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THE FUTURE OF BANKRUPTCY APPEALS: APPELLATE STANDING AFTER *LEXMARK* CONSIDERED

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ABSTRACT

The purpose of this Article is to summarize the current state of the law regarding appellate standing in bankruptcy appeals within the various sister circuit courts of the United States, and to recommend how the law of appellate review of bankruptcy court orders should be applied. We will begin with a purely descriptive summary of the law of standing in federal courts and of standing to appeal orders of bankruptcy courts specifically. From this discussion it should be clear that courts almost universally limit appellate standing of bankruptcy court orders to parties that can demonstrate that they are a person-aggrieved—in other words, have been pecuniarily harmed—by that order. The requirement that a party demonstrate a direct pecuniary interest to have standing to appeal a bankruptcy court order is often justified by arguments based on judicial economy and is understood as a prudential standing doctrine. As a prudential doctrine, the person-aggrieved test applied to limit standing has no basis in the constitution or the statutory text of the modern bankruptcy code. Given the Supreme Court's recent holdings—most notably Lexmark International, Inc. v. Static Control Components, Inc.[1]*—which aim to curb the use of prudential standing tests devoid of statutory or constitutional justifications, the law regarding standing to appeal bankruptcy court orders is subject to change.*

We will summarize developments in the law of standing to appeal bankruptcy court orders across the several circuits. Recently, the Supreme Court declined to grant certiorari review to an appellant of a bankruptcy court order who sought clarity regarding the continued legality of the person-aggrieved test in bankruptcy appeals.[2] *Accordingly, in the immediate future,* Lexmark*'s impact on bankruptcy appeals will be defined exclusively by the several circuits. We will conclude with our recommendations that courts should combine different*

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[1] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125–29 (2014).

[2] *In re* Alpha Nat. Res., Inc., 736 F. App'x 412, 413 (4th Cir. 2018) (per curiam), *cert. denied*, 139 S. Ct. 1601 (2019).

circuit approaches to allowing and limiting appeals. Specifically, we recommend that courts adopt the Ninth Circuit's interpretation of Lexmark *combined with the Seventh and Tenth Circuits' rules for appellant standing.*

INTRODUCTION

As we strive to first understand the basic black-letter law regarding standing to appeal orders of the bankruptcy court, we will begin with a short primer on how parties generally have standing to be heard in federal courts of appeals. Our mission here is to be purely descriptive of the landscape of standing tests as applied by the circuit courts. This presents a problem as a voluminous and convoluted literature exists on the myriad of questions raised in any academic treatment of the concept of standing.[3] Therefore, we will curtail this Section to a basic summary of the issue, free from any speculation as to how "correct" courts may be in the tests they apply. We wish to understand the law, not make recommendations or criticize the behavior of the courts. From a generalized discussion of constitutional standing, we will move to specific standing inquiries conducted for claimants appealing orders of the bankruptcy court.

Through this Section we will outline the statutory rights at issue and highlight the prudential doctrines employed by appellate courts in standing analyses of bankruptcy appeals. From this discussion it should become clear—as courts themselves have acknowledged—that there is no constitutional or statutory basis for judges' current application of the "person-aggrieved" standard for granting or denying standing to appellants appealing from orders of the bankruptcy court.[4] Yet, it remains axiomatic that parties seeking appellate review of bankruptcy orders must adhere to the current "person-aggrieved" test and demonstrate a "pecuniary interest" harmed by the lower court's decisions.[5] This prudential test is often justified by arguments of judicial humility and efficiency, and derives its meaning from earlier versions of the Bankruptcy Code.[6]

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[3] *See* Bradford C. Mank, *Prudential Standing Doctrine Abolished or Waiting for a Comeback?:* Lexmark International, Inc. v. Static Control Components, Inc., 18 U. PA. J. CONST. L. 213 (2015) [hereinafter Mank, *Prudential Standing Doctrine Abolished*]; Bradford C. Mank, *Is Prudential Standing Jurisdictional*, 64 CASE W. RES. L. REV. 413 (2013) [hereinafter Mank, *Is Prudential Standing Jurisdictional*]; S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95 (2014) [hereinafter Brown, *Story of Prudential Standing*]; S. Todd Brown, *Non-Pecuniary Interests and the Injudicious Limits of Appellate Standing in Bankruptcy*, 59 BAYLOR L. REV. 569 (2007) [hereinafter Brown, *Non-Pecuniary Interests*]; Cass R. Sunstein, "*What's Standing After* Lujan*? of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Kylie Chiseul Kim, *The Case Against Prudential Standing: Examining the Courts' Use of Prudential Standing Before and After* Lexmark, 85 TENN. L. REV. 303 (2017).

[4] *See In re* Ernie Haire Ford, Inc., 764 F.3d 1321, 1324–25 (11th Cir. 2014); Brown, *Non-Pecuniary Interests*, *supra* note 3, at 588.

[5] *In re* Technicool Sys., 896 F.3d 382, 385–86 (5th Cir. 2018).

[6] *In re Ernie Haire Ford*, 764 F.3d at 1324–25.

A. Article III Standing

It is a basic maxim of our legal system that the judicial power is carefully circumscribed and limited under Article III of the Constitution and applied only to the consideration of live cases or controversies.[7] The exercise of the federal judicial power is "legitimate only as a necessity in the determination of real earnest, and vital controversy."[8] As Chief Justice Roberts once noted:

> The plaintiff must allege at the pleading stage, and later prove, an injury that is fairly traceable to the defendant's challenged conduct and that is likely to be redressed by the relief sought. If the plaintiff cannot do so, the court must dismiss the case as beyond its power to decide—no matter when in the litigation the flaw is discovered or arises. A dismissal on the basis of standing prevents the court from reaching and deciding the merits of the case, whether for the plaintiff or the defendant. Standing is thus properly regarded as a doctrine of judicial self-restraint.[9]

Although this is clearly not an absolute guide, "the standing concepts have gained considerable definition from developing case law."[10] As Chief Justice Roberts summarized, "the injury must be distinct and palpable, concrete, certainly impending, real and immediate, and actual or imminent not conjectural or hypothetical."[11] The need for a "real, earnest, and vital controversy," the adverseness requirement; and the requirement that a claimant "is injured by [the] operation" of the act in question, are foundational rules of standing which have been affirmed by decades of precedent.[12] Furthermore, as the standing requirement is a constitutional limitation, it may not be waived by the parties, ignored by the court, or abrogated by Congress.[13] This reflects the courts' mandate to preserve the delimited separation of powers outlined by the Constitution. As Justice Scalia wrote in *Lujan*:

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[7] U.S. CONST. art. III, § 2, cl. 1.

[8] John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1220 (1993) (footnote omitted).

[9] *Id.* at 1220–21 (footnote omitted).

[10] Allen v. Wright, 468 U.S. 737, 751 (1984).

[11] Roberts, *supra* note 8, at 1223 (footnote omitted).

[12] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–47 (1936); *see also* Kim, *supra* note 3, at 315 ("Two of these seven rules [articulated by Justice Brandeis] are now associated with the case or controversy limitation in Article III, Section 2 of the Constitution.").

[13] Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 100 (1979); *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 487 n.24 (1982) ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III.").

> [T]he Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts . . . Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.[14]

Finally, the burden for establishing standing and thus federal jurisdiction lies on the party bringing suit.[15] However, once Article III standing's jurisdictional concerns are settled, courts have a "virtually unflagging obligation" to hear the case before them.[16] This is reflective of the courts' duty to check the other branches of government and to provide a forum for redress of injuries. Federal courts "have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the constitution."[17]

Although there is a voluminous literature discussing supposed flaws or shortcomings in the courts' defining of the doctrine of standing,[18] it is sufficient for our purposes that Article III standing requires "an injury in fact, an actual or imminent invasion of a legally protected interest, as a result of the challenged action that will likely be redressed by a favorable decision."[19]

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14 Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992); *see, e.g.*, *Allen*, 468 U.S. at 751 (noting that standing requirements act as a self-imposed restraint on the exercise of federal jurisdiction).

15 *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990).

16 Colo. River Water Conservation Dist. v. U.S., 424 U.S. 800, 817 (1976).

17 Cohens v. Virginia, 19 U.S. 264, 404 (1821).

18 Professor Brown, when discussing these shortcomings, states:

> [Standing's] tortured constitutional discourse has been characterized, among other things, as permeated with doctrinal confusion, hopelessly incoherent and subject to manipulation, a pointless constraint on the courts, and driven by substantive or normative assessments masquerading as threshold jurisdictional inquiries. Members of the Court have criticized standing as a word game played by secret rules, and cover for dubious analysis. Collectively, these critiques suggest that standing can apparently be either rolled out or ignored in order to serve unstated and unexamined values.

Brown, *Story of Prudential Standing*, *supra* note 3, at 97 (footnotes and internal quotations omitted). *But see* Roberts, *supra* note 8, at 1222 ("[T]he academic community is less convinced, but the Court is firmly committed.") (footnote omitted).

19 Brown, *Non-Pecuniary Interests*, *supra* note 3, at 574 (internal quotations omitted) (citing *Lujan*, 504 U.S. at 560–61).

B. Statutory Standing

If Article III standing is the bare minimum threshold that must be demonstrated by a party seeking federal jurisdiction, standing under a specific statute is another "product of the separation of powers in the federal system . . . based on the power of the legislative branch to determine what to legislate, balance the interests affected by a law, and design the structure for accomplishing its objectives."[20] Appellants seeking review of lower court orders which implicate specifically created statutory rights requires appellate courts to inquire as to what protections Congress has created in passing federal legislation.[21] Congress cannot abrogate the minimum threshold for Article III standing, but it may, by statute, create legally cognizable rights "the invasion of which creates standing."[22] As the Court explained in *Lujan*, the "[statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."[23] Just as states may—through their own laws and constitutional provisions—broaden federal protections provided by the U.S. Constitution,[24] Congress may—through legislative enactments—define additional and specific kinds of injury and causation which entitle parties to standing not otherwise existent under Article III of the Constitution. The Supreme Court has recently clarified that what has often been dubbed "statutory standing" is a misnomer, because a statutory grant of the ability to bring a suit concerns the merits of a specific claim, not the courts' jurisdictional power to hear a claim.[25] Therefore, the term statutory standing, though it has sometimes been called jurisdictional, is actually about whether a specific claimant has the ability to bring a case in federal court under the underlying statute. The courts' power to hear such a claim is not in question, and

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[20] Brown, *Non-Pecuniary Interests*, *supra* note 3, at 574 (citing *Lujan*, 504 U.S. at 560–61).

[21] Brown, *Non-Pecuniary Interests*, *supra* note 3, at 575 (internal quotation marks omitted) (citing *Lujan*, 504 U.S. at 560–61).

[22] Roberts, *supra* note 8, at 1228 (footnote omitted).

[23] *Lujan*, 504 U.S. at 578 (quoting Sierra Club v. Morton, 405 U.S. 727, 738 (1972)).

[24] *Compare* Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 233 (Conn. 2010) ("[I]n Connecticut the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized."), *and* Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989) (holding existing system of public school finance failed to provide for an efficient system for the essential purpose of a general diffusion of knowledge in violation of Article VII, Section 1 of the Texas Constitution), *with* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37, 55 (1972) (finding education is not a "fundamental right or liberty" under the U.S. Constitution and that disparate outcomes in educational funding do not violate the Equal Protection Clause).

[25] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128 n.4 (2014).

thus "statutory standing" is an imprecise term that may gradually fade from use in light of recent guidance.[26]

In evaluating the ability of a claimant to assert harm under a statutory right, courts must interpret the statutory creations of rights, grievances, and redress of injury in considering whether an appellant may challenge a lower court order.[27] Generally, courts must "presume that a statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked."[28] This zone of interests test "applies to all statutorily created causes of action . . . [and] is a requirement of general application."[29] The Supreme Court has said that an action brought under color of a statutory cause of action is presumed to be limited to plaintiffs "whose injuries are proximately caused by violations of the statute."[30] Additionally, Congress is presumed by courts to "legislat[e] against the background of" the zone-of-interests limitation, "which applies unless it is expressly negated."[31] "[T]he breadth of [that] zone . . . varies according to the provisions of law at issue."[32] In other words, the statutory language and statutory scheme will help to define and give guidance as to whose interests are protected and affected by any given statute and therefore who is likely to be within the zone required to assert a claim.

C. Prudential Standing

As there is much elision between the various concepts of Article III, statutory, and prudential considerations in any discussion of standing, we pause to briefly elaborate on what is meant by the term "prudential standing." As one commentator notes, "prudential standing should not be confused with statutory interpretation or Article III standing. Statutory interpretation focuses on the meaning of the statutory language, and Article III standing concerns the existence of an injury in fact."[33]

Prudential standing is not standing in a jurisdictional sense; rather, it is the courts' way of circumscribing who may bring cases that are otherwise within the courts' jurisdiction. Prudential standing is best understood as a permissible form of judicial self-governance, designed by the courts to avoid overstepping the

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26 *Id.*
27 *Id.*
28 *Id.* at 129 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).
29 *Id.* (quoting *Allen*, 468 U.S. at 751) (internal quotations omitted).
30 *Id.* at 132.
31 *Id.* at 129 (quoting Bennett v. Spear, 520 U.S. 154, 163 (1997)) (internal quotations omitted).
32 *Bennett*, 520 U.S. at 163.
33 Brown, *Non-Pecuniary Interests*, *supra* note 3, at 576.

limits of their power.[34] Prudential standing is often a domain-or-statutorily-specific concept, guided by some generally understood rules such as those which "prohibit a litigant's raising another person's legal rights, bar[] adjudication of generalized grievances more appropriately addressed in the representative branches, and require[s] that a plaintiff's complaint fall within the zone of interests protected by the law invoked."[35]

If we imagine standing as a pyramid, the Article III requirements of injury, traceability, and redressability come first, guided by the statutory definitions of asserted rights and injuries. These concerns are then followed by the prudential doctrines which, "[a]lthough not exhaustively defined . . . incorporate[] three core principles: (i) [bar against] generalized grievances; (ii) the zone of interests; and (iii) [a bar against] third party standing."[36] The convoluted lines between prudential standing, Article III standing, and statutory standing have not always been clearly defined or applied by courts, causing at least one commentator to note:

> Sometimes, a constitutional standing rule is declared prudential; other times, a prudential standing rule is declared constitutional. A rule might appear once and only once, or it might evolve into something far removed from its origins over a short period of time. And . . . nobody can say for certain whether the third-party standing principle is prudential, constitutional, or something else.[37]

Additionally, then-Judge Scalia once noted that prudential standing was indeed an unsatisfying method of dismissing cases, and that this questionable doctrine was a set of presumptions, derived from the common-law tradition, which courts had historically designed to determine whether a legal right existed at all.[38] The implication is that the list of prudential factors employed by courts has no easy or formally legal justification as a valid means by which courts expand or constrict standing. We do not seek to argue the historical validity of prudential concerns, nor to explicitly define where the exact limits or authoritative importance of prudential or statutory considerations lie.[39] Rather, it is sufficient to our summary to state that prudential concerns are consistently

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34 Brown, *Non-Pecuniary Interests*, *supra* note 3, at 576.

35 Kara Bruce, *Prudential Standing in Bankruptcy Appeals: Recent Developments and Unanswered Questions*, 36 No. 6 BANKR. L. LTR. NL 1, 2 (2019).

36 Brown, *Story of Prudential Standing*, *supra* note 3, at 97.

37 Brown, *Story of Prudential Standing*, *supra* note 3, at 97.

38 Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, XVII SUFFOLK U. L. REV. 881, 881–87 (1983).

39 *See* Mank, *Is Prudential Standing Jurisdictional*, *supra* note 3, at 428–29.

applied by courts in limiting parties' standing to appeal.[40] They are a vital part of any understanding of the law regarding appeals of bankruptcy court orders.

D. Bankruptcy Appellate Standing

In the bankruptcy court, section 1109(b) of the Code extends the right to be heard and raise issues to "[parties] in interest" a term which includes but is not limited to "the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee."[41] The term, "party in interest", is otherwise not defined in the Code.[42] Therefore, who exactly is a party in interest "must be determined on an '*ad hoc*' basis" by the bankruptcy court in determining who may be heard.[43] The Code contains specific limitations on rights to appeal for special parties such as the U.S. Trustee and the Security Exchange Commission (SEC), but is otherwise silent on who may appeal the court's orders.[44] Courts of appeals, when reviewing a claimant's challenge to a bankruptcy court order, have scant explicit statutory guidance as to who they must consider to be a party in interest with appellate standing to challenge the bankruptcy court's orders.[45] Put another way, standing to be heard in the bankruptcy court is guided by the non-exhaustive list in section 1109, but the statute is essentially silent as to who may appeal the court's orders.[46] It is no wonder then that courts of appeals, in conducting standing analyses of appeals from the bankruptcy court, have looked to Article III standing concerns and their own generally applied prudential concerns when determining who may appeal orders of the bankruptcy court.[47]

We reiterate the generally understood prudential considerations which include "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interest protect by the law

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40 *See generally* Mank, *Is Prudential Standing Jurisdictional*, *supra* note 3, at 428–29 ("[T]he questions and ambiguity . . . remain. Judge Posner and a number of scholars have argued that the Court's standing doctrine is so confused that the whole doctrine should be either abolished or radically reformed, but it is more likely that the Court will modify the doctrine around the edges").

41 11 U.S.C. § 1109(b) (2019).

42 Brown, *Non-Pecuniary Interests*, *supra* note 3, at 580–81 nn.37–39.

43 *In re* Johns-Manville Corp., 36 B.R. 743, 747 (Bankr. S.D.N.Y. 1984) (citations omitted).

44 *See* 11 U.S.C. § 1109(a); *see also id.* § 307.

45 *See In re Johns-Manville Corp.*, 36 B.R. at 747.

46 Courts have generally interpreted this section broadly. *See* Brown, *Non-Pecuniary Interests*, *supra* note 3, at 583–84.

47 *See In re Johns-Manville Corp.*, 36 B.R. at 747–49.

invoked."[48] In the bankruptcy context, courts have generally applied a person-aggrieved test as a prudential standing rule specific to bankruptcy appeals. "This 'person aggrieved' requirement is more exacting than the requirements for general Article III standing," and requires a claimant to demonstrate that they have a direct pecuniary interest affected by the bankruptcy court's order.[49] Although a wide range of parties have been granted—by the Code—the right to be heard in bankruptcy proceedings, appellate courts have generally limited appellate standing to parties who suffer a direct and adversely affected pecuniary interest from the underlying bankruptcy court decision.[50] An appellant must show some kind of financial stake harmed by the challenged order.

It is worth noting that this "person-aggrieved" language and test has no constitutional or statutory grounding behind it. Rather, the origin of this explicitly prudential doctrine is historical. Under section 39(c) of the now-repealed Bankruptcy Act of 1898, only "a person aggrieved" could appeal from an order of the bankruptcy court.[51] That provision was deleted in the Bankruptcy Reform Act of 1978.[52] There is much commentary on whether this provision should have endured, whether Congress intended it to survive or explicitly rejected it by omission, or whether it is in line with additional modifications to the Code.[53] We do not wade into these arguments now as we seek only to accurately describe the state of the law as applied by reviewing courts; we save our recommendations for the end of this piece. Instead we accept that the

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[48] Brown, *Non-Pecuniary Interests*, *supra* note 3, at 576–77 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

[49] *In re* Andreuccetti, 975 F.2d 413, 416–17 (7th Cir. 1992).

[50] *See In re* Young, 416 F. App'x 392, 399 (5th Cir. 2011) (creditor was aggrieved by order releasing funds they may have had an ownership interest in); *In re* DuPage Boiler Workers, Inc., 965 F.2d 296, 298 (7th Cir. 1992) (former jailed employee was not a person aggrieved by settlement of claims); *In re* Lacy, 335 B.R. 729, 737 (B.A.P. 10th Cir. 2006) (appeal was premature until funds affected by court order were deposited); *In re* Cent. Ice Cream Co., 62 B.R. 357, 359–60 (Bankr. N.D. Ill. 1986) (shareholders were not pecuniarily affected by settlement approval order).

[51] The Act states:

> A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing.

Chandler Act of 1938, Pub. L. No. 696, ch. 575, § 39(c), 52 Stat. 840, 858–59 (repealed 1978) (amending Bankruptcy Act of 1898).

[52] *See* 28 U.S.C.A. § 158(a) (West) (not requiring an appellant of a bankruptcy court order to be a "person-aggrieved" thereby).

[53] *See generally* Dewsnup v. Timm, 502 U.S. 410, 419 (1992) ("this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history.").

Supreme Court traditionally "has been reluctant to accept arguments that would interpret the Code . . . to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history."[54] As the Eleventh Circuit once held, "[t]he Bankruptcy Reform Act of 1978 does not include a similar provision limiting who can appeal, [but] courts continue to apply the person aggrieved standard because Congress did not intend to alter the definition set forth in the prior law."[55]

Beyond and above any historical arguments, courts consistently justify the application of the prudential person-aggrieved standard as a wise rule of judicial economy. It is consistently presented as necessary "to dissuade umpteen appeals raising umpteen issues."[56] Because bankruptcy cases often "involve numerous parties with conflicting and overlapping interests[,] . . . [a]llowing each and every party to appeal each and every order would clog up the system and bog down the courts."[57] Therefore, it is common wisdom that prudence dictates that "[t]he 'person aggrieved' test is an even more exacting standard than traditional constitutional standing."[58] The test, as often applied, "demands a higher causal nexus between act and injury; appellant[s] must show that [they were] directly and adversely affected pecuniarily by the order of the bankruptcy court in order to have standing to appeal."[59] As the Eleventh Circuit explained:

> The person aggrieved standard was developed as an answer to the argument that the failure to limit who can appeal a bankruptcy court's order would cause "bankruptcy litigation [to] become mired in endless appeals brought by the myriad of parties who are indirectly affected by every bankruptcy court order." Since the purpose of adopting this heightened standard was to ensure that the goals of bankruptcy were not derailed by a flood of appeals, it only makes sense to exclude appeals from those parties who do not suffer a direct harm to interests the Bankruptcy Code seeks to protect or regulate—that is, appeals that do not further the goals of bankruptcy. Allowing appeals from parties who have suffered only an indirect harm or who hold interests outside

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54 *Id.*; *see* Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 462 (1998) (Thomas, J., concurring) ("[I]t makes little sense to graft onto the Code concepts that were developed during a quite different era of bankruptcy practice.").

55 *In re* Ernie Haire Ford, Inc., 764 F.3d 1321, 1325 (11th Cir. 2014).

56 *In re* Technicool Sys., 896 F.3d 382, 384 (5th Cir. 2018); *see In re* Revstone Indus. LLC, 690 F. App'x 88, 89 (3d Cir. 2017) ("These requirements are rooted in the 'particularly acute need to limit appeals in bankruptcy proceedings, which often involve a myriad of parties . . . indirectly affected by every bankruptcy court order.'") (quoting Travelers Ins. Co. v. H.K. Porter Co., 45 F.3d 737, 741 (3d Cir. 1995)); *In re* Am. Ready Mix, 14 F.3d 1497, 1500 (10th Cir. 1994).

57 *In re Technicool Sys.*, 896 F.3d at 385.

58 *In re* Coho Energy, Inc., 395 F.3d 198, 202 (5th Cir. 2004).

59 *Id.* at 203.

> the scope of the Bankruptcy Code would defeat the very purpose underlying our person aggrieved standard.[60]

From this discussion, the general law of standing to appeal orders from the bankruptcy court should be clear. Courts consistently require that, in addition to establishing Article III standing, parties seeking to appeal must satisfy the prudential concerns of reviewing appellate courts and demonstrate that they are a person aggrieved by the bankruptcy court's order with a directly and adversely affected pecuniary interest.[61] However, recent developments in Supreme Court case law and across the several circuits suggest that this long-established test may be subject to change.

I. *LEXMARK INTERNATIONAL, INC. V. STATIC CONTROL COMPONENTS, INC.*

A. Lexmark*'s Limitations on Prudential Standing*

In an essay published in 1993, then-Judge Scalia, writing on the behavior of courts "granting or denying standing as [their] prudence might dictate," noted the seeming absence of solid legal authority to justify this behavior.[62] Since that writing, a swath of recent Supreme Court decisions have noted a point of tension between the virtually unflagging obligation of federal courts to hear and decide cases within their jurisdiction and the application of prudential standing doctrines by courts denying standing to various claimants.[63] One commentator has argued that "[t]he only solution to the problems caused by prudential standing is to eliminate the concept."[64] In the wake of *Lexmark*, another commentator has argued that "[i]n the Supreme Court's 2014 decision in *Lexmark* . . . a unanimous Court partially achieved [the] goal of abolishing the

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60 *In re Ernie Haire Ford*, 764 F.3d at 1326 ("[A] person is not aggrieved when the interests harmed by a court order are not interests the Bankruptcy Code seeks to protect or regulate.") (citations omitted).

61 Brown, *Non-Pecuniary Interests*, *supra* note 3, at 585 ("Regardless of the design of the provision in question or how substantial a party's interest may be, the absence of a clear, direct pecuniary injury resulting from an order of the bankruptcy court will frequently bar the party's appeal.").

62 Scalia, *supra* note 38, at 885.

63 Bruce, *supra* note 35, at 2 n.20 (suggesting prudential ripeness is "in some tension with [the Court's] recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging") (citing Susan B. Anthony List v. Driehaus, 573 U.S. 149, 167 (2014)); Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 126 (2014) (suggesting prudential standing is "in some tension with [the Court's] recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging"); Zivotofsky v. Clinton, 566 U.S. 189, 194 (2012) (noting that "the Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid").

64 Kim, *supra* note 3, at 310.

prudential standing doctrine."[65] As our focus is not to relitigate arguments related to standing generally, or to object to the continued application of prudential standing concepts, we leave these arguments where they are.[66] Rather, as we aim to summarize the state of appellate standing for bankruptcy appeals, we now take this Section to summarize *Lexmark* so that its implications for the law of appellate bankruptcy standing may be further understood.

Lexmark was a manufacturer and seller of laser printers and toner cartridges for those same printers.[67] It was able to "dominate[] the market for cartridges compatible with its printers" by designing its printers to only work with its own style of cartridges.[68] However, competitors existed whose business involved acquiring, refurbishing, and reselling Lexmark toner cartridges for Lexmark printers. To stay ahead of its competitors, Lexmark offered discounts to consumers who returned Lexmark cartridges to Lexmark after use. Lexmark also "include[d] a microchip in each . . . cartridge that would disable the cartridge after it ran out of toner," rendering it useless unless replaced by Lexmark.[69] Static Control, a "market leader [in] making and selling the components necessary to remanufacture Lexmark cartridges[,]" developed a microchip that could allow remanufacturers to replace Lexmark's chips and continue to resell their cartridges.[70] Lexmark responded to this development by suing Static Control, "alleging that Static Control's microchips violated both the Copyright Act of 1976 and the Digital Millennium Copyright Act."[71] In Static Control's counterclaim, it "alleg[ed], among other things, violations of § 43(a) of the Lanham Act."[72]

Section 1125(a) "creates two distinct bases of liability: false association . . . and false advertising."[73] Static Control's claims alleged that, under the Lanham Act, Lexmark's Prebate program intentionally misled consumers into believing

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[65] Mank, *Prudential Standing Doctrine Abolished*, *supra* note 3, at 215 (citations omitted).

[66] For example, Professor Brown when discussing this issue, states:

> Although the pecuniary test applied under the Act, like the prudential standards employed at the bankruptcy court level today, advanced the purposes of the specific provisions of the Act to which the test might be applied, the modern test for bankruptcy appellate standing is often applied where it does not serve any such purpose and, to the contrary, arguably conflicts with legislative intent.

Brown, *Non-Pecuniary Interests*, *supra* note 3, at 585–611.

[67] *Lexmark*, 572 U.S. at 120–21.

[68] *Id.* at 120.

[69] *Id.* at 121.

[70] *Id.* (alterations in original).

[71] *Id.* at 122. (citations omitted).

[72] *Id.* (citations omitted).

[73] *Id.* (citing 11 U.S.C. 1125(a) (2019)).

that they legally had to return all cartridges to Lexmark. Secondly, it alleged that Lexmark had, "upon introducing the Prebate program," falsely informed companies in the toner cartridge remanufacturing business that the use of Static Control's products was illegal.[74] Further, it contended that Lexmark's misrepresentations had "proximately caused and [we]re likely to cause injury to [Static Control] by diverting sales from [Static Control] to Lexmark," and had therefore "substantially injured [Static Control's] business reputation by leading consumers and others in the trade to believe that [Static Control] was engaged in illegal conduct."[75] Static Control, as a result, "sought treble damages, attorney's fees and costs, and injunctive relief."[76]

The district court granted Lexmark's motion to dismiss Static Control's Lanham Act claim and held that the indirect nature of its alleged injuries meant that "Static Control lacked 'prudential standing' to bring the claim."[77] This was reversed by the Sixth Circuit. The Sixth Circuit applied a "reasonable interest" test for Lanham Act plaintiffs which requires parties seeking standing to sue under the act to assert that they have: "(1) a reasonable interest to be protected against the alleged false advertising and (2) a reasonable basis for believing that the interest is likely to be damaged by the alleged false advertising."[78]

The Supreme Court affirmed the Sixth Circuit, but on different grounds. In doing so, the Court outlined "the appropriate analytical framework for determining a party's standing to maintain an action for false advertising under the Lanham Act."[79]

Justice Scalia, writing for a unanimous court, began the opinion by labelling the concept of "prudential standing" as "misleading".[80] After first finding that Article III standing had been met by Static Control's claims, he then went on to explore Lexmark's exhortation to dismiss Static Control's claims on prudential grounds. On one hand there is the obligation of federal courts to hear and decide cases within their jurisdiction, but on the other, Justice Scalia admitted, the Court has often:

> [A]dverted to a 'prudential' branch of standing, a doctrine not derived from Article III and 'not exhaustively defined' but encompassing (we

74 *Id.* at 123.

75 *Id.* (alterations in original) (internal quotations omitted).

76 *Id.*

77 *Id.* at 123–24.

78 Static Control Components, Inc. v. Lexmark Int'l, Inc., 697 F.3d 387, 410 (6th Cir. 2012) (quoting Famous Horse, Inc. v. 5th Ave. Photo Inc., 624 F.3d 106, 113 (2d Cir. 2010)).

79 *Lexmark*, 572 U.S. at 125 (citations omitted).

80 *Id.*

> have said) at least three broad principles: "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."[81]

Lexmark based its prudential standing arguments on the Court's holding in *Associated General Contractors*.[82] In *Associated General*, the Court held that a labor union had not sufficiently alleged that the union was a "person injured" by the alleged antitrust violation because

> alleging that [a contractor's association] and its members, in violation of [the Clayton Act], coerced certain third parties and some of petitioner's members to enter into business relationships with nonunion contractors and subcontractors, and thus adversely affected the trade of certain unionized firms, thereby restraining the Union's business activities.[83]

In *Lexmark*, Justice Scalia clarified the Court's holding in *Associated General* as one exclusively based on statutory interpretation.[84] The opinion announced that the relevant inquiry regarding non-Article III standing concerns is not what prudence dictates, but what the "scope of the private remedy created by Congress" is under the statute.[85] Therefore, a reviewing court should not engage in general prudential-factors weighing but instead should look to the underlying statute and determine who are "the class of persons who [could] maintain a private damages action under that legislatively conferred cause of action".[86] The opinion cabined and clarified certain decisions of the court after *Associated General* as "confirm[ing] that *Associated General Contractors* rested on statutory, not 'prudential', considerations."[87]

Scalia then wrote that, despite previous holdings which placed the zone-of-interests test within the ambit of prudential tests for standing, the zone-of-

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81 *Id.* at 126 (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004)).

82 *See* Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 529–35 (1983).

83 *Id.* at 519; *see* 15 U.S.C.A. § 15 (West).

84 *Lexmark*, 572 U.S. at 126.

85 *Id.*

86 *Id.* (alterations in original).

87 *Id.*; *see* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 265–68 (1992) (relying on *Associated General Contractors* in finding a proximate-cause requirement in the cause of action created by the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. § 1964(c) (West).); Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 456 (2006) (affirming that *Holmes* "relied on a careful interpretation of § 1964(c).").

interests test is more properly understood as one of statutory interpretation. The proper zone-of-interest for a standing inquiry is defined by the relevant statute using "traditional tools of statutory interpretation, [to determine] whether a legislatively conferred cause of action encompasses a particular plaintiff's claim."[88] This in essence requires abstention from conducting general prudence inquiries unless they are defined by the statutory language in question. Furthermore, this places the concept of standing under a statute into the realm of non-jurisdictional questions. Prudential or statutory standing should rightfully concern whether a particular claimant is the proper party to bring the lawsuit in question and should not implicate the courts' power to hear a case. "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied . . . it cannot limit a cause of action that Congress has created merely because prudence dictates."[89]

B. Appellate Bankruptcy Standing After Lexmark *Considered*

As to appealing orders of the bankruptcy court, *Lexmark* implicates both the general statutory guidelines regarding causes of action and the person-aggrieved standard which can only be described as a prudential creation of courts.[90] *Lexmark* demands that, rather than a purely prudential test, a statutory inquiry into standing is all that reviewing courts are permitted to apply beyond Article III standing concerns. Such an inquiry would be based on the appropriate application of the zone-of-interest test and, at least as in *Lexmark*, on issues of proximate causation. The zone-of-interest test must be based exclusively on the relevant statute's language regarding what rights it creates and who has an interest which leads to a claim. In *Lexmark*, the Court was able to look to the "unusual, and extraordinarily helpful" statement of purpose in the Lanham Act itself, and decided that "to come within the zone of interests in a suit for false advertising under § 1125(a), a plaintiff must allege an injury to a commercial interest in reputation or sales."[91] The Code contains no such guidance.

It is clear that this opinion moves the loci of any inquiry into non-Article III standing away from any amorphous concept of prudence to a focus solely on the interpretation of the relevant statute. Additionally, the court makes clear in a

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[88] *Lexmark*, 572 U.S. at 127; *see* Ass'n of Battery Recyclers, Inc. v. EPA, 716 F.3d 667, 676 (2013) (Silberman, J., concurring) ("what is involved in the zone-of-interest analysis is more properly described as 'statutory standing'").

[89] *Lexmark*, 572 U.S. at 128 (citations and quotations omitted).

[90] *But see* Mank, *Is Prudential Standing Jurisdictional*, *supra* note 3, at 421 ("the line between constitutional Article III standing doctrine and prudential standing doctrine is often unclear").

[91] *Lexmark*, 572 U.S. at 131–32.

footnote that although the term "statutory standing," sometimes used by the court itself, is superior to "prudential standing" because it directs reviewing courts to focus on the statutory text, it too is a sloppy designation. Although the court has in the past treated such a moniker as "effectively jurisdictional[,]" the footnote cites several cases, a law review article, and an influential dissent penned by then-Judge Kavanaugh, all of which argue against finding as jurisdictional any prudential or statutory standing concerns which do not directly implicate the court's actual power to adjudicate a case.[92] Dismissal for failure to state a claim under a statute does not equate to finding the court lacks power to dispose of a valid claim. Specifically, then-Judge Kavanaugh's dissent in *Grocery Manufacturers Association* argues:

> Supreme Court precedent makes clear . . . that prudential standing is not jurisdictional. Prudential standing concerns who may sue; it is an aspect of the cause of action that stems from the [underlying statutory right and statutory limitations] . . . Prudential standing is not jurisdictional because prudential standing has not been ranked by Congress as jurisdictional and is not a limitation on a court's authority to hear a case, as opposed to a limitation on who may sue to challenge a particular agency action.[93]

This language, and the more authoritative language in *Lexmark*, may affect how courts are permitted to allow or dismiss appeals from the bankruptcy court. If *Lexmark* mandates that federal courts may not decline to exercise their jurisdiction with judicially-crafted limitations on standing, then logically *Lexmark* should have a monumental impact on how courts review appeals from the bankruptcy court. The person-aggrieved test does not originate from a congressional limitation on the judicial power but is rather grounded in the repealed language of the Bankruptcy Act and concerns for judicial economy. It is a test which pertains to prudential concerns in limiting appeals and does not implicate the court's adjudicatory power. It then would seem that the language in *Lexmark* in essence forbids the application of the person-aggrieved test, as the test is only a prudential concern to limit appeals from the bankruptcy court. In

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92 *See id.* at 128 n.4 ("We have on occasion referred to this inquiry as 'statutory standing' and treated it as effectively jurisdictional"); Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 97 n.2 (1998). The moniker "effectively jurisdictional" is an improvement over the language of "prudential standing," since it correctly places the focus on the statute. But it, too, is misleading, since "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional power to adjudicate the case." Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 642–43 (2002) (quoting *Steel Co.*, 523 U.S. at 89); *see* Grocery Mfrs. Ass'n. v. EPA, 693 F.3d 169, 183–85 (D.C. Cir. 2020) (Kavanaugh, J., dissenting); Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 OKLA. L. REV. 89, 106 (2009).

93 *Grocery Mfrs. Ass'n*, 693 F.3d at 183 (Kavanaugh, J., dissenting).

fact, a recent challenge to the person-aggrieved doctrine pitching this very argument was levied in *Mar-Bow Value Partners*.

C. *Supreme Court Denied Review of Whether* Lexmark *Disallows the Person-Aggrieved Test*

Recently, the question as to whether and how far *Lexmark* should shift the landscape of standing in bankruptcy appeals was briefed in a petition for certiorari filed by Mar-Bow Value Partners, LLC. Specifically, the court was asked to consider the continued applicability of the person-aggrieved doctrine as a prudential test for standing in bankruptcy appeals after *Lexmark*.[94] We here briefly summarize the case and the petition for certiorari.

Alpha Natural Resources, one of the largest coal suppliers in the United States, filed "for chapter 11 protection in August 2015 in part because of an 'historic downturn in their industry.'"[95] The Debtors then employed McKinsey Recovery and Transformation Services as a turnaround advisor for the pendency of the bankruptcy under section 327(a) which permits the debtor to employ professionals "that do not hold or represent an interest adverse to the estate, and that are disinterested persons."[96] Six months later, Mar-Bow Value Partners, an entity which the district court found to be beneficially owned and funded by Jay Alix, the founder of AlixPartners, a competitor of McKinsey in the turnaround consulting business, filed a proof of claim "in the amount of $1,250,000.00[,]" which was to receive approximately $35,000 pursuant to the proposed plan of reorganization.[97] Mar-Bow challenged the adequacy of McKinsey's disclosures under Bankruptcy Rule 2014 at least five times as of the time of the district court decision.[98] Mar-Bow likewise objected to the professionals' fees awarded to McKinsey throughout the bankruptcy cases.

In response to certain objections filed by Mar-Bow, the bankruptcy court compelled further detail and disclosures from McKinsey.[99] The judge reviewed those additional disclosures *in camera* to avoid harming McKinsey's business model of confidentiality and to avoid giving an advantage to competitors. Eventually, Mar-Bow objected to confirmation of the debtor's reorganization

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94 Brief for Petitioner at i, Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Serv. US, LLC, 139 S. Ct. 1601 (2019) (No. 18-974).

95 Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Serv. US, LLC, 578 B.R. 325, 328 (E.D. Va. 2017).

96 11 U.S.C. § 327(a) (2019).

97 *Mar-Bow Value Partners*, 578 B.R. at 329.

98 *See id.* at 329–42.

99 *Id.* at 335.

plan and moved to stay its implementation based on objections to McKinsey's further declarations and the court's dismissal of its attempts to reveal the *in-camera* disclosures. The bankruptcy court found that McKinsey was a disinterested party based on all disclosures and found that the plan was a fair compromise.[100]

As there were several appeals to the district court, we deal with their cumulative impact. The important thing to understand is that the district court employed the straightforward black-letter application of the person-aggrieved standard in dismissing Mar-Bow's appeals relating to compliance with Rule 2014.[101] The court said that "[i]t is well-established that a person aggrieved is a party directly and adversely affected pecuniarily."[102] "In other words, in order to have standing to appeal a bankruptcy court order, the appellant must show that the order . . . diminishes [its] property, increases [its] burdens[,] or impairs [its] rights."[103] The court concluded that the person aggrieved standard is justified by efficiency in prevention of "endless appeals brought by the myriad of parties who are indirectly affected by every bankruptcy court order."[104] The court additionally found that Mar-Bow lacked Article III standing to seek disgorgement of McKinsey's fees, because even if all the relief requested were granted, no pecuniary value would remit to Mar-Bow.[105] This is because pursuant to the confirmed plan of reorganization, any fees disgorged from McKinsey would inure to a class of claimholders in which Mar-Bow did not hold a claim.[106] The Fourth Circuit affirmed this judgment in an unpublished *per curium* opinion which stated that they "affirm[ed] for the reasons stated by the district court."[107]

In its petition for certiorari, Mar-Bow asked the Court to review "whether Article III courts may apply the 'persons aggrieved' pecuniary-interest test to bar an appeal of a bankruptcy court order by an appellant who suffers an inherently non-pecuniary injury arising from impairment of the integrity of the bankruptcy process."[108] In addition to arguing against the validity of the person-

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100 *Id.* at 341.

101 We ignore the equitable mootness dismissals as they do not pertain to the viability of the "person-aggrieved" standard. *See id.* at 347–53.

102 *Id.* at 353–54 (citing *In re* Urban Broad., 401 F.3d 236, 244 (4th Cir. 2005) (citations omitted)).

103 *Id.* at 354 (citing *In re* Kaiser Aluminum Corp., 327 B.R. 554, 558 (D. Del. 2005) (internal quotations omitted).

104 *Id.* (citing Kane v. Johns–Manville Corp., 843 F.2d 636, 642 (2d Cir. 1988)).

105 *Id* at 354–56.

106 *Id.*

107 *In re* Alpha Nat. Res., Inc., 736 Fed. App'x 412, 413 (4th Cir. 2018).

108 Brief for Petitioner at 2, Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Serv.

aggrieved test, their petition argued on policy grounds that "[t]he lack of review also has an adverse effect on the substantive development of bankruptcy law."[109] Mar-Bow continued that, when appellate review is denied, it "not only tends to insulate errors by bankruptcy judges or district courts, but also stunts the development of uniformity in the law of bankruptcy."[110] Lastly, Mar-Bow noted the historical arguments against the continued application of the persons-aggrieved test.[111]

As we believe that Mar-Bow's petition rightly identifies an unanswered question in the law regarding appeals of the bankruptcy court, we have striven to summarize the current state of the law and the tension caused by *Lexmark* and other such prudential-standing-limiting cases. As the Supreme Court has not answered this question directly, the law of the circuits is currently the highest law regarding this question.

II. LOWER COURT DEVELOPMENTS

We now shift to the primary goal of this Article. Because the Supreme Court has not ruled on the issue of *Lexmark*'s impact on the person-aggrieved doctrine for bankruptcy appeals, the law within the several circuits is the final say. We therefore will now summarize the state of the law regarding standing inquiries for appeals of orders of the bankruptcy court and chart how, if at all, the circuits are divided on this question.[112]

US, LLC, 139 S. Ct. 1601 (2019) (No. 18-974).

109 *Id*. at 23. The Brief further notes that:

> The number of bankruptcy appeals is miniscule compared to traditional litigation . . . [A]lmost no bankruptcy litigation goes farther than the bankruptcy court, and only the rare case will make it all the way to decision in a court of appeals . . . In 2005, Congress enacted 28 U.S.C. § 158(d)(2), which allows for certification of bankruptcy appeals directly to the court of appeals, in part to generate binding appellate precedent in bankruptcy, whose caselaw has been plagued by indeterminacy.

Id. (citations and quotations omitted).

110 *Id.* at 24 (citing *In re* One2One Comm'n, LLC, 805 F.3d 428, 447 (3d Cir. 2015) (Krause, J., concurring)) (discussing equitable mootness).

111 *Id.* ("Appellate courts that refuse to hear bankruptcy appeals on the basis of judge-made prudential doctrines frustrate Congress' intent to increase bankruptcy appeals – dramatically so when Congress in 1978 eliminated the 'persons aggrieved' test invoked by the Fourth Circuit in this case.").

112 In the Court of Appeals for the District of Columbia, we have found no analysis of *Lexmark* or the "person aggrieved" standard in the bankruptcy context since *Lexmark* was decided, and accordingly have omitted creating a separate section analyzing that appellate court's treatment of *Lexmark* here. Prior to *Lexmark*, the D.C. Circuit conducted the standard "person aggrieved" appellate standing test, which it recognized as prudential. *In re* Hope 7 Monroe St. LP, 743 F.3d 867, 871 (D.C. Cir. 2014) ("We have recognized a prudential rule that limits standing to appeal bankruptcy court orders to a 'person aggrieved.'") (citing McGuirl v. White, 86 F.3d 1232, 1234–35 (D.C. Cir. 1996)).

A. First Circuit

The First Circuit has never cited *Lexmark* in a bankruptcy context, although outside of bankruptcy it has acknowledged *Lexmark*'s potential implications. It has said that despite *Lexmark*'s potential tension with certain prudential standing doctrines and the duty of federal courts to hear cases "the [circuit's] cases discussing the prudential limits on third-party suits remain good law."[113] It has additionally embraced the notion that what was once called statutory standing is not jurisdictional and does not implicate the court's power to hear a case. Therefore, "an inquiring court may opt, in the interest of efficiency, to forgo an inquiry into statutory standing and reject a claim on the merits,"[114] as statutory standing only pertains to whether a party is asserting a claim it has the right to bring. Lastly, the First Circuit has noted that the prudential dimensions of the court's ripeness inquiries may be in tension with *Lexmark*.[115]

In bankruptcy appeals the law of the circuit has not changed since *Lexmark*. The court still applies the pecuniary interest test for appellate standing and requires a higher threshold than Article III minimums.[116] It has however noted the circuit preference to decide cases on the merits which at least suggests that standing would be assumed *arguendo* in closely contested matters.[117]

B. Second Circuit

The Second Circuit has also never cited *Lexmark* in a bankruptcy context, although it has applied the case in several statutory contexts. The circuit has read *Lexmark* to indicate that statutory standing is not standing at all but rather a non-jurisdictional question of determining whether "the particular plaintiff has a cause of action under the statute."[118] In the bankruptcy context, the law of the

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113 Parent/Pro. Advocacy League v. City of Springfield, 934 F.3d 13, 33 n.20 (1st Cir. 2019) (citing *Lexmark* in the context of an ADA suit filed by advocacy organizations).

114 United States v. Catala, 870 F.3d 6, 10 (1st Cir. 2017); *see* Vander Luitgaren v. Sun Life Assurance Co. of Can., 765 F.3d 59, 61 (1st Cir. 2014) (interpreting *Lexmark* as framing the test for statutory standing and who "falls within the class of plaintiffs whom Congress has authorized to sue" in the ERISA context).

115 Reddy v. Foster, 845 F.3d 493, 501 n.6 (1st Cir. 2017).

116 *In re* Old Cold, LLC, 602 B.R. 798, 821 n.17 (1st Cir. 2019) ("appellate standing in bankruptcy cases 'is limited to persons aggrieved, that is, persons whose pecuniary interests are adversely affected by the challenged order . . . however . . . the standing issue and the substantive issue . . . are closely intertwined") (citing Donarumo v. Furlong, 660 F.3d 81, 86 (1st Cir. 2011)); Tamir v. U.S. Trustee, 566 B.R. 278, 282 (D. Me. 2016) ("The 'person aggrieved' paradigm . . . bestows standing only where the challenged order directly and adversely affects an appellant's pecuniary interests.").

117 *See* Davis v. Cox, 356 F.3d 76, 92 n.15 (1st Cir. 2004) (noting that because standing and substantive issues are closely intertwined, the court will address both).

118 Am. Psychiatric Ass'n v. Anthem Health Plans, Inc., 821 F.3d 352, 359 (citing Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128 (2014)) (internal quotations omitted).

circuit remains a strict application of the person-aggrieved pecuniary interest test.[119]

C. *Third Circuit*

The Third Circuit has cited *Lexmark* directly in a concurrence when considering appellate standing of a bankruptcy order. In *In re One2One Communications, LLC*, the court applied the prudential inquiry mandated by its precedent to the question of whether an appeal of a bankruptcy confirmation order was equitably moot.[120] Below, the bankruptcy judge had confirmed a chapter 11 plan of reorganization. The appellant had objected to the plan, "applied for a stay, filed an appeal of the Confirmation Order and sought emergency appellate review," all of which had been denied.[121] The circuit court reversed the district court's decision to dismiss the appeal based on the doctrine of equitable mootness.[122] The Court stated that in the Third Circuit:

> [a] court decides to dismiss an appeal as equitably moot through the consideration of the following "prudential" factors: (1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments.[123]

Additionally, the court's equitable mootness inquiry proceeded in two analytical steps: "(1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably

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[119] *See, e.g.*, *In re* Ocean Rig UDW Inc., 764 Fed. App'x 46, 48 (2d Cir. 2019) ("To have standing to appeal from a bankruptcy court ruling in this Circuit, an appellant must be an 'aggrieved person,' a person directly and adversely affected pecuniarily by the challenged order of the bankruptcy court . . . ."); *see also In re* Lehman Bros. Holdings, Inc., No. 19 Civ 6397, 2020 WL 1503473, at *1–2 (S.D.N.Y. Mar. 30, 2020); *In re* Windstream Holdings Inc., 614 B.R. 441, 450 (S.D.N.Y. 2020) (appeal pending). These cases demonstrate a continuation of the person aggrieved appellate standing requirement that existed before *Lexmark*. *See In re* Barnet, 737 F.3d 238, 242 (2d Cir. 2013) ("[t]his test is stricter than Article III's injury in fact test."); *In re* DBSD N. Am., Inc., 634 F.3d 79, 89 (2d Cir. 2011) ("in order to have standing to appeal from a bankruptcy court ruling, an appellant must be a person aggrieved—a person 'directly and adversely affected pecuniarily' by the challenged order of the bankruptcy court.") (internal citations omitted).

[120] *In re* One2One Communications, LLC, 805 F.3d 428 (3d Cir. 2015).

[121] *Id*. at 437.

[122] *See id.* at 437–38.

[123] *Id.* at 434 (citing *In re* Cont'l Airlines, 91 F.3d 553, 560 (3d Cir. 1996)). Depending on the circumstances, each factor is given varying weight. *Id.* at 434 (citing *In re* PWS Holding Corp., 228 F.3d 224, 236 (3d Cir. 2000)).

relied on the plan's confirmation."[124] Under this inquiry the courts ask whether "implementation of the plan has progressed to the point that turning back may be imprudent."[125] In *In re One2One Communications, LLC*, the simplicity of the reorganization plan—which only involved one secured creditor and seventeen unsecured creditors—counseled against using the judge-made doctrine of equitable mootness to limit appellate review.[126]

In Judge Krause's concurrence, he explicitly raised the notion that *Lexmark* may counsel against permitting courts using 'prudential' considerations to decline to decide cases. He goes as far to speculate that after *Lexmark* only statutory or constitutional grounds may permit a court to decline to decide a case. As equitable mootness has no constitutional or statutory basis, Judge Krause argued that "this judge-made doctrine can survive only if grounded in the Bankruptcy Code or the federal statutes conferring bankruptcy jurisdiction."[127] After finding no such justification, the concurrence launched a lengthy discussion of why equitable mootness violates the separation of powers and Article III.[128] The concern is the same one raised in the Mar-Bow petition regarding the pecuniary interest test.[129] Specifically:

> [The application of equitable mootness to dismiss claims] sounds not in the requirements of Article III but of 'prudential standing,' a now-discredited doctrine under which courts would decline to hear cases within their jurisdiction if the plaintiffs' complaint did not fall within the 'zone of interests' protected by the law they invoked. In *Lexmark* . . . the Supreme Court held that this should be understood solely as a matter of statutory construction . . . of determining whether a given statutory cause of action extended to a particular plaintiff.[130]

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124 *Id.* at 434–35.

125 *Id.* at 435 (internal citations omitted).

126 *Id.* at 435–36.

127 *Id.* Judge Krause goes on to dispose of the appellees' statutory-provision-specific arguments for applying equitable mootness, explaining that "'[n]arrow provisions' such as §§ 363(m) and 364(e), 'which merely prevent the upsetting of certain specific transactions if stays are not obtained,' cannot support the broad doctrine of equitable mootness." *Id.* at 443. (citing *In re* Cont'l Airlines, 91 F.3d 553, 570 (3d Cir. 1996) (Alito, J., dissenting)). Judge Krause also notes that "[s]ection 1127(b) provides even less support for equitable mootness, as it only restricts a party's ability to modify a plan before confirmation; it says nothing about the powers of bankruptcy courts or appellate courts." *Id.* at 443–44 (emphasis omitted).

128 *Id.* at 444–46.

129 Brief in Opposition at 12–13, Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Servs. US LLC (2019) (No. 18-974) ("That case [*In re One2One Commc'ns*] . . . concerned equitable mootness, a doctrine that, unlike appellate standing, prevents appellate review of a non-Article III judge's decision regardless of who asks for it.") (citing *In re One2One Commc'ns*, 805 F.3d at 445 (Krause, J., concurring)).

130 Prometheus Radio Project v. FCC, 939 F.3d 567, 581 (3d Cir. 2019) (internal citations omitted).

Because the case was sent back down following the circuit's decision not to find the appeal equitably moot, it is unclear how this concurrence may pertain to standing in appellate bankruptcy matters. However, Judge Krause's concurrence at least suggests that the prudential pecuniary interest test may not endure. Nonetheless, subsequent to both *Lexmark* and Judge Krause's concurrence, the law of the circuit on standing to appeal bankruptcy orders remains a strict application of the heightened person-aggrieved standard as a prudential standard in limiting appeals.[131] Recently the Third Circuit explicitly clarified that a litigant's "'standing' to pursue causes of action that become the estate's property means its statutory authority under the Bankruptcy Code, not its constitutional standing to invoke the federal judicial power. That articulation aligns [their] precedent with [*Lexmark*]" and with the Seventh Circuit.[132]

D. Fourth Circuit

The Fourth Circuit has never applied *Lexmark* in the context of a bankruptcy appeal. It has interpreted *Lexmark* to outline the non-jurisdictional test of who may sue under a statutory cause of action.[133] In the bankruptcy context, as outlined above, the circuit court recently summarily affirmed the district court's analysis in *Mar-Bow Partners, LLC*, indicating the viability of the person-aggrieved standard post-*Lexmark*. The test remains, as it was before *Lexmark*, that the appellant must be a person aggrieved by the bankruptcy order they seek to challenge, meaning they are "a party directly and adversely affected pecuniarily."[134]

E. Fifth Circuit

Outside of bankruptcy, the Fifth Circuit has interpreted *Lexmark* to outline the test for statutory standing. It has shifted prudential concerns to statutory ones and uses the zone-of-interests test, and proximate cause inquiries, to determine who may allege violations of a statute.[135] In the bankruptcy context the circuit

131 *See In re* Revstone Indus. LLC, 690 Fed. App'x 88, 89 (3d Cir. 2017).

132 *In re* Wilton Armetale, Inc., 968 F.3d 273, 280–81 (3d Cir. 2020).

133 Krakauer v. Dish Network, LLC, 925 F.3d 643, 656 (4th Cir. 2019) (reasoning that "[i]f a plaintiff is the sort of person the law intended to protect, he can press his claim. To determine if a plaintiff is within the 'zone of interests,' we simply look to the statute itself.") (citations omitted).

134 *In re* Clark, 927 F.2d 793, 795 (4th Cir. 1991) (citations and quotations omitted).

135 *See* White Glove Staffing, Inc. v. Methodist Hosps. of Dall., 947 F.3d 301, 307 (5th Cir. 2020) (explaining that a plaintiff has statutory standing under *Lexmark* if his claim "falls within the class of plaintiffs whom Congress has authorized to sue under a substantive statute") (citations omitted). The circuit court has clarified that labeling the zone-of-interests test as one of prudential standing is a misnomer because the test is more properly viewed as one of statutory interpretation. Cell Sci. Sys. Corp. v. La. Health Serv., 804 F. App'x

has not cited *Lexmark* and has continued to apply the stricter person-aggrieved test.[136]

F. Sixth Circuit

The Sixth Circuit has taken an interesting approach to interpreting *Lexmark* in the bankruptcy context. It has acknowledged that *Lexmark* may have done away with prudential doctrines that allow courts to avoid resolving disputes on their merits, such as the doctrine of equitable mootness, but nonetheless have continued to use such doctrines because *Lexmark* and related cases "are not bankruptcy cases and their holdings neither expressly nor necessarily extend to equitable mootness."[137] Prudential doctrines are, at base, useful tools courts have developed out of concern for judicial economy. It is therefore not surprising that courts remain reluctant to disavow them even when confronted with *Lexmark*'s implications.[138]

In *In re Capital Contracting Co.*, the court noted the "post-*Lexmark* uncertainty about various standing concepts" before dismissing a claim based on a lack of Article III standing.[139] Its analysis is the lengthiest treatment of *Lexmark*'s effect on bankruptcy standing in any circuit as of the time of this writing. Like most other courts, the Sixth Circuit interprets *Lexmark* as separating jurisdictional questions from merits questions and views the improperly named statutory standing inquiry as non-jurisdictional.[140] The opinion contains a learned discussion of the problem of standing in bankruptcy

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260, 262 (5th Cir. 2020).

136 For example, the Fifth Circuit recently noted:

> The narrow inquiry for bankruptcy standing—known as the "person aggrieved" test—is more exacting than the test for Article III standing. Rather than showing the customary "fairly traceable" causal connection, a bankruptcy appellant must instead show that he was "directly and adversely affected pecuniarily by the order of the bankruptcy court." In essence, bankruptcy standing requires a "higher causal nexus between act and injury."

In re Technicool Sys., 896 F.3d 382, 385–86 (5th Cir. 2018) (citations omitted); *see* Fortune Nat. Res. Corp. v. U.S. Dep't of Interior, 806 F.3d 363, 366 (5th Cir. 2015) (adopting the same). A district court in the Fifth Circuit has acknowledged *Lexmark*, but nonetheless continued to endorse the prudential standing doctrine, which it called "especially important in bankruptcy proceedings which often involve numerous parties who may seek to assert the rights of third parties for their own benefit." *In re* Emergency Room Mobile Servs., LLC, 529 B.R. 676, 685 (N.D. Tex. 2015) (citations omitted).

137 *See In re* City of Detroit, 838 F.3d 792, 800 (6th Cir. 2016).

138 *See In re Technicool Sys.*, 896 F.3d at 384; *see also In re* Revstone Indus. LLC, 690 Fed. App'x 88, 89 (3d Cir. 2017) (explaining that these requirements are rooted in the "particularly acute need to limit appeals in bankruptcy proceedings, which often involve a myriad of parties indirectly affected by every bankruptcy court order.") (internal citations omitted); *In re* Am. Ready Mix, 14 F.3d 1497, 1500 (10th Cir. 1994).

139 *In re* Cap. Contracting Co., 924 F.3d 890, 893 (6th Cir. 2019).

140 *See id.*

and appellate courts which ultimately and succinctly summarizes the state of confusion regarding appellate standing in bankruptcy:

> What is the source of authority for courts to apply this [prudential] gloss on [28 U.S.C.] § 158(a)? Courts have characterized the test as a prudential prerequisite to standing . . . . At one time, this reasoning might have been viewed as a garden-variety application of the Supreme Court's cases authorizing 'judicially self-imposed limits' on jurisdiction. Then came *Lexmark*.[141]

The court reads *Lexmark* as having "clarified that prior decisions invoking the 'prudential standing' label had" erred in terminology.[142] The court explains that past cases really asked a statutory-interpretation question: "Does the specific statute give the specific plaintiff a right to bring the specific suit?"[143] The court goes a step further to endorse the notion that if a claimant falls under the statutory right of action there is no discretion to not hear the case.[144]

The court also cites existing circuit confusion on how to apply *Lexmark* in the bankruptcy context.[145] The court says that "questions concerning 'standing' in bankruptcy courts and bankruptcy appeals may eventually need answers" before ultimately deciding the case on other grounds.[146] However, the court dispensed with the need to resolve the issue of the viability of the person-aggrieved standard, as it determined that the appellant lacked Article III standing and dismissed the claim because the appellant had not properly shown an injury done to them by the bankruptcy order.[147] This at least suggests that, if given the right case, the circuit is prepared to hold that *Lexmark* has altered the law of appellate standing in bankruptcy appeals. This case further suggests that in some cases where the person-aggrieved standard would bar an appeal, a court can just as readily dismiss an appeal on the ground the appellant lacks standing under Article III. Notwithstanding the opinion in *In re Capital Contracting Co.*, the person-aggrieved standard appears to remain good law in this circuit even after

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141 *Id.* at 896.

142 *Id.*

143 *Id.* (citing Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128 (2014)).

144 *Id.* ("Just as courts do not have a 'prudential' license to open the courthouse doors when the statutory text has closed them, *Lexmark* reasoned, so too they lack a 'prudential' license to close the courthouse doors when the statutory text has opened them.") (citing Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001)).

145 *Id.* at 896–97 (citing *In re* Brown, 851 F.3d 619, 623–24 (6th Cir. 2017); *In re* Cotter, No. 16-1449, 2017 WL 8236168, at *1 (6th Cir. Mar. 1, 2017); *In re* Petrone, 754 Fed. App'x 590, 591 (9th Cir. 2019); *In re* GT Automation Grp., Inc., 828 F.3d 602, 604–05 n.1 (7th Cir. 2016)).

146 *In re Cap. Contracting Co.*, 924 F.3d at 897.

147 *Id.* (reasoning that "[w]hether or not parties must satisfy Article III rules in non-Article III courts and whether or not they must satisfy even stricter standing rules in appeals to Article III courts, parties must at least satisfy Article III rules in appeals to Article III courts").

Lexmark.[148] Opinions subsequent to *In re Capital Contracting Co.*, have continued to recognize—without resolving—the issues presented by *Lexmark*.[149]

G. Seventh Circuit

Outside of bankruptcy, the Seventh Circuit has also interpreted *Lexmark* to mean that statutory standing is a misnomer because the statutory inquiry is one of merits, not jurisdiction. It has applied *Lexmark* in the antitrust context in assessing which parties are authorized to sue under the Sherman Act.[150] In the bankruptcy context, it has acknowledged the potential implications of *Lexmark*, but thus far avoided determining whether the person-aggrieved standard remains by dismissing a bankruptcy appeal that lacked a pecuniary interest under constitutional—and not prudential—grounds.[151]

H. Eighth Circuit

The Eighth Circuit too has affirmed outside of bankruptcy that *Lexmark* requires courts "to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim" under the statute in question.[152] It has said that this is a merits question—not a jurisdictional question—and therefore to call it statutory standing is a misnomer.[153] Post-*Lexmark*, the court has rejected an invitation to "reconsider" the person-aggrieved doctrine as a result of the 1978 amendments

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148 *Id.* at 896–97 (citations omitted). *But cf.* Pension Benefit Guar. Corp. v. Evans Tempcon, Inc., 630 Fed. App'x 410, 415, n.4 (6th Cir. 2015) (declining to consider standing under the person-aggrieved doctrine and observing that "a lack of statutory standing does not implicate subject-matter jurisdiction") (internal citations omitted).

149 *See, e.g.*, *In re* Felix, 825 Fed. App'x 365, 366 n.1 (6th Cir. 2020) (unpublished decision) ("This appeal does not implicate the more problematic question of whether bankruptcy appellate standing may be more limited than Article III standing given the Supreme Court's rejection of the term 'prudential standing' in [*Lexmark*]") (internal citations omitted).

150 *See* McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc., 937 F.3d 1056, 1063 (7th Cir. 2019) (noting that antitrust standing is a sloppy designation used by the court in the past in discussing what is actually a merits question under the statute).

151 *See In re* GT Automation Grp., Inc., 828 F.3d 602, 605 n.1 (7th Cir. 2016). Prior to *Lexmark*, the Seventh Circuit applied the pecuniary interest test justified in part by arguments of efficiency. *See In re* Ray, 597 F.3d 871, 874 (7th Cir. 2010) (reasoning that "[b]ankruptcy standing is narrower than Article III standing . . . [t]hese requirements reflect the need for economy and efficiency in the bankruptcy system"); *In re* Schultz Mfg. Fabricating Co., 956 F.2d 686, 690 (7th Cir. 1992) (explaining that "[o]nly a 'person aggrieved' has standing to appeal an order of the bankruptcy court") (citations omitted).

152 *See* Graham v. Young, 886 F.3d 700, 704 (8th Cir. 2018) (citing Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 (2014)).

153 *See id.*

to the Code, although the party seeking standing in that case did not raise *Lexmark* as a basis for dispensing with the doctrine.[154] In the bankruptcy context, it continues to apply the narrow person-aggrieved test, limiting standing to parties adversely affected pecuniarily by the court's order.[155]

I. Ninth Circuit

The Ninth Circuit has directly considered *Lexmark*'s implications for appellate standing in bankruptcy appeals. In *In re Petrone*, the circuit court confronted the question of whether lien holding creditors could appeal an order allowing a competing creditor to retroactively annul the automatic stay contained in section 362 of the Code.[156] It held that "[c]onsistent with the Supreme Court's decision in [*Lexmark*], the 'person-aggrieved' test identifies appellants 'whose interests fall within the zone of interests protected by the law invoked,' here, the Bankruptcy Code."[157] The court then chose to examine the intent behind section 362 itself and found that the automatic stay "is intended to protect solely the interests of debtors and their estates."[158] Therefore, creditors are not the proper party in the zone-of-interest to appeal for an annulment of the stay under section 362.

This is an interesting application of *Lexmark*, as it does away with a prudential standard—at least in name—and relocates the analysis to the specific Code provision which implicates the party's claim. Further, this application is not restricted to standing to maintain appeals; rather, the court's reasoning—that the automatic stay protects debtors, not creditors—should apply just as well in the first instance to a contested matter brought before the bankruptcy court by a creditor to enforce the automatic stay.[159] The circuit court has been somewhat consistent in this approach using specific Code provisions, rather than solely looking to section 1109(b)'s list of interested parties, to define who under the

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154 Opportunity Fin., LLC v. Kelley, 822 F.3d 451, 457 (8th Cir. 2016).

155 *In re* Wigley, 886 F.3d 681, 684 (8th Cir. 2018); *In re* O & S Trucking, Inc., 811 F.3d 1020, 1023 (8th Cir. 2016).

156 *In re* Petrone, 754 Fed. App'x 590, 591 (9th Cir. 2019).

157 *Id.* (citations omitted).

158 *In re Petrone*, 754 Fed. App'x at 591.

159 Whether the ability to seek such relief exists could change from circuit to circuit, depending on if the circuit in question allows creditors to enforce the automatic stay. *Compare In re* Pecan Groves of Ariz., 951 F.2d 242, 245 (9th Cir. 1991) (explaining that "[l]anguage from many cases indicates that, if the trustee does not seek to enforce the protections of the automatic stay, no other party may challenge acts purportedly in violation of the automatic stay"), *with In re* Howard, 391 B.R. 511, 515 (Bankr. N.D. Ga. 2008) (reasoning that the creditor "has standing to invoke the benefit of the automatic stay and to seek determination of whether an act taken in violation of the stay is void").

statutory provision of the Code can appeal decisions of the bankruptcy court.[160] If the automatic stay exists simply to protect the interests of debtors and their estate then they alone may appeal orders regarding the lifting of the stay.

Prior to *In re Petrone*, in *In re Point Center Financial Inc*. the circuit reaffirmed its general policy that "[a]ll circuits, including this one, limit standing to appeal a bankruptcy court order to 'person[s] aggrieved' by the order."[161] The circuit precedent embraces the pecuniary interest requirement on prudential and efficiency-based grounds.[162] Additionally, it has said that it is not necessary to have appeared in the bankruptcy court to appeal with a valid grievance.[163] On remand, and subsequent to the opinion in *In re Petrone*, the court found that an appellant of a bankruptcy court order was pecuniarily harmed by that order, thereby satisfying the pecuniary interest test.[164] Accordingly, the pecuniary interest test lives on, although rather than calling the inquiry one of pure prudential concerns, courts in this circuit apply it to whatever specific Code provision is implicated by the order and appeal from the bankruptcy court. This is the statutory merits inquiry contemplated by *Lexmark* and not a true jurisdictional inquiry.

J. Tenth Circuit

The Tenth Circuit has echoed *Lexmark* in saying "[t]he question that courts have misguidedly used the term 'standing' to describe . . . is really whether a particular litigant is a member of a class that Congress has authorized to sue . . . ."[165] And the Tenth Circuit will "presume that a statute ordinarily provides a cause of action 'only to plaintiffs whose interests fall within the zone of interests protected by the law invoked.'"[166] Like the Ninth Circuit, the Tenth

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160 *See In re Pecan Groves of Ariz.*, 951 F.2d at 245.

161 *In re* Point Ctr. Fin., Inc., 890 F.3d 1188, 1191 (9th Cir. 2018); *see In re* P.R.T.C., Inc., 177 F.3d 774, 777 (9th Cir. 1999) (reasoning that "[a]n appellant is aggrieved if directly and adversely affected pecuniarily by an order of the bankruptcy court; in other words, the order must diminish the appellant's property, increase its burdens, or detrimentally affect its rights").

162 *In re Point Ctr. Fin.*, 890 F.3d at 1191.

163 We do not attempt to resolve the circuit split on this question. Courts have differed on whether a claimant must appear in the bankruptcy court to appeal an order and this question is beyond the scope of—although relevant to—our standing inquiry. *See* Bruce, *supra* note 35, at 7 n.122 (noting that a circuit split exists between the Seventh, Tenth, Fourth, and Ninth Circuits, respectively).

164 *See In re Point Ctr. Fin.*, 957 F.3d at 996.

165 United States v. Wells, 873 F.3d 1241, 1261 (10th Cir. 2017); *see In re* Peeples, 880 F.3d 1207, 1213 (10th Cir. 2018) (reasoning that "[a]lthough traditionally viewed as a prudential- or statutory-standing requirement, the zone-of-interests doctrine isn't actually a matter of standing at all; instead, it merely asks whether a particular federal cause of action "encompasses a particular plaintiff's claim") (citations omitted).

166 *In re Peeples*, 880 F.3d at 1213 (citations omitted).

Circuit has rebranded the person-aggrieved test as one grounded in the specific Code provision at issue rather than any prudential test.[167] In *In re Peeples*, the court considered whether a creditor fell within the zone of interest to appeal a decision regarding the automatic stay.[168] The court held that the "case law holds that the automatic stay's zone of interests is even more limited" than the general Article III test.[169] Like the Ninth Circuit, it applied the zone-of-interest statutory test to the specific provision of the Code at issue: section 362. It is not clear where the guidance for interpreting these provisions comes from, but it seems to be grounded in circuit precedent and the old prudential test.[170] This in essence means the circuit has applied a prudential limitation on standing, but has called its inquiry an application of the zone-of-interest test under the statutory limitations of the Code. Where the language for "person-aggrieved" comes from in the Code is left unsaid, because it does not exist.

Prior to *Lexmark*, the court had characterized the person-aggrieved test as a prudential limitation and not one grounded in Article III.[171] In at least one case since *Lexmark*, the court has assumed without deciding that such a prudential standing test may be waived to address the merits of a case; it ended up dismissing the case on the merits.[172]

K. Eleventh Circuit

The Eleventh Circuit has interpreted *Lexmark* as altering the description and foundation of the person aggrieved doctrine and has simply decided that the prudential inquiry is the appropriate test, but must now be called a statutory merits question:

> Our case law describes the person aggrieved doctrine as a prudential prerequisite to standing . . . [h]owever, the Supreme Court has since stated that 'prudential standing is a misnomer' in another context . . . *Lexmark* counsels that the person aggrieved standard does not speak

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167 *See In re* Lavenhar, No. 13-cv-00499-MSK, 2014 WL 4232500, at *4 (D. Colo. Aug. 25, 2014), *aff'd*, 808 F.3d 794 (10th Cir. 2015) ("Although this Court recognizes that 'standing' is likely no longer the proper terminology, the Tenth Circuit's interpretation of the relevant [bankruptcy] statutes is controlling.") (internal citations omitted).

168 *In re Peeples*, 880 F.3d at 1213 (analyzing whether two claims brought by creditor pursuant to subsections 362(a) and 362(k) fall within the zone of interests protected by each subsection).

169 *Id.* at 1214.

170 *Id.*

171 *In re* C.W. Mining Co., 636 F.3d 1257, 1260 (10th Cir. 2011).

172 *In re* EuroGas, Inc., 755 Fed. App'x 825 (10th Cir. 2019).

> to a court's subject-matter jurisdiction. Rather, it tells us which parties may appeal from a bankruptcy court order.[173]

In other words, the person-aggrieved test, while called prudential in past precedent, will continue to be applied in the same way, but rebranded as a merits question regarding who the Code authorizes to sue.[174] Under statutory grounds, not jurisdictional standing, "[t]he person aggrieved doctrine limits the right to appeal a bankruptcy court order to 'those parties having a direct and substantial interest in the question being appealed.'"[175] There is no functional change in the law since *Lexmark*—only in the heading the court assigns to the pecuniary interest test.[176]

L. Summary of the Circuit Courts' Approaches

To conclude, the law of the circuits has been consistent in function: the person-aggrieved test reigns. However, decisions in the Third, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits indicate that the issues raised by *Lexmark* will impact how courts assess bankruptcy appeals. We have identified how the circuits have gone about this route. The Sixth Circuit has indicated that its precedent may change but has so far relied on Article III questions to avoid applying *Lexmark* to bankruptcy appeals. The Seventh has dismissed an appeal lacking a pecuniary interest on constitutional standing grounds, avoiding the need to delve into the person-aggrieved standard post-*Lexmark*. Also, the Third, Ninth, Tenth, and Eleventh Circuits have in function altered nothing but have instead used *Lexmark* to signal that the past prudential test, while correct and applicable, was and now is really a merits-based inquiry grounded in the specific Code provisions implicated by the bankruptcy court order in question under the zone-of-interests test. As we see this issue leading to inconsistencies in Article

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173 *In re* Ernie Haire Ford, Inc., 764 F.3d 1321, 1325 n.3 (11th Cir. 2014) (citations omitted).

174 *Id.*; *see In re* Bay Circle Props., LLC, 955 F.3d 874, 879 (11th Cir. 2020) ("Beyond Article III standing, 'we have adopted the person aggrieved doctrine as our standard for determining whether a party can appeal a bankruptcy court's order.' That 'standard does not speak to a court's subject-matter jurisdiction. Rather, it tells us which parties may appeal from a bankruptcy court order.'") (citing *In re Ernie Haire Ford*, 764 F.3d at 1325); *In re* Funderburgh, 526 B.R. 361, 374 (B.A.P. 10th Cir. 2015) (stating, perhaps with imprecise terminology, that "standing for bankruptcy appeal purposes is narrower than Article III standing—it requires an aggrieved person to have a pecuniary interest.") (citing *In re Ernie Haire Ford*, 764 F.3d at 1325–26).

175 *In re Ernie Haire Ford*, 764 F.3d at 1325 ("we have held that this doctrine defines aggrieved persons as those individuals who are 'directly, adversely, and pecuniarily affect[ed]' by a bankruptcy court's order . . . [a]n order will directly, adversely, and pecuniarily affect a person if that order diminishes their property, increases their burdens, or impairs their rights") (internal quotations and citations omitted).

176 *See* Bennett v. Jefferson Cnty., 899 F.3d 1240, 1251 (11th Cir. 2018), *cert. denied,* 139 S. Ct. 1305 (2019) (reversing and remanding the district court, which had cited *Lexmark* and found equitable mootness did not apply in bankruptcy cases under chapter 9, and finding an appeal was equitably moot and barred the instant appeal).

III inquiries, prudential tests, and merits-based inquiries involving variant Code provisions, we now transition into our recommendations for how courts could proactively address this shift in the law of appellate standing for bankruptcy orders after *Lexmark.*

III. ALTERNATIVE APPROACHES

Due to the Supreme Court's denial of the Mar-Bow petition, we cabin our recommendations to only those possibilities which may be employed by circuit courts as they deal with appeals. Our interest is in addressing the likely future arguments which will be raised regarding appellate standing of bankruptcy orders after *Lexmark*. Obviously, the issues we have identified could always be addressed by an amendment to the Code which could specifically enumerate exactly who may appeal the orders of the bankruptcy court, or by a Supreme Court decision which explicitly applies *Lexmark* to the standing analysis in a bankruptcy appeal. As neither seems to be on the horizon we proceed with our recommendations to circuit courts for future reviews of challenges to bankruptcy court orders. We believe that the Ninth Circuit has correctly understood *Lexmark*'s impact, but to apply *Lexmark* successfully under its interpretation would also require the adoption of the Seventh and Tenth Circuit's practices for limiting potential appellants. We will survey the merits of these potential approaches.

A. Lexmark *as a Distinction Without a Difference*

The simplest proactive measure which could be taken to account for *Lexmark*'s impact on bankruptcy appeals is to simply reincorporate past precedent under the banner of *Lexmark*. Courts could simply explicitly or implicitly interpret past precedent as, regardless of sloppy terminology, applying the law of standing as clarified by *Lexmark*. This approach was illustrated in the analysis conducted by the Eleventh Circuit in *In re Ernie Haire Ford, Inc*. and by the Third Circuit in *Artesanias Hacienda.*[177] The court in *In re Ernie Haire Ford, Inc.* in essence chose to interpret *Lexmark* as mandating a semantic shell game regarding the person aggrieved standard.[178] It affirmed the continued applicability of the court's prudential person aggrieved standard for winnowing

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[177] *See In re Ernie Haire Ford*, 764 F.3d at 1323; Brown, *Non-Pecuniary Interests*, *supra* note 3, at 574; *In re* Wilton Armetale, Inc, 968 F.3d 273, 280–81 (3d Cir. 2020).

[178] *In re Ernie Haire Ford*, 764 F.3d at 1325 n.3 ("Our case law describes the person aggrieved doctrine as 'a prudential prerequisite to standing' . . . However . . . *Lexmark* counsels that the person aggrieved standard does not speak to a court's subject-matter jurisdiction. Rather, it tells us which parties may appeal from a bankruptcy court order.") (internal citations omitted).

out potential appellants of bankruptcy orders, after simply renaming the test. In the bankruptcy context, the court has interpreted *Lexmark* to mean that the only problem with the person aggrieved test was that it was sloppily called a prudential jurisdictional concern in previous circuit precedent.[179] The Eleventh Circuit incorporated its past holdings and continued using the person aggrieved test after first renaming what was always called a prudential jurisdictional test as really a statutory right to appeal question. This reading of *Lexmark*, as merely about the proper nomenclature to apply, preserves the standard as a prudential limitation on who may successfully appeal a bankruptcy court's order under the name of statutory considerations.[180] In function, the law will remain unchanged by *Lexmark*; an appellant must still be a person aggrieved by the bankruptcy court order and his appeal will still be subject to the court's prudential inquiry. The only impact is that henceforth the Eleventh Circuit—and any circuit which adopts this approach—will call that prudential inquiry a statutory merits question rather than a jurisdictional one and will incorporate all previous decisions as good law whose opinions merely suffered from bad conceptual designations.[181]

Such "renaming" of the person-aggrieved standard as a statutory bar to maintain suit is not without foundation. It is well established that "[t]he principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor[,]"[182] and that "a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[183] Accordingly, as bankruptcy proceedings are not an appropriate vehicle

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179 *Id.* (citations omitted).

180 *Id.* at 1326 ("a person is not 'aggrieved' when the interests harmed by a court order are not interests the Bankruptcy Code seeks to protect or regulate.") (citations omitted).

181 Ms. Kim argues the opposite:

> The most apparent weakness of this solution is that statutory standing would replace only one of the three categories of prudential standing—the second category, which determines whether a claimant asserts an interest outside the zone of interests protected by the statute invoked. Labeling either of the remaining categories [rules against generalized grievances and asserting third-party rights] as statutory standing would be incorrect, not only because neither involves standing but also because neither necessarily involves a statute. Another weakness of this solution is that, like the first solution, it misidentifies the problems resulting from prudential standing as caused solely by endorsing a "prudential" aspect of standing, not by misusing standing.

Kim, *supra* note 3, at 345.

182 Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (internal quotations omitted) (citing Grogan v. Garner, 498 U.S. 279, 286–87 (1991)).

183 Grogan v. Garner, 498 U.S. 279, 286 (1991) (internal quotations omitted) (citing Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)).

for a party to seek to vindicate alleged rights untethered to financial interests, an appeal unrelated to such actions or without such foundation can be dismissed for violating the statutory purpose under a similar rubric to the one used for Lanham Act claims assessed in *Lexmark*. While outside of bankruptcy it is well established that a party can have a non-pecuniary injury for Article III purposes, the attempt to broaden the understanding of what interests the Code protects was tried and rejected in the Mar-Bow petition for certiorari.[184] This "renaming" approach, while using a hammer instead of a chisel, recognizes that inside a bankruptcy proceeding, the only rights and obligations the Code is designed to affect are those pertaining to pecuniary matters and expands that fact into a quasi-statement of purpose used to limit appeals. Therefore, any appeal of a bankruptcy court order untethered to a pecuniary interest is outside the zone of interests the Code is designed to protect, which *Lexmark* has instructed us creates a statutory bar to proceeding.[185]

In another form of reincorporating the old person-aggrieved test, courts have "renamed" the test as a constitutional test where standing to maintain the appeal of the bankruptcy court order is found to be constitutionally lacking under Article III. This is the approach taken by the Seventh Circuit in *In re GT Automation Group, Inc.*[186] In *In re GT Automation Group*, the court found that a general unsecured creditor of the debtor's estate—whose claim had no chance of being paid due to senior liens—lacked standing to appeal the denial of its objections to attorney's fees remitted to law firms hired by the Trustee to pursue a claim under section 363(n) of the Code.[187] The court observed that "[s]tanding is lacking if it is merely speculative—as opposed to likely—that that plaintiff's injury would be redressed by a favorable decision."[188] The Seventh Circuit is not the first court to look to constitutional standing requirements when reviewing bankruptcy appeals. In Mar-Bow's appeal of the bankruptcy court's order granting fees to McKinsey the district court dismissed their appeal for lack of standing. This was because Mar-Bow was not a "person-aggrieved" by the bankruptcy court's orders. The appeal could have also been dismissed because

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[184] *See* Brief for Petitioner at 17, Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Serv. US, LLC, 139 S. Ct. 1601 (2019) (No. 18-974) ("[l]ikewise, Bankruptcy Code § 107, also at issue here, expressly provides for a presumption of access to court records, thus protecting a non-financial interest . . . The right to access court records is fundamental and cannot be denied simply because a case happens to be in bankruptcy court.") (citing 11 U.S.C. § 107(a) (2019)).

[185] *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 (2014).

[186] *See In re* GT Automation Group, Inc., 828 F.3d 602, 604–05 (7th Cir. 2016); *In re* Cap. Contracting Co., 924 F.3d 890, 896 (6th Cir. 2019).

[187] *In re GT Automation Group*, 828 F.3d at 604–05; *see In re Cap. Contracting Co.*, 924 F.3d at 897.

[188] *In re GT Automation Group*, 828 F.3d at 604 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–62 (1992)).

the relief requested—disgorgement of fees paid to McKinsey RTS by the debtors—could not redress Mar-Bow's alleged injury of being denied access to disclosures pursuant to Bankruptcy Rule 2014.[189]

This renaming approach—of reclassifying the past "prudential" standing inquiry as either a statutory merits or constitutional standing test, depending on the context—has several benefits. First and foremost, it does not require overturning any previous precedent or permit further disruptions to the law.[190] Circuit courts may explicitly incorporate past prudential standing—albeit jurisdictional—decisions into the same inquiry renamed as a statutory rights-based inquiry. *Lexmark* in the bankruptcy context need not mean more than correcting the terminology used to describe the same prudential concerns. Such a declaration would incorporate the prudential person-aggrieved test employed consistently in past precedents into a new statutory interpretation inquiry as implied by *Lexmark*, or a constitutional analysis inquiry as was done in *In re GT Automation Group*. This would be a tidy way of limiting any disruption within circuit case law without further guidance from the Supreme Court, although it does nothing to abate the use of prudential concerns being applied under the banner of statutory interpretation.[191] An additional problem, and one that we have already explained, remains: there is nothing in the statutory text of the Code to justify the application of the person-aggrieved test as a prudential inquiry grounded in the statutory interpretation of the Code.[192] In fact, the only rationale that argues for this approach is the Supreme Court's prudential policy of reluctance at being asked to reinterpret the Code "to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history."[193] The explicit incorporation of the old jurisdictional person-aggrieved standard avoids any such major change; the text would be functionally identical to past precedent and would merely be renamed under *Lexmark*. However, it remains by nature a prudential test, justified by concerns

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[189] Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Sev. US, LLC, 2017 WL 4414155, at *19 (E.D. Va. Sept. 30, 2017), *aff'd sub nom. In re Alpha Nat. Resources, Inc.,* 736 Fed. App'x 412 (4th Cir. 2018) (unpublished).

[190] *See* Mank, *Is Prudential Standing Jurisdictional*, *supra* note 3, at 428–29 ("the questions and ambiguity . . . remain. Judge Posner and a number of scholars have argued that the Court's standing doctrine is so confused that the whole doctrine should be either abolished or radically reformed, but it is more likely that the Court will modify the doctrine around the edges.").

[191] *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128 n.4 (2014).

[192] *See In re* Revstone Indus. LLC, 690 F. App'x 88, 89 (3d Cir. 2017).

[193] Dewsnup v. Timm, 502 U.S. 410, 419 (1992); *but see* Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 461–62 (1998) (Thomas, J., concurring) ("[It] makes little sense to graft onto the Code concepts that were developed during a quite different era of bankruptcy practice.").

for judicial economy, which has no basis in the statutory language. Courts have simply created it as a tool for interpreting the Code's language.

B. Interpreting Individual Code Provisions' Grant Of A Right (Or Lack Thereof) To Appeal Bankruptcy Court Orders

The Ninth Circuit approach in *In re Petrone* offers a different, and more technically correct, interpretation of *Lexmark*'s impact on bankruptcy appeals. Rather than reading *Lexmark* as merely effecting a vocabulary change to previous precedent, the Ninth Circuit interpreted *Lexmark* to completely jettison the blanket application of the broad person-aggrieved test as a general jurisdictional hurdle.[194] As section 1109 provides only a non-exhaustive list of who has a right to be heard in the bankruptcy court, and no guidance appears throughout the Code as to who may appeal the court's orders, the Ninth Circuit has embraced *Lexmark*'s admonition that courts should stop implicating jurisdictional language into what is really an analysis of the rights created by statute.[195]

Like the Eleventh Circuit, the Ninth Circuit approach applies the person-aggrieved test as a statute-centric prudential analysis guided by the Code. But, the Ninth Circuit approach does not embrace the past practice of conducting a general person-aggrieved inquiry; rather the court will interpret whatever specific code provision is implicated by the bankruptcy court order being appealed.[196] In *In re Petrone*, the circuit conducted an exercise in statutory interpretation, examining the specific intent behind the passage and language of section 362 in considering a creditor's appeal of an order allowing a retroactive annulment of the automatic stay.[197] The court found that the automatic stay functions to protect "solely the interests of debtors and their estates."[198] Accordingly, a creditor seeking to prevent retroactive annulment of the automatic stay under section 362 could not appeal the bankruptcy court's order because creditors are not a party contemplated by that code provision's protections.

194 *See In re* Wigley, 886 F.3d 681, 684 (8th Cir. 2018); *In re* O & S Trucking, Inc., 811 F.3d 1020, 1023 (8th Cir. 2016).

195 *In re* Petrone, 754 Fed. App'x 590, 591 (9th Cir. 2019).

196 *See In re* Pecan Groves of Ariz., 951 F.2d 242, 245 (9th Cir. 1991) ("if the trustee does not seek to enforce the protections of the automatic stay, no other party may challenge acts purportedly in violation of the automatic stay.").

197 *See In re Petrone*, 754 Fed. App'x at 591.

198 *Id.* (citations omitted).

We believe that this approach is likely the most accurate reading of what *Lexmark* requires. But it is also likely the most unworkable; the problems created by a Code provision-specific analysis of standing are obvious. The entire existence of the pecuniary interest test is justified "to ensure that the goals of bankruptcy were not derailed by a flood of appeals."[199] However, a Code-specific inquiry for every appeal would require the development of an inconsistent body of case law in each circuit which would strive to determine what rights each specific Code provision is designed to protect; who is implicated by or benefited by each Code provision; and who could appeal orders of the bankruptcy court which implicate each specific Code provision.[200] Regardless of how well courts would manage this increase in the availability of Code-provision-specific arguments on appeal, it is incontrovertible that it would lead to inconsistent law applied across the circuits and across each specific provision of the Code. The very reign by amorphous prudential doctrines that *Lexmark* strives to curb would explode through the intricate rights, parties, and protections courts would have to define on each appeal.[201]

Additionally, the Code does not contain guidance akin to the statement of purpose cited by the court in the Lanham Act in *Lexmark.* This approach applied across the sister circuits would inevitably result in methodological and substantive rights inconsistencies as reviewing courts struggle to interpret the manifest intentions behind each specific Code provision.[202] We imagine a variety of justifications for variant decisions would result, each inconsistently grounded on traditional canons of statutory construction, legislative history across different eras of the Code's amendments, and different strained readings of who is implicated or protected by variant Code provisions. The Ninth Circuit's approach, while perhaps the best straight legal interpretation of

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199 *In re* Ernie Haire Ford, Inc., 764 F.3d 1321, 1326 (11th Cir. 2014).

200 *See, e.g.*, *In re* Ward, No. 10-2669-MKN, 2019 WL 5875106, at *5 (Bankr. D. Nev. June 5, 2019) ("a party asserting an ownership interest in property of a bankruptcy estate does have standing as a party in interest to seek annulment of the automatic stay . . . By contrast, . . . a creditor of a bankruptcy estate does not have standing to object to annulment of the automatic stay") (citations omitted); *In re* Hussain, 508 B.R. 417, 422 (B.A.P. 9th Cir. 2014) ("Ultimately, only creditors with claims affected by a debtor's discharge can object to discharge.").

201 *See generally In re* Menk, 241 B.R. 896, 912, 917 (B.A.P. 9th Cir. 1999) ("[t]he principal statutory provision prescribing the effect of dismissal is 11 U.S.C. § 349 . . . A potential defendant in an adversary proceeding is not a 'person aggrieved' for purposes of bankruptcy appellate standing because every cognizable defense in the underlying dispute will be available in the ensuing adversary proceeding.") (citations omitted).

202 *In re* DeBilio, No. 09-23812-ES, 2014 WL 4476585, at *3 (B.A.P. 9th Cir. Sept. 11, 2014) (assessing a debtor's right to appeal a sale order under section 363 when the debtor possessed a wildcard exemption against one of the real properties sold, "[t]he impact of the Order on the Debtor's wildcard exemption, thus, is sufficient to confer standing"); *In re* Pac. Rim Prop. Serv. Co., No. 19-01051-RF, 2020 WL 4371106, at *3 (B.A.P. 9th Cir. July 29, 2020) (noting that a non-debtor could not appeal a stay annulment that did not reduce his property).

Lexmark's impact on bankruptcy appeals, is likely an unworkable, eminently inconsistent standard which would multiply the very prudential concerns *Lexmark* augurs against.

C. A Blended Approach: Combine Lexmark *with a Requirement that Appellants Objected Below*

Though no circuit court has taken this approach yet, circuit courts should combine the Ninth Circuit's Code-provision-specific analysis with the approach taken by the Tenth Circuit in limiting appeals to only those parties who voiced objections below in the bankruptcy court proceedings. Both the Seventh and Tenth Circuits require that persons aggrieved must have attended and objected to the relief requested during the bankruptcy proceeding.[203] This in essence would establish who was implicated by the order below. In any bankruptcy appeal, the district and circuit courts review conclusions of law *de novo*, but give broad discretion to the bankruptcy courts' findings of fact.[204] Although the lower courts' conclusions regarding what specific parties are protected or implicated by specific Code provisions are not given any deference by the circuit courts on appeal, the court's treatment of objecting or non-present parties could be viewed as factual determinations which are more insulated from appellate review. This would reduce the burden placed on circuit courts to articulate whether a specific order, and a specific Code provision, implicated a party on appeal.

If courts reject the renaming approach and opt for the Ninth Circuit's reading of *Lexmark,* the courts would be aided by the universal adoption of the approach taken by the Seventh and Tenth Circuits regarding potential appellants and requiring parties appealing an order to have been present and objected below in the bankruptcy court.[205] This combination—the Ninth Circuit's Code-specific statutory analysis and the Seventh and Tenth Circuits' absolute bar to unknown appellants emerging after the proceedings conclude—both correctly interprets *Lexmark* and continues to limit a potential onslaught of bankruptcy appeals. It would be unreasonable and absurd to ask bankruptcy courts to speculate as to what potential parties may emerge from the ether to challenge a specific court order, especially if the standard to appeal is broadened by *Lexmark*. Circuit

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[203] *See* Bruce, *supra* note 35, at 7 n.122 (noting that a circuit split exists between the Seventh and Tenth and Fourth and Ninth Circuits, respectively).

[204] *See, e.g.*, *In re* Lehman Bros. Holdings, Inc., 415 B.R. 77, 83 (S.D.N.Y. 2009) ("On appeal, the legal conclusions of the bankruptcy court are reviewed *de novo*, but the findings of fact are reversed only when they are 'clearly erroneous.'") (citing *In re* AppliedTheory Corp., 493 F.3d 82, 85 (2d Cir. 2007)).

[205] *See In re* Wigley, 886 F.3d 681, 684 (8th Cir. 2018); *In re* O & S Trucking, Inc., 811 F.3d 1020, 1023 (8th Cir. 2016).

precedent, which looks to what parties self-identified as potential appellants of a bankruptcy court order, at least attempts to explain who or what interest is implicated by the orders of a bankruptcy court in a legally consistent manner. The absolute requirement of attendance and objection for future appellants may reduce the ambiguity of the eventual circuit inquiry conducted under *Lexmark* as interpreted by the Ninth Circuit as to whether an order based on a specific Code provision implicates the appealing party.

CONCLUSION

Our analysis has demonstrated that circuit courts universally limit appellate standing of bankruptcy court orders to parties that can show a specific pecuniary interest harmed by the bankruptcy court order. In most circuits this person-aggrieved test is self-consciously applied by the courts as a judicially crafted prudential inquiry used to limit the number of potential appeals from any bankruptcy court order. However, this test—whether called a prudential standing test based on concerns of judicial economy, or a statutory interest-based test consulting the bankruptcy code—has no basis in either the Constitution or the text of the Code. After *Lexmark*'s explicit disclamation of prudential tests devoid of statutory or constitutional justifications, the law of standing to appeal bankruptcy court orders is subject to change. It has already been challenged across the several circuits. We have proposed several solutions to proactively address the change in the law, specifically: reinterpreting older precedent as good law under a more statutorily focused analysis; the relocation of the circuit court's focus to specific code provisions on appeal; and the potential curbing of appeals from parties not present below.

At its core, we believe the person-aggrieved test is a valuable test that should remain in substance if not in form. Bankruptcy proceedings under the Code seek first and foremost to determine the financial rights and interests of debtors against creditors, creditors against debtors, and creditors against other creditors. Proceedings—especially appellate proceedings—that do not work toward resolving these issues are not properly the focus or purpose of bankruptcy proceedings or bankruptcy appeals, do not further the interests of parties vindicating their financial interests in bankruptcy proceedings, and are not an intelligent use of Article III courts' judicial resources. That said, courts reviewing bankruptcy court orders cannot simply decline review on prudential grounds even if it is sensible to do so. Such refusals must be based in either the Constitution or the Code. As explained above, this can be readily accomplished by reframing the basis for the person-aggrieved test without affecting a foundational change in the law as it currently exists.