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RECENT CASES

APPELLATE PROCEDURE — FORCE OF CIRCUIT PRECEDENT — NINTH CIRCUIT HOLDS THAT THREE-JUDGE PANELS MAY DECLARE PRIOR CASES OVERRULED WHEN INTERVENING SUPREME COURT PRECEDENT UNDERCUTS THE THEORY OF EARLIER DECISIONS. — *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc).

The nation's courts of appeals have struggled to devise a coherent approach to harmonizing existing circuit case law with intervening decisions of the Supreme Court.¹ When the Court directly overrules a decision of a court of appeals, it is agreed that the overruled decision loses the force of law. But when a Supreme Court opinion disfavors a circuit's jurisprudential theory, the courts of appeals must determine to what extent cases relying on the rejected theory remain good law. Recently, in *Miller v. Gammie (Gammie II)*,² the United States Court of Appeals for the Ninth Circuit, sitting en banc, adopted an approach that directs three-judge panels to reconsider both panel and en banc decisions that would otherwise be binding precedent when those decisions are "clearly irreconcilable with the reasoning or theory of intervening higher authority."³ This test is unbounded and will likely prove impossible to administer, a result foretold by the *Gammie II* court's error in concluding that Ninth Circuit absolute immunity jurisprudence was "effectively overruled" by Supreme Court cases entirely compatible with existing circuit decisions. To preserve the predictability and coherence of their jurisprudence, courts of appeals should instead adopt a default rule that presumes the validity of case law not explicitly overruled by the Supreme Court.

¹ Several recent cases demonstrate the extent to which the courts of appeals have struggled with this difficult question. Compare *Union of Needletrades, Indus. & Textile Employees v. INS*, 336 F.3d 200, 210 (2d Cir. 2003) (holding that Second Circuit panels may overrule decisions of prior panels "where there has been an intervening Supreme Court decision that casts doubt on our controlling precedent" (emphasis added) (citing *Boothe v. Hammock*, 605 F.2d 661, 663 (2d Cir. 1979))), *In re Sealed Case No. 97-3112*, 181 F.3d 128, 131 (D.C. Cir. 1999) (en banc) (correcting a panel for erroneously concluding that the Supreme Court had "effectively overruled" prior circuit authority), and *Dawson v. Scott*, 50 F.3d 884, 893 n.20 (11th Cir. 1995) (allowing panel review when a case "appears to be overruled").

² 335 F.3d 889 (9th Cir. 2003) (en banc) [hereinafter *Gammie II*].

³ *Id.* at 893. Prior Ninth Circuit panels had suggested that they had discretion to declare decisions of the court overruled by intervening Supreme Court precedent. See, e.g., *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1123 (9th Cir. 2002) (holding that circuit law can be overruled by subsequent Supreme Court decisions that are "closely on point" (quoting *United States v. Lancellotti*, 761 F.2d 1363, 1366 (9th Cir. 1985)) (internal quotation marks omitted)). *Gammie II*, however, represents the en banc endorsement of this standard for the first time.

In December 1996, the Nevada Division of Child and Family Services (DCFS) removed a twelve-year-old boy, Earl, and his older brother from their home to protect them from sexual abuse.⁴ Nancy Gammie, a DCFS social worker assigned to the boys' cases, eventually succeeded in petitioning the Nevada Juvenile Court to place Earl in a foster home.⁵ In December 1997, Earl was placed in a home along with his foster parents' two natural children, a twelve-year-old girl and a nine-year-old boy.⁶ Fran Zito, a DCFS social therapist who treated Earl, "assured [the foster parents] that there was nothing to worry about" with respect to the safety of the couple's natural children.⁷ Two months later, however, Earl's foster parents discovered that Earl had molested their son; soon afterwards, Earl was arrested and admitted to sodomizing the child.⁸

In 1999, Earl's guardian *ad litem* filed suit in Nevada state court, asserting claims against DCFS, Gammie, and Zito for redress of constitutional violations in connection with Earl's foster home placement.⁹ The defendants removed the suit to the United States District Court for the District of Nevada and successfully moved to dismiss, on Eleventh Amendment grounds, the claims against DCFS, Gammie, and Zito in their official capacities.¹⁰ The district court declined, however, to dismiss the claims against Gammie and Zito individually, ordering discovery on "all of the issues that relate to [the] absolute immunity" defense Gammie and Zito had asserted as grounds for dismissal.¹¹

Both defendants appealed to the Ninth Circuit.¹² In his analysis of the merits of the defendants' claims of absolute immunity, Judge O'Scannlain, writing for a unanimous three-judge panel, asserted that the Ninth Circuit's previous decision in *Babcock v. Tyler*¹³ "set[] forth this Circuit's law on absolute immunity for state workers involved in child welfare proceedings."¹⁴ In *Babcock*, the court had concluded that, because "caseworkers need to exercise independent judgment in fulfilling their post-adjudication duties," absolute immunity extended

⁴ *Miller v. Gammie*, 292 F.3d 982, 984 (9th Cir. 2002) [hereinafter *Gammie I*].

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 985.

⁸ *Id.*

⁹ *Id.* Although the foster parents filed a similar suit, their claims were settled before the case reached the Ninth Circuit. *Id.* at 983 n.2.

¹⁰ *Id.* at 985.

¹¹ *Id.* at 985-86.

¹² *Id.* at 986. Because there was no final order over which the court of appeals could exercise jurisdiction pursuant to 28 U.S.C. § 1291 (2000), the Ninth Circuit could obtain jurisdiction over the appeal only by way of the collateral order doctrine. *Id.* at 985-86.

¹³ 884 F.2d 497 (9th Cir. 1989).

¹⁴ *Gammie I*, 292 F.3d at 988 (citing *Babcock*, 884 F.2d at 497).

to social workers' foster care placement decisions.¹⁵ Applying *Babcock* to Gammie's and Zito's appeals, Judge O'Scannlain concluded that the case was "factually indistinguishable from *Babcock*"¹⁶ and that the defendants were thus absolutely immune.¹⁷

The Ninth Circuit promptly vacated the panel opinion and granted rehearing en banc.¹⁸ In the subsequent en banc opinion, Chief Judge Schroeder argued that intervening Supreme Court precedent, rather than *Babcock*, should have controlled the panel's analysis of the defendants' absolute immunity claims.¹⁹ The Chief Judge asserted that the Supreme Court's decisions in *Antoine v. Byers & Anderson, Inc.*²⁰ and *Kalina v. Fletcher*²¹ established that "the test we formulated in *Babcock* [was] no longer a relevant standard."²² Accordingly, Chief Judge Schroeder concluded, "[t]o the extent . . . that social workers . . . make discretionary decisions . . . that are not functionally similar to prosecutorial or judicial decisions, only qualified, not absolute immunity, is available."²³

In the final section of her opinion, Chief Judge Schroeder assessed "whether the district court and the three-judge panel were . . . bound to apply *Babcock* until it had been expressly overruled by an en banc court."²⁴ The Chief Judge concluded that, when "the relevant court of last resort . . . [has] undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable," "a three-judge panel of [the Ninth Circuit] . . . should consider themselves bound by the intervening higher authority and reject the prior opinion . . . as having been effectively overruled."²⁵ The court therefore concluded that *Antoine* and *Kalina* rendered *Babcock* "effectively overruled" and that neither the panel nor the district court should have considered itself bound by *Babcock's* analysis.²⁶

¹⁵ *Id.* at 989 (quoting *Babcock*, 884 F.2d at 503).

¹⁶ *Id.* at 991.

¹⁷ Although the panel members were "profoundly disturbed that persons acting in the name of the State of Nevada would place a *known sexual predator* into a home with two small children," *id.* at 990, the panel concluded that it was bound by *Babcock* to hold Gammie and Zito absolutely immune. *Id.* at 991.

¹⁸ *Miller v. Gammie*, 309 F.3d 1209 (9th Cir. 2002).

¹⁹ *Gammie II*, 335 F.3d at 900.

²⁰ 508 U.S. 429 (1993); *see id.* at 436-37.

²¹ 522 U.S. 118 (1997); *see id.* at 129-31.

²² *Gammie II*, 335 F.3d at 897.

²³ *Id.* at 898.

²⁴ *Id.* at 899.

²⁵ *Id.* at 900.

²⁶ *Id.*

In a brief concurring opinion, Judge O'Scannlain²⁷ wrote separately to "note [his] firm conviction that [the] outcome was reachable only by way of en banc review."²⁸ Accordingly, Judge O'Scannlain refused to join the final section of the en banc opinion, reiterating his view that three-judge panels lack the "authority . . . [to] overrule prior decisions of three-judge panels."²⁹

Gammie II's direction to Ninth Circuit panels represents the most recent manifestation of a growing propensity among federal circuits to direct three-judge panels to disregard controlling circuit precedent in view of intervening Supreme Court opinions.³⁰ The circuits have differed in their articulation of the requisite connection between the relevant Supreme Court case law and the circuit court case to be "effectively" overruled, adopting standards ranging from "directly applicable,"³¹ to "clearly irreconcilable,"³² to requiring only that the Supreme Court have "cast[] doubt" upon the circuit's reasoning.³³ Whatever the operative language, this general trend undermines "[t]he principal utility of determinations by the courts of appeals in banc" as it has been identified by the Supreme Court — namely, "making it possible for a majority of [their] judges always to control and thereby to secure uniformity and continuity in [their] decisions."³⁴ This approach offers judges no analytical means of identifying overruled cases and therefore threatens the stability of circuit case law. Courts of appeals should instead adopt a default presumption in favor of the survival of previous decisions unless a case is explicitly overruled by the Supreme Court.

As *Gammie II* itself demonstrates, judges will find it difficult indeed to determine the viability of circuit law under a rule that asks whether a higher court has "undercut the theory or reasoning underlying the prior circuit precedent."³⁵ Although the en banc panel held that the absolute immunity landscape had undergone fundamental changes that rendered *Babcock* "undercut" and therefore overruled, the

²⁷ Judge Tallman joined Judge O'Scannlain's opinion. Judges Kozinski and Tashima filed separate concurrences in which they continued their ongoing debate regarding the en banc court's use of dicta to provide guidance to future three-judge panels. See *id.* at 900 (Kozinski, J., concurring); *id.* at 902 (Tashima, J., concurring).

²⁸ *Id.* at 901 (O'Scannlain, J., concurring in part).

²⁹ *Id.* at 902.

³⁰ See *supra* note 1.

³¹ *Dawson v. Scott*, 50 F.3d 884, 893 n.20 (11th Cir. 1995).

³² *Gammie II*, 335 F.3d at 893.

³³ *Union of Needletrades, Indus. & Textile Employees v. INS*, 336 F.3d 200, 210 (2d Cir. 2003) (internal quotation marks omitted) (citing *Boothe v. Hammock*, 605 F.2d 661, 663 (2d Cir. 1979)).

³⁴ *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689–90 (1960) (quoting Albert Branson Maris, *Hearing and Rehearing Cases in Banc*, 14 F.R.D. 91, 96 (1954)) (internal quotation marks omitted).

³⁵ *Gammie II*, 335 F.3d at 900.

Court's absolute immunity jurisprudence — as articulated in *Imbler v. Pachtman*³⁶ and subsequent cases — is by no means “clearly irreconcilable” with the theory underlying *Babcock*.³⁷ The *Imbler* Court concluded that a prosecutor was absolutely immune from liability arising from the knowing use of false testimony because that conduct was related to the prosecutor's function as “an advocate in judicial proceedings.”³⁸ Although *Imbler* set aside whether a prosecutor would be similarly immune for those aspects of his responsibility “that cast him in the role of an administrator or investigative officer rather than that of advocate,”³⁹ the Court made clear that the critical inquiry in determining the availability of absolute immunity was the “functional nature of the activities” at issue and whether “the reasons for absolute immunity,” including the need for “independence” in prosecutorial decisionmaking, were closely related to those activities.⁴⁰

The Court's absolute immunity jurisprudence after *Imbler* has merely emphasized the importance of the function at issue in determining whether immunity is available. In holding that a court reporter was not absolutely immune from liability for failing to produce a transcript of court proceedings, the *Antoine* Court concluded “that a relationship between judicial process and official duty does not render one absolutely immune,” because it is not “sufficient for obtaining absolute immunity that the task [at issue be] extremely important . . . to the appellate process.”⁴¹ And, as the en banc court recognized in *Gammie II*, the *Kalina* Court's conclusion that a prosecutor could be held liable for false statements made in support of an application for a search warrant “further emphasized that . . . [o]fficials performing the duties of advocate or judge may enjoy absolute immunity for some functions traditionally performed at common law, but that protection does not extend to many of their other functions.”⁴²

Although one could argue that *Antoine* and *Kalina* animated previously unknown details of the *Imbler* test, a close reading of *Babcock* reveals that the panel's holding did not rely on the absolute immunity analyses rejected by the Court after *Babcock* was decided. Had the

³⁶ 424 U.S. 409 (1976).

³⁷ Indeed, some Justices have described the approach initially set forth in *Imbler* as “deeply embedded in [the Court's] § 1983 jurisprudence.” *Kalina v. Fletcher*, 522 U.S. 118, 135 (1997) (Scalia, J., concurring). The *Gammie II* court agreed that “*Imbler* . . . settled the general scope and rationale of [absolute] immunity.” *Gammie II*, 335 F.3d at 896.

³⁸ *Kalina*, 522 U.S. at 125 (describing *Imbler*'s central holding).

³⁹ *Imbler*, 424 U.S. at 430–31 & n.33.

⁴⁰ *Id.* at 423, 430.

⁴¹ *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436–37 (1993) (internal quotation marks omitted).

⁴² *Gammie II*, 335 F.3d at 897 (citing *Kalina*, 522 U.S. at 129–31; and *Antoine*, 508 U.S. at 435–37).

Babcock court rested its holding upon the mere relationship between social workers and the adjudicatory process, or extended social workers' absolute immunity to their testimonial functions, it might be argued that the holding was threatened by the developments in *Antoine* and *Kalina*. But the *Babcock* panel explicitly grounded its conclusion upon its view that "caseworkers need to exercise independent judgment in fulfilling their post-adjudication duties."⁴³ In fact, the *Babcock* panel explicitly rejected the argument that social workers' post-adjudication activities consisted of "purely administrative or ministerial" acts," holding instead that the underlying policy justifications for absolute immunity — the "need [for the] exercise [of] independent judgment" — required the extension of the doctrine to social workers' post-adjudication activities.⁴⁴ These policy justifications were left entirely undisturbed by the Court's subsequent rejection of the application of absolute immunity to activities that require no discretion of judgment but simply attend judicial process generally. If *Antoine* and *Kalina* satisfy the Ninth Circuit's standard for "effectively overruling" *Babcock*, nearly any circuit case law in even distant tension with Supreme Court jurisprudence is in danger of being similarly held "effectively overruled."

Perhaps the most overwhelming evidence that the Court has done nothing to threaten the viability of *Babcock*, however, has come from the Justices themselves. As Justice Thomas pointed out in 1994, the Court has not yet addressed the "threshold question" whether social workers "are, under any circumstances," entitled to the protections of absolute immunity.⁴⁵ It is thus difficult to imagine that the Court has reached the more difficult question raised by *Babcock* — when social workers might be entitled to the broadest quantum of immunity. More importantly, it is difficult to conceive how, as the en banc court insisted, the changes putatively wrought by *Antoine* and *Kalina* undermined *Babcock* but left untouched other Ninth Circuit decisions sustaining absolute immunity defenses for social workers.⁴⁶

Gammie II thus also demonstrates the inherent pliability of the en banc court's standard for disregarding prior circuit precedent. As a result, the *Gammie II* approach puts the viability of innumerable cases in doubt simply because they might be construed as being in tension

⁴³ *Babcock v. Tyler*, 884 F.2d 498, 503 (9th Cir. 1989) (emphasis added).

⁴⁴ *Id.* at 502-03.

⁴⁵ *Hoffman v. Harris*, 511 U.S. 1060, 1060 (1994) (Thomas, J., dissenting from denial of certiorari).

⁴⁶ See *Gammie II*, 335 F.3d at 898 (insisting that the Ninth Circuit's conclusion in other cases that social workers are protected by absolute immunity during the adjudicatory process "is consistent with the controlling Supreme Court decisions," while holding *Babcock* effectively overruled by the same Supreme Court decisions).

with intervening Supreme Court opinions. The courts of appeals' shift in the direction of *Gammie II* therefore threatens the predictability of the circuits' case law, which must rest on the bedrock principle that prior decisions of the courts bind subsequent three-judge panels.⁴⁷

Judge O'Scannlain has proposed a more workable approach for panels' assessment of intervening Supreme Court authority.⁴⁸ "[P]rofoundly troubled by the notion of . . . 'overruling,' as a three-judge panel, the precedent set by an earlier panel," Judge O'Scannlain has urged that, "where there is room for doubt, [panels] must stay [their] erasers."⁴⁹ Under this approach, panels would be able to overrule prior circuit decisions only where no reasonable argument could be advanced in favor of the proposition that settled case law has survived intervening Supreme Court precedent.⁵⁰

Perhaps the approach introduced by the D.C. Circuit in *Irons v. Diamond*⁵¹ — which permits a panel to hold a prior case overruled by circulating its opinion to the entire court for approval and noting the unanimity of the court in a footnote — is most likely to maximize intracircuit jurisprudential predictability.⁵² Applied to the Ninth Circuit, the *Irons* procedure may result in a default rule functionally indistinguishable from Judge O'Scannlain's approach, because obtaining the unanimous approval of all twenty-seven active judges may be even less likely than obtaining the majority vote necessary to produce an

⁴⁷ See, e.g., *In re Complaint of Ross Island Sand & Gravel*, 226 F.3d 1015, 1018 (9th Cir. 2000) (per curiam) ("A three judge panel of this court cannot overrule a prior decision of this court." (citing *Morton v. De Oliveira*, 984 F.2d 289, 292 (9th Cir. 1993))). This shift is particularly troubling in view of the infrequency with which en banc courts generally convene, because the full court will rarely review panel holdings that overrule otherwise binding circuit precedent.

⁴⁸ See *Wolfson v. Watts*, 298 F.3d 1077, 1084–85 (9th Cir. 2002) (O'Scannlain, J., concurring in the judgment).

⁴⁹ *Id.* at 1085. Judge O'Scannlain's proposal comes in a slightly different context — namely, when the circuit should revisit its view of state law in diversity cases. Still, because of his broad adherence to the notion that "[s]tare decisis provides crucial reassurance . . . that our decisions represent more than the subjective preferences of the concurring judges," *id.* at 1086, and because Judge O'Scannlain wrote separately in *Gammie II* to note his "firm conviction that such an outcome was reachable only by way of en banc review," his proposal might apply to the prior-panel context as well. *Gammie II*, 335 F.3d at 901 (O'Scannlain, J., concurring in part).

⁵⁰ Critics of Judge O'Scannlain's approach might argue that his test need not lead to results different from those produced by the *Gammie II* rule of clear irreconcilability. As with the summary judgment standard, however, Judge O'Scannlain's analysis requires panels to declare that *no* reasonable argument for the continued viability of prior circuit authority exists. And, as in the summary judgment context, this threshold is likely to give judges pause before embarking upon paths already trodden by previous panels. In any event, if it is agreed that a lax standard threatens the predictability of intracircuit jurisprudence, then courts should seek the tightest constraints upon panels available — and clearly Judge O'Scannlain's approach features a higher standard than does the rule of *Gammie II*.

⁵¹ 670 F.2d 265 (D.C. Cir. 1981).

⁵² *Id.* at 268 n.11; see also Christopher P. Banks, *The Politics of En Banc Review in the "Mini-Supreme Court"*, 13 J.L. & POL. 377, 389 n.87 (1997).

banc review. Thus a modified *Irons* procedure — requiring, for example, the assent of a majority of active judges to overrule existing circuit precedent — would serve the court’s interest in expediency while “making it possible for a majority of . . . judges always to control and thereby to secure uniformity and continuity in [the circuit’s] decisions.”⁵³

The *Gammie II* court argued that these approaches would create “inconsistenc[ies] between . . . circuit decisions and the reasoning of . . . authority embodied in a decision of a court of last resort.”⁵⁴ Advocates of the *Gammie II* rule, however, fail to recognize that their approach risks the unintended reversal of circuit case law by virtue of the Court’s decisions — an outcome that fails to defer to the limitations the Court places upon its rulings.⁵⁵ Because both rules generate unintended consequences — on the one hand, failing to implement Supreme Court holdings, and on the other, implementing the Court’s holdings incorrectly — courts should employ the rule that affords litigants and the Supreme Court as much predictability as possible. Granted such *ex ante* predictability, the Court should be careful to craft rulings that specify when circuits must revise their case law.⁵⁶ The en banc court would then be forced to respond to panels’ pleas to review the viability of circuit precedent in areas of law where the application of a rule does not fit comfortably with countervailing Supreme Court precedent.

Either approach would be preferable to the rule of *Gammie II*, which encourages randomly selected three-judge panels to undo the work of the court largely at their own discretion. Ironically, *Gammie II* urges this rule — impliedly expressing profound faith in the ability of panels to distinguish between prior cases that have been overruled and those that are merely in tension with Supreme Court jurisprudence — yet is unable to live up to its own expectations. Rather than the clearly problematic approach adopted by the Ninth Circuit in *Gammie II*, courts of appeals should instead seek to provide a default rule that maximizes intracircuit jurisprudential predictability.

⁵³ *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689–90 (1960) (quoting *Maris*, *supra* note 34, at 96 (internal quotation marks omitted)).

⁵⁴ *Gammie II*, 335 F.3d at 900.

⁵⁵ The Supreme Court often consciously limits the reach of its holdings in a manner designed to leave some lower courts’ holdings intact while rendering others overruled. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 195 (2000) (noting specifically that it “would be premature to address the continuing validity” of areas of circuit jurisprudence not addressed by the decision).

⁵⁶ Of course, this approach has its own cost: the Supreme Court would have to signal clearly which circuit jurisprudence it wishes to overrule. This cost, although not insignificant, seems relatively small when compared to the substantial costs imposed by an approach to circuit jurisprudence that threatens the reliability of any case in tension with intervening Supreme Court precedent.