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DISCRETION ABUSED: REINTERPRETING THE APPELLATE STANDARD OF REVIEW FOR HEARSAY

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INTRODUCTION

In the spring of 1990, Kishor Joshi clung to hope that his appeal to the United States Court of Appeals for the Eleventh Circuit would expose a serious mistake made by the United States District Court for the Southern District of Florida.¹ At trial, the district court allowed testimony proclaiming that Joshi had nodded his head when he was described as a partner in a drug-smuggling operation in accordance with the adoptive-admission exclusion to the rule against hearsay.² However, the district court failed to make the required inquiry³ into whether

1 See United States v. Joshi, 896 F.2d 1303, 1305 (11th Cir. 1990).
2 See id. at 1311; see also Fed. R. Evid. 801(d)(2)(B). The adoptive admission exclusion provides that a statement is not hearsay if the statement is offered against the party that made the statement and “is one the party manifested that it adopted or believed to be true.” Fed. R. Evid. 801(d)(2)(B).
3 See id. at 1305.
Joshi understood the statement before nodding his head, which was a particularly significant inquiry considering that Joshi did not speak English and required a translator for most of the trial proceedings. Accordingly, it seemed apparent that the district court improperly admitted hearsay evidence against Joshi. However, the Court of Appeals ultimately held that “[a]lthough this case presents a close question, we find sufficient evidence in the record that Joshi comprehended and adopted the statements . . . to find that the[] admission against Joshi was not a[] [clear] abuse of discretion.” Joshi’s conviction was affirmed because of the significant discretion afforded to the district court’s construction and application of a hearsay exclusion.

The final result in Joshi raises an important question: How much discretion should be afforded to a district court’s application of the rule against hearsay upon appellate review? The answer has become increasingly unclear as some appellate courts have bestowed significant discretion upon the district courts with the use of the abuse-of-discretion standard while other appellate courts have afforded the district court minimal discretion with de novo review. Accordingly, the circuits are split as to what standard of review applies to hearsay rulings. Furthermore, two circuits, the Sixth and the Ninth, are split internally.

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3 According to the Federal Rules of Evidence, district courts must make a preliminary inquiry into whether proposed evidence is admissible. See Fed. R. Evid. 104(a). See, e.g., Huddleston v. United States, 485 U.S. 681, 689-91 (1988) (holding that the district court should ensure that the jury can find, by a preponderance of the evidence, that a conditional fact is true). Moreover, circuit precedence required the district court to find sufficient facts for the jury to conclude that the person making the adoptive admission understood the statement that was adopted. See Joshi, 896 F.2d at 1311.
4 See id. at 1309, 1311.
6 Joshi, 896 F.2d at 1312.
7 See Fenner, supra note 5, at 56.
8 See Wagner v. Cnty. of Maricopa, 706 F.3d 942, 946 (9th Cir. 2013); Trepel v. Roadway Exp., Inc., 194 F.3d 708, 716-17 (6th Cir. 1999).
9 Compare United States v. Brown, 669 F.3d 10, 22 (1st Cir. 2012) (“Review of preserved objections to rulings concerning admissibility of evidence is for abuse of discretion.”), with United States v. Ferguson, 653 F.3d 61, 86 (2d Cir. 2011) (“Whether this statement constitutes double-hearsay is a legal issue, which we review de novo.”).
10 Compare Biegas v. Quickway Carriers, Inc., 573 F.3d 365, 378 (6th Cir. 2009) (“Whether a statement is hearsay is a question of law, which we review de novo.”), with Trepel, 194 F.3d at 717 (“[W]e shall review the district court’s ruling for an abuse of discretion.”). Compare Wagner, 706 F.3d at 946 (reviewing evidentiary rulings for
When the United States Supreme Court declined to examine the issue in 2013,\textsuperscript{11} it became apparent that this issue will have to be resolved by the appellate courts. An approach needs to be established that the federal courts of appeal can apply when reviewing issues involving hearsay based on current jurisprudence, common standards of review, and the Federal Rules of Evidence.\textsuperscript{12} In particular, the United States Circuit Courts of Appeals should make a preliminary assessment of the nature of the district court’s hearsay ruling and apply an appropriate standard of review.\textsuperscript{13} If the ruling was a determination of whether the statement constituted hearsay, \textit{de novo} review should be applied.\textsuperscript{14} If the ruling resolved a factual question as to whether an exclusion or exception applied, the clearly erroneous standard of review should be applied.\textsuperscript{15} Finally, if the ruling was based on the ultimate question of the statement’s admissibility—such as the statement’s relevance or possibility of prejudice—an abuse-of-discretion standard of review should be applied.\textsuperscript{16}

Part I of this Note discusses the current rule against hearsay, its exclusions, and its exceptions as enacted by the Federal Rules of Evidence.\textsuperscript{17} Parts II and III discuss the prevalent standards of review utilized by the Supreme Court and the federal courts of appeals and how

\textsuperscript{11} The Supreme Court denied \textit{certiorari} in 2013. See \textit{Wagner}, 706 F.3d at 942, \textit{cert. denied}, 133 S. Ct. 1504 (2013).
\textsuperscript{12} While several state appellate courts have encountered difficulty in applying a standard of review to hearsay determinations, those cases are beyond the scope of this Note. See, e.g., \textit{State v. Saucier}, 926 A.2d 633, 638-40 (Conn. 2007); \textit{K.V. v. State}, 832 So. 2d 264, 265-66 (Fla. Dist. Ct. App. 2002); \textit{State v. Newell}, 710 N.W.2d 6, 18 (Iowa 2006).
\textsuperscript{13} See infra Part VI (advocating for an approach where the appellate court applies a standard of review based upon the district court’s basis for making a hearsay ruling).
\textsuperscript{14} See infra Part VI (“If the hearsay ruling stemmed from the district court’s interpretation of the rule [against hearsay], the appellate court should review the lower court’s ruling \textit{de novo}.”).
\textsuperscript{15} See infra Part VI (“If the ruling . . . could be attributed to a factual finding, the appellate court should yield to the district court’s expertise under the clearly-erroneous standard.”).
\textsuperscript{16} See infra Part VI (“[I]f the hearsay ruling related to the overall admissibility of the statement . . . the appellate court should completely defer to the district court’s evidentiary expertise pursuant to the abuse-of-discretion standard.”).
\textsuperscript{17} See infra Part I (discussing the current hearsay rule, its exceptions, and the rationale behind it).
those standards of review have been applied to hearsay issues.18 Part IV examines the proposed solutions of other commentators.19 Part V analyzes the shortcomings in the application of abuse-of-discretion and de novo review to hearsay rulings and provides the foundation for the proposed approach to review hearsay rulings.20 Finally, Part VI proposes a solution that will allow the federal courts of appeals to apply a straightforward approach consistent with Supreme Court and circuit precedent.21

I. THE FEDERAL RULES OF EVIDENCE: DISCRETION AND THE RULE AGAINST HEARSAY

A fundamental principle of the Federal Rules of Evidence is that, pursuant to Rule 104(a), the district court is given ultimate discretion to determine the qualifications of witnesses, the existence of privileges, and the overall admissibility of evidence.22 However, aside from making such initial determinations, the district court is also tasked with interpreting the Federal Rules of Evidence and applying them to the facts of a case.23 One set of rules that district courts often find troublesome to apply relate to the admissibility of hearsay evidence.24

Hearsay is a statement that “the declarant does not make while testifying at the current trial or hearing[] and [that] a party offers in evidence to prove the truth of the matter asserted in the statement.”25 A statement that equates to the aforementioned criteria—and is not otherwise permitted by the Federal Rules of Evidence—is inadmissible.26 The general prohibition of

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18 See infra Part II (examining abuse-of-discretion, clearly-erroneous, and de novo standards of review); infra Part III (discussing application of the standards of review by the federal courts).
19 See infra Part IV.
20 See infra Part V (analyzing the misapplication of an abuse-of-discretion and de novo standard in the Sixth and Ninth Circuits).
21 See infra Part VI (proposing a new approach for applying a standard of review to appealed hearsay rulings).
22 Fed. R. Evid. 104(a). The general admissibility of evidence typically requires the court to utilize its discretion to examine evidence for relevancy or unfair prejudice. See Fed. R. Evid. 401-403.
24 See id. at 20-23 (discussing the difficulty in applying the rule against hearsay).
25 Fed. R. Evid. 801(c).
26 See Fed. R. Evid. 802.
hearsay codified in the Federal Rules of Evidence, which stems from English common law and is known as the rule against hearsay, ensures that out-of-court statements are not used to reach a finding of fact because such statements are less reliable than statements made under oath before a finder of fact. Because statements made outside of the courtroom cannot be challenged before the fact finder through cross-examination, those statements are deemed unreliable and are not used in making a factual determination.

Despite the general principle that hearsay is inadmissible, the Federal Rules of Evidence provide two separate methods for admitting such statements. First, the Rules provide exclusions that frame statements as “not hearsay,” even if the statements otherwise would be considered hearsay under the definition in Rule 801(c). If a statement is defined as “not hearsay” in Rule 802, it is admissible. Second, the Rules provide multiple exceptions to the rule against hearsay. If the statement is determined to fall within a hearsay exception, it also may be admitted.

Because the Federal Rules of Evidence are structured to bar hearsay unless either the statement is “not hearsay” by definition or an exception to the rule exists, a determination of what constitutes inadmissible hearsay becomes a two-part inquiry. First, the court must ask

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28 See Roger Park, A Subject Matter Approach to Hearsay Reform, 86 MICH L. REV. 51, 55-56 (1987). Moreover, cross-examination ensures that statements made in-court are reliable because the opposing party may test the statement’s credibility before the finder of fact. See id.
29 See id. at 68.
30 See FED. R. EVID. 801(d); 803; 804.
31 FED. R. EVID. 801(d).
32 FED. R. EVID. 802 (mandating that hearsay be excluded unless the Federal Rules of Evidence, a federal statute, or the Supreme Court provide otherwise). Some examples of statements that are “not hearsay” include the adoptive-admission exclusion, an inconsistent prior statement given under the penalty of perjury, or a statement made by a party’s coconspirator in furtherance of that conspiracy. See id. Thus, even though Kishor Joshi’s head nod was made out of court, and was offered to prove that he was involved in a drug-smuggling operation, Rule 802(d)(2)(B) would make it admissible as a hearsay exclusion. See id.; United States v. Joshi, 896 F.2d 1303, 1311 (11th Cir. 1990).
33 See FED. R. EVID 803-804.
34 See id.
35 Bruno, supra note 23, at 21.
whether the statement is “hearsay by definition.” 36 In determining whether the statement fits within the definition of hearsay or is “not hearsay,” courts examine (1) whether there is an actual statement, (2) whether the statement is made outside of the current trial or hearing, and (3) whether the assertion within the statement equates to what the statement is attempting to prove. 37 If the statement is hearsay by definition, the court must then ask whether the statement is excluded as “not hearsay” under Rule 802 or whether any of the multiple exceptions to the rule against hearsay in Rules 803 and 804 apply. 38

Inherently, in determining whether a statement is hearsay, is not hearsay by virtue of exclusion, or an exception applies, district courts must examine a variety of legal and factual questions. 39 Whether a statement fits the definition of hearsay within the Federal Rules of Evidence is traditionally a legal question because the rules are rules of law. 40 However, whether an exception applies to the hearsay rule may become a question of fact because several of the exceptions require a finder of fact to affirm circumstances that enable an exception. 41 For example, the dying-declaration exception—presently codified as Rule 804(b)(2)—traditionally requires a finding by a preponderance of the evidence 42 that the declarant made the out-of-court statement with “the consciousness of a swift and certain doom.” 43 Because the existence of

36 Id.
37 See id.
38 See id.
39 See id.
40 See id.
41 See Fed. R. Evid. 803; 804.
42 See Fed. R. Evid. 104(a); Bourjaily v. United States, 483 U.S. 171, 175 (1987) (holding that Rule 104 findings are made by a preponderance of the evidence).
43 Shepard v. United States, 290 U.S. 96, 100 (1933). While the dying-declaration exception is mentioned above as an example, there are multiple exceptions to the rule against hearsay, which are beyond the scope of this Note. Rule 804 provides, among other exceptions, that a hearsay statement is admissible if the declarant is unavailable and the statement was former testimony, against the declarant’s interest, or is offered against a party that wrongfully made the declarant unavailable. See Fed. R. Evid. 804. Additionally, Rule 803 provides that, regardless of the declarant’s availability, a hearsay statement may be admitted if the statement was a present-sense impression, an excited-utterance, or a recorded-recollection. See Fed. R. Evid. 803.
hearsay itself is a question of law and its exceptions can often become questions of fact, appellate courts often struggle to apply a standard of review to issues involving hearsay.44

II. STANDARDS OF REVIEW

A standard of review is the “measuring stick” that appellate courts use to determine how much deference to afford to a district court’s factual findings, legal conclusions, and discretionary decisions.45 Standards of review ensure that the trial and appellate courts fulfill their separate functions.46 Traditionally, the function of the district court is to apply the law to factual findings, whereas an appellate court is tasked with scrutinizing a district court’s legal determinations.47 In order to maintain separation, appellate courts afford higher deference and apply a narrow standard of review to district courts’ factual findings.48 In contrast, a broad standard of review is applied to the legal conclusions of a district court, resulting in less deference from the appellate court.49 Accordingly, the standard of review applied will vary based upon whether the issues presented in the appeal are factual, legal, or a mix between law and fact.50 Primarily, the federal courts of appeals apply three standards of review: abuse of discretion, clearly erroneous, and de novo.51

44 Bruno, supra note 23, at 22-23.
46 Id. at 609.
47 Traditionally, “error correction is the historic basis for appellate review.” Chad M. Oldfather, Universal De Novo Review, 77 GEO. WASH. L. REV. 308, 316-17 (2009). “Thus, reversal by an appellate court is appropriate in such situations as where a trial court has exceeded the bounds of its discretion, issued a verdict contrary to the evidence, or applied an inappropriate rule.” Id. “The trial court, however, must not only interpret and apply the rule; it also has a task not usually performed by an upper court—that of ‘finding’ the facts.” Jerome Frank, Both Ends Against the Middle, 100 U. PA. L. REV. 20, 23 (1951).
48 See Maloy, supra note 45, at 607.
49 See id.
50 See id.
51 See id. at 610.
A. Abuse of Discretion

Abuse of discretion is the narrowest standard of review and awards more deference to a district court’s ruling than any other standard.\(^52\) Because of the significant amount of deference afforded to the district court, the appellate court need not agree with the district court’s ruling in order to affirm that ruling.\(^53\) Instead of “substitut[ing] its own judgment for that of the district court,”\(^54\) the appellate court must find that the district court acted “clearly against logic” or that the district court “exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted” in order to reverse a ruling.\(^55\) Because the abuse-of-discretion standard is so narrow, appellate courts typically apply it to issues where the district court must make a ruling that could vary on a case-by-case basis.\(^56\)

An abuse-of-discretion standard is conventionally applied to certain decisions of district courts for three reasons.\(^57\) First, district courts are understood to have more experience and “greater expertise” in making “similar rulings.”\(^58\) Second, district courts have the opportunity to view the witnesses and testimony in-person and, accordingly, may judge the courtroom demeanor of witnesses from a perspective that appellate courts lack.\(^59\) Finally, findings of district courts may be afforded an abuse-of-discretion standard because mandating appellate courts to reconsider all of the evidence would diminish judicial wherewithal.\(^60\)

\(^{52}\) See id. at 629.

\(^{53}\) See id. at 630.


\(^{55}\) See Maloy, *supra* note 45, at 630.

\(^{56}\) See id. at 629 (“Deference to the trial judge contemplates that different results in different cases.”).

\(^{57}\) See Nicholas, *supra* note 54, at 533-34.

\(^{58}\) See id.

\(^{59}\) See id.

\(^{60}\) See id.
Since the abuse-of-discretion standard is used to review questions involving the expertise of district courts, appellate courts often apply that standard to a district court’s evidentiary rulings.\textsuperscript{61} The Supreme Court reinforced this proposition in \textit{General Electric Co. v. Joiner}, noting that evidentiary rulings by the district court should be reviewed for abuse of discretion.\textsuperscript{62} Accordingly, the abuse-of-discretion standard provides the district court with a “‘virtual shield’ from reversal” when making evidentiary rulings.\textsuperscript{63} A district court’s decision will be an abuse of discretion only if it is “‘arbitrary,’ ‘irrational,’ ‘capricious,’ ‘whimsical,’ ‘fanciful,’ or ‘unreasonable.’”\textsuperscript{64}

While it is generally clear that abuse-of-discretion review is afforded to a district court’s deferential findings,\textsuperscript{65} it is unclear whether abuse-of-discretion review mandates a review of a district court’s legal interpretations.\textsuperscript{66} Despite instructing that an error of law is an automatic abuse of discretion,\textsuperscript{67} the Supreme Court has also noted that certain discretionary findings are only reversible if the result is illogical or lacks adequate factual support.\textsuperscript{68} This conflict is a problem for district courts’ hearsay rulings because it may be unclear whether the ruling rests on

\begin{footnotes}
\item[61] See Maloy, supra note 45, at 631. Abuse-of-discretion review is also used to review the exclusion of scientific evidence, the propriety of jury instructions and verdicts, and awards of legal fees. See id. at 630-31.


\item[63] Bruno, supra note 23, at 19.

\item[64] Nicholas, supra note 54, at 533.

\item[65] See Maloy, supra note 45, at 630.

\item[66] Compare Koon v. United States, 518 U.S. 81, 100 (1996) (“A district court by definition abuses its discretion when it makes an error of law.”), with Wagner v. Cnty. of Maricopa, 706 F.3d 942, 950 (9th Cir. 2013) (Smith, J., dissenting) (relying on Supreme Court precedent to explain how a district court’s ruling reviewed under abuse of discretion can only be overturned if the error was “‘illogical,’” or “‘implausible’”).

\item[67] Koon, 518 U.S. at 100.

\item[68] See Andersen v. City of Bessemer, N.C., 470 U.S. 564, 577 (1985). For example, in Andersen, the Court ruled that the district court’s interpretation of the facts to determine that a hiring committee was biased against Petitioner also led to the district court’s legal conclusion that Petitioner was entitled to relief under Title VII. See id. at 580.
\end{footnotes}
an interpretation of the rule against hearsay, application of an exception, or the ultimate question of admissibility.69

In applying an abuse-of-discretion standard of review, federal courts of appeals often use the harmless-error rule to forgive a district court’s error.70 The rationale behind the harmless-error rule is “to avoid ‘setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.’”71 In certain instances, courts have held that, although the hearsay rule was improperly applied, the admission of hearsay or exclusion of non-hearsay was merely a harmless error that would not have changed the outcome of the trial.72 As a result, the harmless-error rule works to shield a district court’s hearsay ruling if the district court exercised its discretion to reach that ruling. Thus, even if the district court abused its discretion and made an improper hearsay ruling, the appellate courts may find that the ruling was a harmless error, essentially granting unlimited discretion to the district court within the realm of hearsay.73

B. Clearly Erroneous

Clearly erroneous is an intermediate standard of review typically afforded to a district court’s factual findings.74 A district court’s ruling is clearly erroneous only when the appellate court “is left with the definite and firm conviction that a mistake has been committed.”75 Thus,

69 See Bruno, supra note 23, at 20-22 (describing how “the trial court examines many potential legal and factual issues” when determining whether a statement is hearsay and if that statement is admissible pursuant to an exception).
70 See Fenner, supra note 5 (“Sometimes an appellate court’s finding of no abuse of discretion blends together with the harmless error rule.”).
72 See, e.g., United States v. Miller, 874 F.2d 1255, 1265 (9th Cir. 1989) (noting that because it was within the district court’s discretion to admit evidence that was ultimately cumulative, it was a harmless error to admit hearsay that should have been excluded).
73 Fenner, supra note 5, at 56-57 (“The courts have effectively written a great deal of discretion into the rules by sloppy interpretation, haphazard attention, fuzzy thinking, meandering adherence to legislative directive, and just general mush-headedness.”).
74See Maloy, supra note 45, at 619-20 (citing First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 948 (1995)).
an appellate court may affirm a district court’s determination so long as that determination is within a scope of reasonable conclusions.\textsuperscript{76}

The primary purpose of the clearly erroneous standard of review is not for the appellate court to make new findings of fact; rather, the appellate court must only remand cases to the district court when its factual conclusions are unsatisfactory based on the record below.\textsuperscript{77} Thus, not only does the clearly erroneous standard ensure that district courts are logically making factual findings, but it also restrains the appellate court from rehearing an entire case.\textsuperscript{78} While the standard does not protect the district court’s decisions to the extent that the abuse-of-discretion standard does, it protects any of the district court’s decisions where “‘there was substantial evidence to support the conclusion of the trier of fact.’”\textsuperscript{79} Currently, a limited number of state jurisdictions use a clear-error standard when reviewing a district court’s hearsay ruling.\textsuperscript{80} Federal appellate courts generally only apply a clearly erroneous standard of review to a district court’s factual findings beyond the hearsay context.\textsuperscript{81}

C. De Novo

De novo is the most expansive standard of review and affords the district court little or no deference.\textsuperscript{82} When the appellate court reviews a ruling de novo, the appellate court is not examining whether the district court erred.\textsuperscript{83} Instead, an appellate court applying a de novo

\textsuperscript{77} See Maloy, supra note 45, at 622 (“[I]f the reviewing court finds clear error in the factual findings of the trial court, all it can do is remand the case back to the trial court for a further attempt at proper findings; it cannot make its own findings.”).
\textsuperscript{78} See id.
\textsuperscript{79} Id. (quoting In re Doe, 928 P.2d 883, 888 (Haw. 1996)).
\textsuperscript{80} See generally Bruno, supra note 23, at 41-46 (discussing the clear error standard used for hearsay related appeals in Nebraska, Oregon, and Utah).
\textsuperscript{81} See Maloy, supra note 45, at 623 (discussing circuit court review for clear error of various factual findings). For example, determinations of whether intentional discrimination occurred under Title VII, there was fraudulent intent, or there was trademark infringement are all factual questions given clearly-erroneous review. See id.
\textsuperscript{82} Id. at 612.
\textsuperscript{83} Id.
standard examines the case as if it was newly before the court. This broad standard allows an appellate court to review the facts of a case, draw inferences from those facts, and apply the proper law.

The de novo standard is justified because the structure of appellate courts is suited to promote precision and decisional accuracy. The structure of an appellate court promotes decisional accuracy because appellate judges can focus primarily on legal conundrums and because appellate courts utilize multiple judges per appeal while district courts act independently. Because de novo review allows appellate panels to specifically focus on legal issues that district courts may not have the time or resources to investigate, de novo review is particularly well suited for application to questions of law.

Since de novo review is primarily applied to questions of law, the federal courts of appeals have used a de novo standard when reviewing a district court’s interpretation of the rule against hearsay. While application of a de novo standard to hearsay, an evidentiary issue, appears to conflict with Supreme Court precedent stemming from Joiner, the Sixth Circuit has observed that the rule against hearsay was not before the Supreme Court in Joiner and that “it is not clear . . . how a trial court would have ‘discretion’ to ignore the definition of inadmissible hearsay” within the Federal Rules of Evidence. Subsequently, while some courts of appeals

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84 Id.
85 See Nicholas, supra note 54, at 532.
86 See Maloy, supra note 45, at 612.
88 See id.
89 See id. at 231.
90 See Maloy, supra note 45, at 613. Moreover, de novo review is utilized as the standard of review for district court rulings on motions for summary judgment, claim dismissal, and subject matter and personal jurisdiction. See id. at 613-14.
91 See id.
have followed Joiner and remarkably adhered to the principle that district courts have discretion in interpreting the Federal Rules of Evidence, other courts have continued to apply a de novo standard to hearsay rulings because of hearsay’s traditional status as a rule of law.94

III. SUPREME COURT PRECEDENT AND CIRCUIT COURT CONFUSION

Because the United States Supreme Court has not explicitly indicated what standard of review is appropriate when reviewing a ruling related to hearsay,95 the courts of appeals are uncertain as to whether hearsay determinations are evidentiary rulings subject to abuse-of-discretion review under Joiner or questions of law subject to de novo review.96 Furthermore, the courts of appeals are far from unanimous in resolving this issue.97 While the First and Ninth Circuits review hearsay rulings for an abuse of discretion,98 the Second and Sixth Circuits review such rulings de novo.99 This conflict requires a solution that not only satisfies Supreme Court precedent, but also provides the courts of appeals with an approach that respects the district court’s discretion in making evidentiary decisions and factual findings while enforcing the appellate courts’ authority to scrutinize legal conclusions.

A. Supreme Court Precedent

The Supreme Court case cited when asserting that hearsay-related rulings should be reviewed for an abuse of discretion is General Electric Co. v. Joiner.100 In Joiner, the issue before the Court was what standard of review the courts of appeals should utilize when

95 See id. at 669.
96 See Wagner v. Cnty. of Maricopa, 706 F.3d 942, 946 (9th Cir. 2013) (stating that “it is not entirely clear whether construction of a hearsay rule is a matter of discretion or a legal issue subject to de novo review”).
97 See McDermott, supra note 94.
99 See United States v. Ferguson, 676 F.3d 260, 285 (2d Cir. 2011) (citing Biegas v. Quickway Carriers, Inc., 573 F.3d 365, 378 (6th Cir. 2009)).
reviewing a district court’s determination to admit or exclude expert testimony.\textsuperscript{101} Relying on \textit{Old Chief v. United States}\textsuperscript{102} and \textit{United States v. Abel},\textsuperscript{103} the Supreme Court stated that “abuse of discretion is the proper standard of review [for] a district court’s evidentiary rulings,”\textsuperscript{104} as well as “the standard by which to review a district court’s decision to admit or exclude scientific evidence.”\textsuperscript{105} Thus, the Court specifically addressed a ruling related to scientific evidence and expert testimony, not the rule against hearsay.\textsuperscript{106}

B. Circuit Court Confusion

Following the Supreme Court’s decision in \textit{Joiner}, the federal courts of appeals were forced to reexamine the standard of review applied to hearsay rulings.\textsuperscript{107} While some circuits strictly adhered to the broad standard promulgated in \textit{Joiner},\textsuperscript{108} other circuits declined to adapt and relied on their own precedent noting that hearsay determinations that depend on rules of law should receive traditional \textit{de novo} review.\textsuperscript{109} To further complicate the situation, two intra-circuit splits emerged in the Sixth and Ninth Circuits, as panels of those courts either interpreted \textit{Joiner} to mandate application of the abuse-of-discretion standard of review or chose to adhere to circuit precedent that required \textit{de novo} review.\textsuperscript{110} In order to thoroughly demonstrate and examine the

\textsuperscript{102} \textit{Old Chief v. United States} specifically dealt with a district court’s decisions relating to relevance, propensity evidence, and stipulation under Rule 403, not whether a district court appropriately constructed an evidentiary rule. \textit{See generally Old Chief v. United States}, 519 U.S. 172, 179-86 (1997).
\textsuperscript{103} In \textit{United States v. Abel}, the Court also noted that Rule 403 expressly gave deference to the district court’s decision to allow testimony relating to a gang’s “odious tenets.” \textit{United States v. Abel}, 469 U.S. 45, 54 (1984) (“A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules.”) (emphasis added).
\textsuperscript{104} \textit{Joiner}, 522 U.S. at 141.
\textsuperscript{105} \textit{Id}. at 146 (emphasis added).
\textsuperscript{106} \textit{See id}.
\textsuperscript{107} \textit{See, e.g.}, Trepel v. Roadway Express, Inc., 194 F.3d 708, 717 (6th Cir. 1999) (“Therefore, in disregard of our heretofore well-settled precedent that hearsay evidentiary rulings are reviewed de novo . . . we shall review the district court’s ruling for an abuse of discretion.”).
\textsuperscript{108} \textit{See id}.
\textsuperscript{109} \textit{See United States v. Bao, 189 F.3d 860, 863-64 (9th Cir. 1999) (citing United States v. Collicot, 92 F.3d 973, 978 (9th Cir. 1996)).}
\textsuperscript{110} Compare Biegas v. Quickway Carriers, Inc., 573 F.3d 365, 378 (6th Cir. 2009) (“Whether a statement is hearsay is a question of law, which we review de novo.”), \textit{with Trepel}, 194 F.3d at 717 (“[W]e shall review the district
dispute involving the standard of review for hearsay, an analysis of the circuit splits within the Sixth and Ninth Circuits is appropriate.\textsuperscript{111}

1. \textit{The Sixth Circuit}

The Sixth Circuit initially identified a problem with the Supreme Court’s \textit{Joiner} ruling—that all evidentiary rulings are reviewed for abuse of discretion—in \textit{Trepel v. Roadway Express, Inc.}\textsuperscript{112} In \textit{Trepel}, the plaintiff purchased a wooden carving worth $2.2 million for $15,000.\textsuperscript{113} Upon the plaintiff’s purchase, the seller shipped the carving from New York to Arizona via Roadway.\textsuperscript{114} Upon arriving in Arizona, the carving was broken into several pieces.\textsuperscript{115} Accordingly, the plaintiff filed suit against Roadway for negligence and breach of contract.\textsuperscript{116} At trial, the plaintiff attempted to admit in evidence a tape-recorded telephone conversation that indicated the value of the carving by arguing that the conversation was an offer to sell at a certain price, not to prove that the sculpture was actually valued at the offer price.\textsuperscript{117} The district court, however, ruled that the telephone conversation was inadmissible hearsay, causing the plaintiff

\textsuperscript{111} An analysis of the intra circuit splits in the Sixth and Ninth Circuits generally encapsulates the dispute. However, it also important to note that other circuits are divided in a similar manner. For example, the Second and Third Circuits award \textit{de novo} review to questions of hearsay while the First, Fifth, and Eighth Circuits review hearsay rulings for an abuse of discretion. \textit{Compare United States v. Ferguson, 676 F.3d 260, 285 (2d Cir. 2011)} (“Whether this statement constitutes double-hearsay is a legal issue, which we review de novo.”) \textit{and United States v. Price, 458 F.3d 202, 205 (3d Cir. 2006)} (“Whether a statement is hearsay is a legal question subject to plenary review.”), \textit{with United States v. Davis, 457 F.3d 817, 824-25} (“We review the district court’s evidentiary rulings for an abuse of discretion . . . .”).

\textsuperscript{112} \textit{Trepel}, 194 F.3d at 716-17 (“It is not clear to us how a trial court would have ‘discretion’ to ignore the definition of inadmissible hearsay . . . [or the] exceptions to the hearsay rule . . . but it is not this court’s privilege to ‘question why.’”).

\textsuperscript{113} See \textit{id.} at 711.

\textsuperscript{114} See \textit{id.}

\textsuperscript{115} See \textit{id.}

\textsuperscript{116} See \textit{id.}

\textsuperscript{117} See \textit{id.} at 716. By offering the statement under the guise that it was merely an offer of a certain price, \textit{Trepel} would not have been offering the statement to prove the truth of the matter asserted, thus, the conversation would not have been subject to the rule against hearsay. \textit{See id.}
difficulty in proving the true value of the carving at trial. The difficulty in proving the carving’s value led to a low award of damages, which the plaintiff subsequently appealed.

On appeal, the Sixth Circuit reviewed the district court’s decision to exclude the telephone conversation as hearsay for an abuse of discretion. The application of an abuse-of-discretion standard was in direct conflict with its own precedent providing that hearsay rulings should be reviewed de novo. In accord with the highly deferential standard of review, the court affirmed the district court’s determination that the conversation was inadmissible under the rule against hearsay because the district court concluded that the plaintiff offered the recorded conversation for its truth, not for a separate purpose.

Although establishing in Trepel that hearsay rulings are reviewed for an abuse of discretion, the Sixth Circuit altered its position in Biegas v. Quickway Carriers, Inc. In Biegas, Richard Biegas was fatally struck by a semi-truck on the side of the road after he had stopped his vehicle to check for damage following contact with a highway overpass. After the accident, the passenger accompanying Biegas told the driver of the semi-truck that he warned Biegas “to get out of the road, [because] he was going to get hit.” In order to show contributory negligence, Quickway sought to introduce the passenger’s statement at trial. Despite an

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118 See id.
119 See id.
120 See id. at 717.
121 See id.
122 Id. Ultimately the court admitted the conversation because the content of the conversation was relied on by Trepel’s expert witnesses pursuant to Federal Rule of Evidence 703. See id.
124 See id. at 370.
125 Id. at 370, 378. Because there were actually two statements at issue in this case—the passenger’s first statement to Biegas and the passenger’s statement to the semi-truck driver—the statement offered in this case would have been barred by the rule against hearsay within hearsay. See FED. R. EVID. 805.
126 See Biegas, 573 F.3d at 377-78.
objection that the passenger’s statement was hearsay, the district court admitted the statement, ruling that it fell within the excited-utterance exception to the rule against hearsay.\textsuperscript{127}

When the Court of Appeals considered whether the passenger’s statement was properly admitted, it held that because hearsay is a question of law, it must be reviewed \textit{de novo}.\textsuperscript{128} After synthesizing the rule for application of the excited-utterance exception,\textsuperscript{129} the court applied the facts, noting that the passenger had “witnessed a terrible accident,” made the statement “within a few minutes of the accident,” and “had been in a state of shock” following the accident.\textsuperscript{130} In the end, the court determined that the excited-utterance exception applied to the passenger’s statement.\textsuperscript{131} Ultimately, the decision to apply \textit{de novo} review in \textit{Biegas} departed from the application of an abuse-of-discretion standard in \textit{Trepel}, resulting in a split within the Sixth Circuit.\textsuperscript{132}

\textit{2. The Ninth Circuit}

One of the first Ninth Circuit cases to illustrate the confusion surrounding a standard of review for hearsay was \textit{Orr v. Bank of America, NT & SA}.\textsuperscript{133} In \textit{Orr}, the plaintiff filed suit against Bank of America, her former employer, for interfering with contractual and business relations, slander, intentional infliction of emotional distress, and multiple violations of federal

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\textsuperscript{127} See \textit{id.} at 378. The excited utterance exception to the rule against hearsay applies when the out-of-court statement “describe[s] or explain[s] an event or condition while or immediately after the declarant perceived it.” \textit{FED. R. EVID.} 803(1).
\textsuperscript{128} \textit{Biegas}, 575 F.3d at 378 (citing \textit{United States v. Rodriguez-Lopez}, 565 F.3d 312, 314 (6th Cir. 2009)).
\textsuperscript{129} See \textit{id.} at 378-79. The court noted that “[t]he excited utterance exception applies when “‘1) there [is] an event, startling enough to cause nervous excitement; 2) the statement [is] made before there is an opportunity to . . . misrepresent; and 3) the statement [is] made while the person [is] under the stress of excitement caused by the event.’” \textit{Id.} at 379 (quoting \textit{United States v. Beverly}, 369 F.3d 516, 539-40 (6th Cir. 2004)).
\textsuperscript{130} \textit{Id.} at 379-80.
\textsuperscript{131} See \textit{id.} at 381.
\textsuperscript{132} Compare \textit{Biegas}, 575 F.3d at 378 (applying a \textit{de novo} standard of review to a district court’s hearsay ruling), \textit{with} \textit{Trepel v. Roadway Express, Inc.}, 194 F.3d 708, 716-17 (6th Cir. 1998) (applying an abuse-of-discretion standard of review to a district court’s hearsay ruling).
\textsuperscript{133} \textit{Orr v. Bank of Am., NT & SA}, 285 F.3d 764, 773 (9th Cir. 2002) (“We review the district court’s construction of the hearsay rule \textit{de novo} and its decision to exclude evidence under the hearsay rule for an abuse of discretion.”).
law. Before the case advanced to trial, the district court granted the defendant’s motion to dismiss the suit by ruling that a substantial amount of the evidence that the plaintiff intended to present, including an FBI report and a deposition, was inadmissible hearsay. 

On appeal, the Ninth Circuit could not fully determine what standard of review to apply to the district court’s ruling. First, the court relied on Joiner and indicated that an abuse-of-discretion standard would be the proper standard of review. However, when the court began examining the district court’s decision that the evidence was hearsay, it held that the district court’s interpretation of the rule against hearsay was to be reviewed de novo and that the district court’s decision to withhold evidence under the rule against hearsay would be subject to abuse-of-discretion review. Ultimately, after examining the plaintiff’s exhibits, the Ninth Circuit held that the exhibits were hearsay and were properly excluded by the district court.

After Orr, the Ninth Circuit became increasingly confused when reviewing hearsay rulings. In Wagner v. County of Maricopa, the plaintiff brought a suit against the County of Maricopa for subjecting her mentally ill brother, Eric Vogel, to numerous constitutional violations after he was arrested and jailed for burglary. The alleged violations occurred when Vogel was held down and his clothes were forcibly changed by five corrections officers. When Vogel was bailed out of jail by his mother and sister, he informed them that he had been

134 See id. at 772.
135 See id. (“The district court found that twenty-two of the twenty-five exhibits submitted by Orr were inadmissible as hearsay or for lack of proper authentication.”).
136 See id. at 773-78.
137 See id. at 773.
138 See id. at 778.
139 See id. at 779. Considering that the Ninth Circuit took the liberty to specifically examine each of the exhibits excluded as hearsay and specifically identified the hearsay rule at issue, it is apparent that it applied a de novo standard of review. See id.
140 Compare United States v. Stinson, 647 F.3d 1196, 1210 (9th Cir. 2011) (“We review a district court’s evidentiary rulings for abuse of discretion.”) with Mahone v. Lehman, 347 F.3d 1170, 1173-74 (“We review the district court’s construction of the hearsay rule de novo . . . .”).
141 See Wagner v. Cnty. of Maricopa, 706 F.3d 942, 945 (9th Cir. 2013).
142 See id.
Vogel could not testify about his treatment in the jail at trial, however, because he died before the action commenced. At trial, the district court excluded Vogel’s statements to his mother and sister as hearsay. Subsequently, a jury found in favor of the defendants.

When examining the admissibility of Vogel’s statements on appeal, a divided panel of the Ninth Circuit ruled that abuse of discretion was the proper standard of review for evidentiary rulings. However, the panel majority noted that “it is not entirely clear whether construction of a hearsay rule is a matter of discretion or a legal issue subject to de novo review,” and added that the result would be the same under either standard of review. The panel majority found that Vogel’s statements were not hearsay because they were not offered to prove the truth of the matter asserted or, alternatively, that the statements fit within the then-existing state-of-mind exception pursuant to Rule 803(3). Thus, the panel majority concluded that Vogel’s statements should have been admitted, and the case was remanded.

Judge Smith, in a spirited dissent, first disagreed with the standard of review attributed to hearsay by the panel majority. Judge Smith suggested that, in light of Orr, the district court’s hearsay rulings should be reviewed de novo, not for an abuse of discretion. Furthermore, Judge Smith argued that if an abuse-of-discretion standard was applied to the district court’s

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143 See id. at 947.
144 See id. at 945.
145 See id. at 945-46.
146 See id. at 946.
147 See id.
148 Id.
149 See id. at 947 (“Here, Vogel’s statements were offered to establish his state of mind, not that he was raped or that he went through the dress-out procedure.”) (emphasis added). Rule 803(3) provides that “[a] statement of the declarant’s then-existing state of mind . . . or emotional, sensory, or physical condition” is an exception to the rule against hearsay. Fed. R. Evid. 803(3). However, it must be noted that, in the Ninth Circuit, to determine whether a statement complies with Rule 803(3), a district court must find that the statement is made contemporaneously and without a chance for reflection. See Wagner, 706 F.3d at 951 (citing United States v. Poncicelli, 622 F.2d 985, 991 (9th Cir. 1980)).
150 Wagner, 706 F.3d at 947, 948.
151 See id. at 949 (Smith, J., dissenting).
152 See id. at 950.
determination that Vogel’s statements were hearsay, the majority could not have concluded that the district court’s application of the hearsay rule was “‘illogical,’ [] ‘implausible,’ or [] ‘without support in inferences that may be drawn from the facts in the record’” because the record indicated that the plaintiff might have testified about Vogel’s statements to prove the truth of the matter asserted.153 Thus, Judge Smith concluded that the district court’s decision to exclude Vogel’s statements would not have constituted an abuse of discretion.154

After determining that de novo review should apply and admonishing the panel majority’s incorrect application of an abuse-of-discretion standard, Judge Smith proceeded to analyze the application of the then-existing state-of-mind exception.155 In doing so, Judge Smith noted that whether a declarant’s statement is the result of a then-existing state of mind is a factual determination best left to the expertise of the district court.156 Accordingly, Judge Smith would have held that the district court properly excluded Wagner’s statements because (1) the record suggested that the statements were being offered to prove the truth of the matter asserted and (2) because the decision not to admit the statements pursuant to the then-existing state-of-mind exception was within the fact-finding expertise of the district court.157

The Orr decision, where the Ninth Circuit utilized abuse-of-discretion and de novo review, and the Wagner decision, where the Ninth Circuit declined to discuss the appropriate standard of review, exacerbated the confusion within the Ninth Circuit.158 Thus, when examining the split within the Sixth Circuit and the remarkable confusion within the Ninth Circuit, it is evident that the courts of appeals must determine what standard of review should be applied to a

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153 Id. at 949-50.
154 See id. at 950, 950 n.1.
155 See id. at 951.
156 Id. at 951-52.
157 See id. at 950-52.
158 See McDermott, supra note 94, at 659.
Accordingly, it is appropriate to discuss solutions that have been proposed before fashioning a new approach.\(^\text{160}\)

**IV. PRIOR PROPOSED SOLUTIONS**

Although there is significant confusion among the circuits regarding the application of a standard of review for hearsay rulings, there have been few proposed solutions.\(^\text{161}\) The limited number of solutions available conflict on one basic premise: whether hearsay should be reviewed for an abuse of discretion.\(^\text{162}\) While one commentator maintains the belief that *Joiner* mandates an abuse-of-discretion standard, another notes the problems with the application of the abuse-of-discretion standard to hearsay rulings.\(^\text{163}\)

One proposed solution suggests that appellate courts should simply bestow an abuse-of-discretion standard upon hearsay rulings.\(^\text{164}\) Proponents of this approach opine that an abuse-of-discretion standard should be used because it would strictly adhere to Supreme Court precedent and give substantial deference to the district court.\(^\text{165}\) Accordingly, an appellate court would be precluded from interfering with the district court’s trial expertise when dealing with the rule against hearsay.\(^\text{166}\) Furthermore, it is argued that an abuse-of-discretion standard inherently allows an appellate court to overturn a district court’s incorrect interpretation of hearsay because discretion has been abused whenever a district court makes a legal error.\(^\text{167}\)

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\(^{159}\) See supra Part II.B (discussing the intra-circuit split within the Sixth Circuit and the confusion within the Ninth Circuit).

\(^{160}\) See infra Part III (discussing the proposed solutions of other commentators).

\(^{161}\) See Bruno, supra note 23, at 53-54; McDermott, supra note 94, at 668-69.

\(^{162}\) See Bruno, supra note 23, at 53-54; McDermott, supra note 94, at 668-69.

\(^{163}\) Compare Bruno, supra note 23, at 53-54 (“I would recommend a return to the traditional abuse of discretion standard . . . .”), with McDermott, supra note 94, at 668-69 (“Circuit courts should refuse to apply this [abuse of discretion] standard to [hearsay] determinations . . . .”).

\(^{164}\) See Bruno, supra note 23, at 53.

\(^{165}\) See id.

\(^{166}\) See id. at 51.

\(^{167}\) See id. at 51-53 (citing Koon v. United States, 518 U.S. 81, 100 (1996)).
In opposition, another commentator argues that abuse of discretion is not an appropriate standard to apply to hearsay rulings.\textsuperscript{168} It is noted that affording such substantial deference to a district court’s ruling based on confusing evidentiary rules will ensure that district court rulings will typically be upheld, even if those rulings are incorrect.\textsuperscript{169} Furthermore, it is argued that hearsay rules within the Federal Rules of Evidence do not afford district courts discretion and that adherence to the rule of law suggests that the appellate courts should utilize a lesser standard of review.\textsuperscript{170} Despite the aforementioned concerns, there has been reluctance to suggest a new approach that should be utilized for the review of a district court’s hearsay rulings.\textsuperscript{171}

V. DISTINGUISHING THE LAW AND FACTS: DETERMINING WHICH STANDARD SHOULD APPLY

A thorough review of the hearsay rule, Supreme Court precedent, circuit splits, and conflicting solutions indicates that the federal courts of appeals must adopt an approach that balances the discretion afforded to district courts in factual inquiries and evidentiary rulings against the appellate court’s interest in ensuring that the rule against hearsay is correctly interpreted.\textsuperscript{172} In order to fashion such an approach, the courts of appeals must first ensure that \textit{Joiner} is correctly understood. Second, the courts of appeals must consider the rationale supporting standards of review and determine which rationale fits the hearsay ruling made by the district court.\textsuperscript{173}

A. The Narrow Holding of \textit{Joiner}

In determining that abuse of discretion is the proper standard for hearsay rulings, appellate courts have often cited the Supreme Court’s language in \textit{Joiner} stating that “abuse of

\textsuperscript{168} See McDermott, \textit{supra} note 94, at 668.

\textsuperscript{169} See id. This could result in significant hearsay errors determining the outcome of cases. See id.

\textsuperscript{170} See id.

\textsuperscript{171} “In the next appropriate case, the [Supreme] Court should grant certiorari and make explicit the distinction between the appropriate standards of review for hearsay and expert testimony rulings.” See id. at 669.

\textsuperscript{172} See \textit{supra} Parts III & IV.

\textsuperscript{173} For example, was the district court merely deciding whether a statement constituted hearsay pursuant to the rules, or was it making factual findings to determine a hearsay statement’s ability to fall within an exception?
discretion is the proper standard of review of a district court’s evidentiary rulings.”

However, that seemingly broad principle is ultimately narrowed by the conclusion of the opinion, which states that an abuse-of-discretion standard is appropriate for reviewing a district court’s decision relating to the admissibility of scientific evidence.

Thus, *Joiner*’s holding was narrow in scope: abuse of discretion is the proper standard for expert testimony. Moreover, *Joiner*’s extension of an abuse-of-discretion standard to evidentiary rulings derived specifically from cases that involved a district court’s ultimate decision to admit or exclude evidence—not its specific interpretation of the Federal Rules of Evidence.

Therefore, if a federal court of appeals concluded that the district court’s decision to admit or exclude hearsay was ultimately based on its discretion, as opposed to an interpretation of law or finding of fact, the court should apply an abuse-of-discretion standard of review consistent with the broad premise in *Joiner*.

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175 *Joiner*, 522 U.S. at 146 (“[A]buse of discretion is the proper standard by which to review a district court’s decision to admit or exclude scientific evidence.”) (emphasis added). The Court continues, noting that “because it was within the District Court’s discretion to conclude that the studies upon which the experts relied were not sufficient . . . the District Court did not abuse its discretion in excluding their testimony.” Id.

176 See id. at 138-39. For instance, the Court in *Joiner* relied on *Old Chief*, which dealt with evidence that was relevant yet prejudicial and fell within the district court’s expressed discretion under Federal Rule of Evidence 403. See Fed. R. Evid. 403; *Joiner*, 522 U.S. at 141; *Old Chief*, 522 U.S. at 174-75. Rule 403 expressly mandates district court discretion by stating, “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”. Fed. R. Evid. 403 (emphasis added).

177 See supra notes 161-62 and accompanying text.

178 Fed. R. Evid. 104(a) (“The court must decide any preliminary question whether a witness is qualified, a privilege exists, or evidence is admissible.”).

179 *Joiner*, 522 U.S. at 141 (asserting that “abuse of discretion is the proper standard of review for a district court’s evidentiary rulings”) (emphasis added).
B. The Misapplication of Abuse of Discretion

If a court of appeals asserts that abuse of discretion is the proper standard of review for a district court’s hearsay ruling, the district court’s ruling should only be examined for reasonableness. Yet, the Sixth Circuit in Trepel, notwithstanding the assertion that it was adopting an abuse-of-discretion standard of review, ultimately retained a *de novo* standard. Rather than focusing on whether the district court’s finding of hearsay was reasonable or permissible, the court reviewed the tape-recorded telephone conversation and the purpose behind offering the statement as evidence. After the court concluded its review, it concluded that Trepel’s phone conversation was inadmissible hearsay, not that the district court’s exclusion of the statement was permissible under its afforded discretion. Because the court ultimately agreed with the district court’s ruling and analyzed the offered statements within the telephone conversation in lieu of analyzing the reasonableness of the district court’s decision, the standard of review applied was *de novo*, not abuse of discretion.

The Ninth Circuit made the same mistake in *Orr*. Despite asserting that the proper standard of review was abuse of discretion, the court embarked upon a complete *de novo* review of the facts. The court examined the substance of the FBI report and the deposition to determine whether inadmissible hearsay existed and an exception to the hearsay rule applied instead of whether the district court’s decision to exclude the evidence as hearsay was

180 See Nicholas, *supra* note 54, at 533 (describing how an appellate court can find an abuse of discretion).
182 *See id.* at 717.
183 *See Nicholas, supra* note 54, at 533.
184 *Trepel*, 194 F.3d at 717 (inquiring whether Trepel sought to offer the phone conversation for the truth of the matter asserted).
185 *Id.* (“It is not clear to us how a trial court would have ‘discretion’ to ignore the definition of inadmissible hearsay . . .”). By bracketing the word discretion in quotation marks, it is apparent that the court noted the lack of a true abuse-of-discretion standard applied to the district court’s hearsay ruling.
186 *See id.*
187 *See Nicholas, supra* note 54, at 532-33.
188 *See Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 778-79 (9th Cir. 2002).
189 *See id.*
reasonable.\textsuperscript{190} Had the court truly been utilizing an abuse-of-discretion standard, the analysis would have focused on the district court’s final decision to exclude the hearsay and whether that decision was reasonably permissible.\textsuperscript{191}

Even with the adoption of an abuse-of-discretion standard to comply with \textit{Joiner}, the Sixth and Ninth Circuits nevertheless conducted a \textit{de novo} review of a district court’s decision to classify statements as hearsay.\textsuperscript{192} The reason is straightforward. Hearsay, which is defined and prohibited by the Federal Rules of Evidence subject to various exclusions and exceptions,\textsuperscript{193} is inherently a rule of law.\textsuperscript{194} As a result, a district court should not have the discretion to ignore or misinterpret the definitions, exclusions, and exceptions of the rule against hearsay within the Federal Rules of Evidence.\textsuperscript{195}

C. The Under-Application of Clearly Erroneous

Notably, the federal courts of appeals have not been utilizing a clear-error standard to review district court hearsay rulings that turn on factual inquiries.\textsuperscript{196} This is significant because clear error is the traditional standard afforded to factual findings,\textsuperscript{197} and several hearsay inquiries require the district court to make a finding of fact.\textsuperscript{198} As a result, it is arguable that clear error is the most appropriate standard of review because of the deference that is afforded to the district

\textsuperscript{190} \textit{See id.}
\textsuperscript{191} Nicholas, \textit{supra} note 54, at 532.
\textsuperscript{192} \textit{See Orr}, 285 F.3d at 778-79; Trepel v. Roadway Express, Inc., 194 F.3d 708, 716-17 (6th Cir. 1999).
\textsuperscript{193} \textit{See generally} Fed. R. Evid. 801-804.
\textsuperscript{194} \textit{See Bruno, supra} note 23, at 22 (“[M]any courts have decided that, because the definition of hearsay is a legal definition, the courts simply have to make legal determinations.”); Nicholas, \textit{supra} note 54, at 554 (noting that “something . . . ‘offered to prove the truth of the matter asserted[’] . . . is a question of law that should be reviewed \textit{de novo}”).
\textsuperscript{195} Trepel, 194 F.3d at 716.
\textsuperscript{196} \textit{See Bruno, supra} note 23, at 41-42 (discussing how the only courts to utilize a clear-error standard are courts in Nebraska and Oregon).
\textsuperscript{197} \textit{See supra} Section II.B (discussing the clear-error standard of review in the federal courts of appeals).
\textsuperscript{198} For example, Rule 803 exceptions require a district court to determine whether the declarant was making a statement as a result of a present sense impression, an excited utterance, or a then-existing mental, emotional, or physical condition. Fed. R. Evid. 803.
court and because the appellate court may still review the district court’s construction of the rule against hearsay, its exclusions, and its exceptions.\footnote{See Bruno, \textit{supra} note 23, at 41-43 (discussing the application of a clear-error standard in Nebraska and Oregon).}

The question then becomes why the federal courts of appeals are not using a clear-error standard when considering issues of hearsay upon appeal. One reason is the broad language in \textit{Joiner} discussed above.\footnote{See \textit{supra} Section V.A.} If the courts of appeals appear to be mandated to adhere to an abuse-of-discretion standard, clearly-erroneous review is simply not an option.\footnote{See Trepel v. Roadway Express, Inc., 194 F.3d 708, 716-17 (6th Cir. 1999) ("Therefore, in disregard of our heretofore well-settled precedent that hearsay evidentiary rulings are reviewed \textit{de novo}, . . . we shall review the district court’s ruling for an abuse of discretion.").} But, when considering the numerous factual inquiries within a hearsay analysis, it becomes apparent that a court will often base its decision to admit or exclude hearsay upon the facts of a case.\footnote{See id. at 378.} For example, because \textit{Biegas} required the district court to inquire whether the declarant made an excited utterance, the district court’s decision should have been afforded deference, and the Sixth Circuit should not have intruded into the realm of fact finding.\footnote{See, e.g., Biegas v. Quickway Carriers, Inc., 573 F.3d 365, 378-79 (6th Cir. 2009); \textit{supra} Subsection II.B.1 (discussing the Sixth Circuit’s \textit{de novo} review of the district court’s hearsay ruling).} Accordingly, the federal courts of appeals should be willing to apply a clear-error standard of review to the factual inquiries within a hearsay analysis.

D. \textit{De Novo} Review: The Appellate Courts’ Intrusion into Fact Finding

In comparison, courts applying \textit{de novo} review have also encountered difficulty maintaining the separate functions of the district and appellate courts.\footnote{See \textit{supra}, Biegas, 573 F.3d at 378-79 (reviewing \textit{de novo} the district court’s finding that the excited-utterance exception applied).} For example, although the Sixth Circuit in \textit{Biegas} indicated that \textit{de novo} review should be utilized for hearsay,\footnote{See id. at 378.} the

\footnotetext[199]{See Bruno, \textit{supra} note 23, at 41-43 (discussing the application of a clear-error standard in Nebraska and Oregon).}  
\footnotetext[200]{See \textit{supra} Section V.A.}  
\footnotetext[201]{See Trepel v. Roadway Express, Inc., 194 F.3d 708, 716-17 (6th Cir. 1999) ("Therefore, in disregard of our heretofore well-settled precedent that hearsay evidentiary rulings are reviewed \textit{de novo}, . . . we shall review the district court’s ruling for an abuse of discretion.").}  
\footnotetext[202]{See, e.g., Shepard v. United States, 290 U.S. 96, 98-101 (1933) (holding that, as a matter of fact, Petitioner did not make her statements as a dying declarant).}  
\footnotetext[203]{See Biegas v. Quickway Carriers, Inc., 573 F.3d 365, 378-79 (6th Cir. 2009); \textit{supra} Subsection II.B.1 (discussing the Sixth Circuit’s \textit{de novo} review of the district court’s hearsay ruling).}  
\footnotetext[204]{See, e.g., Biegas, 573 F.3d at 378-79 (reviewing \textit{de novo} the district court’s finding that the excited-utterance exception applied).}  
\footnotetext[205]{See id. at 378.}
court went beyond determining whether the passenger’s statement was hearsay.\textsuperscript{206} The court proceeded to examine whether the district court correctly admitted that statement under the excited-utterance exception—a factual, rather than legal, question.\textsuperscript{207} In doing so, the court drew several conclusions from facts in the record.\textsuperscript{208} First, the court concluded that the events witnessed by the passenger accompanying Biegas were enough to cause excitement.\textsuperscript{209} Second, the court concluded that the passenger had an insufficient amount of time to fabricate his statement.\textsuperscript{210} Third, the court concluded that the passenger was still excited when his statements were made.\textsuperscript{211} Each of these conclusions were based on a factual finding traditionally beyond the purview of an appellate court.\textsuperscript{212} Thus, even though the Sixth Circuit affirmed the district court,\textsuperscript{213} it should have afforded the district court’s application of the excited-utterance exception more deference.\textsuperscript{214}

E. No Standard of Review: Wagner’s Perplexing Paradox

As demonstrated above, there are problems inherent with an abuse-of-discretion standard and a \textit{de novo} standard when not properly applied, and courts have struggled to determine which standard should apply.\textsuperscript{215} As a result of this struggle, one of the more recent cases to address the issue, \textit{Wagner}, declined to apply a standard of review entirely, indicating that it would reach the

\textsuperscript{206} See id. at 379. The court found that the passenger’s statement was hearsay as a matter of law. See id. Had the court concluded its analysis and affirmed that the statement was hearsay pursuant to the Federal Rules of Evidence, it would have properly performed the duty of an appellate court. See id.

\textsuperscript{207} See id.

\textsuperscript{208} See id. at 379-80.

\textsuperscript{209} Id. at 379.

\textsuperscript{210} See id.

\textsuperscript{211} Id. at 380.

\textsuperscript{212} See Nicholas, supra note 54, at 533-34 (discussing the expertise and experience a district court has when making findings of fact compared with the appellate court’s ability to research and review issues of law and policy).

\textsuperscript{213} See Biegas, 573 F.3d at 381.

\textsuperscript{214} See Nicholas, supra note 54, at 534 (noting that findings of fact should be reviewed with deference).

\textsuperscript{215} See supra Sections IV.B-C (discussing how courts have misapplied an abuse-of-discretion standard by reviewing factual findings and how a court using a \textit{de novo} standard did not give deference to a district court’s factual findings).
same result under either standard. However, as Judge Smith noted in his dissent, the result would not have been the same utilizing either standard. While the majority reversed the district court’s decision to exclude Vogel’s statements, Smith noted that review under an abuse-of-discretion standard would not permit the same result because the district court’s decision was not “‘illogical, [] ‘implausible,’ [] or without ‘support in inferences that may be drawn from the facts in the record.’” Accordingly, Judge Smith’s dissent amply depicts the distinction between each standard of review—an abuse-of-discretion standard within the realm of hearsay does not allow an appellate court to properly review a district court’s interpretation of the rule, but de novo review undermines a district court’s expertise in making factual conclusions necessary for many hearsay issues.

Judge Smith’s approach in Wagner is somewhat demonstrative of how the federal courts of appeals should review a district court’s hearsay rulings. First, Judge Smith addressed de novo the legal question of whether Vogel’s statements were hearsay. After analyzing the statements under the scrutiny of Federal Rule of Evidence 801, Judge Smith determined that the statement was offered to prove the truth of the matter asserted and constituted an impermissible hearsay statement. However, when Judge Smith proceeded to evaluate the district court’s decision to not admit the hearsay pursuant to the exception for statements of a then-existing state

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216 Wagner v. Cnty. of Maricopa, 706 F.3d 942, 946 (9th Cir. 2013) (“We need not resolve the ambiguity here because our conclusions would be the same under either standard.”).
217 See id. at 949-53 (Smith, J., dissenting) (indicating that the appellate court must give substantial abuse-of-discretion deference which would result in affirmation or provide de novo review that would allow an inquiry allowing the reversal of the district court’s hearsay rulings).
218 Id. at 950 (quoting Andersen v. City of Bessemer City, N.C., 470 U.S. 564, 577 (1985)).
219 Id. at 949-50 (discussing how the majority improperly construed the rule against hearsay and how the majority failed to apply the “substantial deference” necessary for an abuse-of-discretion review).
220 See McDermott, supra note 94, at 659 (discussing how “the battle between the majority and dissent in Wagner is illustrative of the difficulty in determining the standard of review for hearsay rulings”).
221 See Wagner, 706 F.3d at 948-53.
222 See id. at 950 (“Wagner’s testimony was offered to prove the truth of the matter asserted . . . . The district court did not incorrectly construe or apply the hearsay rule.”).
223 Id. at 951.
of mind under Rule 803(3), he noted that the district court did not reach an “illogical” result based on the facts in the record and that “[t]he district court did not abuse its discretion.” In sum, when Judge Smith evaluated the district court’s hearsay rulings, he first distinguished whether the district court made a legal, factual, or discretionary determination. After distinguishing between law and fact, Judge Smith applied what he believed to be the appropriate standard of review.

VI. A NEW FEDERAL APPROACH: THE PRELIMINARY INQUIRY

As a result of the aforementioned conflict between the applicable standards of review for hearsay rulings, it is evident that there is not a universal approach. Thus, in order to ensure that the appropriate functions of the district and appellate courts are respected, appellate courts, before applying a standard of review, should inquire (1) whether the district court’s hearsay ruling was rooted in an interpretation of the rule against hearsay; (2) whether the ruling was rooted in a finding of fact specific to an applicable exclusion or exception to the rule against hearsay; or (3) whether the decision to admit or exclude stemmed from the district court’s evidentiary discretion. If the hearsay ruling stemmed from the district court’s interpretation of

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[224] FED. R. EVID. 803(3). Application of the then-existing state of mind exception is contingent upon a factual inquiry where a district court must determine whether the declarant’s statement reveals the declarant’s “emotional sensory[] or physical condition,” rather than a “memory or belief to prove the fact remembered.” Id.

[225] Wagner, 706 F.3d at 953. Although Judge Smith applied an abuse-of-discretion standard in accord with the precedent of the Ninth Circuit, it is notable that under the proposed approach, a determination that the statement was made in a then-existing state of mind would be a factual determination afforded clearly-erroneous review. See id. at 949-50; infra Part VI (discussing the application of clearly-erroneous review for the application of hearsay exceptions based on factual determinations).

[226] See Wagner, 706 F.3d at 950-53 (discussing whether the statement in question was hearsay by definition and what facts were used to determine whether the then-existing state of mind exception applied).

[227] See id. at 949, 953 (implying that de novo review is utilized when “determining whether a statement is hearsay” and that the district court did not abuse its discretion when it applied the then-existing state of mind exception).

[228] See supra Sections IV.B-D (analyzing the impropriety of abuse-of-discretion and de novo review in various situations while demonstrating that Judge Smith’s dissent correctly approaches the standard of review dilemma).

[229] For example, a district court’s determination of whether a statement is hearsay under the Federal Rules of Evidence would be a legal inquiry subject to de novo review. See Bruno, supra note 23, at 22 (“[M]any courts have decided that, because the definition of hearsay is a legal definition, the courts simply have to make legal determinations.”); Nicholas, supra note 54, at 554 (noting that “something . . . ‘offered to prove the truth of the matter asserted[] . . . is a question of law that should be reviewed de novo[]’”). In contrast, because a district court’s
the Federal Rules of Evidence, the appellate court should review the lower court’s ruling *de novo*. If the ruling was based upon a hearsay exclusion or exception that applied because of a factual finding, the appellate court should yield to the district court’s expertise under the clearly erroneous standard. Finally, if the hearsay ruling related to the overall admissibility of the statement—such as its relevance or potential for unfair prejudice—the appellate court should completely defer to the district court’s evidentiary expertise pursuant to the abuse-of-discretion standard.

This approach, which would allow the reviewing court to preliminarily inquire whether the district court’s ruling was legal, factual, or discretionary, should be utilized for three reasons. First, a preliminary inquiry revealing that a district court made a legal determination would allow an appellate court to apply *de novo* review in accord with that court’s precedent. Second, the use of an initial inquiry would allow the appellate courts to make determinations about the district court’s hearsay rulings that would prevent the district court’s ruling from being overly insulated with inappropriate deference or the appellate courts from becoming the finder of fact. Finally, because a preliminary inquiry revealing a discretionary ruling would result in application of an abuse-of-discretion standard of review, the appellate courts would comply with

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230 See *Wagner*, 706 F.3d at 949 (citing *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 778 (9th Cir. 2002), *United States v. Collicott*, 92 F.3d 973, 978-82 (9th Cir. 1996), and *United States v. Warren*, 25 F.3d 890, 894-95 (9th Cir. 1994)) (explaining Ninth Circuit precedent that holds “a district court’s construction of the hearsay rule” is reviewed *de novo*); *Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 378 (6th Cir. 2009) (citing *United States v. Rodriguez-Lopez*, 565 F.3d 312, 314 (6th Cir. 2009)) (applying a *de novo* standard of review to whether a statement is hearsay based on precedent).

231 See *McDermott*, *supra* note 94, at 668 (discussing how “application of abuse of discretion review to hearsay rules is nonsensical”).
the broad proposition stemming from Joiner that evidentiary rulings are reviewed for an abuse of discretion.\textsuperscript{232}

While Joiner mandates abuse-of-discretion review for overall evidentiary rulings involving a hearsay statement’s relevancy or danger of unfair prejudice,\textsuperscript{233} an approach permitting the court of appeals to make an initial inquiry into the underlying rationale of the district court’s hearsay ruling would allow an appellate court to adhere to precedent and to its proper function.\textsuperscript{234} If the reviewing court determined that the district court excluded a statement based upon the definition of hearsay in Rule 801,\textsuperscript{235} the court could declare \textit{de novo} review and properly examine whether the district court correctly applied a rule of law.\textsuperscript{236} However, the district court’s hearsay ruling would be awarded clear-error deference if the reviewing court’s preliminary inquiry determined that the ruling was based upon a factual finding\textsuperscript{237} in accord with Supreme Court and circuit precedent.\textsuperscript{238} Therefore, following a preliminary inquiry into whether the district court’s hearsay ruling derived from law, fact, or discretion, the proposed approach for reviewing hearsay would provide that \textit{de novo} review is applied to legal conclusions, clearly

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\bibitem{233} See id. (asserting that “abuse of discretion is the proper standard of review for a district court’s \textit{evidentiary rulings}”) (emphasis added).
\bibitem{234} See Trepel v. Roadway Express, Inc., 194 F.3d 708, 717 (6th Cir. 1999) (disregarding precedent providing a \textit{de novo} standard of review for hearsay rulings); Maloy, \textit{supra} note 45, at 633 (discussing circuit court precedent for reviewing a district court’s factual findings for clear error).
\bibitem{235} \textit{Fed. R. Evid.} 801.
\bibitem{236} Such an approach would be in-line with the traditional function of the appellate court. See Oldfather, \textit{supra} note 47.
\bibitem{237} See, \textit{e.g.}, State v. Workman, 122 P.3d 639, 642 (Utah 2005) (“In reviewing the admissibility of hearsay . . . factual determinations are reviewed for clear error . . .”).
\bibitem{238} See United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) (extending a clearly-erroneous standard of review to factual findings); Maloy, \textit{supra} note 45, at 633 (discussing circuit court precedent for reviewing a district court’s factual findings for clear error).
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erroneous review is applied to factual findings, and abuse-of-discretion review is afforded to the overall question of admissibility.\textsuperscript{239}

A. Practical Considerations

Because the Supreme Court has established that “[a] district court by definition abuses its discretion when it makes an error of law,”\textsuperscript{240} it may be inherent to suggest that a strict abuse-of-discretion standard should be utilized as the most straightforward approach when applying a standard of review to hearsay.\textsuperscript{241} After all, if \textit{Joiner} holds that evidentiary rulings are reviewed for abuse of discretion and other precedent establishes that an error of law is an abuse of discretion \textit{per se}, it is logical to conclude that abuse of discretion is the sole appropriate standard.\textsuperscript{242} However, this approach generally fails to account for multiple interpretations of the abuse-of-discretion standard suggesting that a decision can only be overturned under that standard if the district court’s decision is unreasonable or illogical.\textsuperscript{243} Again, because hearsay review involves three distinct issues (legal, factual, and discretionary), it is evident that district courts could reasonably—albeit incorrectly—conclude that a statement was hearsay.\textsuperscript{244} Such a conclusion would leave an appellate court in the precarious position of affirming an incorrect legal or factual conclusion, merely because the conclusion was a mistake over which minds could reasonably differ.\textsuperscript{245}

\textsuperscript{239} \textit{Workman}, 122 P.3d at 642. Although this approach derives from a logical application of the Federal Rules of Evidence and Supreme Court and circuit precedent, the rule is best summed up by Utah law, which is similar to the proposed solution.

\textsuperscript{240} \textit{Koon v. United States}, 518 U.S. 81, 100 (1996).

\textsuperscript{241} See Bruno, \textit{supra} note 23, at 52 (advocating for the use of an abuse-of-discretion standard of review for hearsay rulings based upon \textit{Joiner} and \textit{Koon}).

\textsuperscript{242} See id.

\textsuperscript{243} See id. at 52-53 (examining why appellate courts are hesitant to adopt a strict abuse-of-discretion standard for hearsay rulings).

\textsuperscript{244} See Wagner v. Cnty. of Maricopa, 706 F.3d 942, 953 (9th Cir. 2013) (Smith, J., dissenting) (describing why the district court’s decision was not “illogical”).

\textsuperscript{245} Bruno, \textit{supra} note 23, at 53.
Moreover, it is unnecessary for the Supreme Court to reconsider this issue. While clarity from the Court certainly could be useful, the case causing the predominant confusion, *Joiner*, has a narrow holding that provides abuse of discretion applies to district court rulings involving expert testimony. Thus, in applying the proposed preliminary inquiry approach, the federal courts of appeals can continue to apply an abuse-of-discretion standard to expert testimony rulings and similar discretionary rulings to comply with *stare decisis*. Furthermore, applying an abuse-of-discretion standard to traditional discretionary rulings would not limit the appellate courts’ ability to apply a less deferential standard based on its intra-circuit precedent, so long as the appellate court first inquires whether the district court’s ruling is discretionary, factual, or legal.

B. Application

As mentioned above, it is apparent that the United States Court of Appeals for the Eleventh Circuit improperly affirmed an incorrect hearsay ruling by the district court in *United States v. Joshi*. Had the Eleventh Circuit applied the proposed approach, it would have first analyzed whether the district court made a decision based upon a legal interpretation, a factual finding, or upon its afforded discretion. While the district court made a factual finding as to whether Joshi actually nodded his head, and used its discretion to admit the evidence for relevance, the court needed to interpret the Federal Rules of Evidence to determine whether

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246 See McDermott, *supra* note 94, at 669 (“In the next appropriate case, the Court should grant *certiorari* and make explicit the distinction between the appropriate standards of review for hearsay and expert testimony rulings.”).

247 See id.

248 See *supra* notes 175-81 and accompanying text (discussing the narrow holding of *Joiner*).

249 See *supra* notes 175-81 and accompanying text.

250 See *supra* notes 230-41 and accompanying text (discussing the corresponding standard of review for discretionary, factual, and legal determinations relating to hearsay).

251 See *supra* notes 1-4 and accompanying text.

252 See *supra* notes 214-18 and accompanying text.

253 See United States v. Joshi, 896 F.2d 1303, 1311 (11th Cir. 1990).
the adoptive-admission exclusion to the rule against hearsay applied.\textsuperscript{254} In the Eleventh Circuit, that determination required the existence of facts that would lead the jury to believe that Joshi understood the statement to which he responded.\textsuperscript{255} Thus, the Eleventh Circuit should have applied \textit{de novo} review to the district court’s construction of the adoptive-admission exclusion pursuant to the proposed approach.\textsuperscript{256} In applying the \textit{de novo} standard, the court would have relied on its own interpretation of the Federal Rules of Evidence and the Eleventh Circuit’s imposed requirements, and would not have merely affirmed the district court’s decision because no “abuse of discretion” occurred.\textsuperscript{257} Thus, the preliminary inquiry approach would have allowed the Eleventh Circuit to afford appropriate deference to the district court’s factual and discretionary rulings, but would have allowed the Eleventh Circuit to properly scrutinize the district court’s interpretation of the Federal Rules of Evidence and circuit precedent.

\textbf{CONCLUSION}

Because the exclusion or admission of hearsay can significantly alter the outcome of a trial, a district court’s hearsay ruling will often be a critical issue reviewed upon appeal.\textsuperscript{258} There is not one universal standard of review that applies to hearsay rulings.\textsuperscript{259} Because some appellate courts applying an abuse-of-discretion standard ultimately shifted to a \textit{de novo} standard,\textsuperscript{260} and because other appellate courts applying a \textit{de novo} standard of review ultimately made factual

\textsuperscript{254} See id. (“Joshi claims that the trial court erred in admitting the statement as an adoptive admission under Fed. R. Evid. 801(d)(2)(B) . . . .”).

\textsuperscript{255} See id. (quoting United States v. Jenkins, 779 F.2d 606, 612 (11th Cir. 1986) (“[T]here must be sufficient foundational facts from which the jury could infer that the defendant ‘heard, understood, and acquiesced in the statement.’”)).

\textsuperscript{256} See supra notes 214-18 and accompanying text.

\textsuperscript{257} Joshi, 896 F.2d at 1312. While it is not possible to determine how the Eleventh Circuit would ultimately have ruled, it is noteworthy that the court would have been able to closely examine the district court’s legal interpretation.

\textsuperscript{258} See discussion supra notes 1-7 and accompanying text (discussing the impact the admission of a hearsay statement had on the trial of Kishor Joshi).

\textsuperscript{259} See supra Part III (discussing the application of different standard of review by different courts).

\textsuperscript{260} See supra Section V.B (analyzing how in Trepel and Orr the Sixth and Ninth Circuits, respectively, reviewed hearsay rulings \textit{de novo} despite awarding an abuse-of-discretion standard).
conclusions, an approach is needed to ensure that the separate and proper functions of the district and appellate courts are maintained while also complying with Supreme Court and circuit precedent.

Accordingly, an appellate court should preliminarily determine whether the district court relied on legal conclusions, factual findings, or a discretionary determination in making a hearsay ruling. While the rules governing the definition of hearsay are laws and must be subject to de novo review, the factual findings made by a district court should be entitled to clear-error review because a district court is best situated to make such findings. Finally, if the district court ultimately made its ruling through an exercise of discretion, the appellate court should afford an abuse-of-discretion standard of review.

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261 See supra Section V.C (analyzing how the Sixth Circuit in Biegas made factual conclusions related to the application of the excited utterance hearsay exception).
262 See supra note 47.
263 See supra Part VI (discussing the need to maintain the distinction between the district and appellate court functions and the need to adhere to current precedent).
264 See supra Part VI (“[I]n order to ensure that the separate functions of the district and appellate courts are upheld . . . should inquire whether the district court’s hearsay ruling was rooted in an interpretation of the rule against hearsay, . . . a finding of fact . . . , or [] stemmed from the district court’s evidentiary discretion under Federal Rule of Evidence 104.”).
265 See supra Part V.
266 See supra Section II.A and accompanying notes (disclosing that district court judges have greater experience and expertise in making evidentiary rulings and have the opportunity to judge the courtroom demeanor of witnesses).
267 See supra Part I (discussing a district court’s discretion to admit or exclude evidence).