SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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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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Pages: 1 through 69

Place: Washington, D.C.

Date: October 31, 2017

HERITAGE REPORTING CORPORATION
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Washington, D.C.

Tuesday, October 31, 2017

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

APPEARANCES:

GREGORY A. CROSS, Baltimore, Maryland; on behalf of the Petitioners

DANIEL L. GEYSER, Dallas, Texas; on behalf of the Respondents

MORGAN GOODSPEED, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Respondents

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P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Cross.

ORAL ARGUMENT OF GREGORY A. CROSS

ON BEHALF OF THE PETITIONERS

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

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

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

JUSTICE GINSBURG: What is the legal standard?

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

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

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

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

MR. CROSS: Correct.

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

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

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

JUSTICE SOTOMAYOR: That's

fascinating.

MR. CROSS: So --

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

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

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

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

Historically --

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

MR. CROSS: Correct.

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

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

JUSTICE SOTOMAYOR: You're living with it.

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

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

definition of seaman require the application of facts.

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

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

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

Isn't that the factual part of the

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

MR. CROSS: The fact -- Chief Justice Roberts, the factual portions, which are the underlying historical facts made by the trial court, should be reviewed for clear error, but the guidelines and principles that govern the application of the standard to those facts, that's de novo review, and that's what didn't happen.

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

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

CHIEF JUSTICE ROBERTS: Well, it has to --

JUSTICE KENNEDY: Do you think -- do you think the parties are in agreement on the elements or the components of an arm's-length

transaction, or do you think that is a question that requires more elaboration?

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

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

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

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

Now, they agreed on the facts. If

you, in fact, call in a zoologist, I would say putting the label on the fact is a question of fact. If you call in a lawyer, ah, what does it mean, the statute, that's a question of law.

And the beauty of this case is it's somewhat ambiguous. And so -- so which? What's your -- I mean, you know, is that a gold finch over there? I made a mistake of no, it isn't actually there. But if I had a problem with the label and called in an ornithologist, although we're agreed exactly on what it looks like, that's a factual question. Is it?

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

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

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

JUSTICE BREYER: It's unknown among the lawyers.

MR. CROSS: That's probably true.

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

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

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

JUSTICE BREYER: But what if the definition --

CHIEF JUSTICE ROBERTS: But arm's length was not -- arm's length was not invented by the Court here. Arm's length is a legal concept that goes back beyond Blackstone. It's a familiar legal test for lawyers.

And it seems to me that the

application turns on a variety of factors.

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

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

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

JUSTICE KAGAN: Well, Mr. Cross --

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

JUSTICE KAGAN: - if you take two different kinds of opinions. One says the test is an arm's-length transaction. Here are the following considerations that we think should be applied in determining whether something is an arm's-length transaction.

And the second opinion says the test is arm's-length transaction, doesn't talk about considerations or factors, just assumes that

everybody knows what that arm's length is, and just says here are the facts in this case and then reaches a conclusion, well, this either is or isn't an arm's-length transaction.

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

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

MR. CROSS: Your Honor, that -- your second -- your second example would be more reflective of trial courts finding arm's length as a matter of fact. But it is important to remember here we're not solving for arm's length. We're solving for insider status. And the arm's length is just a measure to determine insider status.

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

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

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

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

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

MR. CROSS: The -- the underlying components of the test are questions of fact, how did they engage. So for the trial -- in this case, the trial court, it was a question of fact that there was no negotiation. It was

a question of fact that they didn't -- that there was no due diligence.

Those were questions of fact. The question for the appellate court and the question that this case presents is what standard of review should have been applied to determine whether those facts satisfied the statutory measure so that this was -- so that this -- so that these litigants were not statutory insiders.

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

MR. CROSS: The lower court in this instance, Your Honor, made no determination with respect to whether the parties negotiated at arm's length, never mentioned -- never mentioned arm's length, never mentioned if the parties negotiated as strangers.

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

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

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

I think it's better left in the hands of the bankruptcy judge who deals with financial transactions all the time.

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

It cuts through everything. It determines payment priority. It determines your ability to cast with a single vote a plan that will affect the rights of all the other

creditors in the case.

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

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

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

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

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

JUSTICE ALITO: No, I think you have a

strong argument on that. But on the -- on the second part, whether it's an arm's length transaction, why is it preferable for a court of appeals panel to decide whether this is the kind of transaction that strangers would engage in?

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

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

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

Given those four -- those four

contours to what it means to negotiate as if you're strangers would be of great assistance in clarity.

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

I urge you not to do the same thing with insider status. I can tell you as a practitioner, there is no greater safeguard against a cramdown plan than the requirement that there be a non-insider class consenting that's impaired.

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

CHIEF JUSTICE ROBERTS: What if you had a situation where the underlying -- the legal rule was satisfied if someone was a resident of Nevada? Is that a factual

determination reviewed for clear error?

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

CHIEF JUSTICE ROBERTS: Well, you have a statute and the question is, is somebody a resident of Nevada. If he is, he gets some benefits. If not -- is the determination that he is or is not a resident of Nevada reviewed for clear error?

MR. CROSS: Yes.

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

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

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

CHIEF JUSTICE ROBERTS: So what is -- how do you tell if you're in the first category, which, you know, what constitutes

residence may or may not be clear under the law, there may be difficult issues, he spends four months in Florida, whatever, and at what point does that become something that you need to have de novo review of?

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

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

CHIEF JUSTICE ROBERTS: Well, I agree with you that they're difficult, but I think it's pertinent whether they're more difficult

for the district judge or more difficult for the court of appeals.

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

MR. CROSS: I'm not suggesting that the appellate court reexamine whether they had a two -- two-year romantic relationship or whether or not there was any due diligence. I'm suggesting it was for the appellate court, through the exercise of de novo review, to say whether the existence of that romantic relationship was important or whether the exercise of due diligence was important.

JUSTICE BREYER: And how do they do that? I mean, you know, it might be important in some instances; in some other instances, it

wouldn't be. I mean, he had listed five factors and then on -- you know, at the end of this appendix, he has about four or five more factors, and I guess he saw the people. Did he see the people?

MR. CROSS: Yes.

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

I mean, an appellate court won't see them. An appellate court will have a cold record. An appellate court probably can't go into the myriad details. It will say in this situation whether it was as if between strangers or whether it wasn't. What do you want them to do?

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

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

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

JUSTICE BREYER: Why would you think it would be more accurate, why would it be more accurate about whether this is or is not, as if

this particular financial transaction was or was not as if between strangers?

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

JUSTICE BREYER: I'm not doubting that. I'm just doubting whether you could by having dozens of appellate courts starting to go through dozens of records and each one is a little bit different in respect to the relationship, in respect to the -- any one of these nine different factors, and that you think you're going to get uniformity. That's -- that's what I'm doubting.

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

JUSTICE KENNEDY: And would -- would --

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

JUSTICE KENNEDY: And could part of

your -- your answer to Justice Breyer be that in this case, the subsidiary effects can all be conceded? That the -- that the question is the conclusion you draw from them?

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

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

MR. CROSS: Not in this --

JUSTICE BREYER: You seem -- never you say?

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

JUSTICE BREYER: You don't agree?

MR. CROSS: Because unless --

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

MR. CROSS: Sometimes it can be.

JUSTICE BREYER: All right. And what

is the difference and why does that difference make a difference here?

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

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

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

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

And from the perspective of bankruptcy

judges in your experience, what is the dynamic regarding that determination? Do they have a tendency to try to achieve one result or the other?

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

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

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

MR. CROSS: That's correct.

JUSTICE GINSBURG: But lost on that, and that's not a question before us. But that would certainly be a way of getting uniformity here, if you say all you look to see is if the seller was an insider, and if she was, that her

status be -- can't be removed, the insider status can't be removed by transferring the claim.

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

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

MR. CROSS: The Solicitor General stops with the enunciation of the test. So the Solicitor General says that if the -- if the trial court announces the test, the appellate review stops there.

That cannot be the test. If you're -- if you're going to take that approach, the test has no meaning. If the bankruptcy court had correctly stated the test and then disregarded it and just applied its own test, as this Court did, it took the court -- it took the bench, looked out to all the bankruptcy courts in the country, and said: I conclude that these five factors are sufficient to satisfy the statutory test, but, nevertheless, there was something in

the record which would support a clear error of finding, the Ninth Circuit's test would have had no meaning. So the Solicitor General says as long as you say closeness and arm's length, the appellate analysis stops there.

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

Certainly, the question of whether or not closeness or arm's length are the tests would be subject to de novo review. So why would we stop there? Why wouldn't we say what does "close" and what does "arm's length" mean? They're not just words.

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

We don't think the right thing is to

set out, you know, a more specific legal test. We think that it will be filled in by factual development. And that seems what this is, isn't it?

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

The same thing is going to occur here. I am not suggesting -- I know I would lose -- I am not suggesting that the Court get drawn down into the nuances of arm's length beyond principles.

But the Court could clearly articulate basic principles and guides that would allow this statutory measure to have greater clarity. I articulated the four. And with respect to closeness, the nature of the relationships and defining the categories of the relationships, saying they were a romantic relationship is sufficient to satisfy the presumption so that

you're going to take a closer look, that's an appellate role. That's an easy call. We do not need to get down into the weeds of how many dates did they have. Did they live together? That -- that is not necessary. But a generalized principle would give sufficient guidance, and that's what differentiates this. But it's particularly important because we're interpreting a statute.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. CROSS: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Geyser.

ORAL ARGUMENT OF DANIEL L. GEYSER

ON BEHALF OF THE RESPONDENTS

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

Petitioners' theory requires at least three appellate judges over at least two rounds of appellate review to devote extensive time and resources to re-creating an entire evidentiary record and redoing a trial judge fact-intensive work.

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

And arm's length is a transaction in which there hasn't been a market deal, where -- a market deal being supply and demand, and someone's actually done due diligence on what they are demanding.

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

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

MR. GEYSER: Well, Your Honor, we

think if -- if the challenge is to the legal standard, then it is a question of law, and it's reviewed de novo, which is exactly what the Ninth Circuit said and did in this case.

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

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

And that is exactly --

JUSTICE KENNEDY: Under your view of the case, suppose there is a case that's something like this in another bankruptcy

court, and the bankruptcy court said: Would you please get me the Ninth Circuit opinion in -- in Lakeside?

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

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

MR. GEYSER: Well, Your Honor, what's happening here it's -- it's a legal question that has to be broken into its constituent parts. One question that you would look to, to the Ninth Circuit decision to have guidance here, what is the guiding legal standard?

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

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

JUSTICE KAGAN: But it's not really

the legal test according to the Ninth Circuit, right, because the -- the Ninth Circuit has the arm's-length component of its legal test, but it also has this question whether the closeness of the relationship with the debtor is comparable to that of the enumerated insider classifications in the statute.

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

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

JUSTICE KAGAN: I mean, assume a particular set of facts that everybody agrees to. And then the question is: Well, is that sufficiently close that it's comparable to the enumerated insider classifications?

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

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

And then the factual question for the Court is looking at the -- the multifarious

fleeting special narrow circumstances that arise in all the different cases, does this particular transaction between these, these two people, given their relationships, the nature of the transaction, how well they knew each other, how much negotiation took place, do they look about as close as you find in the statute?

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

MR. GEYSER: He -- he would.

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

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

MR. GEYSER: Well, what the bankruptcy

court did, to be very clear, is they engaged in a totality of the circumstances finding, which is exactly what the controlling standard requires. It's fact-intensive.

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

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

MR. GEYSER: Not according to the -- to the bankruptcy court, but, again, too, that's only one component of a totality analysis.

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

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

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

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

But even if you disagree and you think this is more like a mixed question, that you need to define the legal standard and you need to apply it to the facts of this case, under this Court's functional approach, asking which judicial actor is better positioned to decide these questions, we think the factors weigh overwhelmingly in favor of clear error review.

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

And maybe in the heat of that, trying to make sure that the plan can be confirmed, and it doesn't have to preside over a

liquidation, there is a tendency to stretch things, as certainly -- I mean, Judge Clifton's opinion in this case is pretty strong that this was -- this was -- at least that this was clear error. What do you say to that?

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

JUSTICE ALITO: I don't doubt that they act in good faith, but you're saying that they're better, better situated as an institutional matter. Why is that so?

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

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

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

The Ninth Circuit has developed this two-part test, and near as I can tell, it's conjunctive. You require both closeness and lack of arm's length.

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

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

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

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

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

MR. GEYSER: Maybe. But I -- I think to give you a little bit of comfort, every court of appeals that has addressed this question has effectively adopted the arm's-length test.

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

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

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

MR. GEYSER: Well, Your Honor, I think ultimately, though, the circuits have looked at this, and this includes Collier's conclusion, surveying all the -- the relevant authority. And as the expert bankruptcy treatise, they've said that the transaction -- the test ultimately does turn on whether it's an arm's-length transaction.

And -- and I --

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

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

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

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

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

MR. GEYSER: Totality -- you look at

the totality of the circumstances, so that whether the parties are close is one factor that courts take into account in weighing the entire evidentiary record, which I think, again, points up to why this is a particularly --

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

MR. GEYSER: Well, it's the totality of the circumstances to determine if the transaction is at arm's length.

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

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

JUSTICE GORSUCH: Okay.

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

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

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

JUSTICE GORSUCH: Both.

MR. GEYSER: It said both. But if you read the opinion, our -- our reading of the opinion is consistent with its view of how the

Seventh Circuit approaches this and the Tenth Circuit, which is that the ultimate question is whether the parties conducted the transaction in the ordinary course of business, taking into account their own independent commercial motivations.

JUSTICE SOTOMAYOR: So closeness is irrelevant? It's just --

MR. GEYSER: Well, no, close --

JUSTICE SOTOMAYOR: -- whether it's arm's length and the lack of arm's length defines closeness?

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

JUSTICE GORSUCH: Shouldn't we wait to see what the courts of appeals sort out on all this before we decide what the standard of review is?

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

(Laughter.)

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

CHIEF JUSTICE ROBERTS: I suppose that we could articulate what the right answer is based on a particular understanding of the test, and I gather there is little dispute about that.

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

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

But, again, I think as for the

standard of review, the Ninth Circuit did apply de novo review to the understanding of the legal test, so the definition of the test it clearly said is a purely legal inquiry and it applied de novo review in reviewing the bankruptcy court's decision.

The -- the question before the Court right now is, is it appropriate to have two rounds of appellate review? And, again, for the five circuits that have bankruptcy appellate panels, you have six appellate judges being asked to take a highly multifarious, fleeting, special narrow fact -- factual record and re-evaluating a factual determination --

JUSTICE SOTOMAYOR: But you know something --

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

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

And so why isn't this one of those cases? That's what Judge Clifton was saying, which is on these facts you can't sustain a finding of arm's-length transaction or a

finding that there was a lack of closeness.

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

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

JUSTICE SOTOMAYOR: What else?

MR. GEYSER: -- that that -- well, that is a fact-bound case specific determination as to whether the Ninth Circuit correctly applied clear error review in this case. And, again, the question before the Court is whether it should have applied clear error review or something else.

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

JUSTICE SOTOMAYOR: No, they go into a bidding war. I would have been the very first

one going back and forth and saying who is going to pay me the highest amount?

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

But, again, the relevant question before the Court is whether clear error review, in fact, applies. And --

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

The answer is that, yes, that when she transfers her claim, the insider team travels with it.

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

MR. GEYSER: There is not a split on that question, Your Honor. Every circuit to look at this has understood that whether

someone is an insider is a -- is a determination about the character of the person as opposed to a characteristic of the claim that they acquired.

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

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

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

JUSTICE KENNEDY: Well -- well, you're assuming that it's not cost-effective for courts over a period of time to elaborate

certain standards for the guidance of district court -- of finders of fact. That's not the way the system works.

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

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

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

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

MR. GEYSER: Well, no. To be perfectly clear, if the relevant challenge -- again, you have to break it into its constituent parts -- is to the -- the norm being applied or to the legal definition of the

standard, that is a question of law for the Court, as the Ninth Circuit held.

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

And this Court didn't find concerns about losing law-clarifying benefits to control in Highmark where it decided, you know, exceptional cases under the Patent Act or in issuing in subpoenas in McLane or in looking at exceptional case findings or -- or other questions in Pierce, that there are lots of decisions that look in balance at the -- the -- the comparative advantages of appellate courts deciding things that are inherently factual and trial courts that have expertise in doing exactly what they're doing here.

And that's even if the documentary record is established. Trial judges are very good at taking a whole collection of facts and evidence, an entire record and weighing

components against each other.

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

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

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

And it distracts from the appellate court's work in addressing the true legal standards when parties are actually challenging

the substance of a legal test.

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

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

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

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

And that sounds like a legal inquiry

to me or a -- or, you know, how important is this fact in terms of what we should be looking to, in terms of what the legal test is.

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

The courts are looking to determine if the parties really were acting as if they were strangers to the transaction and that really turns on the evidence.

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

CHIEF JUSTICE ROBERTS: You may. Please finish.

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

And saying that we think that one factor in this given case between these parties on these facts has more weight isn't really

something that produces law-clarifying benefits. It's a factual determination on a given record.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. GEYSER: Thank you.

CHIEF JUSTICE ROBERTS: Ms. Goodspeed.

ORAL ARGUMENT OF MORGAN GOODSPEED

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE RESPONDENTS

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

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

The government's position is not that because that is the test, that automatically is reviewed for clear error, as Petitioner suggests. The government's position is that, because this is the type of test that is well established and is familiar and is asking for a

pure factual inference, that is -- that finding that comes from that test will be reviewed for clear error.

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

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

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

And so I do think that the result of that is that even if there might be more

legal-sounding questions with respect to closeness, it's not really an independent prong of the test so much as folding into it.

The arm's-length test itself is comparable in some ways to this Court's decision in Commissioner versus Duberstein, and that case dealt with what is a gift for purposes of the Tax Code? And this Court said, you know, that's not a pure intent question, but it is essentially a factual inference drawn from all of the other facts.

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

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

MS. GOODSPEED: That's correct.

JUSTICE GINSBURG: And the bankruptcy judge that everybody is praising as having the best insight thought the test ought to be is the seller an insider and the -- the taint

travels with the claim. Does the government have a position on what is the right answer to that?

MS. GOODSPEED: Yes. So, at the cert stage, we agreed with Respondents that what matters for purposes of insider status is the claimant rather than the claim. So it's an individual or an entity that is an insider, not a claim that has an insider status that travels with it.

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

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

The majority said this was a

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

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

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

MS. GOODSPEED: Well, we don't disagree that what is or is not an arm's-length transaction can actually be more objective. When we're talking about intent, we mean the same way the Court used it in Duberstein, which is to say this isn't a pure subjective

question, but the ultimate goal of the test is to get at what is driving these parties, and so the goal in establishing an arm's-length transaction is, is this person commercially disinterested, acting like a stranger, or is this person operating under a conflict of interest? That's the more --

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

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

MS. GOODSPEED: Well --

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

MS. GOODSPEED: Sure, Justice Sotomayor, that may be possible. I guess the thought could be, for example, there could be another plan where he would receive more money

or he could buy this claim for $5,000 and sell it to Petitioner for even more money. And so there were other possibilities other than voting for this particular plan.

But I do want to say that type of argument could be an argument for why there may have been clear error here or why this should have been considered an arm's-length transaction in the first instance.

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

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

MS. GOODSPEED: Sure, Justice Alito. I -- that has been how courts have interpreted this. I think what they've essentially tried to do is apply an ejusdem generis canon to the statute and say what is the concern with all of

these listed entities? And the concern with all of them is that they're going to operate under some sort of conflict of interest and not interact with the debtor in the way that a neutral person would. So I think that's how courts have extracted this arm's-length test from that --

JUSTICE GORSUCH: But --

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

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

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

JUSTICE GORSUCH: So why --

MS. GOODSPEED: But I --

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

MS. GOODSPEED: Sure.
JUSTICE GORSUCH: Which we haven't decided either, right?
MS. GOODSPEED: Yes. I mean, the way that courts have looked at this is by extracting a principle versus trying to establish other categories. That's just the general rule.
I think maybe an explanation for that is that Congress drew these bright lines in the statutes and that it's somewhat more difficult for courts to draw the same kind of bright lines for things like friendships or romantic --
JUSTICE GORSUCH: Would it --
MS. GOODSPEED: -- relationships.
JUSTICE GORSUCH: Would it be nice to resolve that question first before deciding what the standard of review is? I mean, the government's brief, I think, admirably points out, and I couldn't agree more, that determining the standard of review thus requires precise identification of the particular question raised on appeal.
MS. GOODSPEED: Yes, Justice Gorsuch.

In that sense, we do think the Court can still decide the question if it wishes to, because the particular question raised on appeal is what is the standard of review to be applied to this fight over --

JUSTICE GORSUCH: But --

MS. GOODSPEED: -- whether Dr. Rabkin --

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

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

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

MS. GOODSPEED: The government thinks that the courts of appeals have adopted the correct test. It's -- again, this arm's-length determination is consistent with what -- is in the legislative history. It's consistent, we think, with what all of the listed entities are, why they're all in this statute.

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

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

MS. GOODSPEED: So I would bookmark the possibility that courts could say you are sort of, in fact, one of -- in the listed categories, you are, in fact, a married couple,

even if you are not formally given that title. That might be a different inquiry. If the courts are not going to -- may I finish?

CHIEF JUSTICE ROBERTS: Please.

MS. GOODSPEED: If the courts are not going to do that, then we think those circumstances would weigh extremely heavily in the arm's-length analysis but may not decide it.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Cross, four minutes.

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

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

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

The Ninth Circuit chose its test, but if it was going to choose that test it should

have applied through to exercise a de novo review.

We're not solving necessarily for arm's length for closeness, although that's the test that the Court enunciated. And if that was the test the court enunciated, it should have given definition to that test --

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

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

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

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

The alternative is to abdicate that

rule --

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

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

JUSTICE GORSUCH: Always.

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

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

MR. CROSS: Well, then I'm in trouble.

(Laughter.)

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

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

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

The bankruptcy court went out,

surveyed the other courts and said these five factors are determinative of insider status. That's what occurred.

Now, in Miller, I don't usually read quotes, but I think this quote is right on. In Miller the Court wrote, "When relevant legal principles can be given meaning through the application of particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, stripped the federal court of its primary function as an expositor of the law." That's exactly what the appellate court did here.

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

If there are no further questions, I will submit the case.

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

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

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