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ARTICLE

A TEXTUALIST DEFENSE OF A NEW COLLATERAL ORDER DOCTRINE

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As a general rule, federal appellate courts have jurisdiction over "final decisions." Though the rule seems simple enough, the Court's current approach to interpreting "final decisions," the collateral order doctrine, is anything but straightforward. That is because the Court has left the statutory text by the wayside. The collateral order doctrine is divorced from statutory text and is instead based on policy considerations.

Commentators (and, at times, the Court) have offered an alternative reading of "final decisions": the final-judgment rule. This rule would allow appeals from final judgments only. But this alternative is not the product of close textual analysis. Nor is it faithful to the relevant statute's original meaning. In fact, the Court has never made a serious attempt to interpret "final decisions" as that phrase was understood when enacted.

This Article fills that gap, leveraging corpus linguistics evidence to discover the original, ordinary meaning of "final decisions." Adding that corpus evidence to clues from historical context and interstatutory analysis, neither the current collateral order doctrine nor the final-judgment rule reflects the ordinary meaning of "final decisions." Instead, "final decisions" include final judgments, other decisions that end litigation on the merits, and orders deciding issues that are ancillary to the merits and will not be revisited. This is the new, text-conscious collateral order doctrine that the Court should adopt.

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INTRODUCTION

Federal courts must point to a statute that authorizes jurisdiction before exercising judicial power.[1] The general statute for appellate jurisdiction is found in 12 U.S.C. § 1291. It allows federal appellate courts to hear appeals from the "final decisions" of trial courts.[2] Though the rule seems simple, the Supreme Court's cases interpreting "final decisions" are not simple. Scholars have described the caselaw applying § 1291 as an "unacceptable morass,"[3] "unconscionable intricacy,"[4] and "hopelessly complicated."[5] And rightfully so. The Court has left the statutory text by the wayside.

Rather than wrestle seriously with the original meaning of the phrase "final decisions," the Court has assumed that "final decisions" means the same thing as "final judgments."[6] But, at the same time, the Court has interpreted "final decisions" to include collateral orders, or certain lower court orders that *precede* final judgment.[7] This curious interpretation is called the "collateral order doctrine."[8]

The collateral order doctrine is based on the Court's policy preferences, not the text of § 1291.[9] When it first created the doctrine, the Court said it was choosing a "practical . . . construction" over a "technical [interpretation]," suggesting that the doctrine differs from how the Court would otherwise interpret § 1291.[10] The

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1 David R. Dow, *Is the "Arising Under" Jurisdictional Grant in Article III Self-Executing?*, 25 WM. & MARY BILL RTS. J. 1, 1 (2016) (noting "numerous commentators and the handful of judges who have addressed the issue have agreed for centuries that the federal courts have only the jurisdiction Congress gives them" but arguing to the contrary).

2 28 U.S.C. § 1291 (2018).

3 Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 L. & CONTEMP. PROBS. 171, 172 (1984); *see also* Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1238–39 (2007) (collecting criticisms).

4 Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, 47 L. & CONTEMP. PROBS. 165, 165–66 (1984).

5 Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527, 555 (2002).

6 Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1712 (2017) (asserting § 1291 "codified" the "final-judgment rule").

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

8 Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994) ("The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." (citing *Cohen*, 337 U.S. at 546)).

9 *See id.* at 878–79 (noting whether orders are collateral depends on "a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement"); *see also id.* at 879 (discussing whether interests are "weightier than the societal interests advanced by the ordinary operation of final judgment principles").

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

elements of the collateral order doctrine confirm this conclusion, for they have nothing to do with whether an order is "final."[11] Instead, judges are to determine whether an issue is "important" enough to warrant a prejudgment appeal.[12] In sum, the Court has taken "final decisions" to mean "final judgments, except when it makes policy sense for it to mean something else as well." That is simply not a plausible interpretation.

Perhaps for this reason, the collateral order doctrine has recently fallen out of favor. For over a decade, the Court has not applied the doctrine without emphasizing that collateral orders should be few and far between.[13] At least one sitting Justice—Justice Clarence Thomas—would reject the collateral order doctrine altogether.[14] Some lower courts have ceased applying it except to the extent required by vertical stare decisis, i.e., to those orders the Supreme Court has already recognized as collateral.[15]

But what to do instead? Most argue that the Court should replace the doctrine with the final-judgment rule.[16] On this view, "final decisions" means final judgments, and final judgments only. Indeed, the Court itself has long assumed this interpretation to be correct, even as it has invoked the collateral order doctrine.[17]

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11 Steinman, *supra* note 3, at 1253.

12 Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 107 (2009) ("The justification for immediate appeal must therefore be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes.").

13 *Id.* at 106.

14 *Id.* at 115 (Thomas, J., concurring in part and concurring in judgment). *But see* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 531 (2021) (Gorsuch, J., joined by Thomas, J.) (exercising appellate jurisdiction under the collateral order doctrine).

15 *E.g.*, United States v. Wampler, 624 F.3d 1330, 1335–36 (10th Cir. 2010). Some courts have continued applying the collateral order doctrine. *E.g.*, United States v. Mendez, 28 F.4th 1320, 1323–24 (9th Cir. 2022) (exercising collateral order jurisdiction over a denial of a defendant's motion to dismiss criminal charges based on an argument that statute prevented the prosecution).

16 *Mohawk Indus., Inc.*, 558 U.S. at 116 (Thomas, J., concurring in part and concurring in judgment) (suggesting "final decisions" in § 1291 should mean decisions that "en[d] the litigation on the merits and leav[e] nothing for the court to do but execute the judgment" (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)).

17 *Catlin*, 324 U.S.at 233 ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. . . . Hence, ordinarily . . . appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights."); *see also* Microsoft Corp v. Baker, 137 S. Ct. 1702, 1712 (2017) (asserting § 1291 "codified" the "final-judgment rule"). The Court has affirmed both the collateral order doctrine and the final-judgment rule simultaneously. For example, in *Digital Equipment*, the Court acknowledged the collateral order doctrine as a "practical construction" in the very same sentence that it acknowledged "'the final decision' rule laid down by Congress in § 1291." 511 U.S. 863, 867 (1994).

But unless it is the product of a close interpretation of the text, the final-judgment interpretation suffers from the same problem as the collateral order doctrine. To the extent a text-conscious Court rejects the collateral order doctrine for being inconsistent with the text of § 1291, the Court should take care not to replace it with another text-*un*conscious doctrine. Instead, the Court should use the traditional tools of statutory interpretation to identify the ordinary meaning of "final decisions" when that phrase was enacted.[18]

This Article does just that. Leveraging corpus linguistics evidence and the historical context of the statute that first defined appellate jurisdiction in terms of "final decisions," this Article concludes that "final decisions" codifies neither the current collateral order doctrine nor the final-judgment rule. Instead, "final decisions" includes final judgments, other decisions that end litigation on the merits, and orders that resolve issues that will not be revisited and are not intermediary to another decision. This is the text-conscious interpretation of "final decisions" that the Court should apply.

To exhibit this standard, this Article applies the "new" collateral order doctrine to three classes of prejudgment orders. One is an order that the Court has deemed not to be collateral but that is a "final decision": a default judgment. The second is an order that the Court has deemed to be collateral but that is not a "final decision": an order requiring a party to post security. The third is an order to which the Court has not yet applied the collateral order doctrine: an order denying a dismissal sought on the basis of a church autonomy defense. This third order is a "final decision."

This Article proceeds as follows. Part I introduces the collateral order doctrine, and Part II shows the Court's approach to the collateral order doctrine is divorced from the text of § 1291. Part III surveys evidence of what § 1291 originally meant and concludes "final decisions," properly interpreted, includes some orders preceding final judgment. Part IV applies this proposed interpretation of § 1291 to three exemplary orders: a default judgment, an order requiring a party to post security, and an order denying a religious autonomy defense.

I. THE COLLATERAL ORDER DOCTRINE

"From the very foundation of our judicial system," the general rule has been that appellate courts have jurisdiction over final judgments.[19] The Judiciary Act of 1789 enacted what is called the final-

18 As seen below, I use "ordinary meaning" broadly enough to encompass a technical legal meaning.

19 McLish v. Roff, 141 U.S. 661, 665, 665–66 (1891).

judgment rule, allowing appeals from "final judgments or decrees."[20] That made sense. A final-judgment rule is efficient, consolidating all a case's potential appeals into a single, postjudgment appeal and avoiding "piecemeal" review.[21] It also improves trial courts' effectiveness, for repeated interruptions from an appellate court would have a "debilitating effect" on trial court proceedings.[22]

In 1891, Congress enacted a new jurisdictional statute.[23] Skipping over history that will be discussed below,[24] the new statute no longer defined appellate jurisdiction in terms of "final judgments or decrees," but rather used the phrase "final decision[s]."[25] This general grant of jurisdiction is now codified at 28 U.S.C. § 1291 and gives courts appellate jurisdiction over only the "final decisions" of district courts, unless another specific statutory grant of appellate jurisdiction applies.[26]

In its landmark decision, *Cohen v. Beneficial Industrial Loan Corp.*,[27] the Court interpreted "final decisions" to include some orders preceding final judgment.[28] To support this interpretation, the Court asserted it had "long given" the phrase "final decisions" a

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20 Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84. "Decree" was a technical term that referred to "[t]he judgment of a court of equity." *Decree*, 1 GILES JACOB, THE LAW-DICTIONARY: EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE, OF THE ENGLISH LAW (T.E. Tomlins ed., London, T. Longman et al. 1797). Like common law judgments, decrees were final and could not be altered except by petition for rehearing or bill of review; rehearing was appropriate only before the decree was signed and enrolled. *Id.* On bill of review, the whole decree was open (with review usually constrained to the face of the decree), whereas on rehearing, only those portions petitioned against were reopened. *Id.*

21 *Microsoft Corp.*, 137 S. Ct. at 1707 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 471 (1978)); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981).

22 *Microsoft Corp.*, 137 S. Ct. at 1707 (quoting *Livesay*, 437 U.S. at 471).

23 Evarts Act, ch. 517, § 6, 26 Stat. 826, 828 (1891); *see also* Act of June 25, 1948, ch. 83, § 1291, 62 Stat. 929, 929 (codified at 28 U.S.C. § 1291 (2018)).

24 *Infra* Section III.C.

25 Evarts Act § 6.

26 *See* 28 U.S.C. § 1292 (2018). For example, § 1292(a) allows for interlocutory appeals from orders granting or denying injunctions and § 1292(b) allows for prejudgment certification, and § 1292(e) allows the Court to make rules allowing specific classes of interlocutory appeals (e.g., FED. R. CIV. P. 23(f)). The All Writs Act also allows, in rare cases, appellate review by writs of prohibition or mandamus. 28 U.S.C. § 1651 (2018). Such review is allowed only to constrain a lower court to a "lawful exercise of its prescribed jurisdiction" or to compel a lower court to "exercise its authority when it is its duty to do so." Will v. United States, 389 U.S. 90, 95 (1967) (quoting Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943)). There are also limits on appeals from even final judgments. *See* 28 U.S.C. § 2253(c) (2018).

27 337 U.S. 541 (1949).

28 *Id.* at 546.

"practical rather than a technical construction."[29] This practical construction is called the collateral order doctrine.[30]

Perhaps because it is a "practical" construction, the Court has rarely expressed the collateral order doctrine in terms of a formal rule, and its test has shifted over time.[31] Three requirements, however, have been consistent: an order must be conclusive, separate from the merits, and not otherwise reviewable.[32] For some time, the Court held that an order met these requirements if and only if it denied a claimed right not to stand trial.[33] Recently, however, the Court has focused instead on whether the issue a party wants reviewed is "important enough" to justify immediate appeal.[34] These developments are discussed more fully below.

A. Final, Separate, and Not Otherwise Reviewable

Three elements of a collateral order have been consistent over time. Collateral orders include "only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment."[35]

Orders are "conclusive" if they finally resolve the lower court's treatment of the issue; the decision may not be "tentative, informal[,]

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29 *Id.* (citing Bank of Columbia v. Sweeny, 26 U.S. (1 Pet.) 567, 569 (1828) (refusing to grant writ of mandamus); United States v. River Rouge Improvement Co., 269 U.S. 411, 414 (1926) (determining whether review is appropriate after the appellate court remands for new trial); Cobbledick v. United States, 309 U.S. 323, 328 (1940)). Professor Steinman has convincingly argued that the cases *Cohen* relied on do not support *Cohen*'s holding. Steinman, *supra* note 3, at 1249, 1249 n.90.

30 Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994) (citing *Cohen*, 337 U.S. at 546) (noting the collateral order doctrine is "best understood not as an exception to the 'final decision' rule . . . but as a 'practical construction' of it").

31 *Compare* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 105 (2009) (citing the Eleventh Circuit's three-part test for applying *Cohen*), *with id.* at 106 (applying *Cohen* without citing any formal test); Mitchell v. Forsyth, 472 U.S. 511, 543 (1985) (Brennan, J., concurring in part and dissenting in part); 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3911 (3d ed. 2022). *But see* Will v. Hallock, 546 U.S. 345, 349 (2006) (distilling requirements into three conditions).

32 WRIGHT ET AL., *supra* note 31, § 3911.

33 Van Cauwenberghe v. Biard, 486 U.S. 517, 526–27 (1988) (calling the "critical question" "whether 'the essence' of the claimed right is a right not to stand trial," *id.* at 524 (quoting *Mitchell*, 472 U.S. at 525)).

34 *Will*, 546 U.S. at 353, 351–53 (calling *Van Cauwenberghe*'s critical question "too easy to be sound," *id.* at 351, and focusing on whether the issue asserted is "important enough" to justify immediate review, *id.* at 353).

35 Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 42 (1995); *see also Will*, 546 U.S. at 349.

or incomplete."[36] Here, however, the fact that a trial court *might* revisit its decision does not automatically prevent the order from being final.[37]

Collateral orders are also separate from the merits,[38] but consistent with the complexity of the collateral order doctrine generally, this element is wishy-washy. On the one hand, the Court has stated that a collateral order must be "completely separate from the merits" of the plaintiff's claim.[39] An order is too closely connected to the merits if it is a "step toward final disposition of the merits" or will be merged in final judgment.[40] On the other hand, the Court's holdings suggest that orders do not actually need to be "completely" separate—just somewhat separate, or even just "conceptually distinct."[41] According to the Court, an issue can be sufficiently "completely separate" from the merits even when the reviewing court "must consider" the plaintiff's factual allegations to resolve the issue[42] and there is "factual overlap" between the issue and the merits.[43] More confusingly, the Court has held that an issue is "completely separate" from the merits when resolving the issue is "necessarily directly controlling of the question whether the defendant will ultimately be liable"[44] and is outcome determinative of the merits.[45]

Orders must also be effectively unreviewable on appeal from final judgment.[46] This element is applied practically. For example, an order denying a qualified immunity defense needs to be immediately appealed because a major point of the defense is to save officials from the travails of trial, and that benefit is, as a practical

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

37 Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 345 (1985) (Brennan, J., dissenting).

38 *Will*, 546 U.S. at 349.

39 *Id.*

40 *Cohen*, 337 U.S. at 546. Nonfinal orders merge in final judgment if they "produce[]" final judgment. Foy v. Schantz, Schatzman & Aaronson, P.A., 108 F.3d 1347, 1350 (11th Cir. 1997); Klamath Strategic Inv. Fund *ex rel.* St. Croix Ventures v. United States, 568 F.3d 537, 546 (5th Cir. 2009); Hoefer v. Bd. of Educ., 820 F.3d 58, 62 (2d Cir. 2016).

41 Mitchell v. Forsyth, 472 U.S. 511, 527–28 (1985); *see also id.* at 547 (Brennan, J., concurring in part and dissenting in part) (asserting the Court reformulated the separateness condition).

42 *Id.* at 528–29 (noting an issue can be "separate from the merits . . . even though a reviewing court must consider the plaintiff's factual allegations in resolving [it]").

43 *Id.* at 529 n.10.

44 *Id.* (noting double jeopardy and absolute immunity claims—both of which are collateral orders—are "necessarily directly controlling" of whether the defendant will be liable).

45 *Id.* ("[Under] our holdings . . . the fact that an issue is outcome determinative does not mean that it is not 'collateral' for purposes of the *Cohen* test.").

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

matter, already settled and lost if an official has to wait until *after* trial to appeal the denial of the defense.[47] According to the Court, this requirement properly balances a litigant's interest in immediate appeal and societal interests in a robust final-judgment rule; pre-final-judgment appeals are allowed only when waiting until final judgment would nullify an appeal.[48]

The Court has consistently required that collateral orders be final, separate from the merits, and not reviewable on appeal from final judgment. Other elements have been in flux, as shown below.

B. The Right Not to Stand Trial

For some time, the Court held that orders qualified as collateral if and only if they involved claimed rights not to stand trial.[49] Stated otherwise, when a defendant asserts a defense that, at bottom, protects the defendant from both liability *and* the travails of standing trial (e.g., discovery), an order denying that defense is a collateral order.

This made sense: orders denying a claimed right not to stand trial *per se* meet the three classic requirements.[50] If a defendant moves for dismissal based on such a defense, an order denying that motion and allowing the case to go to trial "conclusively" determines whether the defendant in fact has a right not to stand trial.[51] Such an order is also "separate from the merits" because whether the defendant is entitled not to stand trial is "conceptually distinct" from deciding whether the defendant is liable on the merits.[52] The order is also "effectively unreviewable" on appeal from final judgment; an appellate court cannot properly vindicate a defendant's interest in not standing trial if the defendant has to wait until after trial to seek review.[53] Since orders denying claimed rights not to stand trial satisfy all three conditions a priori, any such order was a prime candidate for collateral order review.

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47 *Mitchell*, 472 U.S. at 525–26.

48 *See* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 107 (2009).

49 *E.g.*, Van Cauwenberghe v. Biard, 486 U.S. 517, 526–27 (1988).

50 *See Mitchell*, 472 U.S. at 525–26 (citing Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982)).

51 *Id.* at 527.

52 *E.g.*, *id.* at 527–28 (discussing qualified immunity) ("[I]t follows from the recognition that [the defense] is in part an entitlement not to be forced to litigate . . . that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his [or her] rights have been violated.").

53 *Id.* at 526–27.

In fact, almost every order the Court has deemed to be collateral involves a claimed right not to stand trial.[54] Sovereign immunity,[55] absolute immunity,[56] Speech and Debate Clause immunity,[57] and immunity under the Westfall Act[58] each give defendants a right not to stand trial, and pretrial orders denying each are collateral. The same goes for orders denying claims of double jeopardy,[59] intramilitary immunity,[60] and pretextual prosecution[61]: each protects the defendant from having to stand trial, and a denial of each is a collateral order. The Court justifies the most common collateral order—orders denying claims of qualified immunity—*entirely* on the grounds that qualified immunity "is . . . an entitlement not to stand trial under certain circumstances."[62]

By the same token, when finding that orders do not qualify as collateral, the Court has emphasized that they do not entail a right not to stand trial. An order denying a motion to dismiss based on the First Amendment right to solicit campaign contributions is not collateral because the First Amendment rights "are not rights to avoid trial altogether."[63] An order denying a motion to dismiss for lack of personal jurisdiction is not collateral because personal jurisdiction gives defendants a "right not to be subject to a binding

54 The doctrine has applied to orders denying interests that do not entail such a right. *E.g.*, Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A., 339 U.S. 684, 688–89 (1950) (vacatur of attachment in admiralty). *Swift* was decided before the Court began to emphasize the right not to stand trial.

55 P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993); FG Hemisphere Assocs. v. République du Congo, 455 F.3d 575, 584 (5th Cir. 2006); Rubin v. Islamic Republic of Iran, 637 F.3d 783, 790 (7th Cir. 2011).

56 Nixon v. Fitzgerald, 457 U.S. 731 (1982).

57 Helstoski v. Meanor, 442 U.S. 500 (1979).

58 Osborn v. Haley, 549 U.S. 225 (2007).

59 Abney v. United States, 431 U.S. 651 (1977).

60 Newton v. Lee, 677 F.3d 1017, 1023 (10th Cir. 2012) (noting the immunity is motivated by "the process of defending a lawsuit, not merely the end result" (quoting Dibble v. Fenimore, 339 F.3d 120, 124 (2d Cir. 2003))); *Dibble*, 339 F.3d at 125; Lutz v. Sec'y of the Air Force, 944 F.2d 1477, 1484 (9th Cir. 1991); McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1340 (11th Cir. 2007).

61 United States v. P.H.E., Inc., 965 F.2d 848, 854 (10th Cir. 1992) (finding an order to be collateral because the party presented "a First Amendment 'right not to be tried'").

62 Mitchell v. Forsyth, 472 U.S. 511, 525 (1985). The Court noted "two additional criteria" that had to be met (finality and separability) but found those criteria applicable for the same reason: qualified immunity entails a right not to stand trial. *Id.* at 527–28; *see also id.* at 537 (O'Connor, J., concurring in part) (explaining the Court's recognized collateral orders are such because they "protect the defendant from the burdens of trial, and the right will be irretrievably lost if its denial is not immediately appealable").

63 United States v. Hsia, 176 F.3d 517, 526 (D.C. Cir. 1999).

judgment," not "a right not to stand trial."[64] The analysis is the same for the right to speedy trial,[65] the due process right to challenge improper prosecution,[66] the right to dismissal for prosecutorial vindictiveness,[67] and a host of other defenses that protect the defendant from liability, but not the burdens of trial.[68]

In sum, the "critical question" has been "whether 'the essence' of the claimed right is a right not to stand trial."[69]

C. Is the Underlying Interest Important Enough?

In recent years, however, the Court has backtracked. The collateral order doctrine is no longer all about the right not to stand trial. In fact, the Court has explicitly rejected that focus as "too easy to be sound."[70] Now, the doctrine depends on a new(ish) requirement: the interest decided must be important enough to justify immediate review.[71]

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64 Van Cauwenberghe v. Biard, 486 U.S. 517, 526–27 (1988). More precisely, *Van Cauwenberghe* concerned an order denying a motion to dismiss for reason of immunity from service of process. *Id.* at 517.

65 United States v. MacDonald, 435 U.S. 850, 860–61 (1978) (explaining that denial of the right to speedy trial is not a collateral order because "the Speedy Trial Clause does not . . . encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all," *id.* at 861).

66 United States v. Angilau, 717 F.3d 781, 787 (10th Cir. 2013) (holding that a due process challenge to improper prosecution guarantees that any conviction can be set aside, but does not "preclude the government from subjecting the defendant to . . . trial").

67 United States v. Hollywood Motor Car Co., 458 U.S. 263, 270 (1982) (per curiam) (holding that the right to dismissal for prosecutorial vindictiveness "is simply not one that must be upheld prior to trial if it is to be enjoyed at all").

68 *E.g.*, *Van Cauwenberghe*, 486 U.S. at 525–27 (discussing forum non conveniens and principle of specialty); Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 496 (1989) (involving contractual forum-selection clause); General Steel Domestic Sales, L.L.C. v. Chumley, 840 F.3d 1178, 1179–80 (10th Cir. 2016) (considering immunity under the Communications Decency Act); Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd., 711 F.3d 1136, 1137–38 (9th Cir. 2013) (considering immunity under the *Noerr-Pennington* doctrine).

69 *Van Cauwenberghe*, 486 U.S. at 524 (quoting Mitchell v. Forsyth, 472 U.S. 511, 525 (1985)); *Lauro Lines*, 490 U.S. at 500 (quoting *Van Cauwenberghe*, 486 U.S. at 524).

70 Will v. Hallock, 546 U.S. 345, 351 (2006).

71 The requirement is "new(ish)" because technically, it has always been around. *Cohen* required that the order involve an issue "too important to be denied review." Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949); *Lauro Lines*, 490 U.S. at 502 (Scalia, J., concurring) ("The importance of the right asserted has always been a significant part of our collateral order doctrine."). Nonetheless, the importance was rarely at issue before *Will* and *Digital Equipment*, which placed greater weight on the importance than before. *Will*, 546 U.S. at 351; Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 878–79 (1994).

In the last decade, the Court has grown skeptical of the collateral order doctrine. Recognizing the benefits of a robust final-judgment rule,[72] it has "not mentioned applying the collateral order doctrine recently without emphasizing" that the doctrine is supposed to be narrow.[73] The Court has "resisted efforts to stretch" the collateral order doctrine in a way that would disserve the objectives of a robust final-judgment rule.[74]

The Court has narrowed the collateral order doctrine "principally by raising the bar on what types of interests are 'important enough'" to warrant immediate review.[75] Because many defenses can be construed as rights not to stand trial,[76] the Court has rejected the focus on that right as "too easy to be sound."[77] If every denial of a claimed right not to stand trial were immediately appealable, the policies underlying the final-judgment rule would be disserved.[78]

Thus, whereas the collateral order doctrine used to be all about the right not to stand trial, the doctrine now "boils down to 'a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.'"[79] Examples of "particular value[s] of a high order" include separation of powers, government efficiency, and states' dignitary interests.[80] Other than those examples, the Court has given no guidance on how to evaluate whether an interest is sufficiently important.[81]

Thus, as it stands today, an order is collateral if it finally decides an issue, the issue is separate from the merits, the issue is effectively unreviewable on appeal from final judgment, and it implicates an interest important enough to "overcome the usual benefits of deferring appeal until litigation concludes."[82]

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72 *See, e.g.*, Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106–07 (2009).

73 *Will*, 546 U.S. at 350 ("[W]e have meant what we have said; . . . we have . . . kept [the collateral order doctrine] narrow and selective . . . ."). *See also Mohawk Indus., Inc.*, 558 U.S. at 117 (Thomas, J., concurring in part and concurring in judgment); *Digit. Equip.*, 511 U.S. at 868 ("[T]he 'narrow' exception should stay that way . . . ." (quoting Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 430 (1985))).

74 Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1712 (2017).

75 *Mohawk Indus., Inc.*, 558 U.S. at 117 (Thomas, J., concurring in part and concurring in judgment) (citing *Will*, 546 U.S. at 352–53).

76 *Digit. Equip.*, 511 U.S. at 873 (noting such a generalization would allow immediate appellate review of denied personal jurisdiction, statute of limitations, claim preclusion, and failure to state a claim).

77 *Will*, 546 U.S. at 351.

78 *Id.* at 350–51.

79 *Id.* at 351–52 (quoting *Digit. Equip.*, 511 U.S. at 878–79).

80 *Id.* at 352, 352–53.

81 *Id.*

82 Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 107 (2009).

II. THE COLLATERAL ORDER DOCTRINE CONFLICTS WITH THE TEXT

Because federal appellate courts can exercise jurisdiction only if authorized by statute, the validity of the collateral order doctrine is a question of statutory interpretation.[83] The Court's approach to interpreting § 1291 has been uninterested in the text, and the elements of the collateral order doctrine have little to do with whether an order is a "final decision."

A. The Court's Interpretive Approach

First, the Court has taken a decidedly pragmatic approach to constructing "final decisions," weighing policy considerations more than analyzing communicative content.

At least in word, the Court has characterized the collateral order doctrine as loosely based on statutory text. When creating the doctrine, for example, the Court stated the doctrine was a "construction" of § 1291.[84] Since then, the Court has repeatedly explained that the "doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it.'"[85]

However, the Court's construction[86] does not derive from the text in any meaningful way. This is clear from the quotes just referenced. By choosing a "practical rather than a technical construction" of the text,[87] the Court has explicitly chosen pragmatic considerations over what the text technically conveys.

Other decisions confirm this point. In 1940, the Court claimed that finality "is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system."[88] A few years later, in *Catlin v. United States*, the Court defined "final decisions" to mean the same thing as "final decrees": a "'final decision' generally is one which ends the litigation on the merits and

83 Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1716 (2017) (Thomas, J., concurring in judgment) (noting that whether an order is final "depends on the meaning of § 1291").

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

85 Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994) (citing *Cohen*, 337 U.S. at 546). *Contra* Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 94, 111–12 (1975) (viewing the collateral order doctrine as a judicially created exception to the final-judgment rule, not an interpretation).

86 This Article uses the word "construction" instead of "interpretation" purposefully. "Interpretation" is the discovery of communicative content, while "construction" is the discovery of legal content. *See* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 483 (2013). The Court does not appear to have used "construction" this technical way when describing the collateral order doctrine.

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

88 Cobbledick v. United States, 309 U.S. 323, 326 (1940).

leaves nothing for the court to do but execute the judgment."[89] Though *Catlin*'s definition is often heralded as the true meaning of "final decisions,"[90] the Court did not tie the definition to the text, purpose, or even legislative history of the jurisdictional statute,[91] though it did engage in serious statutory interpretation of *other* statutes at issue in the case.[92] Instead, the Court founded its definition "not in merely technical conceptions of 'finality,'" but rather in a policy "against piecemeal litigation."[93] Again, the driving force was policy, not communicative content.

The Court reiterated its policy-based approach in its most recent collateral order decision, *Microsoft Corp. v. Baker*.[94] There, the Court noted "§ 1291" "codifie[s]" the "final-judgment rule."[95] Curiously, one paragraph later, the Court asserted that "final decisions" include orders *preceding* final judgment, as long as their immediate review would not erode the policies underlying the final-judgment rule.[96] And the Court held that an order *directing final judgment* was not a final decision—because holding otherwise would "undermine[]" those policies.[97]

In sum, "final decisions" are final judgments because the final-judgment rule is a good policy,[98] but "final decisions" also include prejudgment orders that do not undermine the policies served by the final-judgment rule and exclude final judgments that do. The message is clear: in interpreting "final decisions," the Court has focused on whether an immediate appeal is efficient, fair, or consistent with some other policy objective. A final-judgment rule

89 Catlin v. United States, 324 U.S. 229, 233 (1945) (citing St. Louis, Iron Mountain & S. R.R. Co. v. S. Express Co., 108 U.S. 24, 28 (1883)); *see also* Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1716 (2017) (Thomas, J., concurring in judgment) (quoting *Catlin*, 324 U.S. at 233).

90 Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 116 (2009) (Thomas, J., concurring in part and concurring in judgment) (suggesting *Catlin*'s definition "reflected . . . the statute's text").

91 The *Catlin* Court interpreted § 1291's predecessor. 324 U.S. at 233.

92 *Catlin*, 324 U.S. at 233–34, 237–39.

93 *Id.* at 233–34.

94 137 S. Ct. 1702.

95 *Id.* at 1712.

96 *See id.*

97 *Id.* at 1714–15 (quoting Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 47 (1995)) (fearing collateral appeal would "severely undermine[]" the "careful calibration" of Federal Rule of Civil Procedure 23(f)). *See* Leading Case, Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017)*, 131 HARV. L. REV. 323, 330 (2017) (arguing the Court's decision was motivated by a desire to avoid a difficult standing question).

98 *Catlin*, 324 U.S. at 233–34 (basing its definition of "final decisions" on policy).

with some limited exceptions may well be good policy.[99] But it is hard to see how "final decisions" can mean "final judgments and final judgments only, except when it is good policy for the phrase to mean something more or less." The Court's entire interpretive approach has appeared uninterested in the text.

B. The Elements of a Collateral Order

The elements of a collateral order are also divorced from the text of § 1291. Others have made this argument elsewhere,[100] but some examples bear emphasizing here.

For one, an order counts as collateral only if it is effectively unreviewable on appeal from final judgment.[101] While this element makes sense if the Court is balancing the appellant's need for immediate review against the benefits of the final-judgment rule (indeed, that is what the Court has stated it is doing),[102] this requirement is not related to "finality."[103] In fact, final judgments—the prototypical final decision—*are* effectively reviewable on appeal from final judgment.[104] The Court's new *sine qua non* of a collateral order—that it implicate a very important interest[105]—fares no better. A decision is not more "final" just because it implicates a more important interest.[106]

* * *

Choosing a "practical," policy-based interpretation, the Court claimed the power to define its own appellate jurisdiction. It has tried to maintain the benefits of a robust final-judgment rule while reserving the power to make exceptions when the underlying interest appears important enough. This approach should be rejected. Though the *United States Reports* are full of cases prioritizing policy over statutory text,[107] most now agree that such an approach is

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99 The Court balances the costs of inconvenience and piecemeal appeals on the one hand against the danger of denying justice in those myriad cases when important interests are decided early on in a case and would be effectively lost without immediate appeal. *See* Steinman, *supra* note 3, at 1247 n.76 (citing Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152–53 (1964)). That seems to be a good policy approach.

100 Steinman, *supra* note 3, at 1252–53.

101 *Supra* Section I.A.

102 *See* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 107 (2009).

103 Steinman, *supra* note 3, at 1253.

104 *Id.*

105 *See supra* Section I.C.

106 Steinman, *supra* note 3, at 1253.

107 *E.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457 (1892). Most of these cases come from the strong purposivist era.

beyond the judiciary's role.[108] The reasons for this conclusion do not need to be laid out here.[109] Suffice it to say that, because the Court's current approach sets aside the statutory text, the Court should jettison the collateral order doctrine. And to decide what should replace it, the Court should seriously engage the text of § 1291.[110]

III. SECTION 1291 ALLOWS APPEALS FROM SOME PREJUDGMENT ORDERS

This Article is not the first call for change in the collateral order doctrine. Many scholars have criticized it,[111] and Justice Thomas has invited the Court to rethink it.[112] Some lower courts have refused to exercise appellate jurisdiction over pre-final-judgment orders unless required by vertical *stare decisis*.[113] For example, the Tenth Circuit has

108 Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 23–30 (2006). Indeed, some believe the textualist revolution has been so successful that there is no meaningful difference between careful purposivists and careful textualists. *Id.* at 36–43. *But see* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 70 (2006) (asserting careful textualists differ from careful purposivists because they weigh semantic context over policy context); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347 (2005) (asserting that modern textualists and intentionalists seek different values and place different weight on rules).

109 *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 348 (2012); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1528 (1988) ("A focus on the text alone . . . will better constrain the tendency of judges to substitute their will for that of Congress.").

110 Some may argue that "final decisions" is an implicit authorization for courts to define their jurisdiction through federal common lawmaking power—an argument with some precedential support. *See, e.g.*, Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448 (1957) (interpreting a jurisdictional provision to authorize federal common lawmaking power over collective bargaining disputes). However, setting aside any question about whether the federal judiciary should *ever* infer a common lawmaking power from an ambiguous statutory provision, § 1291 seems to be among the worst candidates for such an inference. The Court has asserted that § 1291 codifies the final-judgment rule. This Article shows that proposition is incorrect, but taking the Court at its own word, there would be no ambiguity (let alone a clear statutory delegation) from which the Court could infer an implicit grant of authority to create common law. Beyond that, it has long been held that Article III's jurisdictional grants are not self-executing. By acting beyond a statutory authorization of jurisdiction (which is what the collateral order doctrine allows), the federal judiciary acts without jurisdiction. And by arrogating to itself the power to define its own jurisdiction beyond a statutory authorization, the federal judiciary would presume to make its own jurisdiction both self-executing and self-defined.

111 Steinman, *supra* note 3, at 1238–39 (noting the final judgment rule is "more honored in the breach than in the observance," *id.* at 1238, and collecting criticisms).

112 Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 115 (2009) (Thomas, J., concurring in part and concurring in judgment) ("We . . . should not[] further justify our holding by applying the *Cohen* doctrine . . . .").

113 *See* McClendon v. City of Albuquerque, 630 F.3d 1288, 1297 n.2 (10th Cir. 2011) (Gorsuch, J.); United States v. Wampler, 624 F.3d 1330, 1335–36 (10th Cir. 2010); *In re*

declined to treat denials of motions to proceed *in forma pauperis* as collateral—even though Supreme Court and circuit precedent have treated some such denials as collateral[114] (the collateral order analysis is categorical, not individualized).[115]

But this Article is unique in answering this question: what should replace the collateral order doctrine? Most have suggested the final-judgment rule, but no opinion, as far as I am aware, has seriously engaged with the text of § 1291 to determine whether it requires the final-judgment rule. For example, a recent majority of the Court asserted that § 1291 codifies the final-judgment rule—but did not support that assertion with any statutory interpretation.[116] As another example, Justice Thomas has tied the final-judgment interpretation back to prior precedent, writing that the definition from *Catlin v. United States* accurately "reflect[s] . . . the statut[ory] text."[117] There, the Court defined a "final decision" as one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[118] But, as mentioned above, *Catlin*'s definition was not the result of careful statutory interpretation; the *Catlin* Court grounded its definition "not in merely technical conceptions of 'finality,'" but on policy "against piecemeal litigation."[119] In that

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Motor Fuel Temperature Sales Pracs. Litig., 641 F.3d 470, 486–87 (10th Cir. 2011) (multi-district First Amendment privilege case) (declining to balance interests involved due to the *Mohawk* Court's stated preference for rulemaking over court decision); Herx v. Diocese of Fort Wayne-S. Bend, Inc., 772 F.3d 1085, 1090–91 (7th Cir. 2014) (noting arguments "to extend collateral-order review beyond the[] few [categories recognized by the Court] usually fail," *id.* at 1090, and holding "the Diocese has not made a persuasive case for expanding the scope of the collateral-order doctrine," *id.* at 1091).

114 *Compare* Burnett v. Miller, 507 F. App'x 796, 797–98 (10th Cir. 2013) (noting a denial of a motion to proceed *in forma pauperis* "is often appealable as a collateral order" but holding a particular denial was not a collateral order), *and* Yellowbear v. Norris, 693 F. App'x 737, 739–40 (10th Cir. 2017) (same), *with* Roberts v. U.S. Dist. Ct., 339 U.S. 844, 845 (1950) (citing *Cohen* and concluding "[t]he denial by a District Judge of a motion to proceed *in forma pauperis* is an appealable order"), *and* Lister v. Dep't of Treasury, 408 F.3d 1309, 1310 (10th Cir. 2005) (quoting *Roberts*, 339 U.S. at 845) ("[A] 'denial by a District Judge of a motion to proceed *in forma pauperis* is an appealable order' under the *Cohen* doctrine.").

115 *E.g.*, *Mohawk Indus., Inc.*, 558 U.S. at 107 (quoting Digit. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994)) ("[O]ur focus is on 'the entire category to which a claim belongs.'"). *But see* Johnson v. Jones, 515 U.S. 304 (1995) (holding that a denial of a qualified immunity claim is not immediately appealable when it turns on the alleged insufficiency of the plaintiff's evidence).

116 Microsoft Corp v. Baker, 137 S. Ct. 1702, 1712 (2017).

117 *Mohawk Indus., Inc.*, 558 U.S. at 116 (Thomas, J., concurring in part and concurring in judgment) (citing Catlin v. United States, 324 U.S. 229, 233 (1945)).

118 *Microsoft*, 137 S. Ct. at 1716 (Thomas, J., concurring in judgment) (quoting *Catlin*, 324 U.S. at 233).

119 *Catlin*, 324 U.S. at 233–34; *see also supra* notes 89–93 and accompanying text.

respect, *Catlin*'s interpretation currently rests on footing just as unstable as the collateral order doctrine. Both turn on the Court's policy sensibilities.

The problem with the current collateral order doctrine is not that it is bad policy. The problem is that it is divorced from the text. Rather than merely assuming the meaning of § 1291, the Court should interpret the text. This Part provides that interpretation. "Final decisions" include final judgments, prejudgment decisions that end litigation on the merits for a party, and prejudgment decisions that are separate from the merits and that will not be revisited.

A. Groundwork for Interpreting "Final Decisions"

Because § 1291 does not define "final decisions," a text-conscious interpretation should give the phrase its ordinary meaning as understood at the time of enactment.[120] Congress began using the phrase "final decision[s]" to define appellate jurisdiction in 1891.[121] Thus, the question here is whether the phrase "final decisions" was understood in 1891 to include some prejudgment decisions, or whether it meant final judgments and final judgments only.

The tools traditionally used to identify ordinary meaning are not very helpful here. For example, dictionaries are a common first step in modern interpretation. But here, no pre-1891 legal dictionary defined "final decision,"[122] though many defined synonyms such as "final decree," "judgment," and "final judgment."[123] Moreover,

120 *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 825 (2018); *see also* Moskal v. United States, 498 U.S. 103, 108 (1990) (quoting Richards v. United States, 369 U.S. 1, 9 (1962)) (giving words their "ordinary meaning"); United States v. Muscarello, 524 U.S. 125, 131 (1998) (same); Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 566 (2012) (same). This approach—if and only if used systematically and correctly—gives the public notice of the law, fulfills the court's role as agent of the lawmaker, is objective and consistent, and limits judicial policymaking. WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 35 (2016) (noting values served by an ordinary meaning inquiry).

121 Evarts Act, ch. 517, § 6, 26 Stat. 826, 828 (1891). Congress appears to have used the phrase "final decisions" in an earlier statute, but that statute was specialized (not defining general appellate jurisdiction), received very little attention, and does not appear to have altered the Court's interpretation of "final decisions" in § 1291's predecessor. *See* Harrington v. Holler, 111 U.S. 796, 796–97 (1884). The prior statute is mentioned as relevant throughout the following analysis.

122 At least, none of the multiple legal dictionaries I looked at.

123 JACOB, *supra* note 20 (not defining either "decision" or "final decision"); 2 *id.* at 207–08 (T.E. Tomlins ed., Philadelphia, P. Byrne, New York, I. Riley 1811) (same); 1 STEWART RAPALJE & ROBERT L. LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW 356, 516–17 (The Lawbook Exch., Ltd. 1997) (1888) (not defining "final decision" but

dictionaries should not be relied on when there are competing definitions.[124] And some pre-1891 dictionaries distinguished "decisions" from judgments,[125] while others suggested that "decision" was synonymous with "final judgment."[126] In short, pre-1891 dictionaries do not conclusively answer the question of what "final decision" meant.[127]

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defining "decision" as "a judgment of a court, *i.e.* the determination arrived at, not the paper commonly called the 'judgment' docketed with the clerk, but the result reached by the court after argument or submission of the case"); *id.* at 516 (defining "final decree" as "[a] conclusive decision of the court, as distinguished from an interlocutory decision"); *id.* at 694 (defining "final judgment" as "one which puts an end to the action by declaring that the plaintiff has or has not entitled himself to the remedy he sued for, so that nothing remains to be done but to execute the judgment"); WILLIAM C. ANDERSON, A DICTIONARY OF LAW 318, 460 (Chicago, T.H. Flood & Co. 1889) (not defining "final decision" but defining "decision" as the "result of the deliberations of one or more persons, official or unofficial . . . . Somewhat more abstract or more extensive than 'judgment' or 'decree'"); *id.* at 322 (defining "final decree" as one that "finally decides and disposes of the merits of the whole cause, and reserves no further question or direction for the future judgment of the court"); *id.* at 577 (defining "final judgment" as one that "at once puts an end to the action by declaring that the plaintiff has or has not entitled himself to the remedy for which he sues").

124 Stephen C. Mouritsen, Note, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. REV. 1915, 1925–45 (noting problems with crediting dictionaries when there are competing definitions).

125 RAPALJE & LAWRENCE, *supra* note 123, at 356 (defining "decision" as "the determination arrived at, not the paper commonly called the 'judgment' docketed with the clerk"); ANDERSON, *supra* note 123, at 318 (defining "decision" as "the result of the deliberation of one or more persons, official or unofficial[, s]omewhat more abstract or more extensive than 'judgment' or 'decree'").

126 Noah Webster, *Decision*, AM. DICTIONARY OF THE ENG. LANGUAGE, https://webstersdictionary1828.com/Dictionary/decision [https://perma.cc/4F6Y-F6DF] (defining "decision" as, *inter alia*, a "final judgment or opinion, in a case which has been under deliberation or discussion" and the "[r]eport of the opinions and determinations of any tribunal"). This is the online version of NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

127 Modern dictionaries do not solve the riddle. Modern dictionaries are less relevant—language changes over time—and they may beg the question—part of the question here is whether the Court was correct to interpret "final decisions" as codifying the final-judgment rule, and that question cannot be answered by sources that rely on the Court's interpretation of that phrase, as modern legal dictionaries may. Moreover, modern definitions conflict. Many general-use dictionaries suggest that any determination that will not be altered is a "final decision," an interpretation much broader than final judgments. *Decision*, MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/decision [https://perma.cc/KK5K-RK6W] ("a determination"; "an authoritative determination . . . made after consideration of facts or law"); *Final*, MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/final [https://perma.cc/NP6P-25F9] ("not to be altered" or "last in a series"). Some dictionaries (primarily legal) equate "final decisions" with "final judgments." *Final Decision*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Final Decision*, BALDWIN'S CENTURY EDITION OF BOUVIER'S LAW DICTIONARY 414 (William Edward Baldwin ed., 1926) (citing *In re* Tiffany, 252 U.S. 32, 36

Other traditional tools, like semantic canons, substantive canons, and legislative history, are similarly unhelpful.[128]

Looking beyond these tools, some have gestured at three other interpretive moves. First, "final decisions" may be a legal term of art.[129] Second, history: the Court has stated (without much analysis) that the final-judgment rule has always defined appellate jurisdiction in our system, so perhaps "final decisions" should be read consistently.[130] Third, interstatutory analysis: Justice Thomas has pointed to other provisions in Title 28, arguing that the Court should use rulemaking, not an interpretation of "final decisions," to create exceptions to the final-judgment rule.[131]

(1920), for the proposition that "final decisions" in the judiciary act means the same thing as "final judgments"); *Decision*, 1 JOHN BOUVIER, BOUVIER'S LAW DICTIONARY 793 (Francis Rawle ed., 8th ed. 1914) ("judgment given by a competent tribunal"); *see also Final*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Final*, MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/final [https://perma.cc/GR3H-C357] (legal definition) (defining "final" as "ending a court action or proceeding"). But other legal dictionaries distinguish the two. *E.g.*, *Final Decision*, SHIRLEY RAISSI BYSIEWICZ, MONARCH'S DICTIONARY OF LEGAL TERMS 77 (1983) ("As far as the court is concerned, the matter is ended . . . . The term may denote that the decision, order, judgment, or action is finally ended."); *Final Decision*, 1 JOHN BOUVIER, BOUVIER'S LAW DICTIONARY 1221 (Francis Rawle ed., 8th ed. 1914) (citing Moore v. Mayfield, 47 Ill. 167 (1868)) (an order "from which no appeal or writ of error can be taken"); *Decision*, *id.* at 794 (a decision has "broader significance than judgment"). Less relevant and equally inconclusive, modern dictionaries do not solve the interpretive problem here.

128 No semantic canon helps identify the meaning of "final decisions." Substantive canons are generally problematic, see Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010), and no well-known canon applies here. Legislative history does suggest Congress intended "final decision" to be broader than "final judgments and decrees," but legislative history is always dubious, and the fact that "final decision" is broader does not answer the critical question, which is how much broader "final decision" is.

129 *See generally* Catlin v. United States, 324 U.S. 229, 233 (1945) (citing St. Louis, Iron Mountain & S. R.R. v. S. Express Co., 108 U.S. 24, 28 (1883)), *superseded by statute*, Pub. L. No. 100-669, 102 Stat. 3969; *see also* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 116 (2009) (Thomas, J., concurring in part and concurring in judgment) (suggesting *Catlin*'s definition "reflected . . . the statute's text"); *see also* Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1716 (2017) (Thomas, J., joined by Roberts, C.J., and Alito, J., concurring in judgment) (same).

130 Coopers & Lybrand v. Livesay, 437 U.S. 463, 467–68 (1978) (describing the collateral order doctrine as an exception to historical practice); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373–75 (1981) (same).

131 Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 48 (1995) ("Congress' designation of the rulemaking process as the way to define or refine when . . . an interlocutory order is appealable warrants the Judiciary's full respect."); *Microsoft*, 137 S. Ct. at 1714–15 (arguing the judiciary should rely exclusively on rulemaking authority under § 2092(e) to expand appellate jurisdiction); *Mohawk Industries, Inc.*, 558 U.S. at 115 (Thomas, J., concurring in part and concurring in judgment) (same).

I flesh these interpretive moves out below, taking each in turn. As I do so, I provide both a negative argument and a positive argument for each move—a negative argument that the interpretive move does *not* support the final-judgment rule and a positive argument about what the move tells us about the meaning of "final decisions."

Leveraging corpus linguistics evidence, the first subpart shows that "final decisions" was not a well-established legal term of art. Analyzing the history of appellate jurisdiction in the United States, the second subpart shows that Congress likely used the term "final decisions" to codify an expansion in appellate jurisdiction from the final-judgment rule. The third subpart shows that the interstatutory analysis gestured at by Justice Thomas begs the question. In sum, each interpretive move, fairly analyzed, undermines the final-judgment interpretation. Instead of codifying the final-judgment rule, § 1291 expands it, allowing jurisdiction over final judgments, other orders that finally resolve the merits, and orders that decide an issue that will not be revisited and that are not intermediary to a decision on the merits.

B. Legal Term of Art

Though no one has drawn out the argument, one might argue that "final decisions" is a legal term of art codifying the final-judgment rule.[132] When "Congress borrows terms of art in which are accumulated . . . legal tradition and meaning . . ., it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . ."[133] Thus, though the practice is not without its faults,[134] when a statute uses such a term without defining it, "the general practice is to give that term its [well-established legal]

132 *See* Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1716 (2017) (Thomas, J., concurring in judgment) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)).

133 Morissette v. United States, 342 U.S. 246, 263 (1952); *see* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

134 *See* Adam Reed Moore, Rethinking the Common Law Presumption (work in progress) (on file with author). It remains unclear whether the common law presumption operates within the ordinary meaning inquiry or as an exception to it. *Compare* SCALIA & GARNER, *supra* note 109, at 73 (describing the presumption as an "exception" to the ordinary meaning inquiry), *and* Moskal v. United States, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting) (criticizing the majority for using ordinary meaning as the relevant criterion "rather than the specialized legal meaning"), *with id.* at 114, 116–17 (suggesting the common law presumption was simply another tool in the ordinary interpretive inquiry). It also remains unclear why legal meanings are treated any differently from nonlegal specialized meanings. *See* Nix v. Williams, 467 U.S. 431 (1984) (applying the opposite presumption when dealing with a nonlegal specialized meaning).

meaning."[135] If "final decisions" was a legal term of art codifying the final-judgment rule, perhaps the Court should credit that meaning, regardless of the ordinary public meaning.

To successfully make that argument, one would have to argue that (a) "final decision" had a well-established[136] legal meaning in 1891 and (b) that meaning was the final-judgment rule.[137] However, the available evidence suggests "final decisions" was *not* a well-established term of art or, at least, not one synonymous with "final judgment." Instead, the phrase meant something broader.

1. "Final Decisions" Was Not a Well-Established Term of Art

Dictionaries and corpus linguistics can help identify whether a term is a well-established term of art.[138] Both show that "final decisions" was not.

First, as mentioned above, no legal dictionary before 1891 defined "final decision,"[139] though they did define related terms such as

135 United States v. Turley, 352 U.S. 407, 411 (1957); *see* McCool v. Smith, 66 U.S. (1 Black) 459, 469 (1862) (Swayne, J.) (noting it "must be supposed" that an undefined term is used in the common law sense when the word has a well-established common law meaning); SCALIA & GARNER, *supra* note 109, at 73 (providing an overview of the common law presumption).

136 Only a well-established legal meaning will overcome a contrary general-public meaning. *See Moskal*, 498 U.S. at 127–28 (refusing to apply the common law presumption because the common law meaning was not well established, which the majority took to mean unanimity while the dissent took to mean something slightly broader).

137 This question of timing is of course unsettled. Lee & Mouritsen, *supra* note 120, at 824–28 (discussing problem of timing). The year 1891 is the relevant time frame here. 28 U.S.C. § 1291 became law in 1948, but Congress exchanged "final judgments and decrees" for "final decision[s]" in 1891 with the Evarts Act, and that change carried through to the 1948 law. To determine whether "final decisions" was a legal term of art when it began to define appellate jurisdiction, then, 1891 is the relevant cutoff. In fact, relying on sources after 1891 to define "final decision" would be circular. The question of interest is whether the Court has been correct in assuming that "final decisions" means final judgments and final judgments only, and relying on Court opinions defining "final decision" after 1891 (or sources, such as legal dictionaries, based on opinions) would be to use the answer to prove itself.

There were some statutes before 1891 that used the phrase "final decision" to define appellate jurisdiction, *see* Harrington v. Holler, 111 U.S. 796, 796–97 (1884), but these statutes were passed close to 1891 and in less-used statutes, making it unlikely the meaning of "final decision" materially shifted between when those statutes were passed and 1891.

138 Whereas dictionaries are not helpful in identifying the ordinary meaning of "final decisions" because they do not define that term, the fact that dictionaries do not define that term is itself helpful in determining whether "final decisions" was a well-established legal term of art.

139 *Supra* notes 122–27 and accompanying text.

"final judgment" or "final decree."[140] This alone is noteworthy. Dictionaries reflect "extensive" meaning, indicating the range of a term's possible meanings.[141] Thus, the fact that no legal dictionary defined "final decisions" suggests it may not have had an established legal meaning—especially because synonyms were defined.

Moreover, some pre-1891 legal dictionaries defined "decision" and distinguished the term from judgments.[142] Accordingly, "final decisions" was likely not a legal term of art signifying the final-judgment rule.

Second, corpus linguistics, which can be used to identify whether a phrase is a term of art,[143] confirms this conclusion. Both nonspecialized and legal corpora are helpful.

The Corpus of Historical American English (COHA) is a giant, nonspecialized corpus of historical American publications.[144] A nonspecialized corpus is helpful on this theory: when nonspecialized speakers use a term with an established legal meaning in a legal context, we expect them to use the legal meaning. For example, if a nonspecialized newspaper uses "actual malice" in the sentence, "The Court held that Rihanna had to show actual malice to recover for defamation," a reader would understand that the newspaper likely uses "actual malice" technically.[145] Thus, if nonspecialized sources

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140 *Supra* note 123 and accompanying text.

141 *See* Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 766 (2020) (noting dictionaries reflect "extensive" meaning).

142 RAPALJE & LAWRENCE, *supra* note 123, at 356 (defining "decision" as "the determination arrived at, not the paper commonly called the 'judgment' docketed with the clerk"); ANDERSON, *supra* note 123, at 318 (defining "decision" as "[t]he result of the deliberations of one or more persons, official or unofficial[, s]omewhat more abstract or more extensive than 'judgment' or 'decree.'").

143 Thomas R. Lee, Jesse Egbert & Zachary Lutz, A Linguistic Approach to Linguistic Canons (drft.), *in* Advanced Interpretation: Law and Language 267, 290–91 (Thomas R. Lee & Stephen C. Mouritsen eds., 2021) (unpublished manuscript) (on file with author) (using corpus linguistics to test whether a phrase is a term of art). For an overview of corpus linguistics, see Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275 (2021). For critiques, see Tobia, *supra* note 141, at 746–805, and Kevin Tobia, *The Corpus and the Courts*, U. CHI. L. REV. ONLINE, Mar. 5, 2021, at *1.

144 For information on the Corpus of Historical American English, see *Corpus of Historical American English*, COHA, https://www.english-corpora.org/coha/ [https://perma.cc/6T3E-3V4V].

145 The strength of this empirical premise depends on how well established the legal meaning is and how different the term's legal meaning is from the nonspecialized meanings. "Actual malice" has a well-established legal meaning that is markedly different from the general-public meaning of that phrase. "Negligence" and "judgment" also have well-established legal meanings, but those meanings are not much different from the terms' general-public meanings. It is perhaps more likely that a nonspecialized source intends the legal meaning of "actual malice" in a legal context than the legal meaning of "negligence" or "judgment" in a legal context.

use "final decision" in a legal context to mean something other than final judgment, that is evidence that "final decision" was not a well-established legal term of art. Of course, it is not conclusive evidence—the evidence is only as strong as the theory. If it turns out that people *don't* suspect that "actual malice" is a technical term when used in a legal context, then nonspecialized uses of "actual malice" in a legal context might not be all that probative.

A COHA search for "final decision" yields 100 sources that used the phrase before 1891.[146] Of those sources, eleven used the phrase to refer to the final judgment of a case; eighty-five referred to something else, and four were unclear (and therefore set aside).[147] No source indicated that "final decision" only meant final judgment; the ten referring to final judgment merely indicated only that "final decision" *could* mean final judgment. This is relevant because, to show that "final decision" is a legal term of art codifying the final-judgment rule, one would have to show that "final decision" carries a specialized meaning that *only* refers to final judgments. This is shown in the first row of Table 1.

TABLE 1: USES OF "FINAL DECISION" IN NONSPECIALIZED CORPUS

Context	Refer to final judgment exclusively	Refer to final judgment	Refer to something else	Total
Any	0 (0%)	11 (11.5%)	85 (88.5%)	96
Legal	0 (0%)	11 (24.4%)	34 (75.6%)	45
Court "decision"	0 (0%)	11 (50%)	11 (50%)	22

As also seen in Table 1, forty-five sources used "final decision" in a legal context, but three-fourths referred to something other than final judgment.[148] Twenty-two sources used "final decision" to refer

146 This search can be replicated by typing "final decision" into the COHA "List" search bar. The results are tabulated by decade. Note that while the 1840 tab suggests there are 14 sources from that decade, there are in fact only 13 (the tabulation skips number 9), for a total of 100 sources between 1823 and 1890.

147 Most the sources used "final decision" in nonlegal contexts. Many referred to the people's elective decisions, marriage decisions, decisions to take or reject employment opportunities, and other personal decisions that were not to be revisited.

148 The four sources without a clear meaning used "final decisions" in a legal context. Ten sources referred to a final judgment, and thirty-five (seventy-eight percent) referred to something else. For example, many referred to a legislative body's "final decision" on some matter of policy.

to a decision of a court, and only half of those referred to a final judgment.[149]

This evidence cuts against the final-judgment interpretation. If "final decision" were a well-established legal term of art, sources would likely use it to convey the legal meaning when speaking the language of law, especially when referring to judicial decisions. But frequently they didn't. Thus, either "final decisions" meant something broader than final judgments, or it was not a term of art, at least not one established enough that users of legal English cared to use before 1891.

Legal corpora, such as Westlaw, can also be helpful to identify whether a term is a term of art.[150] If legal writers use "final decisions" to refer to something other than final judgments, it is difficult to say that "final decisions" is a legal term of art that means final judgments only.

Westlaw contains naturally occurring legal language written primarily by appellate judges—precisely the context in which one would expect "final decision" to refer to a final judgment, whether the phrase was a legal term of art or not. As such, we would expect most pre-1891 judicial opinions to use the phrase to refer to a final judgment—and it would be surprising if "final decision" even sporadically referred to decisions other than final judgments. In other words, quantitative data is less helpful with the legal corpora. So, I focus on providing examples.

Several courts used "final decision" to refer to something other than a final judgment. Several used the phrase to mean a decision from which there could be no appeal. Thus, several opinions referred to the determination of a legal question by a court of last resort as a "final decision"—not because the court's opinion was a judgment, but rather because there could be no appeal from the court's decision.[151] Other opinions used the phrase to refer to decisions by legislative bodies and other nonjudicial officers.[152] Again,

149 The remaining sources referred to the Supreme Court being the final decision-maker of important federal questions or a jury's factual findings.

150 Lee, Egbert & Lutz, *supra* note 143, at 292–97 (using Westlaw as part of a corpus analysis).

151 *E.g.*, Lancaster v. Dolan, 1 Rawle 231, 238 (Pa. 1829) (noting other states' "final decision" of an issue undecided in Pennsylvania); Coxe v. United States, 1860 WL 4906, at *2 (Ct. Cl. Mar. 5, 1860) (describing counsel's efforts in preparing the case in the lower court "with a view to its being taken to the Supreme Court for final decision").

152 *E.g.*, Joslyn v. Cnty. Comm'rs, 81 Mass. (15 Gray) 567, 568 (1860) (noting "the final decision of a majority of the board is a valid decision"); Cincinnati & Spring Grove Ave. St. Ry. Co. v. Village of Cumminsville, 14 Ohio St. 523, 547 (1863) (noting private land owners can reasonably assume that when public officials take land and mark the improvements required, that is a "final decision of the wants of the public"); Yick Wo v.

the theory was that the decision wouldn't be revisited—not that the decision was a final judgment.

Some courts defined "final decisions" in a way that was a different and broader category than final judgments.[153] For example, multiple decisions from the Supreme Court of Oregon defined "final decisions" to include orders affecting substantial rights that in effect determined the outcome of the action—even if those decisions preceded final judgment.[154]

These examples are of course one-sided. Indeed, at least one opinion defined "final decisions" to mean final judgments and final judgments only.[155] But the examples are still helpful. Again, appellate judicial opinions are precisely the context in which "final decisions," if it were a term of art, would be used technically. The fact that *any* appellate judge used "final decisions" to refer to something other than a final judgment (especially when discussing a judicial decision) is evidence that "final decisions" was not a well-established legal term of art.

This corpus evidence has a limitation: there are two ways of interpreting it. On the one hand, the results could indicate that "final decisions" did not have a specialized legal meaning equivalent to final judgments. On the other hand, the results could indicate that "final decisions" merely has other, nonspecialized meanings in addition to the specialized meaning.[156] This is known as the "blue

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Hopkins, 118 U.S. 356, 370 (1886) (noting in any society the power of "final decision," meaning the power to be the last word on an issue, must be lodged in some body); People *ex rel.* Bd. of Park Comm'rs v. Common Council of Detroit, 28 Mich. 228, 242 (1873) (noting an act gave citizens the power to make the "final decision" as to whether a park should be purchased).

153 *E.g.*, Mitchell v. Powers, 21 P. 451, 451 (Or. 1889) (noting first an order was not a "final decision" within the meaning of the Constitution and, second, that it was not a final "judgment or decree" within the meaning of a statute for a different reason); *In re* Woman's N. Pac. Presbyterian Bd. of Missions, 22 P. 1105, 1109 (Or. 1890) (citing Pittman v. Pittman, 3 Or. 472, 473 (1869) and suggesting "final decisions" include orders affecting substantial rights that in effect determine the action); Craighead v. Wilson, 59 U.S. (18 How.) 199, 201 (1856) (defining a final decision as one that has a "similar" effect to that of execution on judgment). *See also* Richard L. Heppner Jr., *Conceptualizing Appealability: Resisting the Supreme Court's Categorical Imperative*, 55 TULSA L. REV. 395, 434–37 (2020) (collecting cases).

154 *See In re* Woman's N. Pac. Presbyterian Bd., 22 P. at 1109 (citing *Pittman*, 3 Or. at 473).

155 Harris Mfg. Co. v. Walsh, 3 N.W. 307, 311 (Dakota 1879) (rejecting appeal as premature). *But see* Greeley v. Winsor, 48 N.W. 214, 217–18 (S.D. 1891) (noting *Harris* had not been followed) (discussing examples of statutory authorizations of pre-final-judgment appeals).

156 Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. REV. 1311, 1351 (noting competing inferences that can be made from nonappearance of meaning in corpus).

pitta" problem; the fact that the blue pitta does not appear in a corpus search for "bird" does not prove that the blue pitta is not a bird.[157]

The blue pitta problem can be mitigated through double dissociation.[158] "Final decision" can be double-dissociated by identifying whether the circumstances described by the specialized meaning of "final decision" are present when the term is not.[159] That is, we can look to see whether sources frequently use terms *other* than "final decision" to describe a lower court decision that is final enough to be appealed from. If so, then the absence of evidence for the specialized meaning of "final decision" likely reflects "linguistic regularity."[160]

To double-dissociate "final decisions" from the final-judgment rule, I searched for sources using the word "appeal" close to "judgment" or "decree" in pre-1891 Westlaw opinions. Such a search revealed five sources discussing appeals from "final judgments" or "final decrees." Two of these explicitly noted that appellate jurisdiction was proper only from "final judgments."[161] That is, when discussing appealable orders, sources used "final judgment" or "final decree," rather than "final decisions." This evidence tends to double-dissociate "final decisions," but the evidence is weak because there are so few sources.

The corpus results discussed here are not conclusive. But taken together with the fact that no pre-1891 legal dictionary defined "final decision," these results suggest "final decision" was not an established term of art exclusively signifying final judgment before 1891.

2. Nonspecialized Meaning of "Final Decisions"

The same corpus results discussed can be used to define "final decisions." The evidence shows that ordinary users of English used

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157 Tammy Gales & Lawrence M. Solan, *Revisiting a Classic Problem in Statutory Interpretation: Is a Minister a Laborer?*, 36 GA. STATE U. L. REV. 491, 500–01 (2020) (noting the "blue pitta" problem).

158 *See* Lee, Egbert & Lutz, *supra* note 143, at 293; Solan & Gales, *supra* note 156, at 1353. Justice Lee and Professors Egbert and Lutz propose testing a term's formulaicity as well, Lee, Egbert & Lutz, *supra* note 143, at 294, but they do so in the context of lists and binomials, and it is not clear how to extend their tests to monomials.

159 Solan & Gales, *supra* note 156, at 1353.

160 *Id.*

161 One source noted that an appeal could not be had from a certain judgment that was not considered final. BENJAMIN LYNDE OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 122–23 (1832) (using "judgment" or "decree" to identify the appealable order and "decision" more broadly to the outcome). In contrast, a collocate search for "appeal" close to "decision" resulted almost exclusively in results discussing appeals from the decisions of the court of public opinion, decisions of religious courts, and personal decisions.

the phrase "final decision" in both legal and nonlegal contexts to refer to a resolution of an issue that would not be revisited.[162] Decisions that would be reviewed, or decisions that were intermediate to a subsequent decision, were not described as "final."[163]

Virtually all the 100 COHA results used "final decision" in this way. As mentioned above, several results described decisions as "final" in terms of the issue resolved rather than the relative temporal location of the court's decisions.[164] That is, a decision was deemed "final" not because it was an entity's last decision (in a temporal sense) but because the issue would not be revisited or because the decision was not intermediary to another.[165] Thus, when referring to the "final decision" of a court, sources frequently meant the nonrevisable and nonappealable resolution of a particular issue, usually by a court of last resort.[166] This suggests that the "final decisions of the district courts" include all orders resolving issues that the district court will not revisit and that are not merely intermediary to a

162 *E.g.*, MARY ASHLEY TOWNSEND, THE BROTHER CLERKS: A TALE OF NEW ORLEANS 324 (1857) (calling the "final decision" a parent's decision rejecting a request for marriage); *Doctrine of the Higher Law*, 42 THE NEW ENGLANDER 161, 166 (1853) (noting the "final decision" of morality of actions, regardless of legal support, is individual); Lancaster v. Dolan, 1 Rawle 231, 238 (Pa. 1829) (noting other states' "final decision" of an issue undecided in Pennsylvania); Coxe v. United States, 1860 WL 4906, at *2 (Ct. Cl. Mar. 5, 1860) (describing counsel's efforts in preparing the case in the lower court "with a view to its being taken to the Supreme Court for final decision").

163 *E.g.*, Mitchell v. Powers, 21 P. 451, 451 (Or. 1889) ("I do not think . . . the other orders . . . can be regarded as final decisions . . . [because] they all relate to intermediate matters in the proceeding.").

164 *See, e.g.*, 24 N. AM. REV. 345, 359 (1827) (reviewing JAMES KENT, COMMENTARIES ON AMERICAN LAW (New York, O. Halsted 1826)) (referring to "the final decision" of a legal question "by the Supreme Court of the United States"); *Massachusetts Rail Road*, 28 N. AM. REV. 522, 523 (1829) (noting factors relevant to "deferring a final decision upon the question presented to the legislature" and "appealing to the sense of the public").

165 *The New Constitution: Article VI—The Judiciary*, 4 AM. REV. 520, 520 (1846) (referencing the "final decision" of the people of New York on whether to adopt the constitution); *Constitutional Law*, 46 N. AM. REV. 126, 144 (1838) (reviewing RICHARD PETERS, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES (Philadelphia, Desilver, Thomas, & Co. 1837)) (calling the Supreme Court's resolution of a case a "final decision"); *Classical Studies at Cambridge*, 54 N. AM. REV. 35, 35 (1842) (noting the "final decision" of a college board).

166 *E.g.*, BAPTIST WRIOTHESLEY NOEL, ESSAY ON THE UNION OF CHURCH AND STATE 38 (London, James Nisbet & Co. 1848) (describing courts that made the "final decision" on religious controversies); *A Specimen Case*, N.Y. TIMES, Jan. 7, 1890, at 4 (discussing separately the trial court's "judgment" from the "final decision" of an issue by the Supreme Court on appeal); OLIVER, *supra* note 161, at 194 (noting people need not rely on force to oppose unconstitutional laws because the Constitution provides "a regular and unexceptionable tribunal for the final decision of all such questions"); *see also Mrs. Hall at Last Tells Her Secret*, N.Y. TIMES, Apr. 11, 1901, at 1 (using "final decision" to describe the resolution of an issue reached after expensive litigation, including an appeal).

subsequent decision. As discussed below, the historical record also supports this interpretation of "final decisions."

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Leveraging evidence from pre-1891 legal dictionaries and corpus linguistics, "final decisions" was not a well-established legal term of art in 1891, at least not one that meant final judgments and final judgments only. Instead, "final decisions" seemed to encompass decisions that would not be revisited and were not merely intermediary.

C. History

The second interpretive move is an appeal to history. The Court has grounded the final-judgment rule in history, arguing the rule has defined appellate jurisdiction from the "very foundation" of the United States.[167] This section discusses the history that the Court has focused on. It then fills in the Court's incomplete story. It may be true that the final-judgment rule has been around for a long time,[168] but this rule has been honored "more . . . in the breach than in the observance."[169] History instead suggests that "final decisions" include final judgments, prejudgment orders concluding the merits, and orders deciding issues that will not be revisited and are not intermediary to another decision.

1. The Story That is Told

The history that is often recounted is simple and dates the final-judgment rule back to English common law.[170] At common law, a writ of error could not lie until the completed record was sent to the appellate court. And the completed record could not be sent until after final judgment, which ended the lower court's treatment of the action.[171] Because the record could exist in only one court at a time,

167 *See* Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1712 (2017) (quoting McLish v. Roff, 141 U.S. 661, 665–66 (1891) ("From the very foundation of our judicial system, the object and policy of . . . appeals and writs of error . . . have been . . . to have the whole case and every matter in controversy in it decided in a single appeal.")).

168 *See, e.g.*, *McLish*, 141 U.S. at 665–66.

169 Steinman, *supra* note 3, at 1238–39 (collecting criticisms to suggest appellate jurisdiction jurisprudence is "an unacceptable morass" and "a near-chaotic state of affairs" rather than being a bright-line final-judgment rule).

170 Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 541–44 (1932).

171 *Id.*

no appeal was possible until after final judgment.[172] Thus began the final-judgment rule.

On this side of the Atlantic, the Judiciary Act of 1789 adopted the final-judgment rule from the common law and applied it to equity as well; Congress allowed appeals from "final judgments or decrees."[173] The Court interpreted this grant of jurisdiction to be "only declaratory of [the] well settled and ancient [final-judgment] rule."[174] The Court repeated that statement many times before 1891.[175]

In 1891, Congress established the circuit courts and gave them appellate jurisdiction.[176] Congress changed the operative statutory language from "final judgments or decrees" to "final decision[s]."[177] Soon thereafter, the Court held that the change to "final decisions" was not substantive.[178] Building on that decision and on the basis of

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172 *Id.* at 541–42 ("[I]t is impossible that on one and the same original writ there should be two records in different [c]ourts." *Id.* at 542 (quoting John de Ralegh's Case, YB 17 Edw. 3, Pasch, pl. 4 (1343) (Eng.)).). Though multiple transcripts were kept, the transcript "was not the record but only evidence of it, and it could be in only one court at a time." *Id.* at 543–44 (citing Coot v. Linch (1699) 91 Eng. Rep. 1184; 1 Ld. Raym. 427 (Holt, C.J.)). Additionally, proceedings on a writ of error were viewed as a separate action—"not merely a continuation of the suit." *Id.* at 543.

173 *Id.* at 549 (citing Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84). See *supra* note 20 for a discussion of the technical meaning of "decree."

174 McLish v. Roff, 141 U.S. 661, 665 (1891). When discussing appeals from the circuit and district courts to the Supreme Court, the Evarts Act omitted the word "final." The issue in *McLish* was whether that omission indicated appeals could be taken to the Supreme Court before final judgment; the Court said no, pointing to the history and policies of the final-judgment rule. *Id.* at 665–68.

175 Houston v. Moore, 16 U.S. (3 Wheat.) 433 (1818) (dismissing appeal because it preceded final judgment); Bank of Columbia v. Sweeny, 26 U.S. (1 Pet.) 567 (1828) (same).

176 Evarts Act, ch. 517, § 2, 26 Stat. 826, 826 (1891).

177 *Id.* § 6, 26 Stat. at 828.

178 *In re* Tiffany, 252 U.S. 32, 36 (1920) ("The words: 'final decisions in the district courts' mean the same thing as 'final judgments and decrees . . . .'"); *see also* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 729 (1993) (surveying the history); FRANK O. LOVELAND, THE APPELLATE JURISDICTION OF THE FEDERAL COURTS § 39 (1911) (citing Cassatt v. Mitchell Coal & Coke Co., 150 F. 32, 34 (3d Cir. 1907) (defining "final decision" as "equivalent to 'final decree' or 'final judgment' used in the statutes preceding the enactment of the judiciary act of 1891")); Brush Elec. Co. v. Elec. Improvement Co., 51 F. 557, 560 (9th Cir. 1892) ("It is conceded that the term 'final decision' in this act means the same thing as final decree or judgment. It must be apparent that that term embraces the others."). In fact, before 1891, Congress had provided for appeals from the supreme court of a territory to the Court; one section provided jurisdiction over "final judgments and decrees" while another section fixed the procedure for such an appeal and referred to "final decisions." Harrington v. Holler, 111 U.S. 796, 797 (1884). The Court held "final decisions" meant the same thing, for otherwise, the procedural provision would have expanded the meaning of the substantive provision. *Id.*

this history, the Court has repeatedly stated that "final decisions" means final judgments.[179]

2. The Rest of the Story

If the history described above were complete, the inference that "final decisions" codifies the final-judgment rule would be unobjectionable. But there is more to the story. From very early on, the Court has exercised appellate jurisdiction over orders preceding final judgment.

Even before 1891, when appellate courts had jurisdiction over "final judgments and decrees," the Court repeatedly heard appeals from orders preceding final judgment.[180] Though "final judgment" and "final decree" were clearly terms of art at common law, the cases interpreting the phrases were so disharmonious that by the 1890s, the Court said, "[p]robably no question of equity practice has been the subject of more frequent discussion in this [C]ourt than the finality of decrees."[181]

For example, in one case, the Court interpreted "final . . . decrees" to include an order preceding the final decree: "This decree is not final, in the strict technical sense . . . , for something yet remains for the Court below to do. But . . . 'this Court has not . . . understood the words "final decrees," in this strict and technical sense . . . .'"[182] In another case, *Forgay v. Conrad*,[183] the Court held that an order to deliver property could be appealed before final judgment.[184] Though

179 Coopers & Lybrand v. Livesay, 437 U.S. 463, 467–68 (1978) (describing the collateral order doctrine as an exception to the final-judgment rule in § 1291); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373–74 (1981) (same); Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1712 (2017) (asserting § 1291 "codified" the final-judgment rule).

180 Whiting v. Bank of the United States, 38 U.S. (13 Pet.) 6 (1839) (decree of foreclosure and sale is a final decree despite later proceedings because the merits were finally settled and later proceedings were a means of executing the decree); Ray v. Law, 7 U.S. (3 Cranch) 179 (1805) (same); Bronson v. LaCrosse & Milwaukie R.R. Co., 67 U.S. (2 Black) 524, 531 (1863) ("This decree is not final, in the strict technical sense of the word, for something yet remains for the Court below to do. But . . . 'this Court has not . . . understood the words "final decrees," in this strict and technical sense . . . .'" (quoting Forgay v. Conrad, 47 U.S. (6 How.) 201, 203 (1848))); Marin v. Lalley, 84 U.S. (17 Wall.) 14 (1873) (decree that is "in substance" a decree of foreclosure is a final decree); *Forgay*, 47 U.S. (6 How.) at 201; Sage v. R.R. Co., 96 U.S. 712 (1878) (decree was final even though amounts due still needed to be calculated); First Nat'l Bank of Cleveland v. Shedd, 121 U.S. 74 (1887) (same); Carondelet Canal & Navigation Co. v. Louisiana, 233 U.S. 362 (1914); Radio Station Wow, Inc. v. Johnson, 326 U.S. 120 (1945).

181 McGourkey v. Toledo & Ohio Cent. Ry., 146 U.S. 536, 544–45 (1892).

182 *Bronson*, 67 U.S. (2 Black) at 524 (quoting *Forgay*, 47 U.S. (6 How.) at 203).

183 47 U.S. (6 How.) 201.

184 *Id.* at 204. The Court immediately went back and forth approving and disapproving *Forgay*. *McGourkey*, 146 U.S. at 547–49 (collecting cases).

a judicial accounting still had to take place, the Court reasoned the order was "final" because "the whole of the matters brought into controversy by the bill are finally disposed of as to all of the defendants."[185] In other cases, the Court held that if an order finally concluded a lower court's determination of an issue "incidental" or "collateral" to the merits of the plaintiff's claim, it could "be regarded as . . . substantially a final decree for the purposes of an appeal."[186] So too, an order denying a motion to intervene was immediately appealable because it "dispose[d] of [the intervenor's] rights, and [wa]s a final judgment as to that issue, as to which [the intervenor] ha[d] a right to [appeal]."[187]

State courts followed suit when interpreting "final judgments" in their own statutes.[188] Thus, even when appellate jurisdiction was limited to "final judgments and decrees," the Court created a "number of apparent exceptions . . . [to] the strict rule of finality."[189]

It was against this backdrop that Congress changed the operative language to "final decision[s]."[190] Given the judiciary's "practical" construction of "final judgments and decrees" before 1891, the change to "final decisions" suggests approval of those exceptions.[191] Indeed, early courts drew precisely that conclusion. For example, in 1892, the Ninth Circuit noted that "'final decision' . . . means the

185 *Forgay*, 47 U.S. (6 How.) at 204; *see also* Gulf Refining Co. v. United States, 269 U.S. 125, 128 (1925); *Radio Station*, 326 U.S. at 125 n.2.

186 Trustees v. Greenough, 105 U.S. 527, 531 (1882); Williams v. Morgan, 111 U.S. 684, 699 (1884).

187 Gumbel v. Pitkin, 113 U.S. 545, 548 (1885).

188 *E.g.*, Mitchell v. Powers, 19 P. 647, 650 (Or. 1888) (noting an order preceding final judgment should be "deemed a final judgment" because it "operated as a final disposition of [the] claims, and a perpetual bar to their recovery"); Mitchell v. Powers, 21 P. 451, 451 (Or. 1889) (suggesting a "final judgment" was "an order affecting a substantial right" that "determines the action or suit so as to prevent a judgment or decree"); Pittman v. Pittman, 3 Or. 472, 473 (1869) (same).

189 Note, *Finality of Decree for Purposes of Review in the Court*, 48 HARV. L. REV. 302, 308 (1934); *see also* Thomson v. Dean, 74 U.S. (7 Wall.) 342, 345 (1869) (finding final decree because it determined the principal matter in controversy); Terry v. Sharon, 131 U.S. 40, 46 (1889) (finding an order final because it was "so essentially decisive and important"); Cent. Tr. Co. v. Grant Locomotive Works, 135 U.S. 207, 224 (1890) (finding an order final because it was distinct from the merits and affected a party); Dexter Horton Nat'l Bank of Seattle v. Hawkins, 190 F. 924, 927 (9th Cir. 1911) (quoting Hovey v. McDonald, 109 U.S. 150, 156 (1883) (suggesting that an order is final if, had it gone the other way, it would have been a final judgment, and if the other party "would have had a right to appeal, surely the opposite parties have the same right")).

190 Evarts Act, ch. 517, § 6, 26 Stat. 826, 828 (1891).

191 *See* Brush Elec. Co. v. Elec. Improvement Co. of San Jose, 51 F. 557, 558 (9th Cir. 1892) ("The statute does not say that an appeal lies from *the* final decision, but from *any* final decision, thus contemplating what is well known in equity, viz., that there may be more than one final decision in a cause." (emphasis added)).

same thing as final decree or judgment" and that "that term embraces the others."[192] What did it mean by that? It concluded that "'final decision' . . . [included any] final determination of a collateral matter distinct from the general subject of litigation, affecting only the parties to the particular controversy, and finally settles that controversy."[193] In other words, "final decisions" included all the pre-final-judgment orders that the Court had been approving for interlocutory review. The Third Circuit echoed this reasoning. Citing the Court's practical construction of "final judgment or decree," the Third Circuit concluded that "final decision" "is equivalent to 'final decree' or 'final judgment' used in the statutes preceding the enactment of the judiciary act of 1891."[194] And applying this rule, the Third Circuit held that nonparties could immediately appeal orders compelling discovery because they concluded the court's analysis of an issue collateral to the merits.[195]

The Supreme Court's post-1891 practice is familiar, and it is more of the same. In *Cohen*, the Court noted it had "long given" "final decisions" a practical construction.[196] As has been discussed, the collateral order doctrine creates mandatory appellate jurisdiction over some orders denying motions to dismiss,[197] motions for summary judgment,[198] and even motions to compel posting of security.[199] Moreover, the collateral order doctrine is not the only means of pre-final-judgment appellate jurisdiction. The "death knell" doctrine also creates mandatory appellate jurisdiction over orders that make it "economically imprudent" to continue litigation, even if final judgment has not yet been entered.[200] These more modern doctrines were not novel innovations. Rather, from the early days of the

192 *Id.* at 560.

193 *Id.* at 561.

194 Cassatt v. Mitchell Coal & Coke Co., 150 F. 32, 34 (3d Cir. 1907).

195 *Id.* at 38. The dissent disagreed the order was final, but not because it preceded final judgment; instead, since the appellants were not named parties in the original suit, he thought the order was not final because it "subject[ed] [appellants] to no penalty," did "not aggrieve[]" them, and did not "affect[] or harm[]" them. *Id.* at 47 (Buffington, J., dissenting).

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

197 P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 147 (1993) (motion to dismiss); Abney v. United States, 431 U.S. 651, 659 (1977) (motion to dismiss an indictment).

198 Mitchell v. Forsyth, 472 U.S. 511, 527 (1985).

199 *Cohen*, 337 U.S. at 547.

200 Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 469–70 (1978); *see* Redish, *supra* note 85, at 92 (citing United States v. Wood, 295 F.2d 772, 777 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962)).

nation, the Court has honored the final-judgment rule "more . . . in the breach than in the observance."[201]

3. Implications from History

From this history, there are two possible inferences relevant here. Perhaps Congress intended "final decisions" to codify the final-judgment rule. This is the inference the Court has hinted at.[202] But this seems unlikely. It would make little sense for Congress to try to *limit* appellate jurisdiction to final judgments by replacing the phrase "final judgments or decrees"—a well-defined term of art that clearly means final judgments only (decrees are judgments in courts of equity)[203]—with a term without a defined technical meaning and that, as normally used, is broader than final judgments. (As mentioned above, no pre-1891 legal dictionary defined "final decisions," and the general definitions of "final" and "decision" are much broader than technical final judgments.)[204]

The more likely inference is that Congress intended "final decisions" to extend at least as far as the Court had extended "final judgments and decrees." Why else would Congress replace "final judgments and decrees" with broader terminology? Before 1891, the Court exercised appellate jurisdiction over final judgments, orders that were not final judgments but that finally "dispose[d] of [a party's] rights,"[205] and orders that decided issues "incidental" to the merits and would not be revisited.[206] Thus, Congress likely intended "final decisions" to also include those decisions.

It bears repeating that this is precisely how courts soon after 1891 interpreted the change. In hearing an appeal from what was essentially a denial of a motion to dismiss, the Third Circuit held that "final decision" meant the same thing as "final judgment or decree" as those phrases had been interpreted by the Court, i.e., to include a host of pre-final-judgment orders.[207] The Ninth Circuit reasoned similarly when it held a denial of a motion to dismiss was a "final

201 Steinman, *supra* note 3, at 1238, 1238–39 (collecting criticisms of appellate jurisdiction jurisprudence including "an unacceptable morass" and "a near-chaotic state of affairs").

202 Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1712 (2017).

203 *Supra* note 20.

204 *Supra* notes 122–27 and accompanying text.

205 Gumbel v. Pitkin, 113 U.S. 545, 548 (1885).

206 Trustees v. Greenough, 105 U.S. 527, 531 (1882); *see also* Williams v. Morgan, 111 U.S. 684, 699 (1884).

207 Cassatt v. Mitchell Coal & Coke Co., 150 F. 32, 34–36, 38 (3d Cir. 1907).

decision" in 1892.[208] It reasoned that "'final decision' . . . means the same thing as final decree or judgment" in the sense that "that term [final decision] embraces the others," and extended final decisions to all decisions that "final[ly] determin[e]" "collateral matter[s] distinct from the general subject of litigation . . . and finally settle[] that controversy."[209]

Taken together, history suggests that "final decisions" is at least as broad as what the Court had interpreted "final judgments or decrees" to mean. That includes final judgments, prejudgment orders finally determining the merits for a party, and orders deciding issues that were separate from the merits and that would not be revisited.

D. Interstatutory Analysis

A final interpretive move turns to other provisions of Title 28. Other provisions in Title 28—enacted after § 1291—provide courts with additional jurisdiction over some prejudgment appeals. Perhaps these additional provisions imply that Congress intended "final decisions" to codify the final-judgment rule.

Three other provisions are relevant. The first, 28 U.S.C. § 1292(a)–(d), carves out specific instances in which courts can exercise interlocutory jurisdiction, such as orders granting or denying preliminary injunctive relief.[210] The second, 28 U.S.C. § 2072, delegates rulemaking authority to the Supreme Court to "define when a ruling . . . is final for the purposes of appeal under section 1291."[211] In other words, it gives the Court rulemaking authority to define "final decisions." The third, 28 U.S.C. § 1292(e), allows the Court to use that rulemaking authority to "provide for an appeal of an interlocutory decision . . . that is not otherwise provided for . . . ."[212]

The Court has asserted that these provisions imply that § 1291 codifies the final-judgment rule.[213] The argument proceeds in two

208 Brush Elec. Co. v. Elec. Improvement Co. of San Jose, 51 F. 557, 560–61 (9th Cir. 1892).

209 *Id.*

210 28 U.S.C. § 1292(a) (2018).

211 28 U.S.C. § 2072(c) (2018).

212 28 U.S.C. § 1292(e) (2018) ("The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision . . . that is not otherwise provided for . . . ."). Federal Rule of Civil Procedure 23(f) is the only example of this power.

213 Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 48 (1995). Justice Thomas has made this point a few times. *See* Microsoft Corp. v. Baker, 137 S. Ct. 1702, 1716 (2017) (Thomas, J., concurring in judgment); Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 116 (2009) (Thomas, J., concurring in part and concurring in judgment).

steps. First, because § 1292 lists specific orders in which prejudgment appeals are allowed, the general grant of appellate jurisdiction, § 1291, must only allow appeal from final judgments.[214] Second, the fact that Congress has allowed the Court to expand its appellate jurisdiction through rulemaking (via §§ 1292(e) and 2072) indicates that Congress does not want the Court to use "final decision" to expand its appellate jurisdiction.[215] So, "final decision" should just mean final judgments. Both rationales fail.

The first begs the question. That § 1292 allows certain interlocutory orders does not itself indicate that Congress intended § 1291 to codify the final-judgment rule. This conclusion would follow only if the background rule allowed only appeals from final judgments—but that is the question we are trying to answer.

This highlights a deeper problem. Inferences from postenactment history are problematic because there are usually competing inferences that are equally plausible. That is the case here. The specific grants of interlocutory jurisdiction in § 1292 could suggest that § 1291 is a narrow codification of the final-judgment rule. Or Congress's choice to expand appellate jurisdiction could suggest that it intended "final decisions" to be read broadly, undercutting the final-judgment-rule interpretation. Or those specific grants simply could have been independent of the prior jurisdictional grant of § 1291, in which case the provisions in § 1292 tell the Court nothing about the meaning of "final decisions."

When postenactment history is subject to competing interpretations, historical context, the surplusage canon, and legislative history can make one competing inference more plausible.[216] Here, history cuts against the inference supporting the final-judgment-rule interpretation. Because Congress used "final decisions"—which was not a term of art—to define appellate jurisdiction after the Court had frequently exercised jurisdiction over orders preceding final judgment (on the theory that they were effectively final judgments), the

214 *Swint*, 514 U.S. at 45–46.

215 *Swint*, 514 U.S. at 48 ("Congress' designation of the rulemaking process as the way to define or refine when . . . an interlocutory order is appealable warrants the Judiciary's full respect."); *Mohawk Indus., Inc.*, 558 U.S. at 114–15, 119 (Thomas, J., concurring in part and concurring in judgment) (arguing the judiciary should rely exclusively on rulemaking authority under § 1292(e) to expand appellate jurisdiction).

216 See SCALIA & GARNER, *supra* note 109, at 174–79, for an overview of the surplusage canon. The surplusage canon is not relevant here because "final decisions" could mean something broader than final judgments and still be consistent with § 1292, which merely allows appeals over certain orders that are neither final judgments nor "final decisions" (an order on a preliminary injunction is not a "final decision" since it is necessarily connected to the merits and is necessarily intermediary to a subsequent decision).

likely inference is that Congress intended to codify that broader jurisdiction or expand on it. In fact, the committee report that led to § 1292 indicated a concern that then-current finality jurisprudence "in some circumstances restrict[ed] too sharply the opportunity for interlocutory review" and may result in the waiver of appellate rights.[217]

The second rationale fares no better. To state it is almost to refute it. The theory goes that, because Congress has allowed the Court to expand its appellate jurisdiction through rulemaking, Congress must not want the Court to use "final decision" to expand its appellate jurisdiction, so "final decision" must mean final judgments.[218] While it is certainly likely that Congress does not want the Court to use "final decision" to expand its appellate jurisdiction beyond what Congress has granted, that is irrelevant. The question is not whether "final decisions" is an implicit grant of federal common lawmaking power;[219] rather, the question is what appellate jurisdiction Congress has already granted. The question is whether § 1291 grants jurisdiction over some prejudgment orders, not whether the Court should expand that grant. Accordingly, the grants of rulemaking authority shed no light on the meaning of "final decisions."

This is especially true since § 2072(c) and § 2092(e) were enacted years after § 1291. Just like the specific grants of interlocutory jurisdiction in § 1292, both sections could cut in either direction. Rather than indicating that § 1291 only applies to final judgments,

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217 NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 95 (1990) [hereinafter REPORT]. The Federal Courts Study Committee was created in 1988 to study a range of issues. Federal Courts Study Act, Pub. L. No. 100-702, § 102, 102 Stat. 4644 (1988). Despite repeated criticisms of finality jurisprudence, for example, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 292 (1988) (Scalia, J., concurring) ("[F]inality jurisprudence is sorely in need of further limiting principles . . . ."), the Committee did not seem concerned with finality jurisprudence until the Committee's final meeting, which is when the rulemaking proposal was introduced, despite a plethora of criticisms from the judiciary and others. Martineau, *supra* note 178, at 725. The Committee recommended the rulemaking provision because the uncertainty surrounding the meaning of "final decisions" had caused purely procedural litigation, dismissal of premature appeals, uncertainty, and waiver of appellate rights. REPORT, *supra*. The Court has used its authority exactly once, to allow interlocutory appeal of class certification orders. FED. R. CIV. P. 23(f); *see also* Letter from John G. Roberts, Jr., C.J. of the U.S., to Nancy Pelosi, Speaker, House of Reps. (Apr. 14, 2021), https://www.supremecourt.gov/orders/courtorders/frap21_9p6b.pdf [https://perma.cc/WT2D-3L4Y].

218 *Swint*, 514 U.S. at 48; *Mohawk Indus., Inc.*, 558 U.S. at 114–15 (Thomas, J., concurring in part and concurring in judgment) (quoting *Swint*, 514 U.S. at 48).

219 For examples of jurisdictional grants the Court has construed to implicitly grant federal common lawmaking power, see *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 547 (1957), and *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729–31 (2004).

the rulemaking authority to expand appellate jurisdiction could indicate that Congress disapproves of the final-judgment rule and gave the Court authority to exercise appellate jurisdiction over *additional* nonfinal orders. This inference is supported by the same historical arguments discussed above.

These provisions are more plausibly read as an expansion of this history rather than a repudiation of it. If they are relevant at all, these additional provisions indicate that "final decisions" was intended to be at least as broad as the Court's interpretation of "final judgments and decrees."

* * *

Some who criticize the collateral order doctrine assume that "final decisions" codifies the final-judgment rule. But no interpretive argument supports that result. Without interpretive support, the final-judgment interpretation is on the same footing as the current collateral order doctrine: policy. A final-judgment rule may well be good policy, but the Court should not make the same mistake that it has made before; it should credit the ordinary meaning of "final decisions." The ordinary meaning of "final decisions" includes final judgments, prejudgment orders that terminate litigation on the merits and leave nothing for the court to do but execute judgment, and orders that decide issues that are separate from the merits and that will not be revisited. The Court should repudiate the collateral order doctrine and replace it with this test. For the reasons discussed throughout, that test reflects the text's ordinary meaning.

IV. APPLICATION

This Part applies my proposed interpretation of "final decisions" to three types of orders. The first is a default judgment that the Court incorrectly held not to be a final decision in *Microsoft Corp. v. Baker*.[220] The second is an order requiring a plaintiff to post security that the Court incorrectly held to be a final decision in *Cohen v. Beneficial Industrial Loan Corp.*[221] The third is an order whose finality the Court has not yet analyzed but that has percolated among the lower courts: an order denying a motion to dismiss sought on religious autonomy grounds.

220 137 S. Ct. 1702 (2017).
221 337 U.S. 541 (1949).

A. Microsoft Corp.*'s Order Granting a Stipulated Dismissal*

In *Microsoft Corp. v. Baker*, consumers of Microsoft's Xbox 360 filed a class action lawsuit alleging the Xbox had a design defect.[222] The district court denied class certification, and the Ninth Circuit denied the plaintiff's petition for immediate appellate review under Federal Rule of Civil Procedure 23(f).[223] Typically, after an appellate court declines to immediately review a class certification order, plaintiffs either pursue their claims individually or petition the District Court to certify the order for interlocutory appeal under § 1292(b).[224] Instead, the plaintiffs in *Microsoft Corp.* stipulated to dismiss their claims with prejudice; the district court granted that motion and directed the Clerk to enter judgment.[225] Respondents then appealed, asking the Ninth Circuit to review the certification decision.[226] On certiorari, the Supreme Court held the stipulated dismissal was not a "final decision" under § 1291.[227] Why? Because allowing plaintiffs to stipulate to dismissal with the purpose of immediately appealing an adverse class certification decision would "subvert[] the final-judgment rule and the process [of Federal Rule of Civil Procedure 23(f)]."[228]

The order was a final decision. First, it's worth noting the Court's reasoning has little to do with the text of § 1291—a judgment does not cease being "final" because it was sought with the purpose of securing immediate appellate review. Indeed, a party's motivation has nothing to do with the finality of a district court's order.

The result would have been different had the Court applied the original meaning of "final decision." As discussed above, a text-conscious interpretation of "final decisions" includes any order that (1) is a technical final judgment or decree, (2) finally resolves the merits and leaves nothing for the court to do but enforce judgment, or (3) is a decision resolving an issue that will not be revisited and is not intermediary to a subsequent decision on the merits. The order in *Microsoft Corp.* directed final judgment.[229] The plaintiff's intent to

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222 *Microsoft Corp.*, 137 S. Ct. at 1710.

223 *Id.* at 1710–11.

224 *Id.* at 1711.

225 *Id.* (citing Joint Appendix at 122–23, Microsoft Corp. v. Baker, 137 S. Ct. 1702 (2017) (No. 15-457), 2016 WL 1055637 [hereinafter Joint Appendix]).

226 *Id.*

227 *Id.* at 1712–13.

228 *Id.*

229 Stipulation and Order Granting Plaintiffs' Motion to Dismiss with Prejudice at 4, Baker v. Microsoft Corp., No. 11-cv-00722 (W.D. Wash. Oct. 16, 2012) (dismissing the case with prejudice and directing the Clerk to "enter Judgment accordingly and close this case").

game the system, the effect of plaintiff's action on the policies of the final-judgment rule, and the manner in which judgment was acquired do not change the nature of the order. As an order finally resolving the suit and leaving nothing for the court to do but enforce judgment, the order was clearly a "final decision."

B. Cohen*'s Order Denying a Motion to Compel Security*

In *Cohen v. Beneficial Industrial Loan Corp.*, the Court dealt with an order denying a motion to require the plaintiff to post security.[230] The defendant's motion was based on a state statute that required certain plaintiffs in derivative suits to pay the defense's attorney's fees, and the district court's order denying the motion turned on whether, under *Erie*, the district court (sitting in diversity) had to apply the statute.[231] The plaintiff would need to post security only if the federal court applied the state statute.[232] The district court denied the defendant's motion, and the Supreme Court held that denial was a final decision.[233]

The district court's order, which determined whether the court would apply the state statute, was not a "final decision." It was not a final judgment, nor was it an order that, while technically not a final judgment, completely resolved the merits. Moreover, the order was necessarily intermediary to a subsequent decision. The decision whether to apply the state statute was intermediary to the decision whether the plaintiff would need to pay for the defendant's attorney's fees. The defendant had not yet moved for attorney's fees. Thus, even if the district court granted the motion, the district court would have determined whether the plaintiff needed to pay attorney's fees, which would have entailed an inquiry into the statute's applicability. The court's determination that, under *Erie*, the statute was relevant was only preliminary to that decision. Being preliminary to an issue the district court would have to revisit, the order denying the motion to give security was not a final decision.

C. Denial of a Motion to Dismiss on Religious Autonomy Grounds

The third order considered here is a denial of a motion to dismiss sought on the grounds that the religious autonomy doctrine bars suit. The Court has not passed on whether the collateral order doctrine applies to these orders, but lower courts have begun to address

230 337 U.S. 541, 545–47 (1949).
231 *Id.* at 547.
232 *See* Cohen v. Beneficial Indus. Loan Corp., 7 F.R.D. 352, 355 (D.N.J. 1947).
233 *Cohen*, 337 U.S. at 545–47.

the issue.[234] When the Court is presented with this issue, it should interpret "final decision" as proposed here and should conclude that such orders are final decisions.

1. Overview of the Religious Autonomy Doctrine

To lay out this argument, some background is necessary.

The Free Exercise and Establishment Clauses[235] guarantee religious groups autonomy in matters of faith, doctrine, and internal governance.[236] The principles enforcing this autonomy are collectively called the religious autonomy doctrine.[237]

The religious autonomy doctrine has a rich history. When the Court unanimously recognized one of the doctrine's principles, the ministerial exception,[238] it reached back to just after the Founding for

234 Belya v. Kapral, 45 F.4th 621, 631 (2d Cir. 2022) (holding an order denying a religious autonomy defense does "not fall within the collateral order doctrine"), *cert. denied*, Synod of Bishops of the Russian Orthodox Church Outside of Russ. v. Belya, 143 S. Ct. 2609 (2023) (mem.); Tucker v. Faith Bible Chapel Int'l, 36 F.4th 1021, 1026 (10th Cir. 2022) (same), *cert. denied*, 143 S. Ct. 2608 (2023) (mem.).

235 U.S. CONST. amend. I. Professor Laycock has argued church autonomy is rooted in the Free Exercise Clause. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1416–17 (1981) ("Efforts to base the right on the establishment clause are mistaken, because that clause forbids support of religion, not interference with religion." *Id.* at 1416.); *see also* Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116–18 (1952) (finding a state law that required Russian Orthodox churches to recognize as binding the decisions of the North American churches violated the Free Exercise Clause). But the Court has founded the ministerial exception, a subset of the religious autonomy doctrine, in both clauses. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89 (2012); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020).

236 *Kedroff*, 344 U.S. at 116.

237 The doctrine is also called the church autonomy doctrine and ecclesiastical abstention. I prefer "religious autonomy doctrine" to emphasize that it applies to religious groups not traditionally called a "church." *Cf. Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., joined by Kagan, J., concurring) (reminding that the phrase "ministerial exception" should be read to apply to individuals whose religious groups do not use the word "minister").

238 The ministerial exception is one of multiple religious autonomy principles. The ministerial exception is narrower than the religious autonomy doctrine in that it applies only to the employment context and, within that context, only if the employee performs religious functions important enough to make him or her a "minister." Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 657–58, 658 n.2 (10th Cir. 2002); *see also Hosanna-Tabor*, 565 U.S. at 192. The religious autonomy doctrine is broader because it applies beyond the scope of employment. *E.g.*, *Kedroff*, 344 U.S. at 116. Within the context of employment, the religious autonomy doctrine is broader than the ministerial exception because it applies to all employees of religious groups, regardless of their function. *E.g.*, *Bryce*, 289 F.3d at 658 n.2. The religious autonomy doctrine, however, is narrower than the ministerial exception in that it applies only when the religious group's

support.[239] When the first Catholic bishop in the United States asked President Jefferson to opine on who should occupy a position of authority within the Catholic Church, then–Secretary of State James Madison advised Jefferson to deny the invitation because the church's selection was a matter of entirely ecclesiastical concern.[240] The implication, made explicit by the Court's holding in *Hosanna-Tabor*, is that government should steer clear of involving itself in purely religious matters.[241]

That bedrock principle has been strengthened over time. In an 1872 property dispute that is often cited as the forerunner to the religious liberty doctrine,[242] *Watson v. Jones*, the Court held as a matter of federal common law that federal courts should not question religious groups' determinations on matters of "discipline . . . faith, or ecclesiastical rule, custom, or law."[243] Religious groups' determinations on those matters were final and binding on secular courts.[244] By the middle of the twentieth century, the Court recognized religious autonomy as a constitutional right, applicable against both federal and state governments. Religious groups have constitutional "power to decide for themselves, free from state [and federal] interference, matters of church government as well as those of faith and doctrine."[245]

This autonomy prevents a variety of government actions. Governments may not second-guess religious groups' rules of internal governance,[246] decide who should be admitted as a member of religious groups,[247] or question the hiring and firing of employees who perform important religious functions.[248] The religious autonomy doctrine also prohibits governments from deciding whether a reli-

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decision turns on religious doctrine, whereas the ministerial exception is not so constrained. *Id.* at 657; *Hosanna-Tabor*, 565 U.S. at 187.

239 *Hosanna-Tabor*, 565 U.S. at 183–85.

240 *Id.* at 184 (citing Letter from James Madison to Bishop Carroll (Nov. 20, 1806), *in* 20 RECORDS OF THE AMERICAN CATHOLIC HISTORICAL SOCIETY 63, 63 (1909)).

241 *Id.* at 195.

242 *E.g.*, *id.* at 185–86 (citing Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1872)).

243 *Watson*, 80 U.S. (13 Wall.) at 727.

244 *Id.*

245 Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952).

246 Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 709 (1976).

247 Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 139–40 (1872).

248 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012) (selection and termination); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020) (selection and termination); Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 976–77 (7th Cir. 2021) (en banc) (supervision during employment).

gious statement is true,[249] deciding whether an individual or group has faithfully applied religious doctrine,[250] assessing the relative significance of religious tenets,[251] or interpreting religious doctrine.[252] If a secular court were to take any of these actions, it would interfere with religious groups' decisions on matters of faith, doctrine, and internal governance.

These principles guarantee defendants a right not to stand trial in certain circumstances.

This occurs when resolving a claim would require the court to decide a question that the Religion Clauses vest in religious groups. For example, if a plaintiff brought suit claiming he was wrongfully excommunicated from a church, the church has a right to avoid trial and discovery altogether.[253] An individual's religious standing is a matter of religious doctrine and internal governance. So, a secular court could not rule on the merits of the plaintiff's claim without interfering with the church's protected autonomy.[254]

Similar logic holds for challenges to a religious group's ability to select those who shape its religious mission.[255] Allowing a secular court to review the selection and termination of ministers clearly impinges on the church's protected autonomy on matters of internal governance and doctrine—thus, such suits are barred from the outset.[256] The same is true when an ex-employee disputes the reason he was fired, arguing that the church's proffered religious reasons are a pretext for discrimination.[257] In some cases, resolving this pretext

249 *See* United States v. Ballard, 322 U.S. 78, 86 (1944).

250 Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981).

251 Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969).

252 *Id.*

253 For interesting examples of such cases, see, for example, *Turner v. Church of Jesus Christ of Latter-day Saints*, 18 S.W.3d 877, 896 (Tex. App. 2000) (suing to reinstate certain religious privileges); *Singh v. Sandhar*, 495 S.W.3d 482, 489 (Tex. App. 2016) (same); and *Headman v. Nelson*, No. 20-cv-00115, 2020 WL 6833846, at *4 (D. Utah Nov. 5, 2020) (suing to change religious requirements for religious privileges).

254 *See* Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952) (protecting autonomy on matters of "church government as well as those of faith and doctrine").

255 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 193 (2012).

256 Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020); *see also In re* Diocese of Lubbock, 624 S.W.3d 506, 516 (Tex. 2021) (holding defamation suit against religious organization was barred by church autonomy because the claim was bound up in the church's internal governance).

257 *Hosanna-Tabor,* 575 U.S. at 205 (Alito, J., joined by Kagan, J., concurring) ("For civil courts to engage in the pretext inquiry [urged in this case] . . . would dangerously undermine . . . religious autonomy . . . . In order to probe the *real reason* for respondent's

claim will require a court to determine whether the church consistently applies its doctrine.[258] In others, the court will need to decide whether violations of separate religious rules are comparable, such that the church must treat the violators similarly.[259] These and similar cases are barred from the outset because entertaining these claims would substantively violate protected autonomy.

Other cases are barred because the *process* of resolving them violates autonomy. "[T]he very process of inquiry" into claims implicating questions of religious faith, doctrine, and internal governance is itself a violation of the Religion Clauses.[260] "It is well established . . . that courts should refrain from trolling through . . . religious beliefs,"[261] and that "the mere adjudication of such questions would pose grave problems for religious autonomy."[262] Some claims "require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused [religious group] really believes, and how important that belief is to the [religious group]."[263] Hearing and weighing testimony or mandating discovery into questions of religious doctrine would implicate "considerable ongoing government entanglement in religious affairs."[264] Such procedures would chill free exercise by incentivizing religious groups to "characterize as religious only those activities" a secular court would likely agree to be religious; "the

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firing, a civil court—and perhaps a jury—would be required to make a judgment about church doctrine. The credibility of [defendant's] asserted reason . . . could not be assessed without taking into account both the importance that the [defendant] attaches to the [relevant] doctrine . . . and the degree to which that tenet compromised [the ex-employee's] religious function.").

258 *See, e.g.*, Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc., 450 F.3d 130, 137 (3d Cir. 2006) (pretext claim was barred because its adjudication would require the court to assess the relative severity of separate religious infractions); Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 626 (6th Cir. 2000) (pretext claim was barred because its civil adjudication would impose a secular conception of religious consistency and orthodoxy on a religious group).

259 *See, e.g.*, *Curay-Cramer*, 450 F.3d at 137; *Hall*, 215 F.3d at 626.

260 NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 502 (1979); New York v. Cathedral Acad., 434 U.S. 125, 133 (1977) ("The *prospect* of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment . . . ." (emphasis added)).

261 Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion).

262 *Hosanna-Tabor*, 565 U.S. at 205–06 (Alito, J., joined by Kagan, J., concurring).

263 *Id.* at 206.

264 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 343 (1987) (Brennan, J., concurring in judgment).

prospects of litigation" would "shape[]" the religious groups' religious "self-definition."[265]

Though the outer contours of the religious autonomy doctrine are unsettled,[266] it is clear that courts cannot entertain claims asking them to make determinations about internal faith, doctrine, and internal governance of religious groups. Nor can they allow claims to be litigated that implicate those questions.[267] These claims are barred from the outset.

2. Denials of Motions to Dismiss Based on Religious Autonomy Defenses are "Final Decisions"

When a suit is brought against a religious organization, the organization will often file a motion to dismiss, arguing that resolving the claim will violate the organization's protected autonomy. To the extent that the religious autonomy defense is legitimate, a denial of that motion is a "final decision" and can be immediately appealed under § 1291.[268]

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265 *Id.* at 343–44 (Brennan, J., concurring in judgment) (arguing that the "prospect of government intrusion raises concern that a . . . court may disagree" with a religious group about what activities are religiously important, *id.* at 343, and that "[a]s a result" of incentivizing the church to characterize as religious only those activities a secular court would view as religious, the religious group's "process of self-definition would be shaped in part by the prospects of litigation," *id.* at 343–44).

266 For example, it is not clear what types of claims the ministerial exception applies to and to what extent courts can adjudicate claims involving matters of religious doctrine and internal governance when "neutral principles" of law can be used. *See In re* Diocese of Lubbock, 624 S.W.3d 506, 518 (Tex. 2021); *id.* at 530–34 (Boyd, J., dissenting) (collecting cases).

267 Little v. Wuerl, 929 F.2d 944, 949 (3d Cir. 1991) (claim whose resolution would likely involve inquiry into religious mission was barred because "[e]ven if the employer ultimately prevails, the process of review itself" would constitute a First Amendment violation); McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) ("investigation and review" of protected matters produces a "coercive effect" on free exercise); Skrzypczak v. Roman Cath. Diocese of Tulsa, 611 F.3d 1238, 1245 (10th Cir. 2010) (same); Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184, 187 (7th Cir. 1994) (inquiry itself is a First Amendment violation); Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113, 121 (3d Cir. 2018) (same); Duquesne Univ. of the Holy Spirit v. NLRB, 947 F.3d 824, 829 (D.C. Cir. 2020) (same); EEOC v. Cath. Univ. of Am., 83 F.3d 455, 466 (D.C. Cir. 1996) (court proceedings chill free exercise); Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985) (discovery violates religious autonomy); Sterlinski v. Cath. Bishop of Chi., 934 F.3d 568, 569–72 (7th Cir. 2019) (ministerial exception limits discovery).

268 Some have briefly argued that these denials are collateral orders. *See* Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post-*Hosanna-Tabor, 10 FIRST AMEND. L. REV. 233, 293–94 (2012); Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 FORDHAM L. REV. 1847, 1879–81 (2018); J. Gregory Grisham & Daniel Blomberg, *The Ministerial Exception After* Hosanna-

Orders denying a motion to dismiss are not final judgments. Nor do they dispose of the merits and leave nothing for the court to do but enforce final judgment. But orders denying a motion to dismiss sought on a religious autonomy defense fall within the third category of "final decisions." They resolve an issue that will not be revisited and are not intermediary to a subsequent decision.

These orders resolve whether the religious defendant has a right not to stand trial. An order denying a motion to dismiss based on the religious autonomy doctrine finally resolves that issue because, once it has entered that ruling, a court cannot revisit it. Once the case moves to discovery and trial, the defendant's right not to stand trial has already been lost. And if the court incorrectly denied the motion to dismiss, the proceedings will already have violated the defendant's First Amendment right to autonomy on matters of faith, doctrine, and internal governance. Accordingly, a denial of a motion to dismiss based on the religious autonomy doctrine resolves an issue that cannot be revisited.

Such a denial is also not intermediary to any subsequent decision by the court. Deciding whether the defendant has a First Amendment right not to stand trial is not a step toward the merits of any claim.[269] To succeed on the merits of her discrimination claim, for example, an ex-employee does not need to prove that discovery won't violate the religious autonomy doctrine. And because the First Amendment defense to standing trial is distinct from the First Amendment defense to the merits, a defendant does not need to prove that he has a right not to stand trial in order to defeat the merits. The religious autonomy defense to standing trial is separate from the merits and resolved conclusively at the outset of the suit.

Because an order denying a motion to dismiss sought on religious autonomy grounds will not be revisited and is not intermediary to any subsequent decision, it is a "final decision."

CONCLUSION

The collateral order doctrine is divorced from the text of § 1291. To replace that doctrine, the Court should return to the text, crediting the ordinary meaning of "final decisions" rather than falling back on policy. As evidenced by corpus linguistics and history, the

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Tabor*: Firmly Founded, Increasingly Refined*, 20 FEDERALIST SOC'Y REV. 80, 89–90 (2019). Though I agree such denials qualify as collateral orders, my purpose here is to show that the denials also qualify under what I have argued is a more faithful interpretation of § 1291.

269 *Cf.* Mitchell v. Forsyth, 472 U.S. 511, 525–27 (1985) (making a similar argument about qualified immunity).

ordinary meaning of "final decision" includes (1) final judgments, (2) orders that are not technically final judgments but that end litigation on the merits and leave nothing to do but to enforce the judgment, and (3) decisions that decide issues that will not be revisited and that are not intermediary to another decision. That is the "new" collateral order doctrine the Court should apply.