusal to accept the $50,000 and $60,000 offers, the BAP noted that the bankruptcy court found this "ploy" "'offensive'" and "'appalling,'" prompting the court's apology "for USB's counsel's behavior." *Id.* at 52a-53a.

The BAP therefore vacated "that part of the order deciding that the Debtor does not have an impaired, assenting class of claims necessary to confirm the plan, and the decision denying confirmation." *Id.* at 60a.[5]

c. In a divided opinion, the Ninth Circuit affirmed the rulings on insider status. Pet App. 1a-27a. In a separate, unpublished opinion, the court unanimously affirmed the rejection of petitioner's bad-faith argument. J.A. 157-160.

First, all members of the panel rejected the bankruptcy court's conclusion that Rabkin "bec[a]me a statutory insider solely by acquiring a claim from a statutory insider." Pet. App. 10a. The term "insider" refers to a claimant, not a claim, and thus "general assignment law—in which an assignee takes a claim subject to any benefits and defects of the claim—does not apply." *Ibid.* Like the BAP, the Ninth Circuit emphasized that the insider determination requires an "intensive factual analysis," not the mechanical, categorical rule that the bankruptcy court adopted. *Id.* at 11a. Under the bankruptcy court's holding, "a third-party assignee could be foreclosed from voting a claim acquired from an insider, *even if the entire transaction was conducted at arm's length*." *Ibid.* (emphasis added). Further, the bankruptcy court's view is unnecessary to protect secured creditors because Section 1129 already "contains a number of safeguards for secured creditors who could be negatively impacted by a debtor's reorganization plan." *Ibid.*

Second, the Ninth Circuit held that the bankruptcy court did not clearly err in denying non-statutory insider status. The majority explained that, while determining "the definition of non-statutory insider status" is "a purely

[5] The BAP also ruled on two procedural issues irrelevant to the question presented. See Pet. App. 56a-60a.

legal inquiry," deciding "[w]hether a specific person qualifies as a non-statutory insider is a question of fact" subject to clear-error review. *Id.* at 8a; see *id.* at 15a n.13 ("whether the facts of this case are such that Rabkin met that definition" "is a purely factual inquiry"). Responding to the dissent's assertion that insider status is a mixed question, the majority characterized that position as an improper "backdoor to reassessing the facts." *Id.* at 15a n.13; see *id.* at 23a (Clifton, J., dissenting) ("[T]hat finding turns at least as much on the legal standard that defines a non-statutory insider as it does on the facts.").

As to the legal definition of non-statutory insider, the Ninth Circuit stated the standard discussed above, explaining that "[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; see *id.* at 23a (Clifton, J., dissenting) (agreeing with majority's statement of the standard). Contrary to petitioner's assertions here, the majority left no doubt that the bankruptcy court applied the correct legal standard: "The 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." *Id.* at 17a n.15.

"[O]n the record presented," the bankruptcy court's conclusion that "Rabkin was not a non-statutory insider" was not clearly erroneous. *Id.* at 18a. Rabkin and MBP exhibited no control over each other, and Bartlett was just "one of MBP's five managing members." *Id.* at 16a. Anyhow, "Rabkin and Bartlett kept separate finances, lived separately, and conducted business separately." *Ibid.* And as to Rabkin's purchase decision, "it was a small investment upon which Bartlett had indicated he could make a profit and 'due diligence would have been very expense,'" and Rabkin expected a plan amendment that would "increase his payout to an amount comparable to that offered by U.S. Bank." *Id.* at 17a-18a.

The majority repeatedly rebuffed the dissent's attempts to fight the district court on the facts. For instance, while "[t]he dissent argues that 'the only logical explanation for Rabkin's actions' is that '[h]e did a favor for a friend,'" "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 (first alteration added). More broadly, the majority chided the dissent for "explain[ing] how it would have decided this case had it been sitting as the bankruptcy court judge," when "[t]his court cannot substitute its judgment for that of the bankruptcy court." *Id.* at 16a n.14. The court thus affirmed the BAP's judgment. *Id.* at 18a.

In the unpublished opinion, the Ninth Circuit made short work of petitioner's bad-faith argument under 11 U.S.C. 1126(e). Again, while "Rabkin had not conducted much due diligence," his purchase was mere "speculative investing with no bad motive" given the "'potential for a big payoff.'" J.A. 159. Petitioner's "heavy-handed tactics during Rabkin's deposition" understandably justified his refusal to deal with them. J.A. 159-160. The bankruptcy court's conclusion thus was not clearly erroneous.

4. This Court granted certiorari limited to the question of the appropriate standard of review for determining non-statutory insider status. The Court declined to review the legal standards for determining whether a creditor is a statutory or non-statutory insider. Compare J.A. 161 with Pet. i.

SUMMARY OF ARGUMENT

I. Contrary to petitioner's contention, whether "a specific person qualifies as a non-statutory insider" is not a mixed question at all, but a question of ultimate fact. Pet. App. 8a; see *Pullman-Standard* v. *Swint*, 456 U.S. 273, 285-288 & n.16 (1982). It ultimately asks whether a specific transaction was conducted at arm's length, an inherently *factual* issue. It requires closely examining the particular details of the transaction, the motivation and intent of the parties, the nature of their relationship, and the character of their interactions. The answers are bound up with the case-specific details of the highly factual circumstances below. Indeed, the answer typically turns on the parties' *intent*—whether they were truly negotiating in their own self-interest or motivated instead by a connection to the other side. Those are *quintessential* fact issues. And none of that has anything to do with normative or legal judgments; it is inherently *descriptive*, and it requires a historical determination of what actually happened below. That ultimate finding is subject to the same deferential review as any other historical fact, and there is no basis for departing from Rule 52(a)(6)'s command—which expressly limits review of "[f]indings of fact" to clear error. Fed. R. Civ. P. 52(a)(6).

In contending otherwise, petitioner simply misunderstands the substantive analysis. Everyone agrees that the bankruptcy court's *legal* rulings—including its "definition of non-statutory insider status"—are subject to de novo review. Pet. App. 8a. And that is precisely what the court of appeals held below: "we reviewed de novo the bankruptcy court's definition of non-statutory insider status." Pet. App. 15a n.13. So if the bankruptcy court had *actually* abandoned or modified the legal standard—as petitioner wrongly contends—its decision would have been corrected without deference. But it is a different matter entirely "*whether the facts of this case are such that Rabkin met that definition*." *Ibid.* (emphasis added). Just as in *Pullman-Standard*, that highly fact-intensive historical review is "a purely factual inquiry," and it is "properly left to clear error review." *Ibid.*[6]

II. Even if the insider determination is not a pure fact issue, it is at least a mixed question reviewed for clear error under the Court's traditional analysis. In the absence of a statutory directive or historical tradition, the Court asks whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985); see also *McLane Co., Inc.* v. *EEOC*, 137 S. Ct. 1159, 1166-1167 (2017); *Pierce* v. *Underwood*, 487 U.S. 552, 560 (1988).

This functional approach readily supports deferential review. There is no statutory directive outside Rule 52's command, which favors respondent. Petitioner asserts that there is a clear historical practice, but that is plainly wrong. The circuits have divided 4-3 on the issue, and the majority's analysis is remarkably cursory and inconsistent. Indeed, the only lesson from history is this Court's consistent reliance on *clear error* in reviewing mixed questions outside the constitutional setting.

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[6] Petitioner repeatedly argues that the bankruptcy court failed to apply the controlling "arm's length" standard. *E.g.*, Br. 17, 28, 33. That contention was squarely confronted and rejected by the court of appeals, which held that the bankruptcy court's "entire explanation is a description of why the transaction was conducted at arm's length." Pet. App. 17a n.15. Petitioner may disagree with the appellate court's conclusion, but the court applied de novo review and adopted petitioner's own understanding of the legal standard. *Id.* at 8a (applying "de novo" review to this "purely legal inquiry"). That case-specific holding is unworthy of further review and irrelevant to the question presented.

And, critically, the core functional considerations are lopsided in favor of deferential review. The non-statutory insider determination is "a case-specific one" turning on "the application of broad standards to 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" *McLane*, 137 S. Ct. at 1167 (citations omitted). Fact-bound appeals offer little gain and much to lose: any additional guidance would be limited and modest, while additional review will likely produce *less* accuracy—as appellate judges are forced to relitigate questions of motivation, intent, and credibility on a cold record. That additional review also guarantees serious institutional costs: petitioner wishes at least *three* appellate judges (over at least two rounds of review) to devote the time and resources to reviewing an entire evidentiary record to revisit fact-intensive issues already resolved once below. And the additional appeals will impair the administration of the bankruptcy estate: proposed reorganizations will be tied up in fact-bound appeals while debtors await their fresh start and creditors await any recovery for their claims. Clear-error review accommodates "the respective institutional advantages of trial and appellate courts," *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 233 (1991), and it best respects judicial economy and scarce resources, *Anderson* v. *Bessemer City*, 470 U.S. 564, 574-575 (1985). The Ninth Circuit correctly applied clear-error review below, and its judgment should be affirmed.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY REVIEWED THE LOWER COURT'S PURELY FACTUAL DETERMINATION OF NON-STATUTORY INSIDER STATUS FOR CLEAR ERROR

According to petitioner, "insider status is a mixed question of law and fact." Br. 29-34. Petitioner is wrong.

As this case amply illustrates, the specific finding of non-statutory insider status is "a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 286-288 & n.16 (1982) (describing analogous findings of "intentional discrimination" under § 703(h) of Title VII); Pet. App. 8a, 15a n.13, 17a n.15. "It is not a question of law and not a mixed question of law and fact." *Pullman-Standard*, 456 U.S. at 286-288 & n.16. Petitioner's contrary position is directly at odds with the controlling legal standard, this Court's cases, and the fundamental character of the insider determination.

A. The Lower Court's Non-Statutory Insider Determination Turned Entirely On A Factual Inquiry

As the court of appeals recognized, whether or not Rabkin is a non-statutory insider turns on whether the transaction at issue was conducted at arm's length. Pet. App. 17a n.15; see also *U.S. Med.*, 531 F.2d at 1280; Pet. Br. 54-55. The answer turns entirely on a purely *factual* inquiry. The *fact* of operating at arm's length is grounded in case-specific evidence; it is not decided by broad legal principles or normative judgments. Parties either act at arm's length or they do not; the status describes a state of the world. Trial courts may need to weigh and balance a multitude of historical facts to make that determination, but the ultimate determination is still *factual*—it requires a "fact-intensive analysis" to determine what motivated a transaction and whether parties acted in their own self-interest. Pet. App. 14a; *Schubert* v. *Lucent Techs. Inc. (In re Winstar Commc'ns, Inc.)*, 554 F.3d 382, 399 (3d Cir. 2009). That involves precisely the kind of "who, when, what, and where" inquiries typical of pure fact finding.

See, *e.g.*, Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 235 (1985).[7]

Petitioner responds that the legal standard is too "vague and amorphous" to involve merely historical facts; when "'controlling law is defined pursuant to abstract legal norms or principles, trial-level decision making necessarily involves more than a neat comparison of fact to law.'" Br. 25, 29. But the controlling test is not abstract and does not invite any normative "standard-making," *id.* at 26. The standard is fixed and straightforward: *Was the specific transaction conducted at arm's length?* Why did the parties enter the agreement? What was their motivation and intent? Did they exercise independent and unrestrained judgment?

These factual questions do not require any normative pronouncement of who *ought* to vote on a Chapter 11 reorganization plan; they invite "case-by-case decision[s] based on the totality of the circumstances" against a clear benchmark. *In re Longview Aluminum, L.L.C.*, 657 F.3d 507, 509 (7th Cir. 2011). Clear-error review is not cabined to standards with ex ante encyclopedic definitions at the highest level of granularity exhausting every possible factual scenario that might arise in the universe of human activity; a general, but administrable, standard suffices.

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[7] While courts evaluating non-statutory insider status focus on both "the closeness of the relationship between the parties" and "whether the transaction was negotiated at arm's length," the test ultimately requires a "relationship" that is "not only close, but also at less than arm's length." *Anstine* v. *Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1278 (10th Cir. 2008); see also *id.* at 1280 ("[w]e hold here 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"); 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.") (emphasis added).

In this context, disputes over non-statutory insider status do not turn on the settled understanding of "arm's length," *e.g.*, *U.S. Med.*, 531 F.3d at 1277 n.4 (quoting *Black's Law Dictionary*); they turn on whether that clear standard is *factually* satisfied in each specific case.

Nor does it matter that this fact-finding "resolv[es] the ultimate issue in the case." Pet. Br. 36. The finding may dictate the end result, but "ultimate" facts are still *facts*. *Pullman-Standard*, 456 U.S. at 286 n.16. "[A]n issue does not lose its factual character merely because its resolution is dispositive of the ultimate [legal] question." *Miller* v. *Fenton*, 474 U.S. 104, 113 (1985); see also *Teva Pharm. USA, Inc.* v. *Sandoz, Inc.*, 135 S. Ct. 831, 842 (2015) ("Simply because a factual finding may be nearly dispositive does not render the subsidiary question a legal one."). An arm's-length finding is still a matter of historical fact based on the trial court's assessment of what *actually* happened. Appellate courts must "remain within the constraints of Rule 52(a)" even where "pure" facts are "ultimate facts." *Pullman-Standard*, 456 U.S. at 286 n.16.

Nor is petitioner correct that only *subsidiary* facts count as "historical" facts. See, *e.g.*, Br. 26.[8] The question of a party's motivation or intent may ultimately be derived from *other* historical facts, but it is still a pure question of fact. *Pullman-Standard*, 456 U.S. at 285-288 & n.16. Indeed, "[t]he law often obliges finders of fact to inquire into a person's state of mind. * * * 'It is true that it is very dif-

[8] Petitioner insists that "the historical facts were undisputed" (Br. 26), but this is plainly wrong. Historical facts are not merely *subsidiary* facts; they include still other historical facts *inferred or derived* from subsidiary facts—things like motivation and intent, and even the ultimate fact of whether a transaction was conducted at arm's length. Those material facts assuredly were disputed below, and the trial court's resolution of those disputes is subject to clear-error review.

ficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much as fact as anything else.'" *U.S. Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716-717 (1983); see also *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010) (the "state of a man's mind is as much a fact as the state of his digestion") (internal quotation marks omitted).

A claimholder's motivation will be central to whether he acted at arm's length. The trial court's resolution of that fact dispute fits comfortably within familiar confines of clear-error review. See, *e.g.*, *Teva*, 135 S. Ct. at 837 (Rule 52 "applies to both subsidiary and ultimate facts"); *Pullman-Standard*, 456 U.S. at 287 (the Rule "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous").

Petitioner insists that any determination of non-statutory insider status is necessarily a "mixed" question because (at some level) it requires an application of law to fact. *E.g.*, Br. 16-17. That is wrong because the application of law to fact follows inexorably from the court's *factual* conclusion. This case is a paradigmatic example. The *fact-finding* was determining that the transaction was indeed at arm's length (examining the "who, what, when, and why" evidence in the record). Once the court decided, factually, the transaction was at arm's length, 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. See 456 U.S. at 286 n.16.

B. There Is Simply No Dispute Over The Legal Standard For Deciding Non-Statutory Insider Status

Because the arm's-length standard is inherently factual, petitioner tries to change the subject. According to petitioner, the lower court refused to apply the arm's-length standard at all, and instead "established its own five-factor test for deciding non-statutory insider status." Br. 28, 33; see also *id.* at 17 ("In the proceedings below, the Bankruptcy Court selected five factors to determine whether the relationship at issue was sufficiently 'close.' No standard was applied for determining whether the transaction was 'arm's length.'").

Petitioner's contention is *twice* meritless. First, as explained above, the court of appeals squarely rejected the contention that the bankruptcy court "applied the wrong legal standard." Pet. App. 17a n.15. To the contrary, it found that the bankruptcy court's "entire explanation is a description of *why the transaction was conducted at arm's length*." *Ibid.* (emphasis added). Nor is that surprising: before the bankruptcy court, both parties identified the arm's-length test as the appropriate legal standard.[9]

Petitioner may disagree with that case-specific application of de novo review, but it cannot wish away the actual basis of the court's decision. See also *id.* at 15a n.13 (explaining that the court of appeals "reviewed de novo" this "purely legal question").

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[9] See, *e.g.*, J.A. 78 ("In determining whether a person is a non-statutory insider, courts generally focus on two basic factors: (1) the closeness of the relationship between the debtor and the transferee; and (2) whether the transaction between the transferee and the debtor was conducted at arm's length.") (petitioner); J.A. 90-91 ("The true test of an insider is one who has such a relationship with the debtor that their dealing with one another cannot be characterized as arm['s]-length transactions.") (respondent).

Second, the bankruptcy court did not fashion a new "five-factor" test. Contra Pet. Br. 17. The court simply considered a variety of factors in assessing *evidence* bearing on arm's length. The court did not purport to announce a new legal standard, and it was focused intently on the granular details of this particular record. On any fair reading, it was self-evidently a *factual* inquiry.

To be clear, the court did not restrict itself to petitioner's "five" factors. As established above, petitioner brushes aside entire sections of the court's analysis that contradict its theory. For example, the court discussed Rabkin's motives, his financial situation, his investment practices, his due diligence, his refusal to accept petitioner's "appalling" offer (which the court found "not surprising given the circumstances"), and his lack of bad faith. J.A. 120, 153-155; Pet. App. 66a-67a.

In particular, the evidence showed that Rabkin did not immediately accept the offer, but considered the deal for a month before going forward, conducted due diligence (commensurate with the $5000 investment), and ultimately pressed for more money—which is exactly what independent parties would do. He testified under oath that no one asked him to vote on the plan and he exercised independent judgment in good faith.

Such evidence underscores the fact-intensive nature of the inquiry. Had the bankruptcy court actually applied the wrong legal standard, it would have been reversed under de novo review—as the panel repeatedly explained below. Petitioner cannot avoid Rule 52 (or the actual question presented) by attacking a version of the decisions below that simply does not exist. The court of appeals was correct to hold that the ultimate finding is "a purely factual inquiry and properly left to clear error review." Pet. App. 15a n.13. The judgment should be affirmed.

II. AFFIRMANCE IS WARRANTED EVEN IF THE LOWER COURT'S DETERMINATION OF NON-STATUTORY INSIDER STATUS IS DEEMED A MIXED QUESTION OF LAW AND FACT

For decades now, this Court has applied a consistent framework to determine the standard of review for so-called mixed questions. In the absence of an "'explicit statutory command,'" the Court looks first to whether the "history of appellate practice yields an answer," and next to whether "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *McLane*, 137 S. Ct. at 1166-1167 (internal quotation marks omitted); see also, *e.g.*, *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748-1749 (2014); *Koon* v. *United States*, 518 U.S. 81, 97-100 (1996); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 948 (1995); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 403-405 (1990); *Pierce*, 487 U.S. at 559-560.[10]

In this case, there is no explicit statutory directive (aside from clear error under Rule 52), and there is no established historical practice (aside from this Court's routine resort to clear error *outside* the constitutional setting). Under ordinary functional considerations, trial courts are unquestionably better positioned to decide this fact-intensive issue: their firsthand experience will be more accurate, less costly, and better able to respect judicial and party time and resources. And deferential review promotes the efficient use of scarce funds in bankruptcy, while advancing the Code's interest in "the expeditious

[10] Petitioner argues that the Court has "used four different tests" to determine the proper standard of review. Br. 17, 37-53. This is inaccurate. There are not four "tests," but a single framework with multiple steps. The Court addresses those steps in the progression outlined above. See, *e.g.*, *McLane*, 137 S. Ct. at 1166-1167.

and economical resolution of the case," 11 U.S.C. 105(d)(1)-(2). The court of appeals' use of clear-error review should be affirmed.

A. There Is No Explicit Statutory Directive Regarding The Standard Of Review

There is no clear statutory directive for the standard of review. This issue involves *non*-statutory insiders; the category is not even explicitly found in the statute, but merely implied as a result of the open-ended definition in 11 U.S.C. 101(31). See, *e.g.*, *U.S. Med.*, 531 F.3d at 1276. Congress did not textually delegate authority to anyone to decide the issue.

B. There Is No Consistent Historical Practice—Aside From This Court's Heavy Reliance On Clear-Error Review Outside The Constitutional Context

Contrary to petitioner's contention (Br. 42-46), there is no historical preference favoring de novo review. Petitioner is correct that the issue has divided the courts of appeals, but petitioner overstates the so-called "majority" view. As petitioner itself admits, the current headcount is 4-3, which hardly reflects an overwhelming or consistent practice. Indeed, the Seventh Circuit has flip-flopped its position, see *In re Krehl*, 86 F.3d 737, 742 (7th Cir. 1996), and the Third Circuit has suggested it applies "'plenary review'"—before proceeding to review the critical arm's-length finding *for clear error*, *Winstar*, 554 F.3d at 394-395, 340 (ultimately asking whether the "finding that the parties did not deal at arm's length" was "clearly erroneous"); accord Pet. App. 8a, 15a n.13.

Nor has either side of the split provided an exceptionally robust explanation for its position. Petitioner claims that courts in the "majority" developed their analysis, but its support for that proposition is—*nothing*. None of the pertinent cases walk through this Court's controlling framework, or explain (aside from raw conclusions) why the question is mixed as opposed to purely factual, or why appellate courts are in a better position to decide the intensely factual question than trial courts. This is far from the kind of historical pedigree that warrants adherence or respect. Compare, *e.g.*, *McLane*, 137 S. Ct. at 1167.

Petitioner further maintains that a host of bankruptcy-related decisions also have endorsed de novo review. Br. 42-45. Those decisions, however, involve different issues under different sections of the Code. There is no such thing as a special "bankruptcy" exception to the Court's "traditional[]" rules dictating the standard of review. *McLane*, 137 S. Ct. at 1166. Those rules focus on the specific issue under review, and it proves nothing to cherry-pick a handful of cases that also happen to involve bankruptcy. Thus even assuming petitioner's random assortment of cases were correctly decided (a proposition petitioner has not attempted to establish), those decisions still say nothing about whether *this* highly fact-specific question should be reviewed de novo.

Indeed, the only pertinent historical practice is this Court's consistent use of deferential review for mixed *statutory* questions. See, *e.g.*, *Hana Fin., Inc.* v. *Hana Bank*, 135 S. Ct. 907, 911-912 (2015). As multiple courts have recognized, the heavy cost of independent review is rarely warranted in the statutory context. See, *e.g.*, *Rosiles-Camarena* v. *Holder*, 735 F.3d 534, 538 (7th Cir. 2013). The mixed analysis is virtually always best conducted by the original finder of fact, especially given that any *legal* errors are still subject to de novo appellate review. That balance ensures the consistent and faithful application of the law, without unduly wasting judicial and party resources on questions that do not materially benefit from a complete do-over on a cold record.[11]

C. As A Matter Of The Sound Administration Of Justice, Trial Courts Are Far Better Positioned To Decide This Fact-Intensive Issue

As is often the case, the standard of review ultimately turns upon "'the respective institutional advantages of trial and appellate courts.'" *First Options*, 514 U.S. at 948 (quoting *Salve Regina*, 499 U.S. at 231-233). Here, the trial courts are plainly better positioned to decide "[w]hether a specific person qualifies as a non-statutory insider." Pet. App. 8a.

First, non-statutory insider determinations involve precisely the kind of "multifarious, fleeting, special, narrow facts" appropriate for clear-error review. *Pierce*, 487 U.S. at 561-562; see also *Comm'r* v. *Duberstein*, 363 U.S. 278, 289 (1960). As explained above (Part I, *supra*), the inquiry requires "a fact-intensive analysis" (Pet. App. 14a) and "case-by-case decision[s] based on the totality of the circumstances." *In re Longview Aluminum, L.L.C.*, 657 F.3d 507, 509 (7th Cir. 2011); *In re Kunz*, 489 F.3d 1072, 1079 (10th Cir. 2007); *In re Top Hat 430, Inc.*, 568 B.R. 314, 318 (B.A.P. 8th Cir. 2017) ("The determination of whether a person is a non-statutory insider is fact-intensive, and must be made on a case-by-case basis."). And the

[11] The Court's exceptions to this practice predominantly involve *constitutional* facts. See, *e.g.*, *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 501-503 (1984). Those cases implicate compelling constitutional interests, and also often involve *normative* legal standards (things like "*reasonable* suspicion" or "*just* cause"). See, *e.g.*, *Lilly* v. *Virginia*, 527 U.S. 116, 136-137 (1999); *Ornelas* v. *United States*, 517 U.S. 690, 696-700 (1996). Here, by contrast, the arm's-length inquiry does not require any sensitive determination of what the Constitution permits—it simply asks, factually, whether the parties conducted the transaction at arm's length.

ultimate determination will often turn on motive and intent, which in turn hinges on credibility—issues uniquely within the trial court's wheelhouse. Appellate judges operate at a steep disadvantage in reviewing a cold record without the benefit of observing demeanor firsthand during live testimony. See, *e.g.*, *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 340-342 (1949) ("Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them.").

Second, there are serious costs associated with de novo review. It is a poor use of judicial and party resources to ask multi-judge panels to revisit the entire evidentiary record supporting a non-statutory insider determination. See *Pierce*, 487 U.S. at 560 ("even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record"). And those costs are heightened in the bankruptcy setting: unlike ordinary civil cases, bankruptcy litigants have a right to *two* appeals, not one. In circuits with a bankruptcy appellate panel, petitioner's theory would require potentially two three-judge panels (six judges in total) to devote substantial judicial time and energy to recreating an intense factual record—all for a case-specific ruling on a fact-bound question. That task distracts judges from the work that should consume the vast majority of judicial time—addressing important questions of law.[12]

[12] Petitioner's heavy reliance on Jones Act cases (Br. 40-42) is unavailing. Those decisions involved challenges to the *meaning of the statutory standard*. As the court of appeals explained below, issues implicating the legal definition of the statute are reviewed de novo.

Third, this is a poor and unfair use of limited party resources in bankruptcy. By their very nature, bankruptcy cases involve limited funds. Every dollar spent in litigation is a dollar that cannot be used to pay back legitimate creditors or increase the odds of a successful reorganization. "[T]he parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much." *Anderson*, 470 U.S. at 575.

These costs are particularly intolerable given the lack of any offsetting benefit. De novo review is *less* likely to produce accurate outcomes (given the difficulty of recreating highly fact-specific controversies on a cold record). See, *e.g.*, *Teva*, 135 S. Ct. at 837 ("*de novo* review of factual findings 'would very likely contribute only negligibly' to accuracy 'at a huge cost in diversion of judicial resources'"). And it is unlikely to produce any useful guidance for future cases: "'[f]act-bound resolutions cannot be made uniform through appellate review, de novo or otherwise.'" *Cooter & Gell*, 496 U.S. at 405; see also *Koon* v. *United States*, 518 U.S. 81, 99-100 (1996). And non-statutory insider determinations are indeed fact-bound (and fact-intensive); if *any* key variables change—*e.g.*, the economics of the claim, the closeness of the parties' relationship, the amount of due diligence, the market for the transaction, the amount of negotiation, even the *demeanor or trustworthiness* of a witness—the outcome could well change with it. There is no single or uniform model of arm's-length transaction, and decisions turning

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Pet. App. 8a. The question presented asks how to review the ultimate finding of non-statutory insider status, an inherently fact-bound inquiry.

on case-specific facts will provide little guidance as a result.

Fourth, clear-error review respects the comparative experience and expertise of bankruptcy judges. Those judges have greater exposure to issues related to insider status, and they will be more familiar with the mine run of transactions in ordinary bankruptcies. This familiarity may increase their ability to spot parties acting in good or bad faith. Appellate courts, by contrast, will have less exposure to these issues. Bankruptcy cases rarely percolate up to the courts of appeals, and they have less hands-on experience officiating debtor-creditor relationships. There are sound reasons to delegate primary responsibility for deciding insider issues to those judges facing the issue (in all its forms) most frequently.

Finally, petitioner's position would frustrate the ultimate goals and objectives of bankruptcy administration. Congress has a "strong preference for finality and efficiency in the bankruptcy context." *Hazelbaker* v. *Hope Gas, Inc. (In re Rare Earth Minerals)*, 445 F.3d 359, 363 (4th Cir. 2006); see also *Kreuger* v. *Torres (In re Kreuger)*, 812 F.3d 365, 373 (5th Cir. 2016) (the Code is designed for an "efficient, orderly, and timely disposition of the debtor's assets in exchange for a discharge from debt"). De novo review encourages additional litigation that risks holding up an entire reorganization with multiple rounds of costly appeals. That delay harms the debtor and other creditors, and it interferes with "the expeditious and economical resolution of the case." 11 U.S.C. 105(d)(1). Deferential review, by contrast, will "discourage litigants from pursuing marginal appeals." *Cooter & Gell*, 496 U.S. at 404; see also *McLane*, 137 S. Ct. at 1168. It helps "streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court." *Ibid.*

Here, those concerns not only create material benefits for the judicial process, but they also protect the integrity and efficiency of bankruptcy cases.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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