THE COLLATERAL ORDER DOCTRINE'S ADMINISTRATIVE ODYSSEY: ENDING THE QUESTION OF INTERLOCUTORY REVIEW FOR ADMINISTRATIVE AGENCY DETERMINATIONS

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*Zoe E. Niesel**

The collateral order doctrine, a judicially created construction of the final judgment rule, allows for immediate appellate review of certain nonfinal decisions that conclusively determine important issues separate from the merits and would be effectively unreviewable on appeal from a final judgment. While this doctrine has been widely accepted in the context of federal district court decisions, the question of when it is applicable to nonfinal administrative-agency determinations remains unsettled. Recent court decisions, such as Louisiana Real Estate Appraisers Board v. Federal Trade Commission *and* Rhode Island v. EPA*, have highlighted the need for a better understanding of the scope and applicability of the collateral order doctrine in the administrative agency context.*

This Article analyzes the historical background, policy considerations, and practical implications of applying the collateral order doctrine to nonfinal agency actions. It asserts that the doctrine should be generally applicable to administrative decisions, regardless of the specific language used in the agency's organic statute. This argument is based on the historical use of writs and other mechanisms to provide interlocutory relief despite statutory finality language, the Supreme Court's emphasis on the practical construction of finality, and the need to balance judicial efficiency with the protection of parties' rights in the administrative context. This pragmatic approach to the application of the collateral order doctrine to nonfinal administrative-agency decisions focuses on the practical impact of agency actions and the interests at stake rather than relying solely on rigid textual analysis. By adopting this approach, courts can ensure that the collateral order doctrine serves its intended function of providing a safety valve for parties facing irreparable harm while maintaining the efficiency of administrative proceedings.

INTRODUCTION

A fascinating and unsettled intersection between civil and administrative procedure exists in the federal courts: specifically, whether courts can apply the collateral order doctrine to allow for interlocutory appeals of nonfinal administrative-agency decisions despite statutory language that may restrict judicial review to specific types of agency actions. The federal courts have operated for some time on a general assumption—without much published reasoning[1]—that the collateral order doctrine applies generally to administrative agency determinations.[2] Citing the three-part test from *Cohen v. Beneficial Industrial Loan Corp.*,[3] a so-called "practical construction" of 28 U.S.C. § 1291,

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1. Rhode Island v. EPA, 378 F.3d 19, 22–25 (1st Cir. 2004) (commenting on the lack of thorough reasoning in circuit court decisions on the application of the collateral order doctrine to administrative agency determinations).

2. *Id.*

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

circuits have determined that interlocutory review[4] can be taken from a variety of agency determinations if those determinations (1) conclusively determine the question,[5] (2) resolve an important issue separate from the merits,[6] and (3) are effectively unreviewable on a later appeal.[7]

However, few courts have wrestled with the application of *Cohen* when statutory instructions appear to limit federal appellate review to specific types of agency determinations.[8] But in 2019, the Fifth Circuit in *Louisiana Real Estate Appraisers Board v. Federal Trade Commission*[9] dismissed an attempt to immediately appeal to the federal circuit court a Federal Trade Commission ruling denying state-action immunity, finding interlocutory review incompatible with the Federal Trade Commission Act's (FTCA) language limiting such review to cease-and-desist orders.[10] The Fifth Circuit thus disagreed with a competing line of case law that applied the collateral order doctrine to administrative determinations more broadly.[11]

This Article explores the competing rationales for interlocutory review of agency determinations and proposes clarifying standards. The application of the collateral order doctrine to agency decisions implicates the delicate balance of power between administrative agencies and the courts, potentially affecting the

4. *Id.* at 546 (allowing interlocutory review for a small class of claims that "finally determine claims of right separable from, and collateral to, rights asserted in the action").

5. Will v. Hallock, 546 U.S. 345, 349 (2006) (stating that "[t]he requirements for collateral order appeal have been distilled down to three conditions: that an order '[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'" (quoting P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993))).

6. Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963). There is no requirement here that the lower court's order involve issues that are identical to the ones to be determined on the merits—what the appellate court will look for instead is if there is "a *threat* of substantial duplication of judicial decision making." S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436, 441 (4th Cir. 2006). In some instances, the Court has found that the proposed interlocutory review is too intertwined with the merits for purposes of the collateral order doctrine. In one instance, a lower court denied dismissal on forum non conveniens grounds, but the underlying inquiry would involve the court having to review the proof required for the underlying merits. Van Cauwenberghe v. Biard, 486 U.S. 517 (1988). In another, orders denying class certification were too intertwined with the merits for purposes of the collateral order doctrine since examining the commonality of claims in that context must by definition involve the underlying merits. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

7. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 499 (1989) (examining when something is effectively unreviewable and finding that the lower court's order must be such that the interest involved is "essentially destroyed if its vindication must be postponed until trial is completed"); *see also Will*, 546 U.S. at 353 ("[I]t is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later."). Examples of such orders include (1) absolute immunity, Nixon v. Fitzgerald, 457 U.S. 731, 742 (1982); (2) qualified immunity, Mitchell v. Forsyth, 472 U.S. 511, 530 (1985); (3) Eleventh Amendment sovereign immunity, P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144–45 (1993); and (4) the Double Jeopardy Clause, Abney v. United States, 431 U.S. 651, 660 (1977).

8. *See* Rhode Island v. EPA, 378 F.3d 19, 22–25 (1st Cir. 2004).

9. La. Real Est. Appraisers Bd. v. FTC, 917 F.3d 389 (5th Cir. 2019).

10. *Id.*

11. *See, e.g.*, Rhode Island v. EPA, 378 F.3d 19 (1st Cir. 2004).

speed and efficiency of the regulatory process, as well as the rights of regulated parties. As such, this Article touches on fundamental questions of due process and the appropriate scope of judicial oversight in the administrative state. A clear resolution of this issue could have far-reaching implications for how businesses and individuals interact with federal agencies and navigate the complex landscape of administrative governance. Moreover, the ability to seek prompt judicial review of certain agency actions could serve as a crucial check on potential overreach while also ensuring that legitimate agency processes are not unduly hindered by excessive litigation.

In Part I, this Article traces the roots of the collateral order doctrine and the doctrine's application to administrative agency decisions, and it explains the current and limited treatment of this question in case law. The Article also notes various policy factors traditionally used to favor finality in the agency context, such as arguments against piecemeal appeals interrupting the formation of a complete administrative record. Next, in Part II, the Article examines the use of the collateral order doctrine as to federal agency determinations and notes tension in the case law. Specifically, some courts have applied the collateral order doctrine generally to agency determinations,[12] while the Fifth Circuit, as discussed above, has adopted a textualist approach focused on the agency's organic statute.

Finally, in Part III, the Article proposes a solution to the question of *Cohen* and interlocutory review of agency determinations made against what may appear to be restrictive judicial review instructions. This Article analyzes the textual differences between judicial review provisions across regulatory schemes, the historical context, and precedents affording flexibility or restraint. In doing so, it suggests that the balance between efficiency and protection should examine (1) whether efficiency costs clearly outweigh benefits from prompt remediation of alleged irreparable harms and (2) the extent of discretion that agencies enjoy over procedures that may coerce parties via increased expenses. With these considerations in mind, agency determinations should generally receive collateral order doctrine treatment if they meet the requirements of *Cohen* despite the presence of restrictive statutory language like that contained in the FTCA. By adopting this approach, courts can ensure that the collateral order doctrine serves its intended function of providing a safety valve for parties facing irreparable harm or the loss of important rights, while still maintaining the efficiency and autonomy of administrative proceedings.

12. *Id.*

I. THE FINALITY DOCTRINE AND GENESIS OF THE COLLATERAL ORDER DOCTRINE

Federal circuit courts of appeals have limited jurisdiction and thus may only exercise the jurisdiction that is provided in the Constitution and by statute.[13] The circuit courts generally have appellate jurisdiction over three different types of appeals[14]: (1) final decisions under 28 U.S.C. § 1291;[15] (2) specially designated interlocutory review under 28 U.S.C. § 1292(a) (involving situations like the grant, continuation, denial or modification of injunctions,[16] orders appointing receivers,[17] and decrees of the district courts involving rights and liabilities in admiralty cases);[18] and (3) interlocutory review where the district court certifies a question to the appellate court under 28 U.S.C. § 1292(b).[19]

Against this background stands a general and well-established[20] presumption against interlocutory review in the federal courts.[21] The reasons are many, with courts commenting on the judicial inefficiency of interlocutory review,[22] its ability to generate duplicative litigation,[23] its tendency to prolong uncertainty in litigation,[24] its provocation of an appellate decision before a full record of the case is generated,[25] and of course, concerns about delay[26] and expense.[27] But despite that strong presumption, interlocutory review does happen for a number of categories: certification of judgment under Federal

13. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

14. Dardar v. Lafourche Realty Co., 849 F.2d 955, 957 (5th Cir. 1988).

15. 28 U.S.C. § 1291.

16. *Id.* § 1292(a)(1).

17. *Id.* § 1292(a)(2).

18. *Id.* § 1292(a)(3).

19. This allows the district court to certify for interlocutory review a nondispositive order that meets three criteria: (1) there is a controlling question of law, (2) upon which there is a substantial ground for difference of opinion, and (3) the immediate appeal of which will materially advance the ultimate termination of the litigation. *Id.* § 1292(b). The purpose of this provision is to provide "immediate appeal [of] interlocutory orders deemed pivotal and debatable." Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 46 (1995). The mechanism is to be used "only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *In re* Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982).

20. Hermès Int'l v. Rothschild, 590 F. Supp. 3d 647, 649 (S.D.N.Y. 2022).

21. *Id.*

22. *Id.* at 649–50.

23. Picard v. Katz, 466 B.R. 208, 208 (Bankr. S.D.N.Y. 2012).

24. *Id.*

25. In *Picard v. Katz*, the court effectively quoted baseball player Yogi Berra in warning on this point: "Since, moreover, interim appeals are typically taken before a full record is developed, the appellate courts that permit them must rule without the broader perspective that comes from knowing the whole story. Whether on the ballfield or in court, 'it ain't over till it's over' is both shrewd observation and sound advice." *Id.* at 208–09.

26. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).

27. Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539, 542 (1998); *see also* Jordon L. Kruse, *Appealability of Class Certification Orders: The "Mandamus Appeal" and a Proposal to Amend Rule 23*, 91 NW. U. L. REV. 704, 711 (1997).

Rule of Civil Procedure 54(b);[28] review under the collateral order doctrine, which will be discussed extensively below; interlocutory review of injunctions, receiver appointments, and admiralty matters under 28 U.S.C. § 1291(a);[29] certification of the categories contained in 28 U.S.C. § 1292(b);[30] and mandamus review under the All Writs Act.[31]

Finality in the context of appellate review, however, is always the policy goal.[32] Generally, the federal appellate courts seek to review only final decisions of the district courts or administrative agencies.[33] The finality principle is one

28. Federal Rule of Civil Procedure 54(b) allows a federal district court judge to direct entry of a final judgment as to one or more, but fewer than all, claims or parties in a case. FED. R. CIV. P. 54. Normally, a decision does not become eligible for appeal until the district court has resolved all claims against all parties. However, Rule 54(b) provides an exception to this general rule—it allows the judge, after making an express determination that there is no just reason for delay, to certify that a partial final judgment is appealable right away, even while other claims or parties remain for adjudication in the district court proceedings. Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 3 (1980).

29. Tidewater Oil Co. v. United States, 409 U.S. 151, 167 (1972) ("Section 1292(a) provides for an appeal as a matter of right from a number of specified types of interlocutory orders—in particular, interlocutory orders granting or denying injunctions.").

30. The Interlocutory Appeals Act (now codified in 28 U.S.C. § 1292(b)) requires a certification of an immediate appeal by both the district court and the circuit court of appeals, and "there must be a 'controlling issue of law,' upon which there is a 'substantial ground for difference of opinion,' such that an immediate appeal 'may materially advance the termination of the litigation.'" Michael E. Solimine, *The Renaissance of Permissive Interlocutory Appeals and the Demise of the Collateral Order Doctrine*, 53 AKRON L. REV. 607, 610 (2019) (quoting 28 U.S.C. § 1292(b)). While intended to be a narrow exception to the final judgment rule (as is the collateral order doctrine, as described below), the courts have spent sixty years debating the application of these prongs. *Id.* It remains unclear: (1) if a controlling issue of law is one that would mean a reversal of the district court would result in a final judgment for the appellant, (2) what exactly it would mean to have a substantial ground for difference of opinion, and (3) whether § 1292(b) is supposed to be reserved for large, exceptional cases. *Id.* at 610–11. However, the Supreme Court has continued to endorse the provision while failing to address the confusion in the lower court case law. *Id.* at 611–12.

31. 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, 275 (2014). The Supreme Court has noted that mandamus is "an extraordinary remedy, to be reserved for extraordinary situations." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). As a check against abuse by the judicial system itself, a writ of mandamus has been described as one of the most potent weapons that the appellate court can wield against the lower tribunal. Will v. United States, 389 U.S. 90, 107 (1967). For an appellate court to issue this writ, three demanding conditions must be met. First, the petitioner must have no other viable options to obtain the desired relief, which prevents the writ from being used in place of the normal appeals process. *See Ex Parte* Fahey, 332 U.S. 258, 259–60 (1947). Second, the petitioner must clearly and indisputably demonstrate that the writ is warranted. Kerr v. U.S. Dist. Ct. for the N. Dist. of Cal., 426 U.S. 394, 403 (1976). Third, even if the prior two conditions are satisfied, the court must determine that the writ is appropriate given the specific circumstances. *See id.* Courts may issue the writ in extraordinary situations—for example, to prevent one branch of government from overstepping its bounds and diminishing the separation of powers, or to stop federal courts from improperly interfering in state affairs. Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 381 (2004).

32. Michael E. Harriss, *Rebutting the Roberts Court: Reinventing the Collateral Order Doctrine Through Judicial Decision-Making*, 91 WASH. U. L. REV. 721, 725 (2014).

33. "The general rule is that 'a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.'" Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996) (quoting Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994)).

of judicial economy.[34] If piecemeal review were allowed, the federal appellate courts would face a surge of "housekeeping" matters from the lower courts and federal agencies, which could grind justice to a halt.[35] For example, a party aggrieved by a district court's decision on a discovery matter may ultimately have no need to appeal that issue by the time of final judgment because the party may prevail in the litigation.[36] Further, the rule theoretically creates higher quality appellate decision-making. By delaying appellate review until the conclusion of all proceedings, the appellate court has the benefit of a final record produced by the lower court or administrative agency.[37]

With those goals in mind, we turn to the statutory language of § 1291, which captures the general instructions on finality in the federal appellate courts.[38] Specifically, § 1291 states that:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.[39]

The most important phrase in § 1291 is that the court's jurisdiction is limited to those "final decisions" of the district courts.[40] But what does it mean to be a final decision?

The language goes back some ways.[41] In 1789, the Federal Judiciary Act created a structure of appeals from the state supreme courts to the U.S. Supreme Court, from the federal district courts to the circuit courts, and from the federal circuit courts to the Supreme Court.[42] The Act stated that appeals in

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34. *See, e.g.*, Am. Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 280 (2d Cir. 1967).

35. Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 738 (2006).

36. *Id.*

37. *See id.*

38. Finality as a concept in federal appellate review existed long before the enactment of § 1291, but the statute represents the modern citation of the doctrine. *See* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 726–29 (describing the historical background and development of the Final Judgment Rule).

39. 28 U.S.C. § 1291.

40. *See id.*

41. *See* Martineau, *supra* note 38, at 726–27 (discussing the origins of the Final Judgment Rule and its "language limiting the right to appeal to final judgments").

42. Judiciary Act of 1891, ch. 517, 26 Stat. 826, 828; McLish v. Roff, 141 U.S. 661, 665 (1891) (noting in 1891 that "[f]rom the very foundation of our judicial system the object and policy of the acts of congress in relation to appeals . . . have been to save the expense and delays of repeated appeals in the same suit"). Even at this early hour, there was trouble in paradise. In 1892, the Supreme Court noted that "[p]robably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees." McGourkey v. Toledo & O.C. Ry. Co., 146 U.S. 536, 544–45 (1892).

these scenarios were from "final judgments or decrees."[43] In 1891, with the establishment of the circuit courts of appeals, their appellate jurisdiction was as to "final decisions."[44] The adoption of § 1291 in 1948 kept this phrasing intact, using the same "final decisions" language.[45]

The Supreme Court interpreted the phrase "final decisions" in 1945 in *Catlin v. United States*.[46] *Catlin* examined the phrase with regard to 28 U.S.C. § 1291's predecessor statute—28 U.S.C. § 225(a)—which stated that "circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions . . . [i]n the district courts."[47] *Catlin* interpreted "final decisions" to mean a decision "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[48] That interpretation continues to be applied to this day.[49]

But despite this finality language, the Supreme Court held in *Cohen v. Beneficial Industrial Loan Corp.*[50] that the federal courts of appeals will have jurisdiction to review some types of orders that would not be final in the ordinary usage of the term or within the meaning encompassed by *Catlin*.[51] *Cohen* involved a stockholder derivative suit brought in federal district court in New Jersey on the basis of diversity of citizenship.[52] The plaintiff stockholder owned a very small percentage (0.0125%) of the defendant corporation's stock, and the complaint alleged longstanding fraud and mismanagement by the corporation's directors resulting in over $100 million in wasted assets.[53] After the suit was filed, New Jersey passed a statute requiring plaintiffs in such suits who own less than 5% of the stock to post a bond to cover the defendant's legal fees and expenses if the plaintiff were unsuccessful.[54] The district court

43. Federal Judiciary Act, ch. 20, 1 Stat. 73, 84 (1789); *see also* Di Bella v. United States, 369 U.S. 121, 124 (1962) ("The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment.").

44. *See supra* note 42.

45. *See* 28 U.S.C. § 1291.

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

47. *Id.* at 231 n.2 (quoting 28 U.S.C. § 225(a)).

48. *Id.* at 233.

49. *See, e.g.*, Bd. of Trs. of Plumbers, Loc. Union No. 392 v. Humbert, 884 F.3d 624, 625–26 (6th Cir. 2018) ("Under § 1291 of the Judicial Code, federal courts of appeals are empowered to review only final decisions of the district court[]. . . . A decision is final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." (citations omitted) (first quoting Microsoft Corp. v. Baker, 582 U.S. 23, 27 (2017); and then quoting *Catlin*, 324 U.S. at 233)); Jeffery v. Med. Protective Co., No. 23-5392, 2023 WL 7489983, at *1 (6th Cir. Nov. 13, 2023) (same); Hagler v. Williams, No. 22-14236, 2023 WL 4311215, at *1 (11th Cir. July 3, 2023) (same); DeMartini v. DeMartini, No. 19-16603, 2023 WL 4044434, at *1 (9th Cir. June 16, 2023) (same); Pena v. 220 E. 197 Realty LLC, No. 21-2031-CV, 2023 WL 3221019, at *2 (2d Cir. May 3, 2023) (same); Hixson v. Moran, 1 F.4th 297, 301 (4th Cir. 2021) (same).

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

51. *See id.* at 546–47.

52. *Id.* at 543.

53. *Id.* at 543–44.

54. *Id.* at 544–45.

refused to apply the statute to the pending federal case based on *Erie Railroad v. Tompkins*, despite language that the statute was meant to be applicable to pending actions.[55]

The Supreme Court took up the issue of whether the district court's order refusing to apply the New Jersey statute was appealable before final judgment on the merits.[56] The Court cited 28 U.S.C. § 1291, noting that appellate review was to be "only from all final decisions of the district courts, except when direct appeal to [the Supreme Court] is provided."[57] Section 1292, in contrast, does allow interlocutory appeal for certain types of judgments and decrees, which the Court noted indicates a congressional intent to allow appeals from nonfinal judgments only when there is a "final and irreparable effect" on the rights of the parties.[58]

The Court noted that if Congress "had allowed appeals only from those final judgments which terminate an action," the order in *Cohen* would not be appealable.[59] The Court also noted that the goal of § 1291 was to prevent interlocutory review from decisions which were incomplete, succinctly noting that "[a]ppeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal."[60] However, in a situation like *Cohen*, the order of the district court did not, even in an incremental way, touch the underlying merits of the case—the matter to be reviewed did not impact any part of the decision on the merits, and a complete record existed on the question of the applicability of the New Jersey statute.[61]

The Court held that the order in *Cohen* was immediately appealable because it made a final determination on the claimed statutory requirement of a bond, and that question was not an ingredient of the cause of action.[62] Further, review after final judgment would be too late to protect the rights conferred.[63] This type of conclusive decision on an important matter collateral to the merits was within the small class of orders excepted from the final judgment rule for purposes of appeal.[64] Therefore, the Supreme Court ruled, it had jurisdiction to

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55. *Id.*

56. *Id.*

57. *Id.* There are a few circumstances where cases can be directly appealed to the Supreme Court without first going through a lower federal appeals court. *See* Heather N. Sigrist, Note, Wyoming v. Oklahoma*: "[M]isguided Exercise of Discretion"*, 26 AKRON L. REV. 341, 341–45 (1992) (describing the Supreme Court's original jurisdiction over certain cases).

58. *Cohen*, 337 U.S. at 545.

59. *Id.*

60. *Id.* at 546.

61. *See id.* (discussing the appealability of the district court's determination that it was not bound to follow the New Jersey statute).

62. *Id.* at 546–47.

63. *Id.*

64. *Id.* at 546.

review through an interlocutory appeal the district court's refusal to apply the New Jersey statute.[65]

Cohen was thus considered to have birthed the "collateral order doctrine," which "accommodates a 'small class' of rulings, not concluding the litigation, but conclusively resolving 'claims of right separable from, and collateral to, rights asserted in the action.'"[66] The *Cohen* Court indicated that these rulings may be "too important to be denied review and too independent of the cause itself" to risk waiting until the final termination of the underlying action.[67] In so holding, the Court noted that it was applying a "practical rather than a technical construction" of 28 U.S.C. § 1291.[68]

In the case law, *Cohen* is often cited for the proposition that the collateral order doctrine requires three things. Specifically, a party seeking to invoke appellate jurisdiction under the collateral order doctrine must show that the district court's order: (1) "conclusively determine[d] the disputed question," (2) "resolve[d] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a final judgment."[69]

This three-part test is meant to be applied in a narrow and stringent manner to address the policies behind the goal of finality in review—efficiency, cost reduction, and avoidance of harassment.[70] Additionally, the Court has consistently clarified that it will decide the application of the collateral order

65. *Id.* at 546–47. The Court dismissed an alternative petition for mandamus relief since the order was appealable. *Id.* at 547.

66. Will v. Hallock, 546 U.S. 345, 349 (2006) (quoting Behrens v. Pelletier, 516 U.S. 299, 305 (1996)).

67. *Cohen*, 337 U.S. at 546.

68. *Id.* The Court noted that its "practical construction" approach here was based on previous precedent. *Id.* (first citing Bank of Columbia v. Sweeny, 26 U.S. 567, 569 (1828); then citing United States v. River Rouge Improvement Co., 269 U.S. 411, 414 (1926); and then citing Cobbledick v. United States, 309 U.S. 323, 328 (1940)). *But see* Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1249 n.90 (2007). Professor Steinman calls the reliance on these cases "puzzling" as *Sweeney* involved the court's refusal to issue a writ of mandamus before final judgment, *River Rouge* involved a case in which the district court had already reached a final judgment through a jury trial, and *Cobbledick* held that the finality principle now captured in § 1291 would also apply to a nonparty witness. *Id.* Of the three, *Cobbledick* may be the most supportive in that the Court used language similar to *Cohen*'s in explaining that the construction of the term "final decision" in § 1291's predecessor statute was "not a technical concept of temporal or physical termination." *Cobbledick*, 309 U.S. at 326. Instead, "[i]t is the means for achieving a healthy legal system," thus reinforcing the practical construction of the term "final decision." *Id.*

69. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). *Coopers & Lybrand* is often cited for this three-part test, which summarizes the requirements of *Cohen* in a neat package. *See* Baldridge v. SBC Commc'ns, Inc., 404 F.3d 930, 931 (5th Cir. 2005); Sell v. United States, 539 U.S. 166, 176 (2003); Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994); P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993). *Cooper & Lybrand* took up the question of whether an order denying class action certification met the requirements of *Cohen* for interlocutory review. The Court there determined it did not; the decision is not final because the district court can revise its class certification decision later under the Federal Rules of Civil Procedure, the decision to certify the class is entangled with the factual and legal merits of the case, and after final judgment, the named plaintiffs or intervening class members can effectively obtain review of the denial of certification. *Coopers & Lybrand*, 437 U.S. at 468–69.

70. *Digit. Equip. Corp.*, 511 U.S. at 868; *Will*, 546 U.S. at 350; *see also* Los Lobos Renewable Power, LLC v. Americulture, Inc., 885 F.3d 659, 664 (10th Cir. 2018).

doctrine for "categories of orders," rather than for individual decisions.[71] As such, the Supreme Court has instructed the circuit courts not to consider the individual case at hand in these determinations but rather to engage in a broader assessment of the type of order being considered and assess the "the competing considerations underlying all questions of finality—'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'"[72] And the Court has mentioned that the collateral order doctrine should not be seen as an exception to § 1291; rather, as noted above, it is a practical construction of the statute.[73] Although, at other times, the Court has certainly called *Cohen* an exception to § 1291 too.[74] Scholarly commentators have largely agreed that the *Cohen* doctrine is ultimately a judicially created invention or gloss to the statute.[75]

Construction or exception, since *Cohen*, the state of the collateral order doctrine case law has been messy.[76] In discussing the state of the case law post-*Cohen*, the Fifth Circuit in 1980 noted that: "After this birth the *Cohen* doctrine, spawned by a desire to avoid the rigidity of the final judgment rule and nurtured by the maternal tendency of appellate courts to protect youthful litigation from early trauma, grew to a strapping youth that threatened to master the statute of its genesis."[77] And the problems have continued from there. The Supreme Court has long attempted to emphasize the narrowness of *Cohen*, stating in 2006 that "we have meant what we have said; although the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership."[78] But the Court may protest too much. The scholarly treatment of the collateral order doctrine has shown that the state of interlocutory review is a bit of a mess.[79] There are few

71. Johnson v. Jones, 515 U.S. 304, 315 (1995).

72. *Id.* at 315 (quoting Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950)).

73. *Will*, 546 U.S. at 349; *see also* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981) ("*Cohen* did not establish new law; rather, it continued a tradition of giving § 1291 a 'practical rather than a technical construction.'" (quoting *Cohen*, 337 U.S. at 546)).

74. *Firestone Tire & Rubber Co.*, 449 U.S. at 374 (1981) ("Our decisions have recognized, however, a narrow exception to the requirement that all appeals under § 1291 await final judgment on the merits. In [*Cohen*], we held that a 'small class' of orders that did not end the main litigation were nevertheless final and appealable pursuant to § 1291."). In *Digit. Equip. Corp.*, the Court in one paragraph noted that the collateral order doctrine "is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291" and then one paragraph later, still referring to *Cohen*, stated that "we have also repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule." *Digit. Equip. Corp.*, 511 U.S. at 867–68. *See also* Martineau, *supra* note 38, at 742 (calling *Cohen* a "major exception to the final judgment rule").

75. Solimine, *supra* note 30, at 627–28 n.111 (citing multiple sources on this point).

76. Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809, 1842 (2018) ("Rarely is the [collateral order] doctrine mentioned without accompanying criticism.").

77. Ruiz v. Estelle, 609 F.2d 118, 119 (5th Cir. 1980).

78. *Will*, 546 U.S. at 350.

79. Solimine, *supra* note 30, at 627 (noting that the Court has not provided clear or reliable guidance on determining whether an order is sufficiently important to qualify for collateral order doctrine treatment and that the *Cohen* doctrine has been plagued by vague, uneven application); Anderson, *supra* note 27, at 540

doctrines in civil procedure that have generated such harsh critique,[80] with scholars and judges using language like "regrettable,"[81] "chaotic,"[82] "confused,"[83] "contradictory,"[84] and more[85] to describe the collateral order doctrine. Following *Cohen* itself, lower federal courts used the collateral order doctrine aggressively, greatly expanding the federal appellate docket.[86] The Supreme Court during this time showed much less interest in the doctrine, deciding only four cases on the collateral order doctrine from its creation to 1974.[87] But that did not last, with the Court increasing its attention to the issue after 1974.[88]

From the long history of the collateral order doctrine, some general principles can be discerned. Constitutionally based immunities have long received positive treatment under the collateral order doctrine[89] since their protection is effectively meaningless if an interlocutory review of denial cannot be accomplished.[90] And additional areas have received collateral order doctrine treatment where they involved rights that are purposed to be immune from trial itself.[91] For example, the collateral order doctrine has been cited to provide interlocutory appellate review in these types of situations:

- Orders denying absolute-immunity or qualified-immunity claims by government officials;[92]

(providing various quotes about the collateral order doctrine situation—"our finality jurisprudence is sorely in need of limiting principles," "regrettable expense and delay," "confused and contradictory doctrinal minutiae"); Steinman, *supra* note 68, at 1238 (identifying the many terrible ways the collateral order doctrine has been described, including "an unacceptable morass," "dizzying," "tortured," "a jurisprudence of unbelievable impenetrability," "helter-skelter," "a crazy quilt," and more); Lammon, *supra* note 76, at 1810 ("The law of federal appellate jurisdiction is widely regarded as a mess.").

80. Steinman, *supra* note 68, at 1237 ("Appellate jurisdiction over interlocutory trial court rulings is among the most troublesome issues in civil procedure."); *see also* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 292 (1988) (Scalia, J., concurring) (noting that "our finality jurisprudence is sorely in need of further limiting principles").

81. Manhattan Beach Police Officers Ass'n v. City of Manhattan Beach, 881 F.2d 816, 817 (9th Cir. 1989) (explaining how the appeals "cause regrettable expense and delay").

82. Anderson, *supra* note 27, at 585.

83. Bd. of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Ill. State Bd. of Educ., 79 F.3d 654, 659 (7th Cir. 1996) ("We need not penetrate more deeply into this maze.").

84. Solimine, *supra* note 30, at 627.

85. We can add a "near-chaotic state of affairs." Maurice Rosenberg, *Solving the Federal Finality–Appealability Problem*, 47 L. & CONTEMP. PROBS. 171, 174 (1984).

86. Martineau, *supra* note 38, at 740 (noting that this largely ignored the language from *Cohen* itself that suggested the collateral order doctrine was to be used for serious and unsettled issues).

87. Harriss, *supra* note 32, at 728, 728 n.47 (listing and discussing those cases).

88. *See id.*

89. Jason Kornmehl, *State Action on Appeal:* Parker *Immunity and the Collateral Order Doctrine in Antitrust Litigation*, 39 SEATTLE U. L. REV. 1, 11–12 (2015).

90. *See* Will v. Hallock, 546 U.S. 345, 350 (2006); *see also* Steinman, *supra* note 68, at 1250.

91. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172 (1974).

92. *See* Nixon v. Fitzgerald, 457 U.S. 731, 741 (1982).

- Orders denying a state's claim to Eleventh Amendment immunity;[93]
- Orders remanding a case to the state court based on federal abstention;[94]
- Orders denying a foreign state's claim of immunity;[95] and
- Orders denying tribal immunity[96]

Expansion and confusion continue to be themes. The Court has emphasized that in the realm of the collateral order doctrine, it will "decide appealability for categories of orders rather than individual orders."[97] As such, collateral order determinations are not to be made on a case-by-case basis but rather by balancing overarching competing interests that underlie all finality determinations.[98] On one hand, allowing piecemeal appeals during litigation inconveniences courts and drives up costs. On the other hand, postponing appeals until after final judgment risks denying parties justice in the interim. The Court has said that its goal is to evaluate these systemic concerns, not to make ad hoc judgments about the equities of individual cases.[99] While worthy language, the application of *Cohen* to different types of orders has spawned lines of cases and precedents.[100] This has, understandably, often left litigants confused.

Against a backdrop of dissatisfaction with the collateral order doctrine, Congress in 1988 established a Federal Courts Study Committee to examine rising caseloads and litigation delays in the federal courts.[101] The Committee's findings noted that the final decision rule and collateral order doctrine were unsatisfactory due to the confused state of the case law on each.[102] To address this confusion, the Committee suggested that Congress provide the Supreme Court with rulemaking authority to address the requirements for a ruling to be considered final and appealable, as well as the circumstances in which

93. *See* Mitchell v. Forsyth, 472 U.S. 511, 526–27 (1985).

94. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 706–07 (1996).

95. Terenkian v. Republic of Iraq, 694 F.3d 1122, 1130 (9th Cir. 2012).

96. Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla., 63 F.3d 1030, 1050 (11th Cir. 1995); Burlington N. & Santa Fe Ry. Co. v. Vaughn, 509 F.3d 1085, 1089–91 (9th Cir. 2007).

97. Johnson v. Jones, 515 U.S. 304, 315 (1995).

98. *Id.*

99. *Id.* ("[W]e do not now in each individual case engage in ad hoc balancing to decide issues of appealability.").

100. *See* Matthew R. Pikor, Note, *The Collateral Order Doctrine in Disorder: Redefining Finality*, 92 CHI.-KENT L. REV. 619, 638–46 (2017) (describing circuit splits regarding temporary reinstatement orders, *Parker* immunity, appointed counsel in civil cases, and more).

101. Federal Courts Study Act, Pub. L. No. 100-702, § 102, 102 Stat. 4642, 4644 (1988); Pikor, *supra* note 100, at 620.

102. FED. CTS. STUDY COMM., JUD. CONF. OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 95 (1990).

interlocutory orders could be appealed.[103] In 1990, Congress granted the Supreme Court this expanded authority.[104] However, the Court has exercised this rulemaking authority just once in an effort to clarify appealability standards[105]—the adoption of Federal Rule of Civil Procedure 23(f), which provides the federal circuit courts with jurisdiction over appeals from orders granting or denying class action certification.[106]

II. THE COLLATERAL ORDER DOCTRINE AND ADMINISTRATIVE AGENCIES

The state of the collateral order case law has been widely criticized.[107] However, interestingly, there has been until recently relatively little drama surrounding the application of the collateral order doctrine to decisions of administrative agencies. Many of the circuit courts have accepted, with little detailed reasoning, that nonfinal agency action is generally not reviewable by the federal appellate courts but that nonfinal agency action that meets the standards of the collateral order doctrine can be immediately appealed.[108]

Before pursuing that line, however, it is worth taking a quick detour to the Administrative Procedure Act (APA). The APA contains default language for the judicial review of agency decisions.[109] Specifically, § 704 of the APA states that

> [a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.[110]

As such, the APA does provide for judicial review of final agency decisions.[111] And courts have generally interpreted *Cohen* to attach to § 704's language. For example, in *Chehazeh v. Attorney General*,[112] the Third Circuit determined that § 704's "final agency action" language was analogous to the "final decisions" language from § 1291.[113] As such, the court was comfortable utilizing the same general finality standards for both statutes—"that, while a

103. *Id.* at 95–96.

104. Steinman, *supra* note 68, at 1246; 28 U.S.C. § 2072(c); 28 U.S.C. § 1292(e).

105. Pikor, *supra* note 100, at 620–21.

106. Steinman, *supra* note 68, at 1246.

107. Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 424 (2013) ("The system of appellate jurisdiction over non-final district court orders has thus been a persistent target of reform efforts, and the matter continues to be one of 'the most troublesome issues in civil procedure.'" (citation omitted)).

108. *See* Kornmehl, *supra* note 89, at 28.

109. *See* 5 U.S.C. § 704 (2024).

110. *Id.*

111. *See id.*

112. Chehazeh v. Att'y Gen., 666 F.3d 118, 124 (3d Cir. 2012).

113. *Id.* at 135.

final decision generally is one which ends the litigation on the merits, . . . other preliminary decisions may be final if they are conclusive, resolve important questions completely separate from the merits, and would be effectively unreviewable on appeal from final judgment in the underlying action."[114] As such, per the Third Circuit, the collateral order doctrine could apply to some types of nonfinal agency determinations for purposes of § 704.[115]

However, it is important to note that this is a procedurally distinct inquiry from the discussion below. Section 704 provides for the review of final agency action in the district courts of the United States—not the federal circuit courts of appeals. In *Chehazeh*, the Third Circuit was careful to note that the issue before it was whether the district court had jurisdiction to examine the agency order at issue.[116] The circuit court's jurisdiction thus came in reviewing a final decision of the district court under § 1291.[117] As such, the court was not taking up the question of when there would be federal appellate jurisdiction over interlocutory appeals from the administrative agencies.[118]

A case from the Fourth Circuit provides good example of the reasoning in cases that do deal with the intersection between administrative orders and the collateral order doctrine in the federal appellate courts. *Carolina Power and Light Co. v. United States Department of Labor*[119] involved an appeal of the Secretary of Labor's decision to remand a settlement agreement between James B. DeBose and his employer, Carolina Power and Light (CP&L).[120] DeBose had filed a complaint under the Energy Reorganization Act's whistleblower-protection provision, alleging CP&L demoted him unlawfully.[121] The parties reached a settlement agreement prior to any agency action, which they submitted for the Secretary's approval as required by the Act.[122] However, the Secretary declined to approve the agreement, finding that the agreement's confidentiality requirements would conflict with the Secretary's duties under the Freedom of Information Act.[123] Thus, he remanded the agreement for further negotiations instead of entering into it as mandated by the statute.[124] CP&L appealed the remand order, seeking both to "overturn the Secretary's rejection" of the settlement and "delineate [his] authority to review settlement agreements."[125]

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114. *Id.* (first quoting Catlin v. United States, 324 U.S. 229, 233 (1945); and then quoting Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994)).

115. *See id.*

116. *Id.* at 125.

117. *Id.* at 135.

118. *Id.*

119. Carolina Power & Light Co. v. U.S. Dep't of Lab., 43 F.3d 912 (4th Cir. 1995).

120. *Id.* at 913.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

The Fourth Circuit dismissed for lack of jurisdiction because the Secretary's remand order was neither a final order subject to appellate review under the whistleblower provision nor a collateral order per *Cohen*.[126] In addressing the collateral order doctrine issue, the Fourth Circuit explained that "[i]t is well-settled that these requirements of the collateral order doctrine apply not only to judicial decisions, but also to appeals from executive agency action."[127] For this proposition, the court cited *Federal Trade Commission v. Standard Oil of California*.[128] But *Standard Oil* did not state that the collateral order doctrine applied generally to appeals from agency actions. Instead, *Standard Oil* stated only that the collateral order doctrine would not provide judicial review of the Federal Trade Commission's allegedly illegal issuance of a complaint against the respondent because the Court's opinion had already determined that the issuance of the complaint would be a step towards final disposition of the merits of the case.[129]

The D.C. Circuit has also addressed the collateral order doctrine for administrative action but in regard to review under the Mine Safety and Health Act. Section 106(a) of the Mine Act states that "[a]ny person adversely affected or aggrieved by an order of the Commission issued under this chapter may obtain a review of such order in . . . the United States Court of Appeals for the District of Columbia Circuit."[130] In *Meredith v. Federal Mine Safety and Health Commission*,[131] the D.C. Circuit noted that the "collateral order doctrine extends beyond the confines of 28 U.S.C. § 1291 to encompass the principle of administrative finality contained in § 106(a) of the Mine Act."[132] Although the court referenced the Mine Act specifically, the court cited *Carolina Power and Light* for its principle that the collateral order doctrine is not limited to judicial decisions but rather encompasses appeals from federal agency action generally.[133] The court went on to conduct a collateral order doctrine analysis under the "separability," "unreviewability," and "conclusiveness" elements of the *Cohen* three-part test.[134] Other circuits have joined the D.C. Circuit in similarly finding that § 106(a) of the Mine Act provides language amenable to a *Cohen* analysis.[135]

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126. *Id.*

127. *Id.* at 916.

128. FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 246–47 (1980).

129. *Id.* at 246. *But see* Kornmehl, *supra* note 89, at 29 (characterizing *Standard Oil* as the Supreme Court's suggestion that the collateral order doctrine applies to agency action).

130. 30 U.S.C. § 816(a)(1).

131. Meredith v. Fed. Mine Safety & Health Rev. Comm'n, 177 F.3d 1042 (D.C. Cir. 1999).

132. *Id.* at 1050.

133. *Id.* at 1051.

134. *Id.*

135. Jim Walter Res., Inc. v. Fed. Mine Safety & Health Review Comm'n, 920 F.2d 738, 743 (11th Cir. 1990) ("Although the statute uses the term 'order' rather than 'final order,' this omission alone is insufficient to overcome the general presumption that judicial review of administrative actions is available only when such decisions have become final."); Monterey Coal Co. v. Fed. Mine Safety & Health Review Comm'n,

A. Rhode Island v. EPA

At least one circuit does, however, hold that nonfinal agency determinations are generally subject to *Cohen* treatment. The thorough analysis of the issue comes from *Rhode Island v. EPA*, a 2004 decision by the First Circuit.[136] *Rhode Island* involved an appeal by the state of Rhode Island seeking interlocutory review of a decision by the Environmental Appeals Board (EAB) denying the state's motion to intervene in a pollution-discharge permit proceeding for the Brayton Point power plant.[137] The Brayton Point power plant was operated by USGen New England in Somerset, Massachusetts, on the shores of Mount Hope Bay (partially in Rhode Island territory).[138] The plant's cooling system discharged heated water into the bay, detrimentally impacting fish populations.[139] The plant's National Pollutant Discharge Elimination System (NPDES) permit governing pollutant discharges expired in 1998, and USGen applied for a renewal.[140] In 2002, a draft permit was issued.[141]

In October 2003, the EPA Regional Administrator issued a proposed final NPDES permit for Brayton Point with more stringent conditions.[142] USGen requested an administrative review and evidentiary hearing on the permit, and Rhode Island moved to intervene to support the permit, or alternatively, to participate as amicus curiae.[143]

The EAB then issued a multipart order—it granted USGen's review petition, deferred deciding on an evidentiary hearing, denied without prejudice Rhode Island's intervention motion, granted Rhode Island amicus status, and set a briefing schedule.[144] Rhode Island immediately appealed the denial of intervention to the First Circuit.[145] As such, the First Circuit took up the question of whether it had appellate jurisdiction of the interlocutory appeal.[146]

The First Circuit noted the limited nature of federal appellate jurisdiction, noting that the circuit courts of appeals "can hear cases only if and to the extent that they are authorized to do so by statute."[147] As the court immediately noted, the collateral order doctrine was developed as a construction of the term "final

635 F.2d 291, 292 (4th Cir. 1980) ("The statute, amplified by this legislative history, demonstrates congressional intent that only final Commission orders should be reviewed.").

136. Rhode Island v. EPA, 378 F.3d 19 (1st Cir. 2004).

137. *Id.* at 21–22.

138. *Id.* at 22.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* (citing Bell v. New Jersey, 461 U.S. 773, 777 (1983)).

decisions" in 28 U.S.C. § 1291.[148] However, the statutory language of § 1291 states that the courts of appeals will have review from the "final decisions of the *district courts*."[149] The statute thus does not address appellate review from administrative action. Instead, judicial review here would be conducted under the specific statutory provisions of the Clean Water Act, 33 U.S.C. § 1369(b)(1)(F), which allow judicial review of EPA permit issuance/denial upon application by any interested person.[150] By its plain language, and confirmed by case law, the Clean Water Act predicates judicial review on definitive agency action granting or rejecting a permit.[151] The regional administrator issues permits only at the conclusion of EAB review.[152] In this case, the EAB proceedings were still ongoing, so there had been no issuance or denial of a permit.[153] The First Circuit looped in the above-referenced justifications to the finality doctrine, noting that agency action is generally only reviewable once it is final, representing the culmination of the decision-making process and conclusively determining parties' rights and duties.[154] In the Clean Water Act context, that point only comes after the EAB proceedings conclude.[155]

As such, the court turned to the open question of whether a party aggrieved by an agency's nonfinal order can invoke the collateral order doctrine to obtain judicial intervention before the conclusion of the administrative process.[156] In tackling that question, the court conclusively determined that it could.[157] In so holding, the court relied on three justifications. First, mirroring reasoning from a 1996 concurring opinion by then-Judge Ginsburg on the D.C. Circuit, the First Circuit claimed that the Supreme Court had "strongly signaled" that it supported the application of *Cohen* to administrative determinations.[158] Per the First Circuit, the telegraphed intent on this matter came from *Mathews v. Eldridge*,[159] *FTC v. Standard Oil*,[160] and *Bell v. New Jersey*.[161] *Standard Oil* was discussed above, and it did discuss the collateral order doctrine in regard to an FTC complaint.[162] However, its reasoning noted only that it was clear that the complaint in question would make a step towards the ultimate decision on the

148. *Id.* at 23.
149. 28 U.S.C. § 1291 (emphasis added).
150. *Rhode Island*, 378 F.3d at 23.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *See id.*
156. *Id.*
157. *Id.* at 24.
158. *Id.*
159. Mathews v. Eldridge, 424 U.S. 319 (1976).
160. FTC v. Standard Oil Co. of Cal., 449 U.S. 232 (1980).
161. Bell v. New Jersey, 461 U.S. 773 (1983).
162. *Standard Oil Co. of Cal.*, 449 U.S. at 246.

merits, and therefore would violate the finality doctrine.[163] *Mathews* is more interesting. There, in a footnote, the Court referenced the *Cohen* construction of finality in considering § 405(g) of the Social Security Act.[164] Per 42 U.S.C. § 405(g), district courts cannot conduct judicial review of a denial of a claim for Social Security disability benefits until after a "final decision" by the Secretary of Health, Education, and Welfare.[165] The *Mathews* Court noted that even though *Cohen* was an interpretation of § 1291, all judicially created finality requirements should "be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered."[166] *Bell* cited this language from *Mathews*, as well as *Cohen*, in determining that § 195 of the Elementary and Secondary Education Act of 1965 and § 455 of the General Education Provisions Act allowed federal courts to exercise jurisdiction only over a final order of the Department of Education, "at least in the absence of an appealable collateral order."[167]

Second, *Rhode Island* relied on policy reasoning to apply *Cohen* to an agency's nonfinal order. The court noted that there was no compelling policy rationale for applying divergent finality rules to judicial versus administrative review.[168] Requiring a concluding decision before allowing appeals promotes efficiency equally in both contexts by avoiding disruption, delay, duplication, and unnecessary costs.[169] And in both contexts, the collateral order doctrine is a practical construction of finality recognizing that sometimes finality's costs outweigh its advantages; postponing review sometimes risks permanently losing crucial claims or allowing irreparable harm, whether an appeal involves court or agency proceedings.[170]

Finally, the First Circuit boldly stated that "every circuit to have considered the question to date has determined (often with little or no analysis) that the collateral order doctrine applies to judicial review of administrative determinations."[171] Its citations were as follows:

- *Osage Tribal Council v. United States Department of Labor* (10th Cir. 1999)—cites *Bell* for the proposition that federal courts may exercise jurisdiction over a final administrative order and proceeds

163. *Id.*

164. *Mathews*, 424 U.S. at 328.

165. *Id.* at 327.

166. *Id.* at 331 n.11.

167. Bell v. New Jersey, 461 U.S. 773, 778 (1983) (first citing *Mathews*, 424 U.S. at 331 n.11; and then citing Cohen v. Beneficial Fin. Corp., 337 U.S. 541, 545–47 (1949)).

168. Rhode Island v. EPA, 378 F.3d 19, 24 (1st Cir. 2004).

169. *Id.* at 28.

170. *Id.* at 28–29.

171. *Id.* at 25.

to apply *Cohen* when the underlying statute allows for reviews of "order[s]."[172]

- *Meredith v. Federal Mine Safety & Health Review Commission* (D.C. Cir. 1999)—per above, holding that the collateral order doctrine extends beyond the confines of 28 U.S.C. § 1291 to encompass the principle of administrative finality contained in § 106(a) of the Mine Act, which allows for reviews of "order[s]."[173]
- *Carolina Power & Light Co. v. United States Department of Labor* (4th Cir. 1995)—per above, cites *Standard Oil* and notes that it is "well-settled" that *Cohen* applies to executive agency action and goes on to apply *Cohen* when the underlying statute allows reviews of "order[s]."[174]
- *Jim Walter Resources, Inc. v. Federal Mine Safety & Health Review Commission* (11th Cir. 1990)—like *Meredith*, applies the *Cohen* doctrine to finality principles in a case under § 106(a) of the Mine Act.[175]
- *Donovan v. Oil, Chemical, & Atomic Workers International Union* (5th Cir. 1983)—in a case under 29 U.S.C. § 660(a), which permits an aggrieved person to obtain review of any order of the Occupational Safety and Health Review Commission, the collateral order doctrine is available if the three-part *Cohen* test is satisfied.[176]
- *Donovan v. Occupational Safety & Health Review Commission* (2d Cir. 1983)—another 29 U.S.C. § 660 case that applies *Cohen*.[177]
- *Marshall v. Occupational Safety & Health Review Commission* (6th Cir. 1980)—yet another 29 U.S.C. § 660 case that applies *Cohen*.[178]

Because it determined that the collateral order doctrine could apply to nonfinal agency decisions, like the EAB's order denying Rhode Island's intervention, the court then applied *Cohen* to the situation at hand and determined that the collateral order doctrine could not serve as a basis for interlocutory review.[179] While the intervention issue was separate from the merits, the agency's order denying intervention did not conclusively determine

172. Osage Tribal Council *ex rel.* Osage Tribe of Indians v. U.S. Dep't of Lab., 187 F.3d 1174, 1179 (10th Cir. 1999).

173. Meredith v. Fed. Mine Safety & Health Rev. Comm'n, 177 F.3d 1042, 1050–51 (D.C. Cir. 1999).

174. Carolina Power & Light Co. v. U.S. Dep't of Lab., 43 F.3d 912, 916 (4th Cir. 1995).

175. Jim Walter Res., Inc. v. Fed. Mine Safety & Health Rev. Comm'n, 920 F.2d 738, 744 (11th Cir. 1990).

176. Donovan v. Oil, Chem., & Atomic Workers Int'l Union & Its Loc. 4–23, 718 F.2d 1341, 1344–45 (5th Cir. 1983).

177. Donovan v. OSHA, 713 F.2d 918, 922–23 (2d Cir. 1983).

178. Marshall v. OSHA, 635 F.2d 544, 548 (6th Cir. 1980).

179. Rhode Island v. EPA, 378 F.3d 19, 26 (1st Cir. 2004).

the question because the EAB had denied intervention without prejudice, allowing renewal of the motion if an evidentiary hearing occurred.[180] Further, the issue was not effectively unreviewable later because under the Clean Water Act's judicial-review provision, Rhode Island retained the right as an "interested person" to obtain review of the final permit decision even if it wasn't an intervenor in the permit proceedings.[181]

B. Louisiana Real Estate Appraisers Board v. Federal Trade Commission

Rhode Island was decided in 2004 and has stood for the proposition that, in the absence of direct Supreme Court language on the topic, nonfinal agency orders *generally* are subject to the collateral order doctrine.[182] However, the Fifth Circuit has taken a competing view. In *Louisiana Real Estate Appraisers Board v. Federal Trade Commission*,[183] the Fifth Circuit examined an appeal by the Louisiana Real Estate Appraisers Board seeking interlocutory review of a Federal Trade Commission (FTC) order; specifically, the Board wanted the federal circuit court to examine the FTC's conclusion that the Board could not assert state-action immunity in an underlying federal antitrust proceeding.[184] The Board is a Louisiana state agency that licenses and regulates appraisers and appraisal management companies, and it can adopt regulations to enforce state law, including rules on customary and reasonable fees.[185] The FTC sued the Board in 2017, alleging that the Board's fee rules unreasonably restrained

180. *Id.* at 22, 25–26 (noting that such tentative decisions often fall short of meeting the collateral order doctrine's conclusiveness requirement).

181. In summary, the EAB's denial of intervention was not immediately reviewable by the First Circuit, as Rhode Island could effectively appeal after the administrative proceedings concluded; however, the broader holding remains that the collateral order doctrine can provide interim review of administrative decisions. *Id.* at 24.

182. *See, e.g.*, Chehazeh v. Att'y Gen., 666 F.3d 118, 136 (3d Cir. 2012) (citing *Rhode Island* for the proposition that the collateral order doctrine applies to judicial review of agency decisions); Hale v. Norton, 476 F.3d 694, 698 (9th Cir. 2007) (same, and noting the collateral order doctrine also "applies to judicial review of administrative proceedings"); Riley v. Dep't of Emp. Servs., 258 A.3d 834, 841 (D.C. Cir. 2021) (same, and noting that "[f]ederal courts commonly have ruled that interlocutory review is available for interlocutory agency action").

183. La. Real Est. Appraisers Bd. v. FTC, 917 F.3d 389 (5th Cir. 2019).

184. *Id.* at 390.

185. *Id.* Specifically, the Dodd–Frank Wall Street Reform and Consumer Protection Act imposed a federal requirement that lenders pay appraisers a "customary and reasonable" fee based on rates in the local market. *Id.* (quoting 15 U.S.C. § 1639e(i)(1)). Following the passage of Dodd-Frank, Louisiana then updated its Appraisal Management Company Licensing and Regulation Act to mandate that state-regulated appraisal rates comply with Dodd-Frank and accompanying federal regulations. *Id.* Additionally, the Louisiana legislature gave the Louisiana Real Estate Appraisers Board explicit authority to pass any administrative rules necessary to enforce the state's updated act. *Id.* This enabled the Board to issue regulations to ensure appraisal management companies adhered to the revised statutory standards on appraiser fees synchronized with federal law. *Id.*

competition by displacing market-set rates and unlawfully restrained price competition.[186] The Board argued it had state-action immunity.[187]

After the FTC complaint, the Board issued a revised rule and asked the FTC to dismiss the case given the rule changes, arguing the complaint was moot.[188] The FTC simultaneously moved for partial summary judgment on immunity.[189] The FTC, acting in its adjudicatory role, denied the motion to dismiss and granted the motion for summary judgment, thus denying the Board immunity—the Board then sought interlocutory review in the Fifth Circuit.[190]

The Fifth Circuit began with a discussion of its appellate jurisdiction, stating that "to adjudicate this appeal, there must be a statute allowing us to review the [FTC's] order on a motion to dismiss or motion for partial summary decision."[191] In this case, the Federal Trade Commission Act would be the statute at hand, which states that "[a]ny person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States."[192] Here, the FTC's action in denying the motion to dismiss and granting the motion for partial summary judgment was not a cease and desist, and, as such, per the Fifth Circuit, the statute did not grant appellate jurisdiction.[193]

The Board, though, had anticipated this snafu, and therefore invoked the collateral order doctrine under *Cohen*.[194] There was good reason to do so since, as noted by *Rhode Island* fifteen years before, the circuit courts had largely been applying *Cohen* to interlocutory appeals from the administrative agencies. But that precedent would not win the day here.

The Fifth Circuit addressed the elephant that had existed in *Rhode Island* and previous cases—*Cohen* is an interpretation of 28 U.S.C. § 1291, and that statute "permits collateral review of *district court* decisions."[195] The court did not disagree that *Cohen* could be applied to administrative decisions when the statute granting judicial review of the agency determination was subject to the same

186. *Id.* at 391.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. 15 U.S.C. § 45(c).

193. *La. Real Est. Appraisers Bd.*, 917 F.3d at 391. The Fifth Circuit cited its 1962 decision in *Texaco, Inc. v. FTC*, 301 F.2d 662, 663 (5th Cir. 1962). In *Texaco*, the appellant sought interlocutory review of determinations by the FTC that restricted the appellant's ability to obtain and submit certain files and records into evidence during the agency's adjudication. *Id.* The Fifth Circuit, in a short per curiam opinion, noted that "[t]he jurisdiction of this Court to review an order of the Federal Trade Commission is found in 15 U.S.C.A. § 45(c) [and] arises only from a cease and desist order entered by the Commission." *Id.* As such, even if the FTC's decision was in error, the review of that error could only come at the time that the appellant would be subject to a cease-and-desist order. *Id.*

194. *See La. Real Est. Appraisers Bd.*, 917 F.3d at 391.

195. *Id.* at 392.

"practical construction" (i.e., statutory language) as § 1291.[196] Put more simply—*Cohen* was a construction of the term "final decisions" in § 1291, and thus the same construction could only be used when a federal statute provides for federal appellate review of final decisions (or the equivalent) of an administrative agency.

To support this point, the Fifth Circuit positively cited a case discussed above, *Meredith v. Federal Mine Safety & Health Review Commission*.[197] *Meredith* had applied *Cohen* to an order of the Federal Mine Safety and Health Review Commission.[198] The underlying statute for judicial review of decisions by the Federal Mine Safety and Health Review Commission is § 106(a)(1) of the Mine Act, which states that "[a]ny person adversely affected or aggrieved by an order of the Commission issued under this chapter may obtain a review of such order in . . . the United States Court of Appeals for the District of Columbia Circuit."[199] On first blush, § 106(a)(1) does not use the same term "final decisions" as does § 1291; instead, it only refers to "an order of the Commission."[200] However, *Meredith* addresses this issue. It noted that while the language did not include the term "final," there was nothing in the statute to suggest that the court should depart in this instance "from the background norm of administrative law that judicial review awaits completion of the administrative process."[201] Indeed, the legislative history of § 106(a) addressed that its goal was to provide for a uniform method of reviewing final orders of the Federal Mine Safety and Health Review Commission.[202]

The court also reviewed the Third Circuit decision in *Chehazeh* noted above.[203] As the Third Circuit noted in that case, the APA's finality requirement in § 704 closely mirrors 28 U.S.C. § 1291, which *Cohen* held permitted certain conclusive district court decisions to undergo interlocutory appeal.[204] Consequently, the *Louisiana Real Estate Appraisers Board* court noted that it was reasonable, based on the textual similarity with § 1291, that the APA's language also authorized collateral order review.[205] Presumably, when agency statutes contain textual parallels to the statutory provision at the heart of the *Cohen*

196. *Id.*

197. *Id.* (citing Meredith v. Fed. Mine Safety & Health Rev. Comm'n, 177 F.3d 1042, 1048 (D.C. Cir. 1999)).

198. *Meredith*, 177 F.3d at 1048.

199. 30 U.S.C. § 816(a)(1).

200. *Id.*

201. *Meredith*, 177 F.3d at 1048.

202. *Id.*; *see also* Cobra Nat. Res., LLC v. Fed. Mine Safety & Health Rev. Comm'n, 742 F.3d 82, 85–86 (4th Cir. 2014) (noting that although the Mine Act uses the term "order" rather than "final order," the court has recognized that only a final order of the agency can be reviewed in the federal appellate court).

203. La. Real Est. Appraisers Bd. v. FTC, 917 F.3d 389, 393 (5th Cir. 2019).

204. *Id.* (citing Chehazeh v. Att'y Gen., 666 F.3d 118, 135 (3d Cir. 2012)).

205. *Id.*

decision, they likewise enable appeals of nonfinal administrative orders determining important issues separate from and collateral to a case's merits.[206]

In turning to the FTCA, the Fifth Circuit distinguished the statutory language: the FTCA only authorized the courts of appeals to review "cease and desist" orders.[207] According to the court:

> This language is plainly more restrictive than those statutes authorizing judicial review of "final decisions," "final agency action," or "an order." Given that Congress has expressly limited our jurisdiction to review of cease-and-desist orders, we cannot consider the Board's petition for review of the Commission's denial of its motion to dismiss and granting of the FTC's motion for partial summary decision.[208]

Without the statutory text being sufficiently similar or in keeping with the text of § 1291, the Fifth Circuit could not extend *Cohen* in this context. In so holding, the Fifth Circuit specifically disagreed with *Rhode Island*. As noted above, *Rhode Island* considered the *Cohen* doctrine in the context of the Clean Water Act's language that authorized appeals to the federal circuit courts from the EPA administrator's action "issuing or denying any permit" under the Act.[209] As such, this statutory language was more limited than general language authorizing appeals from final decisions per § 1291 and the *Cohen* practical construction. The statutory language was thus the main basis on which the Fifth Circuit reached a different conclusion.[210] The Fifth Circuit did not find that the collateral order doctrine represented a general exception on all matters of civil and administrative finality as *Rhode Island* had. Rather, it insisted that *Cohen* was based on the statutory language of § 1291 and its linguistic analogues only.[211]

Unsurprisingly, the Fifth Circuit also took issue with *Rhode Island*'s contention that every circuit that had considered the question had determined that *Cohen* applied as a general exception to administrative finality, regardless of the underlying statute authorizing appellate review. As discussed above, *Rhode Island* had cited a number of cases for the proposition that the collateral order doctrine applied to administrative proceedings. These cases were under (1) the Mine Act, which authorizes federal appellate review of an "order . . . issued by the Commission";[212] (2) the Safe Drinking Water Act, which authorizes federal appellate review of an "order" issued under the statute;[213] (3) the Energy Reorganization Act, which authorizes federal appellate review of "an order"

206. *Id.* at 393.
207. *Id.* (citing 15 U.S.C. § 45(c)).
208. *Id.*
209. 33 U.S.C. § 1369(b)(1).
210. *See La. Real Est. Appraisers Bd.*, 917 F.3d at 393.
211. *Id.*
212. 30 U.S.C. § 816(a)(1).
213. 42 U.S.C. § 300.

under the relevant subsection;[214] and (4) the Occupational Safety and Health Act of 1970, which also authorizes federal appellate review of "an order" of the Occupational Safety and Health Review Commission.[215] The Fifth Circuit was unmoved by "practical reasons" for extending the *Cohen* holding to the administrative context (although it did not identify in the written opinion what those practical reasons might be).[216] In an interesting suggestion, the Fifth Circuit did suggest there was another jurisdictional route available to the Board. It noted in a footnote that:

> The Board does not argue that it seeks review under the APA . . . . Unlike the FTCA, [the APA] does not allow direct appeals from agency proceedings to the courts of appeals.[217] Therefore, if the Board were to appeal the Commission's decision under the APA, that action would have to originate in the district court . . . .[218]

The Fifth Circuit's decision contends that *Cohen*'s interpretation of "final decisions" in § 1291 cannot override statutory language that specifically limits appellate jurisdiction over agency actions.[219] Using the case at bar as the case in point, the Fifth Circuit found that Congress in the FTCA expressly restricted judicial review to final cease-and-desist orders issued by the Federal Trade Commission.[220] And because no statute thus authorizes an interlocutory appeal from the agency determination at issue, the court lacked jurisdiction over the appeal under the collateral order doctrine or any other source of appellate authority.[221]

Interestingly, the D.C. Circuit had also touched on analogous reasoning at least once previously. In *Community Broadcasting of Boston, Inc. v. Federal Communications Commission*,[222] that circuit noted in a case under 28 U.S.C. § 2342(1)[223] that "[t]he finality requirement of Section 2342(1) is the counterpart to that of 28 U.S.C. § 1291 (1970) which governs appeals from final orders of federal District Courts."[224] The Court specifically referenced that § 2342(1) used the term "final orders," therefore creating the linguistic basis for analogizing to § 1291.[225] The Fourth Circuit, in contrast, seemed to reject the

214. *Id.* § 5851(c)(1).

215. 29 U.S.C. § 660(a).

216. *La. Real Est. Appraisers Bd.*, 917 F.3d at 394.

217. *Id.* at n.3.

218. *Id.*

219. *Id.* at 394.

220. *Id.*

221. *Id.*

222. Cmty. Broad. of Bos., Inc. v. FCC, 546 F.2d 1022 (D.C. Cir. 1976).

223. 28 U.S.C. § 2342(1) (providing the federal courts of appeals exclusive jurisdiction over "final orders of the Federal Communications Commission").

224. *Cmty. Broad. of Bos.*, 546 F.2d at 1024.

225. *See id.* (explaining that the finality requirement reflects the policy that "judicial and administrative processes should proceed with a minimum of interruption").

requirement of linguistic analogy as a basis for the application of *Cohen* in *South Carolina Board of Dentistry v. Federal Trade Commission*,[226] which examined the same cease-and-desist language in the FTCA as was examined by the Fifth Circuit.[227]

III. TEXTUALISM VERSUS PRACTICALITY

In essence, *Louisiana Real Estate Appraisers* held that the collateral order doctrine cannot stretch jurisdictional statutes that specifically limit appellate review to definitive agency actions.[228] But that is an interesting result in the context of the case. The interlocutory review was in regard to whether or not the Board qualified for state-action immunity in a federal antitrust proceeding.[229] At the time of *Louisiana Real Estate Appraisers Board*, the Fifth Circuit had previously held in *Martin v. Memorial Hospital* in 1996[230] that an order of a *district court* denying a motion to dismiss a federal antitrust claim based on

226. S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436, 440 (4th Cir. 2006).

227. *Id.* Specifically, the Fourth Circuit noted in an interlocutory appeal from a decision of the FTC that was not a cease-and-desist order: "We note that the Federal Trade Commission Act does not use the same 'final judgment' language as § 1291 . . . . An argument could be made that the collateral order doctrine, which represents a 'practical construction' of § 1291's final judgment rule . . . does not apply. The FTC does not advance this argument, however. Moreover, the Supreme Court seems to have rejected this contention." *Id.* at n.5 (citations omitted) (citing FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 246 (1980)).

228. La. Real Est. Appraisers Bd. v. FTC, 917 F.3d 389, 393 (5th Cir. 2019).

229. State-action immunity recognizes that sometimes laws enacted by a state government will end up restricting competition (for example, by requiring licenses for certain professions, providing exclusive rights to some entities to dominate particular markets, or limiting competition to achieve public objectives). N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 503 (2015). But the Sherman Act prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." Parker v. Brown, 317 U.S. 341, 350 (1943) (quoting 15 U.S.C. § 1). State-action immunity, which is also known as *Parker* immunity after *Parker v. Brown*, provides that a state acting in its sovereign capacity is immune from the Sherman Act and from federal antitrust laws. Quadvest, L.P. v. San Jacinto River Auth., 7 F.4th 337, 346 (5th Cir. 2021). *Parker*, which explained this doctrine, held that the Sherman Act does not restrain state sovereignty and that states can limit competition to promote public goals. *Parker*, 317 U.S. at 351. The application of state-action immunity depends on the actor claiming to exercise sovereign power. First, action of a state legislature or state supreme court is *ipso facto* immune from antitrust liability. Hoover v. Ronwin, 466 U.S. 558, 567–68 (1984). Second, municipalities and the executive administrative agencies of states must be acting pursuant to a "clearly articulated and affirmatively expressed state policy" to receive state-action immunity. *Id.* at 568–69. Finally, private parties and state agencies controlled by participants in the markets will only receive state-action immunity if they are taking action pursuant to a clearly articulated state policy and are supervised by the state. *N.C. State Bd. of Dental Exam'rs*, 574 U.S. at 506.

There is a split in the circuits on what "immunity" means for purposes of the *Parker* doctrine. The Fourth, Sixth, Ninth, and Eleventh Circuits hold that state-action immunity is not immunity from suit (as would be the case for qualified immunity or absolute immunity)—instead, state-action immunity is essentially a defense to liability. *S.C. State Bd. of Dentistry*, 455 F.3d 436 (4th Cir. 2006); Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563 (6th Cir. 1986); Solarcity Corp. v. Salt River Project Agric. Improvement and Power Dist., 859 F.3d 720 (9th Cir. 2017); SmileDirectClub, LLC v. Battle, 4 F.4th 1274 (11th Cir. 2021). However, the Fifth Circuit, as will be discussed below, holds that state-action immunity does provide immunity from the suit itself (at least in some circumstances). Martin v. Mem'l Hosp. at Gulfport, 86 F.3d 1391 (5th Cir. 1996).

230. *Martin*, 86 F.3d at 1391.

state-action immunity[231] could qualify for interlocutory appeal under *Cohen*.[232] Discussing the application of the collateral order doctrine, the Fifth Circuit in *Martin* noted:

> [A] district court's refusal to grant defendants' motions for summary judgment vindicating their entitlement to state action immunity is appealable under the collateral order doctrine[; it] meets all of the requisites of an appealable collateral order, viz., that it (a) is 'effectively unreviewable' on appeal after trial; (b) conclusively determines the disputed question; and (c) resolves an important issue completely separate from the merits of the action.[233]

The *Martin* court analogized to Supreme Court decisions that allowed the interlocutory review of qualified immunity, Eleventh Amendment immunity, and absolute immunity.[234] The court explained that like these other immunities, state-action immunity aims to shield states from the indignity and burden of private litigation and the threat of discovery and trial.[235] And given these interests in avoiding the burdens of litigation, the Fifth Circuit ruled that state-action immunity must be evaluated before trial.[236]

But what is interesting is why *Martin* and *Louisiana Real Estate Appraisers Board* came to different results at this point in time. Per the Fifth Circuit's reasoning, it could take interlocutory review in a federal antitrust matter from a motion denying state-action immunity in the federal district court under § 1291 through an application of *Cohen*. But despite all the policy reasons it gave in *Martin* for doing so—that the doctrine was to be a shield to the indignities of litigation and that the immunity itself had to be immediately reviewable to accomplish that goal[237]—it refused to allow the same interlocutory review when the denial of the same immunity emanated from the FTC, rather than a district court. The difference is, of course, the underlying statutory language. *Cohen* interprets the term "final decisions" in § 1291, while the FTCA only allows

231. The Eleventh Circuit had reached the same result in Commuter Transp. Sys., Inc. v. Hillsborough Cnty. Aviation Auth., 801 F.2d 1286, 1289 (11th Cir. 1986) (holding that state-action immunity is similar to qualified immunity in that it protects state officials from "costly litigation and conclusory allegations"). However, in 2021, the Eleventh Circuit retreated from the position and overruled *Commuter Transportation Systems*, holding instead that "non-final denials of *Parker* protection [i.e., state-action immunity] do not fall within the collateral order doctrine." *Battle*, 4 F.4th at 1283. Similarly, the Fifth Circuit has also backed away from the most extreme reading of *Martin*, as will be discussed below.

232. *Martin*, 86 F.3d at 1394; *see also* Bernard Bell, *The Collateral Order Doctrine and Interlocutory Review of Agency Decisions*, YALE J. ON REGUL. (Mar. 5, 2019), https://www.yalejreg.com/nc/the-collateral-order-doctrine-and-interlocutory-review-of-agency-decisions/ [https://perma.cc/45BQ-F23K]. The Fifth Circuit did not reach the actual application of state-action immunity here because it resolved the appeal on jurisdiction alone. However, more to come on that particular point. *See* La. Real Est. Appraisers Bd. v. FTC, 976 F.3d 597, 602–04 (5th Cir. 2020).

233. *Martin*, 86 F.3d at 1394.

234. *Id* at 1394–95.

235. *Id.*

236. *Id.*

237. *Id.* at 1396.

federal appellate review of cease-and-desist orders, which the Fifth Circuit found not amenable to the *Cohen* practical construction language.[238]

Although that is certainly the distinction here, whether or not this kind of rigid approach[239] should matter is a different story. While this textual distinction explains the divergent results, it seems odd that Congress would intend such different treatment of interlocutory state-action immunity denials depending on the originating forum. The same interests in avoiding litigation burdens should exist regardless of whether the immunity ruling comes from a district court or agency. Further, it raises a question of whether the legislative language should control or if the practical impacts suggest a need for a different approach.

The collateral order doctrine in general is not a model of clarity. But the status of how or when it applies in the administrative agency context remains confused and unsettled, and without exploration of what justification is driving the interlocutory boat. As such, an examination should be made as to the underlying justifications for the collateral order doctrine in the administrative-determination context and as to whether a linguistic analogy to § 1291 is required to activate interlocutory review in the circuit courts.

A. The Collateral Order Doctrine Can Apply to Agency Decisions

The easy issue can be knocked out first—there seems to be no question that the collateral order doctrine *can* apply to nonfinal administrative-agency determinations.[240] Although the doctrine was traditionally to permit appeals of interlocutory judicial orders from the district court,[241] the circuits agree that the doctrine can provide appellate jurisdiction over nonfinal administrative decisions (at minimum, in certain circumstances).[242] The First,[243] Second,[244]

238. *Id.* at 1395–96.

239. Bell, *supra* note 232.

240. Hale v. Norton, 476 F.3d 694, 697–98 (9th Cir. 2007) (holding that a small class of claims are treated as final for immediate appeal).

241. *See* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009) ("A 'final decisio[n]' is typically one 'by which a district court disassociates itself from a case.'").

242. *See Hale*, 476 F.3d at 697–98 ("Even if a particular agency action does not, on its own, satisfy the principle of finality, the collateral order doctrine may nevertheless preserve jurisdiction."); Rhode Island v. EPA, 378 F.3d 19, 25 (1st Cir. 2004) (collecting cases holding that the collateral order doctrine applies to administrative agency determinations); Meredith v. Fed. Mine Safety & Health Rev. Comm'n, 177 F.3d 1042, 1051 (D.C. Cir. 1999) ("Mindful of the policies underlying the principle of finality, as well as the institutional costs of premature judicial intervention, we nevertheless recognize the need for immediate review in those exceptional cases that fall within the strictures of the collateral order doctrine."); Donovan v. Oil, Chem., & Atomic Workers Int'l Union, 718 F.2d 1341, 1343–46 (5th Cir. 1983) (holding that the Commissioner's order was appealable even though it was not yet final); Donovan v. OSHA, 713 F.2d 918, 922–24 (2d Cir. 1983) ("This court has recognized that the collateral order exception is a narrow one and must continue to be read that way lest this exception swallow the salutary final judgment rule.").

243. *See Rhode Island*, 378 F.3d at 23–25 (determining whether the Commission's order was final according to *Cohen*).

244. *See Donovan*, 713 F.2d at 922–24 (examining whether the Commission's order met the requirements of *Cohen*).

Third,[245] Fourth,[246] Fifth,[247] Sixth,[248] Seventh,[249] Eighth,[250] Ninth,[251] and D.C. Circuits[252] have all applied (or referred to) *Cohen* in agency determinations in at least some contexts.

Further, Supreme Court breadcrumbs in *Standard Oil* bolster this conclusion.[253] There the FTC had issued a complaint against several oil companies, including Standard Oil of California, for potentially violating the Federal Trade Commission Act.[254] While the matter was pending at the FTC before an administrative law judge, Standard Oil brought an action in the federal district court alleging that the complaint was unlawful because the FTC had no reason to believe Standard Oil was violating the FTCA.[255] The district court dismissed the suit, stating that it would not make a preliminary review of a decision by an administrative agency,[256] but the Ninth Circuit reversed.[257] It held that the district court could inquire as to whether the FTC had made the determination that it had reason to believe that Standard Oil was violating the Act; if the agency had not, then the district court should order the FTC to dismiss its complaint.[258] The Ninth Circuit also "held that the issuance of the complaint was 'final agency action' under § 10(c) of the APA," thus creating the opportunity for judicial review.[259]

The Supreme Court then reversed the Ninth Circuit, holding that the issuance of the complaint was not final agency action under the APA and therefore could not be reviewed by the district court before the FTC hearing concluded.[260] The Court then rejected an attempt by Standard Oil to argue that

245. *See* Marshall v. Oil, Chem. & Atomic Workers Int'l Union, 647 F.2d 383, 386–87 (3d Cir. 1981).

246. S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436, 441 (4th Cir. 2006).

247. *See Donovan*, 718 F.2d at 1343–46.

248. *See* Marshall v. Occupational Safety & Health Rev. Com'n, 635 F.2d 544, 548 (6th Cir. 1980) (determining that the prosecution's right to withdraw is separate and collateral to the main action under *Cohen*).

249. SEC v. Van Waeyenberghe, 284 F.3d 812, 815 (7th Cir. 2002) (finding that the appeal failed to meet any element under *Cohen*).

250. *See* Donovan v. Int'l Union, Allied Indus. Workers of Am. & Its Local 370, 722 F.2d 1415, 1416–17 (8th Cir. 1983) (finding the Commission's order appealable under *Cohen*).

251. Alaska v. EEOC, 564 F.3d 1062, 1065 n.1 (9th Cir. 2009) ("Although the collateral order doctrine is understood as a 'construction' of 28 U.S.C. § 1291 . . . it is also applicable by analogy in the context of non-final agency determinations that meet the standards articulated in *Cohen*.").

252. *See, e.g.*, Cmty. Broad. of Bos., Inc. v. FCC, 546 F.2d 1022, 1024–25 (D.C. Cir. 1976).

253. *Cf.* Energy Transfer Partners, L.P. v. FERC, 567 F.3d 134, 144 (5th Cir. 2009) ("The Supreme Court did not expressly consider in *Standard Oil* whether the [collateral order] doctrine is applicable in construing statutes other than 28 U.S.C. § 1291.").

254. FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 234 (1980).

255. *Id.* at 235.

256. *Id.* at 237 (stating that "review of preliminary decisions made by administrative agencies, except under most unusual circumstances, would be productive of nothing more than chaos").

257. *Id.*

258. *Id.* at 238.

259. *Id.*

260. *Id.* at 239–42.

even though the issuance of the complaint was not a final agency action, it could be a collateral order subject to interlocutory review under *Cohen*.[261] The Court provided the *Cohen* standard, and then determined that if the FTC's issuance of the complaint was supported by the agency's reason to believe a statutory violation had occurred, it would merge in the FTC's decision on the merits.[262] The Court did not address this directly, but it could easily have rejected the argument on the grounds that the collateral order doctrine did not apply to nonfinal administrative-agency determinations, and it did not.[263] Rather, it addressed—though briefly—the merits of *Cohen* in relation to FTC's complaint.[264]

So *Standard Oil* suggests that the collateral order doctrine can apply to a nonfinal agency determination. But here is what it does not do: it does not resolve the concern from *Rhode Island* and *Louisiana Real Estate Appraisers Board* about *when* a federal appellate court can apply the collateral order doctrine to an agency determination. At least one circuit has suggested that *Standard Oil* may resolve the application of the collateral order doctrine to statutes like the FTCA (which, as noted, claims to limit federal appellate review to cease-and-desist orders) because *Standard Oil* itself talked about the FTCA.[265] But that misunderstands the posture of the case. In *Standard Oil*, the federal appellate court's review was based on the APA, not the FTCA.[266] Standard Oil had filed a suit in the district court, not a direct review in the federal appellate court, asking that court to review the FTC's complaint as a final decision of the agency under APA § 10.[267] Indeed, the Court itself noted that the case was "subject to judicial review before the conclusion of administrative adjudication only . . . under § 10(c) of the APA."[268]

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261. *Id.* at 246.

262. *Id.*

263. Energy Transfer Partners, L.P. v. FERC, 567 F.3d 134, 144 (5th Cir. 2009).

264. *Id.*

265. S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436, 440 n.5 (4th Cir. 2006) (noting that the Federal Trade Commission Act does not use the same "final judgment" language as § 1291, and that *Standard Oil* applied a "collateral order analysis to determine whether FTC's non-final decision to issue an administrative complaint was immediately appealable").

266. *Standard Oil*, 449 U.S. at 246.

267. In this context, the district court will function like an appellate body. "Reviews of agency action in the district courts [under the APA] must be processed as appeals. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure." Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1580 (10th Cir. 1994) (emphasis omitted); *see also* Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv., 58 F. Supp. 3d 1191, 1223 (D.N.M. 2014) ("Reviews of agency action in the district courts must be processed as appeals. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure.").

268. *Standard Oil*, 449 U.S. at 238; *see also* Cochran v. SEC, 20 F.4th 194, 210 (5th Cir. 2021), *aff'd and remanded sub nom.* Axon Enter., Inc. v. FTC, 598 U.S. 175 (2023) (acknowledging that Standard Oil's issue before the Court was "whether the FTC had taken a 'final agency action' within the meaning of the Administrative Procedure Act"); Grucon Corp. v. Consumer Prod. Safety Comm'n, No. 01-C-0157, 2001 WL 34360432, at *11 (E.D. Wis. Sept. 18, 2001) (stating that collateral orders are derived from *Cohen* and that the collateral order doctrine was "applied to the APA context in *Standard Oil*").

The FTCA showcases the interesting intersection of federal appellate jurisdiction, the collateral order doctrine, and the APA. The FTCA limits review by a court of appeals to "[a]ny person, partnership, or corporation required by an order of the Commission to cease and desist."[269] If an FTC action, like the issuance of a complaint in *Standard Oil*, does not require its target to cease-and-desist from anything, then it is not generally reviewable by a direct petition to a court of appeals.[270] However, it does not mean the action is wholly unreviewable in a federal court; the APA states that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."[271]

The APA uses the term "final agency action" in the same manner that § 1291 refers to a "final decision" of a lower court.[272] And the underlying policy of finality is similarly potent in both. Just as ongoing district court cases may ultimately end favorably for the defendant through a decision on the merits or settlement, administrative proceedings could yield a favorable ruling for the respondent without the need for judicial intervention. Additionally, a reviewing appellate court benefits from a complete record and all arguments having been fully vetted in assessing appeals from district courts; so too, then, will courts be in a superior position to evaluate agency determinations when the administrative process has fully played out. In essence, waiting for a definitive agency ruling before allowing appeals prevents premature or unnecessary judicial involvement while the case remains pending administratively.

Returning to the FTCA, a party can obtain review by a court of appeals of any cease-and-desist order that may result from an FTC adjudication; however, as suggested in *Louisiana Real Estate Appraisers Board*, parties aggrieved by the FTC could still seek review of the FTC's decisions that were not cease-and-desist orders if they qualified as "final agency action" under the Administrative Procedure Act.[273] This would send the issue to the district court rather than the federal appellate court.[274] And, even more interestingly, the "final agency action" language in the APA has been construed by several circuits to provide for collateral order doctrine review because it is analogous to the language in § 1291.[275]

Indeed, this intersection is exactly what played out in the later branch of *Louisiana Real Estate Appraisers Board*. In the original 2019 Fifth Circuit decision

269. 15 U.S.C. § 45(c).

270. PepsiCo. v. FTC, 472 F.2d 179, 185–86 (2d Cir. 1972).

271. 5 U.S.C. § 704.

272. *PepsiCo.*, 472 F.2d at 185–86.

273. Bell, *supra* note 232.

274. *Id.* (questioning if this is necessarily a good outcome).

275. *See, e.g.*, Rhode Island v. EPA, 378 F.3d 19, 24 (1st Cir. 2004) ("The collateral order doctrine does not frustrate this requirement, but, rather, embodies a practical, common sense realization that, in a few instances, the costs of finality may outweigh its benefits.").

discussed above,[276] the FTC had not issued a final cease-and-desist order in its ongoing proceedings against the Board.[277] That posture led the Fifth Circuit to reject the Board's position that the denial of its state-action immunity claim could be directly reviewed in the federal appellate court.[278] The Board, perhaps reading the tea leaves from the original opinion,[279] sued the FTC in a federal district court, alleging that the FTC's order denying state-action immunity—although not a cease-and-desist order—violated the Administrative Procedure Act.[280] The district court stayed the agency proceedings and the FTC appealed, arguing that the district court lacked jurisdiction.[281] The Board claimed that the district court had jurisdiction under the APA's default review provision for "final agency action."[282]

With some serious déjà vu, the Fifth Circuit again had to take up the question of the collateral order doctrine, but this time with the Board stating that it was relying on *Cohen* as an "expansion of the finality requirement of [the APA]."[283] The Board claimed that the FTC's underlying order met the three requirements of *Cohen* and therefore should be treated as final and subject to challenge under the APA.[284] The Fifth Circuit was forced to acknowledge its previous statement in the first iteration of the case that the APA's "final agency action" requirement is "analogous to the final judgment requirement of 28 U.S.C. § 1291" where *Cohen* would be available.[285] As such, it assumed that the shared language between Sections 1291 and 704 imports the collateral order doctrine into the § 704 (i.e., APA) analysis and went on to discuss the *Cohen* factors in regards to the FTC's denial of the Board's state-action immunity.[286] It ultimately declined to take interlocutory review, finding that the FTC's denial of state-action immunity did not meet *Cohen*'s requirements of being completely separate from the merits and effectively unreviewable on appeal.[287]

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276. *See supra* Section III.

277. La. Real Est. Appraisers Bd. v. FTC, 917 F.3d 389, 391 (5th Cir. 2019).

278. *Id.* at 394.

279. The district court noted that the tea leaves were not particularly subtle, referencing that the "Fifth Circuit opined that the 'final agency action' language of the Administrative Procedure Act . . . may allow a district court to review the FTC Order prior to the final administrative adjudication of the action." La. Real Est. Appraisers Bd. v. FTC, No. 19-CV-00214-BAJ-RLB, 2019 WL 3412162, at *2 (M.D. La. July 29, 2019), *vacated and remanded*, 976 F.3d 597 (5th Cir. 2020).

280. La. Real Est. Appraisers Bd. v. FTC, 976 F.3d 597, 601 (5th Cir. 2020).

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* at 602.

285. *Id.*

286. *Id.*

287. This was a departure from previous Fifth Circuit case law where the court had held that state-action immunity provides immunity from the suit entirely and is thus positively treated under the collateral order doctrine. *See* Martin v. Mem'l Hosp. at Gulfport, 86 F.3d 1391 (5th Cir. 1996). *Louisiana Real Estate Appraisers Board* provided a wrinkle; in the Fifth Circuit, a decision denying state-action immunity by a private party would not be immediately appealable, nor would the decision be immediately appealable in cases

The question, of course, is whether those extra steps of going through the district court on an APA challenge are necessary. The Fifth Circuit operated on the understanding that the FTCA was not analogous to § 1291, and thus required the Board to go through the district court on an APA challenge before there could be appellate treatment of the state-action immunity issue.[288] The First Circuit would have presumably disagreed, having not required such steps of the challenger in *Rhode Island v. EPA* despite the Clean Water Act similarly specifying when federal appellate review of agency action could activate.[289] Of course, both circuits have accepted that *Cohen* is available in at least some administrative determinations.

B. Balancing the Policies of Cohen

Now to the harder issue: even if *Cohen* can be applied to nonfinal administrative-agency determinations, *when* is that the case? Must it be based on a judicial-review statute for the agency that uses a term analogous to "final decisions" in § 1291? Based on the policies underlying *Cohen*, there seems to be no reason for that to be the case. As such, for the precedent discussed above and the policies discussed below, the collateral order doctrine should be available to agency decisions that meet *Cohen*'s test.

Certainly, statutory judicial-review standards for administrative-agency orders frequently use the same type of "final order" or "final decision" language as § 1291.[290] To the extent that one adopts a textual approach, then the construction of those statutes creates a linguistic analogy to § 1291 and thus incorporates *Cohen*'s collateral order doctrine. And, practically, there could be good reason to leave it at that. Congress retains the power to amend judicial-review statutes, like the FTCA, if it did not intend for that statute's language establishing appellate review only of cease-and-desist orders to limit the availability of the collateral order doctrine. After all, Congress could have used the term "final decision" or "final order"[291] in the FTCA to preserve the collateral order doctrine by linguistic analogy, and it did not. Yet as the Supreme Court consistently emphasizes, the collateral order doctrine reflects a practical

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brought by the federal government (rather than in private litigation). *La. Real Est. Appraisers Bd.*, 976 F.3d at 605. As such, a more recent statement of the Fifth Circuit's position on state-action immunity would be that "the collateral order doctrine confers jurisdiction to review an interlocutory appeal of a district court's denial of state-action immunity in certain circumstances." Quadvest, L.P. v. San Jacinto River Auth., 7 F.4th 337, 343 (5th Cir. 2021).

288. *See* La. Real Est. Appraisers Bd. v. FTC, 917 F.3d 389, 392–93 (5th Cir. 2019).

289. *See* Rhode Island v. EPA, 378 F.3d 19, 21–22 (1st Cir. 2004).

290. *See, e.g.*, 29 U.S.C. § 160(f) (granting federal appellate review of a "final order of the [NLRB]" responding to unfair labor practice allegations); 28 U.S.C. § 2342(1) (granting appellate court review of "final orders of the Federal Communications Commission"); 33 U.S.C. § 921(c) (granting review of "final orders" from the Benefits Review Board).

291. *See, e.g.*, 33 U.S.C. § 921(c) (granting review of "final orders" from the Benefits Review Board).

interpretation of the final judgment requirement.[292] It has specifically made clear that *Cohen*'s collateral order doctrine does not strictly interpret the language of § 1291; rather, the collateral order doctrine is a functional and realistic byproduct of finality, not a technical interpretation of a statutory exception.[293]

With that, we turn to some specific points as to how to think about the functional impacts of § 1291. First, in discussing the collateral order doctrine, the Supreme Court has consistently referred to "competing considerations underlying all questions of finality."[294] Those involve, at minimum, concerns about the litigation costs of piecemeal review balanced against the danger of delay in certain circumstances.[295] The question of the collateral order review has always been one of balance, and the courts' job is to balance meaningful review against efficient judicial administration across cases.

Ultimately, the general purpose of finality is to prevent fragmented appeals.[296] Thus, there is balancing that must occur between efficiently packaging appeals and ensuring timely access to appellate review.[297] Allowing fragmented appeals can create inconveniences and inefficiencies; however, awaiting finality risks "denying justice by delay" to affected parties.[298] There is tension between these considerations in construing when a decision is definitively "final," and the inquiry necessitates balancing fairness, efficiency, and utilitarian goals served by restricting appeals to end-stage administrative decisions.[299]

It is always more desirable to appeal a final judgment of a district court or a final decision of an agency because doing so will reduce the number of issues pending in federal appellate courts. As a purely practical matter, the prevailing party on any given issue will no longer have need of appeal at the end if they are the victor—as such, waiting until a final decision removes all the possible issues on appeal that the prevailing party would have otherwise raised.[300] Second, the final judgment rule promotes settlement—parties seeking to avoid the cost and expense of a trial would be more likely to seek appellate review of earlier rulings by the district court or agency, but may instead choose to settle if appellate review is not available until the conclusion of proceedings.[301] Third, the appellate court reviewing a final decision has arguably a better record to

292. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170–71 (1974).

293. *See id.*

294. *Id.* at 171.

295. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

296. Keith Mfg. Co. v. Butterfield, 955 F.3d 936, 939 (Fed. Cir. 2020).

297. Microsoft Corp. v. Baker, 582 U.S. 23, 28 (2017).

298. *See* Los Lobos Renewable Power, LLC v. Americulture, Inc., 885 F.3d 659, 664 (10th Cir. 2018).

299. *See id.*

300. 4 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 14:2 (6th ed. 2022) (noting that "[i]n the abstract, the final judgment rule therefore reduces appeals in half.").

301. *Id.*

review than if the appellate court takes an early look at the evolving decisions of the trial court or agency. This may be particularly potent in the context of the federal administrative agencies. As the agency engages in an adjudication, it generates an official administrative record that is a compilation of its proceedings.[302] Earlier decisions by the agency that go to an appellate court will lack the benefit of a complete administrative record.[303]

These finality policies feed directly into *Cohen*'s policies around the collateral order doctrine. The doctrine exists to ensure that the final judgment rule on its own does not become a "wasteful formality" or jeopardize the rights of litigants.[304] There are some situations in which the lack of an immediate review will itself jeopardize rights—immunities are a perfect example because waiting until final judgment to challenge the denial of an immunity subjects the litigant to the very thing (the court's proceedings) that the immunity was meant to protect against.

Further, there is a judicial-efficiency rationale balanced on this side of collateral order doctrine review as well—if the interlocutory review can quickly resolve an issue separate from the merits, it will prevent lengthy proceedings that may ultimately be overturned down the road after final judgment.[305] This may be extra potent in the agency space, where a party will have to wait out the agency's initial and appellate-level determinations before unlocking the opportunity to challenge the agency's decision in federal court. For something like state-action immunity in the agency context, which was at issue in *Louisiana Real Estate Appraisers Board*, failing to hear an interlocutory appeal on the immunity issue not only increases expense through a potentially needless proceeding (and expense on the taxpayers, no less), but also compromises judicial efficiency and disrupts the efficient functioning of government.[306]

The merits of interlocutory review have long been considered as a balancing test in the struggle between efficiency and the protection of rights. However, even before the formulation of the modern collateral order doctrine, scholars and courts discussed that the question of early review is one of balance and function, not strict statutory interpretation.[307] If the analysis of the

302. Perkins v. Endicott Johnson Corp., 128 F.2d 208, 226 (2d Cir. 1942).

303. *Id.* In 1942, before the *Cohen* decision, the Second Circuit discussed this issue and declined to take interlocutory review of the Department of Labor's enforcement of a subpoena under the Walsh-Healy Act. *Id.* The court noted the importance of the administrative record—asserting that it would generally be improper for a court to take early appellate review of administrative decisions before the full record was developed. *Id.*

304. *Proposals for Interlocutory Appeals*, 58 YALE L.J. 1186, 1187 (1949).

305. *See id.*

306. *See* Brief for the States of Mississippi & Idaho et al. as Amici Curiae in Support of the Petitioner and in Support of a Reversal, La. Real Est. Appraisers Bd., v. FTC, 917 F.3d 389 (5th Cir. 2019) (No. 18-60291).

307. *Id.* (discussing the balance at play in the question of interlocutory appeals and urging a system where the trial court would have the discretion to grant interlocutory appeals through certification—the proposal is seemingly based on the balance between expediting litigation and ensuring that postponement of

availability of interlocutory review is meant to be functional, then it should consider the practical impacts of situations rather than be based strictly on statutory language. As such, several balancing points should be considered in the question of the collateral order doctrine as to agency decisions. To avoid a wholly individual case-by-case approach that would undermine the final judgment rule, these apply as a categorical matter for each type of order, not as case-by-case analyses.[308]

The first touchpoint is whether the efficiency costs clearly outweigh benefits from prompt remediation of alleged irreparable harms. There may be little more to say here, other than that this question of balance exists regardless of whether an agency's enabling statute provides for appellate review using the same "final decisions" language as § 1291. There are certainly situations where waiting until the final decision of the agency imposes the same harms that would exist in waiting for a district court to issue a final decision in federal civil litigation. An example comes from *Meredith v. Federal Mine Safety and Health Review Commission*.[309] In *Meredith*, the Mine Safety and Health Administration (MSHA) petitioned the D.C. Circuit for interlocutory review of a decision of Federal Mine Safety and Health Review Commission that held MSHA individual employees were amenable to suit for discrimination as official actions exceeding their authority under § 105(c)(1) of the Federal Mine Safety and Health Act of 1977.[310] The actual order appealed was a Commission order remanding the matter to an ALJ.[311] The court noted that such an order will not, by itself, satisfy the principle of finality.[312] As such, the court had to determine if the Commission's order operated as a "final decision" under the "practical" construction of finality articulated by the Supreme Court in *Cohen*.[313]

The court noted that a collateral order will amount to a reviewable decision when it satisfies each of the "separability," "unreviewability," and "conclusiveness" prongs of *Cohen*.[314] The court noted that the question of whether § 105(c) covers MSHA employees acting under color of their authority is completely independent from the merits of whether petitioners committed the alleged acts, satisfying the separability prong.[315] Regarding the unreviewability and conclusiveness prongs, the court noted that if the Mine Act's antidiscrimination provision does not apply to MSHA officials, such employees should be immune from the burdens of administrative and judicial

judicial review does not threaten the rights of the parties); *see also* United States v. 243.22 Acres of Land in Town of Babylon, Suffolk Cnty., N.Y., 129 F.2d 678, 680 (2d Cir. 1942).

308. Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164, 173 (5th Cir. 2009).

309. 177 F.3d 1042 (D.C. Cir. 1999).

310. *Id.* at 1044; 30 U.S.C. § 815(c)(1).

311. *Meredith*, 177 F.3d at 1044.

312. *Id.* at 1047–48.

313. *Id.* at 1048.

314. *Id.*

315. *Id.* at 1048–49.

proceedings.[316] This immunity cannot be effective unless it provides a right to avoid suit altogether.[317] Were the proceedings before the ALJ to move forward, the Commission's decision would be effectively unreviewable on appeal, as the interest in avoiding the proceedings would have been vitiated and could not be vindicated.[318]

Against examples like this, the Supreme Court has consistently acknowledged that in certain cases, waiting for a final order in the main action before allowing an appeal may result in the irreparable loss of a claim.[319] While there may be an argument that finality has additional value in the administrative context, or that Congress would prefer finality principles to promote administrative autonomy, the idea that preserving crucial collateral claims and avoiding irreparable harm sometimes justifies interpreting statutorily created finality requirements with some flexibility seems to apply with equal force to the review of both judicial and administrative orders. The purpose of the collateral order doctrine is to safeguard the rights of all parties involved when no other viable option exists to prevent such a loss.[320] Further, courts tend to discuss *Cohen* as flexible in light of the underlying policy considerations behind the collateral order doctrine generally.[321] This flexible approach weighs the interests at stake in postponing appellate review against the interests of efficiency and finality promoted by the final judgment rule. In both litigation and administrative proceedings, requiring a final decision before appellate intervention promotes efficiency; however, in both settings, the collateral order doctrine reflects a practical understanding that, in a few instances, the costs of finality may exceed its benefits.[322] If *Cohen* is a truly practical construction, this balancing should be undisturbed even when the appellate review is under a statute like the FTCA.[323]

Second, in the agency context especially, one should consider the extent of discretion that agencies enjoy over procedures that may coerce parties via increased expenses. The situation in *Louisiana Real Estate Appraisers Board* remains instructive here. If one follows the Fifth Circuit's position in that case, interlocutory review would not be available from FTCA decisions that are not

316. *Id.* at 1048.

317. *Id.*

318. *Id.*

319. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

320. *In re* White Motor Corp., 25 B.R. 293, 295 (N.D. Ohio 1982) (discussing the Supreme Court's policy behind *Cohen*).

321. Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164, 172–73 (5th Cir. 2009).

322. Rhode Island v. EPA, 378 F.3d 19, 25 (1st Cir. 2004).

323. Further, there is little to fear in terms of *Cohen* becoming an uncontrolled monster, eating the finality principle to its bones. Above, when the Fifth Circuit ultimately took up the collateral order doctrine in the second iteration of *Louisiana Real Estate Appraisers Board*, it determined that the FTC's denial of the state-action immunity did not meet *Cohen*'s requirements and therefore did not qualify for interlocutory review. La. Real Est. Appraisers Bd. v. FTC, 976 F.3d 597, 605 (5th Cir. 2020). Since these are categorical decisions, not case-by-case decisions, this resolves this category of claims.

cease-and-desist orders[324]—this puts the agency in an incredible position of control over the proceedings by letting the agency choose to withhold a cease-and-desist order and block interlocutory review. This scenario raises concerns about the balance of power between agencies and the parties they investigate or prosecute. Without the availability of interlocutory review, parties may be forced to endure lengthy and costly proceedings, even when there are strong arguments for relief based on threshold issues like immunity or jurisdiction. The agency's ability to prolong the proceedings by withholding a cease-and-desist order could be used as a tool to pressure parties into settlement or compliance, even in cases where the party is sitting on an issue that would absolve it from the proceedings altogether.

In essence, allowing agencies to control the availability of interlocutory review through their choice of procedural actions could undermine the very purpose of the collateral order doctrine, which is to provide a safety valve for parties facing irreparable harm or the loss of important rights. To mitigate these concerns, courts should focus on the practical impact of agency actions and the balance of interests at stake rather than rigid textual language. This way, courts can ensure that parties have access to interlocutory review in appropriate cases, regardless of the specific form of the agency's decision.

Ultimately, the goal should be to strike a balance between the efficiency and autonomy of administrative proceedings and the need to protect parties' rights and prevent abuse. The collateral order doctrine, as a practical construction of the finality requirement, can play an important role in achieving this balance, but only if it is applied in a manner that is sensitive to the realities of agency decision-making and the potential for coercion. The essential premise from these balancing points is that appellate oversight should at times be possible even absent the termination of proceedings below, whether in court or before an agency. The collateral order doctrine is not a true exception to the final decision rule laid down in § 1291 but rather a practical construction of it.[325] And, since it is not a true exception based on the language of the statute, then there is no reason that language like that in the FTCA would block collateral order review when agency determinations merit treatment under the *Cohen* factors. The courts have repeatedly emphasized that this doctrine should be understood as a practical interpretation of the final decision rule, allowing for immediate appeals in specific, limited circumstances where the interests of justice demand it.[326]

324. *See* La. Real Est. Appraisers Bd. v. FTC, 917 F.3d 389, 393 (5th Cir. 2019).

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

326. *Henry*, 566 F.3d at 169.

C. A Brief Historical Perspective

Finally, the history of this issue reveals that there is nothing special about the term "final decisions" in § 1291 to suggest that agencies' organic statutes must contain textual parallels to § 1291 to confer analogous appellate jurisdiction despite ongoing administrative proceedings. Rather, the historical evidence points firmly to the idea that the question is practical—as *Cohen* indicated.[327]

While there is early English history on the finality of judgments in the context of appeals going back to the 14th century,[328] the American story on the question can start with the Judiciary Act of 1789, which provided for appeals from "final judgments and decrees."[329] This language was certainly intended to curb excessive appeals from overwhelming the federal courts, meaning, in those days, the Supreme Court itself (although contemporary accounts suggest the Court had plenty of appellate bandwidth at the time).[330] Justice Story in 1830 commented on the Judiciary Act of 1789, not in terms of its language but in terms of its policy—noting:

> It is of great importance to the due administration of justice, and is in furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon *final* decrees only, that causes should not come up here in fragments, upon successive appeals. It would occasion very great delays, and oppressive expenses.[331]

Additional judges and scholars in the 1800s commented similarly on the statute's underlying finality policy—to avoid unnecessary expense and docket congestion.[332] However, at the same time arose a number of remedies for early appeals, in recognition of the fact that an efficiency rationale, if harshly enforced, could destroy the rights of parties in some situations.[333] As such, balanced against the language of the Judiciary Act of 1789, the use of writs like mandamus arose to create opportunities for justice where needed.[334]

Early courts were very familiar with the idea that statutory-based finality language did not fully prohibit interlocutory review and that policy drove such a situation.[335] Courts used a variety of mechanisms to provide early review during this time. First, early American courts used the writ of mandamus to

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327. *Cohen*, 337 U.S. at 546.

328. YEAR BOOKS OF THE REIGN OF KING EDWARD THE THIRD 240 (Luke Owen Pike ed. and trans., 1901) (noting that in 1343 counsel in front of the King's Bench indicated that the court had no jurisdiction because the case was still pending in another court, thus the "record is not fully here").

329. Federal Judiciary Act, ch. 20, 1 Stat. 73, 84 (1789).

330. Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 550–51 (1932).

331. Canter v. Am. Ins. Co., 28 U.S. (3 Pet.) 307, 318 (1830).

332. Crick, *supra* note 330, at 551.

333. *See id.*

334. *See id.*

335. *See, e.g.*, *Canter*, 28 U.S. (3 Pet.) at 318.

review interlocutory orders, such as those related to changes of venue, party joinders, and witness testimonies, despite the final judgment rule.[336] The writ of prohibition, originally issued from the English King's Bench, commanded lower courts to cease prosecution of a suit that fell outside their jurisdiction.[337] American courts used it to correct refusals to change venue, orders requiring evidence inspection, and refusals to dismiss prosecutions, among other interlocutory matters.[338] The writ of certiorari was used to review interlocutory decisions like venue changes and receiver sales when waiting for a final decree would cause irreparable harm, and habeas corpus was used to free persons held in custody before final judgment when the court lacked jurisdiction, the charges were insufficient, or there was no legal evidence of a crime.[339] And these methods continued to be used to provide early appellate review, even with the 1891 establishment of the circuit courts of appeals (with the statute limiting their appellate jurisdiction to "final decisions").[340] As such, as long as there has been the concept of final decisions in the American courts, there have been courts that see practical reasons to take early review where necessary for reasons of rights and efficiency.

In the early 1940s, before the enunciation of the *Cohen* doctrine, courts continued to emphasize the practical and policy-based nature of exceptions to finality. Indeed, courts noted that finality as a principle was not all-purpose—its meaning varies by the context.[341] Even *Cohen* itself recognized previous cases that had given practical construction to finality.[342] At least one of those cases noted that baked into the concept of finality was a necessary construction that sometimes early interlocutory review would be needed to protect parties' rights—the case even called such construction the "means for achieving a healthy legal system."[343]

It is true that in the early 1940s, pre-*Cohen*, Courts understood that interlocutory review of agency decisions was particularly undesirable. Specifically, a court noted that "administrative bodies have been created by Congress to give 'expert' and expeditious attention to their specialized fields, so that there is a reluctance on the part of the courts to interfere until the administrative agencies have finished their work."[344] They noted too that they

336. Crick, *supra* note 330, at 551–54.

337. *Id.* at 555–56.

338. *Id.*

339. *Id.* at 556–57.

340. *See* Judiciary Act of 1891, ch. 517, 26 Stat. 828 (1891).

341. United States v. 243.22 Acres of Land, 129 F.2d 678, 680 (2d Cir. 1942) (noting that the term "'[f]inal' . . . is slithery, tricky. It does not have a meaning constant in all contexts.").

342. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (first citing Bank of Columbia v. Sweeny, 26 U.S. (1 Pet.) 567, 569 (1828); then citing United States v. River Rouge Improvement Co., 269 U.S. 411, 414 (1926); and then citing Cobbledick v. United States, 309 U.S. 323, 328 (1940)).

343. *Cobbledick*, 309 U.S. at 326.

344. Perkins v. Endicott Johnson Corp., 128 F.2d 208, 213 (2d Cir. 1942), *aff'd*, 317 U.S. 501 (1943).

would not allow a challenger to interrupt agency proceedings on grounds that the agency did not have jurisdiction over the party and that allowing the proceeding would increase expense for the party.[345] But that does not mean that collateral order review of agency decisions is never available—like all applications of the collateral order doctrine, it should be narrowly construed and applied. As noted by the Court in *Mathews v. Eldridge,* judicially created finality requirements in the agency space should "be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered."[346]

As such, in contrast to the holding in *Louisiana Real Estate Appraisers Board*, the policies of finality, *Cohen*, and history all suggest that the collateral order doctrine generally applies to administrative decisions. As noted in the *Rhode Island* case, the collateral order doctrine is generally applicable to administrative decisions, even when statutes like the FTCA or Clean Water Act appear to have more limited language.[347]

CONCLUSION

In sum, courts should apply the collateral order doctrine to nonfinal administrative-agency determinations that meet the *Cohen* criteria—this approach aligns with historical exceptions to the final judgment rule, the Supreme Court's emphasis on practical construction of finality, and the underlying policy considerations that protect parties from irreparable harm. The Fifth Circuit's decision in *Louisiana Real Estate Appraisers Board* represents an overly rigid and formalistic approach that undermines the purpose of the doctrine and risks subjecting parties to unjust and irreparable harm.

The historical evidence demonstrates that courts have long recognized the need for practical exceptions to the final judgment rule. The use of various writs—such as mandamus, prohibition, certiorari, and habeas corpus—to provide interlocutory relief despite the "final decisions" language in the Judiciary Act of 1789 and later statutes, underscores the courts' reluctance to show a strict adherence to finality.

Moreover, the Supreme Court's decision in *Cohen* itself emphasized that the collateral order doctrine is a practical construction of the finality requirement, not a technical interpretation of the "final decisions" language in § 1291. This practical approach is further supported by the Court's subsequent decisions, such as *Mathews v. Eldridge*, which stressed the importance of construing finality requirements to prevent the loss of crucial collateral claims and irreparable injuries.

345. *See, e.g.*, *id.*

346. Mathews v. Eldridge, 424 U.S. 319, 333 n.11(1976).

347. *See* Rhode Island v. EPA, 378 F.3d 19, 23–26 (1st Cir. 2004).

The policy considerations underlying the collateral order doctrine, particularly the balance between judicial efficiency and the protection of parties' rights, are applicable in the context of administrative agency proceedings. A rigid textual adherence to the specific language of an agency's organic statute for judicial review, such as the "cease and desist" requirement in the Federal Trade Commission Act, can lead to situations where parties are subjected to lengthy and costly proceedings even when strong arguments exist for threshold relief based on issues like immunity or jurisdiction. This not only undermines the purpose of the collateral order doctrine but also risks allowing agencies to coerce parties into settlement or compliance by prolonging proceedings.

To strike the appropriate balance between the efficiency and autonomy of administrative proceedings and the need to protect parties' rights, courts should focus on the practical impact of agency actions and the interests at stake. By applying the collateral order doctrine to administrative agency decisions that meet the *Cohen* requirements, courts can ensure that parties have access to interlocutory review in appropriate cases.