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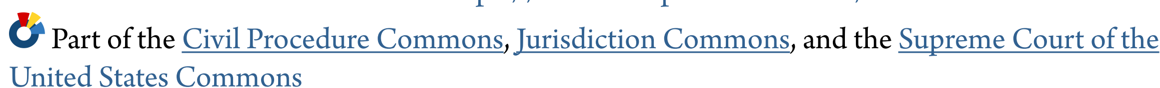
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THE COLLATERAL ORDER DOCTRINE IN DISORDER: REDEFINING FINALITY

MATTHEW R. PIKOR*

I. INTRODUCTION

In 1949, the U.S. Supreme Court introduced a new way for litigants to stay trial court proceedings and establish immediate federal appellate jurisdiction over interlocutory rulings with its landmark decision in *Cohen v. Beneficial Industrial Loan Corp.*[1] This newly created path to appeal, called the collateral order doctrine, or *Cohen* doctrine, has since became one of the most confusing and frequently contested procedural devices. But the doctrine nevertheless provides an important safety valve from the perennial statutory appellate framework, which can produce harsh results for either party in a lawsuit because it disallows immediate appeal of most interlocutory orders.

Before resolving the central issue in any case, courts routinely issue interlocutory rulings on ancillary matters such as whether to allow an extension of time for a discovery request or to exclude certain evidence. If a court errs in deciding one of these issues, it may wrongfully impose profound consequences on litigants. Nevertheless, the law generally does not permit parties to stay proceedings and appeal immediately; if it did, appellate courts would be hopelessly backlogged and litigants would face intolerable delays before reaching a final judgment on the merits.[2]

Congress has therefore mandated that litigants wait until after a final judgment is issued in the case before appealing,[3] even if a final decision may take months or even years, and by then, the issue may be moot. For example, a judge may erroneously deny a motion to reduce bail in a criminal case, forcing a poor defendant to stay in jail pending the outcome at trial. If the defendant could immediately appeal, he may vindicate his right to freedom while the litigation proceeds. If he must wait until final judg-

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1. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).
2. *See* discussion *infra* Part III.A.
3. *See* 28 U.S.C. § 1291 (2011); 28 U.S.C. § 1257 (2011).

ment before appealing, however, a favorable ruling would be purely academic.[4]

To avoid such harsh consequences arising from various types of rulings, both Congress and the Supreme Court have carved out exceptions to this "final decision rule."[5] The collateral order doctrine is the most prevalent of these exceptions, and it interprets certain interlocutory orders as "final" for purposes of appeal.[6] These orders generally must conclusively determine an issue that is distinct from the merits of the central claim, and that would be mooted post-judgment.[7]

Over time, the Supreme Court has both broadened and narrowed each of these requirements for collaterally appealable orders, and the resulting complexity of the doctrinal framework has made consistent application difficult for lower courts.[8] Consequently, there has been a drastic increase in purely procedural litigation.[9] As these cases have risen to the federal courts of appeals, various circuits have reached divergent conclusions on whether to grant appellate jurisdiction for several classes of rulings. Currently, the federal circuits are split regarding whether collateral order appeal is appropriate for denials of appointed counsel in civil rights cases, denials of *Parker* immunity claims, temporary reinstatement orders for miners pursuing claims against their employers, and resolutions of motions to strike under anti-SLAPP statutes.[10]

In response to concerns over increasing caseloads in the federal courts, Congress commissioned a Federal Courts Study Committee to research the issue in 1988.[11] The Committee Report cited both the final decision rule and the collateral order doctrine as "unsatisfactory" because litigants remained unclear on when an order was appealable.[12] To remedy this, the Committee recommended that Congress grant the Court rulemaking authority to define both when a ruling is final for purposes of appeal and when otherwise non-final rulings are appealable.[13] Congress complied and grant-

4. *See generally* Stack v. Boyle, 342 U.S. 1 (1951) (allowing immediate appeal from denials of motions to reduce bail).

5. ALEX KOZINSKI & JOHN K. RABIEJ, FEDERAL APPELLATE PROCEDURE MANUAL 19–37 (2014).

6. *Id.* at 19.

7. *Id.* at 19–20.

8. *See* discussion *infra* Part II.

9. Federal Courts Study Comm., Judicial Conference of the U.S., Report of the Federal Courts Study Committee 95 (1990) [hereinafter Report].

10. *See* discussion *infra* Part III.

11. Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified as amended in scattered sections of 28 U.S.C.).

12. Report, *supra* note 9, at 95.

13. *Id.* at 95–96.

ed the Court this authority soon after, but the Court has used these powers only once.[14]

To address the increased litigation and inconsistent applications by lower courts, the Court should again use its rulemaking authority granted to it by Congress—authority that allows the Court to re-articulate requirements for collateral order appeal and eliminate the various interpretations courts employ. With respect to important, previously appealable classes of orders excluded by the new requirements for collateral order finality, the Court can codify appellate jurisdiction deliberately.

Part II of this Comment discusses the final decision rule and its most common exception: the collateral order doctrine. It traces the Supreme Court's individual development and treatment of each of the doctrine's requirements, and identifies presently conflicting interpretations. It also discusses Congress' grant of rulemaking authority to the Court to address difficulties arising from the collateral order doctrine. Part III highlights current circuit splits surrounding the doctrine, and subsequently analyzes how various federal courts of appeals have applied the requirements differently. Part IV proposes a two-step solution: first, the Court should use its authority to narrowly redefine the collateral order doctrine's three requirements for finality; second, the Court should complement these new requirements by providing for immediate appeal of certain non-final rulings.

II. BACKGROUND

A. The Final Decision Rule

The U.S. Supreme Court and various federal courts of appeals generally have jurisdiction to review final decisions of lower courts.[15] A final decision, alternatively called a final judgment, is one that fully resolves all claims against all parties to the lawsuit, adjudicates all issues on the merits, and leaves only the execution of the judgment to be completed by the lower court.[16] This prerequisite for appellate review is aptly referred to as the "final judgment rule," or "final decision rule." The rule furthers several important policies, such as emphasizing deference to the authority and independent judgment of the lower court; avoiding the obstruction of meri-

14. Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1246 (2007) (Discussing codification of 28 U.S.C. § 2072(c) in 1990, allowing judicial rulemaking to define when a ruling is final for purposes of appeal pursuant to 28 U.S.C. § 1291; also discussing codification of 28 U.S.C. § 1292(e) in 1992, allowing for rulemaking to provide appeal for otherwise non-final rulings, and the Court's sole use of this authority to promulgate FED. R. CIV. P. 23(f)).

15. 28 U.S.C. § 1291 (2011); 28 U.S.C. § 1257 (2011).

16. Catlin v. United States, 324 U.S. 229, 233 (1945).

torious claims arising from the harassment and cost of successive, piece-meal appeals; and promoting efficient judicial administration.[17]

Postponement of appeal promotes efficiency because it guards against review of an issue that may be rendered moot by a trial on the merits. In addition, the eventual trial may raise additional federal questions that are resolved more quickly when consolidated into a single appeal. Thus, post-judgment appeals generally save time and money for both litigants and the court system.[18]

On the other hand, parties unhappy with a court's decision made during litigation must sometimes wait for a long time before they may appeal. By then, it may be too late for an appellate court to restore important rights a lower court wrongfully denied. For example, a litigant confronted with an order rejecting an asserted privilege may be forced to expose private communications before receiving an opportunity to appeal that ruling.[19] Such disclosures— erroneously compelled by the court for use at a public trial— may result in serious personal or professional harm. In this regard, the costs of postponing appeal sometimes outweigh the benefits.

To address this issue, both Congress and the courts have carved out various exceptions to the final decision rule where undue harshness would otherwise result. Legislative exceptions include certain interlocutory orders subject to appeal either as of right or by discretion pursuant to 28 U.S.C. § 1292, such as rulings on injunction or difficult questions of law where substantial ground for difference of opinion exists.[20] Judicially-crafted exceptions include grants or denials of class-action certification pursuant to the Supreme Court's rulemaking authority,[21] writs of mandamus for extraordinary circumstances such as judicial usurpation of power,[22] and the collateral order doctrine.[23]

B. The Collateral Order Doctrine

Established by *Cohen* in 1949, the collateral order doctrine allows for appeal from a narrow category of interlocutory judgments that do not fully

17. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981).

18. Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 428 (2013).

19. *See* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 109 (2009).

20. Kozinski & Rabiej, *supra* note 5, at 37; *see also* 28 U.S.C. § 1292, 28 U.S.C. § 1651, FED. R. CIV. P. 54(b).

21. Kozinski & Rabiej, *supra* note 5, at 37.

22. *Id.* at 22–23.

23. *Id.* at 19.

resolve an action.[24] The plaintiff in *Cohen* brought a stockholder's derivative action against the corporation and several of its managers and directors.[25] The defendants moved to apply a state law holding unsuccessful plaintiffs in such cases liable for costs and requiring them to post a bond as security before proceeding on the action.[26] The district court denied the motion and the defendants immediately appealed.[27] After reversal in the Court of Appeals, the Supreme Court granted *certiorari* partly on the issue of whether the order was immediately appealable.[28]

Citing its history of giving the final decision rule a "practical rather than a technical construction," the Court held that 28 U.S.C. § 1291 permitted immediate appeal for three principal reasons.[29] First, although the cause of action had not been decided, this order represented final disposition of the security issue.[30] Second, the order was separable from the merits of the case—that is, it did not advance any aspect of the central claim, required its own distinct analysis, and would not be merged in final judgment.[31] Third, by the time a reviewing court could resolve the issue on appeal, the lower court would have already forced the plaintiff to post the money as a precondition to the suit, and the issue would therefore be moot.[32]

In the years that followed, the Court failed to offer specific requirements for the *Cohen* doctrine, and instead granted jurisdiction where it found an order to be "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred."[33] Almost thirty years later, the Court finally took this vague standard and articulated three discrete elements for collateral orders which remain in use today in *Coopers & Lybrand v. Livesay*.[34]

The *Coopers & Lybrand* Court held that decisions excepted from the final decision rule must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment.[35] The Court has long held, however, that when applying this test,

24. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545–47 (1949).
25. *Id.* at 543–44.
26. *Id.* at 544–45.
27. *See id.* at 545.
28. *Id.*
29. *Id.* at 546–47.
30. *Id.*
31. *Id.* at 546.
32. *See Id.*
33. Lammon, *supra* note 18, at 448 (quoting *Cohen*, 337 U.S. at 546).
34. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468–69 (1978).
35. *Id.* at 468.

courts must determine whether the type of order at issue generally meets these requirements in all cases rather than just in the case at hand.[36] For example, a denial of a motion to certify a case as a class action may be conclusively determined in a particular case, but immediate appealability of this type of order is inappropriate because courts often revisit the class certification issue as the litigation proceeds. This policy against individualized jurisdictional inquiry promotes efficiency by allowing higher courts to establish appellate jurisdiction over entire classes of orders rather than deciding each case on the merits.[37]

Predictably, the federal circuits have routinely disagreed about proper application of each of these three prongs[38] because the Supreme Court's interpretation of the doctrine's requirements has gradually evolved since *Cohen*.[39] So, to illustrate why lower courts have applied the doctrine inconsistently, this section will trace each prong's development and treatment individually.

1. Conclusiveness

In *Cohen*, the Supreme Court crafted the collateral order doctrine from its interpretation of 28 U.S.C. § 1291, the statutory source of authority for the final decision rule.[40] The Court determined that Congress did not intend the statute to apply only to decisions that terminate an action.[41] Rather, the *Cohen* Court interpreted the statute to allow for appeal of any final ruling, and it found certain interlocutory decisions final so long as they were not tentative, informal, incomplete, open, unfinished, or inconclusive.[42]

This interpretation ostensibly instructed that rulings subject to later modification are not ripe for appeal under the statute. When the Court articulated discrete requirements for collateral order appeals in *Coopers & Lybrand*, it offered similar guidance. In that case, the Court found the conclusiveness requirement not satisfied with respect to a denial of class certification because the order was subject to alteration or amendment before the decision on the merits.[43]

36. *E.g.*, Van Cauwenberghe v. Biard, 486 U.S. 517, 529 (1988) ("In fashioning a rule of appealability under § 1291, however, we look to categories of cases, not to particular injustices.").

37. Holmes v. Fisher, 854 F.2d 229, 231–32 (7th Cir. 1988).

38. See discussion *infra* part III.

39. See discussion *infra* part II.B.1–3.

40. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545 (1949).

41. *See id.*

42. *Id.* at 546.

43. Coopers & Lybrand, 437 U.S. at 469 n.11.

Five years later, however, the Court in *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.* acknowledged that all orders issued before final decree are subject to reopening at the judge's discretion.[44] The Court found that a district court's grant of a motion to stay pursuant to the *Colorado River*[45] doctrine was conclusively determined partially because there was no reason to suspect that the lower court judge contemplated later reconsideration of his decision.[46] This reasoning suggested that an inquiry into conclusiveness involves some question of judicial expectation, not only whether revision of the order remains possible.

In contrast to the *Moses H. Cone* Court's reasoning regarding a grant of stay, the Court later concluded that *denial* of a *Colorado River* motion to stay did not conclusively determine the issue in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*[47] The Court decided that a denial of a stay in this context is inherently tentative because "the district court may well have determined only that it should await further developments before concluding that the balance of factors to be considered under *Colorado River* warrants a dismissal or stay."[48]

The Court clarified that these "inherently tentative" orders, like the denial of class certification in *Coopers & Lybrand*, were not conclusive because the lower court generally expects to revisit the issue as the litigation progresses.[49] The grant of stay in *Moses H. Cone*, however, was conclusive because the district court ordinarily would expect the such a grant to settle the matter at the federal level, and thus would not ordinarily be reconsidered.[50] In these cases, the matter is typically settled because there will be a parallel state court proceeding where the litigation would likely be resolved, which would make the issue *res judicata* in a subsequent federal suit.[51]

Since its decision in *Gulfstream Aerospace*, the Court has not changed, added to, or further explained the conclusiveness requirement in any meaningful way. In both *Gulfstream Aerospace* and *Moses H. Cone*, the Court discussed a court's expectations as a matter for consideration

44. Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 1, 12 (U.S. 1983).

45. The *Colorado River* doctrine, also called *Colorado River* Abstention, provides that a federal district court may stay or dismiss an action because a parallel litigation involving the same questions of law is pending in state court. *See generally* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

46. *Moses H. Cone*, 460 U.S. at 12.

47. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 278 (1988).

48. *Id.*

49. *Id.* at 277.

50. *Id.*

51. *Id.*

under the conclusiveness prong, but the Court's guidance in those cases merely supplemented that of its previous cases. Accordingly, lower courts may reasonably decide whether an order is conclusive based on several considerations, including whether the entering court expects to revise the order later, whether subsequent revision remains possible,[52] and even whether revision is probable.[53] Perhaps one of these considerations should be dispositive or at least weigh more heavily than the others, but this remains unclear.

2. Separability

In its interpretation of 28 U.S.C. § 1291, the *Cohen* Court held that even fully consummated decisions could not be immediately appealed if they were "but steps toward final judgment in which they will merge."[54] The Court required that rulings be sufficiently separable from the central merits of the case to prevent successive, piecemeal appeals by combining "all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results."[55]

In the two and a half decades immediately following *Cohen*, separability questions presented little trouble for the Court.[56] For example, the Court in *Stack v. Boyle* found denial of a motion to reduce bail in a criminal case sufficiently distinct from the merits of the central charge.[57] The *Stack* Court provided little explanation for its grant of jurisdiction in this context, but a court can certainly resolve the issue of whether bail should be reduced in a case without any examination of the underlying criminal charge. In addition, resolution of the bail issue does not advance the underlying action toward final judgment.

In 1977, a pair of cases revealed the most debated issue surrounding separability: whether any overlap with the merits of the case is permissible. The first case, *Abney v. United States*, involved an order rejecting a double jeopardy claim.[58] After being tried and convicted, an appellate court vacated the defendants' convictions. On remand, the defendants moved to dis-

52. *See infra* note 161 and accompanying text.
53. *See infra* note 159 and accompanying text.
54. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).
55. *Id.*
56. *See* Parr v. United States, 351 U.S. 513, 519 (1956); Stack v. Boyle, 342 U.S. 1, 6 (1951); Swift & Co. v. Compania Caribe, 339 U.S. 684, 688–89 (1950); Roberts v. United States District Court, 339 U.S. 844, 845 (1950).
57. *See Stack*, 342 U.S. at 6.
58. Abney v. United States, 431 U.S. 651 (1977).

miss to avoid facing two trials for a single offense.[59] In reviewing appellate jurisdiction over the denial of their motion, the Court determined that the defendants' double jeopardy claim was separable from the central issue of guilt or innocence in the case because the defendants neither challenged the merits of the criminal charge nor sought to suppress the related evidence against them.[60]

Double jeopardy claims, however, often overlap with the merits.[61] As mentioned above, when the court confers appellate jurisdiction, it does so for the entire classes of orders. Thus, *Abney* weakened the requirement that the issue be completely separate from the merits of the action, at least for certain claims.

That same year, the Court decided *National Socialist Party of America v. Skokie*.[62] In that case, the state court entered an injunction preventing a Nazi group from marching or otherwise displaying the swastika in public.[63] Both the Illinois appellate court and Supreme Court denied the Nazis' subsequent motions to stay the injunction.[64] The U.S. Supreme Court granted *certiorari* and found the denial of stay immediately appealable as a collateral order.[65]

The Court reasoned that the Nazis would potentially be deprived of First Amendment rights while waiting more than a year for appellate review to complete, and the state must provide strict procedural safeguards when seeking to impose such restrictions, including access to immediate appeal.[66] Here again, the Court diluted *Cohen*'s strict separability requirement when it held that the issue is sufficiently separable despite immediate review being predicated upon a showing that the underlying First Amendment claim is facially valid.[67]

Less than a decade later, the Court in *Mitchell v. Forsyth* gutted the separability requirement.[68] The order at issue in that case was a denial of a

59. *Id.* at 655.

60. *Id.* at 659–60.

61. Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 Drake L. Rev. 539, 548–551, 557 (1998) ("For example, if the issue is whether the same conduct is the basis of both prosecutions, there may be a need to determine, based upon evidence presented at trial, precisely the conduct in which the defendant engaged.").

62. Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977).

63. *Id.* at 43.

64. *Id.* at 43–44.

65. *Id.* at 44.

66. *Id.*

67. Anderson, *supra* note 61, at 559.

68. Mitchell v. Forsyth, 472 U.S. 511 (1985).

government official's assertion of qualified immunity.[69] The applicable legal analysis called for a court to determine whether the defendant's *alleged* conduct violated *clearly established* legal norms.[70] This issue appeared inextricably entangled with the merits (whether his *actual* conduct violated the law).

Nevertheless, the Court sidestepped the obstacle of separability by redefining it to require only that the issue be "conceptually distinct."[71] The *Mitchell* Court rationalized that such overlap was acceptable because decisions on other classes of immediately appealable orders, like double jeopardy claims, may also require consideration of the facts of the central claim.[72] Thus, *Mitchell* indicated that separability was satisfied so long as the issue on appeal had an identifiable difference from the merits.[73]

Three years later, the Court reverted to a "completely separate" standard in *Van Cauwenberghe v. Biard*.[74] There, the Court considered whether denial of a motion to dismiss on the ground of *forum non conveniens* should be appealable as a collateral order.[75] In a drastic change of position on separability, the Court stated that "[a]llowing appeals from interlocutory orders that involve considerations enmeshed in the merits of the dispute would waste judicial resources by requiring repetitive appellate review of substantive questions in the case."[76]

For example, one factor courts must examine when determining whether venue is appropriate under that doctrine is the ease of access to sources of proof. To assess this factor, a court must "scrutinize the substance of the dispute between the parties to evaluate what proof is required, and determine whether the pieces of evidence cited by the parties are critical, or even relevant, to the plaintiff's cause of action and to any potential defenses to the action."[77] Thus, this analysis necessarily involves some inquiry into the facts and legal issues of the case and cannot be adequately separated from the merits.[78]

69. *Id.* at 515.

70. *Id.* at 517.

71. *See id.* at 527–28.

72. *Id.* at 528 ("To be sure, the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief; the same is true, however, when a court must consider whether a prosecution is barred by a claim of former jeopardy . . . ").

73. Anderson, *supra* note 61, at 574.

74. Van Cauwenberghe v. Biard, 486 U.S. 517, 527–28 (1988).

75. *Id.* at 527.

76. *Id.* at 527–28.

77. *Id.* at 529.

78. *Id.*

After *Van Cauwenberghe*, the Court's only notable review of separability was in *Johnson v. Jones*.[79] But in that case, the Court simply declined to find a particular determination in a lower court's denial of summary judgment separable from the merits, and did not further refine the requirement.[80] In sum, the Court's guidance thus far indicates that considerations necessary to determine collaterally appealable orders may overlap with those necessary to determine the merits of the case, but only in certain situations. Again, the Court has not provided clear guidance on when a lower court must require complete separability rather than mere conceptual distinctness.

3. Importance

In addition to separability, the second prong in *Coopers & Lybrand* specified that an issue must be *important*. Nevertheless, the Court has often considered this requirement as part of the unreviewability prong and has even suggested it as an independent, dispositive consideration.[81] Accordingly, a brief discussion of importance as a distinct element is warranted.

Although the *Cohen* opinion defined the small class of collaterally appealable orders as those "too important to be denied review,"[82] courts did not initially require that a ruling involve a sufficiently important right. Almost forty years after *Cohen*, Justice Scalia first suggested implementation of the importance standard as a further limiting principle of the Court's greatly expanded finality jurisprudence in his 1988 concurrence in *Gulfstream*.[83] Five years later, the Court bolstered its reasoning for allowing the collateral order appeal of a denial of an Eleventh Amendment immunity claim by stating that the "ultimate justification" was the importance of the interests protected.[84]

The next year, the Court in *Digital Equipment Corp. v. Desktop Direct, Inc.* suggested for the first time that importance alone may be a dispositive consideration.[85] In that case, the plaintiffs argued that the lower court's rescission of their settlement agreement should be immediately appealable because it provided immunity from trial.[86] The Court disagreed, finding that—in contrast to a constitutional or statutory right to evade tri-

79. Johnson v. Jones, 515 U.S. 304 (1995).
80. *See id.* at 310–315.
81. *See, e.g.*, Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 878–79 (1994).
82. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).
83. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 291–92 (1988).
84. Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993).
85. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994).
86. *Id.* at 866–67.

al—" such a right by agreement does not rise to the level of importance needed for recognition under § 1291."[87]

Adding to the confusion, the *Digital Equipment* Court also acknowledged that whether importance is a separate factor is a valid question, and emphasized that importance is an appropriate consideration for *each* of the doctrine's prongs.[88] The Court referred to its prior instruction to consider importance in connection with the second prong, but also stated that "the third prong simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement."[89]

Nonetheless, the Court has failed to offer standards for determining whether an interest is sufficiently important. One commentator has suggested that this inquiry only becomes dispositive when all *Coopers & Lybrand* factors are satisfied but the Court believes granting appellate jurisdiction would cause too many practical problems.[90] Yet in practice, courts sometimes forego the inquiry altogether,[91] and sometimes they attempt to measure importance by comparing an interest with those previously held sufficient.[92]

4. Unreviewability

The doctrine's final element, that delay of appeal until final judgment precludes effective review of the issue, has historically been both the most debated and most malleable. The Supreme Court's manipulation of this mootness requirement has primarily driven both the doctrine's expansionary period from 1963 to 1988—which led to a drastic increase in litigation[93]— and its subsequent narrowing through the present. Yet, from its decision in *Cohen* until 1963, the Court appeared to maintain a narrow

87. *Id.* at 877–79.

88. *Id.* at 878–79.

89. *Id.*

90. Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 208 n.131 (2001).

91. *See, e.g.*, Cunningham v. Hamilton Cty., 527 U.S. 198, 203–10 (1999).

92. Cobra Natural Res., LLC v. Fed. Mine Safety & Health Review Comm'n, 742 F.3d 82, 92 (4th Cir. 2014) ("The Supreme Court has conducted its importance analysis under the third prong of the collateral order doctrine by first combing its precedent to identify recurring characteristics that merit collateral order appealability, and then comparing those characteristics to the proceeding at hand.").

93. *See* Anderson, *supra* note 61, at 576 (noting a "litigation explosion over appealability of collateral orders" from 1977–1985; and that during that time the Supreme Court decided eleven cases on the subject).

interpretation, and extended collateral order appeals only where delay would render post-judgment review impossible.[94]

In *Local No. 438 Const. & Gen. Laborers' Union, AFL-CIO v. Curry*, the Court began its expansion of the requirement. The Court allowedimmediate appeal of an order issuing a temporary injunction to stop union picket lines from forming in front of an employer.[95] The issue on appeal was whether the state court had jurisdiction to issue the injunction, or whether that jurisdiction rested with the National Labor Relations Board.[96] This marked a significant departure from the Court's previous decisions because here, postponement of appeal would not completely moot the issue of jurisdiction.[97] Instead, the Court grounded its decision on the fact that delay would have negative national labor policy implications.[98] *Curry* thus signaled a change from *Cohen's* strict mootness requirement to allow for an alternative: broader policy considerations.

Where the Court in *Curry* created an alternative to the requirement of strict unreviewability, the Court seemingly dropped the third prong entirely a decade later. In *Eisen v. Carlisle & Jacquelin*, a district court ordered the defendants to pay most of the cost of providing notice to potential members of a class action.[99] Most notably, the Supreme Court held that the notice cost ruling was immediately appealable as a collateral order but said nothing about loss of effective review after a final decision.[100] The Court's silence here was striking because defendants could have appealed the issue after prevailing on the merits and could have obtained an order for reimbursement from the plaintiffs.[101] Commentators have suggested this indi-

94. *See generally,* Anderson*, supra* note 61, at 548–51. *See also*, Parr v. United States, 351 U.S. 513 (1956); Stack v. Boyle, 342 U.S. 1 (1951); Swift & Co. v. Compania Caribe, 339 U.S. 684 (1950); Roberts v. United States District Court, 339 U.S. 844 (1950).

95. Local No. 438 Const. & Gen. Laborers' Union, AFL-CIO v. Curry, 371 U.S. 542 (1963).

96. *Id.* at 548.

97. Anderson, *supra* note 61, at 552 ("In *Curry* . . . if the defendants had been required to wait until a permanent injunction was granted, the issue whether the NLRB had jurisdiction to the exclusion of state courts would not have been moot; if the United States Supreme Court were to rule on appeal that the state courts lacked jurisdiction, the injunction would be vacated and the union would be free to resume picketing.").

98. *Curry*, 371 U.S. at 550 ("The policy of 28 U.S.C. s 1257 against fragmenting and prolonging litigation and against piecemeal reviews of state court judgments does not prohibit our holding the decision of the Georgia Supreme Court to be a final judgment, particularly when postponing review would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard by the National Labor Relations Board, not by the state courts.").

99. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 167–68 (1974). *See also*, Anderson, *supra* note 61, at 551–53.

100. *Eisen*, 417 U.S. at 172.

101. Anderson, *supra* note 61, at 555.

cated that the third element was unnecessary and that conclusiveness and separability alone were sufficient.[102]

After several years, the Court reaffirmed the three elements of the collateral order doctrine in *Abney*, but it restated the unreviewability prong.[103] This revision required only that a ruling involve "an important right which would be 'lost, probably irreparably,' if review had to await final judgment."[104] In contrast to *Cohen*'s standard that delay must prevent any review at all, this rephrasing appeared to permit appeal where delay would damage some important rights, even though review remained possible.

In *Abney*, that important right was a right not to be tried. As mentioned above, the lower court in that case rejected the defendants' double jeopardy claim.[105] The Supreme Court reasoned that the purpose of the Double Jeopardy Clause was to prevent "the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense."[106] If convicted, the issue would not be completely moot because the defendants could then appeal and possibly have the convictions overturned, but they would have lost the very right that the clause was designed to protect.[107]

This change dramatically increased the pool of orders potentially appealable as collateral orders. Perhaps aware of this, the Court quickly doubled back in two cases that soon followed. In *U.S. v. MacDonald*, the defendant moved to dismiss an indictment for murder charges on the grounds of denial of his Sixth Amendment right to a speedy trial.[108] In *Firestone Tire & Rubber Co. v. Risjord*, the petitioner sought review of an order denying disqualification of opposing counsel for a conflict of interest.[109] In both cases, the Court found that the petitioners would still have an opportunity for meaningful review because the issues could be reviewed after trial and judgment could be vacated if prejudicial error was found.[110]

In these cases, the Court indicated that the burden of defending litigation, by itself, is not a sufficiently important right to justify immediate appeal. A right not to be tried is sufficient only when it is central to the claim

102. *Id.*
103. Abney v. United States, 431 U.S. 651 (1977).
104. *Id.* at 658 (quoting Cohen v. Beneficial Indus. Loan Corp. 337 U.S. 541, 546 (1949)).
105. *Id.* at 655.
106. *Id.* at 661.
107. *Id.* at 662.
108. United States v. MacDonald, 435 U.S. 850, 850 (1978).
109. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 369 (1981).
110. *Id.* at 377–78; *see MacDonald*, 435 U.S. at 860–61.

denied by the order, as it was with the double jeopardy clause in *Abney*.[111] As the *MacDonald* Court described speedy trial claims, "it is the delay before trial, not the trial itself, that offends against the constitutional guarantee . . . ."[112] Likewise, orders refusing to disqualify counsel offend no similar right to evade trial.[113]

In *Mitchell*, expansion of the doctrine reached its apex when the Court added qualified immunity claims to the list of immediately appealable collateral orders.[114] In that case, Attorney General John Mitchell authorized a warrantless wiretap while investigating a domestic national security threat.[115] The wiretap recorded three conversations involving Keith Forsyth, who then sued Mitchell for money damages after an unrelated but timely decision ruled such wiretaps illegal. Mitchell asserted partly that qualified immunity entitled him to immunity from suit.[116]

The *Mitchell* Court reasoned that like assertions of double jeopardy, the issue could be reviewed after final judgment, but an essential purpose of the qualified immunity defense is to guard officials from the litigation itself.[117] The Court explained that qualified immunity is more than just a shield from liability; its purpose is to allow government officials to reasonably make decisions and take action "with independence and without fear of consequences."[118] Those consequences included subjecting officials to the costs and distractions of litigation.[119] With this reasoning, the Court reaffirmed its position that immediate appeal is appropriate where rights central to the claim are jeopardized, even though review and eventual reversal is possible after final decision.

Initiating the doctrine's retrenchment era, the Court changed course two years later and denied immediate appeal despite its conclusion that important rights would be irretrievably lost in *Stringfellow v. Concerned Neighbors in Action*.[120] The petitioners in *Stringfellow* sought to intervene in litigation brought by both state and federal government involving haz-

111. *MacDonald*, 435 U.S. at 861 ("Unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all.").

112. *Id.*

113. *Firestone*, 449 U.S. at 376.

114. Mitchell v. Forsyth, 472 U.S. 511 (1985).

115. *Id.* at 513.

116. *Id.* at 515–16.

117. *Id.* at 525–26.

118. *Id.* at 525 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982)).

119. *Id.* at 525–26.

120. Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987).

ardous waste disposal near their homes.[121] The district court denied the petitioners intervention as of right, but granted them permissive intervention subject to several restrictive conditions, including disallowance of damage claims.[122] The petitioners argued that any appeal of their denial to intervene as of right would be futile after a final decision because an appellate court would almost certainly decline to invalidate such a complex case "involving numerous parties and years of litigation."[123]

The *Stringfellow* Court found this contention plausible, but irrelevant.[124] It explained that any litigant faced with an adverse pre-trial order faces the same practical difficulties, and those difficulties do not justify further erosion of the final decision rule.[125] Perhaps the Court intended to reserve the collateral order doctrine for instances where important rights are certain to be lost, rather than just overwhelmingly probable, yet the Court failed to distinguish the right to intervene from other rights where immediate appeal is allowed.

In two cases over the following two years, the Court further narrowed the doctrine's mootness requirement by chipping away at the "right not to be tried" standard for immediate appeal used in *Abney* and *Mitchell*. In the first case, *Van Cauwenberghe v. Biard*, Justice Marshall alluded to the Courts reason for changing course.[126] He explained that any litigant with a meritorious pretrial claim for dismissal can reasonably assert that such claim entails a right not to stand trial.[127] If it were to tolerate this, the Court would eviscerate the final decision rule because litigants can typically assert *some* ground for dismissal in any case.[128]

Both cases appeared immediately appealable under the more expansive *Mitchell* analysis. The petitioner in *Van Cauwenberghe* argued that his immunity from service of process as an extradited citizen encompassed a right not to be tried, like the Court held with qualified immunity in *Mitchell*.[129] The petitioner in the second case, *Lauro Lines S.R.L. v. Chasser*, argued that its forum selection clause comprised a contractual right not to be tried, at least not in a jurisdiction other than the Italian tribunal specified

121. *Id.* at 372.
122. *Id.* at 373.
123. *Id.* at 376.
124. *Id.*
125. *Id.* at 377.
126. Van Cauwenberghe v. Biard, 486 U.S. 517, 524 (1988).
127. *Id.*
128. Anderson, *supra* note 61, at 579.
129. *Van Cauwenberghe*, 486 U.S. at 522–23; Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

in the clause.[130] The Court's own precedent supported both petitioners' contentions that their respective claims conferred a right not to stand trial.[131]

Nevertheless, the Court held denial orders to be not immediately appealable in both situations. In *Van Cauwenberghe*, the Court concluded that the purpose of immunity from service of process in the case's context was to ensure that the "receiving state does not abuse the extradition processes of the extraditing state," not to protect the extradited person from the burdens of trial.[132] In *Lauro Lines*, the Court drew a distinction between a right not to be tried at all and a right not to be tried in a particular forum.[133] Both results seemed unlikely, given both the recent *Mitchell* decision and precedent indicating a right to avoid trial as central to these specific issues.

Over the next two decades, the Court continued to gradually condense the collateral order doctrine. Its most recent decision in *Mohawk Indus., Inc. v. Carpenter* represents the Supreme Court's narrowest stance on the doctrine since its genesis in *Cohen*.[134] In *Mohawk*, the petitioner sought immediate appeal of the trial court's denial of his privilege claim and ordered that he disclose attorney-client communications.[135] In recognition of the seriousness of its ruling, the trial court issued a stay so that the petitioner could explore possible avenues to appeal, including the collateral order doctrine.[136]

In its analysis of whether effective review would be possible after trial, the Court regressed from its standard that an important right must be injured or lost. Rather, the Court assessed whether the interest was so imperiled by delay that it justified allowing immediate appeal for the entire class of orders—an analysis which would mean undermining both administrative efficiency and the independence and authority of district court judges.[137]

On one hand, the Court recognized the importance of the attorney-client privilege and its purpose of encouraging candor between clients and

130. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 500 (1989).

131. Anderson, *supra* note 61, at 578 (explaining that the Court's leading precedent on the issue at that time held that an extradited foreign citizen's immunity from service conferred "the right to be tried only for the offense upon which extradition was based, and no others"); *Id.* at 584–85 (explaining that the Court's leading precedent supported the argument that forum selection clauses confer a contractual right not to stand trial that would be destroyed by postponement until after trial).

132. *Van Cauwenberghe*, 486 U.S. at 525.

133. *Lauro Lines*, 490 U.S. at 501.

134. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 100 (2009).

135. *Id.* at 104–05.

136. *Id.*

137. *Id.* at 107; 108–09.

counsel. On the other, litigants faced with adverse pre-trial privilege rulings have several remedial options, such as post-judgment appeal with the possibility of receiving a new trial with an order to exclude privileged material from evidence, a petition to the appeals court for a writ of mandamus, or defiance of the order followed by appeal of either the sanctions or the contempt ruling.[138] Because it found these alternatives sufficient, the Court concluded that the benefits of allowing collateral order appeal did not justify the institutional burdens.[139]

As with the doctrine's other requirements, the Court's guidance regarding unreviewability has, with each subsequent case, accumulated into a complicated and confusing morass. Post-*Mohawk*, the requirement remains satisfied where post-judgment appeal is indeed moot. If appeal is not mooted, the requirement is nonetheless satisfied where delay compromises an important right, such as a right not to stand trial. Even where an important right will be lost post-judgment, the requirement is not satisfied if the institutional costs of expanding the doctrine are not justified.

Mohawk was also significant because the Court suggested a preference for using its authority under the Rules Enabling Act—rather than by judicial decision—to expand the class of collaterally appealable orders.[140] In fact, Justice Thomas opined in his concurrence that this preference for rulemaking should be the Court's holding rather than dicta.[141]

C. Rulemaking as an Alternative

Pursuant to the Rules Enabling Act of 1934,[142] the Supreme Court has long had the authority to promulgate rules of procedure.[143] The final decision rule, however, is federal law,[144] and although the Court may interpret a federal statute—as it did in *Cohen*—it generally cannot make formal alterations or amendments. Therefore, the Court previously could not extend appellate jurisdiction beyond what Congress had previously authorized. But in 1990, the congressionally commissioned Federal Courts Study Committee filed a report recommending that Congress grant the Court such power.[145]

138. *Id.* at 109–11.
139. *Id.* at 112.
140. *Id.* at 114.
141. *Id.* at 118–19 (Thomas, J., concurring in part and concurring in the judgment).
142. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (1982)).
143. *See* 28 U.S.C. §§ 2071–2077 (2006).
144. *See* 28 U.S.C. § 1291 (2011); 28 U.S.C. § 1257 (2011).
145. Report, *supra* note 9.

This report addressed problems caused by an increased federal caseload and found partly that the collateral order doctrine "blur[red] the edges of the finality principle" and produced redundant procedural litigation that often required Supreme Court review.[146] Shortly after, Congress amended the Rules Enabling Act to authorize the Court to codify rules defining when an order is final for purposes of appeal.[147] Two years later, Congress granted the Court rulemaking powers to authorize appeal from *non*-final orders.[148] Nevertheless, the Court has never used its authority to define a final ruling, and has only once extended immediate review to a class of non-final orders.

For this sole exercise of its rulemaking power, the Court promulgated Rule 23(f) in 1998, which allowed for immediate review of class action determinations.[149] Years earlier, the *Coopers & Lybrand* Court held interlocutory review of class determinations could not be maintained under the existing appellate framework.[150] This decision proved harsh for litigants where class determination did not end the suit, but made it economically infeasible to continue. Thus, in 1996, the Advisory Committee on the Federal Rules of Civil Procedure proposed the amendment,[151] and two years later, the Court complied.

III. Current Circuit Splits

As the Federal Courts Study Committee noted, the state of the law regarding the definition of a final and thus appealable order has become problematic, thereby generating much purely procedural litigation.[152] As these cases have risen from the lower courts, the various federal Courts of Appeals have diverged regarding whether immediate appeal is justified for certain classes of rulings. The *Mohawk* Court resolved the split between the federal circuits on the immediate appealability of pretrial rulings on assertions of attorney-client privilege, but several more divisions remain. This section examines the major current federal circuit splits and reviews how

146. *Id.* at 95.

147. *See* Jud. Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. § 2072(c) (2006)).

148. *See* Fed. Cts. Admin. Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506, 4506 (codified as amended at 28 U.S.C. § 1292(e)).

149. FED. R. CIV. P. 23(f).

150. Coopers & Lybrand v. Livesay, 437 U.S. 463, 476–77 (1978).

151. Jud. Conf. of the U. S., Advisory Comm. on Civil Rules, Minutes of April 18–19, 1996, 1996 WL 936787.

152. Report, *supra* note 9, at 95.

these courts have applied the Supreme Court's wandering guidance outlined above.

A. Denials of Appointed Counsel in Civil Cases

Pro se litigants prosecuting cases in federal court may petition that court for appointed counsel if they are financially unable to retain counsel independently. Although the Sixth Amendment guarantees appointed counsel to indigent defendants in criminal cases,[153] there is no such guarantee for *pro se* litigants bringing civil lawsuits.[154] The trial courts have discretion over these appointments,[155] and they consider factors such as the merits and complexity of the plaintiff's case, the plaintiff's ability to pay counsel, efforts made to secure counsel, and the litigant's capacity to argue the case without counsel.[156]

Every federal circuit has decided whether an order denying the appointment of counsel in a civil case is immediately appealable under the collateral order doctrine.[157] All but three circuits have declined to extend jurisdiction, but between conflicting circuits, disputes have emerged regarding each element of the *Coopers & Lybrand* test.[158]

First, courts that found conclusiveness not satisfied deduced so because later reconsideration of the order remained *possible*.[159] Those that

153. Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

154. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26–27 (1981) (presuming that indigent litigants only have a right to appointed counsel when their unsuccessful litigation threatens personal freedom).

155. *See* 28 U.S.C. § 1915(e)(1) (2006).

156. *See, e.g.* Ficken v. Alvarez, 146 F.3d 978, 979–80 (D.C. Cir. 1998); Holt v. Ford, 862 F.2d 850, 857 (11th Cir. 1989).

157. *See generally* Brad D. Feldman, Comment, *An Appeal for Immediate Appealability: Applying the Collateral Order Doctrine to Orders Denying Appointed Counsel in Civil Rights Cases*, 99 Geo. L.J. 1717, 1726 (2011). Nine circuits have disallowed immediate appeal of orders denying the appointment of counsel: Ficken v. Alvarez, 146 F.3d 978, 980 (D.C. Cir. 1998); Holt v. Ford, 862 F.2d 850, 852 (11th Cir. 1989); Miller v. Simmons, 814 F.2d 962, 964 (4th Cir. 1987). Henry v. City of Detroit Manpower Dep't, 763 F.2d 757, 759 (6th Cir. 1985); Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d Cir. 1984); Appleby v. Meachum, 696 F.2d 145, 146 (1st Cir. 1983); Randle v. Victor Welding Supply Co., 664 F.2d 1064, 1067 (7th Cir. 1981); Cotner v. Mason, 657 F.2d 1390, 1391–92 (10th Cir. 1981); Miller v. Pleasure, 425 F.2d 1205, 1205–06 (2d Cir. 1970). Three circuits have allowed immediate appeal of such orders: Lariscey v. U. S., 861 F.2d 1267, 1270 (Fed. Cir. 1988); Robbins v. Maggio, 750 F.2d 405, 413 (5th Cir. 1985); Slaughter v. City of Maplewood, 731 F.2d 587, 588 (8th Cir. 1984). The ninth circuit has made immediate appeal of these orders dependent on the type of claim presented: *See* Wilborn v. Escalderon, 789 F.2d 1328, 1330 (9th Cir. 1986); *id.* At 1330 n.2.

158. *See* cases cited *supra* note 157. Notably, there is a petition to the U.S. Supreme Court for a writ of certiorari currently pending in the D.C. Circuit on the question of collateral order appeal from denials of a motion to appoint counsel in civil cases. *See* Petition for a Writ of Certiorari, Sai v. Transp. Sec. Admin., 155 F. Supp. 3d 1 (D.D.C. 2016), appeal dismissed (June 6, 2016) (No. 16-5004).

159. Feldman, *supra* note 157, at 1727; *see also, e.g.*, Miller v. Simmons, 814 F.2d 962, 966 (4th Cir. 1987) (Declining to consider denial of motion for appointment of counsel as conclusively determin-

found the orders conclusive, on the other hand, offered little explanation as to why; the Fifth Circuit noted only that "if a defendant after denial of the motion chooses to go forward with his claim, he must do so without the assistance of appointed counsel."[160] Perhaps these courts, like the Fifth Circuit, reached this conclusion because denial of appointed counsel so often causes litigants to abandon their claims or settle prematurely, and thus, subsequent review of these rulings is *unlikely*.[161]

Second, courts that found separability unsatisfied argued that these orders typically require consideration of the merits and complexity of the claim.[162] In contrast, the Federal Circuit reasoned that such a determination is neither a step toward final judgment on the merits, nor does it "enmesh" the court in such issues (despite the denial of counsel potentially affecting the litigant's ability to proceed on his claim).[163] For this requirement, courts have generally agreed that consideration of the merits is necessary to dispose of the order, but have diverged on whether this is significant.

Third, a majority of circuits have concluded that the issue remains reviewable after final judgment.[164] These courts argued for a stricter, mootness-based interpretation, and commonly analogized to both *Flanagan v. United States* and *Firestone*.[165] In both cases, the Supreme Court considered collateral order appeal of rulings on the disqualification of counsel and found post-judgment review remained effective because the remedy of a new trial is sufficient, which is available upon a successful appeal of an erroneous denial order.[166]

The Fifth, Eighth, and Federal Circuits, however, found that delay would impose intolerable burdens upon plaintiffs, because it would likely strip civil *pro se* litigants of their ability to both effectively prosecute their claim and successfully appeal their denial of appointed counsel.[167] As the Federal Circuit noted, so long as the petitioner's case was presented reasonably, an appellate court is unlikely to find denial of counsel prejudicial,

ing the issue because the magistrate denied the motion without prejudice and therefore could later reconsider).

160. Robbins v. Maggio, 750 F.2d 405, 412 (5th Cir. 1985).

161. *Id.* at 412–13 ("Indeed, there remains a great risk that a civil rights plaintiff may abandon a claim or accept an unreasonable settlement in light of his own perceived inability to proceed with the merits of his case, resulting in the loss of vital civil rights claims.").

162. *E.g.*, Holt v. Ford, 862 F.2d 850, 853 (11th Cir. 1989).

163. Lariscey v. U. S., 861 F.2d 1267, 1269–71 (Fed. Cir. 1988).

164. *See supra* note 157.

165. *E.g.*, Holt v. Ford, 862 F.2d 850, 853–54 (11th Cir. 1989).

166. *See* Flanagan v. United States, 465 U.S. 259, 266–67 (1984); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 377–78 (1981).

167. *See* Lariscey v. U.S., 861 F.2d 1267, 1270 (Fed. Cir. 1988); Robbins v. Maggio, 750 F.2d 405, 413 (5th Cir. 1985); Slaughter v. City of Maplewood, 731 F.2d 587, 589 (8th Cir. 1984).

and "may never know whether a different or better case could have been presented that would have turned the tide in the indigent litigant's favor."[168]

B. Denials of Parker Immunity

The circuits also diverge on whether immediate appeal is appropriate for denials of a defendant's motion to dismiss that asserts state action immunity in antitrust litigation, also called *Parker* immunity. In *Parker v. Brown*, the Supreme Court held that Sherman Antitrust Act prohibitions on anticompetitive activities do not apply to the conduct of a state or its agents.[169]

For example, both parties in *Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC* operated individual apartment complexes near the University of Colorado.[170] Plaintiff Auraria Student Housing at the Regency (Auraria) claimed that Defendant Campus Village Apartments (Campus Village) illegally conspired to monopolize student housing in violation of Sherman Act prohibitions through its agreement with the university.[171] This agreement required that most students reside in the Campus Village apartments for their first two semesters of enrollment.[172]

Campus Village moved to dismiss and argued that the agreement was not subject to Sherman Act prohibitions because it was authorized, or at least a foreseeable result, of both state legislation and a clear state policy to displace competition with those regulations.[173] The district court disagreed and denied Campus Village's motion.[174] Campus Village immediately appealed, but the Tenth Circuit declined jurisdiction under the collateral order doctrine.[175]

The federal circuits are currently split on the issues of whether the denial of *Parker* immunity is immediately appealable by both private parties such as Campus Village and state actors.[176] The split regarding private

168. *Lariscey*, 861 F.2d at 1270.

169. Parker v. Brown, 317 U.S. 341 (1943).

170. Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC, 703 F.3d 1147 (10th Cir. 2013).

171. *Id.* at 1149.

172. *Id.*

173. *Id.*

174. *Id.* at 1149–50.

175. *Id.*; *Id.* at 1153.

176. *See generally*, Jason Kornmehl, *State Action on Appeal:* Parker *Immunity and the Collateral Order Doctrine in Antitrust Litigation*, 39 SEATTLE U. L. REV. 1 (2015).

parties, however, is much less pronounced, especially after the decision in *Auraria*. Only the Eleventh Circuit has allowed interlocutory review in such cases.[177]

Currently, seven federal courts of appeals have addressed the immediate appealability of denials of *Parker* immunity claims. The Fourth Circuit held that denials of *Parker* immunity in motions to dismiss are not immediately appealable,[178] while, as noted above, the Eleventh Circuit held that they are.[179] The Fifth Circuit allows interlocutory review, but only for governmental defendants.[180] Likewise, the Sixth and Tenth Circuits disallow appeals from private party defendants,[181] though they have not considered the question as it relates to state actors. In addition, the Third and Seventh Circuits have yet to offer binding precedent on the matter, but have suggested in dicta that they would side with the Fifth Circuit and find immediate appeal appropriate for state actor defendants.[182]

All of the federal circuits mentioned above agreed that denials of *Parker* immunity conclusively determine the issue.[183] A ruling on immunity as asserted in a motion to dismiss is not a tentative or informal order, and will almost certainly not be subject to reconsideration.[184] And even courts that declined immediate review acknowledged that for governmental defend-ants, these orders present issues separable from the merits of the action.[185]

177. Praxair, Inc. v. Florida Power & Light Co., 64 F.3d 609, 611 (11th Cir. 1995) (grantingcollateral order appellate jurisdiction of appeals from denial of state action immunity from antitrust liability).

178. *See* S. C. State Bd. of Dentistry v. F.T.C., 455 F.3d 436, 444 (4th Cir. 2006).

179. *Praxair*, 64 F.3d at 611.

180. *See* Martin v. Mem'l Hosp. at Gulfport, 86 F.3d 1391, 1395 (5th Cir. 1996) (concluding assertion of state action doctrine by public hospital defendant immediately appealable); Acoustic Sys., Inc. v. Wenger Corp., 207 F.3d 287, 293 (5th Cir. 2000) (finding assertion of state action doctrine by private party defendant effectively reviewable after trial and thus not immediately appealable).

181. Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC, 703 F.3d 1147, 1153 (10th Cir. 2013); Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563, 567 (6th Cir. 1986).

182. We, Inc. v. City of Philadelphia, 174 F.3d 322, 329 (3d Cir. 1999) (Agreeing with Seventh Circuit decision that the state action doctrine immunizes state officials from burdens of litigation and that there is a distinction between cases involving public officials and those involving private parties); Segni v. Commercial Office of Spain, 816 F.2d 344, 346 (7th Cir. 1987) (explaining the distinction between assertion of immunity by a public official and by a private party, and citing courts that found immunity of public officials is intended to shield from burdens of trial).

183. *See, e.g.*, S. C. State Bd. of Dentistry, 455 F.3d at 441 (denying immediate appeal but stating that "there is no dispute that the denial of *Parker* protection satisfies the first collateral order requirement.").

184. Kornmehl, *supra* note 176, at 22–23.

185. *Id.* at 21; *see, e.g.*, S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436, 442–43 (4th Cir. 2006) ("To be sure, the Parker analysis does not always require an inquiry into whether the state acted to displace competition; the ipso facto exemption [immunity for government entities part of the state] turns only on the identity of the defendant.").

A court does not need to examine whether an antitrust violation occurred to determine whether a government entity that is part of the state qualifies for immunity from such claims. Thus, courts have generally agreed that these orders satisfy the first two elements of the *Coopers & Lybrand* test.

For the third prong, the threshold question is whether a denial of *Parker* immunity confers a "right not to be tried."[186] As discussed above, a party entitled to avoid the costs and burdens of litigation cannot adequately vindicate that right after the litigation has concluded. Thus, courts that found this element satisfied have held that *Parker* immunity indeed provides immunity from trial.[187]

In contrast, courts that have disallowed collateral order appeal because of this element have found that *Parker* immunity is merely a defense to liability.[188] For this class of orders, the split regarding unreviewability is unique in that the courts agree about the proper application of the *Coopers & Lybrand* test. If *Parker* immunity confers a right to evade trial, immediate appeal is appropriate. Rather, the issue is whether this immunity confers that right.

C. Temporary Reinstatement Orders for Miners Bringing Claims Under the Mine Safety and Health Act

More recently in 2014, the Fourth Circuit Court of Appeals split from the Seventh and Eleventh Circuits, and from a later decision by the D.C. Circuit in 2016, with its decision in *Cobra Natural Res., LLC v. Fed. Mine Safety & Health Review Comm'n*.[189] In that case, Respondent Russel Ratliff alleged that Petitioner Cobra Natural Resources, LLC unlawfully retaliated and fired him from his job as a coal miner after he voiced safety concerns regarding mining operations.[190] An administrative law judge determined that Ratliff was entitled to temporary reinstatement to work while his claim

186. Kornmehl, *supra* note 176, at 14; Acoustic Sys., Inc. v. Wenger Corp., 207 F.3d 287, 292 (5th Cir. 2000) ("[W]hen we assess whether interlocutory review is appropriate, '[t]he critical question . . . is whether the essence of the claimed right is a right not to stand trial.' " (quoting Van Cauwenberghe v. Biard, 486 U.S. 517, 524 (1988)).

187. *E.g.*, Martin v. Mem'l Hosp. at Gulfport, 86 F.3d 1391, 1395 (5th Cir. 1996) ("We conclude that Parker v. Brown state action immunity shares the essential element of absolute, qualified and Eleventh Amendment immunities—'an entitlement not to stand trial under certain circumstances.'" (quoting Mitchell v. Forsyth, 472 U.S. 511, 525 (1985)).

188. *See, e.g.*, S. Carolina State Bd. of Dentistry v. F.T.C., 455 F.3d 436, 445–47 (4th Cir. 2006) (rejecting arguments that state action antitrust doctrine provides immunity from suit).

189. Cobra Natural Res., LLC v. Fed. Mine Safety & Health Review Comm'n, 742 F.3d 82 (4th Cir. 2014).

190. *See id.* at 83–84.

was pending and the Federal Mine Safety and Health Review Commission ("FMSHRC") affirmed that determination.[191]

If Cobra waited until the court entered final judgment to appeal the reinstatement order, the issue would be entirely moot. Cobra would be unable to recover the wages and benefits Ratliff earned during that period even if the appeals court found reversible error. At that point, the mine operator must sustain both the economic loss and any damage from personnel issues arising from its employment of an unwelcome worker. Cobra thus sought interlocutory review of the FMSHRC order under the collateral order doctrine.[192] The Fourth Circuit declined appellate jurisdiction, finding none of the *Coopers and Lybrand* Factors satisfied.[193]

The Fourth Circuit held that the reinstatement ruling was not a conclusive determination because a mine operator can seek modification of the order based on "a change of circumstances," such as a major layoff or mine shutdown.[194] Alternatively, the Eleventh and D.C. Circuits both reasoned that the order was conclusive because the mine operator was left with no further recourse to avoid the Commission's order at the agency level.[195] Moreover, the D.C. Circuit argued that there was no basis to suspect that the commission contemplated reconsideration of the order.[196] The Seventh Circuit found such an order conclusive as well, but offered no explanation.[197]

In terms of separability, the Fourth Circuit found that the question presented by a review of the order would not be sufficiently distinct from the merits of the case.[198] To obtain temporary reinstatement, the worker must demonstrate that his claim is "non-frivolous" by showing "protected activity, adverse action, and a nexus between the two."[199] The court reasoned that the factual and legal considerations of the discrimination claim were "deeply enmeshed" with initial considerations necessary to determine whether the claim was non-frivolous.[200]

191. *Id.* at 85.
192. *Id.* at 83.
193. *See id.* at 88–92.
194. *Id.* at 89.
195. CalPortland Co., Inc. v. Fed. Mine Safety & Health Review Comm'n on Behalf of Pappas, No. 16-1094, 2016 WL 6123899, at *4 (D.C. Cir. Oct. 20, 2016); Jim Walter Res., Inc. v. Fed. Mine Safety & Health Review Comm'n, 920 F.2d 738, 744 (11th Cir. 1990).
196. *CalPortland*, 2016 WL 6123899, at *4.
197. Vulcan Const. Materials, L.P. v. Fed. Mine Safety & Health Review Comm'n, 700 F.3d 297, 300 (7th Cir. 2012).
198. *Cobra*, 742 F.3d. at 90.
199. *Id.*
200. *Id.*

In contrast, the D.C., Seventh, and Eleventh Circuits found the issues separable, but for different reasons. For the Seventh Circuit case, the ruling at issue was not a grant of reinstatement; rather, it was a denial of a motion to dissolve an existing reinstatement.[201] As such, the determinative issue on appeal was that of statutory interpretation rather than one of whether the miner sufficiently presented prima facie evidence of discrimination.[202] Accordingly, the issue was clearly separable from the merits of the discrimination claim.[203] The Eleventh Circuit found separability because the factual and legal considerations involved were "conceptually distinct" from the merits.[204] Alternatively, the D.C. Circuit found conclusiveness because the reinstatement order resolved no issue necessary for determination of the merits.[205]

For the last element, the Fourth Circuit concurred with the Seventh, Eleventh, and D.C. Circuits that a mine operator such as Cobra would indeed lose any opportunity for recovery if forced to delay its appeal until after final judgment, but it concluded that Cobra's losses were not sufficiently important.[206] The court determined that the financial concerns at stake in the case, being "primarily economic," failed to approach the importance of other orders the Supreme Court found insufficient in this regard.[207]

D. Orders Disposing of Special Motions to Strike under Anti-SLAPP Statutes

The most recent federal circuit split addressing collateral order appeals emerged in early 2016 with the Second Circuit's decision in *Ernst v. Carrigan*.[208] In that case, the Second Circuit declined to follow previous rulings regarding immediate appealability of resolutions of motions to strike under the various anti-SLAPP statutes by both the Fifth and Ninth Circuits.[209]

SLAPP is an acronym for Strategic Lawsuits Against Public Participation.[210] Anti-SLAPP statutes provide for early dismissal of meritless law-

201. *Vulcan*, 700 F.3d at 299.
202. *Id.* at 300.
203. *See id.*
204. *Jim Walter Res.*, 920 F.2d at 744.
205. *CalPortland*, 2016 WL 6123899, at *5.
206. Cobra Natural Res., LLC v. Fed. Mine Safety & Health Review Comm'n, 742 F.3d 82, 91–92 (4th Cir. 2014).
207. *Id.* at 92.
208. Ernst v. Carrigan, 814 F.3d 116 (2d Cir. 2016).
209. *Id.* at 120-21.
210. *Id.* at 117.

suits filed primarily to suppress the exercise of valid political expression by burdening the defendant with costly, time-consuming litigation.[211] In *Ernst*, the applicable Vermont anti-SLAPP statute provides for dismissal where defendants can show that the case arises from their "exercise of 'the right to freedom of speech or to petition the government' [sic] and that the speech or petition is 'in connection with a public issue."[212] If successful in this showing, the burden shifts to plaintiffs to show both that the defendant's conduct at issue lacked either reasonable factual support or any arguable basis in law, and that such conduct caused them actual injury.[213]

The conduct at issue in *Ernst* was the defendants' alleged writing and circulation of a letter regarding their neighbors with whom they had engaged in multiple zoning disputes, Barbara Ernst and Barbara Supeno.[214] The letter contained information supposedly showing that Ms. Ernst and Ms. Supeno routinely falsified information, used harassment, lied, distorted facts, and used the court system for extortion.[215] The defendants also allegedly made defamatory statements during a public meeting and sent a letter to Ms. Ernst and Ms. Supeno's lawyer that implied the plaintiffs would not pay him for his services.[216]

In response, Ms. Ernst and Ms. Supeno sued in state court alleging defamation, false-light invasion of privacy, and tortious interference against the defendants.[217] After successfully removing the case to federal court, the defendants filed special motions to strike the claims against them under Vermont's anti-SLAPP statute.[218] The district court granted the motions to strike two of the allegations and denied the motions for the remaining two.[219] The district court declined to certify the opinion for interlocutory appeal, and both parties cross-appealed.[220]

The Second Circuit Court of Appeals declined to grant appellate jurisdiction because the orders at issue failed to satisfy the separability requirement of the collateral order doctrine.[221] The court determined that the anti-SLAPP statute's requisite examinations of both whether the defendant's

211. *Id.*
212. *Id.* at 119.
213. *Id.*
214. *Id.* at 118.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 119.

conduct had factual support or basis in law, and whether the conduct caused injury, were intertwined with the merits of the action.[222]

For example, the court explained that to decide the anti-SLAPP motion, the district court had to examine the parties' filings and accompanying affidavits to determine whether the alleged statements were "devoid of reasonable factual support."[223] Similarly, the court must find that the statements were false for Ms. Ernst and Ms. Supeno to be successful on the merits of their defamation claim.[224] The court found these two inquiries to be neither "completely separate" nor "conceptually distinct."[225] In contrast, the Fifth and Ninth Circuits found them separable primarily because a court must satisfy a lower standard to resolve an anti-SLAPP motion than it does to resolve the claim, namely, whether the plaintiff's claim merely has merit, not whether it will succeed.[226]

The Second Circuit also dismissed the argument that failure to satisfy the separability prong should not preclude the immediate review of anti-SLAPP statutes because they provide an immunity from trial.[227] The court explained that although denials of a claim of an immunity from trial, such as a qualified immunity claim, can be immediately appealed "even though part of the traditional inquiry touches on the merits," such overlap must involve only the determination of a question of law.[228] Even in the qualified immunity context, a fact-related dispute is not immediately appealable.[229]

Similarly, anti-SLAPP determinations turn on a fact-based inquiry regarding the factual support of the alleged conduct, and therefore the court found them not truly separable from the claim.[230] Thus, the Second Circuit concluded that even if the anti-SLAPP statute did provide a substantive immunity from trial as the Fifth and Ninth Circuits found,[231] resolutions of these motions should not be immediately appealable.[232]

222. *Id.* at 119-20.
223. *Id.* at 120.
224. *Id.*
225. *See Id.* at 120-21.
226. Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164, 174-75 (5th Cir. 2009); Batzel v. Smith, 333 F.3d 1018, 1025 (9th Cir. 2003).
227. *Ernst*, 814 F.3d at 121.
228. *Id.* at 121-22.
229. *Id.*
230. *Id.* at 122.
231. *Henry*, 566 F.3d at 177; *Batzel*, 333 F.3d at 1025.
232. *Ernst*, 814 F.3d at 121-22.

IV. REDEFINING THE REQUIREMENTS FOR COLLATERAL ORDER APPEAL

The collateral order doctrine has become one of the most complex and unpredictable issues in civil procedure. As outlined above, the Supreme Court has expanded and contracted the *Cohen* interpretation of § 1291 finality over the years, and has left a trail of confusing, and, at times, contradictory guidance. These decisions have led to a patchwork of inconsistent outcomes in the lower courts. This section proposes a two-step solution: first, the Court should use its authority to redefine § 1291 finality using a strict, narrow interpretation of *Cohen*'s requirements; second, the Court should use its § 1292(e) authority to provide for appeal of non-final rulings as a safety valve, where policy interests favor immediate appeal.

Professor Lloyd C. Anderson argued that one potential remedy would be for the Court to use its rulemaking authority to create a rule authorizing appeal as of right from prejudgment orders only where it: "(1) conclusively determines an issue; (2) the issue is completely separate from the merits; and (3) the order would be unreviewable at all after final judgment because the issue would be moot."[233] He noted that during the doctrine's initial era, when these requirements were strictly construed, the Supreme Court needed to review collateral order issues only once every six years.[234] In contrast, the Court reviewed the issue once for every year during its expansionary era from 1974 to 1988.[235] As Anderson argues, this is evidently a result of the Court's "own loosening of jurisdictional standards."[236]

Redefining the requirements for collateral orders in these terms would provide further limitations that keep the doctrine "narrow, and selective in its membership," as the Court has repeatedly advocated.[237] It would also preserve appellate jurisdiction for several classes of orders already deemed eligible and maintains the collateral order framework for future classes of orders. Further development is necessary, however, for each of these requirements.

First, Anderson failed to address the difficulties courts have had determining whether an order is conclusive. The revised definition of finality should clarify that a conclusive order is one where the adversely affected litigant can take no further steps to avoid the effects of the order. As the

233. Anderson, *supra* note 61, at 607.

234. *Id.*

235. *Id.* at 581.

236. *Id.*

237. Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 113 (2009) (quoting Will v. Hallock, 546 U.S. 345, 350 (2006)).

Moses H. Cone Court reminded, any order entered without prejudice may be reopened at the judge's discretion.[238] Therefore, the determinative consideration must be whether the order is conclusive from the litigants' perspective. Indeed, even "inherently tentative" orders may be conclusively determined where the trial court has sufficient information. So, for inconclusive rulings, the court should explicitly provide how or when a litigant can re-petition the court with the issue.

Second, the Court should redefine *Cohen* separability to strictly require that a collaterally appealable issue not "make any step toward final disposition of the merits of the case and will not be merged in final judgment."[239] This means that disposition of a collaterally appealable order should not require resolution of any issue necessary for disposition of the central claim. Importantly, this definition does not preclude separability where a court must merely *consider* the substance of the merits in ruling on the collateral order or rule on an issue with a lower standard than necessary to prevail on the merits.

For example, the *Van Cauwenberghe* Court found the separability requirement not satisfied for a *forum non conveniens* ruling partly because one of the factors (the local interest in having localized controversies decided at home) required that the court "consider the locus of the alleged culpable conduct, often a disputed issue, and the connection of that conduct to the plaintiff's chosen forum."[240] But a determination on the nexus between *alleged* conduct and a potential forum requires no determination that advances the central claim. Such an interpretation of separability seems to go beyond what the *Cohen* Court intended.

Third, importance should not be included in a codified definition of finality, either independently or in conjunction with another requirement. Importance is a subjective consideration, and it would be all but impossible to create a workable standard for measuring it in this context. As discussed above, purely economic considerations may seem less important than issues like double jeopardy or attorney-client privilege, especially for a large business with significant capital; nevertheless, even a small sum may cost an indigent litigant his freedom[241] or the ability to pursue his claim.[242]

238. Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 1, 12 (U.S. 1983).

239. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

240. Van Cauwenberghe v. Biard, 486 U.S. 517, 528 (1988).

241. *See, e.g.*, Stack v. Boyle, 342 U.S. 1, 4 (1951) (order on motion for reduction of bail).

242. *See, e.g.*, *Cohen*, 337 U.S. at 544–46 (extending appellate jurisdiction for immediate review of rulings on whether to compel a plaintiff to post security before proceeding with claim).

Fourth, strict unreviewability should require that delayed review be impossible because the issue is mooted. Where review remains possible, this requirement would not be satisfied, even where a litigant suffers some cost or loses some attendant rights upon delay. For example, an order denying a police officer's qualified immunity defense would remain reviewable even though he could never vindicate his right to evade trial. This is because he would still be able to assert the immunity as a defense to liability on appeal, and if vindicated, the judgment could be overturned.

A rule that incorporates these requirements would look something like this: Final decisions for purposes of appeal pursuant to 28 U.S.C. § 1291 include interlocutory decisions that 1) leave no further steps the litigant can take to vindicate the claim of right before final judgment; 2) resolve no issue that must be determined to dispose of the litigation; and 3) are mooted post-judgment. This revised definition resolves current ambiguities and provides clear rules for lower courts to apply, but it would overrule many classes of orders previously held appealable as of right.

For policy reasons, some of these newly excluded classes of orders should be immediately appealable. In these instances, Anderson suggested that litigants seek discretionary appeal under § 1292(b) or file a mandamus action under § 1361.[243] Although these options remain viable, both can be exceedingly difficult paths for litigants seeking an appeal.[244] A better approach would be for the Court to again use its § 1292(e) authority to provide a codified path for appeal of those non-final rulings.

The class of orders that would most benefit from this type of rulemaking are denials of governmental immunity claims. This proposed definition would overrule entire lines of such cases, including those that allowed for immediate appeal from rejections of a president's claim of absolute immunity,[245] a government official's claim of qualified immunity,[246] and a

243. Anderson, *supra* note 61, at 608.

244. Tory Weigand, *Discretionary Interlocutory Appeals Under 28 U.S.C. § 1292(b): A First Circuit Survey and Review*, 19 ROGER WILLIAMS U. L. REV. 183 (2014) ("There is a concern that [1292(b)] is under-utilized, unduly limited to 'exceptional case[s]' or to large complex cases, and otherwise hobbled by allowing trial judges, with unreviewable discretion and 'vested interests,' to serve as gatekeepers of appellate review."); Anderson, *supra* note 61, at 543 ("Mandamus actions, however, are limited to exceptional circumstances in which a district court has exceeded the scope of its authority or has so manifestly abused its discretion that it has, in effect, ignored the rules.").

245. Nixon v. Fitzgerald, 457 U.S. 731 (1982) (permitting immediate appeal from denial of U.S. President's claim of absolute immunity).

246. Mitchell v. Forsyth, 472 U.S. 511, 536 (1985) (permitting immediate appeal from denial of Attorney General's claim of qualified immunity).

state actor's claim of *Parker* immunity.[247] These immunities, and the protections they provide from litigation, further important interests as the court has repeatedly recognized.[248] To preserve these interests, the Court should promulgate a rule providing for appeal as of right from denials of governmentally asserted immunities.

Going forward, this new framework for collateral order appeals would resolve the remaining circuit splits without the need for individual review. For denials of appointed counsel in civil cases, the new requirements would overrule the three circuits that allow immediate appeal because these orders would remain reviewable after final judgment. Indeed, this may prove harsh for litigants in civil rights cases as some commentators and judges have noted, especially where important statutory or constitutional rights are at stake.[249] Cases such as these, however, also present instances where important policy interests could motivate the Court to use its § 1292(e) rulemaking authority to carve a path for appeal.

In contrast, orders granting temporary reinstatement of miners bringing complaints against their employers would fall into the narrow category of orders appealable under the doctrine. The orders satisfy the conclusiveness requirement because there are no further steps the mine operator can take to avoid reinstatement. Although the orders may be revised due to a change in circumstances, those circumstances lie outside the mine operator's control. As noted, every federal circuit to consider the issue agreed that it would also be moot post-judgment.[250]

The remaining requirement, separability, is satisfied for these orders as well. As discussed above, a miner must demonstrate that his claim was non-frivolous to obtain temporary reinstatement.[251] To do so, he must provide evidence of protected activity, adverse action, and a nexus between the two,[252] elements he must also prove to succeed on the merits. But the miner must satisfy a lower standard for purposes of the reinstatement order: that

247. *E.g.*, Praxair, Inc. v. Florida Power & Light Co., 64 F.3d 609, 611 (11th Cir. 1995) (permitting immediate appeal from denial of electric utility company's claim of *Parker* immunity from antitrust liability).

248. *E.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) ("[W]here an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'").

249. *See* Feldman, *supra* note 157, at 1740.

250. *See supra* note 206–207 and accompanying text.

251. *See supra* note 199 and accompanying text.

252. *Id.*

his claim is merely non-frivolous.[253] In doing so, the Commission resolves no issue that needs to be determined to prevail on the merits. Accordingly, the Commission's determination makes no step toward final judgment, and immediate appeal does not risk duplicative review.

Similarly, this framework confirms separability for resolutions of anti-SLAPP motions to strike because the fact-based inquiry required involves a lower standard. Again, these statutes require a court to confirm that the claim is non-frivolous by examining whether challenged conduct is devoid of reasonable factual support or whether the plaintiff can establish a probability of success for his claim.[254] Neither of these requirements, however, is sufficient to succeed on the merits, which requires, for example, a determination that challenged assertions are indeed false.[255] Thus, such preliminary inquiries fail to resolve any issue that is central to the claim.

V. CONCLUSION

The collateral order exception to the final judgment rule functions most efficiently as a narrow mechanism with requirements that, when satisfied, adequately balance the institutional burdens of increased appellate caseloads with the benefits of mitigating unduly harsh consequences for litigants. The U.S. Supreme Court has, however, gradually stretched these requirements, albeit often to further important policy interests. In doing so, the Court has left complex and confusing guidance that has made interpretation difficult and has significantly increased procedural litigation. A revised definition of finality that both returns to a narrow interpretation of *Cohen*'s requirements and resolves potential ambiguities, alongside further Supreme Court rulemaking, would return *Cohen's* collateral order doctrine to a workable standard, resolve current conflicts, and avoid the institutional costs of addressing the issue through fragmentary litigation.

253. Cobra Nat. Res., LLC v. Fed. Mine Safety & Health Review Comm'n, 742 F.3d 82, 90 (4th Cir. 2014) (explaining that an analysis of an application for temporary reinstatement involves a more lenient standard than that which the litigant must undertake following a full hearing on the merits).

254. *E.g.*, Ernst v. Carrigan, 814 F.3d 116, 120 (2d Cir. 2016); Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164, 170 (5th Cir. 2009).

255. *E.g.*, *Ernst*, 814 F.3d at 120.