

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

U.S. BANK NATIONAL ASSOCIATION,)
TRUSTEE, ET AL.,)
 Petitioners,)
 v.) No. 15-1509
THE VILLAGE AT LAKERIDGE, LLC,)
ET AL.,)
 Respondents.)

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7 THE VILLAGE AT LAKERIDGE, LLC,)
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9 Respondents.)
10 - - - - -

11 Washington, D.C.

12 Tuesday, October 31, 2017

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:03 a.m.

16
17 APPEARANCES:

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19 behalf of the Petitioners
20 DANIEL L. GEYSER, Dallas, Texas; on behalf
21 of the Respondents
22 MORGAN GOODSPEED, Assistant to the Solicitor General,
23 Department of Justice, Washington, D.C.; for the
24 United States, as amicus curiae, supporting the
25 Respondents

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 15-1509, the
5 United States Bank National Association,
6 Trustee, versus The Village at Lakeridge.

7 Mr. Cross.

8 ORAL ARGUMENT OF GREGORY A. CROSS

9 ON BEHALF OF THE PETITIONERS

10 MR. CROSS: Mr. Chief Justice, may it
11 please the Court:

12 This case presents a paradigm example
13 of a mixed question of law and fact. It's a
14 polar case. The historical facts are not in
15 dispute, and the legal measure is settled.

16 The question today is what -- what
17 standard of review should govern the
18 application of the legal standard to the
19 undisputed facts.

20 JUSTICE GINSBURG: What is the legal
21 standard?

22 MR. CROSS: The legal standard should
23 be de novo -- the legal standard as articulated
24 by the Ninth Circuit was a two-prong test:
25 whether the parties' relationship was

1 sufficiently close that it was comparable to
2 the factors enunciated in 101(31) of the
3 Bankruptcy Code and whether the parties
4 transacted at arm's length. It's a two-prong
5 test.

6 Historically, when this Court has --
7 has applied --

8 JUSTICE SOTOMAYOR: It's two prongs,
9 that means -- let's assume the district court
10 had found that this couple was an intimate
11 couple that lived together, exchanged payments
12 of their expenses, were like a married couple.
13 Not like the facts found.

14 MR. CROSS: Correct.

15 JUSTICE SOTOMAYOR: But, in fact, they
16 transacted this in an arm's length way. He did
17 due diligence. He -- he thought about it. He
18 talked to investors. They all said this is a
19 great deal; take it.

20 So it has the indicia of arm's length,
21 but it is almost an insider relationship
22 because he's essentially married to this woman.

23 MR. CROSS: Both elements are
24 required, Your Honor.

25 JUSTICE SOTOMAYOR: That's

1 fascinating.

2 MR. CROSS: So --

3 JUSTICE SOTOMAYOR: It seemed -- it's
4 not required with traditional statutory
5 insiders. With statutory insiders, we presume
6 that the transaction is tinged. Why don't we
7 make the same presumption if these -- if these
8 non-statutory insiders are just like insiders?

9 MR. CROSS: Well, the test that we
10 have, which is settled, is the two-prong test.
11 And with respect to the second element of the
12 test -- the first test is more of a
13 presumption: What's the nature of the parties'
14 relationship? But the test goes to the nature
15 of the transaction. And there's a subsidiary
16 test for arm's length.

17 And the question is did the parties
18 transact as if they were strangers? It doesn't
19 include intent. It's an objective status test.

20 You can, for example, have a close
21 relationship and have an intent to transact
22 with a party, but you can nevertheless purchase
23 through a -- through a free-market transaction.
24 That would be an arm's length transaction. You
25 would not qualify for insider status.

1 Historically --

2 JUSTICE SOTOMAYOR: You asked us to
3 take this as a question presented, and we
4 denied it.

5 MR. CROSS: Correct.

6 JUSTICE SOTOMAYOR: So why did you
7 think it was important if you're defending the
8 standard now? Why did you ask us to take the
9 question if you think the standard is okay?

10 MR. CROSS: I thought that -- when we
11 asked for -- when we asked for cert on that
12 question, we thought the standard lacked
13 sufficient definition. But since the Court
14 denied cert on that question, I'm --

15 JUSTICE SOTOMAYOR: You're living with
16 it.

17 MR. CROSS: I'm living with the
18 standard that I have. That's exactly right.

19 The Jones -- the -- the Court's
20 approach to treat -- to defining seamen under
21 the Jones Act is right on point for this case.
22 You know, there, as here, there's no definition
23 of seaman, there's no definition of what is a
24 -- an insider under the Bankruptcy Code. And
25 there, as here, the definition of insider and

1 the definition of seaman require the
2 application of facts.

3 But in those cases, the Court has
4 drawn a distinction between clear error review
5 attached to historical findings of fact made by
6 the trial judge and de novo review with respect
7 to the guidelines and principle for the
8 application of the statute.

9 If you look at McDermott, for example,
10 it was the appropriate function of the trial
11 court to determine that the individual was a
12 painter and that he was a member of the crew.
13 But through the exercise of de novo review, the
14 Court said you do not need to aid in navigation
15 to qualify for seaman status.

16 CHIEF JUSTICE ROBERTS: So it sounds
17 to me like you're taking the position that it
18 is a mixed question, which means it has
19 elements of both, but the standard of review --
20 review should turn on which element the Court
21 is addressing. In other words, you can have
22 both parties to the case agree, yes, this is
23 the standard of review, we agree, it's well
24 settled, but the facts apply in different ways.

25 Isn't that the factual part of the

1 mixed question and, therefore, shouldn't those
2 determinations be reviewed for clear error?

3 MR. CROSS: The fact -- Chief Justice
4 Roberts, the factual portions, which are the
5 underlying historical facts made by the trial
6 court, should be reviewed for clear error, but
7 the guidelines and principles that govern the
8 application of the standard to those facts --

9 CHIEF JUSTICE ROBERTS: Yes.

10 MR. CROSS: -- that's de novo review,
11 and that's what didn't happen.

12 CHIEF JUSTICE ROBERTS: Okay. In my
13 -- my hypothetical, the -- the latter are
14 completely agreed upon. It's a dispute about
15 facts. And, therefore, the -- the ultimate
16 determination, it seems to me, would turn on
17 clear error review.

18 MR. CROSS: Not in this case, Your
19 Honor, because the test lacks definition. Yes,
20 it's a settled test, but it doesn't have
21 sufficient definition.

22 CHIEF JUSTICE ROBERTS: Well, it has
23 to --

24 JUSTICE KENNEDY: Do you think -- do
25 you think the parties are in agreement on the

1 elements or the components of an arm's length
2 transaction, or do you think that is a question
3 that requires more elaboration?

4 MR. CROSS: That clearly requires more
5 elaboration, Your Honor. We're at the Supreme
6 Court. The -- there's a dispute between the
7 two parties with respect to whether intent is
8 an element of arm's length.

9 That's exactly the type of
10 determination that should be made by the
11 appellate court. There's a lack of definition.
12 The definition called --

13 JUSTICE BREYER: That's -- that's -- I
14 don't know if that was the issue the Ninth
15 Circuit thought it was facing. You say, of
16 course, brute facts are a question of fact.
17 Legal standard is a question of law.

18 But sometimes implying a label to the
19 brute facts which are undisputed is a question
20 of fact. There's a good case in the Ninth
21 Circuit you didn't find because it doesn't tell
22 you the answer, United States v. Fifty-Three
23 (53) Eclectus Parrots. Is an eclectus parrot a
24 wild bird? The statute says you can't bring in
25 a wild bird.

1 Now, they agreed on the facts. If
2 you, in fact, call in a zoologist, I would say
3 putting the label on the fact is a question of
4 fact. If you call in a lawyer, ah, what does
5 it mean, the statute, that's a question of law.

6 And the beauty of this case is it's
7 somewhat ambiguous. And so -- so -- so which?
8 What's your -- I mean, you know, is that a
9 goldfinch over there? I made a mistake of no,
10 it isn't actually there. But if I had a
11 problem with the label and called in an
12 ornithologist, although we're agreed exactly on
13 what it looks like, that's a factual question.
14 You see?

15 So -- so -- so we know that, what
16 you're telling us so far, but what is it about
17 this case that suggests what they were -- you
18 and the other side were disagreeing in the
19 lower courts?

20 You both were agreeing about what's
21 the -- disagreeing about what's the label, but
22 it was a legal matter, not a factual matter of
23 whether the well-known phrase "arm's length
24 transaction" fits on these circumstances, which
25 could be a factual matter.

1 MR. CROSS: Your Honor, I would
2 disagree that arm's length is so well-known.
3 It's --

4 JUSTICE BREYER: It's unknown among
5 lawyers.

6 MR. CROSS: That's probably true.

7 JUSTICE BREYER: And that's who you're
8 dealing with.

9 MR. CROSS: In this case -- in this
10 case, arm's length is being used as a measure
11 to determine a status. It's not a settled --
12 it's not a settled fact like in Litton. In
13 Litton, the Court was looking for a fact, a
14 factual determination with respect to arm's
15 length.

16 Here, arm's length is a term that's
17 been invented by the appellate courts, derived
18 from legislative history to say, if you satisfy
19 this standard, then that is the second prong to
20 measure whether or not you have insider status.
21 But arm's length was not --

22 JUSTICE ALITO: But what if the
23 definition --

24 CHIEF JUSTICE ROBERTS: -- arm's
25 length was not invented by the Court here.

1 Arm's length is --

2 MR. CROSS: Right.

3 CHIEF JUSTICE ROBERTS: -- a legal
4 concept that goes back beyond Blackstone. It's
5 a familiar legal test for lawyers.

6 And it seems to me that the
7 application turns on a variety of factors.

8 MR. CROSS: It's not -- I would
9 disagree that it's a familiar legal test
10 because the Ninth Circuit, for example --

11 JUSTICE GINSBURG: Isn't it -- isn't
12 it that they deal with each other as if they
13 were strangers? Isn't that the definition?

14 MR. CROSS: That's the subsidiary
15 test, Your Honor. And if -- and if arm's
16 length was so settled, it would not need a
17 subsidiary test. It's not a fact. It's not --
18 there's not been a finding that it's a totality
19 of circumstances approach.

20 JUSTICE KAGAN: Well, Mr. Cross --

21 JUSTICE BREYER: It's a --

22 MR. CROSS: It's not settled that it
23 requires intent.

24 JUSTICE KAGAN: -- if you take two
25 different kinds of opinions. One says the test

1 is an arm's length transaction. Here are the
2 following considerations that we think should
3 be applied in determining whether something is
4 an arm's-length transaction.

5 And the second opinion says the test
6 is arm's length transaction, doesn't talk about
7 considerations or factors, just assumes that
8 everybody knows what that arm's length is, and
9 just says here are the facts in this case and
10 then reaches a conclusion, well, this either is
11 or isn't an arm's length transaction.

12 Now, it seems to me that on the first
13 case you would have a good reason for saying:
14 Well, when the court tries to elaborate a test
15 and considers factors and considerations, those
16 things are more a part of the legal inquiry.

17 But when the court just says here is
18 our test, now here is the facts, and then
19 reaches a conclusion, it seems like all of
20 those facts, they're just facts.

21 MR. CROSS: Your Honor, that -- your
22 second -- your second example would be more
23 reflective of trial courts finding arm's length
24 as a matter of fact. But it is important to
25 remember here we're not solving for arm's

1 length. We're solving for insider status. And
2 the arm's length is just a measure to determine
3 insider status.

4 And there could be great clarification
5 given to what that measure is. We could have
6 four principles that would give greater
7 definition to what arm's length means.

8 JUSTICE ALITO: Well, I think you're
9 talking about two separate questions. And it's
10 not your fault that the two are hard to
11 separate because we took one question and we
12 didn't take the other.

13 But the issue here is what is the
14 standard of appellate review with respect to
15 the standard that was applied by the Ninth
16 Circuit. I take it that is the question. And
17 the Ninth Circuit standard has two components.
18 One is whether it was an arm's length
19 transaction.

20 And if the definition of an arm's
21 length transaction is the one that Justice
22 Ginsburg mentioned, which I think comes right
23 out of Black's Law Dictionary, is it the kind
24 of transaction in which strangers would engage?

25 Isn't that a -- a question of fact?

1 Isn't that very close to a question of pure
2 fact?

3 MR. CROSS: The -- the underlying
4 components of the test are questions of fact,
5 how did they engage? So for the trial -- in
6 this case, the trial court, it was a question
7 of fact that there was no negotiation. It was
8 a question of fact that they didn't -- that
9 there was no due diligence.

10 Those were questions of fact. The
11 question for the appellate court and the
12 question that this case presents is what
13 standard of review should have been applied to
14 determine whether those facts satisfied the
15 statutory measure so that this was -- so that
16 this -- so that these litigants were
17 non-statutory insiders.

18 JUSTICE SOTOMAYOR: It -- it's more
19 blunt than that, because the lower court said
20 that there was diligence appropriate to the
21 amount of the investment. So that does sound
22 like a factual finding, which is: it was due
23 under the circumstances.

24 MR. CROSS: The lower court in this
25 instance, Your Honor, made no determination

1 with respect to whether the parties negotiated
2 at arm's length, never mentioned -- never
3 mentioned arm's length, never mentioned if the
4 parties negotiated as strangers.

5 It just made the comment that it was
6 the appropriate due diligence for an investment
7 of \$5,000, which in this case was none.

8 This -- this individual had never seen
9 the property, had -- knew nothing about the
10 bankruptcy case, paid \$5,000 for a \$2.7 million
11 claim.

12 JUSTICE SOTOMAYOR: You -- you have an
13 awful lot of strong arguments in this case on
14 the facts, but it still doesn't answer why this
15 is not a finding of fact as opposed to a
16 conclusion of law, because when he says this
17 was diligence enough for a \$5,000 investment,
18 to me, that sounds like a quintessential fact
19 finding. How am I supposed to know that as a
20 judge?

21 MR. CROSS: I think --

22 JUSTICE SOTOMAYOR: I think it's
23 better left in the hands of a bankruptcy judge
24 who deals with financial transactions all the
25 time.

1 MR. CROSS: No, I disagree. We're
2 interpreting a statute. You know, there's no
3 greater provision, no more important provision
4 of the Bankruptcy Code than determining who is
5 and who is not an insider.

6 It cuts through everything. It
7 determines payment priority. It determines
8 your ability to cast with a single vote a plan
9 that will affect the rights of all the other
10 creditors in the case.

11 And that determination is -- should
12 not be relegated to a totality of the
13 circumstances finding of fact made by the trial
14 court that receives minimal appellate review.

15 JUSTICE ALITO: Which entity -- which
16 entity is better positioned based on role and
17 experience to determine whether a particular
18 transaction is the kind of transaction in which
19 strangers would engage, the bankruptcy judge or
20 a panel of the court of appeals?

21 MR. CROSS: I believe that the
22 underlying facts are better determined by the
23 bankruptcy judge. The quantum of facts satisfy
24 the statutory measure for the appellate court,
25 but there are two prongs here.

1 So the first prong of this test is
2 whether the parties' relationship is
3 sufficiently close that the relationship is
4 comparable to that in 101(31).

5 Certainly, an appellate court is
6 better positioned to say what relationship is
7 comparable to 101(31). That is not a trial
8 court decision.

9 JUSTICE ALITO: No, I think you have a
10 strong argument on that. But on the -- on the
11 second part, whether it's an arm's length
12 transaction, why is it preferable for a court
13 of appeals panel to decide whether this is the
14 kind of transaction that strangers would engage
15 in?

16 MR. CROSS: So, in *Pierce*, the Court
17 recognized that sometimes findings develop over
18 time. And we may reach a point, we may very
19 well reach a point where arm's length is
20 sufficiently settled so that it's for the trier
21 of fact and not for the appellate panel, but
22 we're not there. Yes --

23 JUSTICE GINSBURG: What would you add?
24 What would you add to is it comparable to a
25 transaction between strangers? What else would

1 you add?

2 MR. CROSS: I would add four -- I'd
3 add at least four governing principles. Was
4 the transaction marketed? Did negotiations
5 occur? Did due diligence occur? And in the
6 absence of those three factors, was there some
7 indication or finding by the trial court that
8 fair market value was paid?

9 Giving those four -- those four
10 contours to what it means to negotiate as if
11 you're strangers would be of great assistance
12 in clarity.

13 You know, I was reviewing the cases
14 over the weekend, and in Chandris, Justice
15 O'Connor writing for the Court was reviewing 50
16 years of history in determining the Seaman Act
17 -- the seaman status, and she commented that
18 the absence of definition and clarity, the
19 absence of giving general principles had led
20 the lower courts to create a labyrinth and they
21 had gotten lost in it.

22 I urge you not to do the same thing
23 with insider status. I can tell you as a
24 practitioner, there is no greater safeguard
25 against a cramdown plan than the requirement

1 that there be a non-insider class consenting
2 that's impaired.

3 That cannot be left to the ad hoc
4 determination of each trial court. It's
5 particularly troublesome in bankruptcy.

6 CHIEF JUSTICE ROBERTS: What if you
7 had a situation where the underlying -- the
8 legal rule was satisfied if someone was a
9 resident of Nevada? Is that a factual
10 determination reviewed for clear error?

11 MR. CROSS: I'm sorry, I did not
12 understand the question, Your Honor.

13 CHIEF JUSTICE ROBERTS: Well, you have
14 a statute and the question is, is somebody a
15 resident of Nevada.

16 MR. CROSS: Okay.

17 CHIEF JUSTICE ROBERTS: If he is, he
18 gets some benefits. If not -- is the
19 determination that he is or is not a resident
20 of Nevada reviewed for clear error?

21 MR. CROSS: Yes.

22 CHIEF JUSTICE ROBERTS: Okay. Now,
23 let's say that the determination turns, not
24 simply where his residence is, but also where
25 his domicile is.

1 Is that determination of residence --
2 that he qualifies under the statute still just
3 a question of reviewed for clear error?

4 MR. CROSS: The predicate facts to
5 derive a domicile conclusion would be reviewed
6 for clear error. But the legal determination
7 of what is a domicile would be something that
8 was de novo reviewed by the appellate courts.

9 CHIEF JUSTICE ROBERTS: So what is --
10 how do you tell if you're in the first
11 category, which, you know, what constitutes
12 residence may or may not be clear under the
13 law, there may be difficult issues, he spends
14 four months in Florida, whatever, and -- and at
15 what point does that become something that you
16 need to have de novo review of?

17 MR. CROSS: These cases are difficult.
18 I mean, when you review them, it's -- it's very
19 difficult. And, typically, there's a
20 weighting. And the Court has said -- the Court
21 has said in cases involving intent,
22 credibility, and motivations, those tilt
23 towards the trial court and the trial court's
24 better positioned. And it typically turns on
25 who is better positioned to make the

1 conclusion.

2 In those cases, however, where -- and
3 that -- and that distinguishes Pierce, Cooter,
4 that line of cases. They all deal with things
5 that are inherently in the position of the
6 trial court. But where the -- where the issue
7 involves the interpretation of a statute,
8 that's the differentiating factor.

9 CHIEF JUSTICE ROBERTS: Well, I agree
10 with you that they're difficult, but I think
11 it's pertinent whether they're more difficult
12 for the district judge or more difficult for
13 the court of appeals.

14 And it seems to me that a lot of the
15 issues we're talking about here are the sort of
16 things that district court judges, bankruptcy
17 court judges, look at all the time. But to get
18 the intense factual record on a subsidiary
19 issue and ask the court of appeals to look at
20 it after the district court has already done
21 it -- I mean, the de novo review simply means
22 you go through the factual determination a
23 second time -- I'm not quite sure that's --
24 that's desirable.

25 MR. CROSS: I'm not suggesting that

1 the appellate court reexamine whether they had
2 a two -- two-year romantic relationship or
3 whether or not there was any due diligence.
4 I'm suggesting it was for the appellate court,
5 through the exercise of de novo review, to say
6 whether the existence of that romantic
7 relationship was important or whether the
8 exercise of due diligence was important.

9 JUSTICE BREYER: And how do they do
10 that? I mean, you know, it might be important
11 in some instances; in some other instances, it
12 wouldn't be. I mean, he lists five factors and
13 then on -- you know, at the end of this
14 appendix, he has about four or five more
15 factors, and I guess he saw the people. Did he
16 see the people?

17 MR. CROSS: Yes.

18 JUSTICE BREYER: Okay. He heard them.
19 He saw them. He thinks what is the nature of
20 the relationship? And then he lists about nine
21 different things.

22 I mean, an appellate court won't see
23 them. An appellate court will have a cold
24 record. An appellate court probably can't go
25 into the myriad details. It will say in this

1 situation whether it was as if between
2 strangers or whether it wasn't. What do you
3 want them to do?

4 MR. CROSS: Appellate courts all the
5 time in the context of --

6 JUSTICE BREYER: Yeah, they can. I'm
7 not saying you can't.

8 MR. CROSS: No, I -- I understand.

9 JUSTICE BREYER: Why would you think
10 it would be more accurate, why would it be more
11 accurate about whether this is or is not, as if
12 this particular financial transaction was or
13 was not as if between strangers?

14 MR. CROSS: Because there's a great
15 level for a need -- there is a great need for
16 uniformity in this area. I mean, that's
17 another consideration. There's a substantial
18 need for uniformity. In bankruptcy --

19 JUSTICE BREYER: I'm not doubting
20 that. I'm just doubting whether you could by
21 having dozens of appellate courts starting to
22 go through dozens of records and each one is a
23 little bit different in respect to the
24 relationship, in respect to the -- any one of
25 these nine different factors, and that -- to

1 think you're going to get uniformity. That's
2 -- that's what I'm doubting.

3 MR. CROSS: You -- there are 352
4 bankruptcy judges in this country. There
5 should not be 352 views of who is and is not a
6 non-statutory insider. We can provide greater
7 --

8 JUSTICE KENNEDY: And would -- would
9 --

10 MR. CROSS: We can provide greater
11 definition -- I'm sorry.

12 JUSTICE KENNEDY: And would part of
13 your -- your answer to Justice Breyer be that
14 in this case, the subsidiary effects can all be
15 conceded? The -- the question is the
16 conclusion you draw from them?

17 MR. CROSS: That's correct, Your
18 Honor. I wish I had used --

19 JUSTICE BREYER: Is that an answer?
20 Is that an answer? Didn't we just discuss that
21 at the beginning of what I questioned? Didn't
22 I just say sometimes, which you seem to agree,
23 that applying a label like wild bird or
24 transaction, applying a label to a set of
25 undisputed facts is itself a factual matter?

1 MR. CROSS: Not in this --

2 JUSTICE BREYER: You seem -- never you
3 say?

4 MR. CROSS: I do -- I do not agree in
5 this circumstance.

6 JUSTICE BREYER: You don't agree?

7 MR. CROSS: Because unless --

8 JUSTICE BREYER: Wait, wait, wait. Do
9 you or don't you agree that sometimes it's
10 factual?

11 MR. CROSS: Sometimes it can be.

12 JUSTICE BREYER: All right. And what
13 is the difference and why does that difference
14 make a difference here?

15 MR. CROSS: It makes a difference here
16 because the label that's being attached is a
17 statutory conclusion. Because this is settled
18 -- we are not solving for arm's length. We are
19 solving for whether or not this individual was
20 an insider or not an insider. And that's what
21 differentiates it. That's what differentiates
22 this case from Teva, that Your Honor wrote the
23 opinion for the Court up just two years ago.
24 You drew a distinction between a historical
25 fact in a patent term and a statutory term.

1 This is a statutory term. The Court
2 is solving for who -- who enjoys insider status
3 under the Bankruptcy Code.

4 JUSTICE ALITO: Can I ask you a
5 question of -- drawing on your experience as a
6 practitioner?

7 In this case, and I suppose in other
8 cases where this comes up, what is at issue is
9 whether a plan of reorganization is going to be
10 confirmed or whether the debtor is going to be
11 liquidated.

12 And from the perspective of bankruptcy
13 judges in your experience, what is the dynamic
14 regarding that determination? Do they have a
15 tendency to try to achieve one result or the
16 other?

17 MR. CROSS: In my experience, they
18 have a tendency to be -- it depends on the
19 jurisdiction. Some jurisdictions are very
20 pro-debtor and would lean towards confirmation.

21 Bankruptcy is an area where there --
22 where forum shopping is prevalent. My concern
23 is that if you don't provide any uniformity
24 here, we're going to have a race to the bottom,
25 where the most --

1 JUSTICE GINSBURG: That's what the --
2 the bankruptcy judge tried to do. He said
3 forget the arm's length. If the seller was
4 under a disability, the seller was insider,
5 then that taint travels with the transfer of
6 the claim.

7 MR. CROSS: That's correct.

8 JUSTICE GINSBURG: But he lost on
9 that, and that's not a question before us. But
10 that would certainly be a way of getting
11 uniformity here, if you say all you look to see
12 is if the seller was an insider, and if she
13 was, that her status be -- can't be removed,
14 the insider status can't be removed by
15 transferring the claim.

16 MR. CROSS: I agree. And I would have
17 liked to have had cert on that question. But
18 that's true.

19 CHIEF JUSTICE ROBERTS: Counsel, given
20 your articulation, I'm not sure how your
21 approach differs from that of the Solicitor
22 General.

23 MR. CROSS: The Solicitor General
24 stops with the enunciation of the test. So the
25 Solicitor General says that if the -- if the

1 trial court announces the test, the appellate
2 review stops there.

3 That cannot be the test. If you're --
4 if you're going to take that approach, the test
5 has no meaning. If the bankruptcy court had
6 correctly stated the test and then disregarded
7 it and just applied its own test, as this Court
8 did, it took the court -- it took the bench,
9 looked out to all the bankruptcy courts in the
10 country, and said: I conclude that these five
11 factors are sufficient to satisfy the statutory
12 test, but, nevertheless, there was something in
13 the record which would support a clear error
14 finding, the Ninth Circuit's test would have
15 had no meaning. So the Solicitor General says
16 as long as you say closeness and arm's length,
17 the appellate analysis stops there.

18 That's never the case when there's a
19 test. It's the -- it's always the appropriate
20 function of the appellate courts to give
21 meaning and implementation to the test. If
22 you're going to have a test, then the appellate
23 courts have to apply it.

24 Certainly, the question of whether or
25 not closeness or arm's length are the tests

1 would be subject to de novo review. So why
2 would we stop there? Why wouldn't we say what
3 does "close" and what does "arm's length" mean?
4 They're not just words.

5 JUSTICE KAGAN: Well, sometimes there
6 are tests that we think are better formulated
7 at a certain level of generality. And then we
8 want to, you know, do case-by-case-by-case
9 analysis to figure out what exactly that test
10 means and how it applies in particular
11 circumstances.

12 We don't think the right thing is to
13 set out, you know, a more specific legal test.
14 We think that it will be filled in by factual
15 development. And that seems what this is,
16 isn't it?

17 MR. CROSS: That's the mistake that
18 the Court made for 50 years in interpreting the
19 Jones Act. For 50 years, there was a
20 generalized definition that was derived from
21 admiralty, and there were no specific contours
22 or principles applied to it. And that led to,
23 as Justice O'Connor wrote, a labyrinth. And
24 the courts got lost in the definition.

25 The same thing is going to occur here.

1 I am not suggesting -- I know I would lose -- I
2 am not suggesting that the Court get drawn down
3 into the nuances of arm's length beyond
4 principles.

5 But the Court could clearly articulate
6 basic principles and guides that would allow
7 this statutory measure to have greater clarity.
8 I articulated the four. And with respect to
9 closeness, the nature of the relationships and
10 defining the categories of the relationships,
11 saying they were a romantic relationship is
12 sufficient to satisfy the presumption so that
13 you're going to take a closer look, that's an
14 appellate role. That's an easy call. We do
15 not need to get down into the weeds of how many
16 dates did they have. Did they live together?
17 That -- that is not necessary. But a
18 generalized principle would give sufficient
19 guidance, and that's what differentiates this.
20 But it's particularly important because we're
21 interpreting a statute.

22 If there are no further questions, I'd
23 like to reserve my remaining -- remaining time.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 MR. CROSS: Thank you.

2 CHIEF JUSTICE ROBERTS: Mr. Geysler.

3 ORAL ARGUMENT OF DANIEL L. GEYSER

4 ON BEHALF OF THE RESPONDENTS

5 MR. GEYSER: Thank you, Mr. Chief
6 Justice, and may it please the Court:

7 Petitioners' theory requires at least
8 three appellate judges over at least two rounds
9 of appellate review to devote extensive time
10 and resources to recreating an entire
11 evidentiary record and redoing a trial judge
12 fact-intensive work.

13 JUSTICE SOTOMAYOR: I don't think he
14 is. He articulated his test very simply. He
15 wants the circuit court to say what the legal
16 standard is. What does closeness mean? And I
17 guess -- I mean, he may add some tweaks to it,
18 but I think he would say closeness is a
19 relationship that is not between strangers,
20 that you have a friendship, a romantic or
21 otherwise, but it's not between two strangers.

22 And arm's length is a transaction in
23 which there hasn't been a market deal, where --
24 a market deal being supply and demand, and
25 someone's actually done due diligence on what

1 they are demanding.

2 It seems that that seems like pure
3 questions of law to me. And what he's saying
4 is that's what the circuit court didn't do
5 here. It didn't define in any meaningful way
6 what closeness means or what arm's length
7 means. Even as a Black's Law Dictionary
8 definition or as a subsidiary definition, it
9 didn't give any guidance.

10 So why aren't -- why isn't that
11 questions of law?

12 MR. GEYSER: Well, Your Honor, we
13 think if -- if the challenge is to the legal
14 standard, then it is a question of law, and
15 it's reviewed de novo, which is exactly what
16 the Ninth Circuit said and did in this case.

17 And if you look at page 17A of the
18 petition appendix in footnote 15, it said that
19 the bankruptcy court applied the arm's length
20 test. And it said its entire explanation was
21 why the transaction was at arm's length. And
22 it described the standard in exactly the way
23 that my friend has and the way that Justice
24 Ginsburg did. This is a question as to whether
25 the transaction arose as if it were between

1 strangers.

2 So the -- the question before the
3 Court, though, is what is the standard of
4 review, not for challenging the legal
5 definition, but for challenging the underlying
6 factual determination as to whether in the real
7 world this transaction actually occurred at
8 arm's length.

9 And that is exactly --

10 JUSTICE KENNEDY: Under -- under your
11 view of the case, suppose there is a case
12 that's something like this in another
13 bankruptcy court, and the bankruptcy court
14 said: Would you please get me the Ninth
15 Circuit opinion in -- in Lakeside?

16 Under your view, you say don't read
17 it. That -- that's not necessary for you to
18 read. That's a question of fact. You don't --
19 you don't need to know anything about what
20 courts of appeals say.

21 That -- that seems to me a very
22 strange approach.

23 MR. GEYSER: Well, Your Honor, the --
24 what's happening here, it's -- it's a legal
25 question that has to be broken into its

1 constituent parts. One question, and you would
2 look to -- to the Ninth Circuit decision to
3 have guidance here, what is the guiding legal
4 standard?

5 And that is it -- that is as simple as
6 is it an arm's length transaction, did the
7 parties conduct this in the ordinary course of
8 business in good faith, exercising their own
9 independent judgment? What was their
10 motivation for the transaction?

11 That's the legal test. That's
12 reviewed de novo.

13 JUSTICE KAGAN: Well, it's not really
14 the legal test according to the Ninth Circuit,
15 right? Because the -- the Ninth Circuit has
16 the arm's length component of its legal test,
17 but it also has this question whether the
18 closeness of the relationship with the debtor
19 is comparable to that of the enumerated insider
20 classifications in the statute.

21 And -- and how any particular set of
22 facts does or does not meet that prong of the
23 test does not seem much of a factual question.

24 MR. GEYSER: Well, Your Honor, I --

25 JUSTICE KAGAN: I mean, assume a

1 particular set of facts that everybody agrees
2 to. And then the question is: Well, is that
3 sufficiently close that it's comparable to the
4 enumerated insider classifications?

5 That doesn't seem like any factual
6 question I've ever heard of.

7 MR. GEYSER: Well, I -- I think it has
8 -- has a serious factual component, and
9 actually I would submit that it is still a
10 factual question because the statutory
11 enumerated categories create a yardstick. It's
12 the benchmark.

13 And then the factual question for the
14 Court is looking at the -- the multifarious
15 fleeting special narrow circumstances that
16 arise in all the different cases, does this
17 particular transaction between these, these two
18 people, given their relationships, the nature
19 of the transaction, how well they knew each
20 other, how much negotiation took place, do they
21 look about as close as you find in the statute?

22 JUSTICE ALITO: Well, if Bartlett and
23 Rabkin were married, then he would be a
24 statutory insider, would he not?

25 MR. GEYSER: He -- he would.

1 JUSTICE ALITO: All right. So --
2 because he would be a relative, and a relative
3 is defined as somebody within the third degree
4 of consanguinity. And I doubt that I remember
5 this from the bar review, but I looked it up,
6 and the third degree of consanguinity includes
7 grandparents-in-law, brother and sister-in-law,
8 grandchild-in-law.

9 Now, how does that square with the
10 test that the Ninth Circuit seems to -- I'm
11 sorry, that the bankruptcy court seems to have
12 applied here? Did they live together? Did
13 they share finances?

14 MR. GEYSER: Well, what -- what the
15 bankruptcy court did, to be very clear, is they
16 engaged in a totality of the circumstances
17 finding, which is exactly what the controlling
18 standard requires. It's fact-intensive.

19 So whether they lived together and did
20 they share finances, those are certain
21 considerations.

22 JUSTICE ALITO: I mean, they weren't
23 as close -- they were not at least as close as
24 a brother or sister-in-law?

25 MR. GEYSER: The -- not according to

1 the -- to the bankruptcy court, but, again,
2 too, that's only one component of a totality
3 analysis.

4 JUSTICE ALITO: I -- I mean, if that's
5 the kind of determination you think we
6 should -- that should be deferred to under the
7 clear error standard, that's not a very good
8 example, is it?

9 MR. GEYSER: Well, Your Honor, I think
10 that if -- if the Court is concerned that there
11 are -- there are certain degrees of closeness
12 that need a categorical rule that binds all
13 cases, then that would be a challenge to the
14 legal standard.

15 It would say that as a matter of
16 looking at the prong, whether the -- in
17 conducting a totality analysis, as to whether
18 parties are sufficiently close, courts should
19 take into account certain types of
20 characteristics.

21 I still would submit that that
22 ultimately is a factual determination, and it's
23 highly fact-intensive.

24 But even if you disagree and you think
25 this is more like a mixed question, that you

1 need to define the legal standard and need to
2 apply it to the facts of this case, under this
3 Court's functional approach, asking which
4 judicial actor is better positioned to decide
5 these questions, we think the factors weigh
6 overwhelmingly in favor of clear error review.

7 JUSTICE ALITO: Why -- why is that
8 true? Because I have certainly heard it said,
9 as your opponent said in answer to my question,
10 that bankruptcy judges have a very strong
11 tendency to want to get plans confirmed and to
12 do what is necessary to get plans confirmed.

13 And maybe in the heat of that, trying
14 to make sure that the plan can be confirmed,
15 and it doesn't have to preside over a
16 liquidation, there is a tendency to stretch
17 things, as certainly -- I mean, Judge Clifton's
18 opinion in this case is pretty strong that this
19 was -- this was -- at least that this was clear
20 error. What do you say to that?

21 MR. GEYSER: Well, Your Honor, I think
22 that bankruptcy judges do act in good faith.
23 And the code has --

24 JUSTICE ALITO: I don't doubt that
25 they act in good faith, but you're saying that

1 they're better -- better situated as an
2 institutional matter. Why is that so?

3 MR. GEYSER: I think they're better
4 situated for two reasons. One is that
5 bankruptcy judges are fact finders. They have
6 expertise in looking at the totality of the
7 circumstances. They're the ones with the
8 front-row seat to the witnesses here.

9 The bankruptcy judge got to see the
10 demeanor of the witnesses and judge their
11 credibility. They're in a far better position
12 to determine motivation and intent, which we
13 submit are parts of this analysis, than -- than
14 would be an appellate court who has to look on
15 a cold paper record. We --

16 JUSTICE GORSUCH: Counsel, could we
17 back up to where Justice Sotomayor started us
18 off this morning? And that was she pointed out
19 that oftentimes insider status is determined on
20 the basis of the closeness of the relationship
21 without respect to the arm's length nature of
22 the transaction, that that's just presumed.

23 The Ninth Circuit has developed this
24 two-part test, and near as I can tell, it's
25 conjunctive. You require both closeness and

1 lack of arm's length.

2 Other circuits have different verbal
3 formulations and some haven't even weighed in.
4 Some haven't even weighed in on the question
5 whether there is such thing as a non-statutory
6 insider. Right?

7 And yet here we're being asked to
8 decide what the right standard of review is.

9 Can we do that with any degree of
10 assurance when we don't know what the right
11 legal test is? And -- and don't we run the
12 risk, perhaps, of sending the wrong signal to
13 lower courts that we're adopting the Ninth
14 Circuit or endorsing the Ninth Circuit's
15 formulation of what the test is?

16 MR. GEYSER: Well, Your Honor, I -- I
17 think a couple different points to that. The
18 first is there is some degree of difficulty of
19 measuring between two points without knowing
20 what one of the points is, but --

21 JUSTICE GORSUCH: This seems to me a
22 high degree of difficulty. It's like one of
23 those high dives, you know, it's a -- it's a 10
24 out of 10 difficulty.

25 MR. GEYSER: Maybe. But I -- I think

1 to give you a little bit of comfort, every
2 court of appeals that has addressed this
3 question has effectively adopted the arm's
4 length test. And --

5 JUSTICE GORSUCH: Well, you know, I
6 went and I had a law clerk survey that for me
7 and I've looked at it and I'm not sure I
8 entirely agree.

9 So help -- give me some comfort on
10 that, because I look at like the Fourth
11 Circuit, for example, and they talk about
12 sufficient authority. A closeness, they're
13 really focused on the closeness aspect of it.
14 And then I look at others and they focus more
15 on the arm's length.

16 And I agree those are two important
17 factors, but the degree of attention given
18 really does seem very different across the
19 circuits.

20 MR. GEYSER: Well, Your Honor, I think
21 ultimately, though, the circuits have looked at
22 this, and this includes Collier's conclusion,
23 surveying all the -- the relevant authority.
24 And as the expert bankruptcy treatise, they've
25 said that the transaction -- the test

1 ultimately does turn on whether it's an arm's
2 length transaction.

3 And -- and I --

4 JUSTICE GORSUCH: So it doesn't turn
5 on closeness then?

6 MR. GEYSER: Closeness is -- is a
7 factor --

8 JUSTICE GORSUCH: So we're not sure
9 about that?

10 MR. GEYSER: Well, closeness is a
11 factor that weighs into the totality analysis.
12 But --

13 JUSTICE GORSUCH: The totality
14 analysis of the arm's length?

15 MR. GEYSER: Totality -- you look at
16 the totality of the circumstances, so that
17 whether the parties are close is one factor
18 that courts take into account in weighing the
19 entire evidentiary record, which I think,
20 again, points up to why this is a particularly
21 --

22 JUSTICE GORSUCH: So the test isn't
23 closeness or arm's length; it's totality?

24 MR. GEYSER: Well, it's the totality
25 of the circumstances to determine if the

1 transaction is at arm's length.

2 JUSTICE GORSUCH: So it's arm's
3 length?

4 MR. GEYSER: So it's arm's length.

5 JUSTICE GORSUCH: Okay.

6 MR. GEYSER: That's -- that's again
7 too, this -- this case --

8 JUSTICE GORSUCH: But that's not what
9 the Ninth Circuit says.

10 MR. GEYSER: The Ninth Circuit said
11 that two factors count, but it ultimately --

12 JUSTICE GORSUCH: Both.

13 MR. GEYSER: It said both. But if you
14 read the opinion, our -- our reading of the
15 opinion is consistent with its view of how the
16 Seventh Circuit approaches this and the Tenth
17 Circuit, which is that the ultimate question is
18 whether the parties conducted the transaction
19 in the ordinary course of business, taking into
20 account their own independent commercial
21 motivations.

22 JUSTICE SOTOMAYOR: So closeness is
23 irrelevant?

24 MR. GEYSER: Well, no, close --

25 JUSTICE SOTOMAYOR: It's just whether

1 it's arm's length and the lack of arm's length
2 defines closeness?

3 MR. GEYSER: Your Honor, closeness,
4 again, is -- is something that courts look at
5 to determine if a transaction is at arm's
6 length. The parties --

7 JUSTICE GORSUCH: Should we wait to
8 see what the courts of appeals sort out on all
9 this before we decide what the standard of
10 review is?

11 MR. GEYSER: Your Honor, if the Court
12 would like to dismiss the case as improvidently
13 granted, we'll take a win any way we can get
14 it.

15 (Laughter.)

16 MR. GEYSER: But we -- we -- we do
17 think, though, that the -- I think any standard
18 that the courts adopt will still require clear
19 error review because even if you think the
20 standard has sufficient legal norms embedded
21 within it, it still will ask appellate judges
22 to take the time-consuming and inefficient task
23 of reweighing and re-evaluating facts and --

24 CHIEF JUSTICE ROBERTS: I suppose that
25 we could articulate what the right answer is

1 based on a particular understanding of the
2 test, and I gather there's little dispute about
3 that.

4 We certainly can determine exactly
5 what we're looking at and then make it clear
6 and send it back. If the Ninth Circuit thinks
7 its test is something else, then that'll be --
8 they'll be free to apply the facts under the
9 appropriate standard of that test.

10 MR. GEYSER: Your Honor, I think,
11 though, if -- if the Court were to remand to --
12 to reconsider under a different test, I think
13 that would actually be deciding what the test
14 is to some extent.

15 But, again, I think as for the
16 standard of review, the Ninth Circuit did apply
17 de novo review to the understanding of the
18 legal test, so the definition of the test it
19 clearly said is a purely legal inquiry and it
20 applied de novo review in reviewing the
21 bankruptcy court's decision.

22 The -- the question before the Court
23 right now is, is it appropriate to have two
24 rounds of appellate review? And, again, for
25 the five circuits that have bankruptcy

1 appellate panels, you have six appellate judges
2 being asked to take a highly multifarious,
3 fleeting, special narrow fact -- factual record
4 and re-evaluating a factual determination --

5 JUSTICE SOTOMAYOR: But you know
6 something --

7 MR. GEYSER: -- that a bankruptcy
8 judge made.

9 JUSTICE SOTOMAYOR: -- clear error
10 shouldn't be a pass. There are errors. And
11 some of them are clear.

12 And so why isn't this one of those
13 cases? That's what Judge Clifton was saying,
14 which is on these facts you can't sustain a
15 finding of arm's length transaction or a
16 finding that there was a lack of closeness.

17 That -- so even under that standard,
18 there has to be some meaning to what those two
19 things mean and some explanation as to why that
20 -- this fits that.

21 MR. GEYSER: Sure, Your Honor. And
22 you may think --

23 JUSTICE SOTOMAYOR: What else?

24 MR. GEYSER: -- that that -- well,
25 that is a fact-bound case-specific

1 determination as to whether the Ninth Circuit
2 correctly applied clear error review in this
3 case. And, again, the question before the
4 Court is whether it should have applied clear
5 error review or something else.

6 Now we respectfully disagree with
7 Judge Clifton's conclusion. We think that if
8 you look to the facts, as the bankruptcy court
9 found them, the -- this was a negotiated
10 transaction. Dr. Rabkin went back to the -- to
11 the debtor and asked for more money after he
12 determined that his claim was worth more, which
13 is what independent parties do. He --

14 JUSTICE SOTOMAYOR: No, they go into a
15 bidding war. I would have been the very first
16 one going back and forth and saying who's going
17 to pay me the highest amount?

18 MR. GEYSER: Well, but he -- what he
19 concluded, though, is that this -- this is a
20 \$5,000 transaction that he made. And so it's
21 perfectly reasonable for someone who is a
22 sophisticated, wealthy investor to decide that
23 additional bidding and additional negotiation
24 just simply isn't worth his time.

25 But, again, the relevant question

1 before the Court is whether clear error review,
2 in fact, applies. And --

3 JUSTICE GINSBURG: What do we do with
4 -- with -- the bankruptcy court's take on this
5 case was, I think, the right standard, is to
6 see -- to say was this an insider, was -- what
7 is her name -- Bartlett an insider?

8 The answer is that, yes, that when she
9 transfers her claim, the insider taint travels
10 with it.

11 Is there any split on that question?
12 We didn't take it, but --

13 MR. GEYSER: There is not a split on
14 that question, Your Honor. Every circuit to
15 look at this has understood that whether
16 someone is an insider is a -- is a
17 determination about the character of the person
18 as opposed to a characteristic of the claim
19 that they acquired.

20 And I think that the -- the easiest
21 way to understand why the Ninth Circuit's
22 determination on that point was correct is if
23 this claim had been acquired at, you know, an
24 anonymous auction, surely it wouldn't matter
25 that the claim had originated with a -- with a

1 statutory insider.

2 But, again, that -- that is a question
3 that the Court did not agree to review. And
4 looking at the other factors that this Court
5 takes into account in looking at which judicial
6 actor has the better institutional capacity to
7 decide the question, it also considers the --
8 the cost of the appellate court to recreate the
9 factual determination.

10 It looks to the cost to the parties to
11 have to litigate multiple rounds of -- of
12 review on a highly fact-intensive question.

13 JUSTICE KENNEDY: Well -- well, you're
14 assuming that it's not cost-effective for
15 courts over a period of time to elaborate
16 certain standards for the guidance of district
17 court -- of finders of fact. That's not the
18 way the system works.

19 MR. GEYSER: Well, Your Honor,
20 fact-bound conclusions, as this Court has said,
21 won't produce uniform rules under de novo
22 review or otherwise. It's simply not conducive
23 to producing law-clarifying effects because
24 they're too fact-intensive. If you change
25 certain --

1 JUSTICE KENNEDY: But an appellate
2 opinion after it makes a resolution explains
3 neutral standards that are -- principles that
4 are applicable to other cases. That's the
5 whole function of the judicial process.

6 MR. GEYSER: Your Honor, and if -- if
7 the relevant issue being challenged --

8 JUSTICE KENNEDY: You say: Oh, that's
9 inefficient, we might as well just let
10 everybody do everything they want every time.

11 MR. GEYSER: Well, no. To be
12 perfectly clear, if the relevant challenge --
13 again, you have to break it into its
14 constituent parts -- is to the -- the norm
15 being applied or to the legal definition of the
16 standard, that is a question of law for the
17 Court, as the Ninth Circuit held.

18 If the question is whether the facts
19 of this case satisfy that legal standard,
20 that's a factual determination and -- or maybe
21 a mixed question, but that's still a highly
22 fact-intensive process that is not really
23 falling within the, you know, the heartland of
24 what appellate courts typically do.

25 And this Court didn't find concerns

1 about losing law-clarifying benefits to control
2 in -- in Highmark where it decided, you know,
3 exceptional cases under the Patent Act or in
4 issuing subpoenas in McLane or in looking at
5 exceptional case findings or -- or other
6 questions in Pierce, that there are lots of
7 decisions that look in balance at the -- the --
8 the comparative advantages of appellate courts
9 deciding things that are inherently factual and
10 trial courts that have expertise in doing
11 exactly what they're doing here.

12 And that's even if the -- the
13 documentary record is established. Trial
14 judges are very good at taking a whole
15 collection of facts and evidence, an entire
16 record and weighing components against each
17 other.

18 And that's especially true where, as
19 here, it involves questions of motivation and
20 intent. An appellate court simply isn't
21 situated to, on a cold paper record, to decide
22 whether these parties, looking in their eye,
23 really engaged in this transaction because they
24 thought it was in their own self-interest or
25 they were colluding or in cahoots with each

1 other.

2 JUSTICE ALITO: Once all the facts are
3 established, why is it preferable for a
4 bankruptcy judge as opposed to a court of
5 appeals panel to decide whether those facts
6 make the person in question comparable to a
7 statutory insider?

8 MR. GEYSER: I -- I think even if the
9 facts are established, it still requires
10 reweighing and balancing all of those facts,
11 which is something that -- that trial judges do
12 very well and appellate judges don't do quite
13 as well.

14 And it distracts from the appellate
15 court's work in addressing the true legal
16 standards when parties are actually challenging
17 the substance of a legal test.

18 And in bankruptcy in particular,
19 having de novo review encourages additional
20 appeals. And that means it will hold up the
21 administration of the estate. It prevents
22 creditors from getting paid, and it prevents
23 the reorganization of the debtor, which again
24 is Congress's concern with efficiency and
25 finality in the bankruptcy setting.

1 JUSTICE KAGAN: But --

2 JUSTICE ALITO: But appeals are not
3 always a bad thing.

4 MR. GEYSER: Oh, certainly not.
5 And -- and, again, if it's a challenge to the
6 legal standard, then it -- it makes good sense
7 to have de novo review.

8 JUSTICE KAGAN: But one way of
9 thinking of this is that once you have the
10 facts and the facts are uncontested and you're
11 trying to figure out whether those facts
12 satisfy a given legal standard, here whether
13 they are comparably close to the statutory
14 insiders, that then -- what the court is then
15 doing is trying to figure out how important
16 each fact is, given the legal test.

17 And that sounds like a legal inquiry
18 to me or a -- or, you know, how important is
19 this fact in terms of what we should be looking
20 to, in terms of what the legal test is.

21 MR. GEYSER: Well, Your Honor, I -- I
22 disagree, and this is why.

23 The courts are looking to determine if
24 the parties really were acting as if they were
25 strangers to the transaction and that really

1 turns on the evidence.

2 And so some facts in some cases will
3 be more important than others. Let's say you
4 have a witness and you just don't believe him.
5 You think that actually he was colluding with
6 the other side, or let's say you have an
7 extensive period of negotiation. May I?

8 CHIEF JUSTICE ROBERTS: Yeah. Please,
9 finish.

10 MR. GEYSER: If you have an extensive
11 period of negotiation or the -- the transaction
12 is particularly one-sided or particularly even.
13 These are all considerations that are -- that
14 are highly fact-intensive.

15 And saying that we think that one
16 factor in this given case between these parties
17 on these facts has more weight isn't really
18 something that produces law-clarifying
19 benefits. It's a factual determination on a
20 given record.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 MR. GEYSER: Thank you.

24 CHIEF JUSTICE ROBERTS: Ms. Goodspeed.

25

1 ORAL ARGUMENT OF MORGAN GOODSPEED
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE RESPONDENTS

4 MS. GOODSPEED: Mr. Chief Justice, and
5 may it please the Court:

6 At this point, everyone agrees that
7 questions of statutory construction are
8 reviewed de novo and basic historical facts are
9 reviewed for clear error. So the -- the debate
10 this morning is about how do we understand the
11 bankruptcy court's finding here that two
12 parties operated at arm's length.

13 The government's position is not that
14 because that is the test, that automatically is
15 reviewed for clear error, as Petitioner
16 suggests. The government's position is that,
17 because this is the type of test that is well
18 established and is familiar and is asking for a
19 pure factual inference, that is -- that finding
20 that comes from that test will be reviewed for
21 clear error.

22 JUSTICE KAGAN: But that seems easier
23 to say about the arm's length part of the test
24 than about the sufficiently close to a
25 statutory insider part.

1 MS. GOODSPEED: So that's correct,
2 Justice Kagan. Two things: first, as a
3 general matter as Respondents' counsel
4 suggested, how closeness is defined is so close
5 that you're not operating at arm's length.
6 That's how the court of appeals understood it
7 at page 14 of the petition appendix and again
8 at page 17 of the petition appendix.

9 And so, if closeness ultimately just
10 gets folded into the arm's length calculus,
11 then "was this transaction at arm's length" is
12 going to be the ultimate determination in the
13 case. And that's consistent with how the
14 leading bankruptcy court treatise discusses it.
15 That's consistent with how the parties argued
16 this case.

17 And so I do think that the result of
18 that is that even if there might be more
19 legal-sounding questions with respect to
20 closeness, it's not really an independent prong
21 of the test so much as folding into it.

22 The arm's length test itself is
23 comparable in some ways to this Court's
24 decision in Commissioner versus Duberstein, and
25 that case dealt with what is a gift for

1 purposes of the Tax Code? And this Court said,
2 you know, that's not a pure intent question,
3 but it is essentially a factual inference drawn
4 from all of the other facts.

5 What we're trying to get at is, what
6 is the dominant motive for how these parties
7 are interacting? And that's going to be a
8 factual inference, and it's going to be
9 reviewed for clear error. We think the same
10 thing applies here.

11 JUSTICE GINSBURG: Does the government
12 have a position on the -- that we're dealing
13 with a cramdown safeguard.

14 MS. GOODSPEED: That's correct.

15 JUSTICE GINSBURG: And the bankruptcy
16 judge that everybody is praising as having the
17 best insight thought the test ought to be is
18 the seller an insider and the -- the taint
19 travels with the claim. Does the government
20 have a position on what is the right answer to
21 that?

22 MS. GOODSPEED: Yes. So, at the cert
23 stage, we agreed with Respondents that what
24 matters for purposes of insider status is the
25 claimant rather than the claim. So it's an

1 individual or an entity that is an insider, not
2 a claim that has an insider status that travels
3 with it.

4 With respect to the bankruptcy court's
5 competence here, we are not arguing, as I think
6 some of these questions have alluded to
7 earlier, that the bankruptcy court gets to
8 define the legal rules, that if there were a
9 creation of some multi-factor test for defining
10 when something is at arm's length, we agree
11 that that would be a legal question reviewed de
12 novo.

13 But the important thing is that in
14 this particular case, the question that
15 received clear error review was the question of
16 what, at the end of the day, was Dr. Rabkin
17 trying to do here?

18 The majority said this was a
19 speculative investment, or at least it could
20 have been a speculative investment. And the
21 dissent said this was a clear favor to a
22 friend. So it was a fight about motives. And
23 that fight about whether under all of the facts
24 Dr. Rabkin should be viewed as having acted in
25 one way or the other is a classic factual

1 inference.

2 JUSTICE KAGAN: So Ms. -- Ms.
3 Goodspeed, in your brief, you put a lot of
4 emphasis on the idea that the question of arm's
5 length transaction is one of intent. And you
6 just said again there what were the parties'
7 motives.

8 But suppose that was not true.
9 Suppose that our understanding of what is or is
10 not an arm's length transaction is more
11 objective in character. Would your argument
12 still carry the day?

13 MS. GOODSPEED: Well, we don't
14 disagree that what is or is not an arm's length
15 transaction can actually be more objective.
16 When we're talking about intent, we mean the
17 same way the Court used it in Duberstein, which
18 is to say this isn't a pure subjective
19 question, but the ultimate goal of the test is
20 to get at what is driving these parties, and so
21 the goal in establishing an arm's length
22 transaction is, is this person commercially
23 disinterested, acting like a stranger, or is
24 this person operating under a conflict of
25 interest? That's the more --

1 JUSTICE SOTOMAYOR: May -- may I ask
2 you that question? He paid \$5,000 with no
3 diligence. He didn't know what the return on
4 that could or could not be.

5 How come it's an arm's length
6 transaction if the only way he makes his money
7 back is voting for the cramdown plan? Meaning,
8 doesn't he -- isn't he self-interested by
9 definition when he's buying something that
10 depends totally on him voting with the company?

11 MS. GOODSPEED: Well --

12 JUSTICE SOTOMAYOR: Because he doesn't
13 get paid at all if he doesn't vote for -- with
14 the company's cramdown.

15 MS. GOODSPEED: Sure, Justice
16 Sotomayor, that may be possible. I guess the
17 thought could be, for example, there could be
18 another plan where he would receive more money
19 or he could buy this claim for \$5,000 and sell
20 it to Petitioner for even more money. And so
21 there were other possibilities other than
22 voting for this particular plan.

23 But I do want to say that type of
24 argument could be an argument for why there may
25 have been clear error here or why this should

1 have been considered an arm's-length
2 transaction in the first instance.

3 And the government isn't taking a
4 position on whether there was or was not clear
5 error here. I think --

6 JUSTICE ALITO: Whether somebody is a
7 -- is an insider seems to be a question of
8 status, whether it's a statutory insider or a
9 non-statutory insider. So, how do you get from
10 a question of status to a question that
11 examines the particulars of a particular -- of
12 a transaction and the motivation and the
13 relationship between the parties?

14 MS. GOODSPEED: Sure, Justice Alito.
15 I -- that has been how courts have interpreted
16 this. I think what they've essentially tried
17 to do is apply an ejusdem generis canon to the
18 statute and say what is the concern with all of
19 these listed entities? And the concern with
20 all of them is that they're going to operate
21 under some sort of conflict of interest and not
22 interact with the debtor in the way that a
23 neutral person would. So I think that's how
24 courts have extracted this arm's-length test
25 from that --

1 JUSTICE GORSUCH: But --

2 MS. GOODSPEED: -- as a way of getting
3 at --

4 JUSTICE GORSUCH: But isn't Justice
5 Sotomayor correct that in a lot of areas we
6 presume that based on the status of the
7 individual involved or the relationship and we
8 don't make an inquiry into the nature of the
9 transaction at all?

10 MS. GOODSPEED: That's exactly
11 correct, and that would be correct if someone
12 were listed in the statute.

13 JUSTICE GORSUCH: So why --

14 MS. GOODSPEED: But I --

15 JUSTICE GORSUCH: So why couldn't that
16 also be a possible test for those who aren't
17 listed in the statute, assuming such a class of
18 persons exists?

19 MS. GOODSPEED: Sure. I --

20 JUSTICE GORSUCH: Which we haven't
21 decided either, right?

22 MS. GOODSPEED: Yes. I mean, the way
23 that courts have looked at this is by
24 extracting a principle versus trying to
25 establish other categories. That's just the

1 general rule.

2 I think maybe an explanation for that
3 is that Congress drew these bright lines in the
4 statutes and that it's somewhat more difficult
5 for courts to draw the same kind of bright
6 lines for things like friendships or romantic
7 --

8 JUSTICE GORSUCH: Would it --

9 MS. GOODSPEED: -- relationships.

10 JUSTICE GORSUCH: Would it be nice to
11 resolve that question first before deciding
12 what the standard of review is? I mean, the
13 government's brief, I think, admirably points
14 out, and I couldn't agree more, that
15 determining the "standard of review thus
16 requires precise identification of the
17 particular question raised on appeal."

18 MS. GOODSPEED: Yes, Justice Gorsuch.
19 In that sense, we do think the Court can still
20 decide the question if it wishes to, because
21 the particular question raised on appeal is
22 what is the standard of review to be applied to
23 this fight over --

24 JUSTICE GORSUCH: But --

25 MS. GOODSPEED: -- whether Dr. Rabkin

1 --

2 JUSTICE GORSUCH: But as we've
3 discussed, if it depends upon status, that
4 might be a legal-looking question. If it
5 depends on arm's length, that might be a more
6 factual-looking question. And we haven't
7 resolved the relationship between those two or,
8 in fact, whether both of them are appropriate
9 considerations.

10 MS. GOODSPEED: This Court hasn't
11 resolved that, but, again, what it can look to
12 is what the court of appeals actually decided
13 here. And the fight in the court of appeals,
14 as illustrated by the difference between the
15 majority and the dissent is, was this an
16 arm's-length transaction, was Dr. Rabkin acting
17 as a commercial stranger, or was he clearly
18 doing a favor to a friend? So --

19 JUSTICE KAGAN: Does -- does the
20 government have a view as to what the correct
21 legal test is?

22 MS. GOODSPEED: The government thinks
23 that the courts of appeals have adopted the
24 correct test. It's -- again, this arm's-length
25 determination is consistent with what is in the

1 legislative history. It's consistent, we
2 think, with what all of the listed entities
3 are, why they're all in this statute.

4 JUSTICE ALITO: Well, suppose that
5 Dr. Rabkin and Ms. Bartlett had a relationship
6 that was exactly like that of a married couple
7 except that they hadn't gotten married. They
8 lived together for a long time, they shared
9 finances, they had children together.

10 Would the transaction -- would --
11 would -- could Dr. Rabkin then not be an
12 insider on the ground that the particular
13 transaction was done at arm's length? Does
14 that seem right?

15 MS. GOODSPEED: So -- so I would
16 bookmark the possibility that courts could say
17 you are sort of, in fact, one of -- in the
18 listed categories, you are, in fact, a married
19 couple, even if you are not formally given that
20 title. That might be a different inquiry. If
21 the courts are not going to -- may I finish,
22 Your Honor?

23 CHIEF JUSTICE ROBERTS: Please.

24 MS. GOODSPEED: If the courts are not
25 going to do that, then we think those

1 circumstances would weigh extremely heavily in
2 the arm's-length analysis but may not decide
3 it.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Cross, four minutes.

8 REBUTTAL ARGUMENT OF GREGORY A. CROSS
9 ON BEHALF OF THE PETITIONERS

10 MR. CROSS: Mr. Chief Justice, may it
11 please the Court:

12 Justice Gorsuch, I'd like to come to
13 your point. The test -- what we're solving for
14 is who does and does not satisfy insider status
15 under the Bankruptcy Code. That's the question
16 that the Court should have applied de novo
17 review to.

18 The Ninth Circuit chose its test, but
19 if it was going to choose that test, it should
20 have applied through to exercise a de novo
21 review.

22 We're not solving necessarily for
23 arm's length for closeness, although that's the
24 test that the court enunciated. And if that
25 was the test the court enunciated, it should

1 have given definition to that test --

2 JUSTICE GORSUCH: And you think the
3 test is wrong. And -- and we didn't take that
4 question. That's on us.

5 MR. CROSS: I think the test is
6 inadequate. And I think that if you -- if you
7 affirm without applying de novo review, you
8 perpetuate the inadequacy.

9 JUSTICE GORSUCH: Should -- should we
10 even attempt to answer the question, though,
11 without -- of the standard of review without
12 first defining, as the -- as the government put
13 it, the "precise identification of the
14 particular question raised on appeal?"

15 MR. CROSS: Absolutely. I mean, in
16 every instance when this Court's looked at a
17 statute and applied the facts to the statute,
18 it applies de novo review.

19 The alternative is to abdicate that
20 rule --

21 JUSTICE GORSUCH: So you don't care.
22 Whatever the test is, is always going to be de
23 novo review?

24 MR. CROSS: It has to be de novo --

25 JUSTICE GORSUCH: Always. Okay.

1 MR. CROSS: -- review because statutes
2 have to be consistent --

3 JUSTICE GORSUCH: Assume I don't buy
4 that. Then what should I do?

5 MR. CROSS: Well, then I'm in trouble.
6 (Laughter.)

7 JUSTICE GORSUCH: Then -- then do you
8 want me to dig the case?

9 MR. CROSS: I think that you go back
10 to Justice -- the opinion Justice Breyer wrote
11 in Teva. We distinguish between a material
12 fact and a statutory fact. Statutes have to be
13 given uniform application.

14 Now what happened here is we allowed,
15 through the absence of de novo review, the
16 bankruptcy court to develop its own test. The
17 bankruptcy court did not solve for totality of
18 circumstances here.

19 The bankruptcy court went out,
20 surveyed the other courts and said these five
21 factors are determinative of insider status.
22 That's what occurred.

23 Now, in Miller, I don't usually read
24 quotes, but I think this quote is right on. In
25 Miller, the Court wrote, "When relevant legal

1 principles can be given meaning through the
2 application of particular circumstances of a
3 case, the Court has been reluctant to give the
4 trier of fact's conclusions presumptive force
5 and, in so doing, stripped the federal court of
6 its primary function as an expositor of the
7 law." That's exactly what the appellate court
8 did here.

9 It abdicated its responsibility to
10 enunciate clear standards and to give meaning
11 to the insider status by the exercise of clear
12 error review. This should have been decided by
13 de novo review.

14 If there are no further questions,
15 I'll submit the case.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

18 (Whereupon, at 11:03 a.m., the case
19 was submitted.)

20

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22

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Official

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