

INSTANT REPLAY AND INTERLOCUTORY APPEALS

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I. INTRODUCTION

The scene is PNC Park, one of the best stadiums in Major League Baseball,¹ where the Pittsburgh Pirates are hosting the rival Chicago Cubs.

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¹PNC Park, which opened in 2001, has been rated *the* best of the 30 major league ballparks by authorities ranging from ESPN to TripAdvisor. Jim Caple, *Pittsburgh's Gem Rates the Best*, ESPN, <http://espn.go.com/page2/s/ballparks/pncpark.html> (last visited Mar. 26, 2017);

With the score 4-3 in favor of the Cubs in the bottom of the eighth inning, the Pirates have loaded the bases with two outs and their star slugger coming to bat. On the first pitch, he swings and hits a line drive toward the gap in left center field. The Cubs' centerfielder dives in an effort to catch the ball before it falls to the turf. Although the fielder snagged the ball in his glove, the umpire rules that the ball was trapped against the ground, not caught on the fly. So the play is a hit, not an out, and two runners score to give the Pirates the lead. The home crowd goes wild.

But wait a moment. The Cubs' wily manager signals that he wants to challenge the call via "instant replay." Within seconds, the replay official has reviewed multiple replays of the play on a video monitor and determined that the fielder caught the ball before it struck the ground. The challenge is successful, the trap call on the field is overturned, the Pirates' slugger is out, no runs score on the play, and the inning is over with the Cubs still ahead. The home crowd groans. The Cubs ultimately hold onto their 4-3 lead and win the game. That call corrected by instant replay review made the difference.

Contrast that hypothetical with the next scene in a federal courtroom. Plaintiff in this civil case is seeking compensatory and punitive damages. The district court judge has just granted defendant's motion to dismiss the claim asserting punitive damages. Plaintiff and her counsel are upset because the law seemed to be in their favor opposing the motion and because the remaining compensatory damages claim is worth peanuts compared to the punitive damages claim. But plaintiff cannot immediately appeal the trial court's order, because it is not a final judgment and no exception permitting an interlocutory appeal is applicable.² Instead, plaintiff will have to await final disposition of the case—which with discovery, further motions, expert witnesses, and trial may be many months and dollars away—before being able to seek correction of the dismissal of the punitive damages claim by an appellate court. Faced with that grim

TripAdvisor Names PNC Park Top American Ballpark, CBS PITTSBURGH (Mar. 27, 2014, 10:23 PM), <http://pittsburgh.cbslocal.com/2014/03/27/tripadvisor-names-pnc-park-top-american-ball-park/>.

²Theoretically, plaintiff could request the district judge to certify the order for immediate appeal per 28 U.S.C. § 1292(b). *See* 28 U.S.C. § 1292(b) (2012). But in reality such a discretionary interlocutory appeal is foreclosed because immediate appeal of the order will not "advance the ultimate termination of the litigation" since the case will proceed regardless, and because this district judge has not certified an order under Section 1292(b) since the Reagan Administration. *See id.*

prospect, plaintiff and her counsel are resigned to trying to settle the case for a fraction of what it legitimately may be worth.

I submit that the law governing interlocutory appeals in federal civil cases can learn much from how professional sports use instant replay.

In general, immediate appeals of non-final (i.e., interlocutory) orders in federal civil cases are prohibited, and the aggrieved party must await final judgment in the case before seeking appellate review.³ This “final judgment rule” reflects the calculus that typically the value of promptly correcting a district court non-final error is outweighed by the inefficiencies of allowing interlocutory appeals, including delay, expense, and potential for harassment.⁴ It is true that Congress and the courts have developed multiple exceptions and limitations to the final judgment rule, so under certain circumstances immediate appeal of an interlocutory order may be possible.⁵

But there is widespread agreement that the law governing interlocutory appeals in federal civil cases is a complex mess that does not provide adequate avenues for parties aggrieved by non-final orders to obtain timely appellate review. Suggested reforms basically follow one of two models: expand the types of interlocutory orders for which immediate appellate review is available “as of right,” or make it easier to obtain “discretionary” review of interlocutory orders.⁶ Both such reform models, though, have shortcomings, including inability to craft a workable list of what types of orders should be appealable automatically and the uncertainties and satellite litigation inherent in discretionary appeals.⁷

I propose a novel approach to interlocutory appeal reform inspired by instant replay review in professional sports. Each side in the case, plaintiff and defendant, is entitled to one “challenge appeal.” That is, plaintiff and defendant each has the right to appeal one interlocutory order in the case immediately to the court of appeals, without the need for any permission by a judge. In short, my proposal strikes a better balance between the conflicting goals of appellate review, error correction and efficiency. The concept of “challenge appeals” combines the benefits of discretionary appeals, including making a wide universe of interlocutory orders subject to

³The final judgment rule in federal courts is codified at 28 U.S.C § 1291 (2012). *See infra* Part II.A.

⁴*See infra* Part II.A.

⁵*See infra* Part II.A.

⁶*See infra* Part II.A.

⁷*See infra* Part II.B.

immediate appeal, with the benefits of appeals as of right, including certainty and the absence of satellite litigation regarding the ability to immediately appeal, while keeping the number of interlocutory appeals manageable.

Part II of this article discusses the contours of the final judgment rule and its many exceptions, why the existing legal framework governing interlocutory appeals is inadequate, the major approaches that have been proposed by commentators to reform the existing legal framework, and why those approaches to reform are flawed. Part III describes the history of instant replay and how its use to review and correct on-field calls in major professional sports, particularly the National Football League (NFL) and Major League Baseball (MLB), has evolved. Part IV explains how I borrow from instant replay review in the NFL and MLB to craft my proposal for “challenge appeals” that would allow the plaintiff and defendant each to immediately appeal one interlocutory order per case as of right. Challenge appeals would facilitate error correction by providing a much-needed additional avenue for immediate appeals of crucial interlocutory orders, yet with safeguards designed to minimize inefficiencies. I also suggest rule changes that could make such challenge appeals more “instant.” Issues relevant to implementation of my proposal, including in multi-party cases, are addressed in Part V.

II. LAW GOVERNING INTERLOCUTORY APPEALS

A. *The Final Judgment Rule and Its Exceptions*

Entry of a final judgment generally is a prerequisite to appeal.⁸ In the federal system, the so-called final judgment rule is codified at 28 U.S.C. § 1291: “The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts”⁹ Although there may be many decisions by the trial court that one or more parties may want to appeal immediately, the final judgment rule effectively defers all appeals until the case is completed and the trial court has entered a final judgment.¹⁰ The final judgment rule promotes efficiency in multiple ways: the appellate

⁸ See 28 U.S.C. § 1291 (2012).

⁹ *Id.*

¹⁰ See, e.g., Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time To Change the Rules*, 1 J. APP. PRAC. & PROCESS 285, 286 (1999); Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1238 (2007).

court must address the case only once with the advantage of a full record; the appellate court is not burdened with addressing interlocutory appeals on issues that have been rendered moot or irrelevant by the time of final judgment (e.g., the aggrieved party wins at trial); litigants are saved the expense, delay and potential for harassment posed by multiple appeals; and trial courts may orderly administer their cases free from appellate interruption.¹¹ The final judgment rule, however, is not without its downsides. Delay in correcting interlocutory decisions may cause substantial or even irreparable harm to the aggrieved party; proceedings in the district court after the interlocutory decision may have to be repeated if the decision is found to be in error on appeal; and certain important areas of law that are often the subject of interlocutory decisions, but infrequently the subject of appeals after final judgment, may be left unclear and undeveloped.¹² The final judgment rule, however, reflects the view that *usually* the benefits of delaying appeal outweigh the detriments.¹³ Put another way, getting it done (efficiency) trumps getting it right (error correction).

But the courts and Congress have recognized that under some circumstances the balance shifts in favor of immediate appellate review, and hence there are limitations and exceptions to the final judgment rule that allow for immediate appeals of interlocutory decisions.¹⁴ These limitations and exceptions are variously rooted in case law, statutes, and rules.¹⁵

The collateral order doctrine is the most common of the judicially created exceptions or limitations to the final judgment rule.¹⁶ The collateral

¹¹Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380 (1987); 15A CHARLES WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3907 (2d ed. 1992). The final judgment rule also promotes comity between the trial and appeals courts and respect for trial court decisions. *Id.*

¹²Bryan Lammon, Perlman *Appeals After Mohawk*, 84 U. CIN. L. REV. 1, 4 (2016); Michael Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1167–69 (1990).

¹³Lammon, *supra* note 12, at 4; Solimine, *supra* note 12, at 1168; WRIGHT ET AL., *supra* note 11, at § 3911.2.

¹⁴Lammon, *supra* note 12, at 5.

¹⁵*Id.*

¹⁶Steinman, *supra* note 10, at 1247; Lammon, *supra* note 12, at 30. The Supreme Court has explained that the collateral order doctrine is best understood not as an exception to the final judgment rule but rather as a “practical construction” of it. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). Hence, the collateral order doctrine can be viewed as a limitation

order doctrine permits an immediate appeal where there has been a conclusive adjudication of a collateral matter even though the whole case has not yet reached final judgment.¹⁷ The Supreme Court has imposed three criteria for invoking the collateral order doctrine: (1) the order must conclusively determine the disputed question; (2) the order must resolve an important question completely separate from the merits; and (3) the order must be effectively unreviewable on appeal from the final judgment.¹⁸ A leading early case, *Cohen v. Beneficial Industrial Loan Corp.*,¹⁹ is illustrative. The Court permitted immediate appellate review of a district court's denial of a corporate defendant's motion to require plaintiff to post security for defendant's expenses in defending a shareholder's derivative suit,²⁰ even though strict application of the final judgment rule would preclude appellate review until the case was finally decided on the merits. The ruling was final on the subject it addressed, was important yet independent of the merits, and deferred appellate correction would be too late to deter plaintiff's suit or to assure that defense expenses would be reimbursed by plaintiff.²¹ Although interlocutory appeals based on the collateral order doctrine are not uncommon, the Supreme Court has repeatedly instructed that the doctrine applies only to a small class of cases and its criteria must be stringently applied so it does not swallow the general final judgment rule.²²

of the final judgment rule. *See* Steinman, *supra* note 10, at 1248 (a collateral order is a final order within the meaning of 28 U.S.C § 1291). *But see* Lammon, *supra* note 12, at 28 (suggesting that any appeal before the end of the district court proceeding should be called an exception to the final judgment rule).

¹⁷ *See* THOMAS BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS 42 (2d ed. 2009); Eisenberg & Morrison, *supra* note 10, at 289.

¹⁸ *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 105 (2009); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

¹⁹ 337 U.S. 541 (1949).

²⁰ *Id.* at 546.

²¹ *Id.* at 547.

²² *See Mohawk*, 558 U.S. at 106–07; 19 MOORE'S FEDERAL PRACTICE, § 202.07[1] (Matthew Bender 3d Ed.). In exceptional cases, the Supreme Court has also construed the final judgment rule to justify interlocutory appeals in circumstances other than under the collateral order doctrine. *See* WRIGHT ET AL., *supra* note 11, at § 3913 (*Gillespie* pragmatic approach); *id.* at § 3910 (*Forgay* hardship approach). Unlike the collateral order doctrine, though, these exceptional cases have not served to justify many subsequent appeals of interlocutory orders. GENE R. SHREVE ET AL., UNDERSTANDING CIVIL PROCEDURE 485 (5th ed. 2013). *But see* Bryan Lammon, *Dizzying Gillespie: The Exaggerated Death of the Balancing Approach and the Inescapable Allure of Flexibility in Appellate Jurisdiction*, 51 U. RICH. L. REV. 371, 372 (2017) (arguing that, contrary

The most important of the statutory exceptions to the final judgment rule enacted by Congress are set forth in 28 U.S.C § 1292, which authorizes interlocutory appeals both “as of right” and by permission.²³ Immediate appellate review of certain enumerated types of interlocutory orders are available “as of right” pursuant to 28 U.S.C. § 1292(a).²⁴ Interlocutory appeals as of right date back to the 1891 Act that created the courts of appeals, which included a provision allowing immediate appeal of interlocutory orders granting or continuing injunctions.²⁵ That provision, now codified at Section 1292(a)(1), has been broadened over the years to include orders modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, as well as orders granting or continuing injunctions.²⁶ The rationale for this exception is that granting or denying preliminary injunctions can have serious immediate consequences on the case and parties that cannot be effectively remedied via appeal after final judgment, hence immediate appellate review is justified.²⁷ Section 1292(a) also makes two other types of interlocutory orders immediately appealable as of right: orders appointing receivers, refusing to wind up receiverships, or directing sales or disposal of property; and orders determining the rights and liabilities of parties in admiralty cases.²⁸ Appeals as of right under Section 1292(a) are accomplished via filing a timely notice of appeal.²⁹ Failure to immediately appeal one of the interlocutory orders covered by Section 1292(a) does not waive the right to appeal the order upon final judgment; that is, the interlocutory order is appealable immediately but the aggrieved party is not required to immediately appeal.³⁰ As exceptions to

to common perception, appellate courts are employing the *Gillespie* approach with some frequency to justify interlocutory appeals).

²³ 28 U.S.C. § 1291(a)-(b) (2012).

²⁴ 28 U.S.C. § 1292(a) (2012).

²⁵ Act of Mar. 3, 1891, ch. 517, § 7, 26 Stat. 826, 828 (1891).

²⁶ See 28 U.S.C. § 1292(a) (2012). For a more detailed history of the expansion of what is now 28 U.S.C § 1292(a), see *Stewart-Warner Corp. v. Westinghouse Elec. Corp.*, 325 F.2d 822, 829–30 (2d Cir. 1964) (Friendly, C.J., dissenting). See also *WRIGHT ET AL.*, *supra* note 11, at § 3921.

²⁷ *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955); *WRIGHT ET AL.*, *supra* note 11, at § 3921.

²⁸ 28 U.S.C. § 1292(a)(2)–(3) (2012).

²⁹ See FED. R. APP. P. 3. By contrast, discretionary interlocutory appeals require a petition for allowance of appeal. See 28 U.S.C. § 1292(b) (2012). Collateral orders also can be appealed via notice of appeal rather than via petition. Steinman, *supra* note 10, at 1252.

³⁰ *WRIGHT ET AL.*, *supra* note 11, at § 3921.

the final judgment rule, the Section 1292(a) provisions are narrowly construed.³¹

Congress in 1958 established a certification system authorizing “discretionary” interlocutory appeals, codified at 28 U.S.C. § 1292(b).³² Appeals under Section 1292(b) are discretionary because both the trial court and appellate court must assent in their discretion to allow immediate appeal of the interlocutory order.³³ When a district judge is of the opinion that an order, not otherwise appealable under Section 1292, “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation,” the judge shall so state in the order.³⁴ Once the district judge has so certified, the court of appeals then may, in its discretion, permit an immediate appeal to be taken from such order.³⁵ In contrast to the mere filing of a notice of appeal necessary to initiate an interlocutory appeal as of right under Section 1292(a), for a discretionary appeal under Section 1292(b) the aggrieved party must file a petition with the appellate court for permission to appeal.³⁶ Relatively few interlocutory orders are certified for immediate appeal by district courts, and appellate courts grant immediate appeal to relatively few certified orders.³⁷

The All Writs Act, now codified at 28 U.S.C. § 1651(a), also effectively gives courts of appeals the discretionary power to review interlocutory

³¹Switz. Cheese Ass’n Inc. v. E. Home’s Mkt., Inc., 385 U.S. 23, 24 (1966). *See also* BAKER, *supra* note 17, at 52.

³²Act of Sept. 2, 1958, Pub. L. No. 85-919, 72 Stat. 1770 (1958) (codified as amended at 28 U.S.C. § 1292(b) (2012)).

³³28 U.S.C. § 1292(b) (2012).

³⁴*Id.* The requirement that there be a controlling question of law as to which there is a substantial ground for difference of opinion aims to confine discretionary appeal to those cases where the likelihood of trial court error is greatest, as questions of fact or judicial discretion are subject to more lenient standards of appellate review and are less likely to be reversed. SHREVE ET AL., *supra* note 22, at 488. The requirement that interlocutory appeal may materially advance the termination of the litigation aims to avoid immediate appeals where the case is likely to proceed to trial regardless of the correctness of the interlocutory order. *See id.*

³⁵28 U.S.C. § 1292(b) (2012).

³⁶*Id.* The petition must be filed within ten days after entry of the district court order. *Id.* As a practical matter, the aggrieved party may also have to request the trial judge to certify the order for immediate appeal rather than relying upon the trial judge to do so *sua sponte*.

³⁷Section 1292(b) “has not made serious inroads on the final judgment rule.” WRIGHT ET AL., *supra* note 11, at § 3929. *See* Steinman, *supra* note 10, at 1245; Solimine, *supra* note 12, at 1174.

orders by district judges via writs of mandamus. By the terms of this statute, “all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”³⁸ An aggrieved party may petition the court of appeals to issue a writ of mandamus to the trial judge, and “in aid of” its jurisdiction the appellate court may issue the writ to mandate or prevent an action by the trial judge.³⁹ Starting with a Supreme Court decision in 1957,⁴⁰ the All Writs Act has been interpreted to confer discretionary power on the courts of appeals to review and overturn interlocutory decisions of trial judges in extraordinary circumstances.⁴¹ Mandamus is an extraordinary remedy, however, not a substitute for appeal. Mandamus is to be granted only in exceptional circumstances where the party seeking the writ has no other adequate means to attain the desired relief and the right to issuance of the writ is clear and indisputable.⁴²

Congress also has enacted a few narrowly-focused exceptions to the final judgment rule to allow for interlocutory appeals in certain specific situations.⁴³ For example, an appeal as of right may be taken from interlocutory orders refusing to stay an action to allow for arbitration or denying a petition to compel arbitration.⁴⁴ By permission of the appeals court, an order granting or denying a motion to remand a class action to state court may be immediately appealed.⁴⁵

Federal Rules of Civil Procedure also serve to allow appeals of certain orders prior to the termination of the case. In cases involving multiple claims or parties, Rule 54(b) affords an avenue for immediate appeal of a decision that is effectively final for one claim even though all of the claims have not yet been finally decided.⁴⁶ The trial court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties if the

³⁸ 28 U.S.C. § 1651(a) (2012).

³⁹ *See id.*; WRIGHT ET AL., *supra* note 11, at § 3932.

⁴⁰ *La Buy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957).

⁴¹ *See* WRIGHT ET AL., *supra* note 11, at § 3932.

⁴² *Cheney v. U.S.D.*, 542 U.S. 367, 380–81 (2004); *Kerr v. U.S.D.*, 426 U.S. 394, 403 (1976); *Eisenberg & Morrison*, *supra* note 10, at 290.

⁴³ *See* 9 U.S.C. § 16 (2012); 28 U.S.C. § 1453(c) (2012).

⁴⁴ 9 U.S.C. § 16(a) (2012). However, no interlocutory appeal may be taken from orders *granting* a stay to allow for arbitration or *compelling* arbitration. 9 U.S.C. § 16(b) (2012).

⁴⁵ 28 U.S.C. § 1453(c)(1) (2012). Notwithstanding that generally an order to remand is not reviewable at all per 28 U.S.C. § 1447(d) (2012).

⁴⁶ FED. R. CIV. P. 54(b).

court expressly determines that there is no just reason for delay.⁴⁷ Rule 54(b) is not an exception to the final judgment rule, but rather provides a standard for its application in a multi-claim, multi-party case.⁴⁸ But even a decision finally disposing of a claim is appealable under Rule 54(b) only where the trial court decides to enter final judgment as to that claim and certifies that there is no just reason for delay.⁴⁹ Otherwise, appeal of that order must await final adjudication of all claims and all parties' rights and liabilities.

Congress in 1992 amended Section 1292 to add subsection (e), giving the Supreme Court express authority to promulgate rules to provide for an appeal of an interlocutory decision to the courts of appeals not otherwise provided for under other subsections.⁵⁰ To date, Rule 23(f) of the Federal Rules of Civil Procedure is the Supreme Court's only exercise of that power to create categories of interlocutory appeals by rule.⁵¹ Rule 23(f) provides that a court of appeals may permit an immediate appeal from an order granting or denying class action certification.⁵² Although appeal pursuant to Rule 23(f) is discretionary, not as of right, the ability to appeal under this rule differs from discretionary appeal under Section 1292(b) in two important respects. First, no district court certification is required for appeal

⁴⁷ *Id.*

⁴⁸ See SHREVE ET AL., *supra* note 22, at 479–80. In light of the liberal joinder provisions ushered in by the Federal Rules of Civil Procedure in 1938, claims that previously would have been tried separately often became part of the same case. Rule 54(b), part of the Federal Rules since their inception, recognizes that a decision finally disposing of any one claim would have been the end of the case pre-1938 and immediately appealable. *Id.* See also WRIGHT ET AL., *supra* note 11, at §§ 2653–54.

⁴⁹ FED. R. CIV. P. 54(b).

⁵⁰ Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992) (codified at 28 U.S.C. § 1292(e) (2012)). Any rule promulgated pursuant to Section 1292(e), by its terms, must be in accordance with the Rules Enabling Act, 28 U.S.C. § 2072. The Rules Enabling Act itself had been amended in 1990 to allow the Supreme Court to prescribe rules that define when a district court ruling is “final” for purposes of 28 U.S.C. § 1291. Pub. L. No. 101-650, § 313, 104 Stat. 5089 (1990) (codified at 28 U.S.C. § 2072(c)). The constitutionality of that 1990 amendment was upheld in *Bolin v. Sears*, 231 F.3d 970 (5th Cir. 2000).

⁵¹ See Steinman, *supra* note 10, at 1246. Rule 23(f) took effect December 1, 1998. FED. R. CIV. P. 23, Committee Notes on Rules – 1998 Amendments. See also Timothy Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 178 n.10 (2001).

⁵² The petition to the court of appeals must be filed within 14 days of the order. FED. R. CIV. P. 23(f).

per Rule 23(f); only appellate court assent is needed.⁵³ Second, there is no requirement that the order involve a controlling question of law as to which there is a substantial difference of opinion or may materially advance the termination of the litigation; under Rule 23(f) the court of appeals' discretion whether to permit the appeal is akin to the discretion of the Supreme Court in acting on a petition for certiorari.⁵⁴

Interlocutory appeals, unlike appeals from final judgments, do not divest the trial court of the power to proceed with the case while the appeal is pending.⁵⁵ A party can file a motion to stay the district court proceedings pending disposition of the appeal, but whether to grant the stay is in the court's discretion.⁵⁶ The motion to stay ordinarily must be directed initially to the district court; if declined, then the motion may be made to the court of appeals or one of its judges.⁵⁷ The standard is akin to the grant of a preliminary injunction and typically involves consideration of four factors: whether the movant is likely to succeed on the merits; whether the movant will be irreparably injured absent a stay; whether issuance of the stay will substantially injure other parties; and the public interest.⁵⁸

B. Shortcomings of Current Law and Proposed Reforms

The current legal structure for interlocutory appeals in civil cases in federal court "is among the most troublesome issues in civil procedure,"⁵⁹ and there is no shortage of critics. Many lament the complexity of the

⁵³ *Id.* See also 28 U.S.C. § 1453(c)(1) (2012) (appeal of order granting or denying a motion to remand).

⁵⁴ See FED. R. CIV. P. 23, Committee Notes on Rules – 1998 Amendments. Rule 23(f) makes it easier to appeal class certification orders immediately, rather than relying on Section 1292(b). The Supreme Court in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), held class certification orders are not appealable under the collateral order doctrine.

⁵⁵ See WRIGHT ET AL., *supra* note 11, at §§ 3911, 3921.2, 3929. 28 U.S.C. § 1292(b) expressly provides that an application for an appeal does not stay the district court proceedings unless the district judge, court of appeals or appellate judge so orders. 28 U.S.C. § 1292(b) (2012).

⁵⁶ 28 U.S.C. § 1292(b).

⁵⁷ FED. R. APP. P. 8(a). The motion may be made initially in the court of appeals only if moving first in the district court would be impracticable. *Id.*

⁵⁸ See *Nken v. Holder*, 556 U.S. 418, 426 (2009); *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

⁵⁹ Steinman, *supra* note 10, at 1237. For lists of articles criticizing the current system of interlocutory appeals and proposing reforms, see *id.* at 1238–39; Bryan Lammon, *Rules, Standards and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 424 & n.4 (2013). Professor Lammon calls the system of interlocutory appellate review a "mess." *Id.* at 423.

existing law, which includes multiple exceptions, with differing requirements, sprinkled across statutes, rules, and case law.⁶⁰ Perhaps more troubling is the uncertainty and unpredictability of the current system governing interlocutory appeals. Whether a particular order is appealable as a collateral order, for example, is often difficult to predict and frequently results in satellite litigation over whether the order is or is not immediately appealable.⁶¹ Discretionary appeals, by definition, are subject to the discretion of judges, so it is never certain whether a particular order will be immediately appealable, and the issue is often contested at both the trial and appellate levels.⁶²

Importantly, commentators “almost uniformly agree that existing avenues for interlocutory appeal are inadequate.”⁶³ In civil litigation today, where trials are infrequent and most cases are resolved by settlement short of final judgment, interlocutory orders are more important than ever.⁶⁴ The variety of orders for which there is a right to appeal under Section 1292(a) and other specific statutes are relatively few, when compared to the plethora of types of interlocutory orders commonly decided by district courts in modern civil litigation.⁶⁵ While discretionary appeals theoretically could fill the gap, in practice discretionary interlocutory appeals remain very limited.⁶⁶ Many opinions recite that discretionary review under Section 1292(b) exists only for “exceptional” cases, and overall the provision has

⁶⁰ See, e.g., Brian Walsh, *A Primer on the Finality of Decisions for Appeal*, 2015 A.B.A. J SEC. LITIG. 30; Lammon, *supra* note 59, at 430; Melissa Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527, 556 (2002).

⁶¹ See Steinman, *supra* note 10, at 1272–75; Eisenberg & Morrison, *supra* note 10, at 289. An example of such satellite litigation was *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009) (holding that order requiring disclosure of material allegedly subject to attorney-client privilege was not a collateral order).

⁶² See Andrew Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review*, 79 FORDHAM L. REV. 1643, 1662–63 (2011); Eisenberg & Morrison, *supra* note 10, at 291–92. Sometimes it is even difficult to ascertain whether an order fits within the various statutory provisions that provide for appeals as of right, again resulting in time and resources devoted to deciding if it is an immediately appealable order. See WRIGHT ET AL., *supra* note 11, at § 3922 (discussing 28 U.S.C. § 1292(a)(1)).

⁶³ Pollis, *supra* note 62, at 1660. See Eisenberg & Morrison, *supra* note 10, at 286.

⁶⁴ See Steinman, *supra* note 10, at 1276.

⁶⁵ See Pierre Bergeron & Bruce Khula, *The Future of Discretionary Interlocutory Review*, (ABA, Appellate Practice), June 28, 2012, at 2–3; Steinman, *supra* note 10, at 1242.

⁶⁶ See WRIGHT ET AL., *supra* note 11, at § 3929 (Section 1292(b) “has not made serious inroads on the final judgment rule”); Solimine, *supra* note 12, at 1174.

been narrowly construed.⁶⁷ Trial courts have been reluctant to certify orders, and appellate courts have been reluctant to accept for appeal even those orders that obtain certification.⁶⁸ Mandamus under the All Writs Act is an “extraordinary” remedy to be used only in “exceptional circumstances” where the right to the writ is “clear and indisputable.”⁶⁹

The upshot is that many non-final orders throughout the arc of a typical case, ranging from a denial of a Rule 12(b) motion to dismiss through evidentiary rulings at trial, can be of critical importance to the parties and greatly affect the ultimate outcome of the case, yet immediate appellate review to correct an erroneous district court order is seldom available. Instead, the aggrieved party must await final judgment in the case before seeking appeal. In the interim, the aggrieved party may suffer great harm, such as the expense of continuing to litigate a case that should have been terminated by a correct district court order long ago, the delay in obtaining a correct ruling and deserved relief, or the necessity to settle the case on less favorable terms rather than slog through the remainder of the case for a chance at vindication on appeal.⁷⁰ Moreover, the paucity of interlocutory appeals inhibits the development of the law on various issues that are often resolved in interlocutory orders and tend to evade review after final judgment.⁷¹

Not surprisingly in light of such rampant criticism, many commentators have urged that changes be made to the existing legal framework in order to expand the availability of interlocutory appeals in federal civil cases.⁷² Basically, the critics advocate one of two reform approaches: expanding discretionary interlocutory appeals or expanding interlocutory appeals as of right.⁷³ Many call for expanding avenues of discretionary appeal.⁷⁴ A

⁶⁷ See SHREVE ET AL., *supra* note 22, at 488; WRIGHT ET AL., *supra* note 11, at § 3929.

⁶⁸ Eisenberg & Morrison, *supra* note 10, at 292 (Two-thirds of certification orders are declined by courts of appeals). See Steinman, *supra* note 10, at 1245; WRIGHT ET AL., *supra* note 11, at § 3929.

⁶⁹ *Cheney v. U.S.D.*, 542 U.S. 367, 380–81 (2004); *Kerr v. U.S.D.*, 426 U.S. 394, 402–03 (1976). See Eisenberg & Morrison, *supra* note 10, at 290.

⁷⁰ See Steinman, *supra* note 10, at 1276 (vanishing trials make interlocutory orders more important than ever); Solimine, *supra* note 12, at 1176.

⁷¹ Glynn, *supra* note 51, at 177. See Eisenberg & Morrison, *supra* note 10, at 291; Solimine, *supra* note 12, at 1182.

⁷² *E.g.*, Pollis, *supra* note 62, at 1660; Solimine, *supra* note 12, at 1166–67.

⁷³ See Lammon, *supra* note 59, at 424–25.

⁷⁴ See *e.g.*, Eisenberg & Morrison, *supra* note 10, at 287; Solimine, *supra* note 12, at 1167, 1175. See also Pollis, *supra* note 62, at 1660 (noting many commentators advocate for expanded

common feature of proposals to expand discretionary review is to eliminate the requirement of district court certification under Section 1292(b) and vest sole discretion in the court of appeals.⁷⁵ Another take on increasing discretionary review is to advocate more robust use of writs to accomplish appellate review.⁷⁶ By contrast, others propose expanding the availability of interlocutory appeals as of right.⁷⁷ Under this approach, more categories of orders are made appealable before final judgment, based on the critics' views that those certain types of orders most merit immediate appeal instead of deferred review.⁷⁸

Both approaches, however, are imperfect and have been the subject of criticism themselves. Discretionary review, even when only the appeals court and not the district court must assent, has multiple downsides. Discretionary review places substantial burdens on the parties and the judges in connection with the initial determination whether a particular interlocutory order should be immediately appealable.⁷⁹ The aggrieved party must devote the time and resources to petition for permission to appeal, the other side likely will devote time and resources to oppose the petition, and judges must spend time to evaluate whether to permit the appeal.⁸⁰ Further, the decision whether to permit the appeal is left to the unfettered discretion of appellate judges, rendering the availability of immediate interlocutory appeal uncertain, unpredictable and, some argue, substantively suspect.⁸¹

But identifying additional categories of interlocutory orders for purposes of expanding appeal as of right is fraught with peril as well. There is the

discretionary interlocutory appeals, with some urging that an all-discretionary system be substituted for the current mix of "as of right" and discretionary interlocutory appeals).

⁷⁵This was as the drafters of Section 1292(b) originally proposed in 1958, and the American Bar Association advanced such a proposal in 1977. See Pollis, *supra* note 62, at 1660–61. The theory is that trial judges have a vested interest in not being reversed, so they are not adequate gate-keepers of appellate review. *Id.* at 1661.

⁷⁶See Steinman, *supra* note 10, at 1277; Waters, *supra* note 60, at 591.

⁷⁷*E.g.*, Pollis, *supra* note 62, at 1647; Glynn, *supra* note 51, at 179.

⁷⁸See Pollis, *supra* note 62, at 1663; Glynn, *supra* note 51, at 179–80. Not every proposed reform, of course, advocates one approach or the other. See Bryan Lammon, *Dizzying Gillespie: The Exaggerated Death of the Balancing Approach and the Inescapable Allure of Flexibility in Appellate Jurisdiction*, 51 U. RICH. L. REV. 371, 374 (2017) (proposing a combination of categorical rules and a discretionary catchall).

⁷⁹See Glynn, *supra* note 51, at 231.

⁸⁰See Eisenberg & Morrison, *supra* note 10, at 286–87, 291–92.

⁸¹See Pollis, *supra* note 62, at 1662–63; Glynn, *supra* note 51, at 179.

risk of under-inclusiveness. Almost every type of interlocutory order has been deemed appropriate for immediate discretionary appellate review by some court in some case.⁸² On the other hand, over-inclusiveness is a risk, too.⁸³ Immediate appeal of one type of interlocutory order might properly promote error correction over efficiency in one case, but in another case immediate appeal of the same type of order might not be so desirable. For example, denial of a motion for a protective order to shield trade secrets may be a great candidate for interlocutory appeal where the formula for Coca Cola is at stake, but not so much if the issue is customer lists in a typical business tort case. If a wide variety of interlocutory orders are immediately appealable as of right, the appellate courts may become clogged with too many interlocutory appeals of little benefit. In the words of one commentator, “it is virtually impossible to identify in advance classes or types of interlocutory orders that should be appealable immediately,” calling it “an exercise in futility.”⁸⁴

In sum, there is widespread agreement that the existing legal structure does not provide for enough interlocutory appeals. But the commonly suggested solutions – making discretionary appeals easier or adding more types of orders that can be appealed as of right – are not satisfactory. I am proposing a novel approach to expanding the availability of interlocutory appeals inspired by the use of “instant replay” to review and correct calls in professional sports.

III. INSTANT REPLAY

Sports and civil litigation share many common attributes, including the existence of winners and losers, reliance on rules, an adversary system, and neutral decision-makers.⁸⁵ Chief Justice Roberts, for example, famously observed during his confirmation hearing that “judges are like umpires.”⁸⁶

⁸² See Steinman, *supra* note 10, at 1242, 1273–75.

⁸³ Eisenberg & Morrison, *supra* note 10, at 287.

⁸⁴ Robert Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 775 (1993).

⁸⁵ See Chad Oldfather & Matthew Fernholz, *Comparative Procedure on a Sunday Afternoon: Instant Replay in the NFL as a Process of Appellate Review*, 43 IND. L. REV. 45, 52, 54–61 (2009); Michael Eakin, *NFL Justice*, 38 U. BALT. L. REV. 49, 51 (2008) (“[I]n many ways, a football game is much like a case or a trial.”).

⁸⁶ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

The intertwining of sports and law has a rich history in legal scholarship.⁸⁷ Indeed, a number of commentators have noted similarities between sports' use of instant replay and our justice system in general⁸⁸ and appeals in particular.⁸⁹ But this article is the first to draw upon the use of instant replay in professional sports to propose improvements to the legal framework governing interlocutory appeals.

A. History

"Instant replay" refers to the video recording of live action, such as a play in a sporting event, that can be played back immediately after the original play has been completed.⁹⁰ While it may be hard to believe in this era in which sports television broadcasts regularly feature immediate replays of plays from dozens of cameras in slow motion and stop action,⁹¹

⁸⁷Perhaps the most famous example is *The Common Law Origins of the Infield Fly Rule*, 123 U. PENN. L. REV. 1474 (1975), which examined whether the same types of forces that shaped the development of the common law also generated baseball's Infield Fly Rule.

⁸⁸Mitchell Berman, *Replay*, 99 CALIF. L. REV. 1683, 1686 (2011); James Robertson, *Variations on a Theme by Posner: Facing the Factual Component of the Reliability Imperative in the Process of Adjudication*, 84 MISS. L.J. 471, 544 (2015); Diarmuid O'Scannlain, *The Role of the Federal Judge Under the Constitution: Some Perspectives from the Ninth Circuit*, 33 HARV. J.L. & PUB. POL'Y 963, 971 (2010).

⁸⁹Oldfather & Fernholz, *supra* note 85, at 54 (comparing instant replay in the NFL with appellate review); Mark Brown, *Qualified Immunity and Interlocutory Fact-Finding in the Courts of Appeals*, 114 PENN. ST. L. REV. 1317, 1330 (2010) (comparing final judgment rule to why referees and umpires are not always staring at instant replays); William Bedsworth, *Strippers at the Funeral*, ORANGE COUNTY LAWYER (August 2015), www.ocbar.org/AllNews/NewsView/tabid/66/ArticleId/1578/August-2015-Strippers-at-the-Funeral.aspx (associate justice of the California Court of Appeal explains "I am the instant replay booth."). Some commentators have looked to the law of appellate review to suggest improvements to instant replay review in sports. Steve Callandrillo & Joseph Davidson, *Standards of Review in Law and Sports: How Instant Replay's Asymmetric Burdens Subvert Accuracy and Justice*, 7 HARV. J. SPORTS & ENT. L. (forthcoming 2017) (sports should use de novo standard of review); Jack Guggenheim, *Blowing the Whistle on the NFL's New Instant Replay Rule: Indisputable Visual Evidence and a Recommended "Appellate" Model*, 24 VT. L. REV. 567, 567 (2000) ("[M]anifest weight of the evidence" standard of appellate review should replace the NFL's standard of "indisputable visual evidence"). See also *Laborers Int'l Union v. NLRB*, 594 F.3d 732, 739 (10th Cir. 2010) (Judge Gorsuch analogized his role to that of the "instant-replay booth in football").

⁹⁰See MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 648 (11th ed. 2003).

⁹¹Instant replay technology is still improving. In the works is a system that would allow three-dimensional, 360-degree instant replays. See Michael Rosenberg, *Replay Revolution*, SPORTS ILLUSTRATED, June 20, 2016, at 46, 48.

in the early decades of televised sports there were no instant replays. The first use of instant replay in a sports telecast was during the Army-Navy football game on December 7, 1963.⁹² The CBS live telecast showed Army's quarterback score on a touchdown run and then, using a primitive videotape apparatus that literally weighed a ton, the network replayed the touchdown run to the nationwide viewing audience just seconds later.⁹³ The immediate videotape replay innovation was so striking that veteran play-by-play announcer Lindsey Nelson felt obliged to explain to the viewers: "This is not live! Ladies and gentlemen, Army did not score again!"⁹⁴ CBS again deployed its videotape replay technology a month later at the Cotton Bowl football game; announcer Pat Summerall is credited with first using the term "instant replay" during that broadcast.⁹⁵ The National Football League started using instant replay on televised games during its 1964 season, and the use of instant replay quickly spread to other televised sporting events.⁹⁶

The advent of instant replay is credited with helping to popularize televised sports, allowing viewers at home to see key plays in ways that those sitting in the stadium, at least in pre-Jumbotron days,⁹⁷ could not. But instant replay also allowed viewers to second-guess controversial calls

⁹²Bruce Weber, Obituary, *Tony Verna, Who Started Instant Replay and Remade Sports Television, Dies at 81*, N.Y. TIMES (Jan. 21, 2015), <https://www.nytimes.com/2015/01/22/sports/tony-verna-who-started-instant-replay-and-remade-sports-television-dies-at-81.html> [hereinafter *Verna Obituary*]. Verna was the innovator of videotape instant replay as a young director of football games for CBS. *Id.* George Retzlaff, of the Canadian Broadcasting Corporation, was able to produce one not-quite-instant film replay of a goal during a broadcast of "Hockey Night in Canada" during the 1955-56 season. Scott Allen, *Upon Further Review: A Brief History of Instant Replay*, MENTAL FLOSS (Oct. 13, 2010, 7:40 AM), <http://mentalfloss.com/article/26075/upon-further-review-brief-history-instant-replay>.

⁹³See *Verna Obituary*, *supra* note 92.

⁹⁴*Id.*

⁹⁵*Id.* The term "instant replay" quickly became part of our sports vernacular. For example, in 1968 "Instant Replay" was the title of a best-selling book by Jerry Kramer, an offensive guard on the Green Bay Packers, and journalist Dick Schaap. See JERRY KRAMER, INSTANT REPLAY (Dick Schaap ed., N.Y. World Pub. Co. 1968).

⁹⁶See *Verna Obituary*, *supra* note 92.

⁹⁷"Jumbotron" is a registered trademark of Sony Corporation but has become a generic term for any giant television. JUMBOTRON, Registration No. 1561986. The first use of a giant TV screen at a sports venue was the 1980 MLB All-Star Game at Dodger Stadium in Los Angeles. Mary Bellis, *Large Scale Video Displays – Jumbotron*, THOUGHTCO. (Aug. 14, 2016), <https://www.thoughtco.com/large-scale-video-displays-jumbotron-1992018>.

made by referees and umpires on the field.⁹⁸ While instant replay often showed that the officials had made the right call, sometimes instant replay revealed that they were wrong. A prime example was a 1979 NFL playoff game between the Pittsburgh Steelers and Houston Oilers.⁹⁹ Instant replays clearly showed that Houston receiver Mike Renfro had both feet in the end zone when he caught what would have been the game-tying touchdown pass, but the on-field referee ruled Renfro was out of bounds.¹⁰⁰ So no touchdown, Houston lost that conference championship game, and Pittsburgh went on to win the Super Bowl.¹⁰¹

The NFL was the first professional sports league to implement instant replay to review officials' on-field calls.¹⁰² After testing instant replay review during several preseason games as early as 1978, the NFL approved an instant replay review system for regular season games starting in 1986.¹⁰³ After six seasons of instant replay review, the NFL club owners voted to abandon instant replay review following the 1991 season.¹⁰⁴ However, after a series of on-field calls that instant replay revealed were wrong marred the 1998 season, the NFL club owners reinstated a revised system of instant replay review for the 1999 season.¹⁰⁵ Instant replay review has been an integral feature of NFL football games ever since, and the other major North American professional team sports leagues have followed suit with their own instant replay review systems. The National Hockey League instituted instant replay review in 1991, the National Basketball Association in 2002, and Major League Baseball in 2008.¹⁰⁶

⁹⁸ As early as 1965, a New York Times writer observed that due to instant replays, "The day of reckoning for umpires may be near." Allen, *supra* note 92.

⁹⁹ Berman, *supra* note 88, at 1691.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* The Renfro play became the "enduring symbol for instant-replay advocates." James Dudko, *The History of Instant Replay in the NFL*, BLEACHER REPORT (June 8, 2013), <http://bleacherreport.com/articles/1666250-the-history-of-instant-replay-in-the-nfl>.

¹⁰² *Id.*

¹⁰³ *History of Instant Replay*, NFL FOOTBALL OPERATIONS, <http://operations.nfl.com/the-game/history-of-instant-replay/>.

¹⁰⁴ *Id.*

¹⁰⁵ See Thomas George, *Pro Football: NFL Backs Limited Replay After Complaints of Bad Calls*, N.Y. TIMES, (Mar. 18, 1999), <http://www.nytimes.com/1999/03/18/sports/pro-football-nfl-backs-limited-replay-after-complaints-of-bad-calls.html>; Oldfather & Fernholz, *supra* note 85, at 50.

¹⁰⁶ Allen, *supra* note 92.

Particularly instructive to my proposal are the use of instant replay by the two most popular professional sports organizations in the United States—the National Football League and Major League Baseball.¹⁰⁷ The use and evolution of instant replay review in these leagues, including who can initiate review, carry lessons for improving the legal framework governing interlocutory appeals.

B. National Football League

The original system of instant replay review implemented by the NFL was in place from the 1986 season through the 1991 season.¹⁰⁸ All reviews of on-field calls were conducted and decided by a replay official upstairs in an in-stadium booth.¹⁰⁹ The replay official had access to the broadcast feed of the game on one monitor and videocassette recorders that could immediately replay individual plays on a second replay booth monitor.¹¹⁰ Reviews were initiated by the replay official or at the request of the referee on the field; coaches could not initiate an instant replay review.¹¹¹ Not all types of calls were reviewable; reviewable calls basically were limited to plays of possession or touching (fumbles, interceptions, receptions, etc.); and plays governed by lines (out of bounds, forward pass or lateral, break the plane of the goal line, etc.).¹¹² The number of reviews, though, was

¹⁰⁷Fans of pro basketball, hockey and soccer may disagree, but football and baseball are tops by any objective measure. See Darren Rovell, *NFL most popular sport for 30th year in row*, ESPN (Jan. 26, 2014), http://www.espn.com/nfl/story/_/id/10354114/harris-poll-nfl-most-popular-mlb-2nd. Of the major professional team sports in our country, the NFL and MLB rank first and second, respectively, in average attendance per game, and MLB has by far the highest total attendance per season. Cork Gaines, *The NFL and Major League Baseball Are the Most Attended Sports Leagues in the World*, BUSINESS INSIDER (May 22, 2015), <http://www.businessinsider.com/attendance-sports-leagues-world-2015-5>. For 30 consecutive years, Harris polls consistently have ranked pro football and baseball first and second as the favorite sports among U.S. adults. In a Harris poll in December 2015, 33% of the U.S. adults polled chose pro football as their favorite sport, and baseball garnered 15% of the vote, with pro basketball and hockey trailing at 5% each. Larry Shannon-Missal, *Pro Football Is Still America's Favorite Sport*, THE HARRIS POLL (Jan. 26, 2016), http://www.theharrispoll.com/sports/Americas_Fav_Sport_2016.html.

¹⁰⁸See *History of Instant Replay*, *supra* note 103.

¹⁰⁹See *id.*

¹¹⁰*Id.*

¹¹¹See *id.*

¹¹²*Id.*

unlimited.¹¹³ Unless the replay official found “indisputable visual evidence” that the call on the field was wrong, the call on the field was upheld.¹¹⁴

The original NFL instant replay system was moderately successful in promoting error correction, or in the common parlance of many color commentators, “getting it right.” Approximately 13% of the plays reviewed during the 1986–1991 seasons were reversed.¹¹⁵ However, there were many criticisms of the instant replay system, primarily that the reviews were being arbitrarily invoked by officials and were delaying and interrupting the game even though relatively few resulted in changes to the on-field calls.¹¹⁶ There also were some technology problems.¹¹⁷ These concerns, coupled with a study showing that 10% of the reversed calls during the 1991 season were overturned incorrectly, led the NFL club owners to vote not to renew instant replay review for 1992.¹¹⁸

But as it turned out, instant replay review in the NFL was not dead, it was merely on hiatus. Proponents of instant replay review advocated for its return, and a couple of times in ensuing years the NFL owners narrowly rejected proposals to restore instant replay review.¹¹⁹ A series of highly publicized gaffes and questionable calls by officials during the 1998 NFL season galvanized support for the return of instant replay. These included a Thanksgiving Day botched coin toss at the beginning of sudden-death overtime that erroneously gave the ball to Detroit though replays showed

¹¹³ See Dudko, *supra* note 101.

¹¹⁴ *History of Instant Replay*, *supra* note 103. See Don Pierson, *NFL Won't Discuss Replay Official's 'Evidence'*, CHI. TRIB., Nov. 8, 1989, http://articles.chicagotribune.com/1989-11-08/sports/8901290719_1_replay-official-indisputable-visual-evidence-instant-replay.

¹¹⁵ *History of Instant Replay*, *supra* note 103. A high profile example of an overturned call resulted in a 14-13 victory by the Green Bay Packers over the Chicago Bears in 1989. See Pierson, *supra* note 114. The on-field official ruled a touchdown pass incomplete because the Packers' quarterback was beyond the line of scrimmage when he threw the ball. *Id.* The replay official, however, overturned the call, which meant the pass was complete and the Packers had scored the winning touchdown. *Id.*

¹¹⁶ See *History of Instant Replay*, *supra* note 103.

¹¹⁷ See *id.* During a Kansas City Chiefs versus Oakland Raiders game in 1986, the on-field call was a completed touchdown pass for the Raiders, but the replay official determined the pass was incomplete. *Id.* However, due to a miscommunication via walkie-talkie – the on-field official thought the replay official said “pass is complete” instead of “pass incomplete” – the touchdown erroneously was allowed to stand. *Id.* The Raiders won by a touchdown, 24-17. *Id.*

¹¹⁸ *Id.*

¹¹⁹ Thomas George, *PRO FOOTBALL; N.F.L. Backs Limited Replay After Complaints of Bad Calls*, N.Y. TIMES, Mar. 18, 1999, <http://www.nytimes.com/1999/03/18/sports/pro-football-nfl-backs-limited-replay-after-complaints-of-bad-calls.html>.

Pittsburgh's Jerome Bettis correctly called tails; a pair of wrong calls on key passing plays that led to the Buffalo Bills losing a close game to the New England Patriots; and the New York Jets erroneously being credited with a last-second, fourth-down winning touchdown over the Seattle Seahawks, despite replays clearly showing that Jets quarterback Vinny Testaverde was down before he reached the goal line.¹²⁰ So the NFL owners voted in favor of bringing back instant replay review for the 1999 season, but with some significant differences from the prior 1986–1991 system.¹²¹

The instant replay review system as re-instituted in 1999 remains largely the same today.¹²² One key new feature of the re-instituted system is coaches' challenges. Whereas under the old system reviews were initiated only by the replay official or an on-field referee, the current system allows each team's coach to initiate instant replay review of two plays per game, with the potential of a third challenge if both of the earlier challenges are successful.¹²³ Each challenge requires the team to use one of its timeouts.¹²⁴ If a challenge is unsuccessful (i.e., the call on the field is not overturned), that team loses one of its timeouts.¹²⁵ If a challenge is successful (i.e., the call on the field is overturned), the timeout is restored and no timeout is charged to that team.¹²⁶ The coach signals that he is challenging a call by tossing a red flag onto the field prior to the next snap.¹²⁷ During the last two minutes of each half, or during overtime, coaches cannot challenge a call; only the replay official may initiate an instant replay review during the last two minutes of a half or during overtime.¹²⁸

The review process also was changed by the system re-instituted in 1999. Whereas under the old 1986–1991 system the replay official up in the

¹²⁰ *See id.*

¹²¹ *Id.*

¹²² *See History of Instant Replay, supra* note 103; Berman *supra* note 88, at 1692–93. The NFL's instant replay review rules are set forth in Rule 15, section 2 of the 2016 Official Playing Rules of the National Football League. *2016 Official Playing Rules of the National Football League*, NFL FOOTBALL OPERATIONS, r. 15 § 2, at 65, 65–66 [hereinafter *2016 NFL Rules*], <http://operations.nfl.com/media/2224/2016-nfl-rulebook.pdf>.

¹²³ *2016 NFL Rules, supra* note 122, r. 15 § 2, art. 1.

¹²⁴ *Id.*

¹²⁵ *See id.*

¹²⁶ *Id.* The penalty for initiating a challenge when a team has exhausted its timeouts is loss of 15 yards. *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* arts. 1–2.

booth alone conducted the review and decided whether to uphold or overturn the call on the field, under the new system the on-field referee reviews the replays via a field-level video monitor and makes the final decision on whether to uphold or overturn the call.¹²⁹ The referee may consult with the replay official (and, starting in the 2016 season, a member of the league's officiating department at NFL headquarters in New York) during his review, but the on-field referee is the ultimate decider.¹³⁰ In an effort to avoid delays, a review is limited to sixty seconds from the time the referee goes "under the hood" at the field-level monitor.¹³¹

The types of plays that are reviewable have expanded over the years,¹³² but some categories remain non-reviewable. Examples of non-reviewable plays include many judgment calls such as fouls (e.g., holding); the spot of the ball; and whether a player was blocked into a loose ball.¹³³ All reviewable aspects of a play are subject to reversal, even if not identified in the challenge or request for review.¹³⁴

Although many aspects of instant replay review in the NFL have evolved over the years, the standard of review has not really changed. Through 2015 the rules specified that a call will be reversed only if there is "indisputable visual evidence."¹³⁵ Effective 2016, the rules provide that a call will be reversed only where the referee has "clear and obvious visual evidence" that warrants a change.¹³⁶ Even the NFL's vice president of officiating, however, uses the terms interchangeably.¹³⁷

¹²⁹ *Id.* art. 3.

¹³⁰ *See id.* arts. 2–3. Because the on-field official makes the ultimate decision whether to uphold or reverse the call on the field, instant replay review in the NFL is more like a motion for reconsideration than an appeal to a higher court.

¹³¹ *Id.* art. 3.

¹³² *See* Berman, *supra* note 88, at 1692–93. The current list of reviewable plays is set forth at 2016 NFL Rules, *supra* note 122, r. 15, § 2, art. 5.

¹³³ 2016 NFL Rules, *supra* note 122, r. 15, § 2, art. 4.

¹³⁴ *Id.* art. 3.

¹³⁵ *See History of Instant Replay*, *supra* note 103; 2015 Official Playing Rules of the NFL, NFL FOOTBALL OPERATIONS, r. 15, § 2, art. 3, at 63, http://operations.nfl.com/media/1807/2015_nfl_rule_book_final.pdf; Berman, *supra* note 88, at 1693; Oldfather & Fernholz, *supra* note 85, at 52.

¹³⁶ 2016 NFL Rules, *supra* note 122, r. 15, § 2, art. 3.

¹³⁷ *Martavis Bryant's Touchdown Wasn't a Catch, According to NFL VP of Officiating*, BREITBART (Jan. 16, 2016), <http://www.breitbart.com/news/martavis-bryants-touchdown-wasnt-a-catch-according-to-nfl-vp-of-officiating/> (quoting Dean Blandino). *See* Kevin Seifert, *Not 'Clear and Obvious' that Broncos' Will Parks Stepped Out of Bounds*, ESPN (Nov. 13, 2016),

Under the re-instituted system, somewhat fewer plays are reviewed per game than under the NFL's original 1986–1991 instant replay rules.¹³⁸ The frequency of reversals has increased significantly, however, from 13% to 36% of plays reviewed.¹³⁹

C. Major League Baseball

The oldest of the major professional team sports in the United States was also the last to adopt instant replay review.¹⁴⁰ Major League Baseball

http://www.espn.com/blog/nflnation/post/_id/221121/it-wasnt-clear-and-obvious-that-broncos-will-parks-stepped-out-of-bounds (using terms interchangeably and noting that overturn rates were similar in 2016 as in past seasons). Although other aspects of the changes in the NFL's instant replay rules for 2016 received press coverage, the change in standard of review did not. *See, e.g.*, Mark Maske, *NFL Owners Ratify Modest Instant Replay Changes*, WASH. POST, May 24, 2016, https://www.washingtonpost.com/news/sports/wp/2016/05/24/nfl-owners-ratify-instant-replay-changes/?utm_term=.1a68785cc427.

¹³⁸*History of Instant Replay*, *supra* note 103 (comparing statistics from 1986–1991 with 1999–2013).

¹³⁹*Id.*

¹⁴⁰Jack Curry, *Baseball to Use Replay Review on Homers*, N.Y. TIMES, Aug. 26, 2008, <http://www.nytimes.com/2008/08/27/sports/baseball/27replay.html>. Instant replays had fueled controversies long before MLB adopted instant replay review. David Tanklefsky, *Throwback Thursday: Don Denkinger Blows "The Call"*, VICE SPORTS (Oct. 22, 2015), <https://sports.vice.com/ca/article/throwback-thursday-don-denkinger-blows-the-call>. A prime example came in Game 6 of the 1985 World Series between the Kansas City Royals and the St. Louis Cardinals. *Id.* With the Cardinals leading the series 3-2 and the game 1-0 in the bottom of the ninth inning, umpire Don Denkinger erroneously called a Royal safe at first base. *Id.* Instant replays plainly showed the runner should have been called out, but of course no instant replay review was available. *Id.* Given life by the blown call, the Royals rallied to win Game 6 and then went on to win the seventh game for the championship. *Id.*

An early, ad hoc attempt to use instant replay to correct a ruling on the field occurred in a 1999 Cardinals-Marlins game in Miami. *See* Gil Imber, *Reviewing Instant Replay: Observations and Implications from Replay's Inaugural Season*, 44 BASEBALL RES. J., Spring 2015, at 45. Florida batter Cliff Floyd hit a ball that was ruled a double by the second base umpire on the basis that it struck the left field scoreboard. *Id.* After the Marlins successfully argued that the ball had struck a wall above and behind the scoreboard and therefore should have been ruled a home run, the umpires changed the call to a home run. *Id.* This prompted an equally vociferous argument from St. Louis that the original call was correct. *Id.* Crew chief Frank Pulli then decided to consult a dugout-adjacent TV monitor to review the replay, following which Pulli changed the call back to a double. *Id.* The Marlins responded by filing a protest of their 5-2 loss. *Id.* The National League president admonished Pulli for unauthorized use of instant replay, but he ultimately denied the protest because he found the umpire's erroneous decision to consult a replay and change Floyd's home run to a double was a judgment call—and judgment calls cannot be overturned with protests under MLB rules. *Id.*

authorized the use of instant replay review in the middle of its 2008 season,¹⁴¹ prompted by a series of controversial calls on possible home runs that video replays clearly showed were wrong.¹⁴² Under MLB's original instant replay system, which took effect in August 2008, only boundary home run calls were reviewable (i.e., whether a potential home run cleared the fence, whether it was fair, or whether it was subject to fan interference).¹⁴³ Only the umpires on the field could request instant replay review. The umpires would conduct the review by viewing replays on a monitor, and then they would make the final decision on whether the call should be upheld or reversed.¹⁴⁴

This limited instant replay review system remained in effect through 2013. In five-plus seasons, spanning more than 10,000 games, there were only 392 replay reviews, of which 132 (34%) were reversed.¹⁴⁵

Some baseball "purists" lamented that instant replay review eliminated a human element from the game – i.e., umpire mistakes.¹⁴⁶ Others voiced inefficiency concerns, complaining that reviews were delaying the game.¹⁴⁷ Most prevalent, though, were complaints that Major League Baseball's instant replay review rules were too limited in scope. A number of high-profile, controversial calls by umpires on the field were shown conclusively to have been wrong by instant replays, yet the aggrieved team had no recourse because the play was not reviewable under the existing rules.¹⁴⁸ Perhaps the most famous example from this era was the perfect-game-that-wasn't between the Detroit Tigers and Cleveland Indians on June 2, 2010 at

¹⁴¹ Curry, *supra* note 140.

¹⁴² Paul White, *MLB Trying to Implement Instant Replay by August 1*, USA TODAY, June 15, 2008, http://usatoday30.usatoday.com/sports/baseball/2008-06-13-replay-proposal_N.htm. New York alone had some doozies. On May 18, 2008, Carlos Delgado of the New York Mets hit a ball near the left field foul pole that was originally ruled a home run, then called foul after a conference by the umpires. *Id.* Replays showed the ball was fair. *Id.* Three days later, the Yankees' Alex Rodriguez's drive to right-center field was ruled a double by umpires, but replays showed the ball hit a staircase behind the wall and caromed back onto the field and should have been a home run. *Id.*

¹⁴³ See Curry, *supra* note 140.

¹⁴⁴ See *id.*

¹⁴⁵ Imber, *supra* note 140, at 45.

¹⁴⁶ Kevin Baxter, *Joe Torre Still Isn't a Fan of Instant Replay*, L.A. TIMES, July 30, 2011, <http://articles.latimes.com/2011/jul/30/sports/la-sp-0731-down-the-line-20110731>.

¹⁴⁷ Imber, *supra* note 140, at 45.

¹⁴⁸ Phil Taylor, *Play It Again, Bud*, Sports Illustrated, Aug. 30, 2010, <https://www.si.com/vault/2010/08/30/105976962/play-it-again-bud>.

Comerica Park. With two outs in the ninth inning, Tigers pitcher Armando Galarraga was one out away from a perfect game, having allowed no runs, hits or baserunners.¹⁴⁹ The Indians' Jason Donald hit a ground ball to Tigers first baseman Miguel Cabrera, who fielded the ball and tossed it to Galarraga covering first base.¹⁵⁰ Umpire Jim Joyce, a veteran of more than twenty seasons umpiring in the big leagues, called Donald safe at first.¹⁵¹ Video replays clearly showed that Donald should have been called out, as Galarraga caught the ball with his foot on first base well before Donald arrived.¹⁵² The Tigers howled, but they had no recourse because instant replay review then was allowed only for home runs.¹⁵³ Galarraga retired the next hitter, and the Tigers won the game, but the perfect game was gone. The New York Times called Joyce's decision "easily the most egregious blown call in baseball over the last twenty-five years."¹⁵⁴

The Major League Baseball clubs unanimously approved of expanding instant replay for the 2014 season,¹⁵⁵ and with minor revisions the instant replay review system that debuted in 2014 remains in effect today.¹⁵⁶ The new system makes more types of plays reviewable, including force plays, tag plays, fair/foul calls and trap/catch calls in the outfield, batter hit by pitch, and certain baserunning (e.g., whether runner scored before third out, passed another runner, touched base, tagged up), and record-keeping

¹⁴⁹Tyler Kepner, *Perfect Game Thwarted by Faulty Call*, N.Y. Times, June 2, 2010, <http://www.nytimes.com/2010/06/03/sports/baseball/03detroit.html>.

¹⁵⁰*Id.*

¹⁵¹*Id.*

¹⁵²*Id.*

¹⁵³*Id.*

¹⁵⁴*Id.* After reviewing video replay of the play post-game, Joyce admitted he made the wrong call and apologized to Galarraga. *Id.* Galarraga would have been just the 21st pitcher to throw a perfect game in major league history, and only the 19th since the so-called modern era began in 1900. See *Perfect Games*, MLB.COM, http://mlb.mlb.com/mlb/history/rare_feats/index.jsp?feature=perfect_game (last visited Mar. 22, 2017).

¹⁵⁵Press Release, *MLB Clubs Unanimously Approve Expansion of Instant Replay*, MLB.COM (Jan. 16, 2014), <http://m.mlb.com/news/article/66737984/mlb-clubs-unanimously-approve-expansion-of-instant-replay/>. Unions for the MLB players and umpires also consented to the new instant replay protocols. *Id.*

¹⁵⁶The rules governing instant replay review in MLB are set forth in the Major League Baseball Replay Review Regulations. *Major League Baseball Replay Review Regulations*, MLB.COM [hereinafter *MLB Replay Review Regulations*], http://m.mlb.com/official_rules/replay_review (last visited Mar. 22, 2017).

(number of balls, strikes and outs) matters.¹⁵⁷ Unless the type of play is listed as reviewable, however, all other plays are not reviewable.¹⁵⁸ Ball and strike calls are not reviewable under MLB's Replay Review regulations, nor are several other common calls such as foul tips, check swings and interference.¹⁵⁹

Who initiates instant replay review also was changed.¹⁶⁰ Each team's manager now gets one challenge per game; that is, he may initiate instant replay review on one reviewable play per game.¹⁶¹ If the manager's challenge is successful and the play is overturned, the manager retains the ability to challenge one more play during the game, but in no event may the manager challenge more than two plays in a game.¹⁶² The umpiring crew chief also may initiate instant replay review of: (1) any reviewable play from the seventh inning on; and (2) any home run call at any time during the game.¹⁶³ Home run calls are reviewable only at the crew chief's discretion.¹⁶⁴ The manager may signal his challenge to the crew chief verbally or by hand signal (no red flags like in football), and the challenge must be invoked prior to the commencement of the next play or pitch.¹⁶⁵ The manager must let the crew chief know the specific call(s) for which he is seeking replay review of a play, but the manager need not state the reason for his belief that the call was incorrect.¹⁶⁶

Who actually conducts the replay review changed, too. Under the new rules, a designated Replay Official reviews the videos of the play and makes the decision whether to change the call on the field.¹⁶⁷ The Replay Official is a MLB umpire who has been assigned by the Commissioner's

¹⁵⁷ *Id.* §§ II.J.6., V.

¹⁵⁸ *Id.* § V.

¹⁵⁹ See Brian Costa, *MLB 2014: How Will Baseball's Instant Replay Work? A Guide to the Expanded Video-Review System*, WALL ST. J., March 28, 2014, <http://www.wsj.com/articles/SB10001424052702304688104579465230759769104>.

¹⁶⁰ See Costa, *supra* note 159; *MLB Replay Review Regulations*, *supra* note 156, § II.B.

¹⁶¹ *MLB Replay Review Regulations*, *supra* note 156, § II.B.1.

¹⁶² *Id.* For postseason games and the All-Star Game, however, each team starts with two challenges (instead of one). *Id.*

¹⁶³ *Id.* § II.C.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* § II.D.1. If the play at issue ends the game, the challenge must be made immediately. *Id.*

¹⁶⁶ *Id.* § II.I.

¹⁶⁷ *Id.* § II.J.3.

Office to be the Replay Official for that game.¹⁶⁸ Physically located in MLB headquarters in New York City, the Replay Official has access to video replays of the home and away local broadcast feeds, the national broadcast feed if any, and up to thirteen additional camera feeds.¹⁶⁹ The identity of the specific umpire serving as the Replay Official for a particular game is not disclosed.¹⁷⁰ Because MLB instant replay review is decided by someone other than the on-field officials who made the original call, the MLB system is closer to appellate review whereas the NFL system is more like a motion for reconsideration.

Once replay review has been initiated by a manager or the crew chief, the crew chief communicates with the Replay Official via a two-way line what call is subject to review and any information deemed relevant to replay review.¹⁷¹ The Replay Official may confer with the umpires on the field while reviewing the play.¹⁷² The standard for changing a call is “clear and convincing evidence.”¹⁷³ The Replay Official has three choices in making his decision: (1) overturn the call if there is clear and convincing evidence that the call on the field was incorrect; (2) confirm the call if there is clear and convincing evidence that the call on the field was correct; or (3) let the call on the field stand due to the lack of clear and convincing evidence.¹⁷⁴ The crew chief, clubs, public address announcer, and broadcasters are then informed of the Replay Official’s decision.¹⁷⁵ If there is specific video that provides clear and convincing evidence to change or confirm the call, the definitive video is sent to the ballpark so that it may be shown on the scoreboard; otherwise, no video from the challenged play may be shown at the ballpark after the replay review decision has been announced.¹⁷⁶

¹⁶⁸ *Id.* § VI.B.1.

¹⁶⁹ *See id.* § VI.A.–B. The Replay Official is assisted by a technician from Major League Baseball Advanced Media who actually operates the replay equipment. *See id.* § VI.B.1. The “replay room” where Replay Officials and technicians work is a 900-square-foot windowless room in a former cookie factory. Costa, *supra* note 159.

¹⁷⁰ *MLB Replay Review Regulations*, *supra* note 156, § VI.B.1. The Commissioner’s Office, however, may publicly disclose the identity of the umpiring crew(s) serving as Replay Officials for games that day. *Id.*

¹⁷¹ *Id.* § II.J.2.

¹⁷² *See id.*

¹⁷³ *Id.* § III.

¹⁷⁴ *See id.* § II.J.3.

¹⁷⁵ *Id.* § II.J.4.

¹⁷⁶ *Id.* § II.J.5.

The decision of the Replay Official is final, binding and not subject to further review.¹⁷⁷ MLB's Official Baseball Rules do allow a club to "protest" a game when the manager claims that an umpire's decision is in violation of MLB's Official Baseball Rules, although no protest is permitted on "judgment decisions" by an umpire.¹⁷⁸ The Replay Review regulations expressly provide that the protest rule has no applicability to instant replay and that violation of any replay rule or procedure shall not constitute a basis for protesting a game.¹⁷⁹

Statistics for the first full season of MLB's new instant replay review system showed that more on-field calls were reviewed, and the overturn rate was higher, than under the old system.¹⁸⁰ During the 2014 season, there were 1274 total replay reviews, of which 605 calls (47%) were overturned. The 221 reviews initiated by crew chiefs had a much lower overturn rate

¹⁷⁷ *Id.* § II.K.2.

¹⁷⁸ *Official Baseball Rules 2016 Edition*, MLB.COM, r. 7.04, at 91, http://mlb.mlb.com/mlb/downloads/y2016/official_baseball_rules.pdf. Protests are rarely successful. See Mark Townsend, *Giants Win Protest Following Tarp Incident*, YAHOO SPORTS (Aug. 20, 2014), <http://sports.yahoo.com/blogs/mlb-big-league-stew/giants-win-protest-following-tarp-incident--game-to-be-resumed-thursday-230853926.html> (only three upheld protests in more than 30 years).

One of those successful protests arose from the so-called Pine Tar Game. Nick Carbone, *The Pine Tar Incident*, TIME (Sept. 25, 2012), <http://newsfeed.time.com/2012/09/25/the-most-controversial-game-endings-in-sports/slide/the-pine-tar-incident-1983/>. On July 24, 1983, George Brett hit a two-run homer with two outs in the top of the ninth inning to give the Kansas City Royals a 5-4 lead over the New York Yankees. *Id.* New York manager Billy Martin complained that Brett's bat had excessive pine tar (used to improve a batter's grip) in violation of an official MLB rule stating that pine tar cannot reach more than 18 inches up the bat. *Id.* The umpire agreed that Brett had violated the rule, called Brett out, and disallowed the home run, ending the game 4-3 in favor of the Yankees. *Id.*

Kansas City filed a protest, and American League President Lee MacPhail overturned the umpire's decision, saying that the umpire had misapplied the pine tar rule. *Id.* (The bat should have been removed from the game, but Brett should not have been called out and the homer disallowed.) *Id.* MacPhail ordered the game re-started from the point following Brett's home run—that is, with the Royals leading 5-4 with two outs in the top of the ninth inning. *Id.* A month later, the teams completed the game in about ten minutes and Kansas City won 5-4. *Id.*

The NFL expressly does not allow a club or manager to protest a game. See *2016 NFL Rules*, *supra* note 122, r. 17, § 2, art. 2.

¹⁷⁹ *MLB Replay Review Regulations*, *supra* note 156, § II.K.4.

¹⁸⁰ *MLB Ejection & Replay Stats: 2014 Season Sabermetrics*, CLOSE CALL SPORTS, (Sept. 30, 2014), <http://www.closecallsports.com/2014/09/mlb-ejection-replay-stats-2014-season.html>; see *@MLBReplays Statistics*, <http://mlbreplaystats.com/> (last visited Mar. 22, 2017).

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INSTANT REPLAY

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(23%) than the 1053 reviews initiated by team manager challenges (53%).¹⁸¹

IV. APPLYING LESSONS FROM INSTANT REPLAY TO INTERLOCUTORY APPEALS

One obvious parallel between interlocutory appeals in federal civil cases and instant replay review in professional sports¹⁸² is that, despite inefficiency concerns, both have evolved toward more error correction over the years. The original 1891 statute providing for interlocutory appeals as of right in federal civil cases, the forerunner to what is now section 1292(a), limited immediate appeals to orders granting or continuing injunctions.¹⁸³ Shortly thereafter, that statute was expanded to allow immediate appeals of orders refusing or dissolving injunctions as well.¹⁸⁴ Then a few decades later it was broadened again to allow immediate appeals of orders modifying or refusing to modify an injunction.¹⁸⁵ Early in the Twentieth Century, appeals as of right for interlocutory orders appointing receivers and determining the rights and liabilities of parties to admiralty cases were added to what is now section 1292(a).¹⁸⁶ Discretionary interlocutory appeals were ushered in with the addition of section 1292(b) in 1958.¹⁸⁷ More recent additions to the ranks of immediately appealable interlocutory orders

¹⁸¹ *MLB Ejection & Replay Stats: 2014 Season Sabermetrics*, CLOSE CALL SPORTS, (Sept. 30, 2014), <http://www.closecallsports.com/2014/09/mlb-ejection-replay-stats-2014-season.html>; see *@MLBReplays Statistics*, <http://mlbreplaystats.com/> (last visited Mar. 22, 2017).

¹⁸² There are differences, of course, including that in sports generally there is never review of an official's call absent instant replay, whereas in court, absent interlocutory appeal, a judge's interlocutory order generally may be reviewed on appeal after final judgment.

¹⁸³ See Circuit Court of Appeals Act of 1891, ch. 517, § 7, 26 Stat. 826, 828.

¹⁸⁴ Act of Feb. 18, 1895, ch. 96, 28 Stat. 666, 666–67.

¹⁸⁵ Judiciary Act of 1925, Pub. L. No. 68-415, ch. 229, § 129, 43 Stat. 937, 937 (codified as amended at 28 U.S.C. § 1292(a)(1) (2012)) (interlocutory appeals as of right regarding injunctions). The history of the expansion of what is now 28 U.S.C. § 1292(a)(1) is detailed at Wright & Miller, *supra* note 11, § 3921.

¹⁸⁶ Act of June 6, 1900, ch. 803, 31 Stat. 660 (codified as amended at 28 U.S.C. § 1292(a)(2) (2012)) (receivers); Act of Apr. 3, 1926, Pub. L. No. 69-89, ch. 102, 44 Stat. 233 (codified as amended at 28 U.S.C. § 1292(a)(3) (2012)) (admiralty).

¹⁸⁷ Act of Sept. 2, 1958, Pub. L. No. 85-919, 72 Stat. 1770 (codified as amended at 28 U.S.C. § 1292(b) (2012)).

include those denying petitions to compel arbitration¹⁸⁸ and granting or denying class certifications.¹⁸⁹

Similarly, in both professional football and baseball, instant replay review began very limited in scope and then expanded. Originally the NFL allowed instant replay review only for certain boundary and possession calls,¹⁹⁰ but today far more types of plays are reviewable, including whether a quarterback's motion was an attempted pass or a fumble (aka the Tom Brady Tuck Rule) and game clock timing errors (new for 2016).¹⁹¹ When MLB first instituted instant replay review in 2008, the only plays reviewable were potential home runs.¹⁹² Just a few years later, instant replay review is now permissible for a wide panoply of calls ranging from whether a runner was safe or out at a base, to whether an outfielder caught or trapped a fly ball, to whether a batter was hit by a pitch.¹⁹³

¹⁸⁸ Judicial Improvements and Access to Justice Act, Pub. L. 100-702, § 1019, 102 Stat. 4642, 4670-71 (1988) (codified at 9 U.S.C. § 16(a) (2012)).

¹⁸⁹ FED. R. CIV. P. 23(f). Fed R. Civ. P. 23(f) was added in 1998. See FED. R. CIV. P. 23, Advisory Committee Notes on Rules, 1998 Amendment. Judge-made avenues of interlocutory appeals likewise have broadened over time. The collateral order doctrine effectively was created in 1947, see *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949), and mandamus as a tool to review district court orders was expanded in 1957, *La Buy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957). See also *Wright & Miller*, *supra* note 11, at §§ 3911.2 (collateral orders), 3932 (extraordinary writs).

¹⁹⁰ See *History of Instant Replay*, *supra* note 103.

¹⁹¹ 2016 NFL Rules, r. 15, § 2, art. 5. Late in the fourth quarter of a January 2002 playoff game, the officials on the field ruled that New England quarterback Tom Brady had fumbled and the Oakland Raiders had recovered. *Brady Wins First Playoff Game Thanks to Controversial "Tuck Rule"*, SI.COM (Oct. 5, 2016), <http://www.si.com/nfl/2016/10/05/tom-brady-biggest-moments-tuck-rule>. After instant replay review, the officials reversed and ruled an incomplete pass, because Brady had started to move his arm forward to pass and then was attempting to tuck the ball away when he lost possession. *Id.* The Patriots kept the ball and went on to score the winning touchdown to defeat the Raiders. See *id.*

¹⁹² Curry, *supra* note 140.

¹⁹³ *MLB Replay Review Regulations*, *supra* note 156, § V. A similar evolution can be observed in other professional sports. The NBA started by reviewing whether a shot beat the clock and now includes whether a shot was taken from behind the 3-point line and whether a player committed a flagrant foul. *NBA Referee Instant Replay Trigger Outline*, NBA OFFICIAL, <http://www.nba.com/official/instant-replay-guidelines.html#> (last visited Apr. 6, 2017). The NHL started by reviewing whether a goal was scored and now includes goalie interference, high sticking and offside. See *National Hockey League Official Rules 2015-2016*, NHL.COM, r. 38.4, 78.6, 78.7, 78.8, [hereinafter *NHL Official Rules*] <http://www.nhl.com/nhl/en/v3/ext/rules/2015-2016-Interactive-rulebook.pdf>.

A. Challenge Appeals

Even more instructive, though, is the *manner* in which professional sports have expanded the availability of instant replay review. Both the NFL and MLB, as they were expanding the types of plays reviewable by instant replay, chose to move away from a system of discretionary review in favor of allowing each team a limited number of challenges as of right. Each team now gets a limited number of challenges, which can be used to initiate instant replay review of any potentially reviewable play, without the need for anyone to assent to the review.¹⁹⁴

The NFL started with a system of pure discretionary replay review. That is, during 1986–1991, it was up to the discretion of the replay official in the booth or the referee on the field to decide whether to invoke review for a potentially reviewable play.¹⁹⁵ Since instant replay review was brought back to the NFL in 1999, however, each team decides which potentially reviewable play is actually reviewed (with the exception of the last two minutes of each half and overtime). But to prevent teams from resorting to instant replay review every time a call goes against them, each team may challenge only a limited number of plays (two, or three if the first two are successful) per game.¹⁹⁶

The MLB similarly began with a system whereby instant replay review could be invoked only at the discretion of the on-field umpire.¹⁹⁷ Today, as in football, each baseball team decides which potentially reviewable play is actually reviewed.¹⁹⁸ Also as in football, MLB has limited the number of challenges each team receives (one, or two if the first is successful) per game.¹⁹⁹ In both football and baseball, the teams do not need the permission of anyone to invoke instant replay review for a type of play that is potentially reviewable (except for the latter stages of the game in the NFL).²⁰⁰ Effectively, the professional sports leagues have moved largely to

¹⁹⁴ See *MLB Replay Review Regulations*, *supra* note 156, § II.B.; *2016 NFL Rules*, *supra* note 122, r. 15, § 2, art. 1.

¹⁹⁵ *History of Instant Replay*, *supra* note 103.

¹⁹⁶ *2016 NFL Rules*, *supra* note 122, r. 15, § 2, art. 1.

¹⁹⁷ See Curry, *supra* note 140.

¹⁹⁸ *MLB Replay Review Regulations*, *supra* note 156, § II.A.–B.

¹⁹⁹ *Id.* § B.

²⁰⁰ *Id.*; *2016 NFL Rules*, *supra* note 122, r. 15, § 2, art. 1.

a system whereby a wide variety of plays are appealable as of right, but each team is limited in the number of plays per game it may appeal.²⁰¹

An instant replay review system where each team has a limited number of challenges as of right offers advantages over systems of pure discretionary review or unlimited as of right review. First, it is better than leaving it to the discretion of a third party, like the replay official or on-field umpire, to decide which play is to be reviewed. Allowing instant replay review only at the discretion of an official may foster criticism that it is being invoked inconsistently or arbitrarily. Plus, the team, as opposed to a third party, may be in the best position to evaluate the importance to that team of a particular call in a game, thus assuring that the limited number of challenges is used for the most crucial and winnable of calls. Calls in both football and baseball are more frequently overturned when challenged by the teams than when reviews are initiated by third-party officials.²⁰²

Second, it beats trying to create a list of plays that are appealable as of right without limitation. Inevitably, such a list would be both over-inclusive and under-inclusive. Some types of plays may benefit from instant replay review under some circumstances and not under others. For example, whether a player scored a touchdown could be critical—Did the running back break the plane of the goal line with the ball for the go-ahead touchdown in the fourth quarter? But if the touchdown made the score 52–6, instant replay review would be a waste of time. On the other hand, professional sports are replete with examples of controversial plays where instant replays showed that the call on the field was wrong, but because the

²⁰¹In 2015 the NHL introduced team challenges; if the challenge is unsuccessful the team forfeits a timeout. *NHL Official Rules*, *supra* note 193, r. 78.7. The NBA is the lone major professional team sports league in North America not to feature team challenges. *See generally NBA Referee Instant Replay Trigger Outline*, *supra* note 193. Professional tennis gives each player three instant replay challenges per match; the player does not lose a challenge if the call is successfully overturned. *See* Howard Beck et al., *Let's Go to the Tape: How Other Sports Handle Video Review*, N.Y. TIMES, Aug. 15, 2013, <http://www.nytimes.com/2013/08/16/sports/lets-go-to-the-tape-how-other-sports-handle-video-review.html>.

²⁰²*See History of Instant Replay*, *supra* note 103; *MLB Ejection & Replay Stats: 2014 Season Sabermetrics*, *supra* note 180. In the NFL, plays challenged by coaches are overturned more frequently than plays reviewed at the request of the replay official. *See History of Instant Replay*, *supra* note 103. In MLB, reviews initiated by umpires have a lower overturn rate than reviews initiated by managers. *MLB Ejection & Replay Stats: 2014 Season Sabermetrics*, *supra* note 180; *@MLBReplays Statistics*, *supra* note 180.

plays were not reviewable the call stood, leading to much wailing and gnashing of teeth.²⁰³

I propose to expand the legal framework for interlocutory appeals by borrowing from professional sports and adopting the concept of “challenge appeals.” The plaintiff and the defendant would each be afforded one “challenge,” eligible to be used to appeal any interlocutory order. These challenge appeals would be initiated in the same manner as section 1292(a) appeals as of right: that is, simply by filing a notice of appeal. The challenge appeal would be in addition to the existing avenues for immediate appeal of interlocutory orders. Once a party exhausted its challenge appeal, that party could not challenge a later interlocutory order unless that party could ground its immediate appeal in some other existing authority (e.g., mandamus, section 1292(a), section 1292(b)). That party would have to await final judgment to appeal.

“Challenge appeals” offer a better way to enlarge the opportunities for interlocutory appeals than via more expansive appeals by permission. If the ability to appeal is subject to the discretion of judges, there will always be uncertainty whether an order is appealable or not.²⁰⁴ With the challenge appeal system, by contrast, if a party wants to appeal an interlocutory order that is important to the case, it is certain that the party will be able to take the appeal, unless its challenge already has been exhausted.²⁰⁵ Further, challenge appeals streamline the interlocutory appeal process by eliminating the need for the aggrieved party to petition the courts for leave to appeal and for the courts to determine whether this appeal meets the statutory criteria, as is necessary for discretionary appeals under section 1292(b). Such satellite litigation would be eliminated. Under my proposal, for example, a defendant could immediately appeal an interlocutory order denying its motion to dismiss the complaint based on lack of personal jurisdiction merely by filing a notice of appeal. Defendant need not seek certification from the district judge that the order involves a controlling

²⁰³ See *supra* Part III.

²⁰⁴ See Eisenberg & Morrison, *supra* note 10, at 292; Pollis, *supra* note 62, at 1662–63. Uncertainty and unpredictability are exacerbated because decisions to deny permission to appeal need not be explained and are effectively not subject to review. Eisenberg & Morrison, *supra* note 10, at 292.

²⁰⁵ Arguably, challenge appeals may target the most important and reversible interlocutory orders because, as evidenced by pro sports statistics, the party may have a better sense than the judges of when taking an interlocutory appeal is crucial and winnable. See *supra* note 202 and accompanying text.

question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation, nor would defendant need to petition the court of appeals for permission to appeal the order should the district judge so certify.²⁰⁶

Challenge appeals also offer advantages over expanding the types of orders appealable as of right. Trying to expand interlocutory review as of right by adding to the types of orders immediately appealable inevitably will be under-inclusive. Virtually any type of interlocutory order *could* be a good candidate for immediate appeal in a particular case, and indeed courts have used their discretion to allow virtually every type of interlocutory order to be immediately appealed.²⁰⁷ But over-inclusiveness also is a risk.²⁰⁸ If the list of orders subject to interlocutory appeal as of right were expanded much beyond its current scope, without any limit on the number of interlocutory appeals possible, the inefficiencies, costs, delays and harassment of multiple interlocutory appeals likely would swamp the benefits of early appellate review. The challenge appeal system permits a wide variety of interlocutory orders to be immediately appealable, but without the risk of a voluminous increase in interlocutory appeals. My proposal effectively couples the discretionary appeals advantage of allowing appeals from a larger sweep of orders with the appeal as-of-right benefits of certainty and no satellite litigation, while still serving to limit the number of appeals taken. In short, my challenge appeal proposal offers the best of both reform approaches and strikes a good balance between error correction and efficiency.

Some may contend that even a maximum of two challenge appeals per case, one each by the plaintiff and defendant, would result in too much inefficiency, cost, delay and harassment. Although the professional sports experience indicates it is likely plaintiff or defendant or both would not exercise their challenge in most cases,²⁰⁹ there almost certainly will be an

²⁰⁶ See 28 U.S.C. § 1292(b) (2012) (requires certification by district judge and application to court of appeals).

²⁰⁷ See Steinman, *supra* note 10, at 1273–75.

²⁰⁸ See Eisenberg & Morrison, *supra* note 10, at 287.

²⁰⁹ See Imber, *supra* note 140 (in MLB, even though each team was entitled to take at least one challenge per game, there was roughly just one instant replay review for every two games played in 2014); *History of Instant Replay*, *supra* note 103 (in the NFL, even though each team was entitled to take at least two challenges per game, there was an average of just 1.6 instant replay reviews per game in 2013).

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increase in the number of interlocutory appeals under my proposal. But *any* proposal to expand the availability of interlocutory appeals will increase the number of interlocutory appeals.

While increasing the workloads of appellate courts is a legitimate concern with any proposal to expand interlocutory appeals, it should be recognized that the number of cases being handled in the courts of appeals is declining. For 2015, total filings in the twelve regional courts of appeals were down 2.5% from the year before and down nearly 23% from 2006.²¹⁰ So there should be some capacity to hear more interlocutory appeals. Further, every additional interlocutory appeal does not mean a concomitant increase in the total number of appeals.²¹¹ Increased numbers of interlocutory appeals may be offset by the reduced need for appeals after final judgment.²¹² Partly this would be because the error already would have been corrected, but immediate error correction during the case also may promote settlements before final judgment.²¹³ Plus, under my proposal the number of discretionary appeals (e.g., section 1292(b), mandamus) should decline, since parties likely would choose the certainty of a challenge appeal rather than risk a court electing not to hear a discretionary appeal. Fewer section 1292(b) and mandamus petitions means the appeals courts will be saved the time and effort of evaluating whether to exercise their discretion to allow such interlocutory appeals.²¹⁴ If challenge appeals were implemented, it seems there should not be a significant increase in the workload of the appellate judges.²¹⁵

²¹⁰United States Courts, *Federal Judicial Caseload Statistics 2015*, <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015> (last visited Apr. 6, 2017).

²¹¹See Solimine, *supra* note 12, at 1178.

²¹²*Id.*

²¹³See *id.* at 1178, 1180–81 (argues that increase in interlocutory appeals and error correction may decrease appellate workload, because will promote settlements at or before trial by allowing parties to assess their positions more accurately).

²¹⁴See Eisenberg & Morrison, *supra* note 10, at 287, 292 (argues eliminating district judge certification under section 1292(b) will not increase appeals court workload despite the need to handle additional applications for appeal, because parties will be less likely to resort to use of the collateral order doctrine and the satellite litigation it engenders). Similarly, challenge appeals also might result in fewer appeals relying on the collateral order doctrine.

²¹⁵If our judicial system needs more judges in order to function properly, one answer is to appoint more judges. See William M. Richman, *An Argument on the Record for More Federal Judgeships*, 1 J. APP. PRAC. & PROCESS 37, 39 (1999). It should be noted that MLB in 2014 hired additional umpires so that there would be enough to staff the replay booth as well as the on-field

Nevertheless, my proposal could be coupled with other features designed to discourage indiscriminate use of challenge appeals and avoid an excessive increase in appellate court workloads. For example, an unsuccessful challenge in the NFL causes that team to forfeit one of its allotted timeouts.²¹⁶ Similarly, if the challenge appeal were unsuccessful at the court of appeals panel level, the appellant could be precluded from seeking further review of the challenged order, including motions for reconsideration by the panel or for a hearing en banc, or a petition for certiorari to the Supreme Court.²¹⁷ This would curtail further delay of the case by appellant who lost before the panel, as well as act as a deterrent to taking a challenge appeal and reduce courts of appeals workloads. The appellee, though, would retain the ability to seek reconsideration, en banc review, and Supreme Court review.

Also, some orders could be categorized as non-challengeable. Both MLB and the NFL do not allow challenges for every type of play.²¹⁸ If an immediate appeal from a type or time of interlocutory order poses too much of a risk of inefficiency, strategic delay or harassment, that category of order could be ruled non-reviewable as a challenge appeal. For example, since no challenges are permitted in the latter stages of NFL games,²¹⁹ perhaps no challenge appeal should be permitted once the trial begins (e.g., after voir dire is underway in a jury trial). Such non-challengeable orders, however, would still be eligible for immediate appeal under section 1292(a), 1292(b) or other existing avenues of review of interlocutory orders.

B. Truly Instant Appeals

Another way to reduce the inefficiency, delay, cost and potential harassment of interlocutory appeal is to borrow further from the professional sports model and make the appeal truly “instant.” With few exceptions, interlocutory appeals are governed by the same procedural rules

crews. Paul Hagen, *MLB Names Klemm Director of Instant Replay*, MLB.COM, (Feb. 13, 2014), <http://mlb.com/news/article/67748158/mlb-names-justin-klemm-director-of-instant-replay/>.

²¹⁶ See *2016 NFL Rules*, *supra* note 122, r. 15, § 2, art. 1.

²¹⁷ In order to take advantage of accelerated appeals procedures in Tennessee civil cases, the parties must consent to waive their right of further review before the Tennessee Supreme Court. TENN. R. APP. P. 13.

²¹⁸ *2016 NFL Rules*, *supra* note 122, r. 15, § 2, art. 4; *MLB Replay Review Regulations*, *supra* note 156, § V.

²¹⁹ *2016 NFL Rules*, *supra* note 122, r. 15, § 2, art. 1.

as appeals from final judgments.²²⁰ The Federal Rules of Appellate Procedure provide for relatively leisurely time frames for initiating the appeal, transmission of the district court record to the appeals court, briefing, and oral argument.²²¹ It is not unusual for the appeal process to take six to twelve months.²²² Limiting a party's challenge appeals to one per case, combined with the other features of my proposal outlined in subsection A above, go a long way to assuring that a challenge appeal would not be abused to delay the case or harass the opposition. But reducing the time and expense of the interlocutory appeal process would provide even more assurance.

Initiating the Appeal. The Federal Rules of Appellate Procedure provide that generally an appeal must be taken, via notice of appeal or petition for leave to appeal, within thirty days of the order in question.²²³ Some of the existing exceptions allowing for interlocutory appeals provide for shorter periods in which the aggrieved party must initiate the appeal: ten days from the district court certification order under section 1292(b) and fourteen days from the order denying class certification under Rule 23(f).²²⁴ But a lot can happen in a case during even ten days following an interlocutory order.

In MLB, the challenge of a play must be initiated before the next play or pitch.²²⁵ In the NFL, the challenge of a play must be initiated before the next snap.²²⁶ Failure to timely initiate the challenge waives reviewability of the play.²²⁷ Unlike sports where instant replay review halts the game, an interlocutory appeal does not automatically stop the case from proceeding in the district court. Rather, the aggrieved party must move for a stay.²²⁸

For interlocutory orders, the challenge appeal should be initiated promptly and before further action is taken in the case. Allowing the party

²²⁰ See FED. R. APP. P. 1. There are shorter times, however, for initiating appeals under 28 U.S.C. § 1292(b) and FED. R. CIV. P. 23(f).

²²¹ See FED. R. APP. P. 4, 5, 10, 11, 31.

²²² United States Courts, *U.S. Court of Appeals Federal Court Management Statistics* (Dec. 31, 2015), <http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/12/31-0> (median times from appeal to disposition range from 5 to 14 months, depending on the circuit).

²²³ FED. R. APP. P. 4(a)(1)(A), 5(a)(2).

²²⁴ 28 U.S.C. § 1292(b); FED. R. CIV. P. 23(f).

²²⁵ *MLB Replay Review Regulations*, *supra* note 156, § II.D.

²²⁶ *2016 NFL Rules*, *supra* note 122, r. 15, § 2, art. 1

²²⁷ *See id.*; *MLB Replay Review Regulations*, *supra* note 156, § II.D.

²²⁸ *See* FED. R. APP. P. 8(a).

twenty-four hours to invoke the challenge appeal should be workable. As mentioned above, the appeal would be initiated by filing a notice of appeal. Because I suspect many lawyers would love to be able to throw down a red flag in order to challenge a judge's ruling, a red flag symbol could be included on the face of the notice to denote it as a challenge appeal.

The Record. Under the Federal Rules of Appellate Procedure, the appellant has fourteen days to order a transcript or represent that no transcript will be ordered; the court reporter has at least thirty days to complete the transcript if one is ordered; and the district court clerk then must forward the record to the court of appeals clerk.²²⁹ By contrast, the replay review processes for both MLB and the NFL are based on *instant* replays.²³⁰ The technology of the instant replay systems in those professional sports allows officials to view replays of the play in question within seconds, from multiple angles, in slow motion, and in stop action.

Today with electronic dockets and filing, the district court docket and the entire record—pleadings, motions, exhibits, etc.—are available in electronic format and could be accessed by court of appeals judges via computer monitor immediately following the filing of the notice of appeal.²³¹ Court reporters today can generate transcripts of proceedings in real time,²³² and no transcripts are necessary for appeals of most pre-trial interlocutory orders. To the extent some part of the district court record relevant to the challenge appeal was not immediately accessible to the court of appeals via computer upon the filing of the notice of appeal,²³³ the appellant would have the duty to order promptly—perhaps twenty-four hours after the notice of appeal is filed—any necessary transcript and assure that any relevant missing documents are accessible to the appellate court.

Briefing. Briefing is not completed until nearly three months after the record is filed according to the Federal Rules of Appellate Procedure. The

²²⁹ *Id.* 10, 11. The process can take even more time if only a partial transcript is ordered, because the appellee gets fourteen more days to file a designation of additional parts to be ordered. *Id.* 10(b)(3).

²³⁰ See *MLB Replay Review Regulations*, *supra* note 156, § VI.; *2016 NFL Rules*, *supra* note 122, r. 15, § 2, art. III.

²³¹ See PUBLIC ACCESS TO COURT ELECTRONIC RECORDS (PACER), <https://www.pacer.gov/> (last visited Apr. 9, 2017).

²³² Real-time transcripts are recognized as an option in federal courts. *Federal Court Reporting Program*, U.S. COURTS, <http://www.uscourts.gov/services-forms/federal-court-reporting-program> (last visited Apr. 9, 2017).

²³³ An example is documents filed under seal.

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appellant's brief is due forty days after the record is filed; the appellee's brief is due thirty days after the appellant's brief; and the reply brief is due fourteen days after the appellee's brief.²³⁴ In professional sports, by contrast, the team merely identifies the play it wishes to challenge; it need not state the reason for why it believes the call was incorrect.²³⁵

To speed challenge appeals, there would be no new briefing before the appellate court. Instead, the appellant and appellee would rely upon the briefs or other arguments they submitted to the district court regarding the order being challenged.²³⁶ The appellant would, consistent with the Federal Rule of Appellate Procedure governing appeals as of right, designate in the notice of appeal the order or part thereof it is challenging.²³⁷ In addition, as an aid to the court of appeals, the appellant would articulate a statement of the issue(s) presented for review and a statement of the relief sought.²³⁸ These statements would be filed the same day as the notice of appeal, and any counter-statement of the issues by the appellee would be due the next day. The court of appeals would have the discretion, to be exercised only in exceptional cases, to request the parties to submit short briefs on an accelerated time schedule.

Oral Argument. Under the Federal Rules of Appellate Procedure, oral argument must be allowed in every case unless the three-judge panel unanimously agrees that oral argument is unnecessary.²³⁹ In practice, however, the frequency of oral argument has been in decline in federal courts and oral argument on appeal is now the exception rather than the

²³⁴ FED. R. APP. P. 31.

²³⁵ 2016 NFL Rules, *supra* note 122, r. 15, § 2, art. 3; MLB Replay Review Regulations, *supra* note 156, § III.

²³⁶ See TEX. R. APP. P. 28.1(e) (in accelerated civil appeals, appellate court may allow case to be submitted without briefs); ADMIN. CONFERENCE OF THE U.S., 1970-71 REPORT 51 (1971) (recommending interlocutory appeal be decided on the record and briefs submitted to the presiding officer below).

²³⁷ See FED. R. APP. P. 3(c).

²³⁸ Such statements are among the many requirements in FED. R. APP. P. 5(b) for a petition for permission to appeal and FED. R. APP. P. 28(a) for an appellant's brief.

²³⁹ Oral argument must be allowed in every case unless a panel of three judges who have examined the brief and record unanimously agrees that oral argument is unnecessary for one of the following reasons: the appeal is frivolous; the dispositive issue has been authoritatively decided; or the facts and legal arguments are adequately presented in the briefs and records, and the decisional process would not be significantly aided by oral argument. FED. R. APP. P. 34(a)(2).

rule.²⁴⁰ Nevertheless, oral argument continues to take place in a significant percentage of civil appeals.²⁴¹ In professional sports, by contrast, no oral argument is countenanced during instant replay review. Even in MLB, where managers heatedly arguing with umpires is a grand tradition, no argument is permitted once replay review is initiated; any violation of this no-argument ban results in ejection.²⁴²

No oral argument would be allowed in a challenge appeal. The case would be submitted for decision on the briefs below.²⁴³

Court of Appeals Review. The NFL expressly provides that the referee must complete his review within sixty seconds of when he begins looking at replays on the field-level monitor.²⁴⁴ MLB has no such express time limit, but speedy review is emphasized, and the average time of review is less than two minutes.²⁴⁵

Courts of appeals normally are under no time limits when deciding appeals. The Ninth Circuit advises that for most cases the time from oral argument to decision is three months to a year.²⁴⁶ While I am loath to suggest a fixed time period for when a court of appeals must complete its review, I submit that the panels should be encouraged to decide challenge appeals promptly. This could take the form of an express directive, akin to the command that appeals from a criminal release or detention order “shall be determined promptly.”²⁴⁷ Or the encouragement could be softer, such as

²⁴⁰David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROCESS 119, 119–20 (2012). Decades ago oral argument clearly was the norm but that no longer is the case. *Id.* In 2011, only 25% of all federal appeals were orally argued. *Id.*

²⁴¹*See American Academy of Appellate Lawyers Oral Argument Task Force Report*, APPELLATEACADEMY.ORG, at 15 (October 2015), https://www.appellateacademy.org/publications/oa_final_report_10_15_15.pdf (based on 2014 data). The frequency of appellate oral argument in civil cases is somewhat higher than the overall rate but is probably still below 50%. *See id.*

²⁴²*MLB Replay Review Regulations*, *supra* note 156, § II.J.6.

²⁴³*See* FED. R. APP. P. 34(f) (parties may agree to submit a case for decision on the briefs).

²⁴⁴*2016 NFL Rules*, *supra* note 122, r. 15, § 2, art. 3.

²⁴⁵Ken Davidoff, *MLB May Have Plan to Reduce Agony of Replay Reviews*, N.Y. POST, May 19, 2016, <http://nypost.com/2016/05/19/mlb-may-have-plan-to-reduce-agony-of-replay-reviews/>.

²⁴⁶*Frequently Asked Questions*, USCOURTS.GOV, <https://www.ca9.uscourts.gov/content/faq.php> (last updated Dec. 1, 2016).

²⁴⁷18 U.S.C. § 3145(c) (2012).

a requirement of a periodic report showing, by judge, the number of challenge appeals pending more than sixty days.²⁴⁸

Additionally, other features could be included in challenge appeal procedures that should shorten review times:

- In each circuit, one three-judge panel would be “on call” to take the next challenge appeal, so that they could begin the review process promptly. As with other panels, the composition of the on-call panel would be random and the identities of the on-call judges would not be made public prior to the notice of appeal in the case.
- The panel would not be required to issue an opinion. Rather, the panel could just issue an order articulating the disposition of the appeal—affirmed, reversed, etc.²⁴⁹ One of the advantages of expanding the availability of interlocutory appeals, however, is the development of law on issues that are seldom the subjects of appeals from final judgments. Hence a written opinion, even if short, should be encouraged for cases likely to have some precedential value.²⁵⁰

I do not recommend, however, a higher standard of review for challenge appeals. The MLB and NFL replay rules instruct that the play on the field is upheld unless there is “clear and convincing evidence”²⁵¹ or “clear and obvious visual evidence”²⁵² that the call was wrong. While a plenary or de novo standard of review presumably would better promote error correction, this higher standard of review theoretically is supposed to expedite instant replay review by allowing quicker decisions on “close” calls, as well as to discourage frivolous challenges.²⁵³

First, it is not clear that a higher standard of review would result in faster decisions by the courts of appeals. Although there is considerable

²⁴⁸ See Civil Justice Reform Act of 1990, Pub. L. 101–650, § 476, 104 Stat. 5089, 5093 (codified at 28 U.S.C. § 476 (2012)) (requiring semi-annual report showing, by judge, civil cases pending more than three years).

²⁴⁹ See TENN. R. APP. P. 13 (in accelerated civil appeal, allows oral decision followed by written order with no written opinion).

²⁵⁰ Under FED. R. APP. P. 32.1, which took effect in 2007, a party may cite any federal court order or opinion, thus barring the prior practice of some courts of not permitting the citation of unpublished opinions or the like for persuasive value.

²⁵¹ *MLB Replay Review Regulations*, *supra* note 156, § III.

²⁵² *2016 NFL Rules*, *supra* note 122, r. 15, § 2, art. 3.

²⁵³ See Calandrillo & Davison, *supra* note 89, at 3–4.

literature debating whether higher (i.e., more deferential) standards of review have much of an impact on whether the court of appeals upholds the lower court or agency's decisions,²⁵⁴ there is little to suggest that a more deferential standard of review speeds the appellate courts' decisions. Even in the professional sports context, it has been theorized that the "clear evidence" standard does not speed instant replay review because officials who quickly come to the conclusion that the on-field call was wrong need to keep looking for "clear evidence" that the call was wrong before rendering the decision.²⁵⁵

Second, and more importantly, courts of appeals employ numerous different standards of review depending on the type of order or issue below: de novo or plenary for questions of law; clearly erroneous for questions of fact; substantial evidence or arbitrary and capricious for agency decisions; abuse of discretion, etc.²⁵⁶ These various standards reflect different points on the spectrum of deference to the decision below based on longstanding judgments on how best to achieve the goals of error correction and efficiency in appellate review. Substituting a different, higher standard of review for interlocutory appeals could be very counter-productive. For example, if a court of appeals believed the district court erred on a question of law, with a higher standard of review the appellate court may be forced to uphold the erroneous district court decision. That would be a bad result for the parties, and it could set a bad legal precedent for future cases.

V. IMPLEMENTING THE PROPOSAL

A. *Multiple Parties*

Baseball and football games involve two teams competing against each other. As noted previously, our adversary system of civil litigation is similar in the sense that it pits two parties, plaintiff and defendant, against each other. Unlike baseball and football where there is always just one team on

²⁵⁴ See, e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1100 (2008); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 30–31 (1998).

²⁵⁵ Berman, *supra* note 88, at 1705–06; Michael Dorf, *The Evidentiary Threshold for Instant Replay Reversal Is Too High*, DORF ON LAW (Apr. 13, 2015), <http://www.dorfonlaw.org/2015/04/the-evidentiary-threshold-for-instant.html>.

²⁵⁶ See GENE R. SHREVE ET AL., *supra* note 22, at § 13.09.

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each side, however, in modern civil cases frequently there are more than one plaintiff and one defendant. The liberal joinder provisions of the Federal Rules of Civil Procedure allow for multiple plaintiffs suing multiple defendants, the joinder of third-party defendants, and the assertion of multiple claims, counterclaims, and cross-claims among the multiple parties.²⁵⁷

This article has proposed that the plaintiff and defendant each get one challenge appeal. But in cases where there are multiple plaintiffs, defendants and third parties, who should be entitled to a challenge? One option is to award *every* party one challenge, so if there were five plaintiffs and five defendants there would be a total of ten challenges available in the case. In my view, however, this would be unworkable. Keeping the number of challenges low is critical in order to minimize the inefficiencies of cost, delay, and harassment for the parties and of extra workload for the appellate judges. If each party could invoke a challenge, the value of prompt error correction afforded by expanded interlocutory appeals would be swamped by the inefficiency downsides.

Instead, I propose that each “side” gets one challenge. That is, *all* of the plaintiffs collectively receive one challenge, and *all* of the defendants collectively receive one challenge. This would keep the number of potential challenges low, both per case and system-wide, would parallel the professional sports instant replay model, and is consistent with our adversarial system.

Limiting the plaintiff side to one challenge, irrespective of the number of plaintiffs, is appropriate in civil cases because the plaintiff is the master of her own claim. That is, under permissive joinder,²⁵⁸ the plaintiff decides whom to join as co-plaintiffs. Parties may join in one action as plaintiffs if they assert a right to relief arising out of the same transaction and there is a question of law or fact common to all plaintiffs. But even in those circumstances, the parties are not required to join together as plaintiffs in the same case and may choose to maintain separate cases. Only in rare circumstances is someone forced to join a case as an involuntary plaintiff.²⁵⁹

But what about defendants? The plaintiff chooses whom to sue, and defendants typically do not have a say in whether the defendants number

²⁵⁷ See, e.g., FED. R. CIV. P. 13–14, 18–24.

²⁵⁸ *Id.* 20(a)(1).

²⁵⁹ See *id.* 19(a).

one or one hundred.²⁶⁰ Multiple defendants may have divergent interests and defenses, and as a result of cross-claims may even be adverse to one another.²⁶¹ Furthermore, often it is prudent for an original defendant to join another party as a third-party defendant, who may be responsible for all or a portion of the amount the original defendant ends up being obligated to pay to plaintiff.²⁶² So arguably each defendant should have a challenge.

The arguments in favor of limiting the defense side to just one challenge, though, carry the day. One, defendants usually have much in common, in that they all are adverse to the plaintiff, and the claims against them all arise out of the same transaction or occurrence and involve a common question of law or fact.²⁶³ In many cases, defendants enter into joint defense agreements or otherwise more informally work together against the plaintiff. Two, defendants are not required to assert cross-claims or third-party complaints; such claims are permissive.²⁶⁴ Defendants can and sometimes do choose not to assert such claims against their fellow defendants, hoping that they can defeat plaintiff's claims in this case, and knowing that if plaintiff prevails they can assert what would have been cross-claims and third-party complaints in a subsequent case. Three, allowing one "side" more challenges than the other creates an asymmetry that impairs the adversarial system. For example, in civil trial jury selection, although each party is entitled to three peremptory challenges, multiple plaintiffs or defendants may be considered a single party for purposes of exercising their three challenges, and in practice courts often make the number of peremptory challenges for plaintiffs and defendants equal.²⁶⁵ Imagine if the Yankees were allowed more challenges than the Red Sox? Boston fans would be justly upset that the rules were being tilted in favor of the other side. But perhaps most importantly, allowing multiple challenges by defendants would tip the balance too far toward inefficiency. The final judgment rule expresses the judicial system's general aversion to interlocutory appeals. Although there is widespread agreement that more interlocutory appeals are desirable, my proposal is mindful that

²⁶⁰ *See id.* 20(a)(2).

²⁶¹ *See id.* 13(g).

²⁶² *See id.* 14(a).

²⁶³ *See id.* 20(a).

²⁶⁴ *See id.* 13(g), 14(a).

²⁶⁵ *See* 28 U.S.C. § 1870; David Baker, *Civil Case Voir Dire and Jury Selection*, 1998 FED. CTS. L. REV. 3, 4 (1998).

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interlocutory appeals should, to paraphrase President Clinton speaking in a different context, be legal but rare.²⁶⁶

For purposes of this proposal, plaintiffs are those on the left side of the *v.* in the case caption and defendants are those on the right side. This is the same test as federal courts use in determining who is a plaintiff and who is a defendant when evaluating diversity of citizenship subject matter jurisdiction.²⁶⁷ Third-party defendants are defendants, as are original defendants who assert counterclaims, cross-claims or third-party complaints.²⁶⁸ Involuntary plaintiffs are plaintiffs.²⁶⁹

So how would it be decided, in a multi-plaintiff or multi-defendant case, when a side could use its one challenge? We could set up a system by which all the parties on that side would have to unanimously consent to use their one challenge. Unanimous consent, for example, is required for defendants to remove a case from state court to federal court.²⁷⁰ However, especially where the truly instant appeal procedures govern or the number of parties on one side is voluminous, it may be too cumbersome to require unanimous consent in order to invoke the challenge. Accordingly, I favor a “first come, first served” approach. That is, once any party on one side invokes the challenge, no other challenge may be made by any other party on that side in the case. Obviously, that raises a concern that one plaintiff or defendant could use up the challenge for an order that may be of limited value, or even of no value, to some or all of the other parties on his or her side. The plaintiffs or defendants could avoid such a scenario by agreeing among themselves ahead of time about how they would use their side’s challenge (e.g., agree that unanimous consent is necessary, agree that it will

²⁶⁶ See Editorial, *Safe, Legal and Rare?*, N.Y. POST, Feb. 11, 2015, <http://nypost.com/2015/02/11/safe-legal-and-rare/>. President Bill Clinton often stated that abortions should be safe, legal and rare. *See id.*

²⁶⁷ Complete diversity of citizenship is necessary for subject matter jurisdiction under 28 U.S.C. § 1332(a); that is, no plaintiff may be a citizen of the same state as any defendant. 28 U.S.C. § 1332(a) (2012). But minimal diversity is sufficient for diversity subject matter jurisdiction under Article III of the U.S. Constitution; that is, at least one plaintiff must be a citizen of a different state from at least one defendant. *See* CHARLES ALLAN WRIGHT ET. AL., 13E FEDERAL PRACTICE AND PROCEDURE § 3605 (3d ed. 2009). Although usually the pleadings will dictate who are the plaintiffs and defendants, a court may re-align the parties so that those with the same interests in the result are on the same side. *See id.* at § 3607.

²⁶⁸ *See* FED. R. CIV. P. 13, 14.

²⁶⁹ *See id.* 19(a)(2).

²⁷⁰ 28 U.S.C. § 1446(b)(2)(A) (2012).

not be used unilaterally prior to the close of discovery). In the absence of such an agreement, though, the rule would be first come, first served.²⁷¹

B. Accomplish Via Rule Change

The final judgment rule is codified in a statute, as are many key exceptions allowing interlocutory appeals.²⁷² However, my proposal for challenge appeals would not require Congress to enact or amend a statute. Rather, the proposal could be accomplished by rule.

The Supreme Court expressly has been provided the authority to issue rules expanding the universe of decisions by district courts that are subject to immediate appeal to the courts of appeals. The Rules Enabling Act, as amended by Congress in 1992, specifies that the Supreme Court has the power to prescribe rules that define when a ruling of the district court is final for purposes of appeal under section 1291 which codifies the final judgment rule.²⁷³ Even more specifically, section 1292(e) provides that the Supreme Court “may prescribe rules, in accordance with section 2072 of this title [the Rules Enabling Act], to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for” under the other subsections of 1292.²⁷⁴

The Supreme Court has exercised its power to provide for interlocutory appeals via rule once already. Rule 23(f), added to the Federal Rules of Civil Procedure by the Supreme Court in 1998,²⁷⁵ allows the court of appeals to exercise its discretion to hear an immediate appeal of an interlocutory order granting or denying class-action certification.²⁷⁶ My

²⁷¹FED. R. CIV. P. 54(b), of course, could allow one plaintiff or defendant in a multi-party, multi-claim case to take an immediate appeal where the court directs entry of final judgment as to fewer than all claims and parties. Plus, under my proposal all parties retain the ability to seek immediate appellate review of interlocutory orders via other existing avenues (§ 1292, mandamus, etc.).

²⁷²See *supra* Part II.A.

²⁷³Rules Enabling Act, Pub. L. 73-415, 48 Stat. 1064 (1934), amended by Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506, 4506 (codified at 28 U.S.C. § 2072(c) (2012)).

²⁷⁴28 U.S.C. § 1292(e).

²⁷⁵FED. R. CIV. P. 23, Committee Notes on Rules – 1998 Amendments.

²⁷⁶FED. R. CIV. P. 23(f). Unlike section 1292(b), under Rule 23(f) there is no requirement to obtain district court certification nor must the district court order involve a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. FED. R. CIV. P. 23,

“challenge appeal” proposal provides for appeals of interlocutory decisions that otherwise would not receive immediate appellate review. Thus, the Supreme Court could, consistent with its statutory authority, institute my “challenge appeal” proposal via rules of civil procedure.²⁷⁷

Similarly, implementing my suggestions for truly instant appeals could be accomplished via the same rule of civil procedure or amendments to the Federal Rules of Appellate Procedure.²⁷⁸

Finally, in recognition that it is difficult to predict exactly how my “challenge appeal” proposal would impact our system of civil cases and appeals, challenge appeals could be instituted in one circuit for a limited period as a pilot program.²⁷⁹ Hopefully, the experience in that circuit with challenge appeals would lend support to implementing my proposal, perhaps with some improvements, in federal courts nationwide.

Committee Notes on Rules – 1998 Amendments. More recently, the Supreme Court has endorsed the use of rulemaking, rather than court opinions, to define appealable interlocutory orders. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113–14 (2009) (in context of emphasizing the narrow scope of the collateral order doctrine).

²⁷⁷ See 28 U.S.C. § 1292(e) (2012). That appellant under the proposal would not be able, if unsuccessful before the court of appeals panel, to seek reconsideration by the panel, en banc review by the circuit, or certiorari review by the Supreme Court neither necessitates a statutory amendment nor violates the Constitution. The proposal’s bar on further review is simply a condition of the challenge appeal, which is an addition to the existing avenues of appeal. This limit on the nature of appellate review is procedural, does not abridge substantive law, and is consistent with 28 U.S.C. § 2072. See *id.* § 2072. There is no *right* to reconsideration by the court of appeals panel, FED. R. APP. P. 40; rehearing by the court of appeals en banc, *Id.* 35; or Supreme Court review, SUP. CT. R. 10. While Congress can disallow certiorari review, see *Felker v. Turpin*, 518 U.S. 651, 661 (1996) (upholding statute disallowing certiorari review), if the Supreme Court itself is promulgating the rule limiting review beyond the panel, it does not raise the same constitutional concerns a Congressional statute might. See James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1495–96 (2000).

²⁷⁸ For example, Rule 23(f) sets a shorter time (fourteen days versus thirty days under FED. R. APP. P. 5(a)(2)) for filing a petition for permission to appeal an order granting or denying class certification. FED. R. CIV. P. 23(f). Alternatively, amendments could be made to Federal Rules of Appellate Procedure 4 (notice of appeal), 10 or 11 (record on appeal), 31(a) (times for briefs), and 34 (oral argument). See generally 28 U.S.C. § 2072 (2012) (Rules Enabling Act).

²⁷⁹ A pilot program could be established by the Supreme Court or perhaps by the Judicial Conference of the United States or by a circuit court rule. See 28 U.S.C. §§ 2071–2077 (2012).

VI. CONCLUSION

The availability of interlocutory appeals in federal civil cases is inadequate under current law. My proposed reform, inspired by how professional football and baseball use instant replay to review questionable calls, would add a much-needed avenue for parties to immediately appeal key interlocutory orders.

The centerpiece of my proposal is the “challenge appeal.” Each side in the case, plaintiff and defendant, gets one “challenge appeal,” by which that party can obtain immediate appellate review as of right to one interlocutory order per case. There is no need for the party to seek district court certification or petition the court of appeals for permission, eliminating uncertainty and streamlining the appeal process for the parties and the courts. A wide universe of interlocutory orders is eligible for immediate appeal, but because the challenges are limited, their indiscriminate use is discouraged, and discretionary appeals should decline, the number of interlocutory appeals remains manageable. To further minimize delay and disruption inherent in most interlocutory appeals, procedural changes are suggested to make challenge appeals more truly “instant.” Overall, the proposal strikes a good balance between the oft-conflicting key goals of appellate review, enhancing error correction without sacrificing efficiency.